No. 21A457

In the Supreme Court of the United States

WILLIAM C. TOTH JR.; WILLIAM J. HALL; HOWARD GARTLAND; JAMES BOGNET; AARON BASHIR; 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; TOM WOLF, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF PENNSYLVANIA,

Respondents.

REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION TO JUSTICE ALITO FOR WRIT OF INJUNCTION

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The defendants and intervenors either misunderstand or misrepresent the applicants' argument. The applicants are not contending—and we have never argued—that the Elections Clause "wholly prohibited the Pennsylvania Supreme Court from adopting a congressional map when the General Assembly and Governor reached an impasse." Defs.' Response at 19. Nor are we asserting that the Elections Clause "vests state legislatures with exclusive power to draw maps." *Id.* Each of those claims is untenable, and the defendants and intervenors are attacking a straw man by refuting these indefensible ideas. The Elections Clause will often allow the state judiciary to draw a congressional map in response to a legislative impasse—but it did *not* allow the Supreme Court of Pennsylvania to impose the Carter Plan or modify the General Primary Calendar under the circumstances of this case.

To understand the argument that the applicants are actually making—rather than the caricature that the defendants and intervenors falsely attribute to our side—it is helpful to begin with the language of 2 U.S.C. § 2a(c) and the judiciary's authority to draw congressional maps in the event of a legislative impasse. When the political branches are unable to agree on a new congressional map in response to the decennial census, the remedy is set forth in section 2a(c):

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner:

> (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected;
>
> (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State;
>
> (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State;
>
> (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; or
>
> (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a(c). Section 2a(c) is an Act of Congress that regulates the "manner" of electing Representatives, and the states (and the judiciary) are constitutionally obligated to honor this statute under the Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the *Congress* may at any time by Law make or alter such Regulations" (emphasis added)).

Of course, section 2a(c) was enacted before *Wesberry v. Sanders*, 376 U.S. 1 (1964), which announced an equal-population rule for congressional districts. It was also enacted before Congress imposed a single-member district requirement in 2 U.S.C. § 2c. *See* 2 U.S.C. § 2c ("[T]here 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"). So the provisions of section 2a(c)—which are triggered as soon as an "apportionment" occurs, and which last "until" the state is "redistricted in the manner provided by the law thereof"—will often generate maps that are malapportioned or that violate the single-member districting requirement of section 2c. In these situations, the state judiciary may remedy the violations of the Constitution or the violations of section 2c that would result from implementing the fallback regime prescribed by section 2a(c). It does *not* violate the Elections Clause for a court to re-draw an unconstitutional map required by section 2a(c) if the state legislature is unwilling or unable to do so; to deny this would put the Elections Clause at war with the rest of the Constitution.[1] And it does *not* violate the Elections Clause for the state judiciary to enforce section 2c, as the Elections Clause specifically allows Congress to "make or alter" regulations governing the manner of electing Representatives, and the

1. *See* Emergency Application at 21–22 ("Courts always have the authority to issue remedies for constitutional violations, and their power to remedy violations of the Constitution does not contradict the commands of the Elections Clause.").

Elections Clause requires the states to comply with those congressional enactments.

The following chart illustrates the state judiciary's role when the legislature reaches an impasse after the decennial census:

	State Gains Seat(s)	**No change**	**State Loses Seat(s)**
Requirement of 2 U.S.C. § 2a(c) if an impasse occurs	Use old map; elect new representatives at large. *See* 2 U.S.C. § 2a(c)(1).	Use old map. *See* 2 U.S.C. § 2a(c)(2).	Elect all representatives at large. *See* 2 U.S.C. § 2a(c)(5).
Legality?	Unconstitutional under *Wesberry*.	Unconstitutional under *Wesberry*.	Violates 2 U.S.C. § 2c.
May the state judiciary remedy the violation?	Yes. *See Growe v. Emison*, 507 U.S. 25 (1993).	Yes. *See Growe v. Emison*, 507 U.S. 25 (1993).	Yes, but only if there is time to impose a new map "without disrupting the election process." *Branch v. Smith*, 538 U.S. 254, 274–75 (2003) (plurality opinion of Scalia, J.)
How should state judiciary remedy the violation?	Fix malapportionment problem, while deviating as little as possible from the previous legislatively-approved map	Fix malapportionment problem, while deviating as little as possible from the previous legislatively-approved map	Impose a new map, while following the "policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature." *Branch*, 538 U.S. at 274 (plurality opinion of Scalia, J.)

As can be seen from the chart, the first question to ask in a congressional redistricting impasse is what section 2a(c) requires, because section 2a(c) governs when a state has failed to redistrict "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). When a state gains seats or stands pat, the map required by section 2a(c) will almost always result in a *Wesberry v. Sanders* violation—except in the borderline-miraculous scenario in which each of the state's previous congressional districts has precisely the same population after 10 years of comings and goings. And the state judiciary may draw a new map to remedy this constitutional violation if the legislature is unable or willing to do so. *See Growe v. Emison*, 507 U.S. 25 (1993). But the state judiciary cannot impose whatever it map it wants; it must honor the Elections Clause by hewing as closely as possible to the previous map adopted by the state legislature and required by 2 U.S.C. § 2a(c). That map carries the imprimatur of both the state legislature and Congress, and the Elections Clause requires a court to preserve the enactments of those institutions to the maximum possible extent—even when those enactments favor a map that falls short of *Wesberry*'s equal-population rule.

Pennsylvania, by contrast, lost a seat in the reapportionment, so section 2a(c)(5) requires at-large elections unless and until the state is redistricted "in the manner provided by the law thereof." 2 U.S.C. § 2a(c). At-large elections do not violate *Wesberry v. Sanders*, but they may (in some situations) violate 2 U.S.C. § 2c, which requires states to "establish[] by law a number of districts equal to the number of Representatives to which such State is so en-

titled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative." 2 U.S.C. § 2c. *Branch v. Smith*, 538 U.S. 254 (2003), explains how sections 2c and 2a(c) interact. *See id.* at 266–72; *id.* at 273–75 (plurality opinion of Scalia, J.). According to *Branch*, a court may enforce section 2c and impose a court-drawn map to stave off at-large elections that would otherwise occur under section 2a(c)(5)—but *only* when the court-imposed redistricting plan will not "disrupt[] the election process." *Id.* at 275 (plurality opinion of Scalia, J.).[2] And when a court imposes a map under section 2c, it "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,' except, of course, when 'adherence to state policy . . . detract[s] from the requirements of the Federal Constitution.'" *Id.* at 274–75 (plurality opinion of Scalia, J.) (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). None of this violates the Elections Clause, because there is no Elections Clause obstacle to enforcing a congressional enactment as interpreted by this Court. *See* U.S.

2. A plurality of four justices held that courts may enforce section 2c to prevent at-large elections under section 2a(c) only in this situation, *see Branch*, 538 U.S. at 273–75 (plurality opinion of Scalia, J.), while two additional justices opined that courts may *never* enforce section 2c to prevent at-large elections when the legislature has failed to enact a new redistricting plan, *see Branch*, 538 U.S. at 298–304 (O'Connor, J., concurring in part and dissenting in part). A majority of the *Branch* court rejected the notion that section 2c repeals section 2a(c) by implication. *See id.* at 273 (plurality opinion of Scalia, J.); *id.* at 292–98 (O'Connor, J., concurring in part and dissenting in part).

Const. art. I, § 4, cl. 1 (authorizing "Congress" to regulate the "Manner" of electing representatives).

So the problem is *not* that the Supreme Court of Pennsylvania chose to impose a congressional map in response to a legislative impasse. *Branch* allows the state judiciary—in certain circumstances—to draw a congressional map to prevent violations of section 2c's single-member districting requirement. *See Branch*, 538 U.S. at 266–72; *id.* at 273–75 (plurality opinion of Scalia, J.). The problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s interpretation of section 2c—and that means they were not authorized by the Elections Clause either.

First. *Branch* allows a state court to impose single-member districts under section 2c *only* when it can do so "without disrupting the election process." *Id.* at 275 (plurality opinion of Scalia, J.). Yet the Supreme Court of Pennsylvania disrupted the election process (and violated the Elections Clause) by: (1) suspending the General Primary Calendar in its order of February 9, 2022; and (2) modifying the General Primary Calendar in its order of February 23, 2022. Once the Supreme Court of Pennsylvania recognized that these disruptions to the General Primary Calendar would be necessary, it was required to implement at-large elections under section 2a(c)(5) rather than impose its own map under section 2c. *See id.* at 275 (plurality opinion of Scalia, J.) ("How long is a court to await that redistricting before determining that § 2a(c) governs a forthcoming election? Until, we think, the election is so imminent that no entity competent to complete redistricting pursuant to

state law (including the mandate of § 2c) is able to do so without disrupting the election process."). Section 2c does not authorize the state judiciary to violate the Elections Clause by unilaterally "suspending" or "modifying" election-related timetables or deadlines that "the Legislature" has adopted by statutory enactment. And when it is no longer possible to impose a court-selected map without altering the statutory calendar, the judiciary must enforce section 2a(c)(5) rather than section 2c and order at-large elections.

Second. *Branch* holds 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,' except, of course, when 'adherence to state policy . . . detract[s] from the requirements of the Federal Constitution.'" *Branch*, 538 U.S. at 274–75 (plurality opinion of Scalia, J.) (quoting *White v. Weiser,* 412 U.S. 783, 795 (1973)). The Supreme Court of Pennsylvania disregarded this instruction when it rejected the HB 2146 map that had been "'proposed by the state legislature,'" *id.* at 274, and instead adopted the "Carter Plan" that had been proposed by a Stanford professor retained by the Elias Law Group. The state supreme court did not reject HB 2146 because of federal constitutional issues, and it did not attempt to connect its court-selected plan to the maps that had been previously adopted or proposed by the state legislature. It simply decided to impose the map that it thought best, in the apparent belief that the legislative impasse somehow transferred the state legislature's map-drawing prerogatives under the Elections Clause to the judiciary.

Third. The Carter Plan selected by the Supreme Court of Pennsylvania violates the equal-population rule of *Wesberry v. Sanders* because it includes congressional districts with two-person deviations—and the state cannot justify these two-person deviations when 11 of the 13 redistricting plans proposed to the state supreme court had districts with no more than one-person deviations. *See Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983); *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). That means Pennsylvania has *not* been "redistricted in the manner provided by the law thereof" within the meaning of section 2a(c), despite the state supreme court's purported imposition of the Carter Plan, and the state's election officials remain obligated to enforce the at-large election requirement of section 2a(c)(5) until the state is redistricted in a manner consistent with the Elections Clause and *Wesberry*. *See Branch*, 538 U.S. at 281 (plurality opinion of Scalia, J.) (an unconstitutional redistricting fails to satisfy the "until" clause of section 2a(c)).

* * *

With this exposition of the applicants' position, we turn to the objections to emergency relief offered by the defendants and intervenors.

I. Reply To Background Sections

The background sections in the defendants' and intervenors' briefs contain several misstatements of law. The defendants, for example, claim that "[w]hen the political branches are unable to agree, 'it becomes the judiciary's role to ensure a valid districting scheme.'" Defs.' Br., at 3 (quoting *League of Women Voters of Pennsylvania v. Commonwealth*, 645 Pa. 576, 582 n.6

(2018)). That is untrue. When the political branches are unable to agree, the remedy is set forth in 2 U.S.C. § 2a(c), as explained above. And this federal statute trumps anything that the Supreme Court of Pennsylvania has to say on the matter.

Of course, the judiciary will often have a role to play in remedying violations of *Wesberry v. Sanders* or section 2c that result from the maps required by section 2a(c). But that authority rests *solely* on the judiciary's prerogative to remedy violations of the Constitution or federal law. There may also be states in which "the Legislature" has chosen to delegate its map-drawing authority to other institutions (which may include the judiciary) in the event of a legislative impasse. *Cf. Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (recognizing that "the Legislature" may delegate its map-drawing authority to other institutions). But there is *no* freestanding authority for a state court to impose a congressional map in the event of a legislative impasse—and any claim to such authority is a flagrant violation of the Elections Clause. A court may not impose a congressional map unless it is: (1) Acting to remedy a constitutional or legal violation in the extant congressional map adopted by the state legislature or described in section 2a(c); or (2) Acting pursuant to map-drawing authority that has been delegated by "the Legislature" or Congress.

The defendants are likewise wrong to claim that the state-court lawsuit was brought "to declare the prior 2108 unconstitutional." Defs.' Br., at 3; *see also* Intervenors' Br., at 4 ("The Carter Respondents filed a new petition . . .

asking the Commonwealth Court to declare the then-existing congressional map, which was based on outdated Census data, unconstitutional"). The 2018 map no longer existed when the intervenors sued in December 2021, as it had been superseded by the requirements of section 2a(c)(5). *See* 2 U.S.C. § 2a(c)(5). The *only* basis on which the state judiciary could have intervened was to prevent violations of 2 U.S.C. § 2c that could result from at-large elections. *See Branch*, 538 U.S. at 266–72; *id.* at 273–75 (plurality opinion of Scalia, J.). The defendants and intervenors want to pretend as though that the state judiciary was remedying a malapportionment problem with the no-longer-in-existence 2018 map, in an effort to free the state court from the constraints of *Branch* and defend the imposition of the "Carter Plan"—which hews closely to the map that the Supreme Court of Pennsylvania imposed in 2018[3] rather than the "the reapportionment plans proposed by the state legislature." *Branch*, 538 U.S. at 274 (plurality opinion of Scalia, J.).

II. Branch v. Smith Prevented The Plaintiffs From Raising Their Claims Any Sooner Then They Did

The defendants and intervenors repeatedly accuse the plaintiffs of lying in wait to spring their lawsuit, and they insist that the plaintiffs should have sued weeks earlier than they did or intervened in the state-court proceedings. *See, e.g.*, Defs.' Br. at 2, 7, 31–35; Intervenors' Br. at 1–2, 6–8, 39. The Court

3. See *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018); App. to Emergency Application at 603 ("The Carter Plan . . . implements a least-change approach [u]sing the 2018 Remedial Map as a starting point").

needs only to read *Branch v. Smith* to see how nonsensical this claim is. Under *Branch*, the state judiciary is *allowed* to impose a court-drawn map to enforce the single-member districting requirement of 2 U.S.C. § 2c. *See Branch*, 538 U.S. at 266–72; *id.* at 273–75 (plurality opinion of Scalia, J.). So the state courts were doing *nothing wrong* by considering the redistricting lawsuits or deciding that they would impose a new map if the state legislature failed to redistrict in time for the primary elections. All of this was being done to enforce an Act of Congress (2 U.S.C. § 2c), so none of it violated the Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1 (authorizing "Congress" to regulate the "Manner" of electing representatives). It does not violate the Elections Clause for the Pennsylvania judiciary to impose a court-drawn map to prevent a violation of section 2c, so long as the judiciary complies with *Branch* when doing so. *See supra* at pp. 1–9.

The state supreme court did not violate the Elections Clause until it decided to "suspend" the General Primary Calendar in its order of February 9, 2022. *That* violated the Elections Clause because there is no state or federal statute that authorizes the Supreme Court of Pennsylvania to alter or suspend the statutory deadlines and timetables established by the state legislature. It also revoked any authority that the state supreme court had to impose single-member districts under 2 U.S.C. § 2c, because *Branch* allows a court to enforce 2 U.S.C. § 2c at the expense of 2 U.S.C. § 2a(c)(5) only when it can do so "without disrupting the election process." *Branch*, 538 U.S. at 275 (plurality opinion of Scalia, J.). At that point, the state supreme court's ac-

tions demonstrated the impossibility of drawing a map without "disrupting the election process" (and violating the Elections Clause), and it compelled state officials to implement the at-large fallback regime in 2 U.S.C. § 2a(c)(5). *See id.* The plaintiffs had no case before the state supreme court's order of February 9, 2022, because the defendants and the state judiciary had been acting lawfully and in compliance with *Branch* until that point.

The plaintiffs moved with alacrity as soon as the state supreme court violated *Branch* and the Elections Clause by suspending the General Primary Calendar. They sued in federal court on February 11, 2022—only two days after the state supreme court's order of February 9, 2022. The plaintiffs cannot be faulted for failing to file sooner because their lawsuit would have run headlong into *Branch* and would have met an immediate dismissal (if not possible sanctions).

In addition to this federal lawsuit, counsel for the plaintiffs filed an emergency application for intervention in the Supreme Court of Pennsylvania on February 11, 2022, on behalf of Teddy Daniels, a Republican candidate for Lieutenant Governor of Pennsylvania. Mr. Daniels's emergency application claimed that the state supreme court's order of February 9, 2022, which "suspended" the General Primary Calendar, violated the Elections Clause and compelled the state judiciary to order at-large elections under 2 U.S.C. § 2a(c)(5) and *Branch*. *See* Exhibit 1. Mr. Daniels explained that he did not seek intervention sooner because his Elections Clause and at-large elections

claims did not exist until after the state supreme court determined that it was necessary to "suspend" the General Primary Calendar:

> Mr. Daniels's legal interest in ensuring that state officials hold at-large elections, as required by 2 U.S.C. § 2a(c)(5), did not arise until this Court determined that it would be necessary to suspend the General Primary Election Calendar to allow for the imposition of a court-drawn map. *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is not triggered until "the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process").

Exhibit 1 at pp. 6–7. Mr. Daniels also asked the Supreme Court of Pennsylvania to reconsider its order of February 9, 2022, and order at-large elections as required by section 2a(c)(5) and *Branch*. See Exhibit 1. But the Supreme Court of Pennsylvania summarily denied Mr. Daniels's emergency application without explanation. *See* Exhibit 2. The plaintiffs did not attempt to intervene in the state-court proceedings because they had no conceivable Elections Clause claim before the state supreme court's order of February 9, 2022, and because the state supreme court's summary rejection of Mr. Daniels's application signaled that any attempted intervention by the plaintiffs would have met a similar fate—and could have created *Rooker–Feldman* problems in the federal litigation.

All of the defendants' and intervenors' complaints about the timing of our lawsuit rest are caused by their misunderstanding (or misrepresentation) of our argument. We are *not* contending that the state judiciary can never

draw maps under the Elections Clause. If that were our argument, then the defendants and intervenors would be justified in faulting our clients for failing to sue as soon as it became apparent that state judiciary intended to impose a congressional map. But that is not our argument, and the plaintiffs readily acknowledge that the state judiciary can draw congressional maps to: (1) Remedy constitutional violations; and (2) Prevent violations of 2 U.S.C. § 2c, so long as they do consistent with *Branch*. *See supra* at pp. 1–9. The state judiciary was acting in a manner consistent with *Branch* until February 9, 2022—and that is why the plaintiffs and Mr. Daniels did not sue did not sue or seek intervention any earlier than they did.

III. The Applicants' Right To Relief Is Indisputably Clear

The applicants' right to relief is indisputably clear because the imposition of the Carter Plan violates the Elections Clause, 2 U.S.C. § 2a(c)(5), and *Wesberry v. Sanders*, and relief is urgently needed before *Purcell* prevents the judiciary from stopping the implementation of this unconstitutional map. The standing objections raised by the defendants and intervenors are beyond meritless, and their discussion of the merits is non-responsive to the arguments that the applicants are advancing.

A. The Defendants' And Intervenors' Standing Objections Are Meritless

The defendants and intervenors raise numerous attacks on the plaintiffs' standing to assert their Elections Clause claim, none of which have merit.

1. Each Of The Plaintiffs Has Standing As A Voter To Challenge The Defendants' Refusal Hold At-Large Elections, As Required By The Elections Clause And 2 U.S.C. § 2a(c)(5)

The plaintiffs allege that the defendants' refusal to conduct at-large elections is depriving them of their right to vote in all 17 of the state's congressional races. App. to Emergency Application at 585 (¶ 53). That assuredly constitutes a "concrete and particularized" injury sufficient to confer standing:

> We have long recognized that a person's right to vote is "individual and personal in nature." *Reynolds v. Sims*, 377 U.S. 533, 561 (1964). Thus, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue" to remedy that disadvantage.

Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018); *see also Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."); *Iowa Voter Alliance v. Black Hawk County*, 515 F. Supp. 3d 980, 990 (N.D. Iowa 2021) ("[T]here is no doubt that the right to vote is sacrosanct and that any burdens on that right are, in general, judicially cognizable injuries." (citing *Gill*, 138 S. Ct. at 1929)).

The defendants and intervenors claim that the plaintiffs are asserting a mere "generalized grievance" under *Lance v. Coffman*, 549 U.S. 437 (2007). *See* Defs.' Br. at 11–12; Intervenors' Br. at 15–18. But the plaintiffs in *Lance*

failed to allege *any* injury caused by the failure to comply with the Elections Clause:

> The *only injury plaintiffs allege* is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing. See, *e.g., Baker v. Carr,* 369 U.S. 186, 207–208 (1962). *Because plaintiffs assert no particularized stake in the litigation*, we hold that they lack standing to bring their Elections Clause claim.

Id. at 442 (emphasis added). The plaintiffs in this case, by contrast, are alleging that the defendants' violation of the Elections Clause (and 2 U.S.C. § 2a(c)(5)) is depriving them of their right to vote in 16 of the 17 state congressional races. That is far more than a "generalized grievance" that the law has not been followed. It explains *how* the defendants' failure to follow the law is inflicting Article III injury on the plaintiffs—something that the plaintiffs in *Lance* failed to do.

The defendants and intervenors also claim that the denial of the plaintiffs' right to vote in all 17 congressional races is a "generalized grievance" because a similar injury is inflicted on every voter in the Commonwealth. *See* Defs.' Br., at 11–12 (claiming that the plaintiffs' injuries "would be a generalized grievance, since every voter in Pennsylvania could claim to be equally aggrieved"); Intervenors' Br., at 16–18 ("Any purported deprivation of rights, if it exists, is felt by all Pennsylvania voters equally, and Plaintiffs thus lack standing."). That is not the definition of a "generalized grievance." The

fact that an injury is widely shared does not make an injury nonjusticiable. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 n.7 (2016) ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims' injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm."). A generalized grievance arises when a plaintiff alleges "*nothing more than* an abstract and generalized harm to a citizen's interest in the proper application of the law." *Carney v. Adams*, 141 S. Ct. 493, 498 (2020) (emphasis added). As this Court has explained:

> [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.' And it consequently does not show standing. *Hollingsworth, supra,* at 706, 133 S. Ct. 2652; *see also Lance* v. *Coffman*, 549 U.S. 437, 439–441 (2007) (*per curiam*) (describing this Court's "lengthy pedigree" in refusing to serve as a forum for generalized grievances).

Id. at 498–99 (emphasis added). That is not the situation here. The defendants' alleged violations of the law are inflicting injury in fact on the plaintiffs by depriving them of their right to vote in all 17 congressional races. That other voters are equally or similarly burdened does not convert the plaintiffs' claim into a "generalized grievance." *See Spokeo*, 578 U.S. at 339 n.7.

2. Plaintiffs Bashir Has Standing As A Congressional Candidate

The defendants claim that the uncertainty inflicted on Bashir's campaigns fails to qualify as "certainly impending" injury under *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013). *See* Defs.' Br., at 13–14. But the defend-

ants are conflating the uncertainty of a future judicial decision with the immediate, present-day impact on Bashir's campaign. The particular outcome of a future judicial decision may or may not qualify as "certainly impending" under *Clapper*, but the present-day uncertainty affecting the plaintiffs' campaigns, and the uncertainty surrounding whether they should campaign in one location or another, is not a future or "impending" injury at all. It is an immediate injury that Bashir is suffering *now*.

The defendants and intervenors also complain that the alleged fundraising injuries depend on the independent actions of third parties not before the Court. *See* Defs.' Br., at 14 n.3; Intervenors' Br., at 20. But this Court has made clear that a plaintiff may establish standing by relying on the "predictable effect of Government action on the decisions of third parties." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2566 (2019); *see also id.* ("Respondents' theory of standing thus does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties."). Bashir has produced a sworn declaration attesting that the defendants' actions will hinder his fundraising,[4] and neither the defendants nor the intervenors deny that these are "predictable effects" from the defendants' conduct.

The defendants and intervenors complain that the "uncertainty" inflicted on Bashir's campaign is a self-inflicted harm caused by his own lawsuit,[5]

4. App. to Emergency Application at 557 (¶¶ 6–8).

5. *See* Defs.' Br. at 13; Intervenors' Br. at 19.

but that is wrong. The remaining plaintiffs in this case would have challenged the defendants' actions regardless of whether Bashir had sued, and the standing of those plaintiffs to sue in their capacity as voters is undeniable. *See supra* at pp. at 16–18. So these uncertainty harms would have befallen Bashir's campaign regardless of whether he had sued, and the Court cannot use the self-inflicted-harm doctrine to defeat Bashir's standing.

Finally, Bashir is suffering injury in fact from being forced to run in an overwhelmingly Democratic district rather than statewide. The defendants and intervenors deny that a candidate for office has standing to challenge the makeup or boundaries of the district in which he intends to run, but that is untenable. The injury-in-fact test requires nothing more than an "identifiable trifle," *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973), and courts have long permitted candidates for office to sue over redistricting decisions that adversely affect their election prospects. *See, e.g.*, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 475 (2006) (Stevens, J., concurring) ("[T]o have standing to challenge a district as an unconstitutional partisan gerrymander, a plaintiff would have to prove that he is either a candidate or a voter who resided in a district that was changed by a new districting plan."). The defendants and intervenors complain that a candidate or representative lacks a "legally cognizable interest" in the composition of his district, but whether an interest is *legally* protected goes to the merits, not standing. *See Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153 (1970)

("The 'legal interest' test goes to the merits. The question of standing is different."); *id.* at 152 ("The first question is whether the plaintiff alleges that the challenged action has caused him injury in fact, economic or otherwise."); *see also In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) ("[A] plaintiff can have standing . . . even though the interest would not be protected by the law in that case"). The injury-in-fact test asks only whether a plaintiff has been affected in a concrete and particularized way by the defendants' actions, and a congressional candidate who is forced to run in a less favorable district easily satisfies that test. *Corman v. Torres*, 287 F. Supp. 3d 558, 569–70 (M.D. Pa. 2018), which the defendants cite, failed to apply the injury-in-fact test and asked instead whether a legislator has a "legally cognizable interest in the composition of the district he or she represents"—an inquiry that wrongfully conflates a merits-based question with Article III standing analysis. And the intervenors mispresent the holding of *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016). *Wittman* did not hold that candidates "lack[] standing to challenge district lines based on allegations that their districts would be 'flooded with Democratic voters.'" Intervenors' Br. at 20. *Wittman* denied standing to appeal because the litigants failed to produce *evidence* to support the existence of this alleged injury. *See Wittman*, 578 U.S. at 545 ("[W]e have examined the briefs, *looking for any evidence* that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors' chances of reelection, *and have found none*. . . . *Given the lack of evidence* that any of the three Representatives has standing, *we need not*

decide when, or whether, evidence of the kind of injury they allege would prove sufficient for purposes of Article III's requirements." (emphasis added)).

3. Plaintiff Alan Hall Has Standing As A Member Of The Susquehanna County Board Of Elections

Plaintiff Alan Hall has standing because the defendants' actions are forcing him to administer elections in violation of the Constitution and compressing his window of time to prepare and send overseas military ballots as required by federal law. The defendants deny that Mr. Hall can establish standing based on his claim that the defendants are compelling him to act unlawfully, but *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236 (1968), endorses this theory of standing. *See id.* at 241 n.5 ("Appellants have taken an oath to support the United States Constitution. Believing § 701 to be unconstitutional, they are in the position of having to choose between violating their oath and taking a step—refusal to comply with § 701—that would be likely to bring their expulsion from office and also a reduction in state funds for their school districts. There can be no doubt that appellants thus have a 'personal stake in the outcome' of this litigation."). The defendants want this Court to disregard *Allen* in favor of lower-court decisions that take a more skeptical view of oath-of-office standing. *See* Defs.' Br. at 13. But those decisions hold only that the alleged violation of one's oath—*standing alone*—is insufficient to confer standing. *See, e.g.*, *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) ("[T]he violation of one's oath *alone* is an insuffi-

cient injury to support standing.") (emphasis added); *City of S. Lake Tahoe v. California Tahoe Reg'l Plan. Agency*, 625 F.2d 231, 236, 237 (9th Cir. 1980) ("Apart from the highly speculative potential exposure to civil liability which we discuss infra, the councilmembers will lose nothing by enforcing the CTRPA's ordinances save an abstract measure of constitutional principle. No consequences, save those of conscience self-imposed by the councilmembers' personal beliefs, flow from the violation of the oath in performance of a statutory duty."). Mr. Hall is alleging more than the mere violation of his oath. He is alleging that the defendants' actions are not only forcing him to violate the law but *also* compressing his window of time for preparing and mailing overseas military ballots.

The defendants deny that Mr. Hall can sue over this compressed time frame because they claim there is no Article III injury "for a government official to have to do their job." Defs.' Br. at 15. But the defendants are making it *more difficult* for Mr. Hall to do his job by altering the General Primary Calendar and leaving with Mr. Hall and his colleagues with only one or two days to prepare and send ballots to overseas military members after receiving the certified list of candidates—when they would have had a much longer time to accomplish this ask under the statutorily enacted calendar. This is more than enough to satisfy the "identifiable trifle" needed for Article III injury. *See SCRAP*, 412 U.S. at 689 n.14 ("[A]n identifiable trifle is enough for standing" (citation and internal quotation marks omitted)); *New York Republican State Committee v. SEC*, 927 F.3d 499, 504 (D.C. Cir. 2019) ("[E]ven a slight

injury is sufficient to confer standing"). And Mr. Hall is not asserting the "institutional interests"[6] of the Susquehanna Board of Elections; he is asserting his *own* injuries because he personally will be burdened by the compressed time frame caused by the defendants' choice to follow the state supreme court's calendar rather than the calendar enacted by the state legislature. *See* App. to Emergency Application at 588 (¶ 58).

4. The Defendants' Cause-Of-Action Arguments And The Intervenors' Prudential-Standing Objections Are Meritless

The defendants and intervenors claim that the plaintiffs cannot assert claims under the Elections Clause—even if they can establish Article III standing—because (in their view) these claims may be asserted *only* by the state legislative body and not by other individuals who are harmed by the defendants' violation of the Elections Clause and 2 U.S.C. § 2a(c)(5). The defendants claim that the plaintiffs lack a "cause of action,"[7] while the intervenors say that the plaintiffs lack "prudential standing,"[8] but they are essentially making the same argument: That violations of the Elections Clause may be asserted only by the state legislative body whose constitutional prerogatives have been infringed.

This argument is wrong for many reasons. First, the plaintiffs are asserting violations of *both* the Elections Clause *and* 2 U.S.C. § 2a(c)(5), and the

6. *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1953 (2019).
7. Defs.' Br. at 17–18; *see also* Defs.' Br. at 15–17.
8. Intervenors' Br. at 22–23.

defendants and intervenors present no argument that violations of 2 U.S.C. § 2a(c)(5) may be asserted only by state legislatures and not by individuals who suffer harm on account of the statutory violation. The defendants correctly observe that 2 U.S.C. § 2a(c)(5) does not create a private right of action,[9] but the plaintiffs *may* assert violations of federal statutes under 42 U.S.C. § 1983 even when the underlying statute fails to confer a cause of action itself—so long as that federal statute may be said to create "rights." *See Maine v. Thiboutot*, 448 U.S. 1, 6 (1980). A statute that creates an entitlement to vote for every member of a state's congressional delegation indisputably confers "rights," and the defendants cite no authority to the contrary. The plurality opinion in *Branch*, which the defendants cite,[10] never even considers this question. *See Branch*, 538 U.S. at 275 (plurality opinion of Scalia, J.).

Second, there has long existed a cause of action in equity that allows individuals to seek injunctive relief against state and federal officers who violate the Constitution or federal statutes. *See Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 327 (2015) ("The ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity, and reflects a long history of judicial review of illegal executive action, tracing back to England."); *Ex parte Young*, 209 U.S. 123, 155–56 (1908). This

9. *See* Defs.' Br. at 18 n.5; *Branch*, 538 U.S. at 300 (O'Connor, J., dissenting) ("Sections 2a(c) and 2c do not create independently enforceable private rights of action themselves.")

10. *See* Defs.' Br. at 18 n.5.

allows the plaintiffs to sue the defendants both for their violations of the Elections Clause and for their violations of 2 U.S.C. § 2a(c)(5). The defendants argue that the Court should carve out Elections Clause claims from this longstanding equitable cause of action because the Elections Clause (in the defendants' view) is designed to protect only the institutional prerogatives of state legislatures rather than the individual interests asserted by the plaintiffs in this litigation. *See* Defs.' Br., at 17–18. But it is untenable to claim that a constitutional provision concerning federalism or separation-of-powers may be asserted only by the institution of government whose prerogatives have been infringed. In the line-item veto case, the Court had no hesitation allowing lawsuits by entities harmed by the President's targeted "cancellation" of federal statutory provisions, even though the relevant constitutional provisions were designed to protect Congress's institutional prerogatives against lawmaking by executive decree. *See Clinton v. City of New York*, 524 U.S. 417, 434–36 (1998). All that mattered was whether the plaintiffs could show injury in fact from the allegedly unlawful action. *See id.* ("Once it is determined that a particular plaintiff is harmed by the defendant, and that the harm will likely be redressed by a favorable decision, that plaintiff has standing—regardless of whether there are others who would also have standing to sue."). Individual litigants have always been granted standing to seek declaratory or injunctive relief against officers who violate (or allegedly violate) constitutional provisions concerning federalism or separation of powers. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1 (2005); *Bowsher v. Synar*, 478 U.S. 714, 721

(1986). No different result should obtain here. And neither the defendants nor the intervenors present any argument for excluding 2 U.S.C. § 2a(c)(5) violations from the equitable cause of action recognized in *Ex parte Young*.

Finally, the defendants are simply wrong to claim that the Elections Clause serves only to protect the institutional prerogatives of the state legislature. It also protects the interests of the citizenry by ensuring that state redistricting decisions are made by politically accountable legislatures rather than judges. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (noting that Timothy Pickering of Massachusetts described the Elections Clause as a way to "ensure to the *people* their rights of election." (internal quotation marks omitted)). There is no basis in reason to prohibit private individuals from seeking declaratory or injunctive relief against officers who violate the Election Clause—any more than officers who violate other constitutional provisions—so long as the plaintiffs can satisfy the constitutional standing requirements of Article III.

B. It Is Indisputably Clear That The Implementation Of The Carter Plan And The Modifications To The General Primary Calendar Violate The Elections Clause And 2 U.S.C. § 2a(c)

The defendants and intervenors pretend that we are claiming that the Elections Clause categorically prohibits the state judiciary from drawing a congressional map in response to a legislative impasse. *See* Defs.' Br. at 19 ("Petitioners' main contention is that the Elections Clause wholly prohibited the Pennsylvania Supreme Court from adopting a congressional map"); In-

tervenors' Br. at 23 ("Applicants' unsupported theory [is] that the Elections Clause bars a state court from adopting a congressional plan when the legislative process fails"). So most of their Elections Clause arguments are attacking a straw man, and they can be swiftly dispatched by referring the Court to the discussion that appears on pages 1–9 of this brief. The Supreme Court of Pennsylvania did *not* violate the Elections Clause by deciding to impose a congressional map. The Supreme Court of Pennsylvania violated the Elections Clause (and violated 2 U.S.C. § 2a(c)) by: (1) Imposing a congressional map after it became necessary to "modify" the General Primary Calendar, thereby "disrupting the election process";[11] (2) Imposing a "Carter Plan" that was untethered to any map "proposed by the state legislature";[12] and (3) Unilaterally modifying the General Primary Calendar that had been enacted by the state legislature. *See supra* at pp. 1–9.

The defendants claim that the state supreme court's actions were lawful under *Branch* and should be regarded as a permissible means of enforcing section 2c's single-member district requirement. See Defs.' Br. at 22–24. But the state supreme court's order of February 23, 2022, violated *Branch* because: (1) It was too late to impose a court-drawn map without "disrupting the election process,"[13] as evidenced by the Court's decision to "suspend"

11. *See Branch*, 538 U.S. at 275 (plurality opinion of Scalia, J.) (allowing courts to impose congressional maps under 2 U.S.C. § 2c only when it can be done "without disrupting the election process.").
12. *Branch*, 538 U.S. at 274 (plurality opinion of Scalia, J.).
13. *Branch*, 538 U.S. at 275 (plurality opinion of Scalia, J.).

and later "modify" the General Primary Calendar in violation of the Elections Clause; and (2) The "Carter Plan" imposed by the Court failed to "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." *Branch*, 538 U.S. at 274 (plurality opinion of Scalia, J.); *see also White v. Weiser*, 412 U. S. 783, 795–796 (1973).

The defendants make the astounding claim that 2 U.S.C. § 2c authorizes courts to modify the election-related timetables and deadlines established by the legislature whenever they deem it "necessary" to implement a court-selected map. *See* Defs.' Br. at 25 ("2 U.S.C. § 2c . . . is properly read as authorizing schedule modifications"). Section 2c says nothing of the sort. The full text of section 2c is as follows:

> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, 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 (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2c. Nothing in this statute even remotely suggests that courts may unilaterally modify election-related deadlines, and *Branch* rejected this view when it held that courts may impose single-member districts under section 2c *only* when they can do so "without disrupting the election process."

Branch, 538 U.S. at 75 (plurality opinion of Scalia, J.). The defendants do not deny that the Supreme Court of Pennsylvania "disrupted the election process" by suspending and later modifying the General Primary Calendar, so they cannot defend the state supreme court's actions under section 2c or *Branch*.

The defendants claim that their proposed interpretation of 2 U.S.C. § 2c is necessary to avoid "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." Defs.' Br. at 25. But this dilemma is easily avoided, as courts and litigants can plan their litigation and rulings around the statutory election calendars that are immune from judicial revision under the Elections Clause and *Branch*. And the Supreme Court of Pennsylvania has only itself to blame for the constitutional predicament that it created. The Carter petitioners had asked the state supreme court to assert "extraordinary jurisdiction" on December 21, 2021, and they proposed a schedule that would have ensured a final ruling from the state supreme court by January 24, 2022. *See* App. to Emergency Application at 85. But the Supreme Court of Pennsylvania denied this request on January 10, 2022, over the dissent of two justices—including Justice Wecht, who warned that a map needed to be imposed before the timetables described in the General Primary Calendar:

> [O]ur principal concern at this stage is time. The Commonwealth Court has established a deadline of January 30, 2022, for

> the political branches to adopt a congressional map, with court proceedings to follow should those branches fail to do so. For its part, the Department of State has indicated a preference for having a final map chosen by January 24. While neither of these dates is statutorily mandated, practically speaking any judicial resolution of this matter is temporally cabined by the election calendar, which is set forth in the Election Code.

App. to Emergency Application at 180. Justice Wecht also warned (presciently) that her colleagues' lack of urgency could risk triggering at-large elections under 2 U.S.C. § 2a(c)(5). *See id.* at 181–182. So the situation that arose in this case was entirely preventable, and it was caused by the state supreme court's nonchalance toward the Elections Clause and the primary election calendar that the legislature had enacted.

The intervenors, for their part, make an even more audacious claim, insisting that the Elections Clause *allows* the Supreme Court of Pennsylvania to modify the legislature's election-related deadlines—although they appear to hedge this assertion by describing the court-imposed revisions as "minor" and "slight." Intervenors' Br. at 30. The intervenors make no attempt to explain how the text of the Elections Clause can allow the state's *judiciary* to countermand the election-related deadlines enacted by its *legislature*—no matter how "minor" or "slight" those revisions might seem. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*" (emphasis added)). Nor do they make any attempt to reconcile this stance with *Branch*, which instructs the Supreme Court of Pennsylvania

to order at-large elections once it becomes too late to enforce section 2c "without disrupting the election process." *Branch*, 538 U.S. at 75 (plurality opinion of Scalia, J.). The intervenors suggest that the court-imposed modifications to the General Primary Calendar are too "minor" and "slight" to qualify as "disruption," but *any* change to the calendar adopted by the legislature is by definition a "disruption" to the election process—as well as a violation of the Elections Clause. And in all events, the intervenors offer no theory for distinguishing the "non-disruptive" (and permissible) modifications from the "disruptive" (and impermissible) changes. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) ("'[J]udicial action must be governed by *standard*, by *rule*,' and must be 'principled, rational, and based upon reasoned distinctions' found in the Constitution or laws." (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 278, 279 (2004) (plurality opinion)).

The defendants and intervenors also suggest that Pennsylvania law authorized the Supreme Court of Pennsylvania to impose a congressional map of its own choosing and the alter the state's election calendar—and that the state supreme court's actions were therefore lawful under the Elections Clause because "the Legislature" had delegated its powers over these matters to the state judiciary. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015) (recognizing that "the Legislature" can delegate its map-drawing authority through constitutional provisions adopted in a popular referendum). But they cite no language from *any* Pennsylvania statute or constitutional provision that purports to confer these

powers on the state judiciary. Instead, they seem to think that the mere fact that state supreme court has imposed maps and altered election calendars in the past can somehow serve as evidence that "the Legislature" has transferred its constitutional powers over these matters to the courts. See Defs.' Br. at 26–27; Intervenors' Br. at 28. If the defendants want to claim that "the Legislature" has delegated or relinquished its powers under the Elections Clause, then they must identify action taken *by the Legislature* to delegate or relinquish those prerogatives. *See Arizona State Legislature*, 576 U.S. at 791 (describing a state constitutional provision, adopted by popular referendum, that explicitly transferred the legislature's map-drawing authority to an independent commission). They cannot point to the judicial assertion of those powers and claim that this somehow demonstrates a decision by "the Legislature" to confer those powers on the judiciary.

C. It Is Indisputably Clear That The Carter Plan Violates The Equal-Population Rule Of *Wesberry v. Sanders*

It is undisputed that: (1) The Carter Plan contains two-person deviations in congressional districts; and (2) 11 of the 13 maps submitted to the state supreme court had no more than one-person deviations. *See* App. to Emergency Application at 462 ("[U]nlike the other plans that have a maximum population deviation of one person, the Carter Plan and the House Democratic Plan both result in districts that have a two-person deviation."). It is likewise undisputed that the equal-population rule "'permits only the limited population variances which are unavoidable despite a good-faith effort to achieve

absolute equality, or for which justification is shown.'" *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (quoting *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969)). As this Court explained in *Karcher*:

> [T]wo basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730–31.

Neither the defendants nor the intervenors deny that the two-person deviations "could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* at 730. And it is impossible to deny this when the state supreme court had no fewer than *eleven* proposed maps with population deviations of no greater than one person. So it is "indisputably clear" that the plaintiffs have carried their burden of proof on the first prong of the *Karcher* test, and that the two-person deviations *could* have been "reduced or eliminated altogether." *Id.*

So the burden shifts to the defendants to prove that the two-person variance in the Carter Plan was "necessary to achieve some legitimate goal." *Id.*

at 731. Yet the defendants do not offer any "legitimate goal" that could justify imposing the Carter Plan over the 11 maps that contained only one-person deviations. *See* Defs.' Br. at 28–29. The defendants speculate that the Supreme Court of Pennsylvania may have adopted the Carter Plan because it "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." *Id.* at 29. But the state supreme court's desire to adhere to a map that it imposed by judicial decree in 2018 is not a "legitimate goal," as *Branch* instructs courts in redistricting cases to "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*.'" *Id.* at 274–75 (plurality opinion of Scalia, J.) (emphasis added) (citation omitted). And the defendants do not contend that the other supposed advantages of the Carter Plan were unavailable in the 11 maps that did not contain two-person deviations.

The defendants and intervenors observe that courts have upheld congressional redistricting maps with greater deviations in population, but those courts have done so only *after* concluding that: (1) the population variances could not have been "reduced or eliminated"; or (2) the population variances were "necessary to achieve some legitimate goal." *See, e.g.*, *Tennant v. Jefferson County Commission*, 567 U.S. 758 (2012) (upholding population variance after finding that it satisfied the two-part test from *Karcher*). The de-

fendants do not even acknowledge the test from *Karcher*, let alone explain how it could be satisfied.

Finally, the intervenors are wrong to claim that the remedy for this *Wesberry* violation is to order changes to the Carter Plan. *See* Intervenors' Br. at 36–37. The *Wesberry* violation triggers 2 U.S.C. § 2a(c), because the state has not been "redistricted in the manner provided by the law thereof." And it is too late for the courts to impose a new map for the primary cycle under *Branch*. *See supra* at 7–8.

IV. The Defendants' And Intervenors' Remaining Contentions Are Without Merit

The intervenors deny that an injunction would be "necessary or appropriate in aid of this Court's jurisdiction,"[14] but the *Purcell* principle will soon render this Court (and all other courts) powerless to act, as the primary election date is fast approaching and is scheduled for May 17, 2022. The plaintiffs may still be able to challenge the legality of the court-imposed map even after the 2022 elections take place, but this Court will lack jurisdiction to remedy these constitutional violations *before* the 2022 election cycle unless it acts promptly to enjoin the defendants' unconstitutional actions.

The defendants and intervenors also claim that enjoining the enforcement of the Carter Plan will lead to "chaos,"[15] but the primary election date is more than two months away, and they cite no case that has invoked the

14. Intervenors' Br. at 37.

15. Defs.' Br. at 35; Intervenors' Br. at 38.

Purcell principle that far away from an election. And a refusal to intervene on these grounds will allow state courts to flout the Elections Clause by altering their legislatively enacted primary calendars without consequence—because any attempt to remedy these Elections Clause violations in federal court will be rebuffed on the ground that it wreaks havoc on the unconstitutional calendar imposed by the state judiciary. Finally, an order imposing at-large elections and enjoining the defendants from altering the statutory election calendar will create incentives for the General Assembly and Governor Wolf to compromise and reach agreement on a new congressional map and (if necessary) a new primary calendar. *See* Emergency Application at 34. There is plenty of time for a legislative solution to emerge between now and May 17, 2022—and a legislative solution is what the Election Clause requires.[16]

16. The defendants contest the plaintiffs' invitation to construe their application for emergency relief as a jurisdictional statement, insisting that this Court lacks jurisdiction to review the district court's actions under 28 U.S.C. § 1253. Although the text of 28 U.S.C. § 1253 allows this Court to review orders "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," we have reviewed the cases cited by the defendants and agree that this Court has construed the statute to exclude appellate jurisdiction over appeals from single-judge orders denying injunctive relief. *See, e.g.*, *Gonzalez v. Automatic Employees Credit Union*, 419 U.S. 90, 96 n.14 (1974). We therefore withdraw our suggestion that the Court construe the emergency application as a jurisdictional statement.

CONCLUSION

The Court should: (1) enjoin the defendants from implementing or enforcing the Carter Plan; (2) enjoin the defendants from departing from the General Primary Calendar enacted by the Pennsylvania legislature when conducting elections for the U.S. House and Senate; and (3) order the defendants to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map.

Respectfully submitted.

/s/ Jonathan F. Mitchell

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Dated: March 6, 2022

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CERTIFICATE OF SERVICE

I certify that a copy of this document has been sent by e-mail on March 6, 2022, to the following counsel of record in this case:

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Exhibit 1

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**,

Petitioners,

v.

Lehigh 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,

Respondents

No. 7 MM 2022

Philip T. Gressman; **Ron Y. Donagi**; **Kristopher R. Tapp**; **Pamela Gorkin**; **David P. Marsh**; **James L. Rosenberger**; **Amy Myers**; **Eugene Boman**; **Gary Gordon**; **Liz McMahon**; **Timothy G. Feeman**; and **Garth Isaak**,

Petitioners,

v.

Lehigh 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,

Respondents

No. 7 MM 2022

EMERGENCY APPLICATION FOR INTERVENTION OF PROPOSED INTERVENOR TEDDY DANIELS

Proposed intervenor, Teddy Daniels, files this emergency application to intervene as a petitioner in this action and, if the Court grants his application to intervene, requests that he be granted leave to file the attached petition for review (Exhibit A) and application for reconsideration of this Court's order of February 9, 2022 (Exhibit B) and states as follows:

1. Proposed intervenor, Teddy Daniels, is a Republican candidate for Lieutenant Governor of Pennsylvania and a registered Republican voter from Wayne County.

2. On February 9, 2022, this Court entered an order that suspended the General Primary Election Calendar for the Commonwealth of Pennsylvania.

3. Mr. Daniels has a substantial, direct, and immediate interest in the outcome of this litigation as a candidate and a voter.

4. A candidate who wishes to appear on the primary ballot in Pennsylvania must file a nomination petition signed by members of his party who are registered voters. 25 P.S. § 2867.

5. The Election Code provides that the first day that candidates may begin circulating nominating petitions is February 15, 2022. The final day to obtain signatures is March 8, 2022. 25 P.S. § 2868.

6. The Elections Code requires the Commonwealth's primary elections to be held on May 17, 2022. 25 P.S. § 2753.

7. As a candidate for Lieutenant Governor, Mr. Daniels must obtain at least 1,000 signatures from registered Republican voters, with at least 100 signatures coming from each of at least five counties. 25 P.S. § 2872.1(4).

8. A registered voter may sign only one petition per candidate per office. 25 P.S. § 2868.

9. There are no fewer than 9 declared Republican candidates for Lieutenant Governor, all of whom will be competing with Mr. Daniels to obtain the minimum number of valid signatures to appear on the Republican primary ballot.

10. To accomplish the task of obtaining the minimum number of valid signatures to appear on the May 2022 primary ballot, Mr. Daniels's campaign had prepared and trained several hundred volunteers to assist his campaign in gathering signatures from registered Republican voters beginning promptly on February 15, 2022.

11. But this Court's February 9, 2022 order suspending the General Primary Election Calendar throws that plan into disarray.

12. Mr. Daniels does not know when he can start circulating nomination petitions or how long he will have to circulate the petitions to obtain the necessary number of signatures.

13. He, therefore, does not know how many volunteers he needs, how long he will need them, or where to deploy them to efficiently gather the necessary number of signatures.

14. Moreover, Mr. Daniels will be fighting with other candidates to obtain signatures from registered Republican voters.

15. The Order also affects Mr. Daniels because it will compress the time for him to campaign as an official candidate.

16. Before the Court's order of February 9, 2022, if Mr. Daniels obtained the necessary signatures to appear on the primary ballot as a candidate for Lieutenant Governor, he would have at least nine weeks to campaign, solicit votes from Republican voters, and raise funds.

17. Depending on when this Court's temporary suspension is lifted, it could leave Mr. Daniels with only a handful of weeks, if not mere days, to campaign.

18. Even a modestly truncated campaign schedule will adversely affect Mr. Daniels because in a competitive primary, such as that for the 2022 Republican Lieutenant Governor nomination, each day counts.

19. In sum, Mr. Daniels cannot effectively plan for the primary election, whenever that may occur.

20. This action and this Court's order of February 9, 2022, also has a substantial, direct, and immediate effect on Mr. Daniels's interests as a voter in several ways.

21. Under 2 U.S.C. § 2a(c)(5), Mr. Daniels is entitled to cast a ballot for all 17 of the state's representatives in the U.S. House if the General Assembly fails to enact a new congressional map in time for the 2022 elections. If the Court grants the petitioners' requested relief, it will deprive Mr. Daniels of his

entitlement to vote in all 17 congressional races by refusing to hold at-large elections as required by 2 U.S.C. § 2a(c)(5). This injury is casually related to the petitioners' requested relief in this case.

22. Under Pa. R. Civ. P. 2327:

> ***At any time during the pendency of an action***, a person not a party thereto ***shall be permitted*** to intervene therein, subject to these rules if . . .
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R. Civ. P. 2327(4) (emphasis added).

23. "[A]n application for intervention may be refused, if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties." Pa. R. Civ. P. 2329.

24. "Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present." *Larock v. Sugarloaf Twp. Zoning Board*, 740 A.2d 308, 313 (Pa. Comnwlth. 1999).

25. Mr. Daniels has a legally recognized interest in this matter and his rights as a candidate are affected by the Court's order of February 9, 2022.

26. Mr. Daniels has a legally recognized right as a voter to a statewide Congressional election under 2 U.S.C. § 2a(c)(5) that will be affected if this Court grants petitioners' relief and draws or selects a Congressional map of its own.

27. Mr. Daniels also has a legally recognized right as a voter under Art. I, § 4, cl. 1 of the United States Constitution to have the Commonwealth's congressional map determined by the General Assembly.

28. Mr. Daniels's interests are not adequately represented by any current party or intervenor to the action.

29. No current party or intervenor is a candidate for office that is affected by the Court's order of February 9, 2022, which suspends the General Primary Election calendar.

30. No current party or intervenor is a candidate for the Republican nomination for Lieutenant Governor and, therefore, is not required to collect 1,000 signatures with at least 100 each coming from five or more counties.

31. No current party or intervenor has asked or is asking this Court to reconsider its order of February 9, 2022, which purports to suspend the General Primary Election calendar. Nor is any current party or intervenor arguing that the Court's order of February 9, 2022, 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. *See*

U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.").

32. No 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 ordering state officials to hold at-large elections for Pennsylvania's congressional delegation unless and until the General Assembly enacts a new congressional map.

33. Mr. Daniels has not unduly delayed in seeking intervention.

34. It is true that a previous order from the Commonwealth Court required all petitions for intervention to be filed by December 31, 2021. *See* Commonwealth Court Order, 12/20/21.

35. But Mr. Daniels had no legally cognizable interest that was affected by this action on or before December 31, 2021.

36. First, Mr. Daniels's legal interests as a candidate were not affected until February 9, 2022, when this Court entered an order suspending the General Primary Election Calendar.

37. Second, Mr. Daniels's legal interest as a voter did not arise until January 26, 2021, when Governor Wolf vetoed HB 2541, which was a proposed new Congressional map passed by the General Assembly.

38. Finally, Mr. Daniels's legal interest in ensuring that state officials hold at-large elections, as required by 2 U.S.C. § 2a(c)(5), did not arise until this

Court determined that it would be necessary to suspend the General Primary Election Calendar to allow for the imposition of a court-drawn map. *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is not triggered until "the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process").

WHEREFORE, proposed intervenor, Teddy Daniels, respectfully requests that the Court permit him to intervene as a petitioner in this action and file the attached petition for review and application for reconsideration of this Court's order of February 9, 2022.

Respectfully submitted.

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Dated: February 11, 2022

Counsel for Intervenor Teddy Daniels

VERIFICATION

I, Teddy Daniels, verify that that the facts contained in the foregoing are true and correct based upon my knowledge, information, and belief. However, while the facts are true and correct based upon my knowledge, information, and belief, the words contained in the foregoing are those of counsel and not mine. I understand that statements herein are made subject to the penalties set forth in 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

/s/ Teddy Daniels

Dated: February 11, 2022 TEDDY DANIELS

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022
Philip T. Gressman; **Ron Y. Donagi**; **Kristopher R. Tapp**; **Pamela Gorkin**; **David P. Marsh**; **James L. Rosenberger**; **Amy Myers**; **Eugene Boman**; **Gary Gordon**; **Liz McMahon**; **Timothy G. Feeman**; and **Garth Isaak**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022

[PROPOSED] ORDER

AND NOW, this _____ day of February 2022, upon consideration of the Application to Intervene of Teddy Daniels and any response in opposition, it is hereby **ORDERED** that the Application is **GRANTED** and Teddy Daniels is permitted to intervene as a petitioner in this action.

IT IS FURTHER ORDERED that Mr. Daniels is granted leave to file the Petition for Review, attached at Exhibit A to his Application, and Application for Reconsideration of this Court's Order dated February 9, 2022.

BY THE COURT:

_____

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022
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EXHIBIT
A

NOTICE TO PLEAD

To: Commonwealth of Pennsylvania, Department of State, Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries

You are hereby notified to file a written response to the enclosed amended petition for review within thirty (30) days from service hereof or a judgment may be entered against you.

Respectfully submitted.

Date: February 11, 2022

/s/ Walter S. Zimolong, Esquire

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022
Philip T. Gressman; **Ron Y. Donagi**; **Kristopher R. Tapp**; **Pamela Gorkin**; **David P. Marsh**; **James L. Rosenberger**; **Amy Myers**; **Eugene Boman**; **Gary Gordon**; **Liz McMahon**; **Timothy G. Feeman**; and **Garth Isaak**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022

INTERVENOR TEDDY DANIELS'S PETITION FOR REVIEW

The state of Pennsylvania lost a congressional seat in the most recent decennial census. The Pennsylvania legislature must therefore draw a new congressional map for the 2022 elections. Under the U.S. Constitution, "the Legislature" of each state is charged with prescribing the "times, places, and manner" of electing Senators and Representatives, although Congress may enact laws to "make or alter such regulations." *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."). That means the state legislature must either enact a new congressional map or delegate its map-creation authority to another institution. *See, e.g.*, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

The Pennsylvania legislature, however, has not yet enacted a congressional map for the 2022 elections. Although the General Assembly passed a new congressional map earlier this year, it was vetoed by Governor Wolf. *See Smiley v. Holm*, 285 U.S. 355 (1932) (redistricting legislation that is vetoed by the governor is not "prescribed . . . by the Legislature" within the meaning of the Elections Clause). In the meantime, the petitioners in these cases have repaired to state court in the hopes of inducing the state judiciary to impose a congressional map for the 2022 elections. But any congressional map imposed by the state judiciary would violate the Elections Clause, which allows only "the Legislature"—and not the judiciary—to "prescribe" the manner of

electing representatives. The state judiciary must therefore wait for the General Assembly to act.

If the General Assembly fails to enact a new congressional map in time for the 2022 elections, then the remedy is set forth in 2 U.S.C. § 2a(c): The state's congressional delegation shall be elected at-large:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a(c). The Elections Clause requires the state judiciary to implement this congressional instruction if the General Assembly fails to enact a new congressional map in time for the 2022 elections. Congress, in enacting 2 U.S.C. § 2a(c)(5), has "ma[de] . . . Regulations" that govern the election of representatives pursuant to its authority under the Elections Clause, and the state judiciary is constitutionally obligated to follow this congressional command rather than impose a map of its own creation.

On February 9, 2022, the Supreme Court of Pennsylvania issued an order that purports to "suspend" the General Primary Election calendar codified in the Pennsylvania election statutes. This order is flatly unconstitutional, because the Elections Clause provides that "the Legislature"—and not the judiciary—shall prescribe the "times, places, and manner" of electing Senators and Representatives. And if the state supreme court has determined that there

is no longer time for to draw a congressional map given the deadlines in the General Primary Election calendar, then it *must* order at-large elections, as required by 2 U.S.C. § 2a(c)(5). *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is triggered when "the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process"). A state court cannot "suspend" a primary election that the legislature has scheduled, and it cannot remedy the legislature's failure to enact a new congressional map by disrupting the election process rather than ordering at-large elections under 2 U.S.C. § 2a(c)(5).

JURISDICTION AND VENUE

1. The Supreme Court has original jurisdiction over the petition by its order of February 2, 2022, where it exercised extraordinary jurisdiction under 42 Pa.C.S. § 726.

PARTIES

2. Each of the petitioners in the two consolidated cases is a registered voter in the Commonwealth of Pennsylvania.

3. Respondent Lehigh M. Chapman is Acting Secretary of the Commonwealth of Pennsylvania. She may be served at 302 North Office Building, 401 North Street Harrisburg, Pennsylvania 17120. Acting Secretary Chapman is sued in her official capacity.

4. Respondent Jessica Mathis is Director for the Pennsylvania Bureau of Election Services and Notaries. She may be served at 210 North Office Building, 401 North Street Harrisburg, Pennsylvania 17120. Director Mathis is sued in her official capacity.

5. Intervenor Teddy Daniels is a resident of Wayne County. He is a registered voter in Pennsylvania and a Republican candidate for Lieutenant Governor of Pennsylvania.

FACTS

6. Before the 2020 census, the state of Pennsylvania had 18 seats in the U.S. House of Representatives.

7. The results of the 2020 census left Pennsylvania with 17 seats in the U.S. House of Representatives, one less than before. *See* U.S. Dept. of Commerce, Table 1. Apportionment Population and Number of Representatives by State: 2020 Census.

8. Under the Elections Clause of the U.S. Constitution, "the Legislature" of Pennsylvania must prescribe the "manner" by which its representatives are elected, while Congress "may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1; *see also id.* ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."). The powers conferred by the Elections Clause include the prerogative to draw a new congressional map in response to the decennial census.

9. On August 20, 2021, the census-block results of the 2020 Census were delivered to Governor Wolf and the leaders of the General Assembly, which allowed the legislature to begin the process of drawing a new congressional map.

10. On December 15, 2021, the House State Government Committee approved a new congressional map (HB 2541), in a 14-11 vote. The General Assembly eventually passed HB 2541, but it was vetoed by Governor Wolf on January 26, 2022.

11. On December 17, 2021, eighteen voters filed a lawsuit in the Commonwealth Court of Pennsylvania, asking the state judiciary to impose a map for the 2022 congressional elections. Later that day, a separate group of twelve voters filed a similar lawsuit in the Commonwealth Court.

12. The Commonwealth Court consolidated the two redistricting cases on December, 20, 2021, and the cases were assigned to Judge Patricia McCullough.

13. On December 21, 2021, the petitioners in these redistricting cases filed an application for extraordinary relief in the Supreme Court of Pennsylvania, asking the state supreme court to exercise extraordinary jurisdiction over the case.

14. On January 10, 2022, the state supreme court declined to invoke its extraordinary jurisdiction and denied the petitioners' application for extraordinary relief without prejudice.

15. On January 14, 2022, Judge McCullough ordered all parties and intervenors to submit proposed maps and expert reports by January 24, 2022. Judge McCullough also scheduled an evidentiary hearing for January 27 and 28, 2022, and announced 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."

16. On January 26, 2022, Governor Wolf vetoed HB 2541, a congressional map that had been approved by the General Assembly.

17. On January 27 and 28, 2022, Judge McCullough presided over the evidentiary hearings that had been scheduled in her order of January 14, 2022.

18. On January 29, 2022, the petitioners in these cases filed a new "emergency application" with the Supreme Court of Pennsylvania, asking the state supreme court to immediately exercise "extraordinary jurisdiction" and take over the redistricting litigation from Judge McCullough.

19. On February 1, 2022, Judge McCullough announced that her ruling in these redistricting cases will issue no later than February 4, 2022.

20. On February 2, 2022, before Judge McCullough had issued her ruling, the Pennsylvania Supreme Court granted the application to exercise extraordinary jurisdiction in a 5-2 vote.

21. The state supreme court's order designated Judge McCullough to serve as a "Special Master," and instructed her to file with the Supreme Court of Pennsylvania, on or before February 7, 2022, "a report containing proposed findings of fact and conclusions of law supporting her recommendation of a

redistricting plan from those submitted to the Special Master, along with a proposed revision to the 2022 election schedule/calendar."

22. Justice Mundy and Justice Brobson dissented from the state supreme court's order granting extraordinary relief and exercising extraordinary jurisdiction.

23. On February 7, 2022, Judge McCullough issued her findings and recommended that the map approved by the General Assembly (HB 2541) be used as the congressional map.

24. The state supreme court has allowed any party or intervenor to file exceptions to Judge McCullough's findings by February 14, 2022, and the state supreme court has scheduled oral argument for February 18, 2022.

25. On February 9, 2022, the state supreme court issued an order *sua sponte* that purports to "suspend" the General Primary Election calendar codified in 25 Pa. Stat. §§ 2868 and 2873. No litigant had asked the state supreme court to suspend the primary-election calendar or issue an order purporting to do so.

FACTS REGARDING PROPOSED INTERVENOR TEDDY DANIELS

26. Proposed intervenor Teddy Daniels is a Republican candidate for Lieutenant Governor of Pennsylvania and a registered Republican voter from Wayne County.

27. A candidate who wishes to appear on the primary ballot in Pennsylvania must file a nomination petition signed by members of his party who are registered voters. *See* 25 Pa. Stat. § 2867.

28. The Pennsylvania Election Code provides that the first day that candidates may begin circulating nominating petitions is February 15, 2022. The final day to obtain signatures is March 8, 2022. 25 Pa. Stat. § 2868.

29. The Pennsylvania Election Code requires the state's primary elections to be held on May 17, 2022.

30. As a candidate for Lieutenant Governor, Mr. Daniels must obtain at least 1,000 signatures from registered Republican voters, with at least 100 signatures coming from each of at least five counties. 25 Pa. Stat. § 2872.1(4).

31. A registered voter may sign only one petition per candidate per office. 25 Pa. Stat. § 2868.

32. There are no fewer than 9 declared Republican candidates for Lieutenant Governor, all of whom will be competing with Mr. Daniels to obtain the minimum number of valid signatures to appear on the Republican primary ballot.

33. To accomplish the task of obtaining the minimum number of valid signatures to appear on the May 2022 primary ballot, Mr. Daniels's campaign had prepared and trained several hundred volunteers to gather signatures from registered Republican voters beginning promptly on February 15, 2022.

34. But the state supreme court's order of February 9, 2022, which purports to suspend the General Primary Election Calendar, has thrown that plan into disarray.

35. Mr. Daniels does not know when he can start circulating nomination petitions or how long he will have to circulate the petitions to obtain the necessary number of signatures.

36. He, therefore, does not know how many volunteers he needs, how long he will need them, or where to deploy them to efficiently gather the necessary number of signatures.

37. Moreover, Mr. Daniels will be competing with other candidates to obtain signatures from registered Republican voters.

38. The Court's order of February 9, 2022, also affects Mr. Daniels because it will compress the time for him to campaign as an official candidate.

39. Before this Court's order of February 9, 2022, if Mr. Daniels obtained the necessary signatures to appear on the primary ballot as a candidate for Lieutenant Governor, he would have at least nine weeks to campaign, solicit votes from Republican voters, and raise funds.

40. Depending on when the "suspension" imposed by this Court is lifted, it could leave Mr. Daniels with only a handful of weeks, if not mere days, to campaign.

41. Even a modestly truncated campaign schedule will adversely affect Mr. Daniels because in a competitive primary, such as that for the 2022 Republican Lieutenant Governor nomination, each day counts.

42. In sum, Mr. Daniels cannot effectively plan for the primary election, whenever that may occur.

43. The petitioners' lawsuit and the state supreme court's order of February 9, 2022, also have a substantial, direct, and immediate effect on Mr. Daniels's interests as a voter.

44. Under 2 U.S.C. § 2a(c)(5), Mr. Daniels is entitled to cast a ballot for all 17 of the state's representatives in the U.S. House if the General Assembly fails to enact a new congressional map in time for the 2022 elections. If the state judiciary grants the petitioners' requested relief, it will deprive Mr. Daniels of his entitlement to vote in all 17 congressional races by refusing to hold at-large elections as required by 2 U.S.C. § 2a(c)(5). This injury is casually related to the petitioners' requested relief in this case.

CLAIM FOR RELIEF

45. The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. 1, § 4, cl. 1 (emphasis added).

46. The Elections Clause forbids the judiciary of this state to create or impose a congressional map, because the state judiciary is not part of "the Legislature," and the General Assembly has not delegated any of its map-drawing

powers to the state judiciary or authorized the state courts to involve themselves in the redistricting process.

47. The Elections Clause also forbids the state judiciary to defy the requirements of 2 U.S.C. § 2a(c)(5), which requires Pennsylvania to hold at-large elections if the General Assembly fails to enact a new congressional map in time for the 2022 primary election. *See* U.S. Const. art. 1, § 4, cl. 1 (allowing Congress to "make or alter" regulations for electing representatives).

48. The Court should enter declaratory and injunctive relief that requires the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map.

49. The Court should also vacate its order of February 9, 2022, which purports to "suspend" the General Primary Election Calendar established by the legislature of Pennsylvania. The Court's order of February 9, 2022, is a violation of the Elections Clause.

50. Finally, the courts should reject all of the claims asserted by the petitioners, as the relief that they request from the state judiciary violates both the Elections Clause and 2 U.S.C. § 2a(c)(5).

DEMAND FOR RELIEF

51. Mr. Daniels respectfully requests that the court:

a. declare that the Elections Clause and 2 U.S.C. § 2a(c)(5) require the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map;

b. enter an injunction that compels the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map;

c. vacate the order of February 9, 2022, which purports to "suspend" the General Primary Election Calendar established by the legislature of Pennsylvania;

d. grant all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

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Dated: February 11, 2022

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Counsel for Intervenor Teddy Daniels

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022
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EXHIBIT
B

APPLICATION TO RECONSIDER AND VACATE ORDER OF FEBRUARY 9, 2022

On February 9, 2022, this Court issued an order that purports to "suspend" the General Primary Election calendar codified in the Pennsylvania election statutes. The Court issued this order *sua sponte* without asking for briefing or argument on whether it has the authority to issue an order of this sort.

Intervenor Teddy Daniels respectfully asks the Court to reconsider and rescind its order of February 9, 2022. Reconsideration is appropriate to correct a clear error and prevent a manifest injustice from occurring. *See Ellenbogen v. PNC Bank N.A.*, 731 A.2d 175 (Pa. Super. 1999); *Scartelli Gen. Contractors Inc. v. Selective Way Ins. Co.*, No. 2006 CV 4193, 2008 WL 5575968 (Pa. Com. Pl. Sept. 9, 2008); *Bada v. Comcast Corp.*, 2015 WL 6675399 (Pa. Super. Ct. Aug. 21, 2015) (unreported opinion). The Court's order of February 9, 2022, is a clear error because it violates the Elections Clause of the U.S. Constitution, which allows only "the Legislature" of this State to "prescribe" the manner of electing representatives. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."). The Court's order of February 9, 2022, also violates 2 U.S.C. § 2a(c), which requires Pennsylvania to elect its congressional delegation at large if there is insufficient time to draw a congressional map given the deadlines in the General Primary Election

calendar. *See* 2 U.S.C. § 2a(c)(5); *Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.). The Court's order further creates an injustice to Mr. Daniels and other candidates for office because their campaigns remain in limbo during the suspension and they may only have days to campaign once the suspension is lifted.

I. The Court's Attempt To "Suspend" The General Primary Election Calendar Violates The Elections Clause

The Elections Clause provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. 1, § 4, cl. 1 (emphasis added). The state judiciary is not part of "the Legislature," so it cannot "suspend" the congressional primary election calendar that the legislature has "prescribed"—and it cannot replace the legislatively enacted primary calendar with a calendar of its own choosing. Nor is there any statute that purports to delegate the General Assembly's power to prescribe the deadlines for congressional primary elections to the state judiciary or any other institution of government. *See, e.g.*, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). The Court should immediately rescind its unconstitutional order of February 9, 2022, and enforce the General Primary Election calendar that "the Legislature" has "prescribed." U.S. Const. art. 1, § 4, cl. 1.

II. 2 U.S.C. § 2a(c) Requires This Court To Order At-Large Elections, Rather Than "Suspend" The General Primary Election Calendar, If There Is Insufficient Time To Draw A Congressional Map In Time For Primary Elections

If there is insufficient time to create a new congressional map in time for the 2022 primary elections, then the remedy is set forth in 2 U.S.C. § 2a(c): The state's congressional delegation shall be elected at-large. 2 U.S.C. § 2a(c) provides:

> Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

2 U.S.C. § 2a(c). The State has not yet been "redistricted in the manner provided by the law thereof," because the General Assembly has not enacted a new congressional map and no court has imposed one. And if this Court determines that there is no longer time to draw a new congressional map given the deadlines in the General Primary Election calendar, then it must order at-large elections, as required by 2 U.S.C. § 2a(c)(5), rather than suspend or delay the primary-election process. *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is triggered when "the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process").

The Elections Clause also requires the state judiciary to implement the requirements of 2 U.S.C. § 2a(c)(5) if there is insufficient time to draw a new congressional map while accommodating the deadlines prescribed in the General Primary Election calendar. Congress, in enacting 2 U.S.C. § 2a(c)(5), has "ma[de] . . . Regulations" that govern the election of representatives pursuant to its authority under the Elections Clause, and the state judiciary is constitutionally obligated to follow this congressional command rather than "suspend" the legislatively prescribed primary calendar. This Court cannot "suspend" or alter a congressional primary calendar that the legislature has enacted, and it cannot remedy the failure to enact a new congressional map by disrupting the election process rather than ordering at-large elections under 2 U.S.C. § 2a(c)(5).

CONCLUSION

The Court should reconsider and rescind its unconstitutional order of February 9, 2022.

Respectfully submitted.

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Counsel for Intervenor Teddy Daniels

Dated: February 11, 2022

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Carol Ann Carter, **Monica Parrilla**, **Rebecca Poyourow**, **William Tung**, **Roseanne Milazzo**, **Burt Siegel**, **Susan Cassanelli**, **Lee Cassanelli**, **Lynn Wachman**, **Michael Guttman**, **Maya Fonkeu**, **Brady Hill**, **Mary Ellen Balchunis**, **Tom DeWall**, **Stephanie McNulty**, and **Janet Temin**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022
Philip T. Gressman; **Ron Y. Donagi**; **Kristopher R. Tapp**; **Pamela Gorkin**; **David P. Marsh**; **James L. Rosenberger**; **Amy Myers**; **Eugene Boman**; **Gary Gordon**; **Liz McMahon**; **Timothy G. Feeman**; and **Garth Isaak**, Petitioners, v. **Lehigh 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, Respondents	No. 7 MM 2022

[PROPOSED] ORDER

AND NOW, this _____day of February 2022, upon considering the application for reconsideration of this Court's Order dated February 9, 2022, and any responses, it is ORDERED that the application is GRANTED and the Court's Order dated February 9, 2022, is VACATED.

BY THE COURT:

_____

Exhibit 2

			Respondent	Wiygul, Robert Andrew	
			Respondent	Wiygul, Robert Andrew	
2/17/2022 03:53 PM	Case Filing	Application for Leave to File Amicus Brief	Amicus Curiae	Charlene David, et al.	
2/17/2022 03:44 PM	Case Filing	No Answer Letter to Applicaton for Leave to File Amicus Brief	Respondent Respondent Respondent	Chapman, Leigh M. Mathis, Jessica Wolf, Tom	
2/17/2022 03:16 PM	Case Filing	No Answer Letter to Applicaton for Leave to File Amicus Brief	Petitioner	Philip T. Gressman, et al.	
2/17/2022 11:13 AM	Case Filing	Order Exited		Office of the Prothonotary	
2/17/2022 11:11 AM	Case Filing	Order Denying Emergency Application for Intervention of Proposed Intervenor Teddy Daniels		Per Curiam	View
2/17/2022 09:57 AM	Case Filing	Applicaton for Leave to File Amicus Brief	Amicus Curiae	Michael Brill, et al.	
2/16/2022 04:40 PM	Case Filing	Order Exited		Office of the Prothonotary	
2/16/2022 04:38 PM	Case Filing	Order Granting Emergency Application for Relief		Dreibelbis, Amy	View