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 IN OPPOSITION

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QUESTION PRESENTED

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?

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INTRODUCTION

Petitioner has forfeited and waived every argument that he seeks to raise in his Petition—and this Court lacks jurisdiction to consider those arguments, both because they were never properly presented in state court and because Petitioner himself lacks Article III standing on appeal. As if that were not reason enough to deny review, there is no circuit split on the question that Petitioner seeks to present, which arises from a legal theory that no court has ever addressed and which is foreclosed by this Court's opinion in *Branch v. Smith*, 538 U.S. 254 (2003). Ignoring the insuperable wall of vehicle issues that preclude review and jurisdiction, Petitioner alternatively asks the Court to grant or hold this case in light of *Moore v. Harper*, No. 21-1271. But that request fundamentally misdescribes the supposed similarities between the two cases—most obviously by describing this case as a dispute under the Elections Clause (which it is not). Even more disturbingly, Petitioner essentially asks the Court to reward him for presenting a question neither raised nor addressed before the *certiorari* stage, and for suggesting an answer to that question at odds with every position he took below. For these reasons, the Petition should be denied.

BACKGROUND

A. A Political Impasse Triggers State Judicial Proceedings

Pennsylvania lost a congressional seat in the 2020 decennial census. During the months that followed, it became increasingly apparent that the General Assembly and the Governor would be unable to agree on

a new congressional map: although the General Assembly proposed a map (HB 2146), the Governor opposed and ultimately vetoed it. *See* Pa. Const. art. IV, § 15 (establishing gubernatorial veto power); *Smiley v. Holm*, 285 U.S. 355, 372-73 (1932) ("There is nothing in [the Elections Clause] which precludes a state from providing that legislative action in districting the state for congressional elections shall be subject to the veto power of the Governor . . . .").

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

On December 17, 2021, anticipating the need for judicial resolution, two groups of plaintiffs filed suit in the Commonwealth Court of Pennsylvania. One of those groups was known as the "Carter Petitioners." They asked the Commonwealth Court to declare the prior 2018 map unconstitutional—and to adopt a constitutional congressional districting plan that would provide for 17 rather than 18 total districts.

Three days later, on December 20, 2021, the Commonwealth Court directed that "if the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties." Commw. Ct. Dec. 20, 2021 Order. The court also established a briefing schedule.

B. Petitioner Intervenes and Affirms the Role of the State Courts in Adopting an Appropriate Congressional Map

The consolidated *Carter* proceedings unfolded in the Commonwealth Court over the next six weeks. Ten sets of parties sought leave to intervene; ultimately, six were granted leave to intervene and the remaining four participated as *amici*. The intervenors included Respondent Governor Wolf. They also included a group known as the Reschenthaler Intervenors, named for Congressman Guy Reschenthaler. Petitioner Costello was part of this group, along with former Congressmen Tom Marino and Bud Shuster, and Swatara Township Commissioner Jeffrey Varner. For ease of reference, we will ascribe the positions taken by this group to Petitioner.

In seeking leave to intervene, Petitioner never suggested that the Elections Clause or 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." *See* Pet. at (i). Nor did he advocate use of the congressional map that the Legislature had set forth in a vetoed bill. Instead, in his intervention petition (and again at every point subsequently in the state courts), Petitioner adhered to the recognized authority of state

courts to adopt congressional districts in the face of an impasse and to make modest incidental revisions to the primary election calendar.

Thus, in his application to intervene, Petitioner stated that he would "adopt by reference" various paragraphs in the *Carter* petitioners' petition for review. Commw. Ct. Dec. 31, 2021 Application for Intervention I, ¶ 84. He thereby agreed that "when 'the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan.'" Commw. Ct. Feb. 20, 2022 Carter Pet. for Review, ¶ 4 (citation omitted). He also agreed that "the Court should intervene to protect the constitutional rights of Petitioners and voters across the Commonwealth." *Id.* at ¶ 7.

C. Petitioner Champions Adoption of the Reschenthaler Maps and Supports Modification of the Election Schedule

On January 14, 2022, Judge McCullough of the Commonwealth Court stated that if the General Assembly "has not produced a new congressional map by January 30, 2022, the Court shall proceed to issue an opinion based on the hearing and evidence presented by the Parties." Commw. Ct. Jan. 14, 2022 Order. By January 24, the participating parties had submitted 13 proposed districting maps for consideration, accompanied by opening and reply briefs supporting their respective motions.

The opening and reply briefs submitted by Petitioner did not include a single citation of 2 U.S.C. § 2a(c)(5). They did not include a single citation of the Elections Clause. And they did not urge adoption of

the plan proposed by the General Assembly. Simply stated, they looked nothing at all like the Petition he has filed in this Court.

Instead, Petitioner's briefs urged adoption of two alternative plans—known as Reschenthaler I and II—that Petitioner and his consultants had developed on their own. In advocating adoption of these plans, Petitioner did *not* argue that the remedial discretion of the state court is constrained by the legislature's map. To the contrary, he told the Commonwealth Court that its task "is guided by the same constitutional requirements that constrain the General Assembly." *See* Commw. Ct. Jan. 24, 2022 Intervenor Reschenthaler et al. Br. at 9. In other words, Petitioner argued that the state court's remedial power was controlled by the same traditional redistricting criteria applicable to all congressional districting in Pennsylvania. Consistent with that understanding, Petitioner made a lengthy argument from first principles meant to show that his own proposed maps (and *not* the legislature's in HB 2146) should be adopted under Pennsylvania's redistricting criteria. *See id.* at 9-43.[1] In these parts of his briefs, as noted, Petitioner did not cite the Elections Clause or 2 U.S.C. § 2a(c).

Near the end of his opening brief, Petitioner addressed the question of timing. Here, again in direct conflict with the position he advances in this Court, he

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[1] In a footnote in his reply brief, Petitioner described the General Assembly's map as enjoying "deference." *See* Commw. Ct. Jan. 26, 2022 Intervenor Reschenthaler et al. Reply Br. at 1, n.1; *see also id.* at 9. He did not link this claim to any state or federal legal principle. Nor did he advocate adoption of that map, or otherwise stop advocating adoption of the map he had created.

expressly advocated the state court's authority to modify certain interim election-related deadlines if needed to ensure full consideration of the proposed congressional maps. *See id.* at 45-46 (arguing that "the Court can and should simply adopt and approve the same election-related deadlines from [a prior case] . . . [to] give the Court additional time to carefully review, consider, and select a new congressional redistricting plan").

On January 26, 2022—the same day Petitioner filed his reply brief with Judge McCullough—Governor Wolf vetoed the General Assembly's proposed map. Over the next two days, Judge McCullough held an evidentiary hearing and reaffirmed that she would issue a new map if the political branches failed to adopt one by January 30. *See* Jan. 28, 2022 Hr'g Tr. 19:21-20:8. During this hearing, Petitioner's counsel advocated for adoption of the Reschenthaler I and II maps, *id.* at 1043:15-1053:23, and agreed that "the [primary election] calendar should be moved," *id.* at 1056:10-23.

D. Consistent With Unbroken Prior Practice, the Pennsylvania Supreme Court Exercises Extraordinary Jurisdiction

January 30 passed without any further agreement between the Governor and the General Assembly. Given the tight schedule and the need for a definitive ruling, the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the case on February 2, 2022. *See* Pa. Feb. 2, 2022 Order Granting Pet'rs' Emergency Application for Extraordinary Relief (explaining that this approach was warranted "[g]iven the impasse between the legislative and executive

branches concerning the adoption of congressional districts, and in view of the impact that protracted appeals will have on the election calendar, and time being of the essence . . ."); *see also* 42 Pa.C.S. § 726. That exercise of extraordinary jurisdiction was consistent with Pennsylvania law: "[O]ver the last six decades," the Pennsylvania Supreme Court has exercised such jurisdiction "in every single case in which the task of drawing Pennsylvania's election districts has fallen to the judiciary." *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 304580, at *4 (Pa. Feb. 2, 2022) (Dougherty, J., concurring). To expedite proceedings, Judge McCullough was designated as the Special Master and instructed to submit a report and proposed map by February 7, 2022. Pa. Feb. 2, 2022 Order.

In her report, Judge McCullough recommended adoption of HB 2146, as well as modest changes to the general primary election schedule that had been advocated for by the proponents of that map. In reaching this conclusion, Judge McCullough evaluated criteria including population equality. With respect to the map proposed by the Carter Petitioners, Judge McCullough did not—as Petitioner incorrectly states—conclude that it violated the one-person, one-vote principle. *Contra* Pet. at 14. Instead, she noted that the Carter plan's two-person deviation was "statistically insignificant" and "apparently the byproduct of legitimate efforts to limit the number of municipal splits." App. 308a. While she proposed assigning it "less weight" in light of this deviation, *id.*, she did not find it unconstitutional on that basis, and this was only one of several

reasons she recommended against the plan, *see* App. 377a.[2]

On February 9, 2022, following its receipt of Judge McCullough's report, the Pennsylvania Supreme Court temporarily suspended primary election deadlines. *See* App. 154a. No party to the proceedings objected to that order or sought its reconsideration. This order, based on ample precedent, avoided a risk of both voter and candidate confusion: the period for circulating and filing nomination petitions was set to begin on February 15, 2022, but candidates did not yet know the boundaries of their districts.

E. Petitioner Urges the Pennsylvania Supreme Court to Reject Judge McCullough's Recommendation

The parties and *amici* responded to Judge McCullough's report with hundreds of pages of briefs raising exceptions to (and arguments in support of) her conclusions. None of these briefs disputed the state court's legal authority to adopt a congressional districting plan or its power to propose changes to the election calendar incidental to the adoption of a new map. Nor did any party advocate at-large elections.

That includes Petitioner, who filed a 74-page brief and (once again) did not even cite 2 U.S.C. § 2a(c) or the Elections Clause. Rather, Petitioner devoted five

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[2] Judge McCullough's conclusory statement that the Carter map is "contrary to Pennsylvania and United States Supreme Court precedent" was concerned only with a separate issue, namely use of "least change" analysis and the methods used by an expert to define the census population. App. 367a.

full pages to attacking the Special Master's recommendation supporting HB 2146: "The Special Master also erred in her ultimate recommendation that this Court should select HB 2146, rather than Reschenthaler 1 or 2." *See* Pa. Feb. 14. 2022 Br. in Support of Exceptions, at 2 (Guy Reschenthaler, et al.); *see also id.* at 61-66 (explaining under state law principles why HB 2146 should be rejected and one of the Reschenthaler maps should be adopted as the final congressional map). Nowhere in this brief did Petitioner make the federal law argument he attempts to raise before this Court. Nor did Petitioner object to the changes that the Pennsylvania Supreme Court had already made to the election calendar (the very same changes that he now contends necessitated statewide at-large congressional elections under § 2a(c)).

F. The Pennsylvania Supreme Court Issues the Decision Below

On February 23, 2022, following a review of the exceptions that the parties had filed to Judge McCullough's report, the Pennsylvania Supreme Court issued an order adopting the Carter Plan as Pennsylvania's congressional map. *See* App. 148a. In this order, the court also vacated its February 9 order and extended certain interim election-related deadlines by a few days, including the first day to circulate and file nomination petitions, which had been February 15 and (given the passage of that date) was reset to February 25. All of the dates in the original calendar that fell after April 1 remained completely unchanged, including the date of the primary election itself. Finally, the court stated that a reasoned opinion would follow. App. 151a.

That opinion issued on March 9, 2022. *See* App. 3a. In it, the Pennsylvania Supreme Court applied "the same commands that the Legislature must satisfy" when evaluating districting plans, including traditional core criteria, subordinate historical considerations, state constitutional precepts, and compliance with the Voting Rights Act, 52 U.S.C. § 10301. *See id.* at 28a. Adhering to those criteria, the court concluded that the Carter proposal was superior. *See id.* Consistent with Judge McCullough's report and the many briefs that had been submitted to them (including by Petitioner), no member of the Pennsylvania Supreme Court addressed the federal arguments that Petitioner raises here concerning 2 U.S.C. § 2a(c)(5) or the Elections Clause.[3]

G. Petitioner's Counsel Files Two Defective Petitions for *Certiorari*

On May 24, 2022, Petitioner's counsel sent an email to Respondents' counsel attaching two petitions for *certiorari*. The first petition was styled *Daniels v. Carter* and was prepared on behalf of Teddy Daniels, whose only attempted involvement in the state court proceedings was a defective motion to intervene following entry of the February 9, 2022 order. Presumably because this motion was riddled with state law procedural errors, it had been summarily rejected, and

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[3] In a concurrence, Justice Wecht explained his separate view that Governor Wolf's veto of HB 2146 deprived that proposed bill of special consideration in the state judicial redistricting process. *See* App. 73a-84a. This concurrence did not address Petitioner's new theory that the Elections Clause or 2 U.S.C. § 2a(c) somehow directly required assigning near-presumptive remedial priority to HB 2146.

so Mr. Daniels had never actually participated in the case. The second petition was styled *Costello v. Carter*, but unlike the Petition here at issue, it included a second proposed petitioner: Seth Grove, who did not even attempt to participate in the state court *Carter* case, and who was expressly identified as "not a party to the proceedings below."

On June 8, 2022, Petitioner's counsel sent an email to Respondents' counsel stating as follows: "The clerk's office rejected the Daniels petition because Mr. Daniels was not a party to the state-court proceedings (he had sought to intervene in the state supreme court but his motion to intervene was denied). The clerk's office also asked us to correct the Costello petition by removing Seth Grove as a petitioner, as Mr. Grove was not a party to the state-court proceedings." This left only a single petition for *certiorari* with a single party: Ryan Costello, who is Petitioner here. But Mr. Costello is no ideal petitioner, either: he never advanced any of the federal law arguments that appear in the Petition, and in fact his legal arguments in the state court hearings were squarely opposed to the Petition in every material respect.

THE PETITION SHOULD BE DENIED

This Court should deny review of the Petition for four reasons. *First*, an array of obstacles—including lack of jurisdiction under 28 U.S.C. § 1257(a), forfeiture, waiver, and Petitioner's own failure to demonstrate Article III standing—preclude review of the question presented. *Second*, there is no division of judicial authority on the question presented, which reflects a novel theory that Petitioner fashioned for the very first time while seeking review in this Court.

Third, Petitioner's arguments not only lack merit, but are directly foreclosed by *Branch v. Smith*, 538 U.S. 254 (2003), among other authorities. *Finally*, in asking this Court to grant review or hold the case in light of *Moore v. Harper*, Petitioner fundamentally misdescribes the issues in this case and skips past significant procedural and substantive distinctions from *Moore*.

I. Insuperable Obstacles Preclude Review of the Question Presented

A. Petitioner's Arguments Are Jurisdictionally Barred

Petitioner attempts to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a), which authorizes review of the final judgment of a state high court where (among other things) "any title, right, privilege, or immunity is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." (emphasis added). *See* Pet. at 8. But § 1257(a) does not provide limitless jurisdiction over state court rulings. Rather, under § 1257(a) and its predecessors, "this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim 'was either addressed by or properly presented to the state court that rendered the decision we have been asked to review.'" *Howell v. Mississippi*, 543 U.S. 440, 443 (2005); *see also Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With very rare exceptions, we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been

asked to review." (cleaned up)). Although this Court has raised but not resolved the question, the best interpretation of precedent is that § 1257's limitations are jurisdictional in character. *See* Wright & Miller, 16B Federal Practice & Procedure § 4022 (3d ed. April 2022 update).

Here, the court below did not "expressly address[] the question" raised by Petitioner. *See Adams*, 520 U.S. at 86. No opinion addressed Petitioner's Election Clause arguments, nor did any opinion address his proposed interpretation or application of 2 U.S.C. § 2a(c)(5) or 2 U.S.C. § 2c. Nor is there any suggestion in the majority opinion that it addressed any such asserted limits on its remedial discretion. Although the majority considered and rejected the propriety of offering "preferential treatment" to HB 2146 within its application of traditional state redistricting criteria, it did not do so by reference to any of the legal arguments or federal authorities that Petitioner cites here, and it did not do so at the urging of Petitioner (who advocated *against* adoption of HB 2146 and in favor of his own districting plans). *See* App. 25a-26a. Instead, the majority responded only to Judge McCullough's reliance on *Upham v. Seamon*, 456 U.S. 37 (1982), a case not cited in the Petition or otherwise relied upon by Petitioner. And as the majority below explained, *Upham* was distinguishable because the districting plan in that case had been signed by the Governor, whereas the legislative proposal here was vetoed and

therefore never took legal effect.[4] This short analysis of *Upham* did not draw the Pennsylvania Supreme Court into the distinct federal statutory issues that Petitioner attempts to raise in the Petition.

Because the court below was "silent on [the] federal question" concerning the Elections Clause and 2 U.S.C. § 2a(c), the burden shifts to Petitioner to demonstrate that the issue was nonetheless "properly presented" and that "the state court had a fair opportunity to address the federal question that is sought to be presented here." *Adams*, 520 U.S. at 87-88. Petitioner cannot carry that burden. He never made the federal legal arguments that he advances here. Not a single page of his briefs pressed these points. As we demonstrate *infra*, he actually made directly opposed arguments. He most certainly "did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases," in urging the state courts to adopt his novel view of the Elections Clause and 2 U.S.C. § 2a(c). *See Howell*, 543 U.S. at 443.

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[4] Petitioner notes that Mr. Daniels sought to raise certain federal claims similar to those in the Petition. But his application to intervene—which was filed more than a month after the court-ordered intervention deadline and several days after February 9, 2022 (the date on which certain election deadlines were temporarily suspended)—was summarily denied, apparently based on its numerous state law procedural defects. Mr. Daniels's arguments were thus never presented to the state court. To the extent Petitioner insists otherwise, his position is at odds with the doctrine of adequate and independent state grounds. It is also at odds with common sense: an untimely, procedurally defective, and summarily rejected intervention motion cannot inject brand new federal issues into a state case. Of course, Petitioner himself never adopted or sought to affiliate himself with any of these arguments, even in his later-filed brief in the state supreme court.

Petitioner criticizes the Pennsylvania Supreme Court for "never so much as mention[ing] the Elections Clause or 2 U.S.C. § 2a(c)(5)." Pet. at 20. But that is not a point in Petitioner's favor. The reason these provisions went uncited is that nobody (including Petitioner) advanced the arguments that Petitioner designed in a bid for *certiorari* after the proceedings below ended. And in such circumstances, the Petition is jurisdictionally precluded under § 1257(a). This conclusion not only respects precepts of percolation and judicial modesty, but also upholds federalism and comity: "It would be unseemly in our dual system of government to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider." *Adams*, 520 U.S. at 90 (cleaned up). Because the state high court never had an opportunity to consider Petitioner's federal arguments, and because it did not in fact consider them, this Court lacks *certiorari* jurisdiction under § 1257(a). *See, e.g.*, *Webb v. Webb*, 451 U.S. 493, 501 (1981) ("[T]here should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.").

B. Petitioner's Arguments Are Forfeited

Independent of § 1257(a), this Court ordinarily "does not decide questions not raised or resolved in the lower courts." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (cleaned up). Therefore, even within an otherwise properly presented case and even setting aside the more technical standards under § 1257(a),

an argument that a petitioner "never presented to any lower court" is typically deemed to have been forfeited. *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 37 (2015).

That principle should control here. Petitioner never cited the Elections Clause or 2 U.S.C. § 2a(c) in his state court briefs. He did not contend that they limited the remedial discretion of the state court. He did not assert that they had any bearing on the proceedings. And he failed to press these points all the way through his final brief on February 14, 2022—which was submitted late enough that timing offers no excuse for his failure to raise any of the arguments that he now seeks to present (including with respect to the February 9, 2022 order that modified the state's election schedule).

Given the choices that Petitioner made in his prosecution of the case below, there is no good basis for allowing him to erase history and start over with an entirely different constitutional theory. That would not only require this Court to address an argument that no court has ever considered, but it would also invite future litigants to try their luck with completely novel arguments developed solely for the *cert*-stage.

C. Petitioner's Arguments Are Waived

The law of waiver interposes yet another vehicle issue against Petitioner. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *United States v. Olano*, 507 U.S. 725, 733 (1993) (citations omitted). Courts have repeatedly held that when a party changes its mind, arguing one

position and then advocating the contrary position on appeal, it has waived the inconsistent new position. *See United States v. Sukhtipyaroge*, 1 F.4th 603, 606 (8th Cir. 2021); *United States v. Coleman*, 884 F.3d 67, 72 (1st Cir. 2018); *White v. Chafin*, 862 F.3d 1065, 1070 (10th Cir. 2017).

Here, Petitioner not only failed to press his Elections Clause and statutory points in the state court proceedings, but he also made arguments squarely at odds with these points. First consider Petitioner's varied attacks in this Court on the modification of the election schedule. *See* Pet. at 4, 16-17, 30-31, 32-33. Petitioner affirmatively supported such a modification at *every* stage of the proceedings below, from his initial merits briefing, *see* Commw. Ct. Jan. 24, 2022 Intervenor Reschenthaler et al. Br. at 45, to oral argument, *see* Jan. 28, 2022 Hr'g Tr. 1056:10-23, to his failure to raise any objections following issuance of the initial February 9, 2022 order, to the absence of any objections in his final February 14, 2022 brief. However convenient Petitioner now finds it to complain about the decision of the Pennsylvania Supreme Court, the reality is that he advocated that very decision.

The same is true of the legal standard applied below. Petitioner never urged the state courts to adopt HB 2146. Nor did he ever argue that their discretion was constrained by the Elections Clause, by 2 U.S.C. § 2a(c), or by an obligation to adhere to the vetoed legislative proposal. Instead, Petitioner consistently advanced a totally contrary view: that the General Assembly's proposed map should be *rejected* in favor of his own proposals; that the state courts should in fact adopt single-member districts (rather than an at-large

election); and that the relevant redistricting legal principles included those that the Pennsylvania Supreme Court ultimately accepted. It is nothing short of dizzying to read Petitioner's state court briefs and then to read his Petition in this court. They advance fundamentally inconsistent arguments—which this Court would never know from the Petition itself, since Petitioner curiously fails to address any of his own prior arguments or filings in the state court.

Litigants are free to argue in the alternative, or to evolve their arguments as a case proceeds. Yet doctrines like waiver (and forfeiture, and judicial estoppel, and many others) exist to prevent *exactly* the sort of improper gamesmanship on display here. Petitioner has not merely deepened his legal position. He has buried it six feet under, hidden the gravestone, ignored its untimely passing, and attempted to pass off a brand-new position as though it were the recently deceased. But no matter how much Petitioner acts otherwise, he made clear and unequivocal arguments below, and his new contentions would foreclose virtually every one of them. That is a classic case for application of the waiver doctrine. At the very least, it is a compelling reason for the Court not to exercise its *certiorari* stage discretion in Petitioner's favor.

D. Petitioner Lacks Article III Standing

In addition to the numerous obstacles discussed above, the Petition should be denied because Petitioner lacks Article III standing to proceed in federal court.

"No principle is more fundamental to the judiciary's proper role in our system of government than the

constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997). Thus, Article III "'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (citation omitted). It follows that "[s]tanding to sue in any Article III court is . . . a federal question which does not depend on the party's prior standing in state court." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985) (citation omitted). Where a petitioner in this Court claims injury from entry of a state court judgment, and seeks *certiorari* on that basis, he must prove "a specific injury stemming from the state-court decree." *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

Petitioner cannot meet that standard. As a former congressman who has not held federal elective office in several years, the only interests he can advance belong to him as a voter. But as a voter, his interests in enforcing the Elections Clause and 2 U.S.C. § 2a(c) are not "concrete" or "particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Rather, they amount to a generalized grievance, "shared in substantially equal measure by all or a large class of citizens[.]" *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *accord Carney v. Adams*, 141 S. Ct. 493, 498 (2020) ("A grievance that amounts to nothing more than an abstract and generalized harm to a citizen's interest in the proper application of the law does not count as an 'injury in fact.'").

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

This Court unanimously dismissed the voters' suit for lack of Article III standing, holding that they "assert[ed] no particularized stake in the litigation." *Id.* at 442. "The only injury" the plaintiffs alleged was "that the law—specifically the Elections Clause—[had] not been followed." *Id.* Citing decades of precedent, the Court found that this was "precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance[.]" *Id.*

Lance plainly precludes Petitioner from satisfying Article III on a theory of voter standing. *See, e.g.*, *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *O'Rourke v. Dominion Voting Sys., Inc.*, No. 21-1161, 2022 WL 1699425, at *1 (10th Cir. May 27, 2022); *King v. Whitmer*, 505 F. Supp. 3d 720, 735-36 (E.D. Mich.

2020). Accordingly, Petitioner lacks Article III standing to press his arguments here.[5]

II. No Court Has Ever Considered Petitioner's Theory

Another consideration that weighs heavily against review of the Petition is the absence of any circuit split on the question presented or the federal law arguments offered in relation to it. Petitioner does not allege the existence of any division of opinion in the lower courts. Nor could he: although many state and federal courts have addressed the role of state courts in congressional districting when the political branches reach an impasse, there is no disagreement among those courts concerning the scope of their remedial discretion. *See infra* at III.B. Under this Court's rules, the absence of any split on the question presented is reason enough to deny review.

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

But there is more. To the best of our knowledge, Petitioner's theory is novel. He does not identify any court that has specifically considered it, let alone any court that has accepted it. Although judges have previously considered and rejected aspects of his argument—most notably this Court in *Branch v. Smith*, 538 U.S. 254 (2003)—Petitioner's overarching theory is a recent fabrication. And that novelty is itself a strike against consideration of Petitioner's arguments in the first instance. This Court has in many cases "recognized that when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting). In Justice Gorsuch's words, that is because "the crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights." *Maslenjak v. United States*, 137 S. Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment); *accord Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019). Given that Petitioner's theory is unprecedented, and that it has not previously been presented to any court (including the court below), this Court should deny review.[6]

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[6] There has been only one occasion on which a court considered a version of Petitioner's arguments under § 2a(c)(5) and § 2c—namely, a few months ago in *Toth v. Chapman*, No. 21A457, when

III. Petitioner's Argument Lacks Merit

Petitioner's position fares no better on the merits. He broadly contends that the Pennsylvania Supreme Court violated the Elections Clause and 2 U.S.C. § 2a(c)(5) in selecting a congressional map following a political impasse. Specifically, he faults the Pennsylvania Supreme Court for failing "to explain how these map-drawing powers that it has conferred on itself can be squared with the Elections Clause." Pet. at 3. *But see* Pet. at 25-26 ("It does *not* violate the Elections Clause for a court to redraw an unconstitutional map . . . if the state legislature is unwilling or unable to do so." (emphasis in original)). Petitioner further asserts that the Pennsylvania Supreme Court should have ordered an at-large election rather than the use of a map with congressional districts. Finally, he contends that the court below should have assigned conclusive weight to HB 2146 (even though that map was vetoed and he argued against implementing it).

Although Petitioner repeatedly gestures at the Elections Clause, he does not rest any part of his argument on a claim that the Pennsylvania Supreme Court committed a freestanding constitutional error, or that its reasoning or result are in direct conflict with any requirement of the Elections Clause. This explains why the Petition includes virtually no discussion of original meaning, history and tradition, prior practice, or precedent concerning the Elections

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this Court *unanimously* denied an application for emergency relief filed by the same lawyer who represents Petitioner here. *See also Toth v. Chapman*, No. 1:22 Civ. 208, 2022 WL 821175, at *1 (M.D. Pa. Mar. 16, 2022) (dismissing Elections Clause claims for lack of Article III standing).

Clause. It also explains why Petitioner disavows any invocation of the so-called independent state legislature doctrine. *See* Pet. at 22. Instead, as becomes particularly clear at pages 30 to 32 of the Petition, Petitioner's entire argument reduces to a narrow, fact-bound claim that the Pennsylvania Supreme Court misapplied two statutes: 2 U.S.C. § 2a(c)(5) and 2 U.S.C. §2c, which Congress enacted pursuant to its Elections Clause authority. It is solely in this roundabout way that Petitioner attempts to style this as an Elections Clause case. *See id.* at 30 (describing "the problem" in the Pennsylvania Supreme Court's decision as an incorrect "interpretation of section 2c"); *see also id.* at 30-32.

In any event, it is Petitioner, not the Pennsylvania Supreme Court, who has misread the relevant statutes. This follows from *Branch v. Smith*, 538 U.S. 254 (2003), which speaks directly to the central issues here. We first explain *Branch*'s interpretation of § 2a(c)(5) and § 2c, and we then show how this interpretation supports the decision below and unequivocally forecloses Petitioner's position.

A. *Branch v. Smith* and the Interaction of § 2a(c)(5) and § 2c

Like this case, *Branch* arose from a redistricting dispute after a state lost a seat in the decennial census and its political process reached an impasse. *Id.* at 258. The first issue in *Branch* (not relevant here) concerned the propriety of a federal court's order establishing a congressional map and prohibiting the use of a map created by the state courts. *See id.* at 258-66. This Court upheld that order, which gave rise to a second question (directly relevant here) about whether

the federal court had properly required single-member districts as opposed to an at-large election. *See id.* at 266.

The answer to that question turned on the interaction between § 2a(c)(5) and § 2c. *See id.* at 280 (plurality). Section 2a(c)(5) applies whenever a state loses a seat in the decennial census. It provides that "[u]ntil a State is redistricted in the manner provided by the law thereof after any apportionment," representatives "shall be elected from the State at large." Several decades after enacting § 2a(c)(5), however, Congress enacted § 2c. Under § 2c, whenever a state is entitled to more than one representative following a decennial census, "there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established . . . ." As this Court noted in *Branch*, "the tension between these two provisions is apparent: Section 2c requires States entitled to more than one Representative to select their Representatives from single-member districts . . . Section 2a(c), however, requires multimember districts or at-large elections in certain situations." *Id.* at 267-68.

In *Branch*, one party proposed resolving this tension by holding that § 2c applies only to *legislative* redistricting. On that view, "§ 2c tells the legislature what to do (single-member districting) and § 2a(c) provides what will happen absent legislative action—in the present case, the mandating of at-large elections." *Id.* at 268.

The Court, however, rejected that interpretation—and held that § 2c applies whenever state or federal

courts are called upon to engage in redistricting. *Contra* Pet. at 3-4 (asserting that there is no basis under the Elections Clause for state courts to engage in redistricting following a legislative impasse). To explain that result, the Court first noted that "every court that has addressed the issue has held that § 2c requires courts, when they are remedying a failure to redistrict constitutionally, to draw single-member districts whenever possible." *Id.* at 270. The Court added that this interpretation adhered to statutory text. *See id.* at 271-72. And on these two grounds, the Court unqualifiedly held that § 2c "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming." *Id.* at 273; *see also id.* ("§ 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal and state—as it is on legislatures.").

This interpretation of § 2c raised a question: if courts are required to create single-member districts when called upon to produce maps, what role (if any) does that leave for § 2a(c)(5), which requires at-large elections? Three Justices would have held that there was nothing left for § 2a(c)(5) and that § 2c therefore repealed it by implication. *See id.* at 285-292 (Stevens, J., concurring in part and concurring in the judgment). In a controlling plurality opinion, however, Justice Scalia disagreed. He first observed that § 2a(c)(5) applies only where a state is not redistricted "in the manner provided by the law thereof after any apportionment." *Id.* at 274. He added that when a state or federal court creates a map under § 2c—which often occurs after a political impasse—that qualifies as redistricting "in the manner provided by the law thereof." Thus, whenever a state or federal court redistricts as

expressly authorized by § 2c, there is no need for further consideration of § 2a(c)(5). That fallback provision is triggered only in the extremely rare case when "the state legislature, and state and federal courts, have all failed to redistrict pursuant to § 2c." *Id.* at 275 (plurality). In this sense, § 2a(c)(5) is 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.* (citation omitted).

Branch thus stands for two important propositions: first, that state courts are empowered (and required) by § 2c to create single-member district congressional maps when the state legislative process fails to do so; and second, that § 2a(c)(5)'s provision for at-large statewide elections is irrelevant to state redistricting except in extreme circumstances where it is too late for any competent authority to redistrict.

B. The Decision Below Is Correct Under *Branch v. Smith*

Petitioner asserts that the Pennsylvania Supreme Court violated § 2a(c)(5) and the Elections Clause. He does not advance any standalone argument concerning supposed violations of the Elections Clause. Instead, he advances only a contention that the Pennsylvania Supreme Court violated § 2a(c)(5) by moving a few initial deadlines in the election schedule and by failing to give sufficient weight in its map-drawing process to the vetoed legislative proposal that he himself advocated against.

This argument is foreclosed by *Branch*. Whereas Petitioner's entire brief rests on the premise that map-

drawing starts with § 2a(c)(5)—a provision that features prominently in both his question presented and his analysis—*Branch* confirmed that § 2a(c)(5) is merely a "last-resort remedy" that ordinarily has no significance in the redistricting process. Simply put, § 2a(c)(5) matters only when the state legislature, the state courts, and the federal courts all fail to redistrict on the eve of an election. Petitioner's heavy reliance on this provision leads his analysis awry at the very first step. So, too, does his equivocation on whether state courts may properly exercise redistricting powers when the state legislative process hits an impasse. As *Branch* and many other precedents confirm, state courts are fully authorized and expected to draw single-member districts under § 2c in such cases. *See id.* at 267-72; *see also, e.g.*, *Perry v. Perez*, 565 U.S. 388, 392 (2012); *Growe v. Emison*, 507 U.S. 25, 30-31 (1993); *Scott v. Germano*, 381 U.S. 407, 409 (1965) (collecting cases); *Stephenson v. Bartlett*, 562 S.E.2d 377, 393 (N.C. 2002). *Perry v. Del Rio*, 66 S.W.3d 239, 242-43 (Tex. 2001); *Mellow v. Mitchell*, 607 A.2d 204, 206 (Pa. 1992); *Wilson v. Eu*, 816 P.2d 1306, 1306 (Cal. 1991).

Because Petitioner builds from a faulty foundation, the rest of his argument crumbles. In just a single page, Petitioner contends that § 2a(c)(5)'s rule of last resort was triggered here. He reasons that because the Pennsylvania Supreme Court moved a few initial deadlines, the entire redistricting process failed and Pennsylvania was required to conduct statewide at-large elections for the first time since the 18th century. This argument is unsupportable, and Petitioner offers no case to support it. As Justice Scalia made clear, § 2a(c)(5) applies only "*on the eve* of a congressional

election" when no legislative or judicial body can fashion a redistricting plan. 538 U.S. at 275 (plurality) (emphasis added). No court has ever understood that rule to apply in circumstances like those here. The Pennsylvania Supreme Court did not modify the date of the primary election; instead, to ensure sufficient time for candidates to obtain nominating signatures after districts were announced, it modified—by roughly a week—only a handful of preliminary deadlines related to nomination petitions. This decision was advocated or acquiesced to by every party in the state court proceedings, including Petitioner and the leadership of the General Assembly.[7] And ample precedent supports judicial authority to make such marginal schedule modifications in an exercise of remedial authority. *E.g.*, Order at 2, *Perez v. Perry*, No. 5:11 Civ. 360 (W.D. Tex. Mar. 1, 2012); *Mellow*, 607 A.2d at 237 & 244; *Assembly of State of Cal. v. Deukmejian*, 639 P.2d 939, 964 (Cal. 1982).

This leaves only Petitioner's claim that the Pennsylvania Supreme Court was effectively required to adopt HB 2146, the proposed-but-vetoed legislative map. Notably, Petitioner never links this supposed requirement to any well-defined history or tradition, or to any controlling practice in prior judicial redistricting cases. Nor does he identify any case in which a court invoked the Elections Clause, § 2a(c)(5), or § 2c to require use of a vetoed legislative proposal. In fact,

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[7] *See* Commw. Ct. Dec. 27, 2021 Memo. of Law in Support of App. for Leave to Intervene by Cutler et al., at ¶ 6, No. 464 MD 2021 ("[I]n the past, those nominating petition deadlines have been moved for Congressional elections, and therefore could still be moved in this election cycle.").

the only case he cites is *Branch*. But there, Justice Scalia explained that when redistricting under § 2c, a court 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[.]" 538 U.S. at 274-75 (plurality) (cleaned up). He added that the relevant "policies and preferences" are "expressed in a State's statutes, constitution, proposed reapportionment plans, or a State's traditional districting principles." *Id.* at 277-78 (cleaned up). Put differently, a court complies with federal law when it "redistricts a State in a manner that complies with that State's substantive districting principles." *Id.* at 278.

This interpretation of federal law has *never* been understood as effectively requiring state or federal courts to impose vetoed legislative proposals when called upon to redistrict in the face of an impasse. That would create perverse incentives in state political processes, defy history and prior practice, and stand at odds with both *Branch* and *Smiley v. Holm*, 285 U.S. 355 (1932). Instead, when called upon to engage in redistricting, courts have looked to a state's substantive policies and preferences concerning districting, and have been guided by those principles. *See, e.g.*, *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 628 (D.S.C. 2002); *Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982); *Norelli v. Sec'y of State*, 2022 WL 1498345, at *8 (N.H. May 12, 2022); *Johnson v. Wisconsin Elections Comm'n*, 972 N.W.2d 559, 568-69 (Wis. 2022); *Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012); *Alexander v. Taylor*, 51 P.3d 1204, 1211 (Okla. 2002). That is what the Pennsylvania Supreme Court did here. There is simply no merit to Petitioner's

claim that it erred in applying the very same redistricting principles that he expressly urged it to follow, *see supra* at 3-6—principles that are firmly established in Pennsylvania law.

IV. *Moore v. Harper* Presents Completely Distinct Issues

As a fallback, Petitioner asks the Court to grant this case and set it for oral argument alongside *Moore v. Harper*, or alternatively to hold the Petition pending a decision in that case. These requests should be rejected outright: no matter how many times Petitioner gratuitously mentions the Elections Clause, or complains about lack of deference to state legislatures, this case has nothing to do with *Moore*. The only basis on which Petitioner attempts to connect the two cases collapses upon scrutiny. And that very basis is itself the product of gamesmanship: a novel theory generated at the last minute and at odds with every position Petitioner took below.

The first and most fundamental reason to deny Petitioner's request is that the Court lacks jurisdiction to grant review under 28 U.S.C. § 1257(a). And even if this Court possessed jurisdiction, a wall of vehicle defects—waiver, forfeiture, and lack of standing—would impede review of the question that Petitioner seeks to present (and that he claims will overlap with *Moore*). Granting review and consolidating this case with *Moore* would thus invite nothing but confusion. Moreover, given that Petitioner's entire argument for holding this case in light of *Moore* depends on an argument that he waived and forfeited, the Court should not reward Petitioner for an overt attempt at manipulating

this Court's discretionary docket to challenge the decision below.

Petitioner's argument separately fails because, unlike *Moore*, this case does not involve any direct application of the Elections Clause. It instead concerns two federal statutes, 2 U.S.C. § 2a(c) and § 2c. The petitioners in *Moore* do not cite either of these statutes in their *certiorari*-stage filings, nor do they cite *Branch* (the principal case that controls the outcome in this case). There is thus no reason to believe that *Moore* will have any bearing on the questions of statutory interpretation at issue here.

A final reason to deny Petitioner's request is that *Moore* involves completely different issues. There, this Court is reviewing a map that was fully enacted; here, in contrast, HB 2146 was never enacted because it was vetoed by the Governor. *See Smiley*, 285 U.S. at 372-73. Although Petitioner glides past that distinction, it is foundational in this context, since it speaks to the basic question of whether there is a valid legislative enactment in the first place. And that is not the only dispositive distinction between this case and *Moore*. The central question in *Moore* is whether the Elections Clause directly limits the authority of a state court in reviewing a fully enacted map and adopting a remedy when that map offends the state constitution. Again, in contrast, this case does not present any question about Elections Clause limits on state judicial authority, any questions about the so-called independent state legislature doctrine, or any question about what remedy state high courts can apply when a fully enacted map is invalidated. Instead, the only question here concerns the profoundly different scenario of a

legislative impasse, where *no* map is enacted and the state court is called upon to intervene pursuant to a federal statute (§ 2c).

This case and *Moore* both involve redistricting by state courts. But that is the extent of their similarities. In every respect that matters, this case and *Moore* are utterly distinct, and there is no basis to grant or hold the Petition in light of *Moore*, particularly given Petitioner's total reliance on waived and forfeited arguments.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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