No. 21-1509

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

BRIEF FOR CARTER RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Was the Pennsylvania Supreme Court obligated to order at-large congressional elections under 2 U.S.C. § 2a(c)(5) after the political process failed to produce a map, even though it was able to remedy the impasse without moving the primary election date?

2. If the Pennsylvania Supreme Court was not obligated to order at-large congressional elections, was it required to defer to a redistricting plan that had been vetoed by the Governor?

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INTRODUCTION

Petitioner asks this Court to resolve two questions about Pennsylvania's 2022 congressional redistricting that were never addressed by the court below, run contrary to Petitioner's own positions in the state court litigation, and are outside this Court's jurisdiction. What is more, Petitioner's underlying merits arguments conspicuously ignore the substance and text of this Court's precedent and state courts' historical practice. The petition ultimately amounts to an after-the-fact political grievance with the congressional map that the Pennsylvania Supreme Court adopted, which hardly warrants this Court's review.

Six months ago, the Pennsylvania Supreme Court adopted the current congressional map after the political process failed to produce a map. The players in that process—the leaders of both caucuses in both houses of the General Assembly and the Governor—took no issue with the state court's actions. Nor did Petitioner himself. During their participation in the state court litigation, all parties acknowledged—and, in Petitioner's case, advocated—that the Pennsylvania Supreme Court could both adopt a congressional map of its choosing and modify the administrative election calendar to facilitate the map's implementation.

It is only now—and alone—that Petitioner, former U.S. Representative Ryan Costello, introduces the question of whether the Pennsylvania Supreme Court should have ordered at-large elections in 2022 and, if not, whether it should have deferred to a redistricting plan that had been vetoed by the Governor. In doing so, he asserts an Elections Clause theory that is incoherent at best. On one hand, he

admits that the Elections Clause and 2 U.S.C. § 2c authorized the Pennsylvania Supreme Court to adopt a congressional plan after the political process failed to produce one. Pet. 30. On the other, he contends that *Branch v. Smith*, 538 U.S. 254 (2003), required the Pennsylvania Supreme Court to defer to a specific map: the redistricting plan that had been vetoed by the Governor, which was the very map that led to impasse in the first place. Pet. 30. Petitioner's arguments have no basis in law and misread the text of *Branch* itself.

In any event, this Court lacks jurisdiction to consider Petitioner's questions. Petitioner does not have standing to bring this appeal. Additionally, whether the Pennsylvania Supreme Court should have ordered at-large elections for this election cycle is both moot and hypothetical. And whether the Pennsylvania Supreme Court correctly followed state "policies and preferences" is "necessarily" a matter of state law, *Branch*, 538 U.S. at 274 (plurality opinion), which this Court cannot decide.

Even without these jurisdictional barriers, prudential concerns militate against considering questions that rarely arise and are fundamentally about error correction. They especially disfavor cases like this one, where this Court would be deciding the issues in the first instance, where there is no division among courts on the questions presented, and where Petitioner previously advocated for much of the very relief he now challenges.

Finally, this Court should deny review because the decision below was correct. The Pennsylvania Supreme Court acted in accordance with this Court's precedent, Pennsylvania law, and the longstanding practice of state courts across the country. Petitioner's preferred outcome would invite this Court to mandate

at-large congressional elections despite Congress having enacted a single-member congressional district requirement in 1967, *see* 2 U.S.C. § 2c, and would defy well-established precedent respecting a governor's role in the lawmaking process. This Court should deny certiorari.

STATEMENT

A. Commonwealth Court Proceedings

In mid-December 2021, after months of legislative inaction on congressional redistricting, a group of Pennsylvania voters residing in overpopulated districts filed suit in Pennsylvania's Commonwealth Court, alleging malapportionment among the state's congressional districts. Those voters—the Carter Respondents[1]—asked the Commonwealth Court to adopt a new, constitutional congressional apportionment plan in the likely event of an impasse between the state's political branches. Such a plan needed to account for Pennsylvania's population changes over the past decade, which notably resulted in Pennsylvania's loss of a congressional district following the 2020 Census. The Carter Respondents thus brought their lawsuit in part under 2 U.S.C. § 2c, which provides that a state should have "a number of [congressional] districts equal to the number of Representatives to which such State is so entitled."

Days after the Carter Respondents filed suit, the Commonwealth Court announced that it would proceed to adopt a new congressional plan if the General Assembly and the Governor failed to enact a congressional reapportionment plan by January 30,

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[1] The Carter Respondents are 16 individual Pennsylvania voters.

2022. Shortly thereafter, the Court permitted interested individuals to intervene, including the Republican and Democratic leadership of the Pennsylvania General Assembly, Governor Wolf, and current and former members of the state's congressional delegation. Among those intervenors was Petitioner, Ryan Costello, who previously represented Pennsylvania's Sixth Congressional District.[2] Toth Carter App. 79a.[3]

In their initial briefing in the state court proceedings, the majority leaders of the Pennsylvania House and Senate (hereinafter the "Legislative Leaders") explained that they did not "contest" that "[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan," Toth Carter App. 52a (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (Pa. 2018)); they interposed no objection to "the commencement of a judicial redistricting process," Toth Carter App.54-55a; and they endorsed the state courts' power to modify the election schedule, Toth Carter App. 6-7a. The Legislative Leaders also explicitly agreed that the case raised no Elections Clause issues because "it is settled law that state courts have authority to declare and remedy

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[2] Petitioner intervened in the Pennsylvania state court action as part of a group of former congressmen, but he alone filed this Petition. Notably, although the Petition makes two passing references to a "Mr. Grove," Pet. iii, 8, no Mr. Grove is listed among the parties to the proceeding, *id.* at ii, or was involved in the Pennsylvania state court litigation.

[3] References to the "Toth Carter App." are to the Carter Respondents' Appendix, filed on March 3, 2022, in *Toth v. Chapman,* No. 21A457, https://www.supremecourt.gov/DocketPDF/21/21A457/217673/20220303170407861_Toth%20Appendix.pdf.

violations of the U.S. Constitution, even with respect to laws governing congressional elections." Toth Carter App. 52a n.2 (citing *Growe v. Emison*, 507 U.S. 25, 32–36 (1993)).

In total, the parties and *amici*, including Petitioner, submitted 14 different proposed maps to the Commonwealth Court for consideration. In his submission supporting his proposed maps, Petitioner acknowledged that, "in light of the continued legislative impasse, it has fallen on this Court to select an appropriate congressional redistricting plan." Carter App. 2a. Petitioner encouraged the Commonwealth Court to select from two congressional plans of his own making, then known as the "Reschenthaler" Plans. Carter App. 3a. At no point did Petitioner argue the court should adopt the General Assembly's proposed plan. Carter App. 3a, 8a. And no party suggested the court should order at-large elections.

Petitioner also encouraged the Commonwealth Court to "enjoin further use and enforcement of the Election Code's provisions relating to the timeline for circulating, filing, and objecting to nomination petitions and immediately adopt the timetable proposed by [Petitioner] for the 2022 General Primary." Carter App. 3a. Petitioner noted that the Pennsylvania Supreme Court had previously modified administrative election deadlines just a few years ago and argued Pennsylvania's judiciary should do so again. Carter App. 36-39a. Petitioner specifically recommended that the Court not move the May 17 primary date but shift the dates for filing and circulating nominating petitions from February 15, the original date, to February 29. Carter App. 38-39a. He also proposed corresponding shifts to the rest of the election calendar. Carter App. 38a n.12. Petitioner

explained that briefly delaying the dates for filing and circulating nominating petitions would "give the Court additional time to carefully review, consider, and select a new congressional redistricting plan." Carter App. 39a. Neither Petitioner nor any other party raised Elections Clause concerns about modifying pre-election deadlines.

After receiving all proposed congressional plans, the Commonwealth Court held a two-day evidentiary hearing on the proposed maps, restating at the start that it would adopt a new congressional plan if the General Assembly and Governor failed to enact one by January 30. Costello App. 177a. At no time in those hearings did any party raise Elections Clause concerns or argue that the court should order at-large elections.

B. Pennsylvania Supreme Court Proceedings

Governor Wolf vetoed the General Assembly's proposed map on January 26, and the Commonwealth Court's January 30 deadline passed without a duly enacted map in place. Costello App. 177a. A few days later, the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the ongoing litigation, designating the Commonwealth Court judge who had been presiding over the proceedings in the lower court as Special Master.

Shortly thereafter, the Special Master released her report and recommendation to the Pennsylvania Supreme Court. The Special Master recommended that (1) the Pennsylvania Supreme Court adopt the General Assembly's proposed plan, HB 2146, which had been vetoed by Governor Wolf, and (2) the Pennsylvania Supreme Court adopt "[Petitioner's] proposed revisions to the 2022 General Primary

Election calendar," which would give candidates 15 days to circulate petitions. Costello App. 389a, 394a. The Pennsylvania Supreme Court invited all parties to brief any exceptions to the Special Master's recommendations.[4]

Thirteen parties submitted briefing and presented oral argument to the Pennsylvania Supreme Court. In his brief to the Pennsylvania Supreme Court, Petitioner characterized the Special Master's recommendation to adopt the General Assembly's Plan as error, arguing that the Pennsylvania Supreme Court should adopt one of his plans instead. Carter App. 43a (Petitioner explaining that "the Special Master also erred in her ultimate recommendation that this Court should select HB 2146, rather than [the] Reschenthaler [Plans]"). Petitioner did not argue that the Pennsylvania Supreme Court should order at-large elections—no party did. Nor did Petitioner take exception with the Special Master's recommendation that the Pennsylvania Supreme Court modify the election calendar slightly, just as Petitioner had recommended. For their part, the Legislative Leaders recommended that the Pennsylvania Supreme Court adopt the Special Master's Report "in its entirety," which would have included its recommendation to modify the election calendar. Toth Carter App. 109a.

On February 23, the Pennsylvania Supreme Court ordered the adoption of the Carter Respondents'

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[4] One week before oral argument and six weeks after the Commonwealth Court's deadline for intervention, Lieutenant Governor candidate Teddy Daniels filed an emergency application to intervene, in which he raised some of the arguments Petitioner makes here. The Pennsylvania Supreme Court denied his application to intervene, and his claims were not briefed or addressed by the court.

proposed plan (the "Carter Plan") and announced that an opinion would follow. Costello App. 148a. In its February 23 order, the Pennsylvania Supreme Court accepted the Special Master's recommendation to modify the dates for circulating petitions without moving the primary date, which Petitioner had proposed. Costello App. 149a. The Pennsylvania Supreme Court provided candidates with more time to circulate petitions than the Special Master had recommended—and even more time than the statute itself provided. Costello App. 149-150a; *see* 25 P.S. § 2868.

In its later opinion explaining its reasons for selecting the Carter Plan, the Pennsylvania Supreme Court explained that the Special Master's deference to the redistricting plan that had been vetoed by the Governor was "offensive to the separation-of-powers" in the Commonwealth, which envisioned a lawmaking role for the Governor. Costello App. 25-27a. The Pennsylvania Supreme Court thus declined to automatically defer to HB 2146 without evaluating it, alongside the other submitted plans, for compliance with Pennsylvania's traditional and historical redistricting criteria. Costello App. 28a. After evaluating all of the proposed plans against these criteria, the Pennsylvania Supreme Court selected the Carter Plan, which used Pennsylvania's previous congressional plan as its starting point. Costello App. 30-31a. The Pennsylvania Supreme Court found the Carter Plan was "one of the best in terms of keeping counties whole," Costello App. 41a, "meets or exceeds the other submitted plans in terms of its adherence to the traditional core criteria," Costello App. 42a, best preserved the cores of prior districts, Costello App. 43-44a, and was "superior or comparable to the other

maps in regard to partisan fairness." Costello App. 47a.[5]

Shortly after the Pennsylvania Supreme Court released its order selecting the Carter Plan, six Pennsylvania citizens, none of whom were parties below, sought emergency relief from this Court, raising Elections Clause claims and asking this Court to order Pennsylvania to conduct its congressional elections on an at-large basis. *See* Emergency Appl. for Writ of Inj., *Toth v. Chapman*, No. 21A457 (Feb. 28, 2022). This Court denied the application without dissent. *See Toth v. Chapman*, 142 S. Ct. 1355 (2022).

Petitioner now argues that the Pennsylvania Supreme Court erred in several ways: (1) by modifying the election calendar, just as Petitioner requested, (2) by not ordering at-large elections, which no party requested, and (3) by not selecting the General Assembly's Plan, which Petitioner himself asked the Pennsylvania Supreme Court not to do.

REASONS TO DENY THE PETITION

Certiorari should be denied for numerous reasons. First, this Court lacks jurisdiction to hear the petition. Second, Petitioner does not provide compelling reasons for this Court to exercise its discretionary review. Third, this case is an exceedingly poor vehicle to decide the questions presented given the record below. Finally, the Pennsylvania Supreme Court correctly followed this Court's longstanding precedent and applied its own state law in selecting the plan it did.

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[5] The Carter Plan's mapmaker, Dr. Jonathan Rodden, also testified that he did not consider racial data or partisan performance when drawing the map. Costello App. 32a. No other party made their mapmaker available for examination during the Special Master's hearing.

A. This Court lacks jurisdiction to hear the petition.

Petitioner neither has standing nor presents issues this Court can adjudicate.

1. Petitioner lacks standing to press this appeal.

This Court has held that Article III standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64 (1997). This rule applies to intervenors, who "cannot step into the shoes of the original party [to appeal] unless the intervenor independently 'fulfills the requirements of Article III.'" *Id.* at 65 (citing *Diamond v. Charles*, 476 U.S. 54, 68 (1986)). "[I]t is not enough that the party invoking the power of the court have a keen interest in the issue." *Hollingsworth v. Perry*, 570 U.S. 693, 700 (2013).

Petitioner plainly lacks standing to press this appeal. In his intervention at the Commonwealth Court, Petitioner identified himself as one of several former U.S. Representatives who had "an interest in advocating on behalf of the communities that they formerly served" in the redistricting process, explaining that he hoped to "provide the Court with critical information regarding the communities and boundaries in [his prior] district." Toth Carter App. 92a. Petitioner also broadly alleged malapportionment in Pennsylvania's congressional districts, although Petitioner did not specify his own congressional district, let alone allege that he resides in an overpopulated district. Toth Carter App. 78a-79a n.1 & 81a.

Neither of these interests is sufficient for standing on appeal. Petitioner's first interest in providing input to Pennsylvania courts has already been satisfied and represents no more than a "keen interest in the issue," which is insufficient for standing. *Hollingsworth*, 570 U.S. at 700. His second general interest in remedying malapportionment in Pennsylvania's congressional districts is also insufficient to support standing. Only voters who live in overpopulated (and therefore underrepresented) districts have standing to bring malapportionment claims. *See, e.g.*, *Gill v. Whitford*, 138 S. Ct. 1916, 1930–32 (2018) (reiterating that malapportionment injuries are "district[-]specific" and that plaintiffs cannot allege injury from the statewide plan as a whole). Moreover, the Carter Plan, which was drawn using 2020 Census data, remedies any unconstitutional malapportionment in the preceding plan. Petitioner does not contend otherwise.

On appeal, Petitioner does not attempt to explain his basis for standing. He instead alleges a broad violation of the Elections Clause, which he claims results from the Pennsylvania Supreme Court's modification of the election calendar, failure to order at-large elections, and failure to adopt the General Assembly's vetoed redistricting plan.

But Petitioner suffers no injury-in-fact from these alleged Elections Clause violations. It is well settled that asserting a right "to have the Government act in accordance with law" does not confer standing. *Allen v. Wright*, 468 U.S. 737, 754 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126–27 (2014); *see also TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021) ("[U]nder Article III, an injury in law is not an injury in fact. Only those plaintiffs

who have been concretely harmed by a defendant's . . . violation may sue . . . over that violation in federal court.").

Consistent with this precedent, this Court has held that private individuals do not typically have standing to advance Elections Clause claims. *See Lance v. Coffman*, 549 U.S. 437 (2007). In *Lance*, private citizens challenged the Colorado Supreme Court's imposition of a redistricting plan, which they alleged violated the Elections Clause. After describing this Court's "lengthy" jurisprudence holding that federal courts should not "serve as a forum for generalized grievances," *id.* at 439, this Court articulated the "obvious" problem with the plaintiffs' standing: "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." *Id.* at 442 (emphasis added).

Petitioner does not attempt to distinguish *Lance* from the present case, nor do his circumstances merit such a distinction. Petitioner was not a candidate for re-election this year, and thus the Pennsylvania Supreme Court's modification of nomination petition deadlines could not have affected him. Indeed, Petitioner does not even attempt to explain how the slight modification of election dates affected or injured *anyone*. To the extent Petitioner believes he was entitled to vote in at-large elections in Pennsylvania this year, such a deprivation is not a cognizable injury because it would be felt by all Pennsylvania voters equally. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (holding plaintiff lacked standing where plaintiff "suffers in some indefinite way in common with people generally"

(quoting *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923))). Nor was Petitioner entitled to any particular redistricting plan; this Court has already made clear it is "not responsible for vindicating generalized partisan preferences." *Gill*, 138 S. Ct. at 1933.

Finally, even if Petitioner had suffered an injury-in-fact from the Pennsylvania Supreme Court's adoption of the Carter Plan, prudential standing would bar his claim. Prudential limitations require a party to "assert his own legal rights and interests," rather than "rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). But Petitioner's claims rest entirely on the alleged usurpation of institutional rights held by the Pennsylvania General Assembly, which has not appealed the judgment of the Pennsylvania Supreme Court, is not before the Court, and whose interests cannot be advanced by individuals lacking authority to act on its behalf. Notably, neither the Legislative Leaders, nor the minority caucus, nor the Governor—all of whom were parties to the state court litigation—took issue with the court's authority to change certain election-related deadlines or sought at-large elections. *See supra* Statement. This petition thus materially differs from the recently-granted petition in *Moore v. Harper,* No. 21-1271, in which the leadership of the North Carolina General Assembly itself appealed the judgment of the North Carolina Supreme Court.[6]

[6] Given that *Moore* was brought by substantially different parties, presented different questions, and involved a map altered in a different posture, there is no reason for this Court to hold the present petition until a decision in *Moore*.

Because Petitioner lacks standing to appeal, his petition must be denied.

2. The petition does not present issues this Court can adjudicate.

Petitioner presents two separate issues, each of which he alleges is an independent violation of "*Branch*'s interpretation of section 2c." Pet. 30. The first is whether the Pennsylvania Supreme Court's slight shifting of certain pre-primary election deadlines "disrupt[ed] the election process" such that it should have ordered at-large elections. *Id.* at 30-31. The second is whether, notwithstanding that alleged error, *Branch* required the Pennsylvania Supreme Court to adopt the General Assembly's vetoed map proposal. *Id.* at 31-32. This Court does not have jurisdiction to decide either issue.

a. The petition's first issue is moot, and deciding it would require this Court to enter an advisory opinion.

Petitioner's first issue is undeniably moot. An issue becomes moot when it is "no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496 (1969). That is precisely the situation here because the remedy Petitioner seeks—requiring the Pennsylvania Supreme Court "to implement at-large elections under section 2a(c)(5) rather than impose a court-selected map under section 2c," Pet. 30—is no longer available. As Petitioner concedes, the 2022 election cycle is already proceeding under the single-member district Carter Plan. *Id.* at 21 ("It is too late for this Court to vacate the imposition of the Carter Map for the 2022 election cycle."). The Court "cannot turn back the clock and create a world in which" this

year's congressional elections in Pennsylvania proceed at-large. *Wood v. Raffensperger*, 981 F.3d 1307, 1317 (11th Cir. 2020) (citing *Fleming v. Gutierrez*, 785 F.3d 442, 445 (10th Cir. 2015)). Nor does Petitioner claim that future Pennsylvania congressional elections should be held at-large, and for good reason—there is already a single-member district plan in place, and Petitioner does not and could not contend that implementing a single-member district plan would necessarily disrupt elections in 2024 and beyond. *See generally* Pet. 30-32.

Any concern that Pennsylvania's congressional elections should have been conducted at-large is thus simply "an abstract dispute about the law." *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). Correspondingly, asking the Court to pronounce rules of constitutional interpretation for a hypothetical legislative impasse in a later decade would amount to little more than an "advisory opinion[]" that is barred by Article III. *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam); *see TransUnion LLC*, 141 S. Ct. at 2203 (reaffirming that "federal courts do not issue advisory opinions").

Moreover, the scenario presented is far from the "exceptional situation[]," *Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983), that is "capable of repetition, yet evading review," *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), and thus is not exempt from the mootness doctrine. First, the action is not "in its duration too short to be fully litigated prior to cessation or expiration." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008). The underlying state court litigation lasted for months, *see supra* Statement, and this Court in fact considered and rejected an emergency application seeking similar relief earlier this year, well in advance of Pennsylvania's May 17 primary. *Toth*, 142 S. Ct. at

1355. Second, there is no "reasonable expectation that the same complaining party will be subject to the same action again." *Davis*, 554 U.S. at 735. For Petitioner to face the same circumstances again—no sooner than a decade from now—the following would have to occur: Pennsylvania's population this decade would have to grow at a sufficiently slower rate than the rest of the United States such that Pennsylvania would lose a congressional seat after the 2030 decennial census; Pennsylvania's political branches would have to fail to pass a congressional map for use in the 2032 election; and the Pennsylvania judiciary would have to impose a congressional map too late to keep the entire election calendar intact. At best, the possibility of recurrence is "no more than conjecture." *Lyons*, 461 U.S. at 108–09.

In short, the issue is moot. And "[w]here one of the several issues presented becomes moot, the remaining live issues [must] supply the constitutional requirement of a case or controversy." *McCormack*, 395 U.S. at 497; *id.* at 496 n.8 ("Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has [] considered [only] the remaining requests."). But here, the remaining issue fares no better at preserving this Court's jurisdiction.

b. There is no live federal issue for this Court to decide.

Congress has limited this Court's review of state court decisions to "[f]inal judgments or decrees rendered by the highest court of a State . . . where," in relevant part, "the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States." 28 U.S.C. § 1257(a). Here, there is no federal question for this Court to decide—except for

one which is obviously moot and hypothetical, *see supra* Argument A.2.a—because, while Petitioner tries to disguise his gripe with the Carter Plan as a federal violation, he advances nothing more than disagreement over whether the Pennsylvania Supreme Court correctly applied the "policies and preferences of the State" in choosing a map. Pet. 31-32.

Indeed, Petitioner concedes that "the problem is *not* that the Supreme Court of Pennsylvania chose to impose a congressional map in response to a legislative impasse." *Id.* at 30. Rather, Petitioner asserts that "[t]he problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s interpretation of section 2c." *Id.* But *Branch* simply instructs that a court adopting a congressional plan should "redistrict[] in the manner provided by state law." 538 U.S. at 274 (cleaned up); *see also id.* (explaining that following state "policies and preferences" means to redistrict "in the manner provided by state law"). And because the Pennsylvania Supreme Court is the final arbiter of Pennsylvania law, *see Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("[S]tate courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) (similar), this Court lacks jurisdiction to second-guess that court's interpretation of state law. *See, e.g.*, *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976) (explaining that this Court is "bound to accept the interpretation of [state] law by the highest court of the State").

To the extent Petitioner argues that the Pennsylvania Supreme Court misapplied its own state "policies and preferences" as defined by *Branch*, and that a violation of *Branch* is a violation of the

Elections Clause such that the Pennsylvania Supreme Court's "adherence to state policy . . . detract[s] from the requirements of the Federal Constitution," that reasoning fails. Pet. 31 (quoting *Branch*, 538 U.S. at 275). Irrespective of Petitioner's misreading of *Branch*, explained further below, *see infra* Argument D.2*, Branch* makes clear that it is not attempting to define state "policies and preferences." Rather, *Branch* requires "deferr[ing] to the State's 'policies and preferences' for redistricting" to respect "state sovereignty," recognizing that "instruct[ing] state officials on how to conform their conduct to state law" could create a conflict with *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984). *Branch*, 538 U.S. at 278 n.**.

Ultimately, Petitioner's reasoning is circular. He admits that the underlying question is whether the Pennsylvania Supreme Court followed *Branch*—in which the underlying question is whether the Pennsylvania Supreme Court followed its own state policies and preferences. Thus, the only question Petitioner presents is whether the Pennsylvania Supreme Court followed Pennsylvania state law, policies, and preferences—a question on which *that court* is the ultimate decider. There is no remaining dispute for this Court to resolve.

B. Petitioner has not demonstrated a compelling reason to grant certiorari.

Even if this Court had jurisdiction, "presence of jurisdiction upon petition for writ of certiorari does not, of course, determine the exercise of that jurisdiction." *Hammerstein v. Super. Ct. of Cal.*, 341 U.S. 491, 492 (1951). Under this Court's rules, "[a] petition for a writ of certiorari will be granted only for compelling reasons." U.S. Sup. Ct. R. 10. Such a compelling reason might exist where a state court of

last resort has decided an "important" federal question that either (1) "has not been, but should be, settled by this Court" or (2) conflicts with a decision of a state supreme court or federal appellate court, or this Court. *Id.* Rule 10 expressly states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." *Id.* As described below, the petition does not present compelling reasons of the character that merit certiorari review.

1. Petitioner fundamentally seeks error correction in the absence of any error.

Petitioner concedes that his concern with the Pennsylvania Supreme Court's opinion is simply that it failed to follow this Court's existing precedent. Pet. 30 ("The problem is that the Supreme Court of Pennsylvania's actions were not authorized by *Branch*'s interpretation of section 2c . . . ."). In other words, Petitioner's aim is for this Court to correct what he perceives to be the state court's error of law. But this Court rarely indulges such requests, and it especially should not do so here, where there is no error to correct and where any error correction would necessarily involve interpreting state law.

Precisely as *Branch* sets forth, the Pennsylvania Supreme Court adopted a congressional map "in the manner provided by [state] law," by "follow[ing] the 'policies and preferences of the State.'" 538 U.S. at 274 (first alteration in original) (quoting *White v. Weiser*, 412 U.S. 783, 795 (1973)). For example, the Pennsylvania Supreme Court chose a map that adhered to "factors that are deeply rooted in the organic law of our Commonwealth" and that are codified, for state legislative redistricting, in the

Pennsylvania Constitution. *League of Women Voters*, 178 A.3d at 816, *cited in* Costello App. 5-6a (listing the state's "traditional core districting criteria"). The Pennsylvania Supreme Court also ensured that the map it adopted "does not violate Pennsylvania's Free and Equal Elections Clause . . . and complies with the [federal] Voting Rights Act, 52 U.S.C. § 10301." Costello App. 6a; *see Branch*, 538 U.S. at 275 ("[F]ederal statutory commands . . . are appropriately regarded . . . as a part of the state election law."). Just as importantly, the Pennsylvania Supreme Court "comport[ed] with this Commonwealth's constitutional precepts" in *declining* to select the map that Petitioner now prefers. Costello App. 27a.

In any event, even if the Pennsylvania Supreme Court *did* err in applying *Branch*, "the misapplication of a properly stated rule of law" rarely warrants this Court's certiorari review. U.S. Sup. Ct. R. 10. Moreover, assessing that alleged misapplication would expressly involve deciding whether the Pennsylvania Supreme Court "follow[ed] the 'policies and preferences of the State.'" *Branch*, 538 U.S. at 274. That, again, is a question of state law, on which this Court must defer to the Pennsylvania Supreme Court. *See supra* Argument A.2.b.

2. Rather than presenting important federal questions that this Court should decide, the petition asks questions that rarely arise.

Petitioner's questions are inextricably bound to the specific facts of this case and are unlikely to arise again. As an initial matter, state courts draw congressional districting plans in the first instance only when the state legislative process fails to produce a map following the decennial census. *See Johnson v. Wis. Elections Comm'n*, 967 N.W.2d 469, 473 (Wis.

2021); *Wattson v. Simon*, 970 N.W.2d 42 (Minn. 2022). But Petitioner's questions do not even apply to the majority of those scenarios—they apply only when a state has lost at least one congressional seat after the decennial census *and* its state legislative process fails to produce a map. In the redistricting cycle following the 2020 census, only one state—Pennsylvania—met both of these conditions.

To the extent Petitioner's questions attempt to reach scenarios in which a state's congressional delegation size stays the same or increases—where 2 U.S.C. § 2a(c)(1) or 2a(c)(2) would apply, *see* Pet. 27—a plurality of this Court has already explained that "paragraphs (1) through (4) of § 2a(c) have become (because of post-enactment decisions of this Court) in virtually all situations plainly unconstitutional." *Branch*, 538 U.S. at 273. Thus, even setting aside that these issues are not before the Court, there is no reason to consider whether §§ 2a(c)(1) and 2a(c)(2) limit state courts' remedial discretion as Petitioner suggests.

3. There is no division of authority over Petitioner's questions.

Petitioner does not raise any question on which there is a division of authority, nor does Petitioner contend otherwise. Petitioner relies solely on his own interpretations of *Branch* in arguing that state courts should order at-large elections and defer to legislative proposals—interpretations that seem to be his alone, as he does not cite a single authority in support.

C. This petition is a poor vehicle to decide the issues presented.

Even if this Court had compelling reasons to entertain Petitioner's questions in the abstract, Petitioner's conflicting positions in this case before the

state court and this Court have resulted in both waiver and an undeveloped record of the issues he now asks this Court to decide in the first instance.

1. Petitioner should be estopped from claiming error over rulings he invited the Pennsylvania Supreme Court to make.

As this Court has explained, invited error is a form of waiver. *See Johnson v. United States*, 318 U.S. 189, 199–201 (1943). When a lower court "follow[s] the course which [Petitioner] himself helped to chart and in which he acquiesced," a challenge to the lower court's decision is "plainly waived." *Id.* at 201; s*ee also* 14 Cyc. of Fed. Proc. § 67:12 (3d ed.) ("[A]n appellant will not ordinarily be permitted to complain of an alleged error that she invited or that the court committed at her instance or inducement."). The purpose of the invited error doctrine is "to protect the integrity of the judicial process" and to prevent litigants from playing "fast and loose with the courts." *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2001) (citations omitted). Because Petitioner invited the Pennsylvania Supreme Court to make several of the rulings which he now claims were in error, Petitioner has waived any challenge he might otherwise have raised.

First, while Petitioner now claims it was a violation of the Elections Clause for the Pennsylvania Supreme Court to modify the primary election calendar, Petitioner specifically advocated for such a modification. *Compare* Carter App. 3a, 38a (Petitioner encouraging court to "enjoin further use and enforcement of the Election Code's provisions relating to the timeline for circulating, filing, and objecting to nomination petitions and immediately adopt the timetable proposed by [Petitioner] for the 2022

General Primary"), *with* Pet. 1-2 (Petitioner arguing the Pennsylvania Supreme Court "flagrantly violat[ed] the Elections Clause" by "order[ing] state election officials to disregard the General Primary Calendar enacted by the Pennsylvania Legislature in favor of a court-preferred schedule"). Moreover, after the Commonwealth Court "recommend[ed] for adoption by the Supreme Court *the [Petitioner's] proposed revisions* to the 2022 General Primary Election Calendar" Costello App. 394a (emphasis added), the Pennsylvania Supreme Court gave the parties an opportunity to take exceptions to that recommendation; neither Petitioner nor any other party objected to the Court's authority to modify administrative election-related deadlines. *See supra* Statement B.[7]

Where Petitioner not only acquiesced in the modification of election deadlines, but specifically requested it, Petitioner cannot now complain that the Court did exactly as Petitioner asked. *See City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987) (explaining "there would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested").

Second, while Petitioner now claims it was error for the Pennsylvania Supreme Court to adopt a plan other than that proposed by the General Assembly, he previously argued *against* adoption of that plan. *Compare* Carter App. 43a (Petitioner

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[7] Petitioner claims "no litigant had asked" for modified election deadlines. Pet. 17. This is false—Petitioner himself asked the Commonwealth Court to modify pre-election deadlines. *See supra* Statement.

arguing, "the Special Master also erred in her ultimate recommendation that this Court should select HB 2146"), *with* Pet. 31 (Petitioner arguing "[t]he Supreme Court of Pennsylvania disregarded [*Branch v. Smith*] when it rejected the HB 2146 map that had been proposed by the state legislature") (cleaned up). Throughout the litigation, Petitioner encouraged the state courts to reject the General Assembly's plan; he cannot now complain that the Pennsylvania Supreme Court did exactly that.

2. The Pennsylvania Supreme Court did not have an adequate opportunity to consider or rule upon the issues Petitioner now raises.

This Court has explained that it "will not decide questions not raised or litigated in the lower courts." *Kibbe*, 480 U.S. at 259. This approach makes sense: this Court does not ordinarily decide issues in the first instance but instead sits "as a court of review." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

In addition to the error alleged above, Petitioner also now claims it was error for the Pennsylvania Supreme Court not to order at-large elections after it imposed a modified election calendar. Pet. 30. But no party raised this argument to the Pennsylvania Supreme Court—not Petitioner, not the Legislative Leaders, and not any of the eleven other parties. Instead, each party advocated for the Court to select its own, 17-district congressional plan. For this reason, the Pennsylvania Supreme Court reasonably did not address the issue, meaning this Court would need to consider the issue in the first instance. It should not do so.

D. The decision below was correct.

Finally, this Court should decline to grant the Petition because Petitioner's arguments—that the Pennsylvania Supreme Court should have (1) ordered at-large congressional elections and (2) adopted the General Assembly's vetoed map—conflict with federal statutes and this Court's precedent.

1. The Pennsylvania Supreme Court was correct to order a single-member congressional plan.

Pursuant to its Elections Clause powers, Congress enacted 2 U.S.C. § 2c, which requires that congressional representatives be elected from single-member districts. U.S. Const. art. I, § 4 ("Congress may at any time by Law make or alter [election] Regulations."). This Court has explained that § 2c authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally" and "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming." *Branch*, 538 U.S. at 270, 272. Petitioner does not dispute state courts' authority in this regard. *See, e.g.*, Pet. 26 ("[I]t does *not* violate the Elections Clause for the state judiciary to enforce section 2c."). Although § 2a(c)(5) provides that a state's representatives "shall be elected from the State at large" when a state loses one or more congressional districts after a decennial census and has not been "redistricted in the manner provided by the law thereof," that provision provides a fallback scheme to be used only as a last resort where districting has not occurred. *See Branch*, 538 U.S. at 275.

Petitioner's theory of § 2a(c)(5) advances an argument as baseless as it is untenable. Petitioner's novel theory is that the moment *any* election-related

deadline would have to be modified, no matter how minor or ministerial, courts cannot adopt a congressional plan. Instead, they must order at-large congressional elections that Petitioner concedes would violate § 2c. Pet. 25.

In *Branch*, the Court rejected the interpretation of § 2c and § 2a(c) that Petitioner advances here, holding that § 2a(c) is "inapplicable *unless* the state legislature, and state . . . courts, have all failed to redistrict pursuant to § 2c" and "the election is *so imminent* that no entity competent to complete redistricting" can redistrict. 538 U.S. at 275 (emphasis added).[8] A plurality of the Court explained:

> § 2a(c) cannot be properly applied—neither by a legislature nor a court—as long as it is feasible for [] courts to effect the redistricting mandated by § 2c. So interpreted, § 2a(c) continues to function as it always has, as a last-resort remedy to be applied when, on the eve of a congressional election, no constitutional redistricting plan exists and there is no time for either the State's legislature or the courts to develop one.

Id. Whatever moment is considered the "eve of a congressional election," when it is "[in]feasible" for any competent entity to redistrict, that occasion never came to pass here. The Pennsylvania Supreme Court adopted a lawful congressional plan three months

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[8] Although a four-justice plurality made this statement, three other justices found that § 2a(c)(5) had been impliedly repealed and was inapplicable in any scenario. *Branch*, 538 U.S. at 285 (Stevens, J., concurring). Thus, seven justices found that § 2a(c)(5) could either never apply or could only apply in the extremely limited circumstances described by the *Branch* plurality.

before the state's primary election and almost eight months before the general election; that plan was implemented without incident; and the election process is proceeding under it, in accordance with § 2c and this Court's precedents. Indeed, Pennsylvania's primary election took place, as scheduled, on May 17 under the Carter Plan; §2a(c) thus could not have been "properly applied" because the state court "effect[ed] the redistricting mandated by § 2c." *Id.* Petitioner can hardly contend that the primary was "so imminent" that the state court could not "complete redistricting pursuant to state law . . . without disrupting the election process," where, in fact, the election process is proceeding without disruption. *Id.*

The Pennsylvania Supreme Court issued minor modifications to two pre-election deadlines leading up to the May 17, 2022 primary "[t]o provide for an orderly election process." Costello App. 149a. This change was not only slight, non-disruptive, and months before both the primary and general elections, but essential to crafting a remedy for the underlying violations of state and federal law caused by the political branches' failure to redistrict—a remedy this Court has repeatedly encouraged state courts to formulate. As the Court explained in *Growe*, "[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." 507 U.S. at 33 (quotations omitted). The Pennsylvania Supreme Court's authority to adopt a congressional plan necessarily entails the authority to modify election-related administrative deadlines to effectuate that plan—as Petitioner himself recognized and requested,

supra Statement—especially when, as here, doing so did not disrupt the election process.[9]

Moreover, this Court has endorsed federal courts' authority to alter pre-election deadlines and even elections themselves. *See, e.g.*, *Upham v. Seamon*, 456 U.S. 37, 44 (1982) ("[W]e leave it to [the District Court] in the first instance to determine whether to modify its judgment [as to the state's congressional apportionment plan] and reschedule the [congressional] primary elections for Dallas County or . . . to allow the election to go forward in accordance with the present schedule."). That precedent supports state courts' authority to modify election deadlines as well, especially here, where Petitioner's argument to the contrary is entirely contingent on *Branch*'s reference to "disrupting the election process," which itself applies to "state and federal courts" equally. 538 U.S. at 275.[10]

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[9] Likewise, Pennsylvania's Legislative Leaders expressly endorsed the state courts' power to modify the election schedule in this case, arguing in their pleadings before the Pennsylvania Commonwealth Court that "nominating petition deadlines" have been moved by state courts in the past and "could still be moved in this election cycle." Toth Carter App. 6a (citing *Mellow v. Mitchell*, 607 A.2d 204, 237 (Pa. 1992)). And when the Legislative Leaders argued the Pennsylvania Supreme Court should adopt the Special Master's Report in its entirety, they accordingly endorsed the state election calendar changes the Special Master proposed. *See generally* Toth Carter App. 99-161a; 162-180a.

[10] State courts have routinely made similar election schedule modifications in the redistricting context. *See, e.g.*, Order, *In the Matter of 2022 Legis. Districting of the State*, Misc. Nos. 21, 24, 25, 26, 27 (Md. Feb. 11, 2022) (postponing candidate filing and related deadlines before 2022 primaries); Order, *Harper v. Hall*, No. 413P21 (N.C. Dec. 8, 2021) (postponing 2022 primary filing deadlines and primary election); *Mellow*, 607 A.2d at 237, 244 (revising pre-primary deadlines in similar congressional

Since Congress enacted § 2c in 1967, no state has ever conducted at-large congressional elections. Indeed, Congress enacted § 2c in part to ensure that courts would not order at-large elections. *See Branch*, 538 U.S. at 269 (noting Congress enacted § 2c to stave off the "risk . . . that judges forced to fashion remedies would simply order at-large elections"). And on previous occasions where legislative impasse has followed the loss of one or more congressional seats, courts have adopted single-member congressional district plans.[11] Petitioner has no answer for how his newfound reading of the Elections Clause comports with this legislative history and historical practice. The better reading of § 2a(c)(5) is the *Branch* plurality's reading: that it only comes into play on the eve of an imminent election when no competent entity could possibly pass a lawful map in time. *Id.* at 275. Again, whatever moment that is, the orderly conduct of Pennsylvania's primary and general elections shows that it did not come to pass here.

Worse yet, Petitioner's theory of § 2a(c)(5) would usurp state legislatures' redistricting power. Even when faced with impasse, courts routinely defer to the political process for as long as they can before imposing a remedy. Here, in order to provide maximal time for the political process to produce a map, the Pennsylvania courts declined to act until after the 2021 legislative session adjourned without an enacted map. *See supra* Statement. The Pennsylvania Supreme Court exercised extraordinary jurisdiction

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redistricting impasse case "to provide for an orderly election process").

[11] *See, e.g.*, *Favors v. Cuomo*, No. 1:11-CV-05632 (RR)(GEL)(DLI)(RLM), 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *Alexander v. Taylor*, 51 P.3d 1204 (Okla. 2002).

only after the Governor vetoed the General Assembly's proposal. *Id.* If Petitioner's theory were adopted, courts would be forced to implement a remedy before political branches had exhausted all opportunities to successfully redistrict, flipping the current balance on its head.

2. The Pennsylvania Supreme Court was not obligated to adopt the General Assembly's proposed map.

Petitioner next argues that the Pennsylvania Supreme Court should have adopted the legislature's vetoed congressional plan. *See, e.g.,* Pet. 31-32. Putting aside that Petitioner argued against adoption of that plan to the Pennsylvania Supreme Court, *see supra* Argument C.1, *Branch* does not require courts to elevate a legislature's failed proposal over a gubernatorial veto. *See* Pet. 31-32. To the contrary, Petitioner's argument that a vetoed bill with no force of law deserves judicial deference—beyond being deeply antidemocratic—has already been rejected by the Court.

When courts redistrict pursuant to § 2c, they must "follow the policies and preferences of the State," which can include a state legislature's plan. *Branch*, 538 U.S. at 274 (quotation omitted). But as the Court has explained, a reapportionment plan that has been vetoed by the governor represents little more than the legislature's "proffered" plan and certainly does not reflect "the State's policy" where, as here, the Governor, has a contrary recommendation. *Sixty Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 197 (1972). Petitioner concedes this, admitting that "redistricting legislation that is vetoed by the governor is not 'prescribed . . . by the Legislature' within the meaning of the Elections Clause." Pet. 10 (citing *Smiley v. Holm*, 285 U.S. 355 (1932)). Indeed,

because the governor is part of the lawmaking process in Pennsylvania, *see Smiley*, 285 U.S. at 372–73, and he vetoed the General Assembly's proposal, that map is definitively *not* Pennsylvania's policy, *see Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Co. 1982) (explaining that vetoed legislative plan "cannot represent current state policy any more than the Governor's proposal"). The Pennsylvania Supreme Court explained as much in its decision. Costello App. 27a (explaining that it "comport[ed] with this Commonwealth's constitutional precepts" in *declining* to defer to the vetoed map and that the Special Master's deference to that map as representing "the will of the people" was "offensive to the separation-of-powers" in the Commonwealth).

The only support Petitioner offers for his theory is a misreading of a single line from *Branch*, in which the Court noted that lower courts adopting remedial redistricting plans should "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." 538 U.S. at 274 (quoting *White v. Weiser*, 412 U.S. at 795). But this sentence cannot bear the weight Petitioner gives it. As an initial matter, the plain language of this passage reveals Petitioner's misreading of it. Petitioner's selective emphasis on "plans proposed by the state legislature" ignores that a state's "policies and preferences" can arise from multiple sources. If "or" has meaning, *see U.S. v. Woods*, 571 U.S. 31, 45–46 (2013) ("[Or's] ordinary use is almost always disjunctive, that is, the words it connects are to be given separate meanings" (quotation and citation omitted)), which of course it must, *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) ("If possible, every word . . .

is to be given effect."), then the Pennsylvania Supreme Court's adoption of a map based on Pennsylvania's "statutory and constitutional provisions"—precisely what it did here—fits neatly within *Branch*'s holding.

Petitioner's argument, moreover, ignores not only the plain text but also the context of this sentence. *White v. Weiser*, the original source of the phrase on which Petitioner so heavily relies, was referring to the policies and preferences of a state as reflected in a "duly enacted statute of the State of Texas," which had been passed by the legislature *and* signed by Texas's governor—not proposed legislation that never became law. 412 U.S. at 795. The Court did not—nor has it ever—required lower courts to defer to a plan without the force of law. Tellingly, Petitioner cites no authority supporting his novel theory that unenacted legislative proposals are owed any deference by courts.

The *Carstens* court explained the absurd result of requiring a judicial override of the governor's veto: "To take the [Petitioner's] position to its logical conclusion, a partisan state legislature could simply pass any bill it wanted, wait for a gubernatorial veto, file suit on the issue and have the Court defer to their proposal." 543 F. Supp. at 79. This Court has never endorsed such an end-run around a state's lawmaking process. Instead, the Court has repeatedly held that state courts should—just as the Pennsylvania Supreme Court did here—take up the redistricting pen when the political process has failed and adopt a plan that complies with the "State's substantive policies and preferences for redistricting." *Branch*, 538 U.S. at 277–78 (citations omitted); *see also Growe*, 507 U.S. at 33–34.

Numerous other courts have followed this Court's instruction and rejected Petitioner's

argument. *See, e.g., O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982) ("[W]e are not required to defer to any plan that has not survived the full legislative process to become law."); *Wis. Elections Comm'n.*, 967 N.W.2d at 666 n.8 (rejecting argument that legislature's vetoed map was an expression of "the policies and preferences of the State[.]"); *Hippert v. Ritchie*, 813 N.W.2d, 374, 379 n.6 (Minn. 2012) ("[B]ecause the Minnesota Legislature's redistricting plan was never enacted into law, it is not entitled to [*Upham*] deference.") (citing *Perry v. Perez*, 565 U.S. 388, 392–96 (2012)); *Hartung v. Bradbury*, 33 P.3d 972, 979 (Or. 2001) (similar); *Wilson v. Eu*, 823 P.2d 545, 576 (Cal. 1992) (similar).

This Court's affirmance of *Balderas v. Texas*, No. 6:01CV158, 2001 WL 36403750 (E.D. Tex. Nov 14, 2001), *summarily aff'd*, 536 U.S. 919 (2002), another impasse case where no redistricting plan had been enacted, is instructive. In *Balderas*, like here, the political branches had failed to enact a state redistricting plan following the 2000 Census. *See* 2001 WL 36403750, at *2. As a result, the court set out to "draw a redistricting plan according to neutral redistricting factors, including compactness, contiguity, and respecting county and municipal boundaries." *Id*. (cleaned up). As the Court explained, because "there was no recently enacted state plan," the *Balderas* court was "compelled to design an interim map based on its own notion of the public good." *Perry*, 565 U.S. at 396. There, the court owed no deference to the vetoed map.

As Petitioner admits, "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." Pet. 25-26. 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." *Id.* at 26. Faced with the "unwelcome obligation" of adopting a plan, Costello App. 4a, the Pennsylvania Supreme Court followed this Court's instruction in *Branch* and *White* and adhered to "policies and preferences of the State, as expressed in statutory and constitutional provisions." *Branch*, 538 U.S. at 274 (quotation omitted). Petitioner can point to nothing in state or federal law indicating that a vetoed proposal of a state legislature is owed judicial deference.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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