

IN THE SUPREME COURT OF PENNSYLVANIA

No. 11 MM 2022

**KERRY BENNINGHOFF, individually and as Majority Leader of the
Pennsylvania House of Representatives,
*Petitioner,***

v.

**2021 LEGISLATIVE REAPPORTIONMENT COMMISSION,
*Respondent.***

**ANSWER OF LEIGH M. CHAPMAN, THE ACTING SECRETARY OF
THE COMMONWEALTH, AND JESSICA MATHIS, DIRECTOR FOR
THE BUREAU OF ELECTION SERVICES AND NOTARIES, TO THE
APPLICATION OF PETITIONER KERRY BENNINGHOFF FOR
EMERGENCY RELIEF DIRECTED TO THE 2022 ELECTIONS**

On Review of the Legislative Apportionment Commission's
Final Reapportionment Plan for the Pennsylvania House of Representatives and
Pennsylvania Senate (adopted February 4, 2022)

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER
Robert A. Wiygul (I.D. No. 310760)
Cary L. Rice (I.D. No. 325227)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103-6933
(215) 568-6200

TUCKER LAW GROUP
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica Rickabaugh (I.D. No. 200189)
Ten Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

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Pursuant to this Court’s letter dated February 18, 2022, Respondents Leigh M. Chapman, the Acting Secretary of the Commonwealth, and Jessica Mathis, Director of the Bureau of Election Services and Notaries (collectively, the “Department of State” or “Department”), respectfully submit this Answer to the Application for Emergency Relief Directed to the 2022 Elections filed by Petitioner Kerry Benninghoff, individually and as Majority Leader for the Pennsylvania House of Representatives.

I. INTRODUCTION

Petitioner’s Application seeks unprecedented relief. Petitioner asks this Court to rule—*before* it has adjudicated the appeals from the Legislative Reapportionment Commission’s (“LRC’s”) Final Plan—that the 2022 state legislative election cannot proceed under that Plan, and that the pre-existing plan must remain in effect for another election cycle.

Petitioner’s Application is without foundation in law or fact. The precedent on which Petitioner relies is plainly inapposite, as it involved circumstances in which this Court had *already* ruled that the LRC’s Final Plan was unconstitutional. Petitioner’s argument also relies on mistaken factual assumptions about the feasibility of implementing the Final Plan in time for the primary election currently scheduled for May 17, 2022. In fact, not only has the Department of State already shown that it is not too late to conduct the primary election under the LRC’s Final

Plan, but this Court has recently indicated that it may adopt final redistricting plans—for both congressional and state legislative elections—even sooner than the Department had proposed.

Below, the Department sets forth the legal and factual flaws in Petitioner’s Application. It also respectfully submits, for the Court’s consideration, a recommendation regarding the appropriate congressional/statewide and state legislative election calendar, in the event that the Court is able to adopt district maps before the date requested in the Department’s proposal dated February 14, 2022.

II. PETITIONER RELIES ON INAPPOSITE AUTHORITY ADDRESSING A SITUATION IN WHICH THE LRC’S PLAN HAD BEEN HELD UNCONSTITUTIONAL

In support of the relief requested in the Application, Petitioner relies heavily on this Court’s decision in *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711 (Pa. 2012) (“*Holt I*”). Petitioner contends that this Court “should order that the 2022 elections occur under the *current* legislative reapportionment plan (‘2012 Final Plan’)—just as the Court did in *Holt* less than a decade ago when, in January 2012, *it struck down the original reapportionment plan* and ordered the 2012 elections to proceed under the prior decade’s plan.” (Application at 1 (second emphasis added).) But Petitioner’s own description of *Holt I* makes clear that it is not on point. There, this Court ordered the 2012 elections to proceed

under the pre-existing calendar only *after* holding that the LRC’s new Final Plan was unconstitutional. *Holt I*, 38 A.3d at 721 (noting that the Supreme Court’s order declaring that the Final Plan was contrary to law “also directed that the 2001 Legislative Reapportionment Plan ... remain in effect until a revised final 2011 Legislative Reapportionment Plan having the force of law is approved”). Indeed, a new Final Plan was not approved until more than a year later, in May 2013. *See Holt v. 2011 Legislative Reapportionment Comm’n*, 67 A.3d 1211 (Pa. 2013) (“*Holt II*”).

Here, by contrast, Petitioner requests that this Court order the current LRC plan—that is, the one adopted in 2013, long before the 2020 Census—to remain in effect notwithstanding that there has been no ruling that the Final Plan adopted on February 4, 2022, is unlawful, and notwithstanding that the 2020 Census results show that the current legislative districts are now malapportioned. That would be completely unprecedented—and, Respondents respectfully suggest, in considerable tension (at the very least) with the command of the Pennsylvania Constitution. *See* PA. CONST. art. II, § 17(e) (“When the Supreme Court has finally decided an appeal [from the LRC’s final plan] ..., the reapportionment shall have the force of law and the districts therein provided shall be used thereafter in elections to the General Assembly until the next reapportionment as required under this section” (emphasis added)).

III. CONTRARY TO PETITIONER’S REPRESENTATIONS, IT IS FEASIBLE TO CONDUCT THE PRIMARY ELECTION ON MAY 17, 2022, UNDER THE FINAL PLAN ADOPTED BY THE LRC ON FEBRUARY 4, 2022

Petitioner’s Application is also predicated on incorrect factual assumptions.

In particular, Petitioner asserts that “there is simply no longer time to fully adjudicate challenges to the [LRC’s] 2021 Final Plan *and* run the coming elections on the existing, statutorily prescribed schedule.” (Application at 11.) But the Department of State has already demonstrated the feasibility of implementing the LRC’s 2021 Final Plan (if this Court determines it is lawful) while holding the state legislative primary election on the currently scheduled date of May 17, 2022. *See* Respondents’ Exceptions Regarding the Special Master’s Proposed Revision to the 2022 Election Calendar/Schedule and Incorporated Brief in Support Thereof at 11-13, *Carter v. Chapman*, No. 7 MM 2022 (Pa. Sup. Ct. filed Feb. 14, 2022) (“Respondents’ Calendar Submission”). Petitioner’s attempts to dispute this conclusion miss the mark.

First, Petitioner points to the purported “lead time” that “the Secretary of State and her designees require ... to complete the administrative process necessary to ensure that voters are properly assigned to their new districts.” (Application at 10.) But the Department has explained that, by using generic nomination petitions (similar to those that were used prior to 2011), the Department and county boards of elections would be able to begin the nomination-

petition circulation and filing period as soon as two days after a final district map is adopted. *See* Respondents' Calendar Submission at 5-7 & n.7; *id.* at 11-13.

Second, Petitioner suggests that this Court cannot adjudicate appeals challenging the LRC's Final Plan on the timetable proposed by the Department of State. But Petitioner fails to note that (1) on February 17, 2022, this Court entered an Order requiring "all Petitions for Review, as well as supporting briefs, challenging [the 2021 LRC Final Plan]" to be filed "on or before March 7, 2022"; requiring all answers and responsive briefs by the LRC to be filed by 2:00 p.m. on March 11, 2022; and stating that "[n]o reply briefs will be permitted" and that the Court intends to decide the appeals "on the submitted briefs," Order dated February 17, 2022, *In re Petitions for Review Challenging the Final 2021 Legislative Reapportionment Plan*, No. 569 Judicial Administration Docket (Pa. Sup. Ct.); and (2) during oral argument in *Carter* on February 18, 2022, the Chief Justice indicated that this Court intended, if possible, to resolve the congressional and state legislative redistricting actions on or before the dates requested in the Department of State's proposed calendars. These developments strongly indicate that this Court is likely to settle the outstanding issues regarding Pennsylvania's congressional and state legislative district plans in time to conduct all primary elections as scheduled on May 17. At the very least, the notion that it is *impossible*

to do so, such that the Court should declare defeat before the LRC appeals are even briefed, is unfounded.

Third, Petitioner points to the fact that, under the Department’s proposed calendar for the state legislative election, the deadline for the Commonwealth Court to resolve objections to nominating petitions falls after the federal deadline by which ballots must be mailed to military and overseas voters (“UOCAVA voters”). (Application at 12.) But contrary to Petitioner’s suggestion, this is not a novel scenario. Even under the typical statutory election calendar, it is sometimes the case that a final decision on an objection to a nomination petition is resolved only after ballots have been mailed to UOCAVA voters. *See* Respondents’ Calendar Submission at 4.¹ Petitioner appears to misunderstand the nature of the ballots sent to UOCAVA voters. Where ballots are due to be sent out before the content of the ballots (including the names of the candidates) is finalized, county boards of elections send out write-in ballots. “Election Officials also provide a *separate* list of the candidates who filed to appear on the official ballot. The list does not include any candidate who withdrew or had their names removed from the

¹ Under the statutory calendar, the last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions is approximately 10 days prior to the federal deadline for mailing ballots to UOCAVA voters. *See* Respondents’ Calendar Submission at 4. Under the Rules of Appellate Procedure, parties aggrieved by the Commonwealth Court’s decisions have had 10 days to appeal to this Court. *See* Pa.R.A.P. 903(c)(1)(ii). Respondents have requested that the Court reduce this appeal period to 3 days. *See* Respondents’ Calendar Submission at 9-10, 13.

ballot by a court.” *See* Pennsylvania Department of State, Information for Military and Overseas Voters, <https://www.vote.pa.gov/Voting-in-PA/pages/military-and-overseas-voters.aspx> (emphasis added). In addition, boards of elections notify UOCAVA voters of websites at which they may find an up-to-date listing of the candidates eligible for election, *i.e.*, a listing updated to reflect the resolution of objections to nomination petitions. *See id.* Accordingly, the prospect that a candidate will be excluded from (or restored to) the ballot after the federal deadline for mailing ballots to UOCAVA voters is neither unprecedented nor any basis for granting Petitioner’s Application.

IV. IN THE EVENT THAT THE COURT ADOPTS DISTRICT PLANS EARLIER THAN THE DATE REQUESTED IN THE DEPARTMENT’S PREVIOUS PROPOSAL, THE DEPARTMENT RESPECTFULLY PROPOSES MODIFIED CALENDARS ALLOCATING THE ADDITIONAL TIME

As noted above, during the oral argument in *Carter*, the Court indicated that it might issue final decisions adopting congressional and state legislative district plans prior to the dates contemplated in the proposed modified calendars included in the Department’s February 14, 2022 submission. Those proposed calendars assumed that the Court would adopt a congressional district plan on February 27, 2022, and would enter a final ruling on the LRC’s Final Plan on March 18, 2022.

For the Court’s consideration in the event it is able to issue earlier rulings, the Department respectfully proposes below modified calendars allocating the potential additional time.

A. Proposed Modified Statewide and Congressional Election Calendar With May 17 Primary

To the extent the Court adopts a congressional district plan before February 27, 2022, the Department respectfully recommends that the additional days be used to extend the period for circulating and filing nomination petitions, which the Department’s February 14 proposal had condensed from three weeks to two weeks. For example, the following chart proposes a modified calendar for the statewide and congressional election (expressed relative to the Department’s January 14 proposal) in the event that this Court adopts a congressional plan on February 23, 2022.

Final Congressional Plan Received by Department on February 23, 2022

Event	Deadline for Statewide and Congressional Elections as Proposed in the Department’s February 14 Submission in <i>Carter</i>	Modified Deadline for Statewide and Congressional Elections
First day to circulate and file nomination petitions	March 1, 2022	February 25, 2022 <i>(4 extra days)</i>
Last day to circulate and file nomination petitions	March 15, 2022 <i>(two-week period)</i>	[no deadline change] <i>(18-day period)</i>
First day to circulate and file nomination papers	March 16, 2022	[no deadline change]

Event	Deadline for Statewide and Congressional Elections as Proposed in the Department's February 14 Submission in <i>Carter</i>	Modified Deadline for Statewide and Congressional Elections
Deadline to file objections to nomination petitions	March 22, 2022	[no deadline change]
Last day for candidates who filed nomination petitions to withdraw their candidacy	March 23, 2022	[no deadline change]
Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions	March 25, 2022	[no deadline change]
Last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions	March 30, 2022	[no deadline change]
Last day for the County Board of Elections to send remote military-overseas absentee ballots	April 2, 2022	[no deadline change]
Last day for the County Board of Elections to send all remaining military-overseas absentee ballots	April 2, 2022	[no deadline change]
Last day for voters to register before the primary election	May 2, 2022	[no deadline change]

Event	Deadline for Statewide and Congressional Elections as Proposed in the Department's February 14 Submission in <i>Carter</i>	Modified Deadline for Statewide and Congressional Elections
Last day before the primary election to apply for a mail-in or civilian absentee ballot	May 10, 2022	[no deadline change]
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election	May 17, 2022	[no deadline change]
Pennsylvania's 2022 general primary election	May 17, 2022	[no deadline change]
The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election for the primary election	May 24, 2022	[no deadline change]

B. Proposed Modified State Legislative Election Calendar With May 17 Primary

The chart below proposes a modified calendar for the state legislative election (expressed relative to the Department's February 14 proposal) in the event that this Court disposes of appeals from the LRC's Final Plan on March 15 or 16, 2022. Under this proposal, the period for circulating and filing nomination petitions would begin on March 18, 2022. That period, which the Department's February 14 proposal had condensed from 3 weeks to 9 days, would be expanded

by one day. In addition, the period for objecting to nomination petitions, which the Department’s proposal had condensed from 7 days to 6 days, would be restored to 7 days.

Final Legislative Plan Received by Department on March 15/16, 2022

Event	Proposed Deadline for Legislative Elections as Proposed in the Department’s February 14 Submission in <i>Carter</i>	Modified Deadline for Legislative Elections
First day to circulate and file nomination petitions	March 20, 2022	March 18, 2022 <i>(2 extra days)</i>
Last day to circulate and file nomination petitions	March 29, 2022 <i>(9-day period)</i>	March 28, 2022 <i>(10-day period)</i>
First day to circulate and file nomination papers	March 30, 2022	March 29, 2022
Last day for candidates who filed nomination petitions to withdraw their candidacy	March 31, 2022	[no deadline change]
Last day for the County Board of Elections to send remote military-overseas absentee ballots	April 2, 2022	[no deadline change]
Last day for the County Board of Elections to send all remaining military-overseas absentee ballots	April 2, 2022	[no deadline change]
Deadline to file objections to nomination petitions	April 4, 2022	[no deadline change] <i>(full 7 days instead of 6 days)</i>

Event	Proposed Deadline for Legislative Elections as Proposed in the Department's February 14 Submission in <i>Carter</i>	Modified Deadline for Legislative Elections
Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions	April 7, 2022	[no deadline change]
Last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions	April 12, 2022	[no deadline change]
Last day for voters to register before the primary election	May 2, 2022	[no deadline change]
Last day before the primary election to apply for a mail-in or civilian absentee ballot	May 10, 2022	[no deadline change]
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election	May 17, 2022	[no deadline change]
Pennsylvania's 2022 general primary election	May 17, 2022	[no deadline change]
The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election for the primary election	May 24, 2022	[no deadline change]

V. CONCLUSION

For the foregoing reasons, the Department of State respectfully requests that the Court deny Petitioner's Application.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: February 23, 2022

By: /s/ Robert A Wiygul
Robert A. Wiygul (I.D. No. 310760)
Cary L. Rice (I.D. No. 325227)
John B. Hill (I.D. No. 328340)
One Logan Square, 27th Floor
Philadelphia, PA 19103
Tel: (215) 568-6200
Fax: (215) 568-0300

TUCKER LAW GROUP
Joe H. Tucker, Jr. (I.D. No. 56617)
Dimitrios Mavroudis (I.D. No. 93773)
Jessica Rickabaugh (I.D. No. 200189)
Ten Penn Center
1801 Market Street, Suite 2500
Philadelphia, PA 19103
(215) 875-0609

*Counsel for Respondents Leigh M. Chapman and
Jessica Mathis*

CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: February 23, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul