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

REPLY BRIEF

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STATEMENT

The Elections Clause delegates exclusive authority to regulate congressional elections in each state to "the Legislature thereof" and to Congress. Although state courts have authority to ensure that legislation enacted pursuant to the Elections Clause complies with state *procedural* law governing the manner in which legislation is passed (e.g., by gubernatorial signature or referendum), this Court has never held that state courts have authority to decide whether such legislation complies with *substantive* state constitutional law. Indeed, it has never addressed this question. That alone is reason to grant the Petition.

Moreover, besides invalidating a congressional redistricting plan solely under the Pennsylvania Constitution's "Free and Equal Elections Clause," which does not establish a *procedure* of lawmaking, the Pennsylvania Supreme Court afforded that provision a supposed "interpretation" with zero relation to its text. Rather, the court created new law by placing substantive limitations on the legislature's ability to exercise its authority under the Elections Clause. And it exacerbated this unprecedented act by affording the General Assembly a mere two days to redistrict before implementing its own plan. That intrusion into the legislature's exclusive authority violates the Constitution's plain language.

Respondents cite generic principles of "federalism" in support of the judgment below. Voters' Br. 1.[1] But

[1] The oppositions of Gretchen Brandt et al. ("Voter Respondents") and the Pennsylvania Governor et al. ("Executive Respondents") are referred to as "Voters' Br." and "Executive Br.," respectively.

Respondents' position cannot be squared with *U.S. Term Limits v. Thornton*, 514 U.S. 884, 804-06 (1995), which holds that participation in congressional elections is a power conferred by the Constitution rather than reserved by the states. In this case, the legislature acted through an affirmative grant under the Elections Clause, but the Pennsylvania Supreme Court lacked authority to overturn the enacted legislation (or create its own legislation) based on newly created state substantive law. Put simply, there are no federalism concerns here.

This Court's review of this intrusion is necessary. Unless it intervenes, political parties and their constituents will be incentivized to bring "partisan gerrymandering" claims challenging congressional districts in state rather than federal court, especially since the viability of those claims in federal court is currently in doubt. The likely outcome of certiorari denial here is that state courts will seize enormous policymaking power over *congressional* elections that, according to Respondents, is perfectly acceptable and beyond this Court's power to police. That would flip federal supremacy on its head. The Court therefore should grant the Petition and reverse.

ARGUMENT

I. The Court Should Enforce the Constitution's Plain Text

By delegating exclusive power to regulate congressional districts in each state to "the Legislature thereof," the Constitution denies that power to other state actors—absent a separate, affirmative grant of authority. Respondents do not and cannot show that the Elections Clause or any other federal authority somehow empowers the state courts applying state law to exercise control over congressional redistricting.

A. Indeed, nothing in the Constitution's text or structure suggests that a state legislature acting under the Elections Clause can be subject to a state constitution's substantive provisions.

1. Respondents claim that cases such as *Smiley v. Holm*, 285 U.S. 355 (1932), *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), hold that state constitutions trump legislative enactments pursuant to the Elections Clause. But those cases hold only that "the Legislature" must pass Elections Clause legislation through the state's "manner" of lawmaking. *Smiley*, 285 U.S. at 368. According to this precedent, a referendum (*Hildebrant*, 241 U.S. at 569), a gubernatorial signature (*Smiley*, 285 U.S. at 368), or a ballot initiative and redistricting commission (*Arizona*, 135 S. Ct. at 2668) belong to "the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. The Pennsylvania Free and Equal Elections Clause is different because

it does not create a legislative "method." Thus, Respondents' cited cases do not support their position.[2]

In fact, these cases support Petitioners' position because they draw a "line between state *procedural* requirements…and *substantive* requirements." Voters' Br. 14. State constitutional manner-of-legislation provisions are consistent with the Elections Clause because its term "Legislature" refers to the state constitution's "prescriptions for lawmaking." *Arizona*, 135 S. Ct. at 2668. By contrast, the term "Legislature" in no way refers to state *substantive* constitutional terms, such as free-speech or equal-protection provisions. And affording states power to *define* their legislature (i.e., how laws must be passed) is not to afford them power to tie the legislature's hands with policy prescriptions that must be interpreted and applied by *other bodies* that are not "the Legislature."[3]

Voter Respondents argue (at 15) that state constitutions may "completely eliminate the legislature" from regulating congressional elections. That is backwards. Under this Court's precedents, the Con-

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[2] Executive Respondents' reliance (at 20) on 2 U.S.C. § 2a(c) fares no better because § 2a(c) provides only that congressional redistricting be conducted in "the manner" provided by state law for legislation.

[3] That is the error in Executive Respondents' argument (at 20) that a substantive constitutional provision, as the product of legislative process, is "equally" valid with redistricting legislation. Where conflict is alleged, two laws cannot be "equally" valid; one must yield. And, under the Elections Clause, the state legislatures' lawmaking authority must govern.

stitution's term "Legislature" draws its meaning from the state constitution. The power to define what constitutes the state's "Legislature" is not the power to "eliminate" it from the process. Where, as here, the state constitution identifies one body as the "Legislature," but the judiciary invalidates the legislature's exercise of Elections Clause authority, the judiciary's action is unconstitutional.

2. Respondents also flip the Elections Clause inquiry on its head, arguing that the Clause does not "abrogate[]" the state courts' role they assume exists. Voters' Br. 12; *see also* Executive Br. 20. But *Thornton* held that "electing representatives to the National Legislature was a new right, arising from the Constitution itself," and that "[i]n the absence of any constitutional delegation…such a power does not exist." 514 U.S. at 804-05. According to *Thornton*, congressional-elections legislation is not "a state law just like any other." Voters' Br. 12. So the question is not whether the Elections Clause "abrogates" state-court authority, but whether it affirmatively *grants* it. It does not. *Thornton* renders Respondents' extensive discussion of "federalism" irrelevant. This case involves a state intrusion on a specific constitutional delegation and does not implicate federalism concerns.

While Voter Respondents (at 15) call these principles "anomalous," Respondents admit that Petitioners' view is correct as to the Presidential Electors Clause. Executive Br. 22; Voters' Br. 26-27. That Clause delegates the "Manner" of appointing presidential electors in each state to "the Legislature thereof." Art. II, § 1, cl. 2. Given the similar text, this Court has rightly observed that the provision "paral-

lels" the Elections Clause. *Thornton*, 514 U.S. at 805. Respondents apparently agree, as many authorities have held, that state substantive constitutional provisions do not apply to legislation enacted under the Presidential Electors Clause. *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 730-31, 748 (W.D. Pa. 2012) (holding that state statute, enacted by Pennsylvania's lawmaking method, governing presidential elections "is not circumscribed by the Pennsylvania Constitution"). Taking Respondents' position at face value would mean that, in states like Maine and Nebraska that apportion their presidential electors by congressional district, each district would be subject to the state's constitution as to congressional elections but not presidential elections held the very same day. This reading of the Elections Clause as a second-class constitutional provision is untenable.

3. Although Voter Respondents (at 15) and the court below assume that state courts, when applying state constitutional substantive provisions, are similarly situated with courts applying *federal* constitutional provisions or congressional enactments, they ignore two critical distinctions.

First, federal constitutional provisions are of equal dignity with the Elections Clause. Petition 22-24. Thus, when courts enforce such provisions, they exercise their power to enforce the Constitution, which must be read as a coherent whole. But the federal Constitution neither defers to nor is qualified by state constitutional law.

Second, Respondents ignore that the Elections Clause itself provides that congressional enactments override state legislative enactments. So, in enforc-

ing congressional acts, courts enforce the Elections Clause itself. By contrast, state courts have no delegated power to pick one state legislative enactment over another.

4. Accordingly, multiple cases have enforced a state statutory election law over a state substantive constitutional provision as to congressional elections. *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 692, 694 (Ky. 1944) (finding absentee voting, though "denied by the State Constitution," available because "the Legislature" was "empowered" to legislate it under the Elections Clause); *In re Opinions of Justices*, 45 N.H. 595, 605-06 (1864) (upholding allowance of absentee voting by "the legislature" which "exercise[d] that authority untrammeled by the provision of the State constitution, which requires the elector of State representatives to give his vote in the town or place wherein he resides"); *In re Opinions of Justices*, 37 Vt. 665 (1864) (applying state constitutional provision to state elections but not congressional elections); *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887) (construing state constitutional provision as inapplicable to congressional elections because "to that extent it is…of no effect"); Thomas M. Cooley et al., Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 903 & n.1 (7th ed. 1903). Respondents misread these and other authorities, including by looking at the portions addressing *local* elections, not *congressional* elections.

b. Even if the Pennsylvania Free and Equal Elections Clause could be applied, there must be some limiting principle on state courts' purported "interpretations" in light of the Elections Clause. Re-

spondents argue that the Pennsylvania Free and Equal Elections Clause enjoys the imprimatur of "the people," but then argue that four state judges can rewrite the Clause at will. Executive Br. 20, 27-32. This argument runs afoul of *Arizona*'s vociferous defense of "modes of legislation that place the lead *rein in the people's hands*." 135 S. Ct. at 2762 (emphasis added).

Indeed, multiple Justices have expressed that there "must be some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." *Colo. Gen. Assembly v. Salazar*, 541 U.S. 1093, 1094 (2004) (Rehnquist, C.J., dissenting from the denial of certiorari); *Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring). Contrary to Executive Respondents' casuistic efforts (at 32) to distinguish *Salazar*, this case presents precisely the kind of a-textual interpretations presented in that case. *See* Petition 26-27.

Respondents are also wrong to suggest that this Court has no authority to review whether a state court holding can fairly be said to *create* rather than *apply* legislation. The Court frequently applies levels of deference out of separation-of-powers concerns. And, in that vein, the Court has reviewed state-court judgments, not directly on their merits, but to ascertain whether they were dictated by "the constitution and laws of the state" or amounted to the courts' "policy disagreement" not founded in "local laws," *Second Employers' Liability Cases*, 223 U.S. 1, 55-57 (1912); *see also Haywood v. Drown*, 556 U.S. 729, 756-58 (2009) (Thomas, J., dissenting) (discussing the *Second Employers'* line of cases), or whether they have "fair or substantial support" in the state courts'

own precedent, *New York Times Co. v. Sullivan*, 376 U.S. 254, 264 n.4 (1964) (quotations omitted). The Court can draw the same genre of distinction here.

Besides, as the Court signaled in *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76 (2000), it need not "defer[]" at all where "the legislature is…acting…by virtue of a direct grant of authority" under the Constitution. If deference is, as Respondents say, infeasible, that is an argument for *de novo* review, not for ignoring the Constitution.

And, contrary to Respondents' assertion, federal-court enforcement of the Constitution is not an affront to state sovereignty. A tiny number of state statutes and cases address congressional-election rules. By comparison, the decision below (if left intact) would create endless opportunity for abuse as political parties and other stakeholders would see state-court litigation as the best vehicle to influence congressional redistricting.

c. Even if state courts could declare congressional redistricting plans to be in violation of state substantive constitutional requirements, there is no basis for their creating redistricting plans themselves. Respondents' reliance on cases like *Growe v. Emison*, 507 U.S. 25 (1993), for the proposition that the Pennsylvania Supreme Court could implement its own congressional plan is misplaced: those cases address state courts' ability to implement a plan when the legislature has failed to redistrict or has done so in violation of federal law. In *Growe*, the legislature failed to redistrict at the beginning of the decade, and new census data rendered the prior plan a violation of the federal Equal Protection Clause. There was no doubt that the state court could adjudicate

and remedy a violation of *federal* law. *Growe* says nothing of state courts' ability to remedy violations of *state* law.

Additionally, *Growe* cannot be read to authorize state courts to deprive the legislature of its exclusive authority over congressional redistricting in the first place. The Pennsylvania Supreme Court's decision to implement its own congressional plan without initially affording the legislature an ample opportunity to pass its own plan presents an independent basis for certiorari. Even if a state court may redistrict, it must afford an adequate opportunity for the legislature to comply with its constitutional command under the Elections Clause. Below, the Pennsylvania Supreme Court afforded the legislature only two days to draft a congressional plan consistent with its 138-page opinion identifying the newly created contours of the Pennsylvania Constitution before implementing its own plan. In doing so, the court deprived the legislature of any real opportunity to create a congressional plan.

The same problem inheres in Respondents' reliance on 2 U.S.C. § 2c, which they cite for the proposition that state courts may redistrict, Voters' Br. 24-25. But this statute provides only that redistricting be done "by law," referencing independently existing legal doctrines, like state courts' primitive jurisdiction over federal-law claims. There are no such doctrines here. This case is unlike *Branch v. Smith*, 538 U.S. 254, 271 (2003), which, like *Growe*, considered courts' authority to remedy violations of the Equal Protection Clause's one-person, one-vote rule after a legislature failed to redistrict. *Branch* expressly left open the question of state courts' authority that the

lower court in that case, *Smith v. Clark*, 189 F. Supp. 2d 548 (S.D. Miss. 2002), addressed. This case presents that question—previously deemed fit for this Court's review—yet again.

Finally, Executive Respondents are incorrect (at 25) that Petitioners' remedial argument rises or falls with Petitioners' merits-stage arguments. Creating and imposing a congressional redistricting plan means directly regulating congressional elections, which is a step beyond invalidating laws. Even if the latter were legitimate, it would not justify the former.

II. Estoppel and Waiver are Inapplicable Here

Respondents advance a series of flimsy waiver and estoppel arguments as a basis for this Court not to consider these important, long-unresolved questions. Their arguments are meritless.

A. Executive Respondents' argument (at 14-16) that Petitioners waived their lead Elections Clause position in their emergency stay briefing in this Court fails to distinguish *claims* from *arguments*. "Once a federal claim is properly presented, a party can make any argument in support of that claim." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992). Accordingly, this Court in *Lebron v. National Railroad Passenger Corp.* found no waiver of an argument that the petitioner "*expressly disavowed*…in both the District Court and the Court of Appeals," because the underlying *claim* had been preserved. 513 U.S. 374, 378-79 (1995) (emphasis added). So too here: the Elections Clause *claim* has been repeatedly raised and preserved, and no rule restricts the *arguments* Petitioners can advance in its favor.

Lebron involved a better waiver position than that advanced here because the argument was disclaimed in the court below, thereby prejudicing its ability to adjudicate it. No such prejudice exists here.

B. Respondents' arguments that Petitioners are estopped because they urged two federal district courts to issue stays fares no better. Voters' Br. 28-31. Petitioners' statements to the federal courts are not unambiguously inconsistent with their arguments here. *See Pegram v. Herdrich*, 530 U.S. 211, 228 n.8 (2000). Petitioners argued in the *Diamond* case that the Pennsylvania Supreme Court was the preferred *forum* for "substantially the same legal claims." *See* Supplemental Appendix A26.[4] They made no concession about what *law* should apply in the Pennsylvania courts. Any such concession would have been odd because, by that time, Petitioners had already argued in the Pennsylvania courts that either federal-law standards or, alternatively, direct textual criteria could be applied consistent with the Elections Clause. Indeed, they moved for and temporarily obtained a stay pending this Court's decision in *Gill v. Whitford* on the view that federal-law standards must govern the state case. App. 224-25.

Respondents also cannot show that Petitioners prevailed on these arguments in obtaining a federal-court stay. Petitioners made several alternative arguments that were sufficient and independent bases for the stay. *See* A14-25. In granting the stay, the court did not state that it found only Petitioners' ar-

[4] Petitioners have provided the Court a copy of the *Diamond* stay briefing and order as a supplemental appendix.

gument regarding the state-court proceeding persuasive. A31.

C. Finally, Voter Respondents argue that Petitioners are estopped from pressing this Petition by taking an incompatible position in their motion to affirm in *Agre v. Wolf*, 138 S. Ct. 2576 (2018). But they ignore that the motion directly addressed this Petition, arguing that the possibility of success on this Petition did not change the mootness analysis because success was a contingent possibility that is not assured. *See* Motion to Affirm at 10 n.5. The argument that such contingencies do not alter the mootness analysis is consistent with pressing this Petition and in no way supports estoppel.

CONCLUSION

The Court should grant the Petition and reverse.

Respectfully submitted,

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