No. 21A457

In the Supreme Court of the United States

WILLIAM C. TOTH JR., WILLIAM J. HALL, HOWARD GARTLAND, JAMES BOGNET, AARON BASHIR, AND ALAN M. HALL,
Applicants,

v.

LEIGH M. CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth; JESSICA MATHIS, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries; and TOM WOLF, in his official capacity as Governor of Pennsylvania,
Respondents.

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OPPOSITION TO EMERGENCY APPLICATION TO JUSTICE ALITO FOR WRIT OF INJUNCTION

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TABLE OF CONTENTS

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

TABLE OF AUTHORITIES

Cases

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

RETRIEVED FROM DEMOCRACYDOCKET.COM

Constitution and Statutes

RETRIEVED FROM DEMOCRACYDOCKET.COM

Other Authorities

RETRIEVED FROM DEMOCRACYDOCKET.COM

PRELIMINARY STATEMENT

This Court has affirmed time and again—most recently in a case arising from Alabama—that it is loathe to upend state election processes late in the day. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of applications for stays) ("When an election is close at hand, the rules of the road must be clear and settled."). Here, with nomination petitions already in circulation, Petitioners ask the Court to scrap the entire congressional map for Pennsylvania and to order the Commonwealth to hold statewide at-large congressional elections for the first time since the 18th century. Along the way, they ask the Court to overturn a scheduling order that has been relied on by candidates and election officials across Pennsylvania, and which all parties in the state redistricting litigation (including leaders of the General Assembly) recognized the Pennsylvania Supreme Court had the authority to issue. These requests are nothing short of an invitation to chaos.

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They are also wholly unjustified. Petitioners seek to raise claims under the Elections Clause, but under settled precedent they lack Article III standing to pursue those claims. They also lack a cause of action. And on the merits, their Elections Clause claims are shot through with legal error—including a failure to grapple with a precedent that forecloses virtually their entire position. *See Branch v. Smith*, 538 U.S. 254 (2003). Petitioners' one-person/one-vote claim is equally flawed: they raised this claim for the first time just three days before filing their application, they did not seek any interim relief on that claim in the District Court, they offer only a single page of briefing on it here, and their conclusory arguments are belied by the record

and foreclosed by precedent. There is no basis for concluding that Petitioners have shown an indisputably clear right to relief on any of their claims. Nor is there merit to their fallback requests for certiorari before judgment or review under 28 U.S.C. § 1253: both of these requests face insuperable jurisdictional obstacles.

Equitable considerations independently foreclose Petitioners' right to relief. They unduly delayed in filing this case, passing up one opportunity after another before arriving in federal court and then waiting nine full days before even requesting an "emergency" temporary restraining order. Worse, that delay appears to have been calculated: Petitioners' legal theory *explicitly* depends on waiting until the very last minute to attack Pennsylvania's congressional map and elections schedule, so that the state's political branches and courts would not have enough time to adopt a new plan if Petitioners' claims are accepted (thus triggering at-large elections as a remedy of very last resort under 2 U.S.C. § 2a(c)(5)). Petitioners should not be rewarded for attempting a legal ambush of the Pennsylvania election—especially when their ambush rests on such demonstrably meritless and unsupported theories, and risks widespread voter confusion, injury to candidates, and administrative disarray.

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Both law and equity oppose Petitioners' application, which falls far short of the high standard for a mandatory injunction and should be denied in its entirety.

BACKGROUND

I. State Court Developments

Pennsylvania lost a congressional seat in the 2020 decennial census. App. 577. During the months that followed, it became apparent that the General Assembly and

the Governor would be unable to agree on a new congressional map: although the General Assembly approved a proposed map (HB 2146), the Governor opposed and ultimately vetoed it. *See id.*; *see also Smiley v. Holm*, 285 U.S. 355, 372-73 (1932) ("There is nothing in [the Elections Clause of the Constitution] which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor . . . .").

In Pennsylvania—like in most states—when the political branches are unable to agree, "it becomes the judiciary's role to ensure a valid districting scheme." *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 576, 582 n.6 (2018). As the Pennsylvania Supreme Court has recognized: "[I]t is the legislature, in the first instance, that is primarily charged with the task of reapportionment. However, the Pennsylvania Constitution, statutory law, our Court's decisions, federal precedent, and case law from our sister states, all serve as a bedrock foundation on which stands the authority of the state judiciary to formulate a valid redistricting plan when necessary." *League of Women Voters v. Commonwealth*, 645 Pa. 1, 134 (2018).

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On December 17, 2021, anticipating the need for judicial resolution, two groups of plaintiffs filed suit in the Commonwealth Court of Pennsylvania. App. 578. One of those groups—which appears in this case as an intervenor—was known as the "Carter Petitioners." They asked the Commonwealth Court to declare the prior 2018 map unconstitutional and to adopt a constitutional congressional districting plan. *Id.*

Three days later, on December 20, 2021, the Commonwealth Court directed that "if the General Assembly and the Governor fail to enact a congressional

reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties." App. 176. The court also established a schedule and directed that its order be served on leaders in the General Assembly. App. 176-77.

The consolidated *Carter* proceedings unfolded in the Commonwealth Court over the next six weeks. Ten parties—including Respondent Governor Wolf, as well as various state legislative coalitions and private voter groups—participated in that litigation. Although plainly aware of it, Petitioners made no effort to participate as parties or *amici* in the state court process, or to raise objections to that proceeding.

On January 14, 2022, Judge McCullough of the Commonwealth Court reaffirmed that if the General Assembly "has not produced a new congressional map by January 30, 2022, the Court shall proceed to issue an opinion based on the hearing and evidence presented by the Parties." App. 186, 578-79. By January 24, the participating parties had submitted 13 proposed maps for consideration.

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On January 26, 2022, Governor Wolf vetoed the General Assembly's proposed map. App. 579. Over the next two days, Judge McCullough held an evidentiary hearing and reaffirmed that she would issue a new map if the political branches failed to adopt one by January 30. *See id.*

January 30 passed without any further agreement between the Governor and the General Assembly. Given the tight schedule and the need for a definitive ruling, the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the case on February 2, 2022. *See* App. 263-64 (explaining that this approach was warranted "[g]iven the impasse between the legislative and executive branches concerning the

adoption of congressional districts, and in view of the impact that protracted appeals will have on the election calendar, and time being of the essence . . ."); *see* 42 Pa.C.S. § 726. That exercise of extraordinary jurisdiction was consistent with Pennsylvania law: "[O]ver the last six decades," the Pennsylvania Supreme Court has exercised such jurisdiction "in every single case in which the task of drawing Pennsylvania's election districts has fallen to the judiciary." *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 304580, at *3 (Pa. Feb. 2, 2022) (Dougherty, J., concurring). To expedite proceedings, Judge McCullough was designated as the Special Master and instructed to submit a report and proposed map by February 7, 2022. *See* App. 264.

In her report, Judge McCullough recommended adoption of HB 2146 (the General Assembly's proposed map), as well as modest changes to the general primary election schedule that had been advocated for by the proponents of that map. *See* App. 484-92. In reaching this conclusion, Judge McCullough evaluated criteria including population equality. App. 408-10. With respect to the map proposed by the Carter Petitioners, Judge McCullough did not, in fact, conclude that it violated the one-person, one-vote principle. *Contra* Pet. 23. Instead, she noted that the Carter plan's two-person deviation was "statistically insignificant" and "apparently the byproduct of legitimate efforts to limit the number of municipal splits." App. 408. While she proposed assigning it "less weight" in light of this deviation, App. 409, she did not

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find it unconstitutional on that basis, and she recommended against adopting it for this among numerous other reasons, *see* App. 474-75.[1]

The parties responded to Judge McCullough's report with hundreds of pages of briefs raising exceptions to her conclusions. None of these briefs denied the court's power to modify the election schedule. Following a review of those briefs—and a lengthy oral argument on February 18, 2022—the Pennsylvania Supreme Court issued an order on February 23, 2022, adopting the congressional map proposed by the Carter Intervenors (the "Carter Plan"). App. 548-52. This order vacated an earlier order—issued February 9, 2022—temporarily suspending the election calendar. *See id.* It also extended seven interim election-related deadlines by a few days, including the first day to circulate and file nomination petitions, which had been February 15 and (given the passage of that date) was reset to February 25. *Id.* The calendar was otherwise left untouched: its original April and May deadlines and the General Primary Date remain. *Id.* The Pennsylvania Supreme Court directed Respondent Chapman—Acting Secretary of the Commonwealth—to take a series of immediate measures to implement its order. *Id.* Finally, it stated that an opinion will follow. *Id.*

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Since issuance of the Pennsylvania Supreme Court's order, and as described at great length *infra* in Part II, Respondents have taken substantial steps to implement it. Candidates and county officials have similarly relied on that order. And the whole

[1] Her conclusory statement that the Carter map is "contrary to Pennsylvania and United States Supreme Court precedent" (quoted at Pet. 23) was concerned only with its use of "least change" analysis and the methods used by an expert to define the census population. App. 465.

machinery of election administration in Pennsylvania has proceeded apace on the reasonable expectation that there will be district-based elections in 2022.

II. Procedural History

Throughout the six weeks of litigation that led to the Pennsylvania Supreme Court's order—litigation involving officials, political parties, legislators, candidates, and voters—Petitioners decided not to participate in that process as parties or *amici*. Instead, they bided their time and prepared a federal lawsuit. They did not file that lawsuit on January 14, 2022, when the Commonwealth Court announced its intent to adopt a map if the political branches reached an impasse. They did not file on January 26, 2022, when Governor Wolf vetoed HB 2146. Nor did they file on February 2, 2022, when the Pennsylvania Supreme Court exercised emergency jurisdiction.

No, Petitioners waited until February 11, 2022—and then waited again until February 20, 2022, to file a First Amended Complaint and an "emergency" motion for a TRO, in which they asserted the state court proceeding had been unconstitutional *ab initio*. App. 18-32, 33-43. They did not, at this point, challenge any particular map or schedule. Instead, they claimed that the Elections Clause forbade *any* state court from adopting *any* map unless expressly authorized by the General Assembly. App. 38-44. They further asserted that if the General Assembly did not adopt a map in time for the primary, Pennsylvania should be compelled to hold at-large statewide congressional elections. App. 44. Finally, they renewed the request in their complaint that a three-judge district court hear their claims. App. 15-16.

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The day that Petitioners filed this TRO motion, the District Court established a two-day briefing schedule on the request to convene a three-judge court. App. 530-31. It also set a hearing for February 25, 2022, regarding procedural and scheduling matters relating to the pending TRO motion. *Id.*

At sunset on February 23, 2022—the day the Pennsylvania Supreme Court issued its order adopting a map and a schedule—Petitioners filed a renewed TRO motion in the District Court, stating: "If the Court does not grant the requested TRO by midnight tonight, the plaintiffs will deem the request denied and seek emergency relief from Justice Alito." App. 533. The District Court did not respond by midnight. Petitioners did not, at that point, seek emergency relief from Justice Alito.

Meanwhile, Petitioners—as well as the Carter Intervenors (who had filed a motion to intervene, D. Ct. Dkt. No. 14)—submitted letters explaining that a three-judge district court was unnecessary because Petitioners lacked Article III standing. *See* D. Ct. Dkt. Nos. 36 & 37; *see also Shapiro v. McManus*, 577 U.S. 39, 44-45 (2015).

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On February 25, 2022, the District Court held a conference where, in light of its concerns as to jurisdiction, it denied Petitioners' motion for a TRO and held in abeyance their request to convene a three-judge court. App. 561. The District Court then set a highly compressed briefing schedule for motions to dismiss, jurisdictional statements, and Petitioners' pending request for a preliminary injunction. *Id.*

Later that night, Petitioners served a proposed Second Amended Complaint in which they added a new plaintiff and raised (for the first time) a one-person/one-vote challenge to the Carter map. App. 568-95. Three days later, Petitioners filed a notice

of appeal from the district court's denial of their emergency TRO motion. App. 816. That day, the District Court granted the Carter Petitioners' motion to intervene.

On March 1, Respondents and the Carter Petitioners filed motions contending that Petitioners' Elections Clause claims should be dismissed for lack of jurisdiction and therefore do not warrant consideration by a three-judge district court. D. Ct. Dkt. Nos. 58-61. Respondents and the Carter Petitioners did not object to a three-judge district court hearing Petitioners' new one-person/one-vote claim. On March 2, 2022, the District Court wrote to Chief Judge Chagares requesting that he designate two other judges to convene a three-judge district court. D. Ct. Dkt. No. 62.

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ARGUMENT

The Court should deny Petitioners' emergency application for two reasons: they lack an indisputably clear right to relief (indeed, their claims are meritless), and the equities overwhelmingly militate in favor of denying their requested injunction.

I. PETITIONERS LACK AN INDISPUTABLY CLEAR RIGHT TO RELIEF

To justify the extraordinary remedy of a mandatory injunction from this Court, an applicant must show that the "legal rights at issue" in the underlying dispute are "indisputably clear" in its favor, *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers), such that this Court is reasonably likely to grant certiorari and reverse any judgment adverse to the applicant entered upon the completion of lower-court proceedings, *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 17.13(b) (10th ed. 2013). The applicant must also show that an injunction is "necessary in aid of" this Court's jurisdiction. *Ohio Citizens for Responsible Energy,*

Inc. v. Nuclear Regul. Comm'n, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers). Petitioners fail to satisfy either of these requirements.

A. Petitioners Lack an Indisputably Clear Right to Relief on Their Elections Clause Claims

For three independently sufficient reasons, Petitioners fail the most essential requirement for a mandatory injunction on their Elections Clause claims: they lack Article III standing; they lack a cause of action; and their claims lack merit.

1. Petitioners Lack Article III Standing to Maintain Their Elections Clause Claims

To comply with Article III, Petitioners bear the burden of establishing that they have standing, which requires "(1) an injury in fact, (2) a sufficient causal connection between the injury and the conduct complained of and (3) a likelihood that the injury will be redressed by a favorable decision." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58 (2014) (cleaned up). As this Court has emphasized, plaintiffs cannot rely upon a mere "generally available grievance" arising from a widely shared interest "in the proper application of the Constitution and laws." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992). Plaintiffs must instead prove they have suffered a "concrete" and "particularized" injury. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). Petitioners fail that requirement as to their Elections Clause claims.

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a. Petitioners Lack Standing as Voters

Petitioners first contend that they have been injured as "registered voter[s]" by Respondents' "implementation of the unconstitutional Carter Plan and their refusal to hold at-large elections." Pet. 27. This theory is squarely foreclosed by precedent.

To support Article III standing, a plaintiff's injuries must be "concrete and particularized." *Lujan*, 504 U.S. at 560. To be "particularized," an injury must "affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339. The opposite of a particularized injury is a generalized grievance, "shared in substantially equal measure by all or a large class of citizens[.]" *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Simply put, "a grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact.'" *Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

In *Lance v. Coffman*, 549 U.S. 437 (2007), this Court applied those principles to the Elections Clause in a manner that directly controls here. After the 2000 census, the Colorado legislature was unable to reach agreement on a redistricting plan. *See id.* at 437. The state courts therefore adopted a map for the 2002 election. *See id.* at 438. Although the state legislature finally agreed on a plan in 2003, the Colorado Supreme Court held that it could not go into effect, since the Colorado Constitution limited redistricting to once per census. *See id.* Four Colorado citizens filed suit in federal court, alleging that adherence to the redistricting plan adopted by the Colorado courts in 2002 violated the federal Elections Clause. *See id.*

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This Court unanimously dismissed the voters' suit for lack of Article III standing, holding that they "assert[ed] no particularized stake in the litigation." *Id.* at 442. "The only injury" the plaintiffs asserted was "that the law—specifically the Elections Clause—[had] not been followed." *Id.* Citing decades of precedent, the Court

found that this was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance[.]" *Id.*

Lance plainly precludes Petitioners' theory of voter standing. Citing *Lance*, courts have repeatedly dismissed suits in which plaintiffs sought to raise Elections Clause claims in their capacity as voters. *See, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20 Civ. 3774, 2021 WL 1662742, at *6 (D. Colo. Apr. 28, 2021); *King v. Whitmer*, 505 F. Supp. 3d 720, 735-36 (E.D. Mich. 2020). Petitioners' claims should meet the same fate.[2]

b. Petitioner Bashir Lacks Standing

Petitioner Bashir, a congressional candidate in Philadelphia, alleges several forms of injury. None withstands scrutiny.

First, he claims injury because he would prefer to compete in an at-large election, rather than in the district where he resides. Pet. 28. But as a three-judge court found in *Corman v. Torres*, "[c]ase law strongly suggests that a legislator has no legally cognizable interest in the composition of the district he or she represents." 287 F. Supp. 3d 558, 569 (M.D. Pa. 2018) (discussing cases); *see also City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) ("A legislative

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[2] Petitioners cannot escape *Lance* by citing 2 U.S.C. § 2a(c)(5), which (in their view) entitles them as voters to cast ballots in an at-large election. *First*, the actual injury they allege is traceable solely to supposed violations of the Elections Clause. *Second*, 2 U.S.C. § 2a(c)(5) does not vest any rights, the deprivation of which could constitute an injury: it merely offers "a last-resort remedy" when there is no time to develop a single-member district plan. *Branch v. Smith*, 538 U.S. 254, 275 (2003) (plurality opinion); *accord id.* at 285 (Stevens, J., concurring in part). *Finally*, even if Petitioners could trace an injury to violations of 2 U.S.C. § 2a(c)(5), it too would be a generalized grievance, since every voter in Pennsylvania could claim to be equally aggrieved. *See Lance*, 549 U.S. at 442; *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs who have been *concretely harmed* by a defendant's statutory violation may sue that private defendant over that violation in federal court.").

representative suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment."). This follows directly from the "core principle of republican government . . . that the voters should choose their representatives, not the other way around." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (cleaned up). Regardless, mere speculation that Bashir will face more advantageous odds in an at-large election does not render any injury from adoption of a districting map sufficiently imminent or certain to support standing. *See Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

As a fallback, Bashir claims injury based on his "uncertainty" about "how he should campaign" given the risk that a court will invalidate the current map. Pet. 29. But that asserted risk exists only by virtue of a lawsuit that Bashir *himself* filed. *See Lujan*, 504 U.S. at 564 n.2 (holding it stretches standing "beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff's own control"). Of course, Article III would mean little if plaintiffs could show injury by claiming that they are uncertain whether government conduct might someday be invalidated in court. This Court has thus "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). More pointedly, this Court has held that a party cannot demonstrate injury by asserting that fear or uncertainty about non-imminent future events is affecting their present conduct: "[R]espondents cannot manufacture standing merely

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by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending." *Id.* at 416. Here, Bashir's uncertainty about the results of his own lawsuit do not constitute injury-in-fact. Indeed, only in the rarest circumstance (if ever) could the result of federal judicial review of state action be seen as sufficiently foreordained to constitute a "certainly impending" injury giving rise to Article III standing. That standard is not met in this case.[3]

c. Petitioner Hall Lacks Standing

Petitioner Alan M. Hall, a member of the Susquehanna County Board of Elections, alleges two forms of injury. He first alleges that Respondents are injuring him by forcing him to implement an unconstitutional order in violation of his oath of office. Pet. 29-30. This theory of standing would allow any official charged with implementing any statute or rule to challenge it on any ground. Although sometimes mistakenly attributed to dicta in a footnote from the 1960s, *see Board of Education v. Allen,* 392 U.S. 236, 241 n.5 (1968), that boundless theory of oath-breaker standing has been widely rejected and is especially untenable under this Court's post-*Lujan* standing precedents, *see, e.g.*, *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) ("[T]he violation of one's oath alone is an insufficient injury to support standing.");

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[3] Bashir complains that he has also been injured because his donors are afflicted by uncertainty about the result of his case. *Clapper* forecloses that theory for the reasons given above. Moreover, federal courts rarely accept theories of injury that depend on speculation about the reasons why third parties (who are not before the court) might make complex decisions in the future. *See, e.g.*, *Bennett v. Spear*, 520 U.S. 154, 167 (1997) ("[T]he injury must be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court."). Donors consider a wide range of factors in deciding who to support in elections. Just as a candidate cannot manufacture injury by worrying that a map might be invalidated, neither can a candidate claim injury by asserting that their donors are worried that a map might be invalidated. *See Vita Nuova, Inc. v. Azar*, 458 F. Supp. 3d 546, 556-57 (N.D. Tex. 2020) (O'Connor, J.).

City of S. Lake Tahoe v. California Tahoe Reg'l Plan. Agency, 625 F.2d 231, 237 (9th Cir. 1980); *Finch v. Mississippi State Med. Ass'n, Inc.*, 585 F.2d 765, 773 (5th Cir. 1978) (detailed discussion of *Allen*). Hall cannot show that it is "indisputably clear" that he has standing based on a flawed reading of a half-century-old footnote.

Nor is there merit to Hall's claim that he will be injured by having to complete his duties on a faster schedule. Pet. 30. Respondents are unaware of any case holding that it ranks as Article III injury-in-fact for a government official to have to do their job. It is particularly unlikely that a single member of a county board of elections could have standing on such a theory, since any potential increased workload would accrue to the board in an institutional capacity rather than to its individual members. *Cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019) ("[I]ndividual members lack standing to assert the institutional interests of a legislature."). Independently, for the reasons given above, Hall is not an appropriate party to assert injury-in-fact under the Elections Clause, which exists to protect the prerogatives of state legislatures. *See Corman*, 287 F. Supp. 3d at 573 (concluding Elections Clause claims belong "if they belong to anyone, only to the Pennsylvania General Assembly").

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For these reasons, Hall lacks standing—and for the reasons given above, no other Petitioner has alleged injury-in-fact. The Court need go no further in the analysis. Independent principles of Article III jurisprudence foreclose this suit.

One final consideration supports that conclusion: Petitioners collectively urge an exceedingly expansive standing theory in raising claims under a constitutional provision that exists principally to define the role and prerogatives of the state

legislative process in conducting federal elections. *See Arizona State Legislature*, 576 U.S. at 800-02. Because the Elections Clause exists for that purpose—and addresses itself most explicitly to the role of state and federal legislative bodies—the proper party to assert an injury from alleged violations of the Elections Clause will generally be the state legislature itself. *See Corman*, 287 F. Supp. 3d at 573 ("[T]he Elections Clause claims asserted in the verified complaint belong, if they belong to anyone, only to the Pennsylvania General Assembly."). In an opinion that has since been vacated by this Court on procedural grounds, and that took its name from a plaintiff who is also a Petitioner here, then-Chief Judge Smith offered an especially thorough analysis of that point. *See generally Bognet v. Sec'y Commonwealth of Pennsylvania*, 980 F.3d 336 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021); *see also id.* at 350 ("Because Plaintiffs are not the General Assembly, nor do they bear any conceivable relationship to state lawmaking processes, they lack standing to sue over the alleged usurpation of the General Assembly's rights under the Elections and Electors Clauses.").

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In many other settings, this Court has taken a cautious approach to identifying the proper parties to bring claims that seek to vindicate legislative injuries and interests. *See, e.g.*, *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019); *Raines v. Byrd*, 521 U.S. 811 (1997). There is no reason to vary from that principle here. Indeed, in this case, leaders of the General Assembly affirmatively recognized the Pennsylvania Supreme Court's power to adopt a map and modify the election

schedule.[4] Petitioners' efforts to coopt and direct the constitutional interests of the General Assembly are inconsistent with the design of the Elections Clause—and foreclosed by independent aspects of this Court's Article III jurisprudence. They most assuredly have not shown an "indisputably clear" entitlement to relief.

2. Petitioners Lack a Cause of Action to Maintain Their Elections Clause Claims

Petitioners not only fail to demonstrate standing, but they also lack a cause of action to pursue their claims under the Elections Clause. As Judge Mazzant has reasoned, because the Elections Clause "does not speak to individual rights"—and instead "outlines a structural principle of the American system of federalism"—"no cause of action based solely on the text of the Elections Clause exists for [plaintiffs] to plead." *Tex. Voters All. v. Dallas County*, 495 F. Supp. 3d 441, 462 (E.D. Tex. 2020).

In the alternative, Petitioners may ask this Court to imply a cause of action in equity to pursue their claims. To do so, however, they must demonstrate that they

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[4] For instance, the Speaker and Majority Leader of the Pennsylvania House of Representatives, joined by the President *Pro Tempore* and Majority Leader of the Pennsylvania Senate, stated as follows in proceedings at the Pennsylvania Supreme Court:

> Officers of the General Assembly have argued in prior litigation . . . that the "Elections Clause" of Article I, section 4 of the U.S. Constitution forecloses state courts from enforcing state law against an act of the state's legislature, or at least imposes limitations when they do so. The difference here is that the current congressional plan contravenes the U.S. Constitution, and it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections. *See Growe v. Emison*, 507 U.S. 25, 32-36 (1993). Proposed Intervenors do not dispute that the Pennsylvania courts have the authority to adjudicate Petitioners' claims for violations of the U.S. Constitution or other federal laws, and it appears that the state-law issues they raise implicate standards that duplicate federal standards.

Opp. to App. for Extraordinary Relief of Cutler at 3 n.2, No. 141 MM 2021 (Pa. Dec. 27, 2021).

fall within the zone of interests of the Elections Clause. *See Maher Terminals, LLC v. Port Auth.*, 805 F.3d 98, 105 (3d Cir. 2015). For the reasons given above, they do not: the Elections Clause exists to clarify the role of the state legislative process in federal elections—and to balance power between federal and state legislative action—and so its interests belong squarely to state legislative bodies acting in their institutional capacity, rather than to private plaintiffs. *See, e.g.*, *Corman*, 287 F. Supp. 3d at 573; *Georgia Voter All. v. Fulton Cty.*, 499 F. Supp. 3d 1250, 1255 (N.D. Ga. 2020) ("[T]he Elections Clause does not, on its own, provide Plaintiffs with a basis to sue Fulton County."). Particularly given the significant federalism and separation of powers concerns at play here, it would not be "proper," *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015), or consistent with settled traditions of equity, *see Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 319 (1999), to imply the cause of action that Petitioners seek to invoke.[5]

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3. Petitioners' Elections Clause Claims Are Meritless

Even if Petitioners had standing and a cause of action, they could not show that their right to relief is indisputably clear. To the contrary, their claims under the Elections Clause are meritless.

[5] Petitioners' invocation of 42 U.S.C. § 1983 does not cure this infirmity. Section 1983 "merely provides a mechanism for enforcing individual rights 'secured' elsewhere." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285 (2002). The same is true of the Declaratory Judgment Act, which establishes a procedural mechanism to vindicate independent substantive rights. *See Medtronic, Inc. v. Mirowski Fam. Ventures, LLC*, 571 U.S. 191, 199 (2014). The Elections Clause is not itself a source of individual rights enforceable through these provisions. Of course, to the extent Petitioners cite § 2a(c)(5), this Court has already held that it creates only a remedy, not a right. *See Branch v. Smith*, 538 U.S. 254, 275 (2003) (plurality opinion); *accord id.* at 300 (O'Connor, J., concurring in part and dissenting in part) ("Sections 2a(c) and 2c do not create independently enforceable private rights of action themselves.").

a. Adopting the Congressional Map

Petitioners' main contention is that the Elections Clause wholly prohibited the Pennsylvania Supreme Court from adopting a congressional map when the General Assembly and Governor reached an impasse. Pet. 19-22. They rest this claim on two premises: the Elections Clause vests state legislatures with exclusive power to draw maps, and Congress has enacted a statute (2 U.S.C. § 2a(c)(5)) that requires at-large congressional elections when a state legislature fails to adopt a map following a decrease in the state's number of representatives (*e.g.*, due to a decennial census).

Every premise and every conclusion of this argument is mistaken. To start, this Court has *repeatedly* and *explicitly* upheld the propriety of state courts drawing congressional districts when the legislative process fails to produce one. This theme emerged in many decisions issued during the 1960s, as legislatures and courts aimed to implement new constitutional requirements. In *Scott v. Germano*, collecting many of these cases, the Court made clear that "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." 381 U.S. 407, 409 (1965) (citations omitted).

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Decades later, in *Growe v. Emison*, the Court addressed a case in which (as here) the state legislature had adopted a redistricting plan, the Governor had vetoed it, and so a state court had prepared a congressional map of its own. *See* 507 U.S. 25, 30-31 (1993). Speaking unanimously through Justice Scalia, the Court overturned a federal district court injunction that had blocked the state court from issuing its

congressional map. *See id.* at 32-37. In so doing, the Court took the opportunity to "renew" its "adherence to the principles expressed in *Germano*"—adding that, "[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 33-34 (emphasis added); *see also id.* at 34 (affirming that "the doctrine of *Germano* prefers *both* state branches [legislative and judicial] to federal courts as agents of apportionment" (emphasis in original)).

Ten years later, in *Branch v. Smith*—discussed in more detail below—the Court returned to the field, holding that while federal statutory law addressed to redistricting "assuredly envisions legislative action, it also embraces action by state and federal courts when the prescribed legislative action has not been forthcoming." 538 U.S. 254, 272 (2003). More recently, in *Perry v. Perez*, the Court noted that when a census "renders the current plan unusable, a court must undertake the 'unwelcome obligation' of creating an interim plan." 565 U.S. 388, 392 (2012) (citation omitted).

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State and lower federal courts have repeatedly reached the same conclusion—including in cases where the legislature either failed to produce a map or (as here) proposed one that the governor then vetoed. *See, e.g.*, *Johnson v. Wisconsin Elections Comm'n*, 2021 WI 87, ¶ 2, 399 Wis. 2d 623, 630-31 (Wisc. 2021) (adopting map where "the legislature drew maps, the governor vetoed them, and all parties agree the existing maps, enacted into law in 2011, are now unconstitutional . . ."); *League of Women Voters*, 645 Pa. at 129-34; *Perry v. Del Rio*, 66 S.W.3d 239, 242-43 (Tex. 2001)

("[T]he 77th Legislature this year adjourned its regular session without redrawing congressional districts, and the Governor has notified the presiding officers of that body that he will not reconvene it in special session to consider redistricting 'at this time.' It therefore falls to the courts—first the Texas courts and then those of the United States—to reconstruct the State's congressional districts."); *Mellow v. Mitchell*, 530 Pa. 44 (1992) (judicial proceeding where legislature failed to adopt new plan following 1990 census); *Wilson v. Eu*, 54 Cal. 3d 471, 472 (1991) ("In these mandate proceedings, we are called on to resolve the impasse created by the failure of the Legislature to pass legislative and congressional reapportionment bills acceptable to the Governor in time for the forthcoming 1992 primary and general elections."); *see also, e.g.*, *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002) (adopting plan where the South Carolina governor vetoed the General Assembly's redistricting plans for the South Carolina House and Senate, and the United States Congressional districts); *Rodriguez v. Pataki*, No. 02 Civ. 618, 2002 WL 1058054, at *1 (S.D.N.Y. May 24, 2002) (adopting plan where "there exists a Congressional redistricting 'impasse' in New York State"); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003); *Brown v. Butterworth*, 831 So.2d 683, 688-89 (D.C. App. Fla. 2002).

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This unbroken line of authority coheres with the Constitution and federal statutory law. Under the Elections Clause, Congress "may at any time by Law make or alter such Regulations" as concern the "Manner" of federal legislative elections. Congress exercised that power in 2 U.S.C. § 2c, which (as relevant) provides: "In each

State entitled . . . to more than one Representative . . . there *shall be established by law a number of districts* equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative . . . ." (emphasis added).

In *Branch v. Smith*, this Court definitively construed § 2c in an opinion written by Justice Scalia. It first recognized that § 2c "requires States entitled to more than one Representative to elect their Representatives from single-member districts." 538 U.S. at 267-68. It next recognized that where the legislative process comes up short, § 2c contemplates that the "courts" will "draw single-member districts whenever possible." *Id.* at 270. In other words, *Branch* found that courts are directed by § 2c "to redistrict." *Id.* Finally, *Branch* squarely held "that while § 2c assuredly envisions legislative action, it also embraces action by *state* and federal courts when the prescribed legislative action has not been forthcoming." *Id.* at 272 (emphasis added). "In sum, § 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures." *Id.*

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Along the way, *Branch* considered and rejected the argument that Petitioners advance here: namely, that 2 U.S.C. § 2a(c) requires at-large elections when the state legislature has failed to redistrict. *See id.* at 268. As the Court discussed at length, this interpretation of the statute was inconsistent with text, precedent, prior practice, and congressional purpose. *See id.* at 268-72. This left a question: what remained of § 2a(c)? Some Justices would have said "nothing" and held that it was repealed by implication following the enactment of § 2c. *See id. at* 285-92 (Stevens, J., concurring

in part and concurring in the judgment). Justice Scalia's plurality, however, instead viewed § 2a(c) as "inapplicable *unless* the state legislature, *and state and federal courts*, have all failed to redistrict pursuant to § 2c." *Id.* at 275 (second emphasis added). On this interpretation, which controls, § 2a(c) is merely 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.* (emphasis added).

Accordingly, § 2c requires states to adopt single-member districts. Under *Branch*, state courts are obliged by § 2c to create those districts when the state legislature fails to do so. And consistent with prior practice and precedent, including *Smiley v. Holm*, the state legislature is understood to have failed to redistrict when the Governor vetoes its proposal. *See* 285 U.S. 355, 374 (1932); *see also supra* at pp. 19-21.

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For these reasons, Petitioners (who strangely do not cite *Branch* or § 2c in this section of their brief) advance a fundamentally meritless claim. The Elections Clause empowers Congress to regulate by "Law" the "Manner" of congressional elections. Congress exercised that power in 2 U.S.C. § 2c. This Court has authoritatively interpreted § 2c as requiring state courts to draw single-member districts when the state legislature fails to do so (which includes cases of gubernatorial vetoes). That rule has been repeatedly relied upon by state and federal courts; it is also faithful to this Court's precedential rulings in *Germano*, *Growe*, *Branch*, and *Perry*. Applied

here, these authorities leave no doubt that the Pennsylvania Supreme Court acted well within its authority by adopting single-district maps for the 2022 election.[6]

b. Modifying the Election Schedule

Secondarily, Petitioners claim that the Pennsylvania Supreme Court violated the Elections Clause by slightly modifying the primary election schedule. *See* Pet. 24-26. This claim is meritless—and factually overstated. The Pennsylvania Supreme Court did not change the date of the primary election, *see* 25 P.S. § 2753 (May 17). Nor did it alter any deadline in April or May. Instead, to ensure sufficient time for candidates to obtain nominating signatures after the congressional districts were announced, it modified—by roughly a week—only a handful of preliminary deadlines related to nomination petitions. This decision was either advocated or acquiesced to by every party in the state court proceedings, including (with particular relevance here) the leadership of the General Assembly. *See* Memo. of Law in Support of App. for Leave to Intervene by Cutler et al., at ¶ 6, No. 464 MD 2021 (Pa. Dec. 27, 2021) ("[I]n the past, those nominating petition deadlines have been moved for Congressional elections, and therefore could still be moved in this election cycle.").

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Moreover, consistent with the cases cited *supra* at pp. 19-21, courts have long reasonably understood themselves to have the power to modify election deadlines as a necessary incident to their authority to implement congressional maps (where the legislature fails to produce one). *See, e.g.*, Order at 2, *Perez v. Perry*, No. 5:11 Civ. 360

[6] Accordingly, the Court need not reach the question whether, absent § 2c or any other federal statute, a state court could (consistent with provisions of state constitutional law) adopt districts when the legislature enacts a map but the governor vetoes it.

(W.D. Tx. Mar. 1, 2012), ECF 68 ("It is necessary to make certain adjustments to the election schedule and other provisions of the Texas Election Code for the 2012 elections."); *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 576, 585-86 (2018); *Mellow v. Mitchell*, 530 Pa. 44, 49 (1992); *Assembly of State of Cal. v. Deukmejian*, 639 P.2d 939, 964 (1982).

This understanding is supported by 2 U.S.C. § 2c, which directs courts to redistrict when state "legislative action has not been forthcoming," *Branch*, 538 U.S. at 272, and which is properly read as authorizing schedule modifications inherent to (and necessary to effectuate) that limited judicial role. Otherwise, federal law would assign courts a crucial fallback function in the redistricting process, would direct them to wait as long as possible to give the state legislature an opportunity to enact a map, but would strip them of the ability to include in their redistricting orders even *de minimis* modifications of the schedule necessary to implement those plans. To our knowledge, no court has ever understood itself as so limited. Rather than read federal law as setting a trap for courts—telling them to wait for legislative action, but forbidding any schedule modifications if they wait a few days too long to issue their orders—2 U.S.C. § 2c should be read consistent with longstanding practice, statutory context, and this Court's opinion in *Branch* as reflecting Congressional authorization of state and federal courts to effectuate their redistricting function when necessary. That is particularly true when those courts have not altered the date of any election, but instead direct only reasoned modifications of preliminary deadlines.

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Because this is the best understanding of 2 U.S.C. § 2c, there is no merit to Petitioners' claim that the Supreme Court of Pennsylvania violated the Elections Clause. Its order was fully consistent with the "Law" enacted by Congress.

That same conclusion follows from a recognition that the General Assembly played an essential role in adopting and maintaining the Free and Equal Elections Clause of the Pennsylvania Constitution—which governs elections in the Commonwealth and which the Pennsylvania Supreme Court must uphold in elections cases. *See* Amicus Br. of Tom Ridge et al., *Republican Party of Pennsylvania v. Boockvar*, 20A54, at 3-10. (Oct. 2, 2020)[7]; *see also id.* at 7 ("The 1967 Act not only effectively approved the Free and Equal Clause and Inviolate Clause as the General Assembly's own, [but] these approvals ensured that through the Inviolate Clause, the Free and Equal Clause took precedence over statutory election laws."). This grant of state constitutional power to the Pennsylvania Supreme Court—undertaken by the people of Pennsylvania when they ratified the 1874 Constitution and endorsed by the state legislature in 1967—further authorized its order modifying election deadlines. *See Arizona Redistricting*, 576 U.S. at 814; *id.* at 841-42 (Roberts, C.J., dissenting) (recognizing that the legislature need not be "exclusive" in redistricting); *accord Democratic Nat'l Comm. v. Wisc. State Legislature*, 141 S. Ct. 28, 28 (2020) (Roberts, C.J., concurring in denial of application to vacate stay). Petitioners offer no argument that the Pennsylvania Supreme Court's scheduling order was *ultra vires* under the

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[7] Former Governor Ridge's amicus brief is available at this link: https://www.supremecourt.gov/DocketPDF/20/20A53/156682/20201002164607951_298904_Brief.pdf.

Pennsylvania Constitution, including the Free and Equal Elections Clause. There is simply no basis for finding a violation of the Elections Clause here.

Finally, even apart from the fact that federal law authorized the Pennsylvania Supreme Court's order, and apart from the fact that the General Assembly played a key role in vesting the Pennsylvania Supreme Court with the constitutional power it exercised here, Petitioners' claims reflect a mistaken understanding of the Elections Clause itself. The Framers expected that the "exercise of the [legislative] authority," even over federal elections, had to be "in accordance with the method" prescribed in a state's constitution. *Smiley*, 285 U.S. at 367. Thus, nothing in the Elections Clause "attempt[s] to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Id.* at 368; *see McPherson v. Blacker*, 146 U.S. 1, 25 (1892) ("The legislative power is the supreme authority, except as limited by the constitution of the state."). Indeed, this Court has rejected the claim that state legislatures can enact laws governing elections that violate state constitutions. *Arizona Redistricting*, 576 U.S. at 817-18. Here, to the extent the unmodified state statutory deadlines for the general election raised state constitutional issues as applied to the 2022 cycle, it was well within the power of the Pennsylvania Supreme Court to modify them.

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For these reasons, Petitioners' constitutional challenge to the Pennsylvania Supreme Court's order is meritless. At bare minimum, they have not demonstrated an indisputably clear right to relief—and so their application cannot succeed.

B. Petitioners Lack an Indisputably Clear Right to Relief on Their One-Person/One-Vote Claim

Petitioners come nowhere close to demonstrating an indisputably clear right to relief on their claim under *Wesberry v. Sanders*. *See* 376 U.S. 1 (1964). They alleged this claim for the first time just three days before filing their application in this Court. They did not seek any form of interim relief on this claim in the District Court before presenting it here (they filed the Second Amended Complaint after the denial of their TRO). They have submitted barely more than a single page of briefing in support of this claim—a page on which they offer only conclusory assertions. There has not been a factual or legal finding by *anyone*—including Judge McCullough, *see supra* at pp. 5-6—that the Carter plan actually violates *Wesberry*, and plainly the Pennsylvania Supreme Court (which adopted it as a congressional map) determined it did not.

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Given this aberrant backdrop, Petitioners offer no basis to find that there is such overwhelming clarity and necessity to their *Wesberry* claim that the Court should undertake immediate, extraordinary intervention. Rather, the proper course is for Petitioners to press their claim before the three-judge district court that the District Court has asked Chief Judge Chagares to convene under 28 U.S.C. § 2284.

To the extent Petitioners develop an argument under *Wesberry*, it is that the bare fact of a two-person deviation "is constitutionally intolerable . . . when it remains possible to draw a map that contains no more than one-person deviations among the proposed districts." Pet. 23. But courts (including this one) have upheld plans with larger deviations than the one at issue here, even where plans with lower deviations were available. *See, e.g.*, *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 761 (2012);

Abrams v. Johnson, 521 U.S. 74, 100 (1997); *S.C. State Conf. of Branches of NAACP, Inc. v. Riley*, 533 F. Supp. 1178, 1182 (D.S.C. 1982), *aff'd sub nom. Stevenson v. S.C. State Conf. of Branches of Nat'l Ass'n for Advancement for Colored People, Inc.*, 459 U.S. 1025 (1982); *Carstens v. Lamm*, 543 F. Supp 68, 94 (D. Colo. 1982); *Drum v. Scott*, 337 F. Supp. 588, 591 (M.D.N.C. 1972). As this Court has emphasized in evaluating *Wesberry* claims, "[a]ny number of consistently applied legislative policies might justify some variance." *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). While the Pennsylvania Supreme Court's opinion is forthcoming, there are ample legitimate justifications that could support its ruling: for example, despite having a deviation that Judge McCullough deemed "statistically insignificant," the Carter Plan hewed most closely to the 2018 congressional map, was among the most compact, boasted the best efficiency gap score (a measure of partisan fairness), and had some of the lowest rates of county and precinct splits. Redistricting always involves complex and multi-dimensional trade-offs; Petitioners are mistaken in their claim that a two-person deviation categorically precluded adoption of the Carter plan, and they offer no further argument as to why it was not (or could not be) legitimately justified.

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At this early stage, on this record, and with the threadbare argumentation in their brief, Petitioners have not shown an indisputably clear right to relief.

C. The Court Should Not Grant Certiorari Before Judgment or Consider This Application under 28 U.S.C. § 1253

Because Petitioners have failed to demonstrate an indisputably clear right to relief, the Court should deny their application for an injunction under 28 U.S.C. § 1651. As a fallback, Petitioners suggest that the Court might consider the merits by

granting certiorari before judgment, Pet. 35, or by exercising "jurisdiction to consider this application under . . . 28 U.S.C. § 1253," *id.* at 3. Petitioners are mistaken.

Starting with Petitioners' brief request for certiorari before judgment, there is an insuperable jurisdictional impediment to this proposal: the notice of appeal that Petitioners filed below is limited to an interlocutory appeal from the denial of their motion for a TRO. App. 816. This is clear from the record: the District Court denied Petitioners' "motions for temporary restraining order" and promptly implemented an "expedited schedule . . . to resolve . . . the merits of Plaintiffs' motion for preliminary injunction." App. 561. It is black letter law "that denials of temporary restraining orders are ordinarily not appealable." *Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps.*, 473 U.S. 1301, 1303-04 (1985). No exception to that rule applies here, since there is no basis for concluding that the TRO decision either "decide[d] the merits of the case" or was the "equivalent to a dismissal of the claim." *Ambiance, Inc. v. Municipality of Monroeville*, 66 F. App'x 409, 410 (3d Cir. 2003). Rather, the TRO was denied because the District Court had doubts concerning Petitioners' standing to pursue their Elections Clause claims and wanted briefing on that issue before ruling. There is thus no jurisdiction over Petitioners' appeal. *See Off. of Pers. Mgmt.*, 473 U.S. at 1306.

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Petitioners' invocation of 28 U.S.C. § 1253 is equally fruitless. By its plain terms, § 1253 provides only for an "appeal to the Supreme Court from an order granting or denying . . . an interlocutory or permanent injunction in any civil action . . . *required by any Act of Congress to be heard and determined by a district court of three judges*." (emphasis added). "Long ago, this Court made clear that no

direct appeal lies under § 1253 to the Supreme Court from a temporary restraining order issued by a single judge, even though the order may amount to an 'interlocutory injunction' and may have been issued in an action required to be heard by a three-judge court." *Hicks v. Pleasure House, Inc.*, 404 U.S. 1, 2 (1971); *see also Gonzalez v. Automatic Emp. Credit Union*, 419 U.S. 90, 96 n.14 (1974) ("[W]e have glossed the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts."). Here, there has been no order by a three-judge district court, so Petitioners cannot rely on that statute to invoke this Court's jurisdiction. They are confined to the stringent standard of 28 U.S.C. § 1651—a standard they cannot satisfy.

II. THE EQUITIES CUT DECISIVELY AGAINST AN INJUNCTION

Petitioners' application for emergency relief should also be denied because the equities militate overwhelmingly against this Court's eleventh-hour interference in Pennsylvania's congressional election. Issuing an injunction at this late juncture would unjustly reward Petitioners after they sat on their hands for months. It would also sow chaos and confusion in the electoral process—all at the direct expense of the Commonwealth's voters, political candidates and parties, and election officials, who have already placed substantial reliance on the redistricting map and primary election deadlines confirmed by the order of the Pennsylvania Supreme Court.

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A. Petitioners Engaged in Undue Delay and Now Advance a Legal Theory That Would Improperly Reward Them for That Delay

Petitioners should not receive extraordinary relief after unduly delaying in a manner that created the very exigent circumstances that supposedly animate their rush to this Court. *See Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324

U.S. 806, 814 (1945) ("[H]e who comes into equity must come with clean hands."). That concern looms especially large here because Petitioners' delay appears designed to serve their own strategic ends: Petitioners seek to force Pennsylvania to hold at-large elections under § 2a(c)(5), which, even on their own flawed theory, would occur *only* if Pennsylvania's congressional map were invalidated without enough time for state or federal courts (or the state legislative process) to fashion new districts. In other words, Petitioners' whole strategy depends overtly on springing a legal attack too late for any alternative remedy—which may explain their months of delay, but which does not excuse it or justify rewarding Petitioners for that prejudicial gambit.

As explained *supra* at p. 3, the redistricting litigation here began in December 2021, when the Carter Petitioners filed a lawsuit asking the Pennsylvania courts to invalidate the 2018 congressional map and adopt a new one. Ultimately, ten parties participated in that litigation (including Governor Wolf, numerous groups of state legislators, and various groups of voters). It is difficult to imagine that Petitioners—who include congressional candidates and a local election official—were unaware of that litigation. But they chose *not* to participate as intervenors or *amici*, and they chose not to raise in that case any of their "emergency" constitutional concerns.

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Nor did Petitioners file suit in federal court in December 2021 or January 2022 to block the Pennsylvania judiciary's active involvement in the redistricting process altogether. Apparently, they believed that was an option: they did ultimately file suit in federal court in early February 2022, *before* the Pennsylvania Supreme Court had adopted any maps or modified any schedules (which indicates that they did not see

any specific decisions by the Pennsylvania judiciary as a necessary prerequisite to filing suit). But rather than seek to raise their arguments in federal court at the earliest opportunity, Petitioners waited over six weeks before filing their case.

Throughout that period, there were many points at which Petitioners might have rushed to court if they were truly concerned that they faced irreparable harm from a judicial proceeding that was unconstitutional under the Elections Clause. Instead, Petitioners bided their time. Their inaction persisted through December 20, 2021, when the Commonwealth Court announced its intent to select a plan if the General Assembly and Governor did not adopt one by January 30, 2022. It persisted through January 14, 2022, when Judge McCullough reaffirmed that intention. It persisted through January 26, 2022, when Governor Wolf vetoed the General Assembly's proposed map—making it a virtual certainty that the state courts would step in. And it persisted through February 2, 2022, when the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the redistricting proceedings.

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Rather than file suit on any of those dates, Plaintiffs waited until February 11, 2022, to file suit in federal court. They then waited nine more days, until February 20, 2022, to first seek a TRO, at which point they commenced a frantic barrage of "emergency" filings in the District Court and, later, in this Court. This nine-day delay between filing suit and seeking the TRO was especially noteworthy because in that period, the default deadline for first circulating and filing nomination petitions passed (February 15, 2022). *See* 25 P.S. § 2868. Petitioners took no action to stop that

from occurring. Petitioners' delay in bringing this suit was as inexcusable as it was prejudicial: when it comes to the primary elections calendar, time is of the essence.

Disturbingly, Petitioners' delay in alleging their Elections Clause claims appears to have been calculated. Their attempt to invoke the remedy of last resort set forth in 2 U.S.C. § 2a(c)(5) would necessarily fail if they filed suit earlier, since there would still be time for state or federal courts to redistrict under 2 U.S.C. § 2c (or for the political branches to re-engage). *See Branch*, 538 U.S. at 267-72. Thus, Petitioners could achieve their stated goals only by exploding the map and election calendar with no time left on the clock. And that is exactly what they are trying to do.

Blessing this strategy would be an invitation to mischief, chaos, and acrimony in future elections. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019) (refusing an "expansion of judicial authority" into "one of the most intensely partisan aspects of American political life"). It would also effectively rebuke the Pennsylvania courts for doing exactly what they were supposed to do: give the political branches every reasonable opportunity to agree on a redistricting plan before the state courts took on that task themselves, which necessarily means waiting until late in the process to impose a court-drawn map. This Court should not encourage Petitioners' gamesmanship by rewarding it with extraordinary relief. *See Lonchar v. Thomas*, 517 U.S. 314, 338 (1996) (Rehnquist, J., concurring) ("'[A]busive delay'—waiting until the last minute to submit a claim that could have been submitted earlier—and 'obvious attempt[s] at manipulation'—in that case, asking the court to exercise its equitable

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powers in defiance of a clearly applicable legal rule precluding relief on the merits—constitute equities to be considered in ruling on the prayer for relief.").

B. Granting Petitioners' Requested Relief Would Cause Significant Chaos and Confusion in Pennsylvania's Congressional Elections

This Court has repeatedly warned against the dangers of disruptive, late-in-the-day federal judicial interventions in state election administration. *See, e.g.*, *Merrill v. Milligan*, 142 S. Ct. 879, 880-81 (2022) (Kavanaugh, J., concurring in grant of applications for stays) ("When an election is close at hand, the rules of the road must be clear and settled."). "Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) (Sutton, J.); *see also Purcell v. Gonzalez*, 549 U.S. 1 (2006).

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As Justice Kavanaugh has explained, "federal courts ordinarily should not alter state election laws in the period close to an election"—even if those rules are flawed—since that risks confusing voters and election officials, sowing doubt about election results, and inviting further late-in-the-day litigation. *Democratic Nat'l Comm. v. Wisc. State Legislature*, No. 20A66, 141 S. Ct. 28, 29 (2020) (Kavanaugh, J., concurring in denial of application to vacate stay). "It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

That principle applies here with full force. Since the Carter Plan was adopted by the Pennsylvania Supreme Court, the Commonwealth's election officials have

undertaken significant steps to administer the 2022 election in conformity with that order. The Secretary of State has rearranged staffing, internal schedules, and other administrative priorities to ensure the election is administered with the districting map and schedule directed by the Pennsylvania Supreme Court. Pennsylvania election officials have also begun the time-consuming (but essential) task of updating the Commonwealth's voter registry—which candidates rely on to solicit signatures for nominating petitions, and which election officials use to send the appropriate ballots to voters (including military, overseas, and absentee voters). In the wake of the Pennsylvania Supreme Court's order, the Department of State has already posted the revised election schedule on its website and informed primary candidates, journalists, and county officials that they may rely on those new deadlines for the 2022 primary election. Based on Respondents' experience and interactions with these groups, reliance on the operative map and calendar has quickly taken root.

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Forcing Pennsylvania to abruptly unwind these efforts, change the election calendar that has been widely disseminated, and undertake statewide at-large congressional elections for the first time since the 18th century would invite chaos and confusion. *See Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 734 (2021) (Thomas, J., dissenting from denial of certiorari) ("To prevent confusion, we have thus repeatedly—although not as consistently as we should—blocked rule changes made by courts close to an election." (citing *Purcell*)). For example, many candidates have already relied on the modifications that the Pennsylvania Supreme Court made to the schedule for circulating and submitting nominating petitioners; if

this Court undid that order, there would be a frantic scramble among candidates, a concerning number of whom might fail to collect the necessary number of signatures or otherwise fail to submit a proper petition in time (which, in some districts, might result in no candidates appearing on the ballot through the nominating petition process, leading to confusion and conflict later in the general election process).

Holding statewide congressional at-large elections, in turn, would pose a series of daunting obstacles. Respondents anticipate that as many as 100 candidates, and certainly dozens for each party primary, will seek federal congressional office in Pennsylvania. The vast majority of Pennsylvania voters are unfamiliar with ballots that present such a large number of options and require them to select a sizeable number of candidates (here, up to 17). The risk of confusion and frustration in such circumstances is self-evident; so is the risk that the outcome of the congressional election would be determined (to a far greater degree than might otherwise occur) largely by how high on that list of candidates any individual candidate appears.

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Moreover, holding an at-large election with such a long list of congressional candidates would likely require officials to prepare and print multi-page ballots for every single eligible voter—particularly for the May primaries, where counties must also print the names of candidates for multiple statewide, legislative, and state and local party offices. Such multi-page ballots would be unfamiliar to voters and to most election administrators (introducing a higher risk of voter and administrative errors). And it would raise distinct, urgent logistical concerns. Some counties, for example, appear not to have an adequate supply of paper to print multi-page ballots (and there

is up to a 10-to-12-week backlog on ordering some of the necessary supplies due to supply chain delays). Postage costs may increase if the ballot weight exceeds the standard first-class weight limits. And multi-page ballots may introduce severe administrative burdens and voter confusion during the process of voting in the many counties without prior experience at preparing and issuing multi-page ballots. Ballot tabulators would have to be programmed to accept multi-page ballots, and voters would have to be reminded to properly insert both pages of the ballot into the scanners attached to the ballot boxes. These departures from standard voting practice in many counties could cause all manner of administrative and practical concerns.

In short, there can be no doubt that issuing an injunction at this point to modify the calendar or to require statewide at-large elections would "lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

There is an easy solution to avoid such mayhem: deny Petitioners' belated request for emergency injunctive relief. That is precisely the course of action that this Court took in its most recent election-law case. *Id.* at 879. In *Merrill*, a three-judge district court issued an injunction invalidating Alabama's congressional redistricting plan under the Voting Rights Act, finding that it illegally diluted the votes of Black Alabamians. But this Court stayed that injunction, at least partly on the ground that it had been issued too close to the upcoming congressional election in Alabama. *Id.* at 880-81 (Kavanaugh, J., concurring). Since then, relying on *Merrill*, a federal district court in Georgia has denied a request for injunctive relief in a vote dilution challenge

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under the VRA principally "because changes to the redistricting maps [were] likely to substantially disrupt the election process." Order at 10, *Alpha Phi Alpha Fraternity Inc. v. Raffensberger*, No. 1:21 Civ. 5337, at 23 (N.D. Ga. Feb. 28, 2022).

If it was too late in February for federal courts to remedy a violation of the Voting Rights Act, it is assuredly too late in March to issue an injunction based on Petitioners' belated and meritless complaints in this litigation. That point assumes only greater force in light of the drastic remedy that Petitioners seek—an order forbidding district-based voting for Pennsylvania's 2022 congressional primary, in defiance of the preference for districts expressed in § 2c, in contravention of the Pennsylvania judiciary's efforts to honor that preference, and in a stark departure from the experience of every living Pennsylvania voter and election official.

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CONCLUSION

Petitioners' application for a writ of injunction should be denied.

Respectfully submitted,

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