No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2011, the Pennsylvania General Assembly passed a congressional redistricting plan according to the state's prescriptions for lawmaking, and that plan complied in all respects with federal law. But the Pennsylvania Supreme Court invalidated that legislation solely on state-law grounds and redistricted the state itself. To accomplish this, it inferred from the Pennsylvania Constitution's Free and Equal Elections Clause textually nonexistent requirements that congressional districts be, *inter alia*, compact and contiguous and avoid political-subdivision splits. It then enjoined the 2011 congressional redistricting plan by reference to these newly identified rules. Next, the court provided a mere 18 days for the legislature to enact a new districting plan, but withheld its 138-page opinion identifying not only which state constitutional provisions the legislature's plan violated but also how a new legislative plan could be compliant until only two days before the end of the 18-day period. When the legislature was unable to enact a plan in two days, the court enacted its own plan which it declared by fiat—without any adversarial proceeding—was superior to all submitted plans and compliant with state law. In crafting its own plan, the court made no effort to implement the legislative policy goals of any legislatively enacted districting plan.

The questions presented are:

1. Whether the Pennsylvania Constitution's substantive provisions and whatever interpretation

QUESTIONS PRESENTED—Continued

Pennsylvania courts afford them, however atextual, can restrict time, place, and manner rules Pennsylvania's lawmakers have passed to govern congressional elections pursuant to Article I, § 4, cl. 1, of the United States Constitution, known as the "Elections Clause."

2. Whether the Pennsylvania Supreme Court, which has no lawmaking authority, may, consistent with the Elections Clause, adopt a redistricting plan as a remedy solely for state-law violations and, if so, whether it may, consistent with the Elections Clause, craft redistricting policy wholesale in creating that remedy.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners Joseph B. Scarnati, III (President Pro Tempore of the Pennsylvania Senate) and Michael C. Turzai (Speaker of the Pennsylvania House of Representatives) were respondents in their official capacities in the Commonwealth Court and Pennsylvania Supreme Court proceedings.

Respondents Gretchen Brandt, John Capowski, Jordi Comas, Carmen Febo San Miguel, John Greiner, Lisa Isaacs, Don Lancaster, Mary Elizabeth Lawn, Mark Lichty, Richard Mantell, William Marx, Robert B. McKinstry, Jr., Priscilla McNulty, Lorraine Petrosky, Thomas Rentschler, Robert Smith, James Solomon, and Thomas Ulrich were petitioners in the Commonwealth Court and Pennsylvania Supreme Court proceedings.

Respondents the Commonwealth of Pennsylvania, Thomas W. Wolf (Governor of Pennsylvania), Jonathan M. Marks (Commissioner of Elections), Michael J. Stack, III (Lieutenant Governor of Pennsylvania), Robert Torres (Acting Secretary of the Commonwealth), and the Pennsylvania General Assembly were respondents in the Commonwealth Court and Pennsylvania Supreme Court proceedings.

Respondents Michael Baker, Glen Beller, Kathleen Bowman, Wayne Buckwalter, Karen C. Cahilly, Barry O. Christenson, Timothy D. Cifelli, Thomas W. Corbett, Ann M. Dugan, William P. Eggleston, Patricia J. Felix, Daphne Goggins, Mark J. Harris, Tegwyn Hughes, Jacqueline D. Kulback, Bryan Leib, Vicki Lightcap,

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT—Continued

Brian McCann, Arnold C. McClure, James R. Means, Martin Morgis, David Moylan, Lisa V. Nancollas, Carl Edward Pfeifer, Ann Marshall Pilgreen, Ginny Steese Richardson, Cynthia Ann Robbins, Carol Lynne Ryan, Joel Sears, Hugh H. Sides, Brandon Robert Smith, Kurtes D. Smith, James Taylor, Richard J. Tems, Scott Uehlinger, Thomas Whitehead, and Ralph E. Wike were intervenors in in the Commonwealth Court and Pennsylvania Supreme Court proceedings.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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PETITION FOR WRIT OF CERTIORARI

Under Article I, § 4 of the Constitution (known as the "Elections Clause"), time, place, and manner rules governing federal congressional elections must be "prescribed" by "the Legislature" of each state. In 2011, the Pennsylvania General Assembly fulfilled this duty by enacting bipartisan legislation establishing 18 voting districts to govern Pennsylvania's congressional elections (the "2011 Plan"). But that Plan does not currently govern Pennsylvania elections; a map drawn by the Pennsylvania Supreme Court governs instead. This state of affairs is unprecedented, violates the Elections Clause, and calls for this Court's intervention.

The replacement of legislation enacted by "the Legislature" with legislation enacted by the state court was not for any reason this Court's precedent tolerates. It is, to the contrary, undisputed here that the General Assembly's 2011 Plan complies with all preconditions this Court has identified for Elections Clause legislation to be valid and effective. First, Elections Clause legislation must in fact regulate the times, places, or manner of elections, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995), and the 2011 Plan lawfully establishes the times, places, and manner of elections by creating 18 single-member voting districts. Second, Elections Clause legislation must be passed "in accordance with the method which the state has prescribed for legislative enactments," *Smiley v. Holm*, 285 U.S. 355, 367 (1932), and the 2011 Plan was enacted by a bipartisan vote of the Pennsylvania General Assembly,

see Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n, 135 S. Ct. 2652, 2667 (2015) (*AIRC*), and presented to the Commonwealth's governor who signed it, *see Smiley*, 285 U.S. at 367. Third, the 2011 Plan complies with all federal-law standards, such as the individual-rights guarantees of the federal Constitution and the vote-dilution prohibitions of the Voting Rights Act. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986).

Thus, the General Assembly's 2011 Plan is the plan that, according to the U.S. Constitution's plain text, should govern Pennsylvania's congressional elections—and that is so as a matter of *federal* law. Nevertheless, the Pennsylvania Supreme Court invalidated the 2011 Plan and implemented its own solely on newly created *state*-law grounds. But if federal supremacy means anything, it plainly favors legislation founded on federal law over legislation founded solely on state law, not the other way around.

The Pennsylvania Supreme Court could conclude otherwise only by making two leaps of bad logic.

First, it identified an additional criterion for Elections Clause legislation to be valid: legislation must, the court said, comply with state constitutional individual-rights guarantees as interpreted by the state courts. This was doubly erroneous. State substantive constitutional law does not belong to the state's lawmaking "method." Nor is it analogous to federal-law individual-rights guarantees that may alter or qualify the balance of power the Election Clause plainly

establishes. The state constitution is subordinate to the Elections Clause by virtue of federal supremacy. Moreover, even if state substantive constitutional law were applicable, this Court has never equated state-court interpretations of time, place, and manner rules with the rules themselves. In claiming this power, the Pennsylvania Supreme Court claimed, in effect, a judicial veto to be exercised at will and for purely political reasons.

Second, the Pennsylvania Supreme Court assumed the power to enact time, place, and manner rules itself by redistricting the Commonwealth through a court-drawn map. But its basis for this was, again, a *non-sequitur*. State courts' prerogative to create districts, if it even exists, lies solely in their concurrent jurisdiction to remedy violations of federal law. (Even that prerogative is disputed.) But nothing in this Court's precedent affords state courts power to create election rules or order them as a remedy when legislative election rules violate only state constitutional law, especially when the state courts alone have created the violation from whole cloth. Affording that right would confer on state courts a power even superior to a veto; it would allow them to establish time, place, and manner rules wholly outside of the state's prescriptions for lawmaking. That is exactly what occurred here.

The Pennsylvania Supreme Court's judgment is therefore unlawful. And it was conceivable only because this Court has never adjudicated a case involving a competition between a validly enacted legislatively drawn plan and a state-court-drawn plan. As a result,

the body of law governing such cases is in disarray. Some courts have held that state constitutional policy prescriptions are inapplicable against congressional election legislation, others that constitutional prescriptions do apply but that courts are limited to enforcing their explicit text, and still others that state courts may not create remedial districting plans. And for each holding along any of these lines, an equal and opposite holding has issued from some other court, meaning that practically all questions regarding state courts' role in congressional redistricting remain hotly disputed. This case therefore presents an ideal vehicle for this Court to address these questions of national importance that have for generations caused confusion.

OPINIONS BELOW

The order of the Pennsylvania Supreme Court enjoining the use of Pennsylvania's Congressional map (App. 208-10) is unpublished. The opinion of the Pennsylvania Supreme Court (App. 3-170) is reported at 178 A.3d 737. The order of the Pennsylvania Supreme Court adopting an alternative plan (App. 227-38) is unpublished. The Report and Recommendation of the Commonwealth Court (Pennsylvania's intermediate level appellate court) (excerpted at App. 249-255) is unreported.

JURISDICTION

The judgment of the Pennsylvania Supreme Court was entered on January 22, 2018. This Court has jurisdiction under 28 U.S.C. § 1257(a).

On April 13, 2018, Petitioners moved for a 60-day extension to file a petition for writ of certiorari to and including June 21, 2018. Justice Alito granted that request on April 16.

CONSTITUTIONAL PROVISION INVOLVED

The Elections Clause of the federal Constitution provides that:

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

U.S. CONST. art. I, § 4, cl. 1.

STATEMENT OF THE CASE

I. The Pennsylvania Constitution delegates the "legislative power of this Commonwealth" to a General Assembly. PA. CONST. art. II, § 1. The Pennsylvania Constitution also delegates a "limited legislative power" to the governor, who may veto legislation

passed out of the General Assembly. *Jubelirer v. Rendell*, 953 A.2d 514, 529 (Pa. 2008).

Separately, the Pennsylvania Constitution establishes a state-court system. In a provision called "Prohibited Activities," it expressly provides: "No duties shall be imposed by law upon the Supreme Court or any of the justices thereof or the Superior Court or any of the judges thereof, except such as are judicial." PA. CONST. art. II, § 17(d).

The Pennsylvania Constitution additionally establishes a legislative reapportionment commission and delegates to it power to create *state legislative* districts. PA. CONST. art. II, § 17. The Pennsylvania Constitution provides a set of explicit criteria governing creation of those legislative districts, including requirements that they "be composed of compact and contiguous territory" and, "[u]nless absolutely necessary" avoid dividing any "county, city, incorporated town, borough, township or ward." PA. CONST. art. II, § 16. The reapportionment commission, however, has no authority to draw *congressional* voting districts, and the Pennsylvania Constitution, as the Pennsylvania Supreme Court acknowledged as recently as 2002, provides "no analogous, direct textual references to [the] neutral apportionment criteria" that govern legislative districts. *Erfer v. Commonwealth*, 794 A.2d 325, 334 (Pa. 2002).

On December 22, 2011, the Pennsylvania General Assembly passed a redistricting plan that apportioned Pennsylvania into 18 congressional districts.

The vote was bipartisan; 36 Democratic House members voted for the Plan, supplying the majority needed for passage. The plan was presented to the governor, and he signed it into law. The 2011 Plan remained unchallenged for more than five years and was used in three congressional elections.

II. On June 15, 2017, eighteen Pennsylvania residents (the "Challengers") commenced this action alleging that the 2011 Plan violated the equal-protection, free-expression, and "Free and Equal Elections" provisions of the Pennsylvania Constitution. The Challengers contended that the General Assembly violated these provisions by drawing the 2011 Plan to enhance the Republican Party's representation in Congress. The Speaker of Pennsylvania's House of Representatives and the President Pro Tempore of Pennsylvania's Senate, the Petitioners here, were named as respondents in their official capacities.

Although this matter was initially stayed pending this Court's decision in *Gill v. Whitford*, No. 16-1161, the Pennsylvania Supreme Court exercised extraordinary jurisdiction and ordered that a trial be completed and recommended findings of fact and conclusions of law be issued by December 31, 2017. App. 224-25. After a five-day trial, the Pennsylvania Commonwealth Court (the Pennsylvania intermediate court charged by the Pennsylvania Supreme Court to conduct the trial and recommend findings of fact and conclusions of law) concluded that the Challengers had failed to show a violation of any Pennsylvania constitutional provision. App. 249-55. Following Pennsylvania Supreme Court precedent that construed the Free and

Equal Elections Clause as "coterminous" with federal law, *see Erfer*, 794 A.2d at 139, the court employed the framework a plurality of this Court established in *Davis v. Bandemer*, 478 U.S. 109 (1986), to claims of unlawful partisan-motivated redistricting, App. 249-51. The court recommended, *inter alia*, a finding that the Challengers had failed to satisfy that equal-protection standard. App. 252-55.

III. The Pennsylvania Supreme Court rejected this recommendation. On January 22, 2018, it issued an order by a 5-2 vote that the 2011 Plan "plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania." App. 208. The court enjoined the 2011 Plan, but did not identify which constitutional provision it violated. It noted instead, "Opinion to follow." App. 210.

The court afforded the General Assembly 18 days to submit a proposed alternative plan to the Governor and specified that, if the Governor were to "accept[]" such a plan, it would still be subject to the court's further review. The court also stated that it would "proceed expeditiously to adopt a plan" if the General Assembly failed to comply by February 9. App. 209.

Additionally, the January 22 Order identified new redistricting criteria absent from the Pennsylvania Constitution, instructing that

> to comply with this Order, any Congressional districting plan shall 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. These criteria track almost verbatim the Pennsylvania Constitution's criteria governing state legislative districts—and *only* state legislative districts, as the Pennsylvania Supreme Court had previously held. *Erfer*, 794 A.2d at 334.

IV. On February 7, just two days before the court-imposed deadline, the Pennsylvania Supreme Court issued a 138-page opinion. App. 1-169. In response to Petitioners' contention that the Elections Clause foreclosed the court from adopting standards different from the federal-law standards of *Bandemer*, the court concluded that Elections Clause legislation is "subject to the requirements of the Pennsylvania Constitution" and to the state courts' interpretations of those requirements. App. 139-40.

The court's opinion also stated for the first time that its judgment was predicated on Pennsylvania's Free and Equal Elections Clause. App. 3. That clause provides: "Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." PA. CONST. art. I, § 5. The provision had received practically no attention in the Challengers' briefing. And the court's long-standing precedent expressly held that the Free and Equal Elections Clause did *not* provide any standards different from those applicable under the

federal Equal Protection Clause. *Erfer*, 794 A.2d at 332.[1]

Regardless, the court interpreted the clause to mandate "that all voters have an equal opportunity to translate their votes into representation." App. 123. The court also concluded that the compactness and political-subdivision-integrity principles announced in the January 22 Order were "measures" to ensure this "equal opportunity." App. 146. Yet it conceded that "[n]either [the Free and Equal Elections Clause], nor any other provision of our Constitution, articulates explicit standards which are to be used in the creation of congressional districts." App. 146. It also conceded that map-drawers may "unfairly dilute the power of a particular group's vote for a congressional representative" even while complying with these criteria, App. 153, and therefore held that a showing of non-compactness or split political subdivisions is "not the exclusive means by which a violation of [the Free and Equal Elections Clause] may be established," App. 152. This additional criterion of proportional representation did not appear in the January 22 Order, and the first time the General Assembly heard of it was two days before the court-imposed redistricting deadline.[2]

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[1] The Pennsylvania Supreme Court reached a similar conclusion in *Holt v. 2011 Legislative Reapportionment Comm'n*, 67 A.3d 1211, 1234, 1236 (Pa. 2013), that "nothing in the Constitution" prohibits partisan redistricting.

[2] The court provided other criteria absent from the January 22 Order, including that a congressional plan is unlawful when it splits 28 counties and 68 municipalities, when its "mean-median

Two dissents and a partial dissent accompanied the majority opinion. Justice Mundy's dissent argued that the Pennsylvania Supreme Court's actions violated the U.S. Constitution's Elections Clause by, *inter alia*, placing "the General Assembly on a three-week timeline without articulating the complete criteria necessary to be constitutionally compliant." App. 202. Similarly, Justice Baer's partial dissent rejected the majority's application of "court-designated districting criteria" absent from the Pennsylvania Constitution. App. 173. He observed that the Free and Equal Elections Clause "obviously does not address the size or shape of districts" and that "there is nothing inherent in a compact or contiguous district that insures a free and equal election." App. 176.

V. After the February 7 Opinion was issued identifying what was required for a new plan to pass state constitutional muster, the General Assembly's leadership prepared a new congressional plan, but there was insufficient time to proceed with three different reviews of the legislation in both chambers—as the Pennsylvania Constitution requires, PA. CONST. art. III, § 4—and to set the plan for a vote. Nor was there sufficient time prior to the court's deadline to negotiate with Pennsylvania's Governor to obtain his support. The General Assembly's leadership nevertheless attempted to work within the court's timeline

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vote gap" is 5.9% or higher, and when its "efficiency gap" measures between 15% and 24% relative to statewide vote share. App. 155-61. The so-called efficiency gap had not been created when the 2011 Plan was adopted.

by filing a proposed plan for consideration on February 9. Other parties, including the Governor, filed proposed plans on February 15.

On February 19, the court chose *none* of the proposed alternatives and enacted its own plan instead. App. 227-37. The court summarily concluded that its map was "superior or comparable to all plans submitted" as to the new criteria, App. 234, but did not find that the other maps, including the legislative leaders' map, violated those criteria. Moreover, the court afforded the litigants no opportunity to challenge whether the court's new map complied with the court's own criteria, such as by offering the court's expert for deposition. It therefore remains unclear how the court ensured "that all voters have an equal opportunity to translate their votes into representation" and whether the map's political subdivision splits were necessary for population equality.

It also remains unclear how the court made other policy choices. But, as news accounts have noticed, the court's map was plainly drawn to favor the voters of the Democratic Party. The *New York Times* declared that "Democrats couldn't have asked for much more from the new map. It's arguably even better for them than the maps they proposed themselves."[3] Real Clear Politics observed that the court "repeatedly made

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[3] Nate Cohen et al., *The New Pennsylvania Congressional Map, District by District*, THE NEW YORK TIMES: THEUPSHOT (Feb. 19, 2018), https://www.nytimes.com/interactive/2018/02/19/upshot/pennsylvania-new-house-districts-gerrymandering.html.

choices that increased the Democrats' odds of winning districts."[4]

The court ordered that its plan be implemented immediately, and it unilaterally rearranged dates related to the 2018 primary to facilitate implementation. App. 237-38.

VI. The Pennsylvania Supreme Court's decisions were the fulfillment of campaign promises made by some justices before a 2015 judicial election that changed the composition of the court. One of the votes against the 2011 Plan and in favor of the 2018 judicial plan was cast by Justice David Wecht, who attacked the 2011 Plan during his 2015 election campaign. Justice Wecht expressed those views in a forum held by the League of Women Voters, the original lead Challenger in this very case.[5] At that forum, he stated:

> Everybody in this room should be angry about how gerrymandered we are. . . . Understand, sitting here in the city of Pittsburgh, your vote is diluted. Your power is taken away from you.[6]

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[4] Sean Trende, *How Much Will Redrawn Pa. Map Affect the Midterms*, REAL CLEAR POLITICS (Feb. 20, 2018), https://www.realclearpolitics.com/articles/2018/02/20/how_much_will_redrawn_pa_map_affect_the_midterms_136319.html.

[5] The League of Women Voters was dismissed from the case on November 13, 2017, pursuant to an order from the Commonwealth Court.

[6] Eric Holmberg, *Forums Put Spotlight on PA Supreme Court Candidates*, PUBLICSOURCE (Oct. 22, 2015), https:www.publicsource.org/forums-put-spotlight-on-pa-supreme-court-candidates.

On another occasion, he stated:

> There are a million more Democrats in this Commonwealth—I want to let that sink in—a million more Democrats in this Commonwealth, but . . . *there are only 5 Democrats in the Congress, as opposed to 13 Republicans. Think about it.* Do we need a new Supreme Court? I think you know the answer.[7]

He also argued that

> . . . [I]n 2014, I believe, there were at least more than 200,000 votes for Democratic candidates for U.S. Congress than Republicans *and yet we elected 13 Republicans and 5 Democrats*, and there are more than 1,000,000 more Democrats. . . . I'm not trying to be partisan, but I have to answer your question, frankly—. We have more than a million more Democrats in Pennsylvania, we have a state senate and state house that are overwhelmingly Republican. *You cannot explain this without partisan gerrymandering*.[8]

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[7] Spring 2015 Judge Candidate Forum, Neighborhood Networks and MoveOn Philly, https://www.youtube.com/watch?v=713tnbv55mU&feature=youtu.be, at 18:00 (emphasis added).

[8] *Get to Know the Candidates for State Supreme Court*, LANCASTER ONLINE, at http://lancasteronline.com/news/local/get-to-know-the-candidates-for-state-supreme-court/article_65c426d4-6d45-11e5-b74f-6babb36c03bb.html, at 38:15 (emphasis added).

Petitioners moved for Justice Wecht's recusal. In response, Justice Wecht issued an opinion concluding, *inter alia*, that these statements were permissible under Pennsylvania law and the First Amendment as judicial campaign speech.[9]

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle for addressing unanswered questions of national importance that remain in dispute well over a century after they first surfaced. The Court's guidance is needed to address the legal authority for each element of the Pennsylvania Supreme Court's judgment.

I. The Pennsylvania Supreme Court's Judgment Raises Questions Of National Importance Relating To State Courts' Role In Congressional Redistricting That Have Bedeviled Courts For Over 150 Years

The Elections Clause commits power to regulate congressional elections—including by creating congressional voting districts—to "the Legislature" of each state and to "Congress." State courts are delegated none of this authority. To the contrary, the Clause necessarily excludes them.

[9] Petitioners moved for stays in this Court both after the Pennsylvania Supreme Court issued its first judgment and after it ordered a new plan. Both motions were denied.

That principle is plain from the provision's text: the word "Legislature" was "not one 'of uncertain meaning when incorporated into the Constitution.'" *Smiley*, 285 U.S. at 365 (quoting *Hawke v. Smith*, 253 U.S. 221, 227 (1920)). The term "Legislature" necessarily differentiates between that body and the "State" of which it is but a subpart. And by empowering one body of the state to prescribe election rules, the Constitution impliedly denies it to others.

That obvious plain-text conclusion is also evident from several points of context.

One is that the power to regulate federal elections is incident to the Constitution's establishment of a federal government; it is not an inherent state power. *Thornton*, 514 U.S. at 805; *Cook v. Gralike*, 531 U.S. 510, 522 (2001). Thus, it "had to be delegated to, rather than reserved by, the states." *Cook*, 521 U.S. at 522 (quotations omitted). Because the delegation necessarily confines the scope of power, the term "Legislature" is "a limitation upon the state in respect of any attempt to circumscribe the legislative power" over federal elections. *McPherson v. Blacker*, 146 U.S. 1, 25 (1892).

Another is that, in referencing the "Times, Places and Manner" of elections, the Clause plainly references what English Parliamentary law called "methods of proceeding" as to the "time and place of election" to the House of Commons. *See* 1 WILLIAM BLACKSTONE, COMMENTARIES *158-59, *170-174. Those "time and place" "methods," in turn, were completely within

parliamentary control and beyond the reach of "the Common-Law" and "the Judges." GEORGE PETYT, LEX PARLIAMENTARIA 9, 36-37, 70, 74-75, 80 (1690); 1 WILLIAM BLACKSTONE, COMMENTARIES, *146-47. The House of Commons guarded its exclusive jurisdiction over time, place, and process rules. It, for example, declared a *quo warranto* writ from "any Court" that sent burgesses to Parliament based on time, place, and manner adjudications to be "illegal and void," and it further opined that the "Occasioners, Procurers, and Judges in such Quo Warranto's" may be punished by the Commons for jurisdictional usurpation. *See* GEORGE PETYT, *supra*, at 80, 4 CO. INST. 49-50. By delegating the procedures of congressional elections to legislative bodies, the Elections Clause carried forward that English-law tradition of maintaining legislative control, and excluding judicial control, over such matters.

Another contextual reference point comes from the framing debates and early commentaries. Though all concerned parties appreciated that state legislatures may abuse their authority over election rules, none of them even proposed that other branches of state government may exercise a check on such abuse. Instead, they viewed Congress as the exclusive check. *See* THE FEDERALIST NO. 59 (Alexander Hamilton). That check, expressed directly in the Constitution's text, parallels the judicial-type functions Congress performs in other quintessentially legislative affairs, as described in adjacent constitutional provisions. *See* U.S. CONST. art. I, §§ 2-5. It was, furthermore, assumed

that even Congress would exercise its prerogative to override state legislatures' regulations only "from an extreme necessity, or a very urgent exigency." 1 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 820 (3d ed. 1858). This was because the power "will be so desirable a boon" in the "possession" of "the state legislatures" that "the exercise of power" in Congress would (it was thought) be highly unpopular. *Id.* That state courts might deprive state legislatures of this "desirable . . . boon" in their "possession" was beyond anyone's imagination.

Nevertheless, in spite of the Constitution's plain text and history, the reach of state courts' power over congressional redistricting remains sufficiently undefined under this Court's precedent that the Pennsylvania Supreme Court viewed itself as empowered to invalidate a legislatively enacted congressional districting plan and to redistrict the Commonwealth itself—based wholly on state, not federal, law. Neither of these acts squares with the plain language of the Elections Clause, neither was remotely contemplated in the framing debates, and neither enjoys the imprimatur of this Court's precedents.

A. The Court's Intervention Is Necessary To Clarify That State Courts Cannot Create Time, Place, Or Manner Rules

The Pennsylvania Supreme Court usurped a legislative function by subjecting a congressional districting law to judicial review under a state constitutional

individual-rights provision, inferring from that provision a wildly atextual set of policy prescriptions, and enjoining the law on that basis alone. This was error for two independent reasons.

1. Pennsylvania's Free And Equal Elections Clause Is Ineffective Against The 2011 Plan

a. The Pennsylvania Supreme Court erroneously concluded that the Pennsylvania Constitution's Free and Equal Elections Clause is enforceable against a congressional districting plan. Subjecting that legislation to a state constitution's substantive law frustrates the Elections Clause's express delegation to "the Legislature" because an alleged conflict between the state constitution's policy and the state legislature's policy requires the state courts to pick one policy over the other. This sets up a battle between the state courts and its legislature, and the Elections Clause plainly picks "the Legislature" in that dispute.

But enforcing constitutional policy prescriptions necessarily results in the opposite: court-made policy will supersede legislative policy. That is because inferences courts draw from constitutional rules may be remote and tenuous, whereas there is no question that an actual adopted plan reflects the choices of "the Legislature." Accordingly, this Court has never held that state constitutional provisions purporting to set time, place, or manner rules or policy limitations on those

rules can nullify contrary acts of legislatures pursuant to their Elections Clause authority.

b. This question, however, remains unanswered over 150 years after it was first raised. Some courts have concluded that a state constitution may not "impose a restraint upon the power of prescribing the manner of holding [federal] elections." *In re Plurality Elections*, 8 A. 881, 882 (R.I. 1887); *In re Opinions of Justices*, 45 N.H. 595, 601-07 (1864); *Chase v. Miller*, 41 Pa. 403, 409 (1862); *Wood v. State*, 142 So. 747, 755 (Miss. 1932) (concurring opinion). Others have held that state constitutions may bind legislatures "in every essential detail, when, where, and how the elective franchise should be exercised." *In re Opinion of Justices*, 30 Conn. 591, 595 (1862) (emphasis omitted). *See also* Thomas Cooley et al., TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 903 & n.1 (1903) (discussing the split of authority).

That latter position has, since 1932, relied principally on this Court's holding in *Smiley*, 285 U.S. at 367, that legislation pursuant to the Elections Clause is ordinary legislation that "must be in accordance with the method which the state has prescribed for legislative enactments." Some courts have afforded this a broad reading, concluding that the Elections Clause permits legislation to be subject to state constitutions in every respect. *Brown v. Saunders*, 166 S.E. 105, 107 (Va. 1932); *see also Erfer*, 794 A.2d at 331.

But that reading is unsound. As other courts have recognized, "it does not necessarily follow" from *Smiley* "that when functioning in the manner prescribed by the State Constitution, the scope of [the legislature's] enactment on the indicated subjects is also limited by the provisions of the State Constitution." *Commonwealth ex rel. Dummit v. O'Connell*, 181 S.W.2d 691, 694 (Ky. 1944); *see also Parsons v. Ryan*, 60 P.2d 910, 912 (Kan. 1936); *State ex rel. Beeson v. Marsh*, 34 N.W.2d 279, 286-87 (Neb. 1948); *PG Pub. Co. v. Aichele*, 902 F. Supp. 2d 724, 748 (W.D. Pa. 2012).[10] *Smiley* held only that, when a legislature enacts election restrictions, its function is "that of making laws"—not of, say, "consenting . . . to the acquisition of lands by the United States under" Article 1, § 8, cl. 17, or choosing senators under Article 1, § 3 (prior to the Seventh Amendment). 285 U.S. at 365-68. As a result, the legislature must "prescribe" congressional districts through whatever lawmaking process the state constitution provides—such as presentment to the governor or a referendum. "There is," however, "a difference between *how* and *what*." James C. Kirby, Jr., *Limitations on the Power of State Legislatures Over Presidential Elections*, 27 LAW & CONTEMP. PROBS. 495, 503 (1962) (emphasis in original). Under *Smiley*, a state constitution may identify which state bodies have authority to draw

[10] Indeed, this Court expressly recognized that state legislation pursuant to the U.S. Constitution's direct grant of authority takes primacy over state judicial interpretations. *See*, *e.g.*, *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).

congressional districts, but it may not control what those lines will be.

As this Court's more recent *AIRC* decision clarified, the reason for this distinction is that a state constitution is always assumed to identify the state's "Legislature"—i.e., its "prescriptions for lawmaking." 135 S. Ct. at 2668. Identifying a non-traditional body for that function does no violence to the text, which looks to state law for its meaning. Thus, the Court in *AIRC* concluded that Arizona could properly locate its redistricting authority in an independent commission; this holding, like *Smiley*, addressed *how*, not *what*.[11] But it is altogether different, and offensive to the Elections Clause, for a state to identify its lawmaking bodies and processes and then to empower entirely different and non-legislative bodies (e.g., the courts) and processes (e.g., litigation) to override otherwise lawful time, place, and manner rules. In that instance, the state's federal-election rules do not emanate from the organ its own constitution has identified as its "Legislature." This Court has never endorsed that radical departure from the federal Constitution's plain text.

c. The Pennsylvania Supreme Court also ostensibly believed it could review the 2011 Plan under the state's Free and Equal Elections Clause because courts routinely subject election laws, including redistricting

[11] The *AIRC* decision neither approved nor addressed the Arizona Constitution's provisions limiting the redistricting commission's policy choices in redistricting.

plans, to constitutional scrutiny. But there is no analogy between *federal* and *state* constitutional litigation in this arena. This Court's precedent only supports judicial review to the extent it prevents election rules from abridging "fundamental rights" codified in the federal Constitution and statutes, "such as the right to vote" and "the freedom of political association."[12] *Tashjian*, 479 U.S. at 217. For example, this Court's jurisprudence enforcing equal-protection, free-speech, and equal-population principles follows from its judicial duty "to decree the substance" of the federal constitutional "restrictions on the States," *City of Boerne v. Flores*, 521 U.S. 507, 519, 536 (1997), such as those under the Civil War Amendments and Article I, § 2, *see Wesberry v. Sanders*, 376 U.S. 1, 6 (1964).

These holdings make sense only because the Constitution's individual-rights guarantees must be afforded equal dignity with the Elections Clause. Just as principles of state sovereignty under the Tenth and Eleventh Amendments "are necessarily limited by" the Civil War Amendments, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976), *City of Rome v. United States*, 446 U.S. 156, 180 & n.15 (1980), *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991), so too is the delegation to "the Legislature" under the Elections Clause. *See also Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 65-66 (1996) ("the Fourteenth Amendment . . . operated to alter the pre-existing balance between state and federal power

[12] The Court, of course, has also asserted the right to adjudicate whether a law purporting to be a time, place, or manner rule actually qualifies. *See Thornton*, 514 U.S. at 805.

achieved by Article III and the Eleventh Amendment."). But state constitutions do not enjoy that status. They are, instead, subject to federal supremacy and are plainly subordinate to the Elections Clause's prescribed balance of power. Their provisions therefore cannot justify judicial intrusion into time, place, or manner rules.

There is then no basis for Pennsylvania's Free and Equal Elections Clause to nullify the 2011 Plan. In concluding otherwise, the Pennsylvania Supreme Court exacerbated the split of authority on this question. And it marked an especially pronounced split with the Nebraska Supreme Court, which found a similar state constitutional provision mandating that "[a]ll elections shall be free" inapplicable to federal elections because "this provision may not operate to circumscribe the legislative power granted by the Constitution of the United States." *Beeson*, 34 N.W.2d at 286-87. This Court's intervention is necessary to resolve this disputed question.

2. Even If Pennsylvania's Free And Equal Elections Clause Is Effective Against The 2011 Plan, The Elections Clause Cannot Tolerate Blatantly Atextual Court-Made Policy Prescriptions

Even if state lawmakers were subject to state constitutional policy prescriptions when drawing congressional districts, the Pennsylvania Supreme Court's judgment would not survive Elections Clause scrutiny

because it strayed well beyond what the state's constitutional text can support. From a guarantee that elections be "free" and "equal," the court inferred detailed requirements that districts be "compact and contiguous" and "not divide any county, city incorporated town, borough, township or ward, except where necessary to ensure equality of population." It also inferred a statewide proportionality requirement for congressional districts. This is obviously judicial policymaking.

a. The Elections Clause—assuming it tolerates any intrusion by a state's constitution—cannot treat a state's constitution as concurrent with whatever the courts interpret it to mean when those interpretations are wholly unmoored from the constitutional text. That rule would allow a state court to impose any number of policy requirements that have no tie at all to the provisions at issue.

This Court therefore has signaled that state judicial interpretive power has limits under the similarly worded Article II, § 1, cl. 2, governing appointment of presidential electors, warning that, although it normally defers "to a state court's interpretation of a state statute," that deference will not apply where "the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under . . . [the] United States Constitution." *Palm Beach Cty. Canvassing Bd.*, 531 U.S. at 76; *see also Bush v. Gore*, 531 U.S. 98, 112-13 (2000) (Rehnquist, C.J., concurring). Because the Elections Clause "parallels" that provision and both provisions

"reflect the idea that the Constitution treats both the President and Members of Congress as federal officers," *Thornton*, 514 U.S. at 890 n.17, the Court should be equally skeptical of state-court claims to plenary authority over congressional elections.

b. Nevertheless, this question is the subject of differing judicial approaches. Nearly all decisions addressing state-law challenges to congressional districts have applied only explicit textual constitutional language, such as that districts be compact, contiguous, or honor subdivisions lines, *see*, *e.g.*, *Beauprez v. Avalos*, 42 P.3d 642, 651 (Colo. 2002); *Legislature v. Reinecke*, 516 P.2d 6, 10, 13 (Cal. 1973), and many have expressed hostility towards crafting policy beyond what "can be pointed out in the [state's] Constitution," *see Richardson v. McChesney*, 108 S.W. 322, 323-24 (Ky. 1908); *Brown*, 159 Va. at 46 ("it is not the duty of the court to substitute its judgment for that of the legislature").

In sharp contrast, the Colorado Supreme Court in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221, 1234 (Colo. 2003), read a Colorado constitutional clause providing that, "[w]hen a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts," to mean that (1) redistricting may occur only once per decade and (2) a judicial redistricting counts as that single redistricting by "the general assembly." *Id.* at 1237. The court justified these aggressive extra-textual inferences by reading "the word 'legislature' in Article I" to include "any means permitted by state law." And it held that,

because state courts "have the authority to evaluate the constitutionality of redistricting laws," the term "Legislature" in the Elections Clause "encompasses court orders." *Id.* at 1232.

The ruling below tracked the Colorado court's reasoning. Both the Colorado and Pennsylvania courts' approaches effectively read the state courts into the lawmaking process by giving them a veto over redistricting legislation—a prerogative that can be exercised for purely political reasons. There being no legal requirement that Pennsylvania congressional districts be compact or honor political subdivisions, the Pennsylvania Supreme Court's decision was nothing more than a policy choice about what does and does not amount to sound redistricting. But the drafters of the Pennsylvania Constitution made a policy decision to apply compactness, contiguity, and political-subdivision-integrity requirements to legislative districts alone. The Pennsylvania Supreme Court usurped a legislative function by imposing those same requirements on congressional districts.

c. Unless the Court reviews the decision of the Pennsylvania Supreme Court, other challengers and state courts will be emboldened to seek similar state judicial usurpation of districting authority. At least 17 states have "free and equal" constitutional provisions that are similar to Pennsylvania's. Without intervention from the Court, the state legislatures' unquestioned authority to create congressional maps under the Elections Clause will almost certainly be diminished.

Accordingly, in federal-election cases, this Court's role in enforcing the balance of power prescribed in the *federal* Constitution necessarily implies, at a minimum, a role in limiting the scope of judicial interpretations of state law.[13] This means, if nothing else, ensuring that a state court's interpretation has some reasonable connection with the constitutional text and that the legislature could "fairly be deemed to have been apprised" of the "existence" of the rules the state court imposes. *NAACP v. State of Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958); *Bouie v. City of Columbia*, 378 U.S. 347, 361-62 (1964). But the Pennsylvania Supreme Court's criteria have no reasonable connection to the text, and the Pennsylvania General Assembly could not have been apprised of them in 2011. The Court should grant this petition to enforce that principle or to circumvent the problem entirely by holding state constitutional policy rules inapplicable to federal elections.

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[13] Notably, the 2011 Plan was concurrently challenged in federal court based solely on a theory that it violated the Elections Clause. *Agre v. Wolf*, 2018 U.S. Dist. LEXIS 4316 (E.D. Pa. Jan. 10, 2018). A majority rejected the challenge, and Third Circuit Chief Judge Smith opined that the Elections Clause delegated districting policy decisions exclusively to the state legislatures and he rejected the claim precisely because the plaintiffs asked the court to usurp that policymaking authority. *Id*. at *10-11.

B. This Court's Intervention Is Necessary To Address The Scope Of State Courts' Authority To Enact Congressional Districts

The Pennsylvania Supreme Court also unlawfully usurped the General Assembly's federally prescribed role by redistricting Pennsylvania itself. It did so notwithstanding that the Pennsylvania General Assembly fulfilled its duty to redistrict in compliance with its federal obligations, and the General Assembly complied with the "method which the state has prescribed for legislative enactments" by presenting its legislation to the governor for approval. *Smiley*, 285 U.S. at 367. Thus, the state's lawmaking bodies spoke, but a state body with *no* lawmaking power overrode their legislation, and the plan currently governing the state was not enacted by lawmaking power or through any lawmaking process.

This Court's precedent addressing courts' remedial redistricting authority does not support this state of affairs. Nor could it: the Court appears never to have even considered a case where both court-drawn and legislature-enacted plans claimed to be the lawful plan governing a jurisdiction. That alone is reason enough to grant this petition.

1. The Pennsylvania Supreme Court's entry of a court-drawn plan facially violates the Elections Clause because the plan was not enacted by "the Legislature" of Pennsylvania. In fact, the Pennsylvania Constitution expressly rejects any possible analogy to either

the General Assembly or the redistricting commission *AIRC* approved by making it unmistakably clear that Pennsylvania courts exercise only "judicial" duties. PA. CONST., § 17(d).

The Pennsylvania Supreme Court therefore erroneously inserted itself into Pennsylvania's lawmaking apparatus and, in doing so, claimed a right even beyond the veto right it claimed in striking down the 2011 Plan; the right it claimed in redistricting the state was nothing less than the right to create time, place, and manner rules completely outside the state's "prescriptions for lawmaking." *AIRC*, 135 S. Ct. at 2668. The court's plan was subject neither to approval by the General Assembly nor presentment to the Governor, but was instead imposed by a body with only "judicial" power. Nothing could be further removed from the U.S. Constitution's plain text.

2. The court presumably divined the power for its actions in its remedial authority. But that authority is grounded solely in state law, which is subject to federal supremacy. This claim to state-law-created authority conflicts with the Elections Clause's mandate that congressional district lines be drawn by "the Legislature," so this state-law-based authority must yield to federal law.

This Court's precedent does not suggest otherwise. The most deferential statement of state-court authority over redistricting is found in *Growe v. Emison*, 507 U.S. 25, 33 (1993), in which this Court held that, where a legislature reaches impasse and fails to redistrict at

the beginning of a decade, state courts have priority over federal courts in remedying the resulting one-person, one-vote violation. This case, which established a doctrine akin to *Colorado River* abstention, *see* 507 U.S. at 32, gives state courts priority over federal courts in remedying violations of federal law. But that does not support the Pennsylvania Supreme Court's judgment; it is, to the contrary, two steps removed.

First, as a federal three-judge panel recognized in *Smith v. Clark*, 189 F. Supp. 2d 548, 555 (S.D. Miss. 2002), *Growe* did not address the Elections Clause, and this omission may have been because the Minnesota court at issue was a unique "Special Redistricting Panel" possessing a statutory delegation of redistricting authority from the state's legislature. *See id.* (citing *Cotlow v. Growe*, 622 N.W.2d 561, 562 (Minn. 2001) and Minn. Stat. §§ 2.724 and 480.16). This share of legislative power, the three-judge panel in *Smith* held, rendered *Growe*'s holding inapplicable to the Mississippi Chancery Courts, which, like the Pennsylvania Courts, enjoy no legislatively delegated authority. *See also Mauldin v. Branch*, 866 So.2d 429, 433-34 (Miss. 2003) (adopting this view). The *Smith* court concluded that such courts have no remedial authority—even to remedy violations of federal law—and it therefore enjoined a state-court-drawn map as a violation of the Elections Clause.

In the subsequent appeal in *Smith*, this Court expressly left that question unresolved because a narrower ground—that the state-court-drawn plan was not precleared under Voting Rights Act § 5—supported

the district court's injunction. *Branch v. Smith*, 123 S. Ct. 1429, 1437 (2003). It therefore remains an open question whether *Growe*'s reach to congressional districts is limited to the unique nature of Minnesota redistricting courts.[14] The Pennsylvania Supreme Court's judgment splits with the *Smith* three-judge panel, and this case presents that open question yet again, illustrating that it is due to be answered.

Second, even if all state courts have the authority *Growe* described in legislative impasse cases, that case addressed the "concurrent jurisdiction" of state and federal courts "over the same subject matter." 507 U.S. at 32. That "concurrent jurisdiction" plainly references state courts' concurrent jurisdiction with federal courts to enjoin violations of *federal* law, *see Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), since the "subject matter" of *Growe* was concededly a one-person, one-vote violation, 507 U.S. at 27-28. State courts may exercise this authority because they are "subject also to the laws of the United States," and the authority is therefore derivative of federal law. *See Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 137 (1876).

However, the power to remedy federal-law violations with remedial time, place, or manner rules does not imply the power to establish such rules for state-law violations. As described *supra* § I.A.1, courts' power to adjudicate federal-law violations is

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[14] *Growe* involved both legislative and congressional plans, but the case it relied on, *Scott v. Germano*, 381 U.S. 407 (1965) (per curiam), involved only legislative plans.

a qualification to the Elections Clause justified to vindicate federal rights. State law, by contrast, is plainly subordinate. Nor may state courts claim inherent authority under their own constitutions for this endeavor because the power to redistrict is not "inherent" and finds its source solely in the Elections Clause. *Thornton*, 514 U.S. at 805.

3. Even if state courts possess remedial authority, the Court has never addressed its scope. It has, however, severely curtailed the remedial authority of federal courts. Federal courts, it has held, must implement redistricting plans that "most clearly approximate[] the reapportionment plan of the state legislature," *White v. Weiser*, 412 U.S. 783, 796 (1973), leaving courts no power to create policy, *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982). This doctrine honors the Constitution's delegation of power over time, place, and manner rules to "the Legislature" by ensuring that courts' involvement is narrowly tailored to remedying violations of federal law. And it expressly disclaims any federal-court authority to establish time, place, or manner rules.

This implied federal constitutional basis for such a rule necessitates that state courts be equally bound. At a minimum, the question remains open and calls for this Court's review.

II. This Case Presents An Ideal Vehicle To Resolve These Questions Individually And Cumulatively

This case presents an appropriate vehicle for addressing state courts' roles in both creating policy and remedying supposed violations of that policy. And it is an ideal vehicle because it presents the profound cumulative impact of these asserted state-court roles.

A. This case squarely presents all the issues described above. The Pennsylvania Supreme Court's judgment depends solely on the state's constitution. The court possesses no legislative power and cannot be analogized to the commission this Court addressed in *AIRC*. And it took the single most aggressive state-court interpretation of an election regulation in history by inferring from a guarantee that elections be "free" and "equal" detailed requirements that districts be "compact and contiguous" and "not divide any" political subdivision "except where necessary to ensure equality of population." Thus, this case directly concerns all questions related to the scope of state courts' interpretive power over federal elections.

Likewise, the Pennsylvania Supreme Court's imposition of its own redistricting plan raises all outstanding questions regarding state courts' remedial authority described above. *See* § I.B. The redistricting was not the result of a legislative impasse, it did not purport to remedy any federal-law violations, and the Pennsylvania Supreme Court did not purport to follow express state constitutional or statutory law or

legislative policy. Thus, unlike all other cases in which this Court has addressed state courts' remedial powers, this case presents a direct conflict between a redistricting plan passed by "the Legislature" and one passed by a court.

These questions are overdue for resolution. As described above, many of them are subject to differing judicial approaches, if not outright conflict. And the election of representatives and senators is the cornerstone of republican government, which presumably is why this Court routinely reviews decisions involving federal-election issues, even without a split among the lower courts. *See*, *e.g.*, *Thornton*, 514 U.S. 779; *Cook*, 531 U.S. at 510; *Foster v. Love*, 522 U.S. 67 (1997). The particular importance of *redistricting* controversies, moreover, is plain from Congress's choice to subject federal-court resolution of constitutional redistricting issues to direct appeal to this Court. 28 U.S.C. §§ 1253, 2284. This reflects both the national importance of such controversies and Congress's desire that uniform rules govern. *See Perez v. Ledesma*, 401 U.S. 82, 128 n.18 (1971); S. Rep. No. 94-204, at 9 (1975), reprinted in 1976 U.S.C.C.A.N. 1988, 1996.

Yet, in this area, the rules are not uniform and, increasingly, lack constitutional reasoning. The predominant judicial approach has been simply to presume with no analysis that legislative acts are invalid when deemed in conflict with state constitutional policy. *See*, *e.g.*, *League of Women Voters of Fla. v. Detzner*, 179 So.3d 258, 263 (Fla. 2015); *Beauprez v. Avalos*, 42 P.3d 642, 651 (Colo. 2002); *Legislature v. Reinecke*, 516 P.2d

6, 10, 13 (Cal. 1973). This evolution of the law has "come about more as a historical accident than through the careful application of [constitutional] principles." *Knox v. Serv. Employees Int'l Union, Local 1000*, 567 U.S. 298, 312 (2012). And it has come about largely through decisions of state courts, the very institutions that stand most to gain in terms of raw political power from a non-textual reading of the Elections Clause.

Indeed, three Justices of this Court dissented from denial of certiorari from the Colorado Supreme Court's *Salazar* decision (discussed at § I.A.2, *supra*), opining 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., Thomas, Scalia, JJ., dissenting from the denial of certiorari). The courts are no closer to identifying that "limit" today than they were in 2004, and, unless this Court intervenes, state courts will have no incentive to identify such a limit on their own power. The orders of the Pennsylvania Supreme Court illustrate as much.

B. The Court should also intervene to address the harm flowing from the cumulative impact of the Pennsylvania Supreme Court's liability and remedial orders: the Pennsylvania Supreme Court seized complete control over the Commonwealth's redistricting by exploiting the uncertainty over both its interpretive and remedial functions.

That was possible because it could, in its view, enforce a broadly worded state constitutional provision

and interpret it to require virtually any policy prescription it desired. The court then combined that power with an equally potent power to implement its own plan simply by declaring it compliant with state law, as newly created. It then afforded an impossibly short time for a legislative remedy and withheld guidance on the new state-law requirements it invented until two days before a new legislative plan was due, virtually ensuring a court-drawn map. The court's decision also mandated that the legislative plan be passed only with approval from the Governor, thereby eliminating the General Assembly's constitutionally afforded power to override the Governor's veto.

What is worse, the Pennsylvania Supreme Court's decision afforded no opportunity for the litigants to assess whether the judicial plan complies with the principles the court announced. That plan is simply the law by the court's *ipse dixit*, and, as a practical matter, *only* the Pennsylvania Supreme Court could have drawn the plan because it alone could declare it to be legally sufficient in light of changing doctrines known only to itself.

The cumulative impact of this, niceties aside, is that the state judiciary may simply redistrict when it chooses. And when it does, it may exclude all other state actors. The legislature can do exactly nothing to stop this. By the Pennsylvania Supreme Court's logic—and with no additional chutzpah—a state court could interpret an equal-protection guarantee to require that the state legislature redistrict within 10 minutes of the release of census data before deeming itself

authorized to redistrict; it could identify the proper redistricting authority as a political scientist in Switzerland (or Stanford); or it could simply declare that it will undertake all future redistricting. There is, in short, no limiting principle to the effect of the court's combined liability and remedial rulings.

But if the term "Legislature" means anything, there must be a limiting principle *somewhere*. Whether that limit applies to the state courts' liability determinations or their remedial powers—or, more likely, both—their authority must be circumscribed in some way by federal law. And wherever that limit lies, this case implicates it. For that reason, it is the ideal vehicle to resolve the scope of state courts' power when it conflicts with the will of "the Legislature" under the Elections Clause.

III. This Case Is A Vivid Illustration Of Why The Constitution Delegates Redistricting Authority To Legislatures, Not Courts

In addition to the reasons stated above, this case is an optimal vehicle to resolve issues under the Elections Clause because it squarely presents the policy problems that Clause seeks to curtail by delegating power over time, place, and manner rules to legislative bodies alone.

Though litigants like the Challengers have long complained of politics in congressional redistricting, two centuries' worth of practical experience demonstrate that districting is "root-and-branch a matter of

politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (plurality op.). That is because redistricting choices—such as what shape districts should assume or what communities of interest they should preserve or split—present fundamentally political, not legal, questions. *See*, *e.g.*, *Holder v. Hall*, 512 U.S. 874, 884 (1994) (rejecting legal challenge to the size of an elective body because the question is "inherently standardless") (quotations omitted); *see also id.* at 897 (Thomas, J., concurring in the judgment). This Court has therefore found it appropriate "to assume that those who redistrict and reapportion work with political and census data" and that, "[w]ithin the limits of the population equality standards of the Equal Protection Clause," they work "to achieve the political or other ends of the State." *Gaffney v. Cummings*, 412 U.S. 735, 754 (1973).

But what happens when judges redistrict? There being no objective legal principles to recommend one district over another, they too engage in political decision-making. And, unsurprisingly, they too "work with political . . . data" to achieve their own "political" ends in what is "root-and-branch a matter of politics." *Vieth*, 541 U.S. at 285. The trade, then, is one political actor for another, nothing more.

That is exactly what happened here. Faced with remedying what it perceived to be a Republican Party-friendly "gerrymander," the Pennsylvania Supreme Court, with a Democratic Party majority, drew a Democratic Party-friendly gerrymander. That is evidenced by not only the plan itself but also the black box the

court composed to shield it from public input or scrutiny.

Moreover, when judges engage in redistricting, they too begin to behave like politicians, and that means making political promises—and keeping them. This case is an exceptionally colorful illustration: the vote of Pennsylvania Supreme Court Justice Wecht was in keeping with his campaign promise to Pennsylvania Democratic Party voters that, if they elected "a new Supreme Court," they would end the situation of "only 5 Democrats in the Congress" from Pennsylvania "as opposed to 13 Republicans." These and other statements by Justice Wecht, then a Democratic Party candidate for judicial office, committed him to a position, not only on gerrymandering generally, but on the *specific* plan challenged here. And some of those promises were made to the original lead Challenger in this case. Moreover, according to Justice Wecht, Pennsylvania ethics law and the federal Constitution permitted his statements, so, in his own words, he would do the exact same thing again. No doubt, others will as well.

That should concern anyone, and when it is at the expense of a federally mandated balance of power, it should concern this Court.

CONCLUSION

The Court should grant the petition and reverse the judgment below.

Respectfully submitted,

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