No. _____

In the Supreme Court of the United States

RYAN COSTELLO, PETITIONER

v.

CAROL ANN CARTER, ET AL., RESPONDENTS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Elections Clause provides that "the Legislature" of each state must prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Yet sometimes the state judiciary must draw a congressional map in response to a constitutional violation or legislative impasse. When state courts impose a congressional map in these situations, they often act as though they enjoy the prerogative to impose a map of their choosing, unconstrained by the requirements of Elections Clause or 2 U.S.C. § 2a(c), a federal statute that establishes a default regime when the state legislature fails to enact a congressional map in response to the decennial census.

The state of Pennsylvania lost a congressional seat in the most recent census. Its Republican-controlled legislature passed a reasonable, non-gerrymandered map that would have created a 9-8 majority of Democratic-leaning congressional districts. But Governor Wolf vetoed this 9-8 Democratic map, calling it "unfair" and insufficiently "bipartisan." In response to this impasse, the Supreme Court of Pennsylvania—which has a 5-2 Democratic majority—imposed a more partisan Democratic map backed by the Elias Law Group, overruling the recommendation of its special master that had urged the adoption of the legislature's plan.

The question presented is:

> Do the Elections Clause and 2 U.S.C. § 2a(c) constrain the remedial discretion of courts when they impose congressional maps in response to a constitutional violation or an impasse in the state legislature?

PARTIES TO THE PROCEEDING

Petitioner Ryan Costello was an intervenor in the proceedings before the Supreme Court of Pennsylvania. App. 173a–175a.

Respondents 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 were petitioners in the proceedings before the Supreme Court of Pennsylvania. App. 1a.

Respondents 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 were petitioners in the proceedings before the Supreme Court of Pennsylvania. App. 2a.

Respondents Leigh M. Chapman, in her official capacity as the Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries, were respondents in the proceedings before the Supreme Court of Pennsylvania. App. 1a–3a.

The following respondents were intervenors in the proceedings before the Supreme Court of Pennsylvania: (i) Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (House Republican Intervenors) and Jake Corman, President Pro Tempore of the Pennsylvania Senate, and Kim Ward, Majority Leader of the Pennsylvania Senate (Senate

Republican Intervenors) (collectively, Republican Legislative Intervenors); (ii) Pennsylvania State Senators Maria Collett, Katie J. Muth, Sharif Street, and Anthony H. Williams (Democratic Senator Intervenors); (iii) Tom Wolf, Governor of the Commonwealth of Pennsylvania (Governor Wolf); (iv) Senator Jay Costa, Senate Democratic Leader, and members of the Democratic Caucus of the Senate of Pennsylvania including Senator Vincent Hughes, Senator Wayne Fontana, Senator Judy Schwank, Senator Lisa Boscola, Senator James Brewster, Senator Amanda Cappelletti, Senator Carolyn Comitta, Senator Marty Flynn, Senator Art Haywood, Senator John Kane, Senator Tim Kearney, Senator Steve Santarsiero, Senator Nikil Saval, Senator Christine, Tartaglione, and Senator Lindsey Williams (Senate Democratic Caucus Intervenors); (v) Representative Joanna E. McClinton, Leader of the Democratic Caucus of the Pennsylvania House of Representatives (House Democratic Caucus Intervenors); and (vi) Congressman Guy Reschenthaler, Swatara Township Commissioner Jeffrey Varner, and former Congressmen Tom Marino and Bud Shuster (Congressional Intervenors). App. 173a–175a.

A corporate disclosure statement is not required because neither Mr. Costello nor Mr. Grove is a corporation. *See* Sup. Ct. R. 29.6.

STATEMENT OF RELATED CASES

Counsel is aware of no directly related proceedings arising from the same trial-court case as this case other than those proceedings appealed here.

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PETITION FOR A WRIT OF CERTIORARI

Under the U.S. Constitution, "the Legislature" of each state is charged with prescribing "the Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Yet on February 23, 2022, the Supreme Court of Pennsylvania ordered state election officials to implement a court-selected map for the state's 2022 congressional elections, despite the fact that the Pennsylvania Legislature never approved this map nor authorized the state judiciary to participate in the congressional redistricting process. App. 148a–149a. The Supreme Court of Pennsylvania also ordered state election officials to disregard the General Primary Calendar enacted by the Pennsylvania Legislature in favor of a court-preferred schedule that delays and compresses the time period in which candidates

may circulate and file nomination petitions—an order that flagrantly violates the Elections Clause by supplanting the election-related deadlines adopted by "the Legislature" and replacing them with a calendar of the court's own creation. App. 154a (order of February 9, 2022); *id.* at 149a–150a (order of February 23, 2022).

When Teddy Daniels, a Republican candidate for Lieutenant Governor, sought to intervene in response to the state supreme court's unconstitutional suspension of the General Primary Calendar,[1] the state supreme court summarily denied his motion. And the state supreme court refused to consider or address Mr. Daniels's claims that the Elections Clause and 2 U.S.C. § 2a(c) prohibit the state judiciary from altering the General Primary Calendar and imposing a court-drawn congressional map—either in its order of February 23, 2022, or in the subsequent opinions explaining the court's actions. App. 148a–151a (order); *id.* at 1a–145a (opinions). Instead, the state supreme court acted as though the Elections Clause and 2 U.S.C. § 2a(c) do not exist—or that is so patently obvious that they impose no constraints on a court's powers to draw congressional maps or alter a legislatively approved election calendar that they can be ignored without discussion. The Supreme Court of Pennsylvania then proceeded to impose the so-called "Carter Plan" as the state's congressional map, despite the fact that its special master rejected the map as excessively

1. App. 397a–432a.

partisan to Democrats,[2] thereby creating a 10-7 majority of Democratic-leaning congressional districts in a battleground state where Republicans control both houses of the state legislature.

For too long, state supreme courts have acted as though they possess inherent authority to adopt and impose congressional maps of their choosing when the legislature fails to enact a new map after the decennial census, or when a map adopted by the legislature is declared invalid because it conflicts with the federal or state constitutions or the Voting Rights Act. The case law from the Supreme Court of Pennsylvania reflects this attitude, going so far as to declare that the state supreme court has an "obligation" (albeit an "unwelcome obligation")[3] to draw the state's congressional map whenever the legislature and the governor fail to agree on a redistricting plan.[4] But the Supreme Court of Pennsylvania has never attempted to explain how these map-drawing powers that it has conferred upon itself can be squared with the command of the Elections Clause, which states quite clearly that it is the "the Legislature"—and not the ju-

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2. App. 377a (criticizing the Carter Plan for "pair[ing] two Republican incumbents in one congressional district"); *id.* (rejecting the Carter Plan because it "provides a partisan advantage to the Democratic party"); *id.* at 367a (¶¶ 32–33).

3. *League of Women Voters of Pennsylvania v. Commonwealth*, 178 A.3d 737, 823 (Pa. 2018) (*LWV II*); *see also id.* (describing this authority as "inherent in the state judiciary").

4. App. 20a ("[I]t becomes the judiciary's task to determine the appropriate redistricting plan when the Legislature is unable or chooses not to act.").

diciary—that must "prescribe" the "Times, Places, and Manner of holding Elections for Senators and Representatives,"[5] and that empowers "Congress" to "make or alter such Regulations, except as to the Places of chusing Senators." U.S. Const. art. I, § 4, cl. 1. And when Mr. Daniels had the temerity to point out that the Elections Clause and 2 U.S.C. § 2a(c) prohibit the state supreme court from unilaterally altering the General Primary Calendar and imposing a court-selected map for the 2022 congressional elections,[6] the Supreme Court of Pennsylvania brushed those concerns aside by denying his motion to intervene and ignoring the Elections Clause and 2 U.S.C. § 2a(c) in its order and subsequent opinions.

The Supreme Court of Pennsylvania is far from the only court that has displayed insouciance toward the Elections Clause and the requirements of 2 U.S.C. § 2a(c). The Supreme Court of North Carolina also decided to impose a congressional map of its own creation after ruling that the redistricting plan adopted by the North Carolina legislature violated its state constitution. *See Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay) (criticizing the North Carolina Supreme Court for "order[ing] that the 2022 election proceed on the basis of a map of the court's own creation."); Pet. for Cert., *Moore*

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5. *See Moore v. Harper*, 142 S. Ct. 1089, 1090 (2022) (Alito, J., dissenting from the denial of application for stay) ("[T]he Elections Clause . . . specifies a particular organ of a state government, and we must take that language seriously.").

6. App. 397a–432a.

v. Harper, No. 21-1271 at 37 (criticizing the state judiciary for "creating, and imposing by fiat, a new congressional map."). And state courts have for decades been drawing and imposing congressional maps in response to legislative impasses or constitutional violations, without giving the slightest thought to how this practice can be allowed under a Constitution that requires "the Legislature" (or Congress) to decide how the state's congressional delegation will be elected. *See, e.g.*, *Johnson v. Wisconsin Elections Comm'n*, 967 N.W.2d 469 (Wis. 2021); *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083, 1087 (Pa. 2018) ("*LWV III*"); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1229 (Colo. 2003); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002).

But there are members of this Court who take the language of the Elections Clause far more seriously than the state judiciaries do. *See Moore*, 142 S. Ct. at 1089–92 (Alito, J., dissenting from the denial of application for stay); *id.* at 1089 (Kavanaugh, J., concurring in denial of application for stay) (acknowledging "serious arguments" surrounding the extent to which the Elections Clause constrains the state judiciary's authority to impose congressional maps). And at least four justices have indicated that this Court should grant certiorari to resolve whether and to what extent the Elections Clause limits the authority of state judges to disapprove their legislature's congressional redistricting plan based on provisions in their state constitutions. *See Moore*, 142 S. Ct. at 1089–92 (Alito, J., dissenting from the denial of application for stay) ("[T]he question presented by this

case easily satisfies our usual criteria for certiorari"); *id.* at 1089 (Kavanaugh, J., concurring in denial of application for stay) ("[T]he Court should grant certiorari in an appropriate case—either in this case from North Carolina or in a similar case from another State"). The issues presented in this petition are similar, as they concern the extent to which the Elections Clause constrains the *remedial discretion* of state-court judges when they draw congressional maps in response to a legislative impasse or a constitutional violation. The Pennsylvania Supreme Court refused to consider the possibility that the Elections Clause might limit its ability to choose among the proposed congressional maps. And freed from any such Election Clause constraints, it wound up selecting a partisan Democratic map that would never have been enacted by the state's Republican-controlled legislature.

But the Elections Clause has much to say when a state court draws or selects a congressional map. The Elections Clause does not categorically prohibit a court from drawing or selecting a congressional map, but it *does* require a state court to derive its map-drawing authority from an enactment of the state legislature,[7] an Act of Congress that makes or alters the "Regulations" for electing representatives,[8] or a provision of the U.S.

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7. *See 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).

8. *See* U.S. Const. art. I, § 4, cl. 1 (authorizing "Congress" to "make" or "alter" the "Regulations" for electing representatives).

Constitution. And a state court *must* be guided by the provisions of 2 U.S.C. § 2a(c), an act of Congress enacted pursuant to the Elections Clause, which establishes the redistricting plans that states must use until that state has been "redistricted in the manner provided by the law thereof." The state judiciary has *no* inherent authority to draw or select congressional maps—and any such idea is anathema to the Elections Clause and its decision to vest congressional map-drawing authority in "the Legislature" of that State and in Congress.

The Court should grant certiorari, along with the petition in *Moore v. Harper*, No. 21-1271, and use these cases to rein in the state judiciaries' unconstitutional meddling in congressional redistricting decisions. *Moore* concerns whether the Elections Clause allows state judiciaries to disapprove congressional redistricting plans adopted by the state legislature. This petition concerns whether the Elections Clause constrains the state judiciary's discretion in drawing or selecting congressional maps in response to a legislative impasse or constitutional violation. The remedial issues presented in this petition are as urgent—and equally certworthy—as the issues presented in *Moore*.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is available at 270 A.3d 444 (Pa. 2022), and it is reproduced at App. 1a–145a. The special master's report and recommendation is reproduced at 155a–396a.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment on February 23, 2022. App. 3a. Mr. Costello and Mr. Grove timely filed this petition for a writ of certiorari on May 24, 2022.

This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the U.S. Constitution 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. I, § 4, cl. 1.

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:
>
> (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).

STATEMENT

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

sults of the 2020 census left Pennsylvania with 17 seats in the U.S. House, one fewer than before. The Pennsylvania legislature was therefore required to draw a new congressional map. *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").

In January of 2022, the Republican-led General Assembly approved a reasonable, non-gerrymandered map (HB 2146) that would have created a 9-8 majority of *Democratic*-leaning congressional districts. App. 213a (picture of map); App. 384a (¶ 78) ("HB 2146 is predicted to result in 9 Democratic-leaning seats and 8 Republican-leaning seats and, consequently, is more favorable to Democrats than the most likely outcome of 50,000 computer drawn simulated maps that used no partisan data, which resulted in 8 Democratic-leaning seats and 9 Republican-leaning seats."). But Governor Wolf vetoed the map, despite its Democratic tilt, complaining that this 9-8 Democratic map was "unfair" and insufficiently "bipartisan."[9] *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, a group of litigants represented by the Elias Law Group repaired to state court in an effort to induce the Supreme Court of Pennsylvania—which has a 5-2 Democratic majority—to impose a more partisan Democratic congressional map for the 2022 elections. The Elias-backed map is

9. *See* https://bit.ly/33WvHW7 (Governor Wolf's veto statement).

known as the "Carter Plan," and it was developed by Jonathan Rodden, a Stanford political-science professor retained by the Elias Law Group. App. 224a.

I. THE CARTER PLAN

The Carter Plan would create a 10-7 majority of Democratic-leaning congressional districts, rather than the 9-8 Democratic majority in the map approved by the General Assembly. App. 231a (FF47). It would also place two Republican incumbents in the same congressional district, ensuring that at least one incumbent Republican will be eliminated from the state's congressional delegation. App. 367a (¶ 32). The General Assembly's map, by contrast, would have placed a Democratic and a Republican incumbent in a single competitive district, an approach that does not "seek to obtain an unfair partisan advantage through incumbent pairings." App. 383a (¶ 68). The Carter Plan contains other partisan gerrymanders designed to help Democrats and harm Republicans, which are described in the special master's report. App. 377a.

The Carter Plan also violates the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964), because it includes congressional districts with two-person deviations. App. 377a. The HB 2146 map passed by the General Assembly, by contrast, limits population deviation among congressional districts to no more than one person, consistent with this Court's equal-population rule. App. 363a–364a (¶ 18).

II. THE STATE-COURT LITIGATION

On December 17, 2021, the Elias Law Group filed suit on behalf of a group of 18 voters known as the "Carter petitioners." The Carter petitioners filed their lawsuit in the Commonwealth Court of Pennsylvania,[10] asking the state judiciary to impose their preferred map for the 2022 congressional elections. *See id.* Later that day, a separate group of 12 voters (the "Gressman petitioners") filed a similar lawsuit in the Commonwealth Court. The Commonwealth Court consolidated the two redistricting cases on December, 20, 2021, and the cases were assigned to Judge Patricia McCullough.

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. But on January 10, 2022, the state supreme court declined to invoke its extraordinary jurisdiction and denied the application for extraordinary relief without prejudice.

On January 14, 2022, Judge McCullough ordered the parties and intervenors in the redistricting cases 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

10. The Commonwealth Court of Pennsylvania is the court of original jurisdiction for lawsuits involving the state and its officials.

and evidence presented by the Parties." On January 26, 2022, Governor Wolf vetoed HB 2146, the congressional map that had been approved by the General Assembly.

On January 27 and 28, 2022, Judge McCullough presided over the evidentiary hearings that had been scheduled in her order of January 14, 2022. On January 29, 2022, the petitioners in the state redistricting lawsuit 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. On February 1, 2022, Judge McCullough announced that her ruling in the redistricting cases would issue no later than February 4, 2022.

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 party-line vote. The state supreme court's order designated Judge McCullough to serve as its "Special Master," and instructed Judge McCullough 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." Justice Mundy and Justice Brobson, both Republicans, dissented from the state supreme court's order granting extraordinary relief and exercising extraordinary jurisdiction.

III. THE SPECIAL MASTER'S FINDINGS AND RECOMMENDATION

On February 7, 2022, Judge McCullough issued her findings and recommended that the map approved by the General Assembly (HB 2146) serve as the state's congressional map. App. 155a–396a. Judge McCullough recommended HB 2146 from among the 13 plans that had been submitted for consideration by the parties and their amici. App. 221a–233a (describing the 13 competing plans and maps). Judge McCollough noted that HB 2146 would result in "9 Democratic-leaning seats and 8 Republican-leaning seats," despite the fact that the Republican majority in the General Assembly had developed and proposed that plan. App. 384a (¶¶ 78–79). Judge McCollough noted that the willingness of the Republican-led General Assembly to produce a map that favors Democrats was something that "underscores the partisan fairness" of HB 2146. App. 384a (¶ 79) ("Unlike other maps that leaned Democrat, here, it is the Republican majority in the General Assembly that developed and proposed a plan, HB 2146, that favors Democrats, which ultimately underscores the partisan fairness of the plan."). Judge McCullough also expressed concern that the imposition of a court-drawn map that departs from the redistricting plan approved by the General Assembly would "effectively usurp the role and function of the law-making bodies of this Commonwealth." App. 378a (¶ 49).

Judge McCullough rejected the Carter Plan because it includes districts with a two-person deviation in population, which violates the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964). App. 363a–364a

(¶ 18) ("[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."); App. 367a (¶ 34) (describing the Carter Plan as "contrary to . . . United States Supreme Court precedent."); App. 377a ("[T]his Court does not recommend adopting the Carter Plan for the congressional districts in the Commonwealth of Pennsylvania because . . . it has a two-person difference in population from the largest to their smallest districts, while the majority of other plans were able to achieve a one person deviation"); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) ("*Wesberry v. Sanders* . . . requires that the State make a good-faith effort to achieve precise mathematical equality."); *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations as close to perfect equality as possible.").

Judge McCullough also rejected the Carter Plan because it would put two incumbent Republican incumbents into one congressional district:

> [C]ontrary to every other map submitted, the Senate Democratic Caucus 1 Plan and the Carter Plan include two Republican incumbents in one congressional district, which effectively eliminates a Republican from continued representation in the United States House of Representatives. . . . [A]lthough Pennsylvania has already lost one congressional seat as a result of decreased population, the Senate Democratic Caucus 1 Plan and the Carter Plan, in ef-

> fect, seek to preemptively purge a Republican Congressman from the 17 seats that . . . remain available for office.").

App. 367a (¶ 32–33); App. 377a ("[T]his Court does not recommend adopting the Carter Plan for the congressional districts in the Commonwealth of Pennsylvania because . . . without any explicit or apparent justification, it pairs two Republican incumbents in one congressional district and effectively eliminates a Republican from continued representation in the United States House of Representatives"). Finally, Judge McCullough rejected the Carter Plan because she found that it contained gerrymanders designed to "provide[] a partisan advantage to the Democratic party." App. 377a.

IV. THE SUPREME COURT OF PENNSYLVANIA SUSPENDS THE PRIMARY ELECTION CALENDAR IN VIOLATION OF THE ELECTIONS CLAUSE

The Supreme Court of Pennsylvania allowed the parties and intervenors to file exceptions to Judge McCullough's findings and recommendation by February 14, 2022, and it scheduled oral arguments for February 18, 2022. But the ongoing litigation started bumping into deadlines in the General Primary Election calendar. Under the law of Pennsylvania, a candidate who wishes to appear on the primary ballot must file a nomination petition signed by registered voters of his party, and candidates for the U.S. House of Representatives must obtain 1,000 signatures on their nomination petition by March 8, 2022. *See* 25 Pa. Stat. §§ 2867, 2872.1(12). And under the statutes governing Pennsylvania elections, the first

day that candidates may begin circulating nomination petitions is February 15, 2022, while the final day to obtain signatures is March 8, 2022. So the window for circulating nomination petitions was fast approaching, and it was scheduled to begin before the state supreme court would hold oral arguments on Judge McCullough's findings and recommendation. But the state supreme court issued an order of February 9, 2022, that purports to "suspend" the General Primary Election calendar codified in 25 Pa. Stat. §§ 2868 and 2873. App. 154a. No litigant had asked the state supreme court to suspend the General Primary Election calendar; the court did this entirely on its own initiative. And the state supreme court made no attempt to explain how it can "suspend" a primary-election calendar enacted by the legislature when the Elections Clause provides that "the Legislature" of each state shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1.

V. TEDDY DANIELS MOVES TO INTERVENE IN RESPONSE TO THE STATE SUPREME COURT'S UNCONSTITUTIONAL ORDER SUSPENDING THE GENERAL PRIMARY CALENDAR

On February 11, 2022, two days after the Supreme Court of Pennsylvania issued its *sua sponte* order suspending the General Primary Calendar, Teddy Daniels filed an emergency application to intervene. App. 397a–432a. Mr. Daniels was seeking the Republican nomination for Lieutenant Governor of Pennsylvania, and his emergency application protested that the state supreme court's order of February 9, 2022, violated the Elections

Clause by departing from the General Primary Calendar that "the Legislature" had enacted. App. 421a (¶ 49) ("The Court's order of February 9, 2022, is a violation of the Elections Clause."). Mr. Daniels also insisted that the state supreme court's attempt to "suspend" the General Primary Calendar amounted to an acknowledgement that the state judiciary could not implement a court-drawn map for the 2022 election cycle without "disrupting the election process," thereby requiring the court to order at-large elections under 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)(5)'s requirement for at-large elections 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").

Mr. Daniels explained that he did not seek intervention sooner because his Elections Clause and 2 U.S.C. § 2a(c)(5) claims did not exist until after the state supreme court announced on February 9, 2022, that it was necessary to "suspend" the General Primary Calendar:

> 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. . . .
>
> 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").

App. 404a (¶¶ 36, 38). 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 2 U.S.C. § 2a(c)(5) and *Branch*. App. 421a–422a (¶ 51); App. 425a–428a. But the Supreme Court of Pennsylvania summarily denied Mr. Daniels's emergency application without explanation.

VI. THE SUPREME COURT OF PENNSYLVANIA OVERRULES THE SPECIAL MASTER AND IMPOSES THE CARTER PLAN

On February 23, 2022, the Supreme Court of Pennsylvania, in a 4-3 vote, overruled the special master and issued an order purporting to "adopt" the Carter Plan as the state's congressional map. App. 146a–151a. The order instructed state election officials to "prepare textual language that describes the Carter Plan and submit the same to the Secretary of the Commonwealth without delay," and to "publish notice of the Congressional Districts in the Pennsylvania Bulletin." App. 149a. The state supreme court also "modified" the statutory deadlines in the General Primary Election calendar to accommodate its decision to impose the Carter Plan for the 2022 congressional elections, and commanded that its "modified"

schedule "shall be implemented by the Secretary of the Commonwealth and all election officers within the Commonwealth." App. 150. It also directed the Secretary of the Commonwealth to "notify this Court by 4:00 p.m. on February 25, 2022, should it foresee any technical issues." App. 151a.

The state supreme court's order of February 23, 2022, promised that opinions explaining the court's ruling would follow, and the court released those opinions on March 9, 2022. App. 1a–145a. The opinions never so much as mention the Elections Clause or 2 U.S.C. § 2a(c)(5), nor do they show any awareness that the Elections Clause requires "the Legislature" of Pennsylvania (or the U.S. Congress) to decide how Pennsylvania's congressional delegation will be elected. Instead, the opinions simply assume a judicial prerogative to draw or select a congressional map—a prerogative entirely unconstrained by the Elections Clause or congressional enactments, and a prerogative that amounts to a largely freewheeling choice among the competing redistricting plans submitted by the parties, the intervenors, and the amici.

The opinion of the court, for example, acknowledged that "there is no perfect redistricting plan" and that the task of choosing among competing congressional maps "is better suited to the Commonwealth's political branches, rather than the judiciary." App. 6a. But it nonetheless insisted that the court's "obligation" was to choose the one map that its members regard as "superior or comparable" to the other proposals, based on "traditional core redistricting criteria" and "subordinate his-

torical redistricting considerations"—a decision that the Court recognized to be largely non-falsifiable. *See id.* ("As evidenced by the views expressed by our esteemed colleagues and the Special Master, reasonable minds can disagree in good faith as to which submitted plan best balances the requisite criteria and considerations."); App. 48a ("[S]everal of the maps submitted would be reasonable choices to be made by a legislature.").

* * *

It is too late for this Court to vacate the imposition of the Carter Map for the 2022 election cycle. *See Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)); *see also Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020). But the order adopting the Carter Map still violates the Elections Clause and 2 U.S.C. § 2a(c), and the Court should grant certiorari and vacate this unlawful redistricting plan before it is used for the next round of congressional elections. This petition also presents an ideal vehicle for the Court to announce the constraints that the Elections Clause and 2 U.S.C. § 2a(c) impose on judicial map-drawing—which is urgently needed as state judiciaries become ever more audacious in legislating redistricting plans from the bench.

REASONS FOR GRANTING THE PETITION

The issues presented in this petition complement the recently filed petition in *Moore v. Harper*, No. 21-1271, and they are equally certworthy—if not more so. The petitioners in *Moore* are asking this Court to endorse a

version of the independent-state-legislature doctrine and hold that the Elections Clause limits the state judiciary's ability to review congressional maps adopted by the state legislature. *See* Pet. for Cert., *Moore v. Harper*, No. 21-1271. They also want this Court to put an end to partisan-gerrymandering claims that are rooted in "vague state constitutional provisions." Pet. for Cert., *Moore v. Harper*, No. 21-1271 at i; *id.* at 34 ("The Elections Clause does not give the state courts, or any other organ of state government, the power to second-guess the legislature's determinations.").

The arguments presented in this petition are more modest—and they do not implicate the independent-state-legislature doctrine because the Pennsylvania legislature failed to enact a new congressional map for its judiciary to review. Rather than disapproving a map enacted by the state legislature, the Supreme Court of Pennsylvania acted to fill a vacuum caused by the deadlock between the legislature and the governor. And the Elections Clause issues presented in this petition do not concern the state judiciary's *authority* to review the legislature's work product, but the extent to which the Elections Clause and 2 U.S.C. § 2a(c) constrain state judiciary's *remedial discretion* when imposing congressional maps in response to a legislative impasse or a constitutional violation.

These issues are implicated in the *Moore* petition as well, as the petitioners criticize the North Carolina judiciary for imposing a new congressional map after finding the legislatively adopted map unconstitutional. *See* Pet. for Cert., *Moore v. Harper*, No. 21-1271 at 37 ("[T]he

state courts then compounded the constitutional error by creating, and imposing by fiat, a new congressional map."). But the *Moore* petitioners appear to be suggesting that the Elections Clause categorically prohibits the state judiciary from imposing a congressional map—even in response to a legislative impasse or constitutional violation. Our position is more nuanced: The state judiciary *may* impose a congressional map in response to a legislative impasse or constitutional violation, but its remedial discretion is constrained by the Elections Clause and 2 U.S.C. § 2a(c). Both petitions should be granted, and the cases should be heard together on the same day.

I. THE COURT SHOULD GRANT CERTIORARI TO REVIEW THE EXTENT TO WHICH THE ELECTIONS CLAUSE AND 2 U.S.C. § 2a(c) CONSTRAIN THE REMEDIAL DISCRETION OF THE STATE JUDICIARY WHEN IT IMPOSES CONGRESSIONAL MAPS IN RESPONSE TO A LEGISLATIVE IMPASSE OR CONSTITUTIONAL VIOLATION

The judicial freewheeling displayed by the Supreme Court of Pennsylvania (and by the Supreme Court of North Carolina) reflects a failure to honor not only the Elections Clause but also 2 U.S.C. § 2a(c), a federal statute that spells out exactly what must happen when a legislature fails to enact a new (and lawful) congressional map in response to the decennial census:

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

But the state judiciary's map-drawing authority in these situations comes from the fact that it is attempting to remedy or prevent a violation of the Constitution (or a violation of section 2c) that would occur if it implemented the congressionally mandated redistricting plan described in section 2a(c). And the judiciary's remedial discretion in these situations is limited by Elections Clause, which requires the states to hew as closely as possible to the congressionally required plans in section 2a(c) even as the state courts devise a remedy that will avoid violations of *Wesberry* or section 2c.

The following chart illustrates the state judiciary's remedial authority 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 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 op. 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 op. 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 entitled, 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.).[11] 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

11. 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).

enactment as interpreted by this Court. *See* U.S. 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;[12] and (2) modifying the General Primary Calendar in its order of February 23, 2022.[13] 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 a court-selected map under section 2c. *See id.* at 275 (plurality opinion of Scalia, J.) ("How long

12. App. 154a.

13. App. 149a–151a.

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.

* * *

For all these reasons, the state supreme court's order imposing the Carter Map violates the Elections Clause. It does *not* violate the Elections Clause because the map was selected by the judiciary rather than "the Legislature." Rather, the state supreme court's order violates the Elections Clause because it cannot be tied to the requirements of a federal statute such as 2 U.S.C. § 2c—which the state courts are obligated to implement under the commands of the Elections Clause. *See* U.S. Const. art. I, § 4, cl. 1 (authorizing "Congress" to "make" or "alter" the "Regulations" for electing representatives). The Supreme Court of Pennsylvania was asserting an inherent or residual power to select its own congressional map in response to a legislative impasse—and to suspend and modify the General Primary Calendar in whatever manner it sees fit. No such power can exist as long as the Elections Clause remains in the Constitution.

The Supreme Court of Pennsylvania's unconstitutional posture is reflected in the following sentence from the opinion below:

> [W]hile the primary responsibility for apportioning congressional districts rests with the General Assembly, it becomes the judiciary's task to determine the appropriate redistricting

> plan when the Legislature is unable or chooses not to act.

App. 20a. That statement is untrue. When the Pennsylvania legislature fails to enact a congressional redistricting plan, the remedy is set forth in 2 U.S.C. § 2a(c)—and the state judiciary must look first to that statute in determining what should happen in response to a legislative impasse. Of course, the judiciary will often have a role to play in preventing or remedying violations of *Wesberry v. Sanders* or violations of section 2c that would result from implementing the maps described in section 2a(c). But that authority rests *solely* on the judiciary's prerogative to prevent or remedy violations of the Constitution or federal law.[14] 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 an 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 Court

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14. 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).

should grant certiorari and affirm these Election Clause limitations on the judiciary's map-drawing powers.

II. AT THE VERY LEAST, THE COURT SHOULD HOLD THIS PETITION FOR MOORE V. HARPER

If the Court is uninterested or unwilling to grant certiorari on whether the Elections Clause limits the remedial map-drawing powers of the state judiciary, it should at least hold this petition if it grants certiorari in *Moore* and GVR if it rules in favor of the petitioners in that case. A ruling that disapproves the North Carolina judiciary's decision to replace the congressional map adopted by the state legislature will necessarily undercut the Supreme Court of Pennsylvania's decision to impose the Carter Map by judicial decree, and the Court should instruct the Supreme Court of Pennsylvania to reconsider its actions in light of this Court's eventual Elections Clause pronouncement.

* * *

For too long, state judiciaries have ignored the Elections Clause and refuse acknowledge the limits that it imposes on their congressional map-drawing powers. Worse, they have acted as though a legislative impasse or a constitutional violation allows them to impose whatever congressional map they want, without any need to derive their map-selection powers from a legislative enactment or federal constitutional provision. It is long past time for this Court to rein in these lawless and unconstitutional practices.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted.

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