No. ________

In the Supreme Court of the United States

William C. Toth Jr.; William J. Hall; Howard Gartland; James Bognet; Aaron Bashir; Alan M. Hall,

Applicants,

v.

Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries; Tom Wolf, in his official capacity as Governor of Pennsylvania,

Respondents.

Emergency Application To Justice Alito For Writ Of Injunction

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To The Honorable Samuel A. Alito Jr., Associate Justice Of The Supreme Court And Circuit Justice For The Third Circuit:

Under the U.S. Constitution, "the Legislature" of each state is charged with prescribing "the Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1. Yet on February 23, 2022, the Supreme Court of Pennsylvania ordered state election officials to implement a court-selected map for the state's 2022 congressional elections, despite the fact that the Pennsylvania Legislature never approved this map nor authorized the state judiciary to participate in the congressional redistricting process. App. 549. The Supreme Court of Pennsylvania also ordered state election officials to disregard the General Primary Calendar enacted by the Pennsylvania Legislature in favor of a court-preferred schedule that delays and compresses the time period in which candidates may circulate and file nomination petitions. App. 550.

The state's election officials intend to implement this court-selected map and judicially altered calendar for the upcoming primary election, which is scheduled to be held on May 17, 2022. But this course of action is flagrantly unconstitutional and should be swiftly enjoined. Under the Elections Clause, it is "the Legislature"—and not the judiciary—that must prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives," and the Supreme Court of Pennsylvania has no authority to impose a congressional map unless "the Legislature" has authorized it to do so. *See Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576

U.S. 787 (2015). Worse still, the map selected by the Supreme Court of Pennsylvania violates the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964), as the congressional districts in the court-selected map contain *two*-person deviations. App. 635; App. 462 (¶ 18); *see also Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations as close to perfect equality as possible."). Finally, the state's election officials are constitutionally forbidden to depart from the General Primary Calendar enacted by the Pennsylvania Legislature, as the Elections Clause empowers "the Legislature" and not the judiciary to prescribe the deadlines and timetables for the state's congressional primary.

The applicants sued the state's election officials in federal district court, but their efforts to obtain immediate injunctive relief were unsuccessful. App. 561. The applicants respectfully ask this Court to immediately enjoin the respondents from implementing the court-selected congressional map or departing from the General Primary Calendar enacted by the legislature. Relief is urgently needed because candidates are already campaigning for office under this unconstitutional map, and the statutory deadline for obtaining the needed signatures on nomination petitions in March 8, 2022. A belated injunction that pronounces the congressional map unconstitutional *after* the candidates have gathered the needed signatures and organized their campaigns in reliance on the court-selected map will lead to chaos.

DECISIONS BELOW

The district-court order denying the applicants' request for immediate injunctive relief can be found at App. 561.

JURISDICTION

The district court denied the applicants' request for immediate injunctive relief on February 25, 2022. App. 561. The applicants filed a timely notice of appeal on February 28, 2022. App. 816. The Court has jurisdiction to consider this application under 28 U.S.C. § 1651 and 28 U.S.C. § 1253.

STATEMENT

Before the 2020 census, the state of Pennsylvania had 18 seats in the U.S. House of Representatives. The results of the 2020 census left Pennsylvania with 17 seats in the U.S. House, one fewer than before. The Pennsylvania legislature must therefore draw a new congressional map for the 2022 elections. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof").

In January of 2022, the Republican-led General Assembly approved a reasonable, non-gerrymandered map (HB 2146) that would have created a 9-8 majority of *Democratic*-leaning congressional districts. App. 317 (picture of map); App. 481 (¶ 78) ("HB 2146 is predicted to result in 9 Democratic-leaning seats and 8 Republican-leaning seats and, consequently, is more favorable to Democrats than the most likely outcome of 50,000 computer drawn simulated maps that used no partisan data, which resulted in 8 Demo-

cratic-leaning seats and 9 Republican-leaning seats."). But Governor Wolf vetoed the map, despite its Democratic tilt, complaining that this 9-8 Democratic map was "unfair" and insufficiently "bipartisan."[1] *See Smiley v. Holm*, 285 U.S. 355 (1932) (redistricting legislation that is vetoed by the governor is not "prescribed . . . by the Legislature" within the meaning of the Elections Clause). In the meantime, a group of litigants represented by the Elias Law Group repaired to state court in an effort to induce the Supreme Court of Pennsylvania—which has a 5-2 Democratic majority—to impose a more partisan Democratic congressional map for the 2022 elections. App. 49–71 (state-court petition); App. 596–650 (state-court brief). The Elias-backed map is known as the "Carter Plan," and it was developed by Jonathan Rodden, a Stanford political-science professor retained by the Elias Law Group. App. 615–650 (Rodden's expert report and CV).

I. The Carter Plan

The Carter Plan would create a 10-7 majority of Democratic-leaning congressional districts, rather than the 9-8 Democratic majority in the map approved by the General Assembly. App. 638. It would also place two Republican incumbents in the same congressional district, ensuring that at least one incumbent Republican will be eliminated from the state's congressional delegation. App. 465 (¶ 32). The General Assembly's map, by contrast, would have placed a Democratic and a Republican incumbent in a single competi-

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

tive district, an approach that does not "seek to obtain an unfair partisan advantage through incumbent pairings." App. 480 (¶ 68). The Carter Plan contains other partisan gerrymanders designed to help Democrats and harm Republicans, which are described in the special master's report and the declaration of Seth Grove. App. 474–475; App. 809–815.

The Carter Plan also violates the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964), because it includes congressional districts with two-person deviations. Professor Rodden openly acknowledged these two-person deviations in his expert report:

> ***Equal Population:*** Based on the 2020 Census, the ideal population of each congressional district is 764,865. The Carter Plan includes 4 districts with the ideal population and 13 districts with a deviation of plus or minus one person. District-level details are provided in Table 4.
>
> **Table 4: District Population Deviations**[5]
>
> | District | Population | Deviation from Ideal |
> |---|---|---|
> | 1 | 764866 | 1 |
> | 2 | 764865 | 0 |
> | 3 | 764864 | -1 |
> | 4 | 764865 | 0 |
> | 5 | 764866 | 1 |
> | 6 | 764864 | -1 |
> | 7 | 764865 | 0 |
> | 8 | 764866 | 1 |
> | 9 | 764864 | -1 |
> | 10 | 764864 | -1 |
> | 11 | 764864 | -1 |
> | 12 | 764864 | -1 |
> | 13 | 764864 | -1 |
> | 14 | 764866 | 1 |
> | 15 | 764864 | -1 |
> | 16 | 764865 | 0 |
> | 17 | 764864 | -1 |

App. 635; App. 462 (¶ 18). The HB 2146 map passed by the General Assembly, by contrast, limits population deviation among congressional districts to no more than one person, consistent with this Court's equal-population rule:

Difference between Preliminary Map and Updated Preliminary Map by Population			
District	Final Population	Unchanged Population	Preliminary Distrcts that Remains Unchanged
1	764,865	764,865	100.00%
2	764,865	727,974	95.18%
3	764,865	727,974	95.18%
4	764,865	764,865	100.00%
5	764,865	665,110	86.96%
6	764,865	664,660	86.90%
7	764,864	744,414	97.33%
8	764,864	745,298	97.44%
9	764,864	710,269	92.86%
10	764,865	685,726	89.65%
11	764,865	745,299	97.44%
12	764,865	720,103	94.15%
13	764,864	642,606	84.02%
14	764,865	741,290	96.92%
15	764,864	764,864	100.00%
16	764,865	755,133	98.73%
17	764,865	741,290	96.92%
		Average Same	95%

App. 681.

II. The State-Court Litigation

On December 17, 2021, the Elias Law Group filed suit on behalf of a group of 18 voters known as the "Carter petitioners." App. 49–71. The Carter petitioners filed their lawsuit in the Commonwealth Court of Penn-

sylvania,[2] asking the state judiciary to impose their preferred map for the 2022 congressional elections. *See id.* Later that day, a separate group of 12 voters (the "Gressman petitioners") filed a similar lawsuit in the Commonwealth Court. The Commonwealth Court consolidated the two redistricting cases on December, 20, 2021, and the cases were assigned to Judge Patricia McCullough.

On December 21, 2021, the petitioners in these redistricting cases filed an application for extraordinary relief in the Supreme Court of Pennsylvania, asking the state supreme court to exercise extraordinary jurisdiction over the case. Ap. 72. The Supreme Court of Pennsylvania has a 5-2 Democratic majority, while the Commonwealth Court of Pennsylvania has a 6-3 Republican majority.[3] But on January 10, 2022, the state supreme court declined to invoke its extraordinary jurisdiction and denied the application for extraordinary relief without prejudice. App. 178–182.

On January 14, 2022, Judge McCullough ordered the parties and intervenors in the redistricting cases to submit proposed maps and expert reports by January 24, 2022. Judge McCullough also scheduled an evidentiary hearing for January 27 and 28, 2022, and announced that if the General Assembly "has not produced a new congressional map by January 30, 2022, the Court

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

3. The justices of the Supreme Court of Pennsylvania and the judges of the Commonwealth Court are chosen by the voters in partisan elections.

shall proceed to issue an opinion based on the hearing and evidence presented by the Parties." App. 183–186. On January 26, 2022, Governor Wolf vetoed HB 2146, the congressional map that had been approved by the General Assembly.

On January 27 and 28, 2022, Judge McCullough presided over the evidentiary hearings that had been scheduled in her order of January 14, 2022. On January 29, 2022, the petitioners in the state redistricting lawsuit filed a new "emergency application" with the Supreme Court of Pennsylvania, asking the state supreme court to immediately exercise "extraordinary jurisdiction" and take over the redistricting litigation from Judge McCullough. App. 187. On February 1, 2022, Judge McCullough announced that her ruling in the redistricting cases will issue no later than February 4, 2022.

On February 2, 2022, before Judge McCullough had issued her ruling, the Pennsylvania Supreme Court granted the application to exercise extraordinary jurisdiction in a 5-2 party-line vote. App. 263–264. The state supreme court's order designated Judge McCullough to serve as its "Special Master," and instructed Judge McCullough to file with the Supreme Court of Pennsylvania, on or before February 7, 2022, "a report containing proposed findings of fact and conclusions of law supporting her recommendation of a redistricting plan from those submitted to the Special Master, along with a proposed revision to the 2022 election schedule/calendar." App. 264. Justice Mundy and Justice Brobson, both Republicans, dissented from the state su-

preme court's order granting extraordinary relief and exercising extraordinary jurisdiction. App. 264.

III. The Special Master's Findings And Recommendation

On February 7, 2022, Judge McCullough issued her findings and recommended that the map approved by the General Assembly (HB 2146) serve as the state's congressional map. App. 265–492. Judge McCullough recommended HB 2146 from among the 13 plans that had been submitted for consideration by the parties and their amici. App. 314–327 (describing the 13 competing plans and maps). Judge McCollough noted that HB 2146 would result in "9 Democratic-leaning seats and 8 Republican-leaning seats," despite the fact that the Republican majority in the General Assembly had developed and proposed that plan. App. 481 (¶¶ 78–79). Judge McCollough noted that the willingness of the Republican-led General Assembly to produce a map that favors Democrats was something that "underscores the partisan fairness" of HB 2146. App. 481 (¶ 79) ("Unlike other maps that leaned Democrat, here, it is the Republican majority in the General Assembly that developed and proposed a plan, HB 2146, that favors Democrats, which ultimately underscores the partisan fairness of the plan."). Judge McCullough also expressed concern that the imposition of a court-drawn map that departs from the redistricting plan approved by the General Assembly would "effectively usurp the role and function of the law-making bodies of this Commonwealth." App. 476 (¶ 49).

Judge McCullough rejected the Carter Plan because it includes districts with a two-person deviation in population, which violates the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964). App. 462 ("[U]nlike the other plans that have a maximum population deviation of one person, the Carter Plan and the House Democratic Plan both result in districts that have a two-person deviation."); App. 465 (¶ 34) (describing the Carter Plan as "contrary to . . . United States Supreme Court precedent."); App. 474 ("[T]his Court does not recommend adopting the Carter Plan for the congressional districts in the Commonwealth of Pennsylvania because . . . it has a two-person difference in population from the largest to their smallest districts, while the majority of other plans were able to achieve a one person deviation"); *see also Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) ("*Wesberry v. Sanders* . . . requires that the State make a good-faith effort to achieve precise mathematical equality."); *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations as close to perfect equality as possible.").

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

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

> Carter Plan, in effect, seek to preemptively purge a Republican Congressman from the 17 seats that . . . remain available for office.”).

App. 465 (¶ 32–33); App. 474–475 (“[T]his Court does not recommend adopting the Carter Plan for the congressional districts in the Commonwealth of Pennsylvania because . . . without any explicit or apparent justification, it pairs two Republican incumbents in one congressional district and effectively eliminates a Republican from continued representation in the United States House of Representatives”). Finally, Judge McCullough rejected the Carter Plan because she found that it contained gerrymanders designed to “provide[] a partisan advantage to the Democratic party.” App. 475.

IV. The Supreme Court Of Pennsylvania Overrules The Special Master And Imposes The Carter Plan

The Supreme Court of Pennsylvania allowed the parties and intervenors to file exceptions to Judge McCullough’s findings and recommendation by February 14, 2022, and it scheduled oral arguments for February 18, 2022. But the ongoing litigation started bumping into deadlines in the General Primary Election calendar. Under the law of Pennsylvania, a candidate who wishes to appear on the primary ballot must file a nomination petition signed by registered voters of his party, and candidates for the U.S. House of Representatives must obtain 1,000 signatures on their nomination petition by March 8, 2022. *See* 25 Pa. Stat. §§ 2867, 2872.1(12). And under the statutes governing Pennsylvania elections, the first day that candidates may begin circulating nomination petitions is February 15, 2022, while the final day to ob-

tain signatures is March 8, 2022. So the window for circulating nomination petitions was fast approaching, and it was scheduled to begin before the state supreme court would hold oral arguments on Judge McCullough's findings and recommendation. But the state supreme court issued an order of February 9, 2022, that purports to "suspend" the General Primary Election calendar codified in 25 Pa. Stat. §§ 2868 and 2873. App. 494. No litigant had asked the state supreme court to suspend the General Primary Election calendar; the court did this entirely on its own initiative. And the state supreme court made no attempt to explain how it can "suspend" a primary-election calendar enacted by the legislature when the Elections Clause provides that "the Legislature" of each state shall prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1.

On February 23, 2022, the Supreme Court of Pennsylvania, in a 4-3 vote, overruled the special master and issued an order purporting to "adopt" the Carter Plan as the state's congressional map. App. 548–552. The order instructs state election officials to "prepare textual language that describes the Carter Plan and submit the same to the Secretary of the Commonwealth without delay," and to "publish notice of the Congressional Districts in the Pennsylvania Bulletin." App. 549–550. The state supreme court also "modified" the statutory deadlines in the General Primary Election calendar to accommodate its decision to impose the Carter Plan for the 2022 congressional elections, and commanded that its "modified" schedule "shall be imple-

mented by the Secretary of the Commonwealth and all election officers within the Commonwealth." App. 550. It also directed the Secretary of the Commonwealth to "notify this Court by 4:00 P.M. on February 25, 2022, should it foresee any technical issues." App. 551.

V. The Federal-Court Proceedings

On February 11, 2022, the applicants sued the state's election officials in federal district court, seeking to enjoin them from departing from the General Primary Election calendar or implementing any congressional map selected by the state judiciary. App. 1–14. The applicants claimed that the Constitution prohibits Pennsylvania's election officials from implementing a court-drawn map because the Elections Clause says that "the Legislature"—not the judiciary—must "prescribe" the manner of electing representatives, and the General Assembly has not authorized the state judiciary to draw congressional maps or participate in the redistricting process. App. 12–13. And if the General Assembly fails to enact a new congressional map in time for the 2022 elections, then the remedy is set forth in 2 U.S.C. § 2a(c)(5): The state's congressional delegation shall be elected at-large.

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

2 U.S.C. § 2a(c). The applicants immediately asked the judge to convene a three-judge district court under 28 U.S.C. § 2284, but the district judge has not yet ruled on this request. App. 15–16.

On February 20, 2022, the applicants filed their first amended complaint, which added an additional plaintiff, as well as an emergency motion for temporary restraining order or preliminary injunction. App. 18–32; App. 33–48. The applicants protested that the Supreme Court of Pennsylvania had no authority to "suspend" the General Primary Election calendar in its order of February 9, 2022, and that the state election officials' acquiescence in this unconstitutional "suspension" of the election calendar was inflicting irreparable harm on the applicants. App. 38–45. The applicants also asked the district court to enjoin the state election officials from implementing any congressional map selected by the state judiciary, and to order them to conduct at-large elections under 2 U.S.C. § 2a(c)(5) unless and until the General Assembly enacts a new congressional map. App. 527–529. The applicants asked the Court to grant an immediate TRO and instruct the defendants to respond to the request for preliminary injunction within 7 days. App. 47.

On February 21, 2022, the district court entered a scheduling order that: (1) ordered the defendants to respond to the plaintiffs' request to convene a three-judge district by 5:00 P.M. on Thursday, February 24, 2022; and (2) ordered the plaintiffs to file a reply brief in support of their request to convene a three-judge district court by 5:00 P.M. on Friday, February 25, 2022. The district court did not set a briefing schedule on the plaintiffs' request for

a TRO or preliminary injunction, and it did not rule on the plaintiffs' request for an immediate TRO. Instead, the court ordered an "on-the-record telephone conference to discuss only the procedural and scheduling matters on Plaintiffs' emergency motion for temporary restraining order or preliminary injunction," and it scheduled this conference for Friday, February 25, 2022, at 11:15 A.M. On February 22, 2022, the Carter petitioners moved to intervene in the federal-court proceeding, and the district court granted their motion.

On February 23, 2022, the applicants filed a "renewed" motion for temporary restraining order in the wake of the Supreme Court of Pennsylvania's order of February 23, 2022, which purports to "adopt" the Carter Plan for the 2022 elections and "modify" the General Primary Calendar enacted by the Pennsylvania legislature. App. 532–547. The applicants described the state supreme court's order as "a flagrant violation of the Elections Clause and 2 U.S.C. § 2a(c)(5)," and asked the district court to "immediately issue a TRO that restrains the defendants from implementing this unconstitutional order while the Court considers the plaintiffs' request for preliminary-injunctive relief." App. 533. The applicants also informed the district court that they would "seek emergency relief from Justice Alito" if it did not promptly enjoin the state's election officials from implementing the state supreme court's order of February 23, 2022. App. 533.

On February 25, 2022, the district court held a telephone conference with the parties and the Carter petitioners to discuss a briefing schedule. The

district court declined to rule on the applicants' request to convene a three-judge district court under 28 U.S.C. § 2284, claiming that it could not rule on this request without first resolving the jurisdictional objections that the defendants and Carter petitioners had raised. App. 561. The district court also denied the plaintiffs' request for an immediate TRO, on the ground that it "will not grant a temporary restraining order on the expedited basis requested by Plaintiffs prior to resolving the jurisdictional issues raised by Defendants and potential Intervenors." App. 561. Then the district court ordered the following schedule:

> Motions to dismiss on jurisdictional grounds are due by 5:00 P.M. on Tuesday, March 1, 2022.
>
> The plaintiffs' brief opposing jurisdictional dismissal is due by 5:00 P.M. on Friday, March 4, 2022, while any reply briefs are due by 5:00 P.M. on Saturday, March 5, 2022.
>
> Briefs opposing the plaintiffs' expedited motion for preliminary injunction are due by 5:00 P.M. on Tuesday, March 8, 2022.
>
> The plaintiffs' reply brief in support of its motion for preliminary injunction is due by 5:00 P.M. on Thursday, March 8, 2022.
>
> A hearing on the motion for preliminary injunction will be held on Friday, March 11, 2022, at 1:00 P.M., although the hearing date "is subject to change depending on whether a three-judge district court is convened and the availability of the two other presiding judges."

App. 561–562. This scheduling order makes it impossible for any ruling on the motion for preliminary injunction to occur until after the statutory dead-

line for filing and gathering signatures for nomination petitions (March 8, 2022) has passed. And even under the "modified" calendar decreed by the Supreme Court of Pennsylvania, the deadline for circulating and filing nomination petitions falls on March 15, 2022—only four days after the district court intends to hear arguments on the motion for preliminary injunction. So any remedy that attempts to undo or counteract the unconstitutional congressional map that the state supreme court has imposed will come *after* the statutory window for circulating and filing nomination petitions has closed—pulling the rug from under candidates who had prepared nomination petitions and papers on the assumption that the unconstitutional Carter Plan would apply. If the federal judiciary is going to thwart the implementation of this unconstitutional Carter Plan, it must act *now*, so that the state's election officials can administer an election consistent with the legislatively enacted General Primary Calendar—a calendar that state officials (and the judiciary) are constitutionally obligated to respect. *See* U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*" (emphasis added)).

On February 27, 2022, the applicants moved for leave to file a second amended complaint, which adds an additional plaintiff and attacks the constitutionality of the Carter Plan under *Wesberry v. Sanders*, 376 U.S. 1 (1964). App. 568–595. (The earlier pleadings had been filed before the state supreme court's order "adopting" the Carter Plan as the state's congressional map).

On February 28, 2022, the applicants filed a notice of appeal from the district court's decision denying immediate injunctive relief. App. 816.

ARGUMENT

The standard for issuing an injunction under the All Writs Act, 28 U.S.C. § 1651(a), mirrors the four-part test for deciding whether a preliminary injunction should issue:

> To prevail in an application for a stay or an injunction, an applicant must carry the burden of making a "strong showing" that it is "likely to succeed on the merits," that it will be "irreparably injured absent a stay," that the balance of the equities favors it, and that a stay is consistent with the public interest.

Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2495 (2021) (quoting *Nken* v. *Holder*, 556 U.S. 418, 434 (2009)). Each of these factors favors immediate injunctive relief.

I. The Applicants Are Likely To Prevail On The Merits Of Their Claims

The command of the Elections Clause is clear: It is "the Legislature" of Pennsylvania—and not the judiciary—that shall "prescribe" the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."). The rule of *Wesberry v. Sanders* is equally clear: the population of a state's congressional districts must be "as close to perfect equality as possible." *Evenwel v. Abbott*, 578 U.S. 54, 59 (2016). The defend-

ants are violating the Constitution by implementing a congressional map that has not been "prescribed" by the Pennsylvania legislature, and that violates *Wesberry v. Sanders* to boot.

A. The Defendants Are Violating The Elections Clause By Implementing The Carter Plan

Under the Elections Clause, "the Legislature" of Pennsylvania must prescribe the "manner" by which its representatives are elected, while Congress "may at any time by Law make or alter such Regulations." U.S. Const. art. I, § 4, cl. 1; *see also id.* ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."). The powers conferred by the Elections Clause include the prerogative to draw a new congressional map in response to the decennial census. *See Arizona State Legislature*, 576 U.S. 787.

The Elections Clause prohibits the defendants from implementing the Carter Plan because it has not been "prescribed" by "the Legislature" of Pennsylvania. The Supreme Court of Pennsylvania is not part of "the Legislature,"[4] and the General Assembly has not delegated any of its map-drawing powers to the state judiciary or authorized the state courts to involve themselves in the redistricting process. The state supreme court cannot arrogate to itself powers that the Constitution specifically assigns to "the Legisla-

4. *Compare* Pa. Const. art. II ("The Legislature"), *with* Pa. Const. art. V ("The Judiciary").

ture," and it cannot step into the shoes of the legislature and impose a congressional map merely because the General Assembly and the governor have failed to reach agreement on a map to govern the 2022 elections.

The state supreme court's behavior is even more egregious because there is a congressional enactment that specifies what must happen in the event of a stalemate between the General Assembly and the governor. Under 2 U.S.C. § 2a(c)(5), the state's congressional delegation must be elected at-large if the State has not been "redistricted in the manner provided by the law thereof":

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

2 U.S.C. § 2a(c). The State has not yet been "redistricted in the manner provided by the law thereof," because the General Assembly has not enacted a new congressional map and the judiciary has no authority to impose one under the Elections Clause. And the congressional map "adopted" by the Supreme Court flunks the equal-population requirement of *Wesberry v. Sanders*, so the Carter Plan fails to qualify as redistricting "in the manner provided by the law thereof" for that reason alone. 2 U.S.C. § 2a(c).

The Elections Clause requires state officials to implement the requirements of 2 U.S.C. § 2a(c)(5) if the General Assembly fails to enact a new congressional map in time for the 2022 elections. Congress, in enacting 2

U.S.C. § 2a(c)(5), has "ma[de] . . . Regulations" that govern the election of representatives pursuant to its authority under the Elections Clause, and state election officials are constitutionally obligated to follow this congressional command over any contrary instructions from the state judiciary.

The notion that the Supreme Court of Pennsylvania can replace the fallback regime that Congress has established in 2 U.S.C. § 2a(c)(5) with a congressional map of its own creation violates the Constitution in at least two respects. First, it usurps the authority that the Elections Clause assigns to the state legislature, because the Elections Clause gives "the Legislature" and not the judiciary the power to "prescribe" the manner of electing representatives. Second, it usurps the authority that the Elections Clause confers upon Congress, because Congress has enacted a statute requiring Pennsylvania's representatives to be elected at large if the General Assembly fails to enact a congressional map in time for the 2022 elections. The applicants are likely to prevail on their claims that the implementation of the Carter Plan violates the Elections Clause.

None of this even remotely implies that courts are categorically prohibited from drawing a congressional map.[5] Courts always have the authority to issue remedies for constitutional violations, and their power to remedy viola-

5. *See, e.g.*, Nicholas Stephanopoulos (@ProfNickStephan), Twitter (Feb. 15, 2022, 6:32 a.m.), https://bit.ly/3IwirX4 ("Lawyers should think twice before filing suits that imply that every plan ever drawn by a federal court in the face of political gridlock was unlawful. Maybe every prior court *didn't* get it wrong.").

tions of the Constitution does not contradict the commands of the Elections Clause. If a legislature has enacted an unconstitutional congressional map, a court may remedy those constitutional violations by ordering changes needed to bring the districts into constitutional compliance—although it should exercise this remedial discretion carefully and hew as closely as possible to the legislatively approved design. The Supreme Court of Pennsylvania, by contrast, has decided to impose a congressional map of its own creation in response to an impasse between the legislature and the governor, and in defiance of a federal statute that requires at-large elections when the state has failed to redistrict itself in time for the upcoming election calendar. *See* 2 U.S.C. § 2a(c)(5). Then the Court declared that it could unilaterally amend the General Primary Calendar enacted by the legislature, in outright defiance of the Elections Clause, in order to ensure that its belatedly imposed congressional map could be used for the 2022 primary elections. This is nothing short of an appropriation of power that the Constitution specifically assigns to the state legislature.

B. The Defendants Are Violating *Wesberry v. Sanders* By Implementing The Carter Plan

Even apart from the Elections Clause violations, the Carter Plan does not even comply with the Constitution's apportionment rules. This Court has repeatedly held that congressional redistricting plans must establish districts of exactly equal population. *See Evenwel v. Abbott*, 578 U.S. 54, 59 (2016) ("States must draw congressional districts with populations *as close to perfect*

equality as possible." (emphasis added)); *Kirkpatrick v. Preisler*, 394 U.S. 526, 530–31 (1969) ("*Wesberry v. Sanders* . . . requires that the State make a good-faith effort to achieve precise mathematical equality."); *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983). The Carter Plan flouts this requirement by creating congressional districts with *two*-person deviations. It is constitutionally intolerable to implement this map when it remains possible to draw a map that contains no more than one-person deviations among the proposed districts. *See Evenwel*, 578 U.S. at 59.

Indeed, the special master rejected the Carter Plan for this very reason. App. 462 (¶ 18) ("[U]nlike the other plans that have a maximum population deviation of one person, the Carter Plan and the House Democratic Plan both result in districts that have a two-person deviation."); App. 465 (¶ 34) (describing the Carter Plan as "contrary to . . . United States Supreme Court precedent."); App. 474 ("[T]his Court does not recommend adopting the Carter Plan for the congressional districts in the Commonwealth of Pennsylvania because . . . it has a two-person difference in population from the largest to their smallest districts, while the majority of other plans were able to achieve a one person deviation"). This did not appear to trouble the Supreme Court of Pennsylvania, which overruled the special master and adopted the Carter Plan despite its incompatibility with *Wesberry*'s equal-population rule. But there is no way that the Carter Plan can survive the plaintiffs' constitutional attack unless this Court is prepared to back away from its previous redistricting pronouncements.

C. The Elections Clause Requires The Defendants To Adhere To The General Primary Calendar Enacted By The State Legislature

The Elections Clause also forbids the defendants to depart from the General Primary Calendar that has been "prescribed" by "the Legislature" to govern the state's congressional and senatorial elections. The Supreme Court of Pennsylvania appears to believe that it can "suspend" or "modify" these legislatively enacted timetables whenever it finds it suitable to do so. App. 493–494 (order of February 9, 2022, purporting to "temporarily suspend[]" the General Primary Election calendar "pending further Order of this Court."); App. 550 (order of February 23, 2022, purporting to "modif[y] the deadlines and timetables established in the legislatively enacted General Primary Calendar). The Elections Clause says otherwise. It is "the Legislature"—and not "the judiciary"—that is tasked with prescribing the "times, places, and manner" of electing Senators and Representatives. *See* U.S. Const. art. I, § 4, cl. 1. And if the General Primary Calendar needs to be altered to accommodate the belated enactment of a congressional map, then the legislature must enact new laws to change the relevant deadlines.

The state supreme court apparently thought it could unilaterally "modify" the General Primary Calendar because it would otherwise be too late for the court to impose its preferred congressional map for the 2022 elections. Under Pennsylvania law, candidates for Congress may begin circulating their nomination petitions on February 15, 2022, and their final day to obtain signatures to appear on the ballot is March 8, 2022. 25 Pa. Stat. § 2753. Yet the

state supreme court's order adopting the Carter Plan was announced on February 23, 2022—eight days *after* the first date for circulating nomination petitions. The court's attempt to impose its preferred congressional map at this late date would cut into the three-week period that the legislature had provided for obtaining the needed signatures to appear on the ballot. So the court decided to take matters into its own hands by attempting to "suspend" (and later "modify") the statutory deadlines established by the legislature, in flat contravention of the Elections Clause.

When it becomes impossible for a court-selected map to be imposed without disrupting the calendars and deadlines that the legislature has prescribed for the upcoming election, the proper response is not to violate the Elections Clause by altering the General Primary Election calendar through judicial decree. Instead, the state judiciary (and the state's election officials) must obey the command of 2 U.S.C. § 2a(c)(5) and hold at-large elections:

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

2 U.S.C. § 2a(c). Pennsylvania has not yet been "redistricted in the manner provided by the law thereof," because the General Assembly has not enacted a new congressional map and the judicially imposed Carter Plan is unconstitutional under the Elections Clause and *Wesberry v. Sanders*. And because

there is no longer time to draw a new congressional map given the deadlines prescribed in the General Primary Election calendar, the courts must order at-large elections as required by 2 U.S.C. § 2a(c)(5). *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is triggered when "the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process"). Having a court "suspend" or delay the primary-election calendar to accommodate the judicial creation of a new congressional map is not an option.

The Elections Clause also compels state election officials to implement the requirements of 2 U.S.C. § 2a(c)(5) when there is insufficient time to adopt a new congressional map without altering the deadlines prescribed in the General Primary Election calendar. Congress, in enacting 2 U.S.C. § 2a(c)(5), has "ma[de] . . . Regulations" that govern the election of representatives pursuant to its authority under the Elections Clause. And state officials are constitutionally obligated to follow this congressional command rather than any court-drawn map or court-attempted "modification" of the General Primary Election calendar. The Supreme Court of Pennsylvania is constitutionally forbidden to "modify" a congressional primary calendar that the legislature has prescribed, and it cannot remedy the legislature's failure to enact a new congressional map by disrupting the election process rather than ordering at-large elections under 2 U.S.C. § 2a(c)(5).

D. The Applicants' Standing Is Clear and Indisputable

The district court declined to issue an immediate TRO because the defendants had questioned the plaintiffs' standing,[6] but the plaintiffs' standing is as clear as can be. Each of the six plaintiffs is a registered voter in Pennsylvania, and each of them is suffering injury from the defendants' implementation of the Carter Plan and their refusal to hold at-large elections, as required by the Elections Clause and 2 U.S.C. § 2a(c)(5). Under 2 U.S.C. § 2a(c)(5), the plaintiffs are entitled to cast ballots for all 17 of the state's representatives in the U.S. House if the General Assembly fails to enact a new congressional map in time for the 2022 elections. The defendants are depriving each of the plaintiffs of their entitlement to vote in all 17 congressional races by refusing to hold at-large elections. This injury is traceable to the allegedly unlawful conduct of the named defendants, who are violating the Elections Clause and 2 U.S.C. § 2a(c)(5) by implementing the Carter Plan for the 2022 congressional elections. And it will be redressed by an injunction that halts the implementation of the Carter plan and requires the defendants to conduct at-large elections unless and until the General Assembly enacts a new congressional map.

6. App. 561 ("Plaintiffs' motions for temporary restraining order, Docs. 10 & 30, are DENIED because the court will not grant a temporary restraining order on the expedited basis requested by Plaintiffs prior to resolving the jurisdictional issues raised by Defendants and potential Intervenors.").

Plaintiff Howard Gartland is suffering additional injury from the Carter Plan's violation of the equal-population rule. Mr. Gartland resides and will vote in the Carter Plan's 5th congressional district,[7] and his vote will carry less weight because the population of his district has been overweighted in violation of the Constitution's equal-population rule. App. 635. This injury is traceable to the allegedly unlawful conduct of the named defendants, who are violating *Wesberry v. Sanders* by implementing the Carter Plan for the 2022 congressional elections. And it will be redressed by an injunction that halts the implementation of the Carter Plan and requires the defendants to conduct at-large elections unless and until the General Assembly enacts a new congressional map.

Plaintiff Aaron Bashir is a Republican congressional candidate who resides in Philadelphia. Mr. Bashir is suffering injury in fact because the Carter plan is forcing him to run in a congressional district with a massive Democratic voter-registration advantage, rather than in a statewide at-large election where the numbers of Democratic and Republican voters are more evenly split. *See* Bashir Decl. ¶ 4 (App. 556). This injury is traceable to the allegedly unlawful conduct of the named defendants, who are violating the Elections Clause and 2 U.S.C. § 2a(c)(5) by implementing the Carter Plan for the 2022 congressional elections. And it will be redressed by an injunction that halts the implementation of the Carter plan and requires the defendants to con-

7. Gartland Decl. (App. 808).

duct at-large elections unless and until the General Assembly enacts a new congressional map.

Mr. Bashir is suffering additional injuries because the defendants' implementation of the unconstitutional Carter Plan and their refusal to honor the Elections Clause and 2 U.S.C. § 2a(c)(5) is leaving Mr. Bashir uncertain of how he should campaign for a seat in the U.S. House of Representatives. The primary election is less than three months away, and the defendants' implementation of a patently unconstitutional congressional map creates a substantial risk that a federal court will declare the map unlawful after he has spent time and resources campaigning in the court-drawn congressional districts. *See* Bashir Decl. ¶ 5 (App. 557). This cloud of legal uncertainty over the court-drawn map inflicts additional injury by making it difficult for Mr. Bashir to raise money from donors to finance his campaign. *See* Bashir Decl. ¶ 6–8 (App. 557). This injury is traceable to the allegedly unlawful conduct of the named defendants, who are violating the Elections Clause and 2 U.S.C. § 2a(c)(5) by implementing the Carter Plan for the 2022 congressional elections. And it will be redressed by an injunction that halts the implementation of the Carter plan and requires the defendants to conduct at-large elections unless and until the General Assembly enacts a new congressional map.

Finally, plaintiff Alan M. Hall is suffering injuries in his capacity as a member of the Susquehanna County Board of Elections. The defendants' implementation of the Carter Plan will force Mr. Hall to conduct an election under an unconstitutional map, in contravention of Mr. Hall's oath of office.

In addition, the state supreme court's unilateral "revisions" to the statutorily mandated primary election calendar will force Mr. Hall to depart from the General Primary Calendar that the legislature enacted, in violation of the U.S. Constitution and in contravention of Mr. Hall's oath to obey the Constitution. These injuries are traceable to the allegedly unlawful conduct of the named defendants, who are violating the Elections Clause and 2 U.S.C. § 2a(c)(5) by implementing the Carter Plan for the 2022 congressional elections. And it will be redressed by an injunction that halts the implementation of the Carter plan and requires the defendants to conduct at-large elections unless and until the General Assembly enacts a new congressional map.

Mr. Hall is suffering additional injury in fact from the defendants' decision to implement the "revised" General Primary Calendar decreed by the state supreme court. Because the state supreme court extended the deadline for circulating and filing nomination petitions by seven days, Mr. Hall does not expect to have a certified list of candidates until March 29, 2022—seven days later than would be expected under the calendar prescribed by the Legislature. *See* Hall Decl. ¶ 7 (App. 559–560). Yet under the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), Mr. Hall's office must send ballots to overseas military members at least 45 days before the primary election. *See* 52 U.S.C. § 20302(a)(8)(A). That deadline falls on April 2, 2022, a Saturday. So the defendants' departure from the legislatively enacted calendar leaves Mr. Hall and his colleagues with only one or two days to prepare and mail overseas military absentee ballots given the deadline estab-

lished in UOCAVA. *See* Hall Decl. ¶ 8 (App. 560). This injury is traceable to the allegedly unlawful conduct of the named defendants, who are violating the Elections Clause by departing from the General Primary Calendar that the Pennsylvania legislature enacted. And it will be redressed by an injunction that enjoins the defendants from departing from the General Primary Calendar.

Standing is secure, as at least one plaintiff has standing to seek each form of relief requested,[8] and each of the theories for standing is backed by sworn declarations. The applicants are likely to establish standing, just as they are likely to establish the unconstitutionality of the defendants' actions.

II. The Applicants Will Suffer Irreparable Harm Absent Immediate Injunctive Relief

Each of the six applicants will suffer irreparable harm if the defendants' implementation of the Carter Plan is not enjoined, because the Carter Plan deprives them of their right to vote for all 17 members of the Pennsylvania congressional delegation in the upcoming primary election. Plaintiff Gartland will also suffer irreparable harm from the unconstitutional dilution of his vote if the implementation of the Carter Plan is not enjoined.

Plaintiff Bashir is suffering irreparable harm from being forced to run in a heavily Democratic district rather than in a statewide at-large election. And plaintiffs Bognet and Bashir are suffering irreparable harms from being

8. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017) ("At least one plaintiff must have standing to seek each form of relief requested in the complaint.").

forced to campaign for office under an unconstitutional court-drawn map, which is likely to be declared unconstitutional and undone at the conclusion of these proceedings. The lingering uncertainty surrounding whether they will need to campaign for office in statewide at-large elections or in the Carter Plan's districts inflicts irreparable harm on the candidates and their campaigns, as they cannot be certain where they need to campaign, who their voters will be, or who their primary and general-election opponents will be. *See* Bognet Decl. ¶¶ 4–9, 19 (App. 519–521); Bashir Decl. ¶¶ 3–6, 17 (App. 522–523). It is also hindering their fundraising. *See* Bognet Decl. ¶¶ 10–12 (App. 520); Bashir Decl. ¶¶ 6–8 (App. 557). These injuries are especially harmful to challengers who are attempting to unseat incumbents, as challengers must act quickly to establish name recognition and organize an effective campaign. *See* Bognet Decl. ¶¶ 13–16 (App. 520). Finally, plaintiff Alan Hall will suffer irreparable harm absent an injunction because he and his colleagues on the Susquehanna Board of Elections will be forced to depart from the General Primary Calendar that the legislature enacted, in contravention of his oath to obey the Constitution and the Elections Clause.

None of these injuries can be compensated with monetary relief after trial, as each of the defendants enjoys sovereign immunity from damages. *See Marland v. Trump*, 498 F. Supp. 3d 624, 642 (E.D. Pa. 2020). And the *Purcell* principle will make it difficult if not impossible for the applicants to obtain injunctive relief at a later time. *See Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205, 1207 (2020) ("This Court has re-

peatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)).

III. The Balance Of Equities Favors An Injunction

The balance of equities favors an immediate injunction because it is clear that any action taken to implement the Carter Plan will violate the Elections Clause and 2 U.S.C. § 2a(c)(5), as well as the equal-population rule of *Wesberry v. Sanders*, 376 U.S. 1 (1964). The need to enforce the Constitution and federal law outweighs any harms that might befall others from an injunction. *See Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 597 (3d Cir. 2002) ("[T]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor." (citation and internal quotation marks omitted)); Charles Alan Wright & Arthur R. Miller, et al., 11A Fed. Prac. & Proc. Civ. § 2948.2 (3d ed.) ("[W]hen plaintiff is claiming the loss of a constitutional right, courts commonly rule that even a temporary loss outweighs any harm to defendant and that a preliminary injunction should issue.").

IV. The Public Interest Favors An Injunction

An injunction will ensure that the Constitution and 2 U.S.C. § 2a(c)(5) are obeyed, which is by definition in the public interest. *See Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

An immediate injunction will also advance the public interest by forcing the General Assembly and Governor Wolf to negotiate a new congressional map against the backdrop of 2 U.S.C. § 2a(c)(5). By requiring at-large elections in the event of an impasse between the legislature and governor, 2 U.S.C. § 2a(c)(5) creates strong incentives for compromise among rival factions of state governments. But the Supreme Court of Pennsylvania has removed any incentive for Governor Wolf to negotiate or compromise with the Republican-controlled legislature. The governor knew from the outset that an impasse would lead to a court-selected map—and he knew that this process would be controlled by a state supreme court with a 5-2 Democratic majority. So Governor Wolf had every reason to veto the General Assembly's map and throw the issue to the Democratic-controlled court, even though the General Assembly had offered him a map with a majority of Democratic-leaning districts. The state supreme court rewarded the governor's intransigence by adopting a congressional map proposed by the Elias Law Group, an outcome that the state's Democrats could only have dreamed of obtaining from a Republican-controlled legislature. The Court should immediately enforce the command of 2 U.S.C. § 2a(c)(5), which will restore the incentive the legislature and Governor Wolf to agree on a new map (and a modified primary schedule) and avoid the spectacle of at-large elections for the state's 17 congressional representatives.

V. The Court May Construe This Application As A Jurisdictional Statement

In *United States v. Texas*, No. 21A85, the Court construed the Solicitor General's emergency-relief filing as a petition for certiorari before judgment, and it granted that petition and scheduled expedited briefing and oral argument. *See United States v. Texas*, 142 S. Ct. 14 (2021). The applicants invite the Court to take a similar approach to this application if it decides that the issues are worthy of merits briefing and oral argument. We have filed a notice of appeal from the district court's order of February 25, 2022, denying our request for immediate injunctive relief. App. 816. So the Court may (if it wishes) construe this filing as a jurisdictional statement, note probable jurisdiction, and schedule briefing and oral argument. *See* 28 U.S.C. § 1253 (allowing "any party" to appeal to this Court from an order "denying, after notice and hearing, an interlocutory or permanent injunction").[9] Alternatively, the Court may decide to schedule briefing and argument on the writ-of-injunction question, without noting probable jurisdiction to formally review the district court's ruling below. *See, e.g.*, *Biden v. Missouri*, 142 S. Ct. 735 (Mem); *NFIB v. OSHA*, 142 S. Ct. 736 (Mem).

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9. This lawsuit is indisputably "required" to be "heard and determined by a district court of three judges" within the meaning of 28 U.S.C. § 1253, as it is "challenging the constitutionality of the apportionment of congressional districts" in the Carter Plan. 28 U.S.C. § 2284(a). That remains the case even though the district judge has not yet convened a three-judge district court, as required by 28 U.S.C. § 2284(b)(1).

The pending application from North Carolina[10] shows that state-court insouciance toward the Elections Clause is not limited to Pennsylvania. Inaction by this Court in response to these episodes will only encourage similar behavior from other state judiciaries. The Court should take swift and decisive action to rein in this unconstitutional judicial meddling in redistricting decisions.

CONCLUSION

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

Respectfully submitted.

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10. *See Moore v. Harper*, No. 21A455.

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RULE 20.3(a) STATEMENT

The applicants seek relief against Leigh M. Chapman, in her official capacity as Acting Secretary of the Commonwealth; Jessica Mathis, in her official capacity as Director for the Pennsylvania Bureau of Election Services and Notaries; and Tom Wolf, in his official capacity as Governor of Pennsylvania. The relief that the applicants seek is not available in any other court because the district court denied the applicants' request for immediate injunctive relief on February 25, 2022.

CERTIFICATE OF SERVICE

I certify that a copy of this document has been sent by e-mail on February 28, 2022, to the following counsel of record in this case:

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