No. 17-1700

IN THE

Supreme Court of the United States

MICHAEL C. TURZAI, ET AL.,

Petitioners,

v.

GRETCHEN BRANDT, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF FOR RESPONDENTS GRETCHEN BRANDT ET AL. IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether state statutes establishing congressional districts are subject to state constitutional provisions, as construed by state courts.

2. Whether state courts may adopt remedial congressional districting plans, including when the prior plan violated the state constitution and the state legislature failed to adopt a remedy of its own.

3. Whether petitioners are estopped from arguing that state courts lack authority under the first two questions because petitioners have argued the polar opposite of their current positions, including to this Court.

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INTRODUCTION

The Pennsylvania Supreme Court struck down Pennsylvania's 2011 congressional map on the "sole basis" that it violates the Pennsylvania Constitution's Free and Equal Elections Clause—which has no counterpart in the U.S. Constitution—and ordered a remedial map for the 2018 elections. Petitioners' serial emergency applications asking this Court to stay the state court's orders were denied. Since then, Pennsylvania conducted its primary elections under the state court's remedial map in May 2018, and that map will be used in the November 2018 general elections.

Petitioners now ask this Court to grant certiorari and order the reinstatement of a map that violates the Pennsylvania constitution for use in Pennsylvania's 2020 elections. The Court should deny review, just as it denied two stays. It is hornbook law that this Court cannot review decisions of state courts construing state law. State courts are "free to serve as experimental laboratories," *Arizona v. Evans*, 514 U.S. 1, 8 (1995), and "[i]t is fundamental that state courts be left free and unfettered by [this Court] in interpreting their state constitutions," *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940). Petitioners urge this Court to cast aside these fundamental principles and intervene in this state-court, state-law case. The Court should not do so. There is no partisan gerrymandering exception to federalism.

Petitioners' ostensible hook for federal intervention is a theory of the U.S. Constitution's Elections Clause that this Court has squarely rejected in decisions dating back nearly a century. Petitioners ask this Court to grant certiorari to hold that state laws creating congressional districts need not comply with "substantive" state constitutional provisions. This

radical theory is inconsistent with basic federalism principles and this Court's longstanding precedent, and would upend constitutional provisions in at least 11 states imposing "substantive" restrictions on congressional redistricting. Petitioners' alternative suggestions—that this Court should invent a novel distinction between "explicit" and "non-explicit" constitutional provisions, or should hold that state courts may identify but may not remedy state constitutional violations—are no more serious and raise no important questions.

Unsurprisingly, there is no division or confusion among lower courts on the basic issues here, contrary to Petitioners' assertions. Petitioners' citation to Civil War-era decisions predating this Court's authoritative interpretations of the Elections Clause does not evidence a split warranting certiorari. There is simply no need to grant certiorari to decide whether state courts may impose state constitutional provisions on state laws creating congressional districts, or may remedy congressional plans that do violate the state constitution. It is settled that they can.

This Court need not take our word for it. For months, Petitioners told federal courts in separate suits challenging the 2011 map that, under settled precedent, the Pennsylvania state courts in this very case had the power to review the plan for state-constitutional defects and to issue a remedial plan, and that the federal courts had to defer. Petitioners persuaded a federal court to grant a stay of parallel litigation based on these arguments. Petitioners are estopped from now challenging the state court's judgment on the theory that state courts have no power in this realm. Estoppel and other defects make this case a poor vehicle to review either of the

questions presented, even if those questions otherwise merited this Court's review, which they do not.

COUNTER-STATEMENT OF THE CASE

A. Pennsylvania's 2011 Congressional Districting Map

1. In the 2010 general elections, Republicans took control of the Pennsylvania House, retained control of the Pennsylvania Senate, and won the governorship. App. 8. This gave Republicans exclusive control over Pennsylvania's congressional redistricting following the 2010 census. Working in secret, Republican mapmakers in Pennsylvania's legislature used past election results to calculate partisanship scores for each precinct, municipality, and county in Pennsylvania, and created "redistricting maps revealing partisan scoring down to the precinct level." App. 42; *see* Pls.' Exhibit ("PX") 1 at 38-41; Trial Tr. ("Tr.") 299:10-309:21.

Senate Bill 1249 started as an empty shell—it contained no map or details for three months. App. 8-9. On December 14, 2011, Republicans amended the bill to add, for the first time, actual descriptions of the new districts. *Id.* Republican Senators suspended the ordinary rules of procedure to rush the bill through the Senate that same day. 17A909 Stay Appl. App'x D ("App'x D") ¶¶ 109, 126.[1] Less than a week later, on December 20, 2011, the House passed SB 1249, and Governor Corbett signed the bill into law two days later. App. 10.

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[1] The petition appendix includes only a short excerpt from the Pennsylvania lower court's opinion; Respondents accordingly cite to the version attached to Petitioners' second stay application.

2. The 2011 map "packed" Democratic voters into five districts that Democrats would win by wide margins, and "cracked" the remaining Democratic voters by spreading them across 13 districts that would be reliably Republican. Petitioners' counsel admitted to the Pennsylvania Supreme Court that "[v]oters were classified and placed into districts based upon the manner in which they voted in prior elections." Oral Arg. Video at 1:54:33-44. The result was bizarre districts that ripped apart Pennsylvania's communities to an unprecedented degree. App. 58-61.

By way of example, the 7th District's tortured shape earned the moniker "Goofy Kicking Donald Duck." App. 59; Tr. 598:25-599:22. This district alone split five counties and 26 municipalities and at multiple points was barely contiguous. App. 59-60; PX53 at 30-32.

The 6th District was nearly as absurd as the 7th. It cobbled together pieces of multiple communities, resembling Florida "with a more jagged and elongated panhandle." App'x D ¶ 324. A surgical incision carved out Reading, the county seat and a Democratic stronghold, from the rest of Berks County, instead grouping it with far-flung communities in the Republican 16th District via a narrow isthmus. App. 16, 29 n.17; App'x D ¶ 325; PX53 at 28-29, 50-52.

Erie County was undivided throughout modern history until the 2011 map split it, cracking its Democratic voters between the Republican 3rd and 5th Districts. App. 13, 15, 29 n.19, 59. The map carved up the distinctive community of the Lehigh Valley for the first time in modern history to dilute its Democratic voters. App'x D ¶¶ 326-28; PX53 at 47-49, 54-55. The record contains many more examples.

3. In each of the three election cycles under the 2011 map, Republican candidates won 13 of Pennsylvania's 18 congressional seats—the same 13 seats each time. App. 33. In 2012, Republicans won those same 13 of 18 seats (72%) despite winning only a minority of the total statewide vote (49%). *Id.*

B. The Pennsylvania State Court Proceedings Below

1. Respondents filed this action against Petitioners and others in the Pennsylvania Commonwealth Court on June 15, 2017. Respondents challenged the 2011 map exclusively under the Pennsylvania Constitution, including its Free and Equal Elections Clause, Pa. Const. art. I, § 5. That provision requires that "[e]lections" be "free and equal." *Id.* It has no federal counterpart.

On November 9, 2017, the Pennsylvania Supreme Court exercised "extraordinary jurisdiction" under 42 Pa. Cons. Stat. § 726, which authorizes the court to "assume plenary jurisdiction" over any case "involving an issue of immediate public importance" and to "enter a final order or otherwise cause right and justice to be done." The state high court ordered the Commonwealth Court to conduct a trial and issue findings of fact and conclusions of law.

2. At the weeklong trial in December 2017, Plaintiffs' experts demonstrated the 2011 map's extreme partisan bias. Dr. John J. Kennedy, an expert in Pennsylvania's political geography, demonstrated—without rebuttal—that partisan intent was the only explanation for the map's packing and cracking of Democratic voters, its bizarre districts, and its unprecedented division of communities. App. 58-61, 156-60.

Using a computer simulation methodology, Dr. Jowei Chen concluded with over 99.9% statistical certainty that the 2011 plan's 13-5 Republican advantage would never have emerged from a districting process that adhered to traditional principles. App. 47-58. Dr. Chen concluded that extreme partisan intent subordinated traditional districting principles in the 2011 plan. App. 54. As a result, Republicans won 4 to 5 more seats than they would have under a plan that followed only traditional principles. App'x D ¶ 267; Tr. 204:16-205:6.

Dr. Wesley Pegden, a mathematician at Carnegie Mellon University, demonstrated to a mathematical certainty that the 2011 map was intentionally drawn to maximize partisan advantage. App. 61-62. Using a computer algorithm that generated hundreds of billions of maps, he showed that the 2011 map was so carefully engineered that its Republican bias rapidly dissipated when tiny random changes were made to the district boundaries. App. 61-62; App'x D ¶¶ 342-43, 358-59.

Dr. Christopher Warshaw demonstrated that, under the "Efficiency Gap" measure, the three congressional elections held under the 2011 map produced extreme levels of pro-Republican bias—the worst in Pennsylvania's history and among the worst in American history. App. 62-66; PX35 at 5-15.

3. On December 29, 2017, the Commonwealth Court issued recommended findings of fact and conclusions of law. The court credited all of Respondents' experts and found Petitioners' experts not credible. The court then found that the evidence "established intentional discrimination," App. 82-83, and that "a particular partisan goal—the creation of 13 Republican districts—predominated" in drawing

the 2011 map, App'x D ¶ 291. The court nevertheless recommended upholding the map.

4. At oral argument in the Pennsylvania Supreme Court, Petitioners' counsel stated that, if the 2011 map were struck down, Petitioners wanted "at least three weeks" to pass a new map. App. 229 n.2. Counsel also admitted that the Pennsylvania Supreme Court had previously applied the traditional districting criteria of compactness, contiguity, and avoiding splitting political subdivisions in assessing congressional maps, and agreed that those criteria were appropriate. Oral Arg. Video at 1:29:41-1:32:47.

5. On January 22, 2018, the Pennsylvania Supreme Court struck down the 2011 map on the "sole basis" that it violated the Pennsylvania Constitution. App. 208. In light of the "requests of the parties … [a]t oral argument," App. 229 n.2, the court gave the General Assembly nearly three weeks (until February 9) to submit a remedial map to the Governor, and another week for the Governor to consider such a submission. If the other branches failed to agree on a valid map, the court stated that it would "proceed expeditiously to adopt a plan." App. 209. The court declared that there would be a remedial map in place by February 19, App. 209, in line with an earlier affidavit from Pennsylvania's chief election official that the May 15 congressional primaries would need to be postponed, at a cost of $20 million, unless a new map were adopted by February 20, App'x D ¶ 448.

The Pennsylvania Supreme Court's January 22 order set clear, well-established criteria for any remedial map. It had to "consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated

town, borough, township, or ward, except where necessary to ensure equality of population." App. 209.

On January 25, 2018, the state high court appointed Dr. Nathaniel Persily of Stanford University to serve "as an advisor to assist the Court in adopting, if necessary, a remedial congressional redistricting plan." App. 230.

6. On January 26, 2018, Petitioners filed an emergency application asking this Court to stay the Pennsylvania Supreme Court's judgment and remedial process on the ground that they violated the Elections Clause. 17A795 Stay Appl. 9-10, 20, 22-23. Justice Alito denied the stay application on February 5.

7. In an opinion issued February 7, 2018, the Pennsylvania Supreme Court held that the 2011 map violated the Pennsylvania Constitution's Free and Equal Elections Clause. App. 3. The court explained that Pennsylvania's "founding document is the ancestor, not the offspring, of the federal Constitution," and that Pennsylvania's Free and Equal Elections Clause "provides a constitutional standard, and remedy," for partisan gerrymandering, "even if the federal charter does not." App. 3. The court undertook a lengthy analysis of the Free and Equal Elections Clause and its "evolution" in light of "[o]ur Commonwealth's centuries-old and unique history." App. 123-33. The court concluded that the Clause's "actual and plain language … mandates that all voters have an equal opportunity to translate their votes into representation." App. 123.

The state high court explained that traditional redistricting criteria set forth in its January 22 order were a "measure by which to assess whether th[is] guarantee" has been violated. App. 149-50. Those

criteria are "deeply rooted in the organic law of [the] Commonwealth." App. 149. The court held that "a congressional redistricting plan violates" the Free and Equal Elections Clause when the "neutral criteria" of equal population, contiguity, compactness, and avoiding splitting political subdivisions "have been subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage," and that the 2011 plan failed that test. App. 152, 154. The court stressed that, "while explicating our rationale, nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018." App. 5-6.

The court observed that it had fashioned remedial districting maps on multiple prior occasions where the legislature failed to correct a constitutional infirmity after having been given an opportunity to do so, and that both state and federal law recognize state courts' power to fashion remedial maps. App. 164-68.

Justice Baer concurred in part and dissented in part. Chief Justice Saylor and Justice Mundy dissented.

8. On February 9, 2018, Petitioners (but not the General Assembly, which was also a party in the state court) submitted a proposed map to the Governor. The same day, they submitted the map to the Pennsylvania Supreme Court. After considering the map, the Governor rejected it because it was another extreme gerrymander. Neither Petitioners' proposed map nor any other map was turned into legislation or brought to a vote. And as the Pennsylvania Supreme Court noted, "[n]either the General Assembly

nor the Governor sought an extension of the dates set forth in our January 22 Order." App. 232.

9. On February 19, 2018, the Pennsylvania Supreme Court adopted a remedial map (the "Remedial Plan") developed with the assistance of Dr. Persily. The court explained that "[t]he Remedial Plan is based upon the record developed in the Commonwealth Court, and it draws heavily upon the submissions provided by the parties, intervenors, and amici." App. 233. The Remedial Plan strictly adheres to the criteria set forth in the court's January 22 order. *Id*. Compared to the 2011 map, it splits fewer counties (13 versus 27), splits fewer municipalities (19 versus 68), and is far more compact.[2]

The Pennsylvania Supreme Court published the data files relating to the Remedial Plan on the Internet, and empirical analysis of the Remedial Plan confirms that it exhibits no bias in favor of either party. If anything, it slightly favors Republicans. Under the Remedial Plan, ten districts favored Donald Trump in the 2016 presidential election, while eight favored Hillary Clinton. Objective metrics that redistricting scholars commonly use to evaluate districting plans, such as the mean-median gap and the Efficiency Gap, similarly produce results slightly favoring Republicans. *See* Br. of Amicus Campaign Legal Center, *Corman v. Torres*, No. 18-cv-443, ECF No. 81 (M.D. Pa. Mar. 2, 2018).

10. On February 27, Petitioners filed a second stay application in this Court. No. 17A909. That application was referred to the whole Court and denied without a noted dissent on March 19.

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[2] App. 233-34; Pa. Supreme Court, goo.gl/1FRrxy (click on "Remedial Plan Reports").

11. On May 15, 2018, Pennsylvania held primary elections for the 2018 election under the Remedial Plan, which will govern the November 2018 general elections. To this day, Petitioners have not introduced, much less passed, any new congressional map.

REASONS TO DENY THE PETITION

The Court should deny certiorari. This Court has long held that state courts may impose state constitutional requirements on congressional redistricting maps. Petitioners' tortured efforts to distinguish those decisions present no substantial or important federal question. There are no splits of authority on any of the questions presented, and there is no reason or precedent for this Court to insert itself into decisions of state courts applying state constitutions. Finally, this case is an exceedingly poor vehicle for deciding any Elections Clause question.

I. The Petition Does Not Raise Any Substantial Federal Question

A. State Statutes Establishing Congressional Districts Are Subject to State Constitutional Provisions, as Construed by State Courts

Petitioners contend that state statutes establishing congressional districts are not subject to a "state constitution's substantive law." Pet. 19. In their view, "a state constitution … may not control what [congressional] lines will be," and congressional districting statutes need not "comply with state constitutional individual-rights guarantees as interpreted by the state courts." Pet. 2, 21-22. Petitioners thus contend that state constitutions may not require congressional districts to be compact or to respect political subdivisions, may not prohibit racial discrimi-

nation in drawing congressional districts, and may not impose any other "substantive" constraint on the contours of congressional districts.

This radical proposition is antithetical to the basic tenets of American democracy. State constitutional provisions reflect and enable control of the government by the people. In our system of government, the people of every state have the sovereign right to establish their own constitution, and every state legislature must comply with its state's constitution in enacting state laws. A statute creating congressional districts is a state law just like any other. While the Elections Clause authorizes state legislatures to draw congressional districts, nothing in the Elections Clause abrogates the fundamental principle that a state legislature must comply with its state's constitution in performing its responsibilities.

This Court has repeatedly affirmed as much in a series of decisions that squarely foreclose Petitioners' position. In *Smiley v. Holm*, 285 U.S. 355 (1932), the Court held that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided." *Id.* at 368. There, this Court made crystal clear that congressional districting legislation must comport with state constitutions, explaining that the Elections Clause does not "render[] inapplicable the conditions which attach to the making of state laws" in each state. *Id.* at 365. In companion cases decided the same day as *Smiley*, the Court reiterated that state courts have authority to strike down congressional plans for violating "the requirements of the Constitution of the state in relation to the enactment of laws." *Koenig v. Flynn*, 285 U.S. 375, 379 (1932); *accord Carroll v. Becker*, 285 U.S. 380, 381-82 (1932).

This Court reaffirmed this principle just three years ago, holding: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). The Court affirmed that congressional redistricting must be "performed in accordance with the State's prescriptions for lawmaking." *Id.* at 2668. And the Court rejected the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (quotations and alterations omitted). Indeed, *Arizona State Legislature* presented a greater intrusion on the authority of the state legislature than here. The independent commission there entirely supplanted the state legislature in drawing congressional districts. Here, the Pennsylvania Supreme Court merely held that the General Assembly must comply with the Pennsylvania Constitution in performing the task. Even the dissent in *Arizona* acknowledged that the legislature "may be required to [legislate] within the ordinary lawmaking process." *Id.* at 2687 (Roberts, C.J., dissenting).

It is not only that this Court has repeatedly rejected the notion that the reference to "Legislature" in the first part of the Elections Clause precludes state courts from reviewing congressional districting laws under state constitutions. The second part of the Elections Clause allows Congress "at any time" to make its own regulations related to congressional redistricting, U.S. Const. art. I, § 4, and Congress has exercised this authority to codify the principle that

congressional districting plans must comport with all aspects of state law. In 2 U.S.C. § 2a(c), Congress has required that congressional districting laws be adopted "in the manner provided by [state] law." In *Arizona State Legislature*, the Court explained that congressional maps are valid under § 2a(c) where they are "established . . . in whatever way [states] may have provided by their constitution and by their statutes." 135 S. Ct. at 2669. Conversely, a map is invalid under § 2a(c) where it does not comply with state law, however the state defines it. *Id.*; *see also Branch v. Smith*, 538 U.S. 254, 273-76 (2003) (plurality op.).

In short, it is well-settled that state legislatures may not pass congressional districting statutes that violate the "provisions of the State's constitution." *Ariz. State Legislature*, 135 S. Ct. at 2673. In Pennsylvania, one of the conditions that attaches to the making of state laws is compliance with the Pennsylvania Constitution, as interpreted by the Pennsylvania Supreme Court. *E.g.*, *Emerick v. Harris*, 1 Binn. 416, 1808 WL 1521 (Pa. 1808). Here, the Pennsylvania Supreme Court held that the 2011 map violates the Pennsylvania Constitution's Free and Equal Elections Clause, and consequently the 2011 map cannot stand.

Seeking to evade this extensive controlling authority, Petitioners attempt to draw a line between state *procedural* requirements for the "lawmaking process" and state *substantive* requirements imposing "time, place, or manner rules or policy limitations." Pet. 21-22. According to Petitioners, only procedural restrictions apply to congressional districting legislation: a state constitution purportedly "may identify which state bodies have authority to draw congressional districts, but it may not control

what those lines will be." Pet. 21-22. But none of this Court's precedents remotely suggest such a distinction. To the contrary, this Court has made clear that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature *may prescribe regulations on the time, place, and manner* of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 135 S. Ct. at 2673 (emphasis added). Nor does Petitioners' proposed distinction make any sense. Allowing a governor to veto a state legislature's districting plan, *Smiley*, 285 U.S. 355, or giving redistricting authority to an entirely different body, *Ariz. State Legislature*, 135 S. Ct. 2652, constrains the "Legislature" in setting the "time, place, and manner" of congressional elections at least as much as substantive state constitutional requirements. It would be anomalous to hold that, under the Elections Clause, state constitutions may completely eliminate the legislature from the redistricting process, but may not guide state legislatures in redistricting or permit judicial review. *See Patchak v. Zinke*, 138 S. Ct. 897, 906 (2018) (plurality op.) (greater power includes the lesser power).

Petitioners' view would seemingly require this Court to overrule *Wesberry v. Sanders*, 376 U.S. 1 (1964). There, the Court rejected the plurality opinion in *Colegrove v. Green*, 328 U.S. 549 (1946)—which had concluded that the Elections Clause's reference to "Congress" deprives federal courts of power to review congressional maps for compliance with constitutional provisions, including so-called "substantive" ones. Petitioners say this is because all federal constitutional provisions have "equal dignity," Pet. 23, but *Wesberry* explained: "[N]othing in the *language* of [the Elections Clause] gives support to a construction

that would immunize state congressional apportionment laws … from the power of courts to protect the constitutional rights of individuals from legislative destruction." 376 U.S. at 6 (emphasis added).

Petitioners' argument, if accepted, would have extraordinarily far-reaching consequences that would upset settled redistricting rules across the country. At least eleven states besides Pennsylvania have constitutional provisions that expressly impose *substantive* requirements for congressional redistricting. *See* Ariz. Const. art. 4, pt. 2, § 1; Cal. Const. art. 21, § 2; Fla. Const. art. III, § 20; Iowa Const. art. III, § 37; Mo. Const. art. 3, § 45; N.Y. Const. art. 3, § 4; Ohio Const. art. XIX, §§ 1-2; Va. Const. art. 2, § 6; Wash. Const. art. 2, § 43; W. Va. Const. art. 1, § 4; Wyo. Const. art. 3, § 49; *see also League of Women Voters of Fla. v. Detzner,* 172 So. 3d 363 (Fla. 2015). All of these states have constitutional provisions requiring that congressional districts be compact and contiguous. *Id.* Seven have constitutional provisions prohibiting the unnecessary splitting of political subdivisions in congressional districts. *Id.* And six state constitutions prohibit favoring any political party in congressional redistricting, or require that congressional districts promote competition. *Id.*

All of these provisions impose substantive limitations on the state legislature's enactment of statutes establishing congressional districts, Pet. 19-20, and hence all of the provisions would be invalid under Petitioners' reading of the Elections Clause. And that count does not even include the many additional states that have free and equal elections clause like Pennsylvania's or other substantive limitations on elections legislation generally. App. 143 n.71. This Court should decline Petitioners' invitation to wreak havoc on congressional districting across the country

based on a legal theory that is contrary to decades of precedent.

B. This Court Cannot Second-Guess State High Court Interpretations of State Constitutions

Petitioners next argue that, even if state constitutions can substantively constrain state congressional maps, this Court can overrule a state high court's interpretation of its own state's constitution if the state court "strayed well beyond what the state's constitutional text can support." Pet. 24-25. According to Petitioners, this Court can overrule the state court if its interpretation is just too "atextual," Pet. 24. This argument tramples just as much on foundational principles of federalism as Petitioners' first argument.

It is hornbook law that this Court cannot review decisions of state courts construing state law. This Court is "bound to accept the interpretation of [state] law by the highest court of the State." *Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n*, 426 U.S. 482, 488 (1976). The Elections Clause provides no exception to this rule, and no basis for this Court to second-guess the legitimacy of state high courts' interpretations of their own state constitutions. Neither this Court nor any federal court has ever suggested otherwise. The Pennsylvania Supreme Court held that Pennsylvania's Free and Equal Elections Clause prohibits Pennsylvania's General Assembly from subordinating traditional districting criteria to partisan motivations in creating congressional districts, and that holding is conclusive and unreviewable.

Petitioners' proposed distinction between "explicit" and "atextual" state constitutional requirements

is also contrary to basic principles of judicial constitutional interpretation. Pet. 24, 26. Of course, Pennsylvania's Free and Equal Elections Clause *is* explicit; Petitioners' real objection is that it is broad. But courts, including this one, interpret broad constitutional provisions all the time. *E.g.*, U.S. Const. amends. I, XIV. Courts frequently impose mandatory criteria or factors to consider in interpreting broad constitutional guarantees. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964) (identifying mandatory one-person, one-vote rule from generic requirement of equal protection); *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 455 (Pa. 2017) ("Courts give meaning routinely to all manner of amorphous constitutional concepts …"). A high court's interpretation of an open-ended constitutional provision is no less authoritative than a constitutional provision that sets forth specific requirements on its face.

Federal courts certainly have no authority to draw Petitioners' proposed distinction in reviewing state high court interpretations of state law. Federal courts do not get to decide whether a state constitutional provision is or is not "explicit" enough to sustain a state court's interpretation. Petitioners' rhetoric about "obvious[] judicial policymaking," Pet. 25, does not transmute a state constitutional interpretation into a federal question.

In any event, Petitioners' intemperate portrayal of the state high court's decision does not accord with reality. The Pennsylvania Constitution's Free and Equal Elections Clause explicitly guarantees freedom and equality in Pennsylvania elections. The decision below outlined the history of the clause at length, App. 123-33, tracing the clause to a specific concern about the "dilution of the right of the people of this Commonwealth to select representatives to

govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered." App. 133. And the court explored the historical importance of traditional districting criteria in Pennsylvania, explaining that these requirements have long been used "to prevent vote dilution" in Pennsylvania and "are deeply rooted in the organic law of [the] Commonwealth." App. 149. The decision below was well-grounded in Pennsylvania history and prior state court precedent.

As for Petitioners' assertion that they were not fairly "apprised" of these requirements back in 2011, Pet. 28, that is false and contrary to admissions they made below. More than 25 years ago in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), the Pennsylvania Supreme Court adopted a remedial congressional map using criteria including "avoid[ing] splitting of political subdivisions and precincts," "preserv[ing] communities of interest," and "compactness." *Id.* at 208, 215-25. While Petitioners now assert that the decision below created these criteria "from whole cloth," Pet. 3, Petitioners admitted to the state high court that "[c]ompactness and avoiding splitting political subdivisions were things that [the Pennsylvania Supreme Court] identified in *Mellow*." Oral Arg. Video at 1:29:49-1:30:21. Petitioners' counsel subsequently confirmed at oral argument that these criteria were valid for evaluating the constitutionality of congressional districts in Pennsylvania. Oral Arg. Video at 1:32:18-1:33:05.

In sum, this Court should reject Petitioners' invitation to supervise state high courts' interpretation of their own states' constitutions.

C. The Elections Clause Does Not Strip State Courts of Authority To Remedy Violations of State Constitutions

In their second question presented, Petitioners argue that the word "Legislature" in the Elections Clause, U.S. Const. art. I, § 4, forbids state courts from remedying violations of the state constitution. Thus, according to Petitioners, the Pennsylvania Supreme Court lacked authority to adopt a remedial congressional map after the court invalidated the prior map and the legislature failed to adopt its own remedy. Pet. 29-31. That argument has been rejected time and again by this Court and does not warrant review. This Court would have to overturn at least six of its decisions spanning almost a century to hold that the Elections Clause precludes state courts from setting criteria for, or adopting, remedial congressional maps.

In the two companion cases decided the same day as *Smiley*, this Court expressly affirmed state courts' implementation of remedial congressional districting plans after those courts invalidated prior plans under the state constitution. *Carroll*, 285 U.S. at 381-82; *Koenig*, 285 U.S. at 379. In *Koenig*, the New York Court of Appeals struck down the state's congressional districting law because it violated "the requirements of the Constitution of the state in relation to the enactment of laws," and the state court ordered the election to proceed under a remedial plan. 285 U.S. at 379. This Court affirmed. *Id.*; *see also Carroll*, 285 U.S. at 381-82 (same as to congressional districting plan imposed by Missouri Supreme Court).

More recently, in *Growe v. Emison*, 507 U.S. 25 (1993), this Court held that federal courts must defer

to state courts in congressional redistricting—and upheld a state court's power to draw a remedial plan using traditional districting criteria. After invalidating Minnesota's prior congressional districting plan, a Minnesota state court "adopted final criteria" for developing its own congressional plan. *Cotlow v. Growe*, C8-91-985 (Minn. Special Redistricting Panel Apr. 15, 1992). However, a federal court enjoined the state court from adopting any new plan and adopted its own remedial plan. *Growe*, 507 U.S. at 30-31. The state court subsequently released a provisional remedial plan, subject to the federal injunction, that used the criteria of "minimiz[ing] the number of municipal and county splits" and promoting "compactness." *Cotlow*, C8-91-985, *supra*.

This Court reversed the federal court's injunction. Writing for a unanimous Court, Justice Scalia held that "[t]he District Court erred in not deferring to the state court's efforts to redraw Minnesota's … federal congressional districts." *Growe*, 507 U.S. at 42. This Court stated over and over again that state courts have the power to review and remedy congressional districting plans and that federal courts must not interfere:

- "In the reapportionment context, the Court has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative or judicial branch, has begun to address that highly political task itself." 507 U.S. at 33.
- "The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action

by the States in such cases has been specifically encouraged." *Id.* (quotations omitted).

- "[T]he District Court's December injunction of state-court proceedings … was clear error. It seems to have been based upon the mistaken view that federal judges need defer only to the Minnesota Legislature and not at all to the State's courts. Thus, the January 20 deadline the District Court established was described as a deadline for the legislature, ignoring the possibility and legitimacy of state *judicial* redistricting.…[T]he doctrine of *Germano* prefers *both* state branches to federal courts as agents of apportionment." *Id.* at 34.
- "The Minnesota [court's] issuance of its plan (conditioned on the legislature's failure to enact a constitutionally acceptable plan in January), far from being a federally enjoinable 'interference,' was precisely the sort of state judicial supervision of redistricting we have encouraged." *Id.* at 34.

Following this Court's decision, the state court's remedial plan—drawn using traditional criteria of compactness and minimizing political subdivision splits—governed the 1994 congressional elections.

The Pennsylvania Supreme Court proceeded here precisely as *Growe* "encouraged": it gave the legislature a chance to enact a new plan and "conditioned" the adoption of a state court plan on the "legislature's failure to enact a constitutionally acceptable plan." *Growe*, 507 U.S. at 34. Petitioners offer no argument for overcoming ordinary stare decisis principles to overturn a unanimous and recent decision.

Petitioners' attempts to distinguish *Growe* get them nowhere. First they rely (at 31-32) on the "al-

ternative holding" in *Smith v. Clark*, 189 F. Supp. 2d 548, 549 (S.D. Miss 2002), that a state court-drawn congressional map ran afoul of the Elections Clause. But this Court subsequently "vacated" that alternative holding and made clear that it "is not to be regarded as supporting" this Court's resolution of the case, "or as binding upon state and federal officials … in the future." *Branch*, 538 U.S. at 265-66.

Petitioners argue that *Growe* may be limited to the "unique" context of the "Special Redistricting Panel" established by the Minnesota Supreme Court pursuant to state statutes. Pet. 31. Nothing in *Growe* suggests anything like that. Besides, the state statutes employed in *Growe* to establish the Special Redistricting Panel were generic state laws authorizing the Minnesota Supreme Court to superintend and assign responsibilities to lower court judges. The Pennsylvania Supreme Court acted pursuant to a similar generalized state statute authorizing the court to "assume plenary jurisdiction" over important cases, including redistricting cases. 42 Pa. Cons. Stat. § 726.

Petitioners next contend that *Growe* involved the authority of state courts to remedy violations of "federal law," Pet. 32-33, rather than state law. But in *Growe*, the Minnesota state court had found that the prior congressional map violated "both the State and Federal Constitutions." 507 U.S. at 29. In any event, Petitioners offer no coherent explanation of why the remedial authority of state courts should turn on whether a court is remedying a violation of federal or state law. It would be nonsensical to hold that state courts have greater power to remedy violations of federal law than state law.

Petitioners (at 30) cite *Arizona State Legislature*, but that decision rejects the notion that the "Elections Clause renders the State's representative body the sole component of state government authorized to prescribe regulations for congressional redistricting." *Id.* at 2673 (quotations and alterations omitted).

What's more, pursuant to the second part of the Elections Clause, Congress has specifically authorized state courts to establish remedial congressional districting maps. Contrary to Petitioners' contention (at 31-32), *Branch* squarely held that 2 U.S.C. § 2c authorizes both state and federal courts to "remedy[] a failure" by the state legislature "to redistrict constitutionally," and "embraces action by *state and federal courts* when the prescribed legislative action has not been forthcoming." 538 U.S. at 270, 272 (emphasis added). "[Section] 2c is as readily enforced by courts as it is by state legislatures, and is just as binding on courts—federal or state—as it is on legislatures." *Id.* at 272.

In the plurality portion of *Branch*, the Court held that another federal statute, 2 U.S.C. § 2a(c), also recognizes state courts' power to adopt congressional redistricting plans pursuant to state law. *Id.* at 273. Section 2a(c) prescribes procedures that apply "[u]ntil a State is redistricted in the manner provided by [state] law." The plurality held that the "[u]ntil a State is redistricted" language in this provision "can certainly refer to redistricting by courts as well as by legislatures," and that "when a court, state or federal, redistricts pursuant to § 2c, it necessarily does so 'in the manner provided by state law.'" *Id.* at 274 (emphasis added; bracketing omitted). The dissent disagreed with the plurality not on the theory that state courts lack authority to impose a redis-

tricting plan, but because the dissent thought that only state courts (and not federal courts) may undertake an initial redistricting. *Id.* at 277. Every Justice agreed that, as compared to federal courts, it is "preferable for the State's legislature to complete its constitutionally required redistricting … or for the state courts to do so if they can." *Id.* at 278.

The majority in *Arizona State Legislature* reaffirmed this interpretation. It held that, under § 2a(c), "Congress expressly directed that when a State has been redistricted in the manner provided by state law—whether by the legislature, *court decree*, or a commission established by the people's exercise of the initiative—the resulting districts are the ones that presumptively will be used to elect Representatives." 135 S. Ct. at 2670 (emphasis added) (quotations, citation, and alterations omitted).

In short, with at least six decisions of this Court—*Smiley*, *Koenig*, *Carroll*, *Growe*, *Branch*, and *Arizona State Legislature*—definitively resolving the question of state courts' remedial redistricting authority against Petitioners, there is no conceivable need for this Court's review.

II. There Is No Split of Authority

In light of the foregoing, it is unsurprising that there is no split of authority on the question whether state legislatures are bound by the state constitution when they enact congressional districting legislation. Every lower court to have considered the issue since *Smiley* has concluded that the Elections Clause does not bar the application of the state constitution. *See, e.g.*, *Detzner*, 172 So. 3d at 370 & n.2. And this case is not the first time a state court has applied a broad state constitutional provision to invalidate a congressional map. *E.g.*, *Moran v. Bowley*, 179 N.E. 526, 531-

32 (Ill. 1932) (applying Illinois Constitution's Free and Equal Elections Clause, before *Wesberry*, to require one-person one-vote; citing additional cases).

Petitioners cite a handful of cases from the 19th century holding that the Elections Clause precluded states from applying state constitutional provisions to regulate federal congressional elections. Pet. 20. But all of these cases pre-dated *Smiley* and this Court's other decisions interpreting that Clause.

None of the post-*Smiley* cases that Petitioners identify remotely hold that a state legislature may enact statutes creating congressional districts in violation of the state constitution. *Wood v. State*, 142 So. 747 (Miss. 1932), has nothing to do with the issue presented here. In that case the court considered whether to grant a writ of mandamus on the ground that the districts violated a federal law, and declined to do so. *Id.* at 748. And the concurrence that Petitioners cite expressly rejects the proposition for which Petitioners cite it, explaining that the state legislature "was in full possession of power and discretion vested in it by section 4, art. 1" *because* "[t]here was no state constitutional restriction upon the Legislature in creating districts." *Id.* at 755 (Ethridge, J., concurring).

Commonwealth ex rel. Dummit v. O'Connell, 181 S.W.2d 691 (Ky. 1944), states that the "legislative process must be completed in the manner prescribed by the State Constitution in order to result in a valid enactment," *id.* at 694, and then holds that the statute at issue did not violate any state constitutional provision, *id.* at 696. *Parsons v. Ryan*, 60 P.2d 910 (Kan. 1936), did not even involve a claim that the state law violated the state constitution. And *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 282, 286-87

(Neb. 1948), concerned *presidential* elections governed by Article II, § 1 of the federal constitution, not Article I, § 4. The same is true of *PG Publishing Co. v. Aichele*, 902 F. Supp. 2d 724, 748 (W.D. Pa. 2012).

Nor are there "differing judicial approaches" (Pet. 26) to the question whether the federal Constitution mandates different treatment of what Petitioners term "explicit" (*id.*) constitutional language. Petitioners do not identify a single decision of any court declining to apply a state constitutional provision on the ground that the provision needed some interpretation; none of the decisions cited at page 26 of the petition draw any such distinction. That is again unsurprising in light of this Court's decisions applying the Equal Protection Clause and other federal constitutional provisions to congressional districting maps, notwithstanding that those provisions require some interpretation. Indeed, Petitioners cite no decision holding in *any* context that federal courts or the federal constitution could disable states from guaranteeing due process, or equal protection, or free speech, or any of the myriad protections that are hallmarks of state (and federal) constitutions.

Nor is this case a proper vehicle to address issues raised by a dissent from denial of certiorari in *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). That dissent raised the very different question whether state courts can entirely prohibit state legislatures from redistricting. The petitioners there did "not disput[e] state courts' remedial authority to impose temporary redistricting plans 'so long as the legislature does not fulfill its duty to redistrict'" in a lawful manner. *Id.* at 1094. Here, the state high court gave the legislature the opportunity to redistrict in a constitutional manner and stepped in only

after the legislature failed to do so—again, precisely as *Growe* encouraged.

III. This Petition Presents a Poor Vehicle for Resolving Any Elections Clause Question

A. Petitioners' Elections Clause Arguments Are Doubly Estopped

There is a dispositive vehicle problem that alone should prevent this Court from granting certiorari: Petitioners are judicially estopped from asserting their Elections Clause arguments in this Court.

To determine whether a party is judicially estopped under federal law, courts consider whether (1) the party's position is "clearly inconsistent with its earlier position"; (2) "the party has succeeded in persuading a court to accept that party's earlier position"; and (3) "the party seeking to assert an inconsistent position would derive an unfair advantage ... if not estopped." *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (quotations omitted). All three factors are met here. Indeed, it is difficult to imagine a clearer case where estoppel is warranted "to prevent improper use of judicial machinery." *Id.* (quotations omitted).

1. Petitioners Previously Argued that the Pennsylvania State Courts Had Power To Review and Remedy the 2011 Map

a. Petitioners advanced the opposite of their current position in separate litigation. On October 16, 2017, in a parallel federal lawsuit challenging the 2011 map, Petitioners argued that *Growe* "**required**" the federal court to stay or abstain because the Pennsylvania state courts had authority, and indeed

primacy, to address challenges to Pennsylvania's congressional plans. Mot. to Stay and/or Abstain at 25, *Agre v. Wolf*, No. 17-cv-4392, ECF No. 45-2 (E.D. Pa. Oct. 2, 2017). When the district court denied the motion, Petitioner sought emergency mandamus relief in this Court. They explained that, under "principles of federalism" and this Court's precedents in *Growe* and *Scott v. Germano*, 381 U.S. 407 (1965), "federal judges are '***required*** … to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.'" Emergency Mandamus Pet'n at 13-14, *In re Michael C. Turzai*, No. 17-631 (2017) (summarizing *Growe*, 507 U.S. at 33) (emphasis by Petitioners). In a section titled "The District Court Usurped the Power of the Pennsylvania State Courts," Petitioners wrote:

> [T]here can be no question that the Pennsylvania state courts have already begun the "highly political task" of addressing the challenges to the 2011 Plan. Because federal courts are ***required*** to defer adjudication of a redistricting matter that a state legislative or judicial branch is already considering, the District Court usurped the power of the Pennsylvania appellate courts[.]

Id. at 18-19.

While this Court denied mandamus, Petitioners subsequently succeeded in persuading a lower federal court to enter a stay based on the exact same argument. On November 20, 2017, in a second federal lawsuit challenging Pennsylvania's 2011 map, Petitioners again argued that the federal court was "**required**" to defer to the Pennsylvania state courts,

because state courts are valid and preferable "agents of apportionment." Mot. to Stay and/or Abstain at 23-26, *Diamond v. Torres*, No. 5:17-cv-5054, ECF No. 26-4 (E.D. Pa.). The federal court granted an initial stay on November 22, and subsequently extended the stay through January 8, 2018 on the basis of this state court action. *Diamond*, ECF Nos. 40, 48.

After the stay expired, Petitioners filed a new stay motion, again asserting that the "legislative *or* judicial branch" of a state has authority to review and remedy congressional maps in the first instance. *Diamond*, ECF No. 69-2 at 16 (emphasis in original).

On January 22, 2018—after the Pennsylvania Supreme Court struck down the 2011 map under the state constitution and set forth the timeline for the legislature to enact a new map—Petitioners filed a reply brief in *Diamond* again asserting that the federal court had to defer to Pennsylvania's "judicial branches" under the "plain language of *Growe*." *Diamond*, ECF No. 81 at 2, 5.

On January 23, the *Diamond* court stayed the case indefinitely "upon consideration of Legislative Defendants' motion to stay (Doc. No. 69), as well as the *per curiam* order entered by the Supreme Court of Pennsylvania on January 22, 2018 in *League of Women Voters of Penn. v. Commw. of Penn.*" *Diamond*, ECF No. 84. The parties eventually stipulated to a dismissal.

Under these circumstances, there can be no dispute that Petitioners have taken inconsistent positions. Petitioners remarkably now assert that it is an "open question" whether *Growe* applies in cases such as this, and that, at most, *Growe* allows state courts to address "violations of *federal* law" in congressional redistricting, not state law. Pet. 32. But

Petitioners previously told this Court that *Growe* was so clearly controlling that it warranted mandamus relief. Petitioners continued to rely heavily on *Growe* in obtaining a stay in *Diamond*. While Petitioners now argue that the Elections Clause "commits power" to regulate congressional redistricting *only* to state legislatures and Congress, and that "[s]tate courts are delegated none of this authority," Pet 15, Petitioners previously told this Court and the *Diamond* court that state courts are "agents of apportionment." *Diamond*, ECF No. 69-2 at 16; *see* No. 81 at 2. And whereas Petitioners now contend that only federal, and not state, law may constrain congressional plans, Petitioners argued to the *Diamond* court that "state courts, rather than federal courts," are preferable forums to address challenges to congressional plans. *Diamond*, ECF No. 69-2 at 16. Petitioners so argued even though they knew that the ongoing state court case raised *only* state-law claims.

Significantly, Petitioners reiterated these arguments in *Diamond* even *after* the Pennsylvania Supreme Court issued its January 22 order setting forth the remedial timeline. *Diamond*, ECF No. 81. Far from arguing that the state high court's decision and remedial process were invalid, Petitioners cited them as a reason for the federal court to stay its hand. *See id.*

b. Petitioners "succeeded" in making this argument to the federal *Diamond* court. *New Hampshire*, 532 U.S. at 750-51. The *Diamond* court granted a full stay based on Petitioners' argument that state courts such as the Pennsylvania Supreme Court have primacy in addressing congressional redistricting challenges. *Diamond*, ECF No. 84. Petitioners accrued significant benefits from this stay: it allowed them to avoid discovery and trial in federal court,

and led the *Diamond* plaintiffs to agree to dismiss the case.

c. Judicial estoppel is necessary to prevent Petitioners from "deriv[ing] an unfair advantage" and abusing the "judicial machinery." *New Hampshire*, 532 U.S. at 750-51. If this Court were to ultimately rule in Petitioners' favor, Petitioners will have obtained relief in two different courts based on diametrically opposed positions: (1) a stay, and then dismissal, in *Diamond* based on the argument that state courts have primary authority to review and remedy congressional districting challenges, including under state law; and (2) a victory in this Court based on the argument that Pennsylvania Supreme Court had no authority to resolve the challenge to the 2011 map. This is reason alone to deny certiorari.

2. Petitioners Successfully Urged this Court to Dismiss a Direct Appeal Based on the State Court Decision They Now Challenge as Invalid

Petitioners are judicially estopped for a second reason: shortly before filing their Petition, they successfully argued to this Court that the federal *Agre* case was moot because of the state high court decision in this case.

In *Agre v. Wolf*, an unsuccessful lawsuit challenging the 2011 map under the U.S. Constitution, Petitioners argued to this Court that the plaintiffs' appeal was "moot" because "the 2011 Plan . . . is no longer in effect." Mot. to Affirm at 8, *Agre v. Wolf*, No. 17-1339 (Apr. 23, 2018). They wrote: "Because the Pennsylvania Supreme Court invalidated the 2011 Plan, imposed a new plan, and identified specific cri-

teria that future plans must satisfy to comply with Pennsylvania law, this case is no longer definite and concrete, and the parties have no current adverse legal interests." *Id.* at 9. Petitioners have now taken a "clearly inconsistent" position, *see New Hampshire*, 532 U.S. at 750, telling this Court that the "2011 Plan is the plan that … should govern Pennsylvania's congressional elections." Pet. 2.

Petitioners "succeeded in persuading [this] [C]ourt to accept [their] earlier position." *New Hampshire*, 532 U.S. at 750. This Court stated: "The appeal is dismissed as moot." *Agre v. Wolf*, 138 S. Ct. 2576, 2576 (2018).

For this reason too, judicial estoppel is necessary to prevent Petitioners from "deriv[ing] an unfair advantage" and abusing the "judicial machinery." *New Hampshire*, 532 U.S. at 750-51. Petitioners might have asked this Court to defer adjudication of the *Agre* appeal until this Court had resolved this petition for certiorari and, if granted, the merits of this case. *See generally Growe*, 507 U.S. at 32 ("We have required deferral … when a constitutional issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case."); *id.* at 32 n.1 (similar). But Petitioners did not request deferral or abstention in their Motion to Affirm in *Agre*; instead, they urged dismissal on the ground that the Pennsylvania Supreme Court's decision was final and that the *Agre* plaintiffs' claims were thus moot.

It would be fundamentally unfair for this Court to dismiss the appeal in *Agre* as "moot" on the basis of the Pennsylvania Supreme Court's decision, but then overturn that very same decision.

B. There Are Other Significant Vehicle Problems

Multiple other issues render this a poor vehicle for resolving any Elections Clause question.

First, as stated above, Petitioners expressly conceded at oral argument before the Pennsylvania Supreme Court that the traditional districting criteria, which the state court eventually adopted, were valid criteria for assessing the validity of the 2011 map. They have waived any argument to the contrary.

Second, with respect to the state high court's remedy, Petitioners repeatedly complain about the short time the General Assembly was given to enact a new congressional map. But the petition does not actually present any argument regarding the constitutionality of the timing of the state high court's remedial process. In any event, Petitioners have again waived any such complaint. Petitioners asked the Pennsylvania Supreme Court for "at least three weeks" to pass a new plan if the court struck down the 2011 map, Oral Arg. Video at 1:45:53-1:46:09, and the Pennsylvania Supreme Court gave them the time that they asked for.

Finally, this Court's intervention is unwarranted because the Pennsylvania Supreme Court's remedial plan is in place and indisputably will govern the 2018 elections. The only election that would be impacted by a decision by this Court would be the 2020 elections. But although many months have passed since the decision below, Petitioners have never made an effort to pass a compliant plan or to submit it to the Pennsylvania Supreme Court and ask the court to install that plan for the 2020 elections. Under these circumstances they should not be heard to

complain that the court has supplanted the legislature.

C. This Court Should Not Intervene in Disputes Between Branches of State Government

This Court should independently deny the petition because federal courts should not be adjudicating disputes between branches of state government "regarding their respective powers." *Ariz. State Legislature*, 135 S. Ct. at 2695 (Scalia, J., dissenting). This Court has long been reluctant to intervene in disputes between other branches of the *federal* government, *e.g.*, *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997), and should be even more reluctant to referee disputes between branches of a state government. As Justices Scalia and Thomas explained in an Elections Clause challenge in *Arizona State Legislature*, separation of powers principles and the limited role of the federal judiciary dictate that it is simply not the "business" of federal courts to resolve disputes between branches of state government over their allocation of power. 135 S. Ct. at 2695.

CONCLUSION

The petition should be denied.

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