

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

**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,**

Petitioners,

v.

Lehigh 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,

Respondents

No. 7 MM 2022

**Philip T. Gressman; Ron Y. Donagi;
Kristopher R. Tapp; Pamela Gorkin; David P.
Marsh; James L. Rosenberger; Amy Myers;
Eugene Boman; Gary Gordon; Liz McMahan;
Timothy G. Feeman; and Garth Isaak,**

Petitioners,

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Respondents

No. 7 MM 2022

EMERGENCY APPLICATION FOR INTERVENTION OF PROPOSED INTERVENOR TEDDY DANIELS

Proposed intervenor, Teddy Daniels, files this emergency application to intervene as a petitioner in this action and, if the Court grants his application to intervene, requests that he be granted leave to file the attached petition for review (Exhibit A) and application for reconsideration of this Court's order of February 9, 2022 (Exhibit B) and states as follows:

1. Proposed intervenor, Teddy Daniels, is a Republican candidate for Lieutenant Governor of Pennsylvania and a registered Republican voter from Wayne County.

2. On February 9, 2022, this Court entered an order that suspended the General Primary Election Calendar for the Commonwealth of Pennsylvania.

3. Mr. Daniels has a substantial, direct, and immediate interest in the outcome of this litigation as a candidate and a voter.

4. A candidate who wishes to appear on the primary ballot in Pennsylvania must file a nomination petition signed by members of his party who are registered voters. 25 P.S. § 2867.

5. The Election Code provides that the first day that candidates may begin circulating nominating petitions is February 15, 2022. The final day to obtain signatures is March 8, 2022. 25 P.S. § 2868.

6. The Elections Code requires the Commonwealth's primary elections to be held on May 17, 2022. 25 P.S. § 2753.

7. As a candidate for Lieutenant Governor, Mr. Daniels must obtain at least 1,000 signatures from registered Republican voters, with at least 100 signatures coming from each of at least five counties. 25 P.S. § 2872.1(4).

8. A registered voter may sign only one petition per candidate per office. 25 P.S. § 2868.

9. There are no fewer than 9 declared Republican candidates for Lieutenant Governor, all of whom will be competing with Mr. Daniels to obtain the minimum number of valid signatures to appear on the Republican primary ballot.

10. To accomplish the task of obtaining the minimum number of valid signatures to appear on the May 2022 primary ballot, Mr. Daniels's campaign had prepared and trained several hundred volunteers to assist his campaign in gathering signatures from registered Republican voters beginning promptly on February 15, 2022.

11. But this Court's February 9, 2022 order suspending the General Primary Election Calendar throws that plan into disarray.

12. Mr. Daniels does not know when he can start circulating nomination petitions or how long he will have to circulate the petitions to obtain the necessary number of signatures.

13. He, therefore, does not know how many volunteers he needs, how long he will need them, or where to deploy them to efficiently gather the necessary number of signatures.

14. Moreover, Mr. Daniels will be fighting with other candidates to obtain signatures from registered Republican voters.

15. The Order also affects Mr. Daniels because it will compress the time for him to campaign as an official candidate.

16. Before the Court's order of February 9, 2022, if Mr. Daniels obtained the necessary signatures to appear on the primary ballot as a candidate for Lieutenant Governor, he would have at least nine weeks to campaign, solicit votes from Republican voters, and raise funds.

17. Depending on when this Court's temporary suspension is lifted, it could leave Mr. Daniels with only a handful of weeks, if not mere days, to campaign.

18. Even a modestly truncated campaign schedule will adversely affect Mr. Daniels because in a competitive primary, such as that for the 2022 Republican Lieutenant Governor nomination, each day counts.

19. In sum, Mr. Daniels cannot effectively plan for the primary election, whenever that may occur.

20. This action and this Court's order of February 9, 2022, also has a substantial, direct, and immediate effect on Mr. Daniels's interests as a voter in several ways.

21. Under 2 U.S.C. § 2a(c)(5), Mr. Daniels is entitled to cast a ballot 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. If the Court grants the petitioners' requested relief, it will deprive Mr. Daniels of his

entitlement to vote in all 17 congressional races by refusing to hold at-large elections as required by 2 U.S.C. § 2a(c)(5). This injury is casually related to the petitioners' requested relief in this case.

22. Under Pa. R. Civ. P. 2327:

At any time during the pendency of an action, a person not a party thereto *shall be permitted* to intervene therein, subject to these rules if . . .

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R. Civ. P. 2327(4) (emphasis added).

23. “[A]n application for intervention may be refused, if (1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or (2) the interest of the petitioner is already adequately represented; or (3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” Pa. R. Civ. P. 2329.

24. “Considering Rules 2327 and 2329 together, the effect of Rule 2329 is that if the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary, unless one of the grounds for refusal under Rule 2329 is present.” *Larock v. Sugarloaf Twp. Zoning Board*, 740 A.2d 308, 313 (Pa. Comwlth. 1999).

25. Mr. Daniels has a legally recognized interest in this matter and his rights as a candidate are affected by the Court's order of February 9, 2022.

26. Mr. Daniels has a legally recognized right as a voter to a statewide Congressional election under 2 U.S.C. § 2a(c)(5) that will be affected if this Court grants petitioners' relief and draws or selects a Congressional map of its own.

27. Mr. Daniels also has a legally recognized right as a voter under Art. I, § 4, cl. 1 of the United States Constitution to have the Commonwealth's congressional map determined by the General Assembly.

28. Mr. Daniels's interests are not adequately represented by any current party or intervenor to the action.

29. No current party or intervenor is a candidate for office that is affected by the Court's order of February 9, 2022, which suspends the General Primary Election calendar.

30. No current party or intervenor is a candidate for the Republican nomination for Lieutenant Governor and, therefore, is not required to collect 1,000 signatures with at least 100 each coming from five or more counties.

31. No current party or intervenor has asked or is asking this Court to reconsider its order of February 9, 2022, which purports to suspend the General Primary Election calendar. Nor is any current party or intervenor arguing that the Court's order of February 9, 2022, violates the Elections Clause, which vests "the Legislature" of Pennsylvania with the sole authority for prescribing the "times, places, and manner" of electing Senators and Representatives. *See*

U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”).

32. No current party or intervenor is asking this Court to enforce Article I, § 4, clause 1 of the United States Constitution and 2 U.S.C. § 2a(c)(5) by ordering state officials to hold at-large elections for Pennsylvania’s congressional delegation unless and until the General Assembly enacts a new congressional map.

33. Mr. Daniels has not unduly delayed in seeking intervention.

34. It is true that a previous order from the Commonwealth Court required all petitions for intervention to be filed by December 31, 2021. *See* Commonwealth Court Order, 12/20/21.

35. But Mr. Daniels had no legally cognizable interest that was affected by this action on or before December 31, 2021.

36. First, Mr. Daniels’s legal interests as a candidate were not affected until February 9, 2022, when this Court entered an order suspending the General Primary Election Calendar.

37. Second, Mr. Daniels’s legal interest as a voter did not arise until January 26, 2021, when Governor Wolf vetoed HB 2541, which was a proposed new Congressional map passed by the General Assembly.

38. Finally, Mr. Daniels’s legal interest in ensuring that state officials hold at-large elections, as required by 2 U.S.C. § 2a(c)(5), did not arise until this

Court determined that it would be necessary to suspend the General Primary Election Calendar to allow for the imposition of a court-drawn map. *See Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.) (holding that 2 U.S.C. § 2a(c) is not triggered until “the election is so imminent that no entity competent to complete redistricting pursuant to state law . . . is able to do so without disrupting the election process”).

WHEREFORE, proposed intervenor, Teddy Daniels, respectfully requests that the Court permit him to intervene as a petitioner in this action and file the attached petition for review and application for reconsideration of this Court’s order of February 9, 2022.

Respectfully submitted.

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III
Pennsylvania Bar No. 89151
Zimolong LLC
Post Office Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Pennsylvania Bar No. 91505
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Dated: February 11, 2022

Counsel for Intervenor Teddy Daniels

VERIFICATION

I, Teddy Daniels, verify that that the facts contained in the foregoing are true and correct based upon my knowledge, information, and belief. However, while the facts are true and correct based upon my knowledge, information, and belief, the words contained in the foregoing are those of counsel and not mine. I understand that statements herein are made subject to the penalties set forth in 18 Pa. C.S.A. § 4904 relating to unsworn falsification to authorities.

Dated: February 11, 2022

/s/ Teddy Daniels
TEDDY DANIELS

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[PROPOSED] ORDER

AND NOW, this _____ day of February 2022, upon consideration of the Application to Intervene of Teddy Daniels and any response in opposition, it is hereby **ORDERED** that the Application is **GRANTED** and Teddy Daniels is permitted to intervene as a petitioner in this action.

IT IS FURTHER ORDERED that Mr. Daniels is granted leave to file the Petition for Review, attached at Exhibit A to his Application, and Application for Reconsideration of this Court's Order dated February 9, 2022.

BY THE COURT:

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NOTICE TO PLEAD

To: Commonwealth of Pennsylvania, Department of State, Leigh M. Chapman, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries

You are hereby notified to file a written response to the enclosed amended petition for review within thirty (30) days from service hereof or a judgment may be entered against you.

Respectfully submitted.

Date: February 11, 2022

/s/ Walter S. Zimolong, Esquire
Walter S. Zimolong, Esq.
ZIMOLONG, LLC
wally@zimolonglaw.com
353 West Lancaster Avenue,
Suite 300
Wayne, Pennsylvania 19087

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INTERVENOR TEDDY DANIELS’S PETITION FOR REVIEW

The state of Pennsylvania lost a congressional seat in the most recent decennial census. The Pennsylvania legislature must therefore draw a new congressional map for the 2022 elections. Under the U.S. Constitution, “the Legislature” of each state is charged with prescribing the “times, places, and manner” of electing Senators and Representatives, although Congress may enact laws to “make or alter such regulations.” *See* U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”). That means the state legislature must either enact a new congressional map or delegate its map-creation authority to another institution. *See, e.g., Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015).

The Pennsylvania legislature, however, has not yet enacted a congressional map for the 2022 elections. Although the General Assembly passed a new congressional map earlier this year, it was vetoed by Governor Wolf. *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, the petitioners in these cases have repaired to state court in the hopes of inducing the state judiciary to impose a congressional map for the 2022 elections. But any congressional map imposed by the state judiciary would violate the Elections Clause, which allows only “the Legislature”—and not the judiciary—to “prescribe” the manner of

electing representatives. The state judiciary must therefore wait for the General Assembly to act.

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): 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 Elections Clause requires the state judiciary to implement this congressional instruction 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 the state judiciary is constitutionally obligated to follow this congressional command rather than impose a map of its own creation.

On February 9, 2022, the Supreme Court of Pennsylvania issued an order that purports to “suspend” the General Primary Election calendar codified in the Pennsylvania election statutes. This order is flatly unconstitutional, because the Elections Clause provides that “the Legislature”—and not the judiciary—shall prescribe the “times, places, and manner” of electing Senators and Representatives. And if the state supreme court has determined that there

is no longer time for to draw a congressional map given the deadlines in the General Primary Election calendar, then it *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”). A state court cannot “suspend” a primary election that the legislature has scheduled, 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).

JURISDICTION AND VENUE

1. The Supreme Court has original jurisdiction over the petition by its order of February 2, 2022, where it exercised extraordinary jurisdiction under 42 Pa.C.S. § 726.

PARTIES

2. Each of the petitioners in the two consolidated cases is a registered voter in the Commonwealth of Pennsylvania.

3. Respondent Lehigh M. Chapman is Acting Secretary of the Commonwealth of Pennsylvania. She may be served at 302 North Office Building, 401 North Street Harrisburg, Pennsylvania 17120. Acting Secretary Chapman is sued in her official capacity.

4. Respondent Jessica Mathis is Director for the Pennsylvania Bureau of Election Services and Notaries. She may be served at 210 North Office Building, 401 North Street Harrisburg, Pennsylvania 17120. Director Mathis is sued in her official capacity.

5. Intervenor Teddy Daniels is a resident of Wayne County. He is a registered voter in Pennsylvania and a Republican candidate for Lieutenant Governor of Pennsylvania.

FACTS

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

7. The results of the 2020 census left Pennsylvania with 17 seats in the U.S. House of Representatives, one less than before. *See* U.S. Dept. of Commerce, Table 1. Apportionment Population and Number of Representatives by State: 2020 Census.

8. Under the Elections Clause of the U.S. Constitution, “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.

9. On August 20, 2021, the census-block results of the 2020 Census were delivered to Governor Wolf and the leaders of the General Assembly, which allowed the legislature to begin the process of drawing a new congressional map.

10. On December 15, 2021, the House State Government Committee approved a new congressional map (HB 2541), in a 14-11 vote. The General Assembly eventually passed HB 2541, but it was vetoed by Governor Wolf on January 26, 2022.

11. On December 17, 2021, eighteen voters filed a lawsuit in the Commonwealth Court of Pennsylvania, asking the state judiciary to impose a map for the 2022 congressional elections. Later that day, a separate group of twelve voters filed a similar lawsuit in the Commonwealth Court.

12. The Commonwealth Court consolidated the two redistricting cases on December, 20, 2021, and the cases were assigned to Judge Patricia McCullough.

13. 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.

14. On January 10, 2022, the state supreme court declined to invoke its extraordinary jurisdiction and denied the petitioners' application for extraordinary relief without prejudice.

15. On January 14, 2022, Judge McCullough ordered all parties and intervenors to submit proposed maps and expert reports by January 24, 2022. Judge McCullough also scheduled an evidentiary hearing for January 27 and 28, 2022, and announced that if the General Assembly “has not produced a new congressional map by January 30, 2022, the Court shall proceed to issue an opinion based on the hearing and evidence presented by the Parties.”

16. On January 26, 2022, Governor Wolf vetoed HB 2541, a congressional map that had been approved by the General Assembly.

17. On January 27 and 28, 2022, Judge McCullough presided over the evidentiary hearings that had been scheduled in her order of January 14, 2022.

18. On January 29, 2022, the petitioners in these cases 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.

19. On February 1, 2022, Judge McCullough announced that her ruling in these redistricting cases will issue no later than February 4, 2022.

20. 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 vote.

21. The state supreme court’s order designated Judge McCullough to serve as a “Special Master,” and instructed her 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.”

22. Justice Mundy and Justice Brobson dissented from the state supreme court’s order granting extraordinary relief and exercising extraordinary jurisdiction.

23. On February 7, 2022, Judge McCullough issued her findings and recommended that the map approved by the General Assembly (HB 2541) be used as the congressional map.

24. The state supreme court has allowed any party or intervenor to file exceptions to Judge McCullough’s findings by February 14, 2022, and the state supreme court has scheduled oral argument for February 18, 2022.

25. On February 9, 2022, the state supreme court issued an order *sua sponte* that purports to “suspend” the General Primary Election calendar codified in 25 Pa. Stat. §§ 2868 and 2873. No litigant had asked the state supreme court to suspend the primary-election calendar or issue an order purporting to do so.

FACTS REGARDING PROPOSED INTERVENOR TEDDY DANIELS

26. Proposed intervenor Teddy Daniels is a Republican candidate for Lieutenant Governor of Pennsylvania and a registered Republican voter from Wayne County.

27. A candidate who wishes to appear on the primary ballot in Pennsylvania must file a nomination petition signed by members of his party who are registered voters. *See* 25 Pa. Stat. § 2867.

28. The Pennsylvania Election Code provides that the first day that candidates may begin circulating nominating petitions is February 15, 2022. The final day to obtain signatures is March 8, 2022. 25 Pa. Stat. § 2868.

29. The Pennsylvania Election Code requires the state's primary elections to be held on May 17, 2022.

30. As a candidate for Lieutenant Governor, Mr. Daniels must obtain at least 1,000 signatures from registered Republican voters, with at least 100 signatures coming from each of at least five counties. 25 Pa. Stat. § 2872.1(4).

31. A registered voter may sign only one petition per candidate per office. 25 Pa. Stat. § 2868.

32. There are no fewer than 9 declared Republican candidates for Lieutenant Governor, all of whom will be competing with Mr. Daniels to obtain the minimum number of valid signatures to appear on the Republican primary ballot.

33. To accomplish the task of obtaining the minimum number of valid signatures to appear on the May 2022 primary ballot, Mr. Daniels's campaign had prepared and trained several hundred volunteers to gather signatures from registered Republican voters beginning promptly on February 15, 2022.

34. But the state supreme court's order of February 9, 2022, which purports to suspend the General Primary Election Calendar, has thrown that plan into disarray.

35. Mr. Daniels does not know when he can start circulating nomination petitions or how long he will have to circulate the petitions to obtain the necessary number of signatures.

36. He, therefore, does not know how many volunteers he needs, how long he will need them, or where to deploy them to efficiently gather the necessary number of signatures.

37. Moreover, Mr. Daniels will be competing with other candidates to obtain signatures from registered Republican voters.

38. The Court's order of February 9, 2022, also affects Mr. Daniels because it will compress the time for him to campaign as an official candidate.

39. Before this Court's order of February 9, 2022, if Mr. Daniels obtained the necessary signatures to appear on the primary ballot as a candidate for Lieutenant Governor, he would have at least nine weeks to campaign, solicit votes from Republican voters, and raise funds.

40. Depending on when the "suspension" imposed by this Court is lifted, it could leave Mr. Daniels with only a handful of weeks, if not mere days, to campaign.

41. Even a modestly truncated campaign schedule will adversely affect Mr. Daniels because in a competitive primary, such as that for the 2022 Republican Lieutenant Governor nomination, each day counts.

42. In sum, Mr. Daniels cannot effectively plan for the primary election, whenever that may occur.

43. The petitioners' lawsuit and the state supreme court's order of February 9, 2022, also have a substantial, direct, and immediate effect on Mr. Daniels's interests as a voter.

44. Under 2 U.S.C. § 2a(c)(5), Mr. Daniels is entitled to cast a ballot 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. If the state judiciary grants the petitioners' requested relief, it will deprive Mr. Daniels of his entitlement to vote in all 17 congressional races by refusing to hold at-large elections as required by 2 U.S.C. § 2a(c)(5). This injury is casually related to the petitioners' requested relief in this case.

CLAIM FOR RELIEF

45. The Elections Clause provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

U.S. Const. art. 1, § 4, cl. 1 (emphasis added).

46. The Elections Clause forbids the judiciary of this state to create or impose a congressional map, because the state judiciary is not part of "the Legislature," 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.

47. The Elections Clause also forbids the state judiciary to defy the requirements of 2 U.S.C. § 2a(c)(5), which requires Pennsylvania to hold at-large elections if the General Assembly fails to enact a new congressional map in time for the 2022 primary election. *See* U.S. Const. art. 1, § 4, cl. 1 (allowing Congress to “make or alter” regulations for electing representatives).

48. The Court should enter declaratory and injunctive relief that requires the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map.

49. The Court should also vacate its order of February 9, 2022, which purports to “suspend” the General Primary Election Calendar established by the legislature of Pennsylvania. The Court’s order of February 9, 2022, is a violation of the Elections Clause.

50. Finally, the courts should reject all of the claims asserted by the petitioners, as the relief that they request from the state judiciary violates both the Elections Clause and 2 U.S.C. § 2a(c)(5).

DEMAND FOR RELIEF

51. Mr. Daniels respectfully requests that the court:

- a. declare that the Elections Clause and 2 U.S.C. § 2a(c)(5) require the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map;
- b. enter an injunction that compels the respondents to hold at-large elections for the Pennsylvania congressional delegation, unless and until the General Assembly enacts a new congressional map;
- c. vacate the order of February 9, 2022, which purports to “suspend” the General Primary Election Calendar established by the legislature of Pennsylvania;
- d. grant all other relief that the Court may deem just, proper, or equitable.

Respectfully submitted.

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III
Pennsylvania Bar No. 89151
Zimolong LLC
Post Office Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Pennsylvania Bar No. 91505
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Dated: February 11, 2022

Counsel for Intervenor Teddy Daniels

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Kristopher R. Tapp; Pamela Gorkin; David P.
Marsh; James L. Rosenberger; Amy Myers;
Eugene Boman; Gary Gordon; Liz McMahan;
Timothy G. Feeman; and Garth Isaak,**

Petitioners,

v.

Lehigh 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,

Respondents

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**APPLICATION TO RECONSIDER AND VACATE
ORDER OF FEBRUARY 9, 2022**

On February 9, 2022, this Court issued an order that purports to “suspend” the General Primary Election calendar codified in the Pennsylvania election statutes. The Court issued this order *sua sponte* without asking for briefing or argument on whether it has the authority to issue an order of this sort.

Intervenor Teddy Daniels respectfully asks the Court to reconsider and rescind its order of February 9, 2022. Reconsideration is appropriate to correct a clear error and prevent a manifest injustice from occurring. *See Ellenbogen v. PNC Bank N.A.*, 731 A.2d 175 (Pa. Super. 1999); *Scartelli Gen. Contractors Inc. v. Selective Way Ins. Co.*, No. 2006 CV 4193, 2008 WL 5575968 (Pa. Com. Pl. Sept. 9, 2008); *Bada v. Comcast Corp.*, 2015 WL 6675399 (Pa. Super. Ct. Aug. 21, 2015) (unreported opinion). The Court’s order of February 9, 2022, is a clear error because it violates the Elections Clause of the U.S. Constitution, which allows only “the Legislature” of this State to “prescribe” the manner of electing representatives. *See* U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”). The Court’s order of February 9, 2022, also violates 2 U.S.C. § 2a(c), which requires Pennsylvania to elect its congressional delegation at large if there is insufficient time to draw a congressional map given the deadlines in the General Primary Election

calendar. *See* 2 U.S.C. § 2a(c)(5); *Branch v. Smith*, 538 U.S. 254, 273–76 (2003) (plurality opinion of Scalia, J.). The Court’s order further creates an injustice to Mr. Daniels and other candidates for office because their campaigns remain in limbo during the suspension and they may only have days to campaign once the suspension is lifted.

I. The Court’s Attempt To “Suspend” The General Primary Election Calendar Violates The Elections Clause

The Elections Clause provides:

The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

U.S. Const. art. 1, § 4, cl. 1 (emphasis added). The state judiciary is not part of “the Legislature,” so it cannot “suspend” the congressional primary election calendar that the legislature has “prescribed”—and it cannot replace the legislatively enacted primary calendar with a calendar of its own choosing. Nor is there any statute that purports to delegate the General Assembly’s power to prescribe the deadlines for congressional primary elections to the state judiciary or any other institution of government. *See, e.g., Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787 (2015). The Court should immediately rescind its unconstitutional order of February 9, 2022, and enforce the General Primary Election calendar that “the Legislature” has “prescribed.” U.S. Const. art. 1, § 4, cl. 1.

II. 2 U.S.C. § 2a(c) Requires This Court To Order At-Large Elections, Rather Than “Suspend” The General Primary Election Calendar, If There Is Insufficient Time To Draw A Congressional Map In Time For Primary Elections

If there is insufficient time to create a new congressional map in time for the 2022 primary elections, then the remedy is set forth in 2 U.S.C. § 2a(c): The state’s congressional delegation shall be elected at-large. 2 U.S.C. § 2a(c) provides:

Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: . . . (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 no court has imposed one. And if this Court determines that there is no longer time to draw a new congressional map given the deadlines in the General Primary Election calendar, then it must order at-large elections, as required by 2 U.S.C. § 2a(c)(5), rather than suspend or delay the primary-election process. *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”).

The Elections Clause also requires the state judiciary to implement the requirements of 2 U.S.C. § 2a(c)(5) if there is insufficient time to draw a new congressional map while accommodating 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 the state judiciary is constitutionally obligated to follow this congressional command rather than “suspend” the legislatively prescribed primary calendar. This Court cannot “suspend” or alter a congressional primary calendar that the legislature has enacted, and it cannot remedy the 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).

CONCLUSION

The Court should reconsider and rescind its unconstitutional order of February 9, 2022.

Respectfully submitted.

/s/ Walter S. Zimolong III
WALTER S. ZIMOLONG III
Pennsylvania Bar No. 89151
Zimolong LLC
Post Office Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

/s/ Jonathan F. Mitchell
JONATHAN F. MITCHELL
Pennsylvania Bar No. 91505
Mitchell Law PLLC
111 Congress Avenue, Suite 400
Austin, Texas 78701
(512) 686-3940 (phone)
(512) 686-3941 (fax)
jonathan@mitchell.law

Dated: February 11, 2022

Counsel for Intervenor Teddy Daniels

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

**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,**

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[PROPOSED] ORDER

AND NOW, this ____ day of February 2022, upon considering the application for reconsideration of this Court's Order dated February 9, 2022, and any responses, it is ORDERED that the application is GRANTED and the Court's Order dated February 9, 2022, is VACATED.

BY THE COURT:
