No. 21A457

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM C. TOTH JR., *et al.*,

Applicants,

v.

LEIGH CHAPMAN, in her official capacity as Acting Secretary of the Commonwealth of Pennsylvania, *et al.*,

Respondents,

&

CAROL ANN CARTER, *et al.*,

Intervenor-Respondents.

On Emergency Application for Writ of Injunction from the United States District Court for the Middle District of Pennsylvania

INTERVENOR-RESPONDENTS' RESPONSE IN OPPOSITION TO EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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CORPORATE DISCLOSURE STATEMENT

Per Supreme Court Rule 29.6, no Intervenor-Respondent has a parent company or a publicly-held company with a 10 percent or greater ownership interest in it.

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INTRODUCTION

Last month, the Pennsylvania Supreme Court adopted the current congressional map (the "2022 Congressional Map") after the legislative process failed to ensure the state's congressional districts were reapportioned based on 2020 Census data in time for the 2022 congressional elections. The Pennsylvania Supreme Court similarly adopted congressional maps in 1992 and 2018, when no constitutional map was in place in advance of an impending election. The 2022 election is now underway. Congressional candidates are already circulating nomination petitions under the 2022 Congressional Map, and Pennsylvania state officials have taken numerous steps to implement that Map.

As far as Pennsylvania is concerned, the state court's adoption of a congressional map was uncontroversial. Leaders of both caucuses in both houses of the Commonwealth's General Assembly, as well as the Governor, participated in the state court action without objection, and Pennsylvania's legislative leaders expressly invoked this Court's precedent in stating that "it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections." Carter Respondents' Appendix ("Carter App'x) 52 fn. 2 (citing *Growe v. Emison*, 507 U.S. 25, 32–36 (1993)).

It is only Applicants—six Pennsylvania citzens who sat out the state court proceedings altogether—who now ask this Court to retroactively nullify Pennsylvania's redistricting process based on an allegedly exclusive legislative prerogative over congressional redistricting that the General Assembly's leaders

themselves disclaim. Not only do they ask the Court to effectively overrule Pennsylvania's highest court and throw out the 2022 Congressional Map, they ask it to force the Commonwealth to conduct its upcoming congressional elections on an at-large basis, something no state in the union has done in more than half a century, since Congress required single-member congressional districts.

The Court should reject Applicants' request in its entirety. As a threshold matter, the Court lacks jurisdiction. But even if the Court were to reach the merits, Applicants seek extraordinary injunctive relief, and they must correspondingly meet a high threshold to demonstrate that the legal rights they assert are indisputably clear. They fall far short.

Applicants' Elections Clause claims have no foundation in law, and this Court has made clear that Applicants are not the proper parties to even assert such claims. Moreover, Applicants ignore this Court's binding precedents endorsing the duty of state courts to redistrict where state legislatures are unable or unwilling to act. "The 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." *Growe*, 507 U.S. at 33 (quoting *Scott v. Germano,* 381 U.S. 407, 409 (1965)). And federal law enacted by Congress "embraces action by state and federal courts when the prescribed legislative action [over congressional districting] has not been forthcoming." *Branch v. Smith*, 538 U.S. 254, 272 (2003). This law is squarely on point and uncontestable—

and yet Applicants inexplicably fail to even grapple with it, let alone provide sound reason for the Court to depart from its earlier rulings.

Applicants' equal population claim is likewise without merit. The plus or minus one person deviation reflected in the 2022 Congressional Map has been accepted by courts and states across the country as the equivalent of perfect population equality.

Nor do the equities cut in Applicants' favor. Applicants' late-filed complaint, as well as their procedurally improper tactics for emergency relief, came after Pennsylvania's elections were already underway. Enjoining the 2022 Congressional Map and ordering the state to conduct at-large elections at this late hour would cause chaos and irreparably harm voters and the Commonwealth of Pennsylvania.

The law and equities speak as one: Applicants are not entitled to the relief they seek. Accordingly, the Carter Respondents respectfully request that this Court deny the Emergency Application for Writ of Injunction.

JURISDICTION

This Court lacks jurisdiction over the application because neither 28 U.S.C. § 1253 nor 28 U.S.C. § 1651 provides a basis for jurisdiction here. This Court also lacks jurisdiction to hear Applicants' claims under U.S. Const. Art. I, § 4 because no Applicant has Article III standing to maintain those claims.

BACKGROUND

I. STATE COURT IMPASSE PROCEEDINGS

More than ten months ago, shortly after the 2020 Census results were released, a group of Pennsylvania voters residing in overpopulated congressional districts filed a lawsuit in Pennsylvania's Commonwealth Court alleging that the state's

congressional districts were malapportioned. *See generally* Applicants' Appendix (App'x) 90-115. Those voters—then, the Carter Petitioners,[1] now, the Carter Respondents[2]—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. App'x 110. Multiple groups of legislators and voters moved to intervene in the case; Applicants did not. While the Commonwealth Court dismissed the case without prejudice on ripeness grounds in October 2021, it underscored that, "[s]hould lawmakers fail to act, Pennsylvania courts have demonstrated the ability to move swiftly to implement remedial congressional districting plans." App'x 133-149.

In mid-December 2021, when it became clear that Pennsylvania's political branches faced certain impasse, the Carter Respondents filed a new petition, once again asking the Pennsylvania Commonwealth Court to declare the then-existing congressional map, which was based on outdated Census data, unconstitutional and adopt a new map. *See generally* App'x 49-71. On December 20, the Commonwealth Court entered a scheduling order stating that "[i]f the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties." App'x 176 ¶ 3.

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[1] The Carter Petitioners were Pennsylvania voters Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael Guttman, Maya Fonkeu, Brady Hill, Mary Ellen Balchunis, Tom Dewall, Stephanie McNulty, and Janet Temin.

[2] The Carter Respondents consist of all but one of the original Carter Petitioners.

That scheduling order also expressly invited interested parties to seek intervention by December 31, 2021. App'x 176 ¶ 3. Ten separate parties moved to intervene, including the Pennsylvania General Assembly's Republican and Democratic leadership, Governor Wolf, current and former members of the state's congressional delegation, and multiple groups of individual voters. None of the Applicants sought intervention in that case.

Meanwhile, on December 21, the Carter Respondents filed an application for extraordinary jurisdiction in the Pennsylvania Supreme Court to ensure a new map would timely be in place. App'x 72-88. Once again, the General Assembly leaders sought intervention in that proceeding; once again, Applicants did not. The Pennsylvania Supreme Court denied the application for extraordinary jurisdiction without prejudice, App'x 178, and the litigation continued apace in the Commonwealth Court.

The Commonwealth Court ultimately granted intervention to six parties and allowed the other four to participate as *amici*. App'x 184-185 ¶¶ 1, 5. All intervenors and *amici* proceeded to participate in those judicial proceedings and in the court's process to adopt a congressional map. App'x 184-185 ¶¶ 3, 6. In their applications for leave to intervene in the state court proceedings, Speaker Cutler and Leader Benninghoff of the Pennsylvania House and President Corman and Leader Ward of the Pennsylvania Senate (hereinafter the "Republican Legislative Leaders") stated 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,"

Carter App'x 52 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (2018)); they interposed no objection to "the commencement of a judicial redistricting process," Carter App'x 55; and they endorsed the state courts' power to modify the election schedule, Carter App'x 6 ¶ 6 (citing *Mellow v. Mitchell*, 607 A.2d 204, 237 (1992)). The Republican 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 violations of the U.S. Constitution, even with respect to laws governing congressional elections." Carter App'x 52 (citing *Growe*, 507 U.S. at 32–36). Similarly, current and former Pennsylvania congressmen advocated for the state courts to "continue to execute the blueprint—which proved remarkably effective—as set forth in *Mellow*" to resolve a legislative impasse in congressional redistricting. Carter App'x 85-86 ¶¶ 53-54.

The Commonwealth Court directed parties and *amici* to submit proposed maps by January 24, 2022. In total, parties and *amici* submitted 13 different proposed maps to the Commonwealth Court for consideration. App'x 184-185 ¶¶ 3-4, 6. The Commonwealth Court then held a two-day evidentiary hearing on the proposed maps, restating at the start that it would proceed to adopt a new congressional district map if the General Assembly and Governor failed to adopt one by January 30. App'x 185, 284-285. At no time in those hearings did any party contest the judiciary's authority to adopt a new congressional map for the Commonwealth in light of the impasse or to modify election-related deadlines.

Governor Wolf vetoed the General Assembly's proposed map on January 26, and the Commonwealth Court's January 30 deadline passed with no legislatively-enacted map in place. App'x 285. On February 2, the Pennsylvania Supreme Court exercised extraordinary jurisdiction over the litigation, designating the Commonwealth Court judge who had been presiding over the proceedings in the lower court as Special Master, and ordering oral argument for February 18. App'x 263-264. In the lead up to that argument, the Pennsylvania Supreme Court entertained new intervention motions and granted amicus status to new interested parties who had not participated in the Commonwealth Court proceedings. *See, e.g.,* Carter App'x 181-183; 217. Applicants again chose not to participate. Thirteen parties ultimately submitted briefing and presented oral argument to the Pennsylvania Supreme Court.

On February 23, the Pennsylvania Supreme Court announced the adoption of the 2022 Congressional Map. App'x 536. In its order, the Court retained the Commonwealth's May 17, 2022 primary date but gave candidates an additional week to collect nomination petitions, moving the deadline by which petitions must be filed with the Secretary of the Commonwealth from March 8 to March 15. App'x 537. As a result, congressional candidates are already circulating nomination petitions under the 2022 Congressional Map, as they have been for nearly a week. State officials have also taken numerous steps to implement the 2022 Congressional Map. App'x 537; Carter App'x 221-222.[3]

[3] The Pennsylvania Supreme Court indicated that a written opinion explaining its decision would follow, App'x 538; that opinion has not yet been issued.

II. FEDERAL COURT PROCEEDINGS AND INTERVENTION

Applicants waited until February 11, 2022 to initiate this litigation in the U.S. District Court for the Middle District of Pennsylvania, in which they collaterally attack the long on-going state court proceedings and the judgment of Pennsylvania's highest court. *See generally* App'x 1-14. Applicants' initial complaint came more than nine months after the Carter Respondents first filed in state court seeking to ensure that a constitutional map would be adopted in time for the 2022 election should the political branches reach impasse (as they had in prior redistricting cycles). Applicants' complaint came two months after the Commonwealth Court issued its schedule for proceedings related to the impasse. It came more than two weeks after Governor Wolf vetoed the General Assembly's congressional plan, and nearly as long after the deadline the Commonwealth Court announced for proceeding to select a map if the legislative process failed.

In their initial complaint, Applicants argued that Pennsylvania's state courts lack the power to order a remedial map under the Elections Clause of the U.S. Constitution and 2 U.S.C. § 2a(c)(5). App'x 12-13. On February 20, Applicants filed a first amended complaint, in which they maintained the same claims but added a new plaintiff. *See generally* App'x 18-32. It was not until that day that Applicants moved for a temporary restraining order ("TRO") asking the district court to intervene and order Pennsylvania to conduct at-large elections. App'x 33-48. The Carter Respondents moved to intervene in the case on February 22. *See generally* Mot. Intervene, *Toth v. Chapman*, No. 22-0208-JPW (M.D. Pa. Feb. 22, 2022), ECF Nos. 14, 15.

On February 23, after the Pennsylvania Supreme Court ordered implementation of the 2022 Congressional Map, Applicants filed a renewed Emergency Motion for TRO, again asking the district court to order at-large congressional elections and noting that, "[i]f the Court does not grant the requested TRO by midnight tonight, the plaintiffs will deem the request denied and seek emergency relief from Justice Alito." App'x 532-533. On February 25, after convening the parties on a telephone conference, the district court advised that, "[i]n lieu of granting a temporary restraining order," it would establish an expedited briefing schedule "to resolve all jurisdictional issues and, if appropriate, the merits of Plaintiffs' motion for preliminary injunction." App'x 561 ¶ 1.

Two days later, Applicants moved for leave to file a second amended complaint, alleging for the first time that the 2022 Congressional Map is unconstitutionally malapportioned. App'x 563-564. The next day, *before* the district court granted leave to file, Applicants sought relief from this Court. App'x 816 (docketed on Feb. 28, 2022 at 4:47 a.m.); Order, *Toth v. Chapman*, No. 22-0208-JPW (M.D. Pa. Feb. 28, 2022), ECF No. 55 (docketed on Feb. 28, 2022 at 12:18 p.m.).

Under the district court's existing scheduling order, all motions to dismiss will be fully briefed by Saturday, March 5, and the court will hold a hearing on Applicants' pending preliminary injunction motion on Friday, March 11. App'x 562. To date, the district court has not had an opportunity to hear from the State Respondents or the Carter Respondents on the merits of Applicants' claims, nor has it had any opportunity to consider Applicants' malapportionment claim, which was raised in a

proposed second amended complaint mere hours before Applicants sought relief from this Court on that basis.

On March 2, the district court requested that the Chief Judge of the Third Circuit appoint a three-judge court pursuant to 28 U.S.C. § 2284, which has not yet been constituted as of this filing.

ARGUMENT

Applicants bear a heavy burden to demonstrate that the extraordinary remedy of a writ of injunction is warranted. "The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court's authority to issue an injunction." *Turner Broad. Sys., Inc. v. F.C.C.*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., in chambers). The Court has "consistently stated, and [its] own Rules so require, that such power is to be used sparingly." *Id.*; *see* S. Ct. R. 20.1 ("Issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised."). Issuance of such an "injunction 'does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts,' and therefore 'demands a significantly higher justification' than that required for a stay." *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (quoting *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)).

To meet this heavy burden, first, "an applicant must demonstrate that 'the legal rights at issue are indisputably clear.'" *Id.* (quoting *Turner Broad. Sys.*, 507 U.S. at 1303 (Rehnquist, C.J., in chambers)). Second, "[a]n injunction is appropriate only

if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)). This Court's Rules also require Applicants to demonstrate "that adequate relief cannot be obtained in any other form or from any other court." S. Ct. R. 20.1. Even then, this Court must consider whether "exceptional circumstances" warrant such an exercise of the Court's discretionary powers. *Id.* Applicants' request for an injunction plainly fails this test. In fact, Applicants do not even purport to pass this test. They instead quote the factors for a preliminary injunction, Appl. 18, the purpose of which is typically to preserve the status quo. Applicants, however, are seeking to *alter* the status quo, and ask this Court to, among other things, "order[] the defendants to hold at-large elections for the Pennsylvania congressional delegation"—a system of elections the Commonwealth has not used in centuries. *Id.* at 36.

I. THE COURT LACKS JURISDICTION TO ISSUE AN INJUNCTION.

Applicants claim two bases for the Court's jurisdiction: 28 U.S.C. § 1253, for direct appeals from three-judge courts, and 28 U.S.C. § 1651, the All Writs Act. Neither provides a basis for jurisdiction here.

A. The Court lacks jurisdiction under 28 U.S.C. § 1253.

This Court lacks jurisdiction to issue relief under 28 U.S.C. § 1253 because the order from which Applicants seek review is the order of a single judge, not a three-judge court. App'x 561. Section 1253, entitled "Direct appeals from decisions of three-judge courts" provides for what it says: direct appeals from decisions of three-judge courts, not single-judge courts.

To the extent that Applicants seek appellate review under the novel theory that orders that *should* have been issued by three-judge courts are appealable under § 1253, they did not brief that issue, nor would it be consistent with this Court's approach to "narrowly construe[]" jurisdiction under § 1253, "since 'any loose construction of the requirements of (the Act) would defeat the purposes of Congress to keep within narrow confines our appellate docket.'" *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (quoting *Phillips v. United States*, 312 U.S. 246, 250 (1941)). "That canon of construction must be applied with redoubled vigor when the action sought to be reviewed [] is an interlocutory order of a trial court," as it is here. *Id.*

For precisely that reason, this Court has previously "declined to review the actions, orders, and rulings of a single judge sitting on a three-judge court," *In re Slagle*, 504 U.S. 952 (1992) (citing *Gonzalez v. Automatic Emp. Credit Union,* 419 U.S. 90, 96 (1974)), and "dismissed an appeal of a temporary restraining order by a single judge of a three-judge court for want of jurisdiction" under 28 U.S.C. § 1253, *id.* (citing *Hicks v. Pleasure House, Inc.,* 404 U.S. 1 (1971) (per curiam)). If "a single judge has erroneously invaded the province of a three-judge court," a party can seek recourse from the appropriate court of appeals, not this Court. *Id.* (citing *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, 716 (1962) (per curiam)).

In any event, the district court's decision to decline to convene a three-judge court until it could determine whether Applicants met the jurisdictional threshold for relief, App'x 561, is consistent with this Court's precedent. *See Shapiro v. McManus*, 577 U.S. 39, 44–45 (2015) ("[A] three-judge court is not required where the district

court itself lacks jurisdiction of the complaint or the complaint is not justiciable in the federal courts."); *see also Gonzalez*, 419 U.S. at 100 (explaining that "dismissing [a] complaint for lack of 'standing'" or being otherwise "nonjusticiable" is "a ground upon which a single judge could have declined to convene a three-judge court, or upon which the three-judge court could have dissolved itself"); *see also* App'x 561 (district court noting intention to "resolv[e] the jurisdictional issues raised by Defendants" before appointing a three-judge court).[4] Applicants have given this Court no compelling reason—or any reason at all—to deviate from past precedent by hearing this case under § 1253. This Court should decline to do so.

B. The Court lacks jurisdiction under 28 U.S.C. § 1651.

This Court similarly lacks jurisdiction to hear this case under the All Writs Act, 28 U.S.C. § 1651, the only other basis Applicants cite. Appl. 3. But as the Court has explained, the All Writs Act itself does not convey jurisdiction; it simply provides for a possible remedy where the Court would already have jurisdiction over the case. *See United States v. Denedo*, 556 U.S. 904, 911 (2009) ("As the text of the All Writs Act recognizes, a court's power to issue any form of relief—extraordinary or otherwise—is contingent on that court's subject-matter jurisdiction over the case or controversy."); *see also Burr & Forman v. Blair*, 470 F.3d 1019, 1027 (11th Cir. 2006)

[4] The district court has since requested that the Chief Judge of the Third Circuit appoint a three-judge court, but it did so only after Applicants amended their complaint for the second time to add a claim under Article I, § 2 of the U.S. Constitution, which no party sought to dismiss on jurisdictional grounds.

(explaining "the Act provides courts with a procedural tool to enforce jurisdiction they have already derived from another source").

Applicants do not explain what source of law gives this Court authority to review the denial of a TRO by a single-judge court. Indeed, such review would not ordinarily be available to Applicants even at the Court of Appeals. *See Off. of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., AFL-CIO*, 473 U.S. 1301, 1305 (1985).

II. APPLICANTS HAVE NOT SHOWN AN INDISPUTABLY CLEAR LEGAL RIGHT TO THE RELIEF THEY SEEK.

Even if this Court had jurisdiction, a party is entitled to an injunction under the All Writs Act *only if* their legal rights are *indisputably clear*. *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers). Applicants cannot meet this high bar. As a threshold matter, they have no right to relief at all because their suit is foreclosed on jurisdictional grounds, including that they lack standing to assert Elections Clause claims. But their claims also fall short on the merits: To obtain relief under the Elections Clause, Applicants must persuade this Court to overturn its precedent. To obtain relief on their malapportionment claim, they must convince this Court for the first time to conclude that a plus-or-minus-one-person deviation in a congressional map violates the Constitution. Such a ruling would be a sea change in redistricting law, contrary to multiple actions in which state legislatures and courts across the country (including this Court) approved congressional plans with the same or greater deviations. Finally, the appropriate remedy for a successful malapportionment claim is not to order a state to conduct at-large elections, but to "require some very minor

changes in the court's plan—a few shiftings of precincts—to even out districts with the greatest deviations." *Abrams v. Johnson*, 521 U.S. 74, 100 (1997).

If there is even "some doubt" as to the parties' legal rights, the Court can conclude "with some confidence that their position is less than indisputable." *Brown v. Gilmore*, 533 U.S. 1301, 1302 (2001) (declining to issue injunction). In fact, even where a party "may very well be correct that [precedent relied on by the lower court] has been undermined," that too would be insufficient to show that a party's legal rights are "indisputably clear." *Lux*, 561 U.S. at 1307 (Roberts, C.J., in chambers). Where, as here, a party's legal rights stand in direct contradiction of the Court's precedent, this Court can conclude with full confidence that they are not "indisputably clear." The Court should deny Applicants' request for an injunction.

A. Applicants lack standing to assert Elections Clause violations.

Should the Court consider the Application, several threshold legal defects preclude relief on Applicants' Elections Clause claims. Under the Court's precedents—including *Lance v. Coffman*, 549 U.S. 437, 442 (2007), which involved the same factual scenario presented here—Applicants lack standing for these claims.

The doctrine of standing "asks whether a litigant is entitled to have a federal court resolve his grievance," and "[t]his inquiry involves 'both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise.'" *Kowalski v. Tesmer*, 543 U.S. 125, 128–29 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). At its "irreducible constitutional minimum," Article III requires (1) an injury-in-fact that is (2) fairly traceable to the defendant's conduct, and (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560

(1992). Plaintiffs must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan,* 504 U.S. at 560). When litigants allege injuries that are undifferentiated and common to all members of the broader electorate, courts routinely dismiss their claims as "generalized grievances" insufficient for standing. *See, e.g., United States v. Richardson*, 418 U.S. 166, 173–74 (1974).

As a general matter, 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.") (emphasis added). But that is precisely what Applicants assert here. Because Applicants' only purported injuries alleged in support of their Elections Clause claims are (1) common to all voters in Pennsylvania or (2) speculative grievances untethered to any cognizable right, they lack standing to assert them. And even if any Applicant had suffered an injury sufficient for Article III standing, their claims would still be barred under prudential standing, as they are premised on the alleged exclusive authority of a third party—the General Assembly—to draw congressional districts.

1. Individual voter Applicants lack standing to assert Elections Clause claims.

In a case nearly identical to this one, this Court held that private citizens do not have standing to assert Elections Clause claims absent a "particularized stake in the litigation." *Lance*, 549 U.S. at 442. The Application makes no mention of *Lance*, but it is dispositive and forecloses Applicants' Elections Clause claims.

In *Lance*, individual private citizens similarly launched a collateral attack on a congressional districting plan adopted by the Colorado Supreme Court, arguing that only the state legislature could redistrict and that the state courts had usurped the legislature's rights under the Elections Clause. *Id*. at 438. After describing the Court's "lengthy" jurisprudence holding that federal courts should not "serve as a forum for generalized grievances," the Court explained 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. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing.

Id. Consistent with *Lance*, this Court and other federal courts have repeatedly declined to adjudicate Elections Clause claims brought by private plaintiffs, *see, e.g.*, *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (2020) ("[A]pplicants lack a cognizable interest in the State's ability to 'enforce its duly enacted' laws." (quoting *Abbott v. Perez,* 138 S.Ct. 2305 (2018))); *Wise v. Circosta,* 2020 WL 6156302, at *6 (4th Cir. Oct. 20, 2020); *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020); *Corman v. Torres*, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018)—including a claim

involving one of the Applicants currently before the Court, *see Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 346 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

Any purported deprivation of Applicants' rights, if it exists, is felt by all Pennsylvanians equally, and thus Applicants have failed to assert a particularized injury necessary to satisfy Article III. *See Allen*, 468 U.S. at 754; *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (finding plaintiffs did not have standing where plaintiff "suffers in some indefinite way in common with people generally") (quoting *Commonwealth of Massachusetts v. Mellon,* 262 U.S. 447, 488 (1923))).

Applicants' appeal to 2 U.S.C. § 2a(c)(5) does not save their Elections Clause claims, as explained fully below. But even if that statute could provide the relief Applicants seek, any right under § 2a(c)(5) is again nothing more than a request that the government follow the law as Applicants perceive it. And for all the reasons just described, any purported injury would be shared by all Commonwealth voters and is thus too generalized to confer standing.

2. The candidate Applicants lack standing to assert Elections Clause claims.

Applicants Bognet and Bashir claim injury because they are running for Congress, but their candidacy does not confer standing under the Elections Clause. In fact, Applicant Bognet made the same argument in 2020 before the Third Circuit, which held that such allegations failed to establish that the challenged law affected the plaintiffs "in a particularized way when, in fact, all candidates in Pennsylvania, including [their] opponent[s]," were in a similar posture. *Bognet*, 980 F.3d at 351.

Undeterred, Bognet and Bashir now try a new theory, alleging injury based on the "uncertainty" as to how they should campaign for a seat because the 2022 Congressional Map may be declared unlawful *in the suit that they have now brought*. Appl. 32. Their own litigation activity is insufficient to confer standing. *See Lujan*, 504 U.S. at 564 n.2 (1992) (standing "has been stretched beyond the breaking point when, as here . . . the acts necessary to make the injury happen are at least partly within the plaintiff's own control."). It is well established that Applicants cannot "manufacture standing" by filing a lawsuit "in anticipation of non-imminent harm." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 422 (2013); *see also Buchholz v. Meyer Njus Tanick*, PA, 946 F.3d 855, 867 (6th Cir. 2020) (holding plaintiff's "undue sense of anxiety" resulting from his own inaction was not a cognizable injury for standing). As evidenced by the state court litigation, Pennsylvania voters, candidates, and legislators—Republicans and Democrats alike—all agree that Pennsylvania courts have authority to adopt and order the implementation of a congressional plan. Applicants alone call the finality of the 2022 Congressional Map into question, and their injury, if any, arises from their own decision to file a lawsuit in the first place. *See Clapper*, 568 U.S. 416 (holding that "an enterprising plaintiff" should not be able to achieve Article III standing by simply alleging injury they chose to incur "based on a nonparanoid fear").

Applicants' allegation that the "uncertainty" caused by their lawsuit will make it more difficult for them to raise money for their campaigns is even more far afield. Appl. 32. This Court has rightly "been reluctant to endorse standing theories that

require guesswork as to how independent decisionmakers will exercise their judgment." *Clapper*, 568 U.S. at 422; *Reilly v. Ceridian Corp.*, 664 F.3d 38, 42 (3d Cir. 2011) (injuries that "stem[] from an indefinite risk of future harms inflicted by unknown third parties" are insufficient to confer standing) (citing *Lujan*, 504 U.S. at 564). And even if Plaintiffs could assert a cognizable injury based on speculative fundraising concerns prompted by their own litigation, that injury would not be traceable to Defendants. *See Clapper*, 568 U.S. at 418 (finding plaintiffs lacked standing where their "self-inflicted injuries are not fairly traceable to" defendants); *Natural Res. Def. Council, Inc. v. U.S. Food & Drug Admin.*, 710 F.3d 71, 85 (2d Cir. 2013) ("To be sure, a plaintiff may not establish injury for standing purposes based on a "self-inflicted" injury.").

Finally, Bashir separately alleges that he is injured because the 2022 Congressional Map "forc[es] him to run in a congressional district" that is more Democratic-leaning than the Commonwealth overall. Appl. 28. But it is a "core principle of republican government" that voters "choose their representatives, not the other way around." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 823 (2015); *cf. Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1955 (2019) ("the House . . . has no cognizable interest in the identity of its members"). The Court rejected a similar argument in *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016), finding that officeholders lacked standing to challenge district lines based on allegations that their districts would be "flooded with Democratic voters," reducing their chances of reelection. This is because elected officials and candidates have "no

legally cognizable interest in the composition of the district" they hope to represent, *Corman*, 287 F. Supp. 3d at 569, and a legislator (or in this case, a candidate), "suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment," *City of Phila. v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980). This same principle applies to Bashir, who has "no [cognizable] interest in representing any particular constituency." *Id.*

3. The county election official Applicant lacks standing to assert Elections Clause claims.

The final Applicant, Alan Hall, claims that, as a member of the Susquehanna Board of Elections, he has an injury-in-fact because Defendants' failure to implement at-large elections forces him to administer elections "in violation of the U.S. Constitution and in contravention of [his] oath to obey the Constitution." Appl. 30. The infirmities of this claim are self-evident. Once again, the grievance is highly generalized. *See Bognet*, 980 F.3d at 351. This Court has rejected standing based on undifferentiated grievances or abstract policy statements, *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018), such as an interest in overseeing the lawful administration of elections, as Hall alleges here. Moreover, a perceived violation of an oath of office is insufficient for standing. *See, e.g.*, *Crane v. Johnson*, 783 F.3d 244, 253 (5th Cir. 2015) ("[T]he violation of one's oath alone is an insufficient injury to support standing."); *City of S. Lake Tahoe v. Cal. Tahoe Reg'l Plan. Agency*, 625 F.2d 231, 237 (9th Cir. 1980), *cert denied*, 449 U.S. 1039 (1980). To hold otherwise would confer on any official the right to challenge virtually any statute or rule they are charged with implementing or enforcing, on almost any ground.

Finally, although Hall claims the new election calendar will give him less time to prepare military absentee ballots, Appl. 30, any relief from this Court will only cause further delay in preparing for the state's primary. The 2022 Congressional Map has been adopted, and Hall is legally required to implement it.

4. Applicants do not meet the requirements for prudential standing.

Applicants' claims are separately and independently barred by the doctrine of prudential standing, as they are premised not on Applicants' own rights, but on the General Assembly's alleged exclusive authority to draw congressional districts. Prudential limitations require "that a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Kowalski*, 543 U.S. at 129 (quoting *Warth*, 422 U.S. at 499). Applicants' claims rest entirely on the alleged usurpation of institutional rights held by the General Assembly, a party that is not before the Court and whose interests cannot be advanced by Applicants who have no authority to act on its behalf.

"Absent a 'hindrance' to the third-party's ability to defend its own rights, this prudential limitation on standing cannot be excused." *Corman,* 287 F. Supp. 3d at 572 (quoting *Kowalski,* 543 U.S. at 130). Applicants have failed to identify any "'hindrance' to the [General Assembly's] ability to protect [its] own interests," *Kowalski,* 543 U.S. at 130 (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Quite to the contrary, not only did the leaders of the General Assembly participate in the state court impasse proceedings to advocate for their own interests, they rejected

Applicants' Elections Clause theory in those proceedings. Before the Pennsylvania Supreme Court, the Republican Legislative Leaders stated:

> The current congressional plan contravenes the U.S. Constitution, and it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections. *See Growe v. Emison*, 507 U.S. 25, 32–36 (1993). Proposed Intervenors do not dispute that the Pennsylvania courts have the authority to adjudicate Petitioners' claims for violations of the U.S. Constitution or other federal laws. . . .

Carter App'x 52 n.2. These same legislators also endorsed the state courts' power to modify election schedules. Carter App'x 6 ¶ 6 (citing *Mellow*, 607 A.2d at 237). Thus, applying the "usual rule" of prudential standing, *Virginia v. Am. Booksellers Ass'n Inc.*, 484 U.S. 383, 392 (1988), Applicants cannot assert claims on behalf of the General Assembly that actual members of that body disclaim.

For these reasons, Applicants have failed to demonstrate that they have standing, and their Elections Clause claims must be dismissed.

B. Congress has explicitly authorized state courts to issue remedial maps, and the relief Applicants seek is foreclosed by this Court's precedent.

Applicants' unsupported theory that the Elections Clause bars a state court from adopting a congressional plan when the legislative process fails is foreclosed by congressional enactments pursuant to the Elections Clause itself and multiple decisions of this Court. It is also repugnant to the sovereignty of states and would produce absurd consequences. Applicants' argument does not warrant review, much less a procedurally improper emergency injunction.

The Court has reaffirmed on multiple occasions that state courts are not only authorized to adjudicate congressional redistricting claims but should play a *primary*

role in adopting congressional plans when the legislative process fails. As the Court explained in *Growe v. Emison*, "[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).

In *Growe*, like here, the legislative process failed to yield a congressional redistricting plan. After a federal district court bypassed a congressional plan adopted by a state court, the Court unanimously held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's . . . federal congressional districts." *Id*. at 42. Far from restricting apportionment responsibilities to a state's legislative branch alone, the Court affirmed that congressional reapportionment may be conducted "through [a state's] legislative *or* judicial branch." *Id.* at 33 (emphasis in original). The Court found that the state court's "issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan)" by a date certain was "precisely the sort of state judicial supervision of redistricting [the Court] has encouraged." *Id*. Applicants do not even mention *Growe*. Instead, they demand that the federal judiciary commit the same error denounced by this Court in that case, "ignoring the . . . legitimacy of state judicial redistricting." *Id.* at 34.

Applicants' Elections Clause claims are foreclosed not only by *Growe*, but by federal statute. Applicants acknowledge that, pursuant to its authority under the Elections Clause, Congress may "at any time" make its own regulations related to

congressional redistricting. Appl. 18; U.S. Const. Art. I, § 4. But then Applicants ignore that Congress did that when it enacted § 2 U.S.C. 2c and 2 U.S.C. § 2a(c)(5).

Section 2c requires that congressional representatives be elected from single-member districts. 2 U.S.C. § 2c ("There shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative."). Section 2a(c)(5) provides a fallback scheme to be used as a last resort where districting has not occurred. 2 U.S.C. § 2a(c)(5) (listing processes for election of congressional represetnatives "[u]ntil a State is redistricted in the manner provided by the law thereof . . . .").

As the Court recognized in *Branch v. Smith,* 538 U.S. 254, 275 (2003), in enacting these statutes, Congress directly authorized state courts to adopt remedial plans. At the same time, the Court rejected the interpretation of § 2c and § 2a(c)(5) that Applicants advance here, holding that § 2a(c)(5) should be used only as a last resort and that it 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 (second emphasis added).[5] Observing that when Congress enacted § 2c in 1967, "the immediate issue was precisely the involvement of the courts in fashioning electoral plans" and the risk that they would order at-large elections, the Court held that

[5] Although the 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).

Applicants' interpretation of the two provisions "is contradicted both by the historical context of § 2c's enactment and by the consistent understanding of all courts in the almost 40 years since that enactment." *Id.*

Because Congress enacted § 2c to prevent exactly what Applicants seek here—at-large congressional elections—the Court held 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 (emphasis added). The Court explained that "[Section] 2c is as readily enforced by courts as it is by state legislatures." *Id.* at 272. And while Applicants wrongly assert that § 2a(c) prohibits state court action, its default procedures apply only "[u]ntil a State is redistricted in the manner provided by [state] law," which the *Branch* plurality explained "can certainly refer to redistricting by courts as well as by legislatures." *Id.* at 274.

Applicants concede that the last-resort remedy of § 2a(c)(5) is available only in the narrow circumstance where, "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.* at 275; *see also* Appl. 15. This is not the scenario that we presently find ourselves in here. The Pennsylvania Supreme Court *has already adopted* a lawful congressional plan and State Defendants *have implemented* that plan, in accordance with 2 U.S.C. § 2c and this Court's precedents.

Therefore, "§2a(c) cannot be properly applied" because the state "court[] . . . effect[ed] the redistricting mandated by § 2c." *Branch*, 538 U.S. at 275.

The Court reaffirmed this interpretation in *Arizona State Legislature*, finding that under § 2a(c): "Congress expressly directed that when a State has been 'redistricted in the manner provided by [state] law'—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." 576 U.S. at 812 (citing *Branch*, 538 U.S. at 274; emphasis added). While the Court split over the meaning of "Legislature," no justice suggested state courts were not authorized to redistrict where the legislative process had failed. And just three years ago, the Court confirmed in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019), that state courts are an appropriate forum for redistricting complaints.

This Court's consistent reading of § 2a(c) as endorsing state court involvement in congressional redistricting is grounded in both the text and legislative history of the statute. As explained in both *Branch* and *Arizona State Legislature*, a predecessor to § 2a(c) had mandated last-resort default procedures "unless '*the legislature*' of the State drew district lines." 576 U.S. at 809 (quoting, *inter alia*, Act of Jan. 16, 1901, ch. 93, § 4, 31 Stat. 734) (emphasis added); 538 U.S. at 274. But Congress "eliminated the statutory reference to redistricting by the state 'legislature' and instead directed that" the state must redistrict "in the manner provided by the law thereof." *Id.* at 809–10. Congress made that change out of "respect to the rights, to the established

methods, and to the laws of the respective States." *Id.* at 810 (quotation marks omitted).

Here, it is clear that Pennsylvania law allows its judiciary to redistrict where the legislature has failed. *Mellow*, 607 A.2d at 204 (Pennsylvania Supreme Court adopted congressional plan following legislative impasse); *League of Women Voters of Pa. v. Commonwealth*, 181 A.3d 1083, 1086 (Pa. 2018) (same following judicial invalidation of congressional plan and legislature's failure to timely adopt new plan). Even if there were any ambiguity about Pennsylvania's institutional redistricting assignments, what constitutes the state's legislative process is itself a matter of state law, on which the Pennsylvania Supreme Court's interpretation is conclusive and unreviewable. *See Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("State courts are the ultimate expositors of state law."); *Florida v. Powell*, 559 U.S. 50, 56 (2010) ("It is fundamental . . . that state courts be left free and unfettered by us in interpreting their state constitutions." (quotations omitted)).

Since Congress enacted § 2c in 1967, no state has ever conducted at-large congressional elections. This is in part because this Court has long endorsed non-legislative map-drawing in this context, *see, e.g.*, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (affirming map adopted by a bipartisan commission after legislative impasse), which has been a regular feature of every redistricting cycle.[6] Applicants have no

[6] For examples from the 2010 and 2000 redistricting cycles, *see, e.g.*, *Essex v. Kobach*, 874 F. Supp. 2d 1069 (D. Kan. 2012); *Favors v. Cuomo*, No. 1:11-cv-05632, 2012 WL 928223 (E.D.N.Y. Mar. 19, 2012); *Colleton Cnty. Council v. McConnell*, No. 3:01-CV-3581, 201 F. Supp.2d 618 (D.S.C. Mar. 20, 2002); *Balderas v. State*, No. 6:01-CV-158

answer for how their reading of the Elections Clause comports with this common historical practice. The better reading of the Elections Clause is to recognize that state legislatures maintain *primary* redistricting authority but that the map-drawing pen may pass to the judiciary when a legislature—as here—fails to timely adopt lawful plans in advance of regularly scheduled elections.

Applicants' theory would produce absurd results in other contexts as well. What would happen in a state where the legislature failed to redistrict its congressional map but the state had not lost a seat? Voters in such states would be left without recourse and forced to vote in malapportioned districts, in violation of the constitutional requirement that congressional districts be equally populated. This is precisely the harm the Court identified in *Branch* in rejecting Applicants' argument. Holding otherwise would force the Court to adopt an unconstitutional interpretation of § 2c. 538 U.S. at 269–71 (explaining that barring judicial districting would at times require congressional elections to be held in malapportioned districts). But "only when it is utterly unavoidable should [the Court] interpret a statute to require an unconstitutional result—and that is far from the situation here." *Id.* at 272.

(E.D. Tex. Nov. 14, 2001), *aff'd* 536 U.S. 919 (June 17, 2002) (No. 01-1196) (mem.); *Hippert v. Ritchie*, 813 N.W.2d 391 (Minn. 2012); *Hall v. Moreno*, 270 P.3d 961 (Colo. 2012); *Egolf v. Duran*, No. D-101-CV-2011-02942 (N.M. Dist. Ct., Santa Fe Cnty. Dec. 29, 2011); *Guy v. Miller*, No. 11 OC 00042 1B (Nev. Dist. Ct., Carson City Oct. 27, 2011); *Alexander v. Taylor*, No. 97836, 51 P.3d 1204 (Okla. June 25, 2002); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Spec. Redis. Panel Mar. 19, 2002); *Avalos v. Davidson*, No. 01 CV 2897 (Dist. Ct. Denver Co. Jan. 25, 2002), *aff'd sub nom. Beauprez v. Avalos,* No. 02SC87, 42 P.3d 642 (Colo. Mar. 13, 2002) (en banc); *Jepsen v. Vigil-Giron*, No. D0101 CV 2001 02177 (1st Jud. Dist. Santa Fe Co. Jan. 2, 2002); *Perrin v. Kitzhaber*, No. 0107-07021, (Dist. Ct. Multnomah Co., Or. Oct. 19, 2001).

Applicants also ignore that the alternative to state courts adopting plans would be federal court intervention, which would flip the Court's precedent on its head. *See Growe*, 507 U.S. at 34, 42.

C. State courts have authority to modify election deadlines.

The Pennsylvania Supreme Court undoubtedly has the authority to modify election-related deadlines, especially when, as here, doing so does not disrupt the election process. It is long settled that the Elections Clause's reference to the "Legislature" "neither requires nor excludes . . . participation" in the lawmaking process by other organs of state government. *Smiley v. Holm*, 285 U.S. 355, 368 (1932). Here, the Pennsylvania Supreme Court issued minor modifications to certain election deadlines leading up to the May 17, 2022 primary, the date set by statute, "[t]o provide for an orderly election process." App'x 537. This order was not only slight and non-disruptive, but *essential* to crafting a remedy for the underlying violations of state and federal law caused by the political branches' impasse in redistricting—a remedy this Court has repeatedly encouraged state courts to formulate. *See, e.g.*, *Growe*, 507 U.S. at 37; *Scott*, 381 U.S. at 409. Indeed, deferring to the state supreme court's remedy, of which modifying election-related deadlines was a part, follows from this Court's insistence that state, not federal, courts, should be the primary actors when state legislatures fail to redistrict. *See, e.g.*, *Growe*, 507 U.S. at 33–34.

Other state courts have routinely made similar election schedule modifications in the redistricting context. *See, e.g.*, Order, *In the Matter of 2022 Legislative 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 before primary); *Mellow*, 607 A.2d at 237, 244 (revising pre-primary deadlines in similar congressional redistricting impasse case "to provide for an orderly election process"). And this Court has authorized federal district courts to do the same. *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."); *Sixty-Seventh Minn. State Senate v. Beens*, 406 U.S. 187, 201 n.11 (1972) ("If time presses too seriously [to implement a remedial reapportionment plan], the District Court has the power appropriately to extend the [election deadline] time limitations imposed by state law."); *see also Larios v. Cox*, 305 F. Supp. 2d 1335, 1343 (N.D. Ga. 2004) (noting court's power to extend election deadlines and ordering new statewide maps be drawn in time for upcoming primary election).

Notably, 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." Carter App'x 6 ¶ 6 (citing *Mellow*, 607 A.2d at 237). And when the Republican Legislative Leaders later filed exceptions to the Special Master's Report, they did *not*

object to the state election calendar changes that were proposed. *See generally* Carter App'x 99-159; 162-178.

Finally, Applicants' argument that it is now the "eve of an election," such that the back-stop provisions of 2 U.S.C. § 2a(c) apply, is misplaced. A constitutional congressional map is already in place, and elections are proceeding accordingly. It is thus *Applicants'* requested relief that would disrupt the election process—not the Pennsylvania Supreme Court's order, as discussed below.

D. Applicants' equal population claim fails on the merits.

Applicants also claim that the 2022 Congressional Map violates the constitutional principle of one-person, one-vote because its districts deviate from the ideal population by plus or minus one person, rather than having an absolute deviation of one person.[7] But no court has ever held that a plus-or-minus-one-person deviation does not satisfy the equal population requirement. But even if there were a question as to the 2022 Congressional Map's deviation, on multiple occasions this Court has upheld congressional plans with significantly greater population deviations where, as here, they are justified by a legitimate state interest.

Article I, § 2 of the U.S. Constitution establishes that congressional districts must be apportioned to contain equal population "as nearly as practicable." *Wesberry*

[7] Based on the 2020 Census, the ideal population of Pennsylvania's 17 congressional districts is 764,865. App'x 635. Pennsylvania's population is not perfectly divisible by 17, which means that the population of at least some of its districts must deviate from the state's ideal district population. The 2022 Congressional Map has four districts with the ideal population, nine districts with one person fewer, and four districts with one person more, for a total deviation of two persons. App'x 635.

v. Sanders, 376 U.S. 1, 7–8 (1964); *see Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (explaining that this principle applies with force to court-ordered plans, which "should ordinarily achieve [the] goal of population equality with little more than *de minimis* variation" (citing *Chapman v. Meier*, 420 U.S. 1, 26–27 (1975))). Applicants cite no authority suggesting that a deviation of plus or minus one person is inconsistent with this Court's precedent, nor do they offer any reason that this Court should adopt the specific rule they suggest.

Population deviations of plus or minus one person have long been considered to satisfy the population equality standard. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) ("In keeping with our overriding concern, the court plan complies with the 'as nearly as practicable' population equality requirement of Article 1, § 2 of the Constitution . . . with a deviation of plus or minus one person." (citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983))); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) ("The Court's plan results in two districts with populations of 713,278 and two with populations of 713,281. Such a distribution provides equality among Kansas voters as nearly as practicable, and therefore satisfies Article I, Section 2 of the U.S. Constitution."). Likewise, since 2000, at least six states have adopted congressional apportionment plans with a two-person deviation without constitutional consequence. *See, e.g.*, Oregon (two-person population range after 2010 redistricting cycle);[8] Georgia (two-person population

[8] *See* "2010 Redistricting Deviation Table," Nat'l Conf. State Legislatures (Jan. 15, 2020), https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx.

range after 2010 redistricting cycle);[9] South Carolina (two-person population range in court-enacted plan after 2000 redistricting cycle); [10] Kentucky (two-person population range after 2000 redistricting cycle);[11] Colorado (two-person population range in court-enacted plan after 2000 redistricting cycle);[12] Maryland (two-person population range after 2000 redistricting cycle).

Even if the 2022 Congressional Map's deviation of plus or minus one person required justification, it has one that precisely aligns with this Court's prior decisions. As the Court has explained, if "the population differences among districts could have been reduced or eliminated," the state "bear[s] the burden of proving that each *significant* variance between districts was necessary to achieve some legitimate goal." *Karcher*, 462 U.S. at 730–31 (emphasis added). The burden identified in this second prong "is a flexible one" and "depend[s] on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interest, and the availability of alternatives that might substantially vindicate those

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[9] *See* 2010 Redistricting Deviation Table, *supra* note 9; *see also* "Justice Approves Georgia's Redistricting Plans," Ga. Dep't of Law (Dec. 23, 2011), https://law.georgia.gov/press-releases/2011-12-23/justice-approves-georgias-redistricting-plans (announcing preclearance by U.S. Department of Justice).

[10] *See* "Designing P.S. 94-171 Redistricting Data for the Year 2010 Census," U.S. Census Bureau (Sept. 2004), https://www2.census.gov/programssurveys/rdo/2010_pl94-171rv.pdf, at 26; *Colleton Cty. Council*, 201 F.Supp.2d at 664.

[11] *See* U.S. Census Bureau, *supra* note 11.

[12] *See* "Designing P.S. 94-171 Redistricting Data for the Year 2010 Census," U.S. Census Bureau (Sept. 2004), https://www2.census.gov/programs-surveys/rdo/2010_pl94-171rv.pdf, at 26; *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002) (adopting plan).

interests yet approximate population equality more closely." *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 760 (2012).

Here, the Pennsylvania Supreme Court has not yet issued an opinion setting forth its reasons for ordering the adoption of the 2022 Congressional Map. But, as the Pennsylvania Supreme Court was aware, any steps to further equalize population in the 2022 Congressional Map would have required an additional split of an election precinct.[13] This is exactly the kind of tradeoff that courts, including this Court, have approved as sufficient justification for minor population deviations. Indeed, much greater deviations than those in the 2022 Congressional Map have been found to be acceptable. *See Shayer v. Kirkpatrick*, 541 F. Supp. 922, 933 (W.D. Mo. 1982), *aff'd sub nom.*, *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) (holding departures from mathematical perfection are justified by avoiding the splitting of political subdivisions, particularly where a particular split "can cause innumerable administrative problems and additional costs in holding elections"); *Mellow*, 607 A.2d at 208, 218 (holding a deviation of 0.0111% was "fully justified by the policy of preserving the boundaries of municipalities and precincts" and adopting Special Master's conclusion that "a serious election administration problem arises from requiring the voters in a single precinct to look to two different sets of congressional

[13] The Carter Respondents provided the Pennsylvania Supreme Court with an alternative map that had a one-person population deviation at the expense of an additional voting district split. They noted the court could choose to adopt the alternative map pursuant to its extraordinary jurisdiction, but it declined to do.

candidates").[14] Applicants provide no reason to second-guess the judgment of the Commonwealth's highest court that the 2022 Congressional Map (along with any very slight deviations) achieves a legitimate state goal.

Applicants' assertion that "there is no way the [2022 Constitutional Map] can survive the plaintiffs' constitutional attack unless this Court is prepared to back away from its previous redistricting pronouncements," Appl. 23, has it entirely backward. The only means by which the 2022 Congressional Map does not survive Applicants' attacks is if this Court reverses its precedent. This Court has held time and again that, not only do *de minimis* deviations *not* rise to constitutional significance, *see Abrams*, 521 U.S. at 98 (explaining court-drawn maps "should ordinarily achieve [the] goal of population equality with little more than *de minimis* variation"), but even far more significant deviations can be justified by legitimate state interests, *see Tennant*, 567 U.S. at 763; *Abrams*, 521 U.S. at 99; *Karcher*, 462 U.S. at 731. Applicants offer nothing to suggest the 2022 Congressional Map fails on either score.

Finally, even if the 2022 Congressional Map's population deviation were "unacceptable," the proper remedy would be to "require some very minor changes in the court's plan—a few shiftings of precincts—to even out districts with the greatest

[14] *See also Tennant*, 567 U.S. at 763–65 (concluding a 0.79% population deviation between smallest and largest districts in West Virginia's congressional plan was justified by state's interest in avoiding contests between incumbents, not splitting political subdivisions, and limiting population shifts between the new and old congressional districts); *Abrams v. Johnson*, 521 U.S. at 99–100 (finding plan ordered by federal court with overall population deviation of 0.35%, which the Court characterized as containing a "slight deviation[]," was justified by state's interest in reducing political subdivision splits, maintaining the core of its districts, and preserving communities of interest).

deviations." *Abrams*, 521 U.S. at 100. It would not require the Court to "restrain the defendants from implementing or enforcing" the Plan, as Applicants suggest, Appl. 36, let alone the unprecedented elimination of congressional districts altogether.

III. AN INJUNCTION WOULD NOT BE NECESSARY OR APPROPRIATE IN AID OF THIS COURT'S JURISDICTION.

An injunction under the All Writs Act "is appropriate only if . . . it is 'necessary or appropriate in aid of [the Court's] jurisdictio[n].'" *Turner Broad. Sys., Inc.*, 507 U.S. at 1301 (Rehnquist, C.J., in chambers) (quoting 28 U.S.C. § 1651(a)). This requirement permits an injunction where the Court's appellate jurisdiction "might otherwise be defeated by the unauthorized action of the court below." *McClellan v. Carland,* 217 U.S. 268, 280 (1910). Applicants make no attempt to show how this standard applies here.

The question of whether parties would be irreparably harmed without an injunction is not the same as whether an injunction would aid in the Court's jurisdiction. *See, e.g.*, *Hobby Lobby Stores, Inc. v. Sebelius*, 568 U.S. 1401, 1404 (2012) (Sotomayor, J., in chambers) ("While the applicants allege they will face irreparable harm . . . , they cannot show that an injunction is necessary or appropriate to aid our jurisdiction."). This Court's precedent demonstrates that the passage of an election does not necessarily deprive the Court of its appellate jurisdiction over an issue. In *Fishman v. Schaffer*, 429 U.S. 1325 (1976), for example, applicants sought an injunction from this Court ordering the state of Connecticut to place certain candidates on the ballot before an election. *Id.* at 1325. The Court declined to issue an injunction, holding in part that the applicants' "claim will not be rendered moot

by the occurrence of the election or by our refusal to grant affirmative relief now." *Id.* at 1330 n.4. The same is true here. Even if the passage of the election would "irreparably harm" Applicants (and it does not), it would not deprive this Court of jurisdiction to hear the issue at a later date. For that reason, Applicants do not make the necessary showing to be entitled to an injunction under the All Writs Act.

IV. THE BALANCE OF THE EQUITIES AND PUBLIC INTEREST COUNSEL AGAINST GRANTING AN INJUNCTION.

Neither equity nor the public interest counsel in favor of enjoining use of the 2022 Congressional Map and ordering Pennsylvania to conduct at-large elections. The election is now proceeding under the 2022 Congressional Map: candidates are partway through the nomination process, and State Respondents are readying for the primary under that map. Enjoining the Map would throw Pennsylvania's election machinery into chaos. It would require substantial revisions to the election calendar (at significant expense to the Commonwealth), severely prejudice the candidates whose campaigns for the upcoming primary elections are already well underway, and create massive confusion for candidates, voters, and election officials alike, to say nothing of the significant and irreparable harm that would attend forcing millions of Pennsylvanians to choose their members of Congress at-large. Weighed against Applicants' purported injuries, the balance of the equities decidedly cuts against granting their requested emergency relief.

The Court has counseled that "[a]s an election draws closer," court orders affecting election rules "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

This principle is especially salient here: candidates began filing nomination petitions and seeking signatures in support of their candidacy almost a week ago; the deadline to file nomination petitions is in less than two weeks; and the state's primary election is just 11 weeks away. Applicants' argument that the Court "must act *now*" because the election is already underway only underscores the harm an injunction would cause at this late stage. Appl. 17 (emphasis in original).

Applicants themselves have caused this eleventh-hour crunch. They were on notice that Pennsylvania's courts would adopt a congressional map as early as April 2021, but certainly as of December 20, 2021, when the Commonwealth Court declared it would do so. And no excuse could possibly remain on January 26, 2022, when Governor Wolf vetoed the General Assembly's proposed map. Rather than seek intervention in the state court proceedings or even file suit after the Governor vetoed the General Assembly's map, Applicants waited months to file their complaint and then waited an additional ten days to seek emergency relief. By their delay, Applicants have exacerbated the harms that will befall all Pennsylvanians should the 2022 Congressional Map be enjoined at this late date. That delay in and of itself undermines their claim for urgent relief. *Westermann v. Nelson*, 409 U.S. 1236, 1236–37 (1972) (Douglas J., in chambers) ("I have concluded that in fairness to the parties I must deny the injunction, . . . because orderly election processes would likely be disrupted by so late an action. . . . [O]ne in my position cannot give relief in a responsible way when the application is [as] tardy as this one.").

Finally, it is notable that Applicants do not claim that the 2022 Congressional Map has resulted in voter confusion, depressed turnout, or disorderly elections—the primary concerns underlying *Purcell* itself. It would be the issuance of an injunction that would impose such harms. These typical harms associated with alterations to a state's apportionment plan on the eve of an election are enough to counsel against an injunction. But the relief Applicants request here is even worse because it asks the Court to order Pennsylvania to conduct at-large elections for *17* congressional seats, a dramatic change that would cause an *unusual* degree of confusion and impose extraordinary harm on the state's candidates, voters, and election officials.

Consequently, the balance of the equities and the public interest clearly cut against granting an injunction in this case.

CONCLUSION

For the foregoing reasons, Carter Respondents respectfully request that this Court deny Applicants' emergency application for writ of injunction.

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Respectfully submitted,

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