No. 17-1339

In The Supreme Court of the United States

LOUIS AGRE, ET AL.,
Appellants,

v.

THOMAS W. WOLF,
GOVERNOR OF PENNSYLVANIA, ET AL.,
Appellees.

On Appeal from the United States District Court
for the Eastern District of Pennsylvania

MOTION TO AFFIRM

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QUESTIONS PRESENTED

Appellants filed this case to challenge Pennsylvania's Congressional voting districts—enacted in 2011 (the "2011 Plan")—under the Constitution's Elections Clause. Soon after they filed this appeal from an adverse final judgment of the three-judge panel below, the Pennsylvania Supreme Court enjoined the 2011 Plan in a separate case. Appellants maintain that this appeal seeks judicial relief unrelated to the 2011 Plan in the form of a court order requiring the Pennsylvania General Assembly to enact a new redistricting "process" into law. They do not, however, challenge any particular redistricting plan. Indeed, Appellants have made it clear they are *not* challenging the current map imposed by the Pennsylvania Supreme Court, nor could they: they no longer reside in voting districts they contend are unlawful.

The questions presented are:

1. Whether the Court has jurisdiction over this appeal.

2. Whether the Elections Clause, which delegates authority over congressional elections processes to state legislatures, either requires a court-imposed redistricting process or bars or limits the exercise of political discretion in redistricting.

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INTRODUCTION

It is hard to imagine a more jurisdictionally defective appeal than this one. In October 2017, Appellants filed this case challenging Pennsylvania's 2011 Congressional districting plan (the "2011 Plan") under the Constitution's "Elections Clause," Article I, Section 4. Although Appellants lost below, the Pennsylvania Supreme Court has since invalidated the 2011 Plan in connection with a separate case brought by different plaintiffs advancing claims under the Pennsylvania Constitution. In February 2018, the Pennsylvania Supreme Court imposed a new congressional plan to govern future elections, including the 2018 elections. Appellants have no objection to that court-ordered plan, they do not challenge it here, and the validity of the 2011 Plan is therefore a moot question. That should have set this case to rest.

However, Appellants have filed this appeal in an effort to impose in the future "a neutral process" for redistricting "in the 2020 elections and beyond." Jurisdictional Statement ("JS") 4–5. But any dispute over what Pennsylvania's General Assembly *might* do in 2020 and thereafter is not ripe, and a legal opinion concerning how the General Assembly may comply with the law in the future would be advisory. Moreover, without an alleged ongoing legal violation to enjoin, the Court's assumption of jurisdiction would violate Pennsylvania's Eleventh Amendment-guaranteed sovereign immunity. What's more, because Appellants cannot identify a personal harm now that the 2011 Plan has been enjoined, this appeal presses only "a generally available grievance about government," leaving Appellants without Arti-

cle III standing. *Lance v. Coffman*, 549 U.S. 437, 439 (2007).

Undeterred, Appellants propose a solution to all those defects by requesting "additional or supplemental" relief beyond that imposed by the Pennsylvania Supreme Court in the form of a judicial mandate that the Pennsylvania General Assembly now be forced to "develop a process for developing maps…." JS 30, 33. But this Court lacks power to take this entirely unprecedented step. Congress cannot require a state legislature to pass legislation, *New York v. United States*, 505 U.S. 144, 178 (1992), and therefore a federal court cannot order a state legislature to "remedy" a supposed violation of a congressional enactment (here, 42 U.S.C. § 1983), *Atchison, T & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U.S. 667, 682 (1884). In addition, this relief is unavailable because it offends legislative immunity, basic principles of equity, and the Federal Rules of Civil Procedure. The illusory possibility of obtaining "additional or supplemental relief," JS 30, that is patently beyond the Court's powers does not un-moot an otherwise moot appeal like this one. Appellants' demand for a new redistricting "process" also triggers a separate standing defect because the General Assembly can neither bind *future* General Assemblies to that process with legislation nor amend that process into Pennsylvania's Constitution. Instead, enacting a new process requires a vote of Pennsylvania's electorate, so Article III's redressability prong cannot be satisfied.

A single jurisdictional defect compels dismissal. Thus, the approximately eight defects (depending on how one counts) presented here are simply unsur-

mountable. Therefore, the Court should dismiss this appeal.

Appellants' merits arguments are equally untenable. Appellants proudly tout the novelty of their arguments, proclaiming that this appeal presents "the first legal challenge" to a redistricting plan "as a violation of the Elections Clause." JS 2. But their challenge is not colorable. The Elections Clause is a positive grant of authority to *political* branches of government, and "unsurprisingly that turns out to be root-and-branch a matter of politics." *Vieth v. Jubelirer*, 541 U.S. 267, 285 (2004) (citing Art. I, § 4). The Elections Clause affords no basis for a court-ordered "process." On the contrary, it expressly grants power to set process to *legislatures*, not courts, and virtually any redistricting plan fits within this grant as a time, place, or manner voting regulation because, on its face, it merely classifies precincts and census blocks into voting districts. So, even if a redistricting plan was being challenged before this Court (and one is not) and even if it were shown to be the product of partisan motive, that plan would not be analogous to the *qualifications* to office appearing on the *face* of the state-law provisions invalidated in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832–36 (1995), and *Cook v. Gralike*, 531 U.S. 510, 523 (2001). Thus, those cases offer no support to Appellants' Elections Clause theory.

Rather, all Appellants do is repackage the same intent arguments based on racial-gerrymandering precedent that five Justices of this Court in *Vieth* expressly rejected as "both dubious and severely unmanageable." 541 U.S. at 286; *id.* at 307 (Kennedy, J., concurring) (agreeing). Then, Appellants slap

the label "Elections Clause" on those arguments. And, with that, they boast at having solved the partisan-gerrymandering riddle that has for decades stumped federal courts. But the justiciability puzzle *Vieth* described is not so effortlessly cracked, and the Court's rejection of the very standard again offered here should not be so flippantly ignored. Consequently, the label "Elections Clause" does not somehow render a "dubious and severely unmanageable standard" now suitable for federal-court cases. Were all that not enough, the Elections Clause claim fails for the independent reasons that it is not enforceable under 42 U.S.C § 1983 and does not create a cognizable right under the Privileges and Immunities Clause.

In short, this appeal offers nothing worth this Court's time or attention. The Court should dismiss it or, alternatively, affirm the judgment below.

Background

In 2011, the Pennsylvania General Assembly enacted, by a bi-partisan vote, a congressional districting plan setting the lines of 18 Pennsylvania House of Representatives districts. The 2011 Plan remained in effect, unchallenged, until 2017.

Appellants are Pennsylvania residents, including voters from all congressional districts in the 2011 Plan. App. 6. On October 2, 2017, a subset of them (most were added later) filed a complaint in the United States District Court for the Eastern District of Pennsylvania, naming the Pennsylvania Governor and other executive officers as defendants. Appellants professed to have found "a direct violation of

the 'Elections Clause,'" U.S. Const. Article I, Section 4, cl. 1, stemming from the Pennsylvania General Assembly's alleged prioritization of partisan ends over "neutral districting criteria" in drawing the 2011 Plan. App. 2. Appellants cited 42 U.S.C. § 1983 as the vehicle for their cause of action. *Id.*

Pursuant to 28 U.S.C. § 2284(a), a three-judge panel (Third Circuit Chief Judge D. Brooks Smith, Third Circuit Judge Patty Schwartz, and District Judge Michael Baylson) was convened. The Speaker of Pennsylvania's House of Representatives, Michael C. Turzai, and Senate President Pro Tempore, Joseph B. Scarnati III, intervened as defendants in their official capacities on behalf of their respective legislative chambers. *See Karcher v. May*, 484 U.S. 72, 77–78 (1987). The case was expedited and proceeded to trial from December 4 through 8, 2017.[1]

On January 10, 2018, the court entered final judgment against Appellants in a 2-1 decision. Each judge wrote separately. Judge Smith rejected Appellants' Elections Clause claim because (1) the "check on state power within the text of the Elections Clause" resides in Congress, not the federal courts, (2) "[c]ourts cannot mandate new process for creating election regulations," and (3) the "Elections Clause claim is an unjustifiable attempt to skirt existing Supreme Court precedent" on partisan gerrymandering. App. 4. Accordingly, he viewed the case as presenting a non-justiciable question and amenable to dismissal on summary judgment. App. 7.

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[1] While Appellants recount what they believe the evidence at trial showed, JS 7–8, their evidence was contested, and there is no two-judge majority on any point of fact.

Judge Shwartz concluded that Appellants lacked standing to make a statewide challenge to the 2011 Plan, the sole basis of Appellants' theory. App. 108–116. Additionally, she found that Appellants failed to "present a judicially manageable standard" for adjudicating the claim. App. 119–128. She recounted the litigation history, observing that Appellants initially condemned "any consideration of partisanship" seeking a "none means none" standard, but, on receiving notice from the panel that this view "was likely inconsistent with both the Elections Clause and" binding precedent, offered additional flawed and contradictory standards that proved no more manageable; and, besides, they failed to satisfy their own standards. App. 119–128.

Judge Baylson, in dissent, favored the adoption of a visual approach. He would have found that districts six, seven, ten, eleven, and fifteen violate the Elections Clause because "visualization of the 2011 map…allows for me to draw conclusions regarding improper redistricting." App. 299; *see also* App. 307–328 (conducting visual examination of districts). Finding those visual defects absent in the remaining districts, Judge Baylson would have upheld them.

On January 18, 2018, Appellants filed a notice of appeal.

Four days later, on January 22, the Pennsylvania Supreme Court issued its order invalidating the 2011 Plan under the Pennsylvania Constitution in *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, 175 A.3d 282 (Pa. 2018) (the "*League of Women Voters*" case). It enjoined the use of the

2011 Plan in further elections.[2] Subsequently, on February 19, 2018, the Pennsylvania Supreme Court issued an order adopting a remedial plan.[3] By its order, that plan will govern future elections beginning with the May 2018 primaries.[4]

REASONS FOR GRANTING THE MOTION

The Court has no jurisdiction over this case because it challenges a redistricting plan that has been enjoined and now replaced for future elections by order of the Pennsylvania Supreme Court. Appellants only raise issues that are moot (because they concern an invalidated plan), that are unripe (because they speculate as to future events), or that this Court cannot remedy (because they propose remedies beyond the Court's power). This appeal, then, should be dismissed.

Appellants' position on the merits fares no better. The Elections Clause is a positive grant of legislative power to each state legislature, and the grant both assumes they will exercise political discretion and deprives the courts of power to second-guess exercis-

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[2] The Court excepted the March 13, 2018, special election in House District 18 from that order, requiring that the 18th District remain as drawn under the 2011 Plan for that special election.

[3] In this Order, the Court made clear that should there be any additional vacancies prior to the General Election of 2018, any special elections to fill those vacancies would be to fill the remainder of the unexpired terms from districts formerly prescribed under the 2011 Plan.

[4] A petition for certiorari in the *League of Women Voters* case is likely forthcoming. On April 16, 2018, this Court granted an extension of time to file the petition until June 21, 2018.

es of that discretion. For that reason, the Court's review is restricted to assessing whether legislation prescribes the time, place, or manner of elections, and any redistricting plan plainly does. Appellants' invitation to delve into legislators' alleged hidden motive replaces that inquiry into the *scope* of legislative power with an inquiry into the *wisdom* of legislative decision-making—a quintessential political question. This theory flips the Elections Clause's delegation to "the Legislature" on its head. If accepted, it would embroil the judiciary in every congressional redistricting effort.

Appellants' position also overlooks numerous other bars to relief, including that their claim is no more justiciable than any other partisan-gerrymandering claim and that the Elections Clause creates no rights enforceable under Section 1983. For these reasons, even if the Court somehow reached the merits, it should summarily affirm the judgment below.

I. This Appeal Is Jurisdictionally Barred Many Times Over

This appeal violates numerous jurisdictional bars to relief.

First, the case is moot. It challenged the 2011 Plan, which is no longer in effect. A case is moot when the controversy "cease[s] to be 'definite and concrete' and no longer 'touch(es) the legal relations of parties having adverse legal interests.'" *DeFunis v. Odegaard*, 416 U.S. 312, 317 (1974) (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937)). That occurs where the challenged law ceases to be operative, *id.* at 318, such as where it is re-

pealed, *Kremens v. Bartley*, 431 U.S. 119, 128–29 (1977), or invalidated by a state court, *Moore v. Louisiana Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). Because the Pennsylvania Supreme Court invalidated the 2011 Plan, imposed a new plan, and identified specific criteria 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.

Second, the Court lacks jurisdiction to enjoin the General Assembly and Pennsylvania Governor from passing "another gerrymandered map in 2020," JS 31, because that purported controversy is not ripe. The 2020 Census will present significant factual differences from the 2010 Census, and it remains to be seen how the General Assembly will handle them. "[T]he attempt to anticipate" what a defendant will do in the future "takes us into the area of speculation and conjecture." *Rizzo v. Goode*, 423 U.S. 362, 372 (1976) (quoting *O'Shea v. Littleton*, 414 U.S. 488, 496–97 (1974)) (internal quotation marks omitted). Accordingly, the simple fact that a defendant took an action in the past does not allow a case to proceed on the assumption that he will take similar action again. *See id.*; *Local No. 8-6, Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. Missouri*, 361 U.S. 363, 370 (1960) ("Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of

Congress.").[5] The circuit courts therefore unanimously hold the possibility that repealed legislation may be reenacted to be an insufficient basis for jurisdiction. *See, e.g.*, *Nat'l Black Police Ass'n v. Dist. of Columbia*, 108 F.3d 346, 349 (D.C. Cir. 1997); *Jones v. Temmer*, 57 F.3d 921, 923 (10th Cir. 1995); *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1510 (9th Cir. 1994); *cf. Local No. 8-6*, 361 U.S. at 371 (rejecting challenge to injunction that expired by its own terms, notwithstanding possibility that a similar one may issue in ongoing litigation).[6]

Third, in demanding court action "that will keep the General Assembly…within the scope of its authority under the Elections Clause," JS 32, Appellants seek an advisory opinion, *see Flast v. Cohen*, 392 U.S. 83, 96 n.14 (1968); *Muskrat v. United States*, 219 U.S. 346, 362 (1911). An advisory opinion consists of "advance expressions of legal judgment upon issues which remain unfocused…." *United States v. Fruehauf*, 365 U.S. 146, 157 (1961). An

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[5] The possibility of success on a certiorari appeal to this Court in the *League of Women Voters* case, *see* JS 35–36, does not change the analysis because "it is not for us now to anticipate its outcome." *Local No. 8-6*, 361 U.S. at 370 ("We cannot agree that the pendency of that litigation gives life to the present appeal.").

[6] Appellants' "voluntary cessation" cases, JS 31–32, hold that a case may not become moot where the challenged conduct ends *voluntarily* and "resumption of the challenged conduct" may begin "as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012); *see also Vitek v. Jones*, 445 U.S. 480, 487 (1980). That doctrine does not apply here. The 2011 Plan was not abandoned voluntarily, and the Pennsylvania Supreme Court's judgment prevents it from being reinstated "as soon as the case is dismissed."

opinion outlining a "process" to "keep the General Assembly" in the future "within the scope of its" purported "authority under the Elections Clause" is plainly an "advance expression of legal judgment" on "unfocused" issues. *See, e.g.*, *Hillblom v. United States*, 896 F.2d 426, 431 (9th Cir. 1990) (finding proposed "declaration outlining the permissible scope of future Congressional actions" to be an impermissible advisory opinion); *Associated Gen. Contractors of Am. v. City of Columbus*, 172 F.3d 411, 421 (6th Cir. 1999) (finding order enjoining city from enacting future preference legislation—and retaining jurisdiction to review such legislation—to be "an advisory opinion as to the constitutionality of future legislative action").

Moreover, an order of this nature would be "too vague to be understood," *Int'l Longshoremen's Ass'n, Local 1291 v. Phila. Marine Trade Ass'n*, 389 U.S. 64, 76 (1967), amounting to a command simply "to 'obey the law'" (as Appellants see it); it therefore could not "describe in reasonable detail…the act or acts restrained or required" as required by Federal Rule of Civil Procedure 65(d). *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999) (finding a proposed order that a city not discriminate in future annexation decisions incompatible with the Rule's specificity requirement); *Payne v. Travenol Labs., Inc.*, 565 F.2d 895, 898 (5th Cir. 1978) (finding an order forbidding discrimination in employment practices incompatible with the Rule's specificity requirement).

Fourth, for a similar reason, sovereign immunity bars this appeal. To qualify for the *Ex Parte Young* exception to sovereign immunity, a plaintiff must at

least allege a "continuing violation of federal law." *Green v. Mansour*, 474 U.S. 64, 68 (1985). In their Complaint (at ¶ 1), Appellants alleged that the Pennsylvania executive branch was "continuing to implement the 2011 Plan"—a valid continuing state action to satisfy *Ex Parte Young*. But, with the 2011 Plan now out of the picture, Appellants complain only about *past* state action under the 2011 Plan that is now enjoined and speculate about *future* action that *might* occur after the 2020 census; they identify no state action occurring *today*. "But compensatory or deterrence interests are insufficient to overcome the dictates of the Eleventh Amendment." *Green*, 474 U.S. at 68; *see also id.* at 71 (rejecting "notice relief" because it "is not the type of remedy designed to prevent ongoing violations of law").

Fifth, the Court has no authority to grant the remaining relief Appellants request because it cannot order the Pennsylvania General Assembly to enact any legislation. In particular, it may not "order the executive and legislative defendants—Governor Wolf, Senate President Scarnati and Speaker Turzai—to develop a process for developing maps…." JS 33. For one thing, that would turn Section 1983 into an invalid commandeering statute:

> [N]o Member of the Court has ever suggested that…a federal interest would enable Congress to command a state government to enact state regulation. No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate. The Constitution instead gives Congress the au-

> thority to regulate matters directly and to preempt contrary state regulation. Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents.

New York, 505 U.S. at 178; *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577–78 (2012); *Printz v. United States*, 521 U.S. 898, 925 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."); *Coyle v. Smith*, 221 U.S. 559, 565 (1911). And because this Courts' power is limited to ordering "performance of an *existing* legal obligation," *Atchison*, 110 U.S. at 682; *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004) (discussing "traditional practice" of "judicial review"), they also have no power to require a state legislature to enact laws—a *non*-existent obligation. The circuits that have addressed this issue agree that mandating state legislative action is beyond federal judicial power. *E.E.O.C. v. Kentucky Ret. Sys.*, 16 F. App'x 443, 453 (6th Cir. 2001); *Georgia State Conference of NAACP Branches v. Cox*, 183 F.3d 1259, 1264 (11th Cir. 1999).[7]

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[7] *See also Tobin v. Rell*, No. 3:05CV1079 TPS, 2006 WL 3703869, at *3 (D. Conn. Dec. 13, 2006) ("The court could not order the Connecticut legislature to enact any statutes or compel the Department of Corrections to adopt certain policies and procedures."); *Smith v. Justice Highwall Mining*, No. Civ. A. 1:09-0984, 2012 WL 1867170, at *2 n.4 (S.D.W. Va. Apr. 18, 2012) ("Furthermore, this Court does not have authority to order a State to enact a law prohibiting certain conduct.").

Indeed, Congress has not so much as *attempted* to authorize this form of relief. Section 1983 simply confers "authority to grant equitable relief," which incorporates "'existing standards'" of equity. *Rizzo*, 423 U.S. at 378 (quoting *Giles v. Harris*, 189 U.S. 475, 486 (1903) (Holmes, J.)). Accordingly, the Court in *Rizzo* rejected a "novel claim" to "mandatory equitable relief" in the form of "prophylactic procedures for a state agency" to prevent police misconduct—based on an alleged "'right' to be protected from unconstitutional exercises of police power." 423 U.S. at 377–81. The Court repudiated this proposal for "continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings," and, in doing so, it emphasized a state's "latitude in the dispatch of its own internal affairs." *Id.* at 378–80 (internal quotation marks omitted). It would be hard to conceive of a more invasive interference with "the dispatch of" a state's "own internal affairs" than a federal-court order requiring a state legislature to pass a law.[8]

There is, moreover, no need to improvise new rules for redistricting relief because well-settled precedent provides clarity on how equitable principles apply in this context—and that precedent excludes Appellants' admittedly novel approach. The Court has forbidden far less intrusive judicial acts than the type demanded here. *See New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008); *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971)

[8] In fact, it violates equity to order state legislators to vote for legislation, even if the body they comprise previously *agreed* to enact it in a binding consent decree. *See Spallone v. United States*, 493 U.S. 265, 279–80 (1990).

(finding abuse of discretion in lower court's "broadly brushing aside state apportionment policy" in a court-imposed map). Under its precedent, lower courts must *allow* the state legislature the first opportunity to remedy a defective districting plan, and, aside from that remedial mandate, the legislature's "freedom of choice" must "not be restricted." *Burns v. Richardson*, 384 U.S. 73, 85 (1966). Only when the state fails to adopt a remedial measure after being afforded a reasonable opportunity may the courts adopt their own. Even then, federal courts must implement redistricting schemes that "most clearly approximate[] the reapportionment plan of the state legislature…." *White v. Weiser*, 412 U.S. 783, 796 (1973). This duty deprives courts of any independent power to create policy. *Upham v. Seamon*, 456 U.S. 37, 41–43 (1982); *Perry v. Perez*, 565 U.S. 388, 394 (2012) (stating that a "court appropriately confines itself to drawing interim maps…without displacing legitimate state policy judgments with the court's own preferences."). It appears never to have occurred to this or any other court that it might order a legislature to pass a plan based on the *court's* policy prescriptions. Appellants' proposal is, thus, exactly backwards. *Compare Connor v. Finch*, 431 U.S. 407, 415 (1977) (referring to judicial involvement in redistricting as an "unwelcome obligation").

In addition, legislative immunity prohibits Appellants' demand for court-ordered legislation. This Court has "equated the legislative immunity to which state legislators are entitled under § 1983 to that accorded Congressmen under the Constitution." *Supreme Court of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 733 (1980) (citations omitted).

And the lower courts agree that congressional immunity bars federal courts from ordering Congress to pass legislation. *Smith & Lee Assocs., Inc. v. City of Taylor*, 102 F.3d 781, 797 (6th Cir. 1996); *Newdow v. U.S. Congress*, 328 F.3d 466, 484 (9th Cir. 2003), *rev'd on other grounds*, 542 U.S. 1 (2004) ("[I]n light of the Speech and Debate Clause of the Constitution, Art. I, § 6, cl. 1, the federal courts lack jurisdiction to issue orders directing Congress to enact or amend legislation.").[9] Pennsylvania's General Assembly is therefore also immune from this form of relief.

Sixth, Appellants lack standing because there is no "invasion of a legally protected interest" that is "concrete and particularized"; the possibility of future redistricting plans that Appellants disfavor is, at best, "conjectural" or "hypothetical." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992); *compare id.* at 564–67. This case presents an even worse standing argument than the one rejected in *Lance*, 549 U.S. at 442, where the Court dismissed a challenge to a redistricting plan by private citizens under the Elections Clause because the "only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed." *Id.* Here, there is no allegation of vote dilution, vote denial, or impermissible classification in sorting voters into districts on the basis of any suspect classification. And, because the Pennsylvania Supreme Court implemented a new redistricting plan that Appellants do not challenge, Appellants do not reside in districts they

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[9] *See also Schonberg v. McConnell*, No. 3:13-CV-00220-TBR, 2013 WL 6097890, at *3 (W.D. Ky. Nov. 20, 2013); *Meaux v. U.S. Gov't*, No. 6:15-CV-2165, 2015 WL 6692232, at *5 (W.D. La. Sept. 10, 2015).

claim to be gerrymandered. *See United States v. Hays*, 515 U.S. 737, 745 (1995) (holding that standing turns on proof that racial-gerrymandering plaintiffs resided in districts alleged to be gerrymandered). Appellants' only remaining challenge is with the *future* process; they "seek no particular map." JS 34. But the allegation that a "process" that *may* be used in the future and *may* not comply with (a fanciful view of) the Elections Clause is nothing but a "generalized grievance about the conduct of government." *Id.*

Moreover, as in *Lujan*, redressability is an "obvious problem" because the named defendants lack the authority to amend the Pennsylvania Constitution. *See* 504 U.S. at 568–69. Appellants request a new "process" to bind *future* General Assemblies' hands in 2020 "and beyond." JS 5. But, under the Pennsylvania Constitution, "no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body…." *Mott v. The Pennsylvania R.R. Co.*, 30 Pa. 9, 9 (1858). Because *future* legislatures will conduct *future* redistricting, Appellants' proposed relief (were it available) would require an amendment to the Pennsylvania Constitution. An amendment, however, requires a vote of the Pennsylvania electorate, Pa. Const. art. XI, § 1.

Lujan demands dismissal. There, agencies that funded projects causing the environmental harm alleged to support standing were not before the Court, and it was an "open question" whether action by the agency that *was* before the Court would bind those other agencies. *Lujan*, 504 U.S. at 568–69. For that

reason, redressability was lacking in *Lujan*, and it is here as well.[10]

In short, whatever relief Appellants could have reasonably obtained from the lower court in this case was delivered by the ruling of the Pennsylvania Supreme Court in the *League of Women Voters* case. Whatever relief they still hope for is barred. Thus, the Court should dismiss this appeal for lack of subject-matter jurisdiction.

II. Appellants' Elections Clause Theory Holds No Legal Merit

Appellants' Election Clause theory fails on the merits for several independent reasons. Most notably, the Elections Clause is a positive grant of legislative power; it is not a guarantee of individual rights—much less a prescription of a redistricting "process." Accordingly, the Court's role in enforcing it is limited to assessing whether legislation is "within the scope of" that grant. *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819)). Redistricting legislation explicitly sets the places and manner of elections, so it is plainly within the scope of legislative power. The Elections Clause inquiry goes no further.

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[10] Appellants contend a case is not moot where "there is still effectual relief that a federal court can give." JS 31; *see Church of Scientology of California v. United States*, 506 U.S. 9, 13 (1992). But, here, there is no "effectual relief," a federal court can give.

Additionally, Appellants have not presented a justiciable claim. Instead, they repackage standards rejected in *Vieth* under an Elections Clause label, which in no way resolves the justiciability defects *Vieth* identified. Moreover, because the Elections Clause does not confer any personal rights, much less a right founded in the federal character of the national government, this case is not properly brought under either Section 1983 or the Privileges and Immunities Clause.

In other words, there is neither legal merit to Appellants' theory nor a cause of action to adjudicate it. Therefore, if the Court somehow reaches the merits, it should summarily affirm the judgment below.

A. Appellants' Theory Has No Basis in the Elections Clause

The Elections Clause provides:

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

U.S. Const. art. I, § 4, cl. 1. This text commits power to regulate elections to "the Legislature" of each state and to "Congress." In vesting authority in these two *political* bodies, it plainly anticipates an exercise of *political* judgment in crafting election regulations. *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, *see* Article I, § 4, and unsurprisingly that turns out to be root-

and-branch a matter of politics.") (citations omitted). This Court has repeatedly recognized that politics plays a role in the redistricting process. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973); *Vieth*, 541 U.S. at 285 (plurality op.). Yet, notwithstanding this entrenched precedent, Appellants initially sought a standard where no politics could be considered. By the same token, the vesting of political discretion in *non*-judicial bodies necessarily implies that judicial bodies lack authority to police the exercise of that discretion. *See, e.g.*, *Polish Nat. All. of the United States v. N.L.R.B.*, 322 U.S. 643, 650 (1944) ("this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise").[11] Thus, the notion that the Elections Clause forbids, or authorizes judicial oversight over, the exercise of political judgment, JS 13–16, could not stray further from the plain language. Appellants offer no textual support for their contrary theory.

This textual commitment of authority defeats both of Appellants' legal theories.

First, it directly refutes Appellants' contention that federal courts may create, or oversee the creation of, a particular redistricting "process." JS 4. Not only is such a process absent from the Constitution's text, but the very idea of a constitutionally prescribed process was summarily dismissed in the framing debates:

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[11] The exception to this rule lies in the Court's duty to enforce constitutional and statutory civil-rights guarantees, such as those under the First or Fourteenth Amendments. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986). This appeal presents no claim of that nature.

> It will not be alleged, that an election law could have been framed and inserted in the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied, that a discretionary power over elections ought to exist somewhere.

The Federalist No. 59 (Alexander Hamilton). The Constitution carefully lodged that "discretionary power" with "the Legislature" of each state and with Congress in order to create a balance of power between *those* two bodies. *See id.* In fact, the national and state legislatures were deemed the "only" potential candidates for this "discretionary power," *id.*; the option of vesting it in courts appears to have crossed no one's mind—presumably because courts were not viewed as suited to exercise political discretion, *see* The Federalist No. 78 (Alexander Hamilton) (the judiciary has "neither FORCE nor WILL but merely judgment"). Because the Constitution does not establish a redistricting "process" that a court may enforce, and because it expressly vests that power in *other* branches of government, the federal courts have no direct role in creating or mandating one.

Instead, the federal courts' role is the same as their role in policing *any* exercise of a "positive grant of legislative power": assessing whether the exercise is "appropriate" to that grant. *Katzenbach v. Morgan*, 384 U.S. 641, 651 (1966); *McCulloch*, 17 U.S. (4 Wheat.) at 421. Although the Court holds authority to adjudicate whether a statute exceeds, for example, Congress's Commerce Clause power, *United States v. Lopez*, 514 U.S. 549, 557–58 (1995), its spending

power, *South Dakota v. Dole*, 483 U.S. 203, 207 (1987), and its power to "enforce" the reconstruction amendments, *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997), it has no authority to *seize* those powers for itself. For the same reason, the courts plainly cannot "order" Congress "to develop a process" for future compliance with its Commerce Clause, spending, or civil-rights-enforcement powers. JS 33.

The Elections Clause is no different. It "grants to the States 'broad power' to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001) (quoting *Tashjian*, 479 U.S at 217), through "comprehensive words" that "embrace authority to provide a complete code for congressional elections." *Smiley v. Holm*, 285 U.S. 355, 366 (1932). As with any grant of legislative power, this Court reviews only whether a specific exercise is appropriate to the grant. In particular, the Court has reviewed whether legislation falls within the comprehensive words "Times, Places, and Manner," *U.S. Term Limits v. Thornton*, 514 U.S. 779, 832–36 (1995), and whether legislation was enacted by "the Legislature," *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). But there is no judicial authority to "order" a new "process" for elections.

Second, the Election Clause's positive grant refutes Appellants' intent-based test for adjudicating Elections Clause claims. JS 12. Even if a specific redistricting plan, such as the 2011 Plan, were before the Court, Appellants' theory would fail because virtually *any* redistricting plan is "appropriate" to the delegation of authority over time, place, and manner election rules. *Katzenbach*, 384 U.S. at 651. District-

ing legislation "classifies tracts of land, precincts, or census blocks," *Hunt v. Cromartie*, 526 U.S. 541, 547 (1999), and clearly sets the "Places" and "Manner" of elections. The 2011 Plan, like every other plan, is on its face a set of "procedural regulations." *Thornton*, 514 U.S. at 833.

Appellants can only argue otherwise by reference to the alleged *motive* of Pennsylvania legislators and their staff in creating and passing the 2011 Plan. JS 13–20. But motive is irrelevant in assessing whether an exercise of authority falls within a positive grant of power. *See, e.g.*, *Sonzinsky v. United States*, 300 U.S. 506, 513 (1937) (finding inquiry into "hidden motives" to be "beyond the competency of courts" in assessing whether tax legislation exceeded constitutional taxing authority); *McCray v. United States*, 195 U.S. 27, 56 (1904) (discussing at length, and rejecting, the notion "that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted"); *see also Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810).

In this regard, the question whether legislation exceeds a positive delegation differs entirely from the question of whether legislation infringes on individual rights. Courts probe motive in individual-rights cases because "[a] statute, otherwise neutral on its face," still violates individual rights if it is "applied so as invidiously to discriminate on the ba-

sis of race" (or another protected classification).[12] *Washington v. Davis*, 426 U.S. 229, 241 (1976). For that reason, the Court, in adjudicating equal-protection redistricting cases, *does* look past the "tracts of land, precincts or census blocks" to ascertain if a redistricting plan was "'motivated by a racial purpose or object….'" *Hunt*, 526 U.S. at 546 (quoting *Miller v. Johnson*, 515 U.S. 900, 913 (1995)). But "purpose or object" has no bearing on whether legislation fits within an affirmative grant of legislative power. *McCray*, 195 U.S. at 54. To hold otherwise would subject the wisdom of legislation to judicial review and "overthrow the entire distinction between the legislative, judicial, and executive departments of the government…." *Id.* Accordingly, whether or not the 2011 Plan is "a partisan gerrymander," JS 2, has no bearing on whether or not it is a valid procedural regulation under the Elections Clause. *Cf. Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203–04 (2008) (finding partisan intent did not impact the question whether a voter identification requirement was an impermissible burden on the right to vote). The 2011 Plan sets the places and manner of elections; the Elections Clause inquiry ends there.

Neither *Thornton* nor *Cook* suggest otherwise. To the contrary, both cases invalidated legislation that, on its face, created qualifications for congressional

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[12] Motive only matters in cases alleging suspect classification. In cases subject to rational-basis review, the Court's precedent (at least in the post-*Lochner* era) ignores motive. *See, e.g.*, *Fox v. Standard Oil Co. of New Jersey*, 294 U.S. 87, 100–01 (1935) (rejecting inquiry into motive in Fourteenth Amendment challenge to state taxing scheme).

office and did not in any way regulate the times, places, or manner of elections.

Thornton concluded that the power to craft procedural laws does not encompass the power to establish *qualifications* to congressional office. 514 U.S. at 833–36. It then rejected a state constitutional provision establishing qualifications (term limits) on its face in the form of a ballot-access rule. *Id*. The provision expressly stated: "the people of Arkansas…herein limit the terms of elected officials." *Id.* at 784. Likewise, *Cook* invalidated a statute that, on its face, expressed government opposition to candidates who declined to support term limits; the Court viewed this mechanism as the functional equivalent of an impermissible qualification for office. 531 U.S. at 514–15 ("Section 18 provides that the statement 'DECLINED TO PLEDGE TO SUPPORT TERM LIMITS' be printed on all primary and general election ballots"). Both cases judged the challenged provisions principally according to their plain text and overt effects in creating *de facto* qualifications to office, and neither invalidated a provision purported on its face to set time, place, or manner rules.

To be sure, *Thornton* referenced the challenged provision's "intent and effect," 514 U.S. at 829 (internal quotation marks omitted), but this was only to confirm that the state's ballot-access measure was the functional equivalent of a candidate-qualification rule—even though a candidate who failed to meet the qualification could conceivably win a write-in race. *Id.* at 829–35. *Thornton* found this "indirect" measure with "the avowed purpose"—apparent in the law's text—of establishing qualifications to be as offensive to the Constitution as ironclad qualifica-

tions. *Id.* at 831. Similarly, *Cook*'s observation that the legislation at issue "is plainly designed to favor candidates who are willing to support the particular form of a term limits amendment" was founded in "a concrete consequence" identifiable in the provision's text. 531 U.S. at 524. It does not follow from these holdings that facially neutral state laws are subject to review for a "hidden" motive that is neither "avowed" nor facially self-evident. *Sonzinsky*, 300 U.S. at 513. Notably, the type of fact and expert testimony Appellants rely on, *see* JS 14–17, is completely absent from *Thornton* and *Cook*.

Moreover, both decisions employed a rational-basis level of review, striking down legislation that "bears no relation to the 'manner' of elections." *Cook*, 531 U.S. at 523; *see also Thornton*, 514 U.S. at 836 ("a state amendment is unconstitutional when it…has the *sole* purpose of creating additional qualifications indirectly") (emphasis added). By contrast, redistricting legislation, no matter the motive, virtually always has a rational basis in equalizing population and assigning voters to districts for orderly elections administration. Appellants thus have it backward in claiming "'[s]ome' partisan intent does not a 'procedural' regulation make…." JS 22. To the contrary, "some" partisan intent does not *un*make a regulation that on its face sets elections procedures. In this respect, it is significant that *Thornton* relied on the Court's *Anderson-Burdick* line of cases in assessing what rules amount to "election *procedures*." That line of cases, in turn, expressly rejects the notion that a hidden partisan intent may invalidate a statute that, on its face, is a legitimate procedural regulation. *Crawford*, 553 U.S. at 203–04.

In addition, partisan gerrymandering does not involve anything like the "concrete consequence" of ballot-access denial or an expression of governmental opposition to certain candidates. The fluid nature of political belief and affiliation "make it impossible to assess the effects of partisan gerrymandering." *Vieth*, 541 U.S. at 287 (2004) (Scalia, J., plurality) (citing *Davis v. Bandemer*, 478 U.S. 109, 156 (1986) (O'Connor, J., concurring)). The resilient majorities that gerrymanders supposedly create virtually always fail over time. *Id.* at 287 n.8. And this case is no different: a Democratic Party candidate won Pennsylvania Congressional District 18, a supposedly safe Republican seat, in the final election under the 2011 Plan. Accordingly, a partisan gerrymander does not have the "effect" of a qualification for office—or anything like it.

For all these reasons, Appellants' proposal to vet "partisan intent" under the Elections Clause through direct evidence by fact witnesses and circumstantial evidence by experts, JS 14–17, is far removed from the appropriate analysis of whether the legislative text falls within "the States['] 'broad power' to prescribe…procedural mechanisms." *Cook*, 531 U.S. at 523 (quoting *Tashjian*, 479 U.S. at 217). And Judge Baylson's related approach of identifying a violation where district "shapes" are visually "so irregular as to be indefensible under normal redistricting criteria," JS 10 (citing App. 306–31), fares no better. "The Constitution does not mandate regularity of district shape." *Bush v. Vera*, 517 U.S. 952, 962 (1996) (plurality op.). A district's shape is only relevant as "circumstantial evidence" of improper motive. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788,

798 (2017) (quoting *Miller v. Johnson*, 515 U.S. at 910–11) (internal quotation marks omitted). Thus, the evaluation of district shapes is only another route through the same *irrelevant* motive inquiry.[13]

B. Appellants' Theory Suffers from Additional Defects

Aside from having no grounding in the Elections Clause or in this Court's precedent, Appellants' theory suffers from a host of defects that should sound familiar.

First, the claim is non-justiciable. As the *Vieth* plurality explained, the absence of judicially manageable standards consistent with "the manner traditional for English and American courts" dooms a claim that a redistricting plan is unconstitutional for being overly partisan. *Vieth*, 541 U.S. at 278. Appellants appear to believe that slapping the label "Elections Clause" on their claim somehow resolves this

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[13] Indeed, the argument that "unusual and egregious" districts violate the Constitution has been weighed and found wanting. *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C.), *aff'd*, 506 U.S. 801 (1992) (internal quotation marks omitted). *Pope* involved a partisan-gerrymandering challenge to the infamous North Carolina freeway districts eventually invalidated as *racial* gerrymanders in the landmark *Shaw* litigation. *See Shaw v. Reno*, 509 U.S. 630, 636 (1993) (discussing *Pope v. Blue*). Although *Shaw* determined that, in a *racial* gerrymandering case, a district's shape can be dispositive proof of unconstitutional motive, *Pope* rejected that argument as to a *partisan*-gerrymandering claim. 809 F. Supp. at 399. That finding was essential to support dismissal of the claim on a 12(b)(6) motion, so this Court's summary affirmance lends it precedential weight. *See, e.g.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786 n.5 (1983).

problem. JS 20. But the label in no way provides the standards that have long eluded federal courts.

In fact, Appellants propose the exact same predominance standard, JS 20–21, that five members of this Court rejected in *Vieth* as "both dubious and severely unmanageable." 541 U.S. at 286; *id.* at 307 (Kennedy, J., concurring) ("That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry."). In reaching that holding, the Court *cited the Elections Clause* for the proposition that "[t]he Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly, that turns out to be root-and-branch a matter of politics." *Id.* at 285. It further rejected any effort to rely on the Court's racial-gerrymandering precedent as establishing partisan-gerrymandering standards: "Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive [i.e., race] as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive [i.e., politics] as to invalidate it." *Id.* at 286.

Nonetheless, Appellants claim that "the Elections Clause places a more specific limit on state authority than other legal bases for the challenge of gerrymanders"—which *Vieth* impliedly rejected—and that "a familiar standard from racial gerrymandering cases" applies in partisan-gerrymandering cases—which *Vieth* expressly rejected. JS 20–21. Those arguments are no more availing, and the proffered

standards no more manageable, here than they were in *Vieth*.

Second, the alleged rights are not enforceable under Section 1983, the suggested vehicle for this case. The right to a purported "fair and neutral *process*" for redistricting is "too vague and amorphous" for courts to enforce." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 106 (1989) (quoting *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 431–32 (1987) (internal quotation marks omitted)). More importantly, the Elections Clause was not "'intend[ed] to benefit' the putative plaintiff." *Id.* The Elections Clause grants legislative authority and does not guarantee any rights specific to Appellants as citizens of Pennsylvania. Just as in *Golden State*, which rejected an effort to enforce the Supremacy Clause because it is "not a source of any federal rights," *id.* at 106–08, this effort to claim injury under the Elections Clause does not allege a "deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. Thus, Appellants have no cause of action by which to advance their admittedly novel Elections Clause theory.

Third, Appellants' alleged right to a "fair and neutral *process*" is also not founded in the Privileges and Immunities Clause. That Clause protects only rights that "arise out of the nature and essential character of the National government, the provisions of its Constitution, or its laws and treaties made in pursuance thereof" such that they would fall within "the protection of Congress" under the Fourteenth Amendment's enforcement. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 37 (1872). Appellants identify

no reason to believe a "fair and neutral *process*" has anything to do with that standard. Quite the opposite, "[p]olitical gerrymanders are not new to the American scene" and, incidentally, can be traced "back to the Colony of Pennsylvania at the beginning of the 18th Century." *Vieth*, 541 U.S. at 274. Appellants ignore all of this and, instead, wax at length on "the right to vote." JS 25–30. But the right to vote is not at issue here because all Appellants already have the right to vote. They maintain this appeal to seek a "fair and neutral *process*" of redistricting, but cite zero support for that right under the "essential character of the National government, the provisions of its Constitution, or its laws and treaties."

Finally, Appellants' assertion of "a conflict among the lower courts" that this case may resolve is incorrect. The court in *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 689 (M.D.N.C. 2018), did *not* conclude that the Elections Clause creates a right to a particular redistricting "process" and did not issue an order demanding that a state legislature create a new process. Rather, the court invalidated a particular map—and this Court, by a 7-2 vote, promptly stayed that decision. Appellants here, however, "seek no particular map"; they seek "a process rather than a map." JS 34. There is no "conflict among the lower courts" on that question because—as Appellants proudly admit—no other court in history has been asked to adjudicate the theories advanced here, or relied upon them to order the relief they seek.

CONCLUSION

This appeal is jurisdictionally defective many times over and should be dismissed. Alternatively, the judgment below rejecting relief should be affirmed.

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