No. 17-1700

IN THE

Supreme Court of the United States

MICHAEL C. TURZAI, *et al.*

Petitioners,

v.

GRETCHEN BRANDT, *et al.*

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

In 2011, the Pennsylvania General Assembly enacted a congressional districting plan that subordinated traditional districting considerations to the goal of securing "unfair partisan advantage." Pet. App. 160. The Pennsylvania Supreme Court struck down that map "on th[e] sole basis" that it violated the Free and Equal Elections Clause of the Pennsylvania Constitution. *Id.* at 118, 208. After the Pennsylvania General Assembly failed to enact a revised redistricting plan, the Pennsylvania Supreme Court issued a remedial map that complies with the State's constitution.

The questions presented are:

1. Whether, notwithstanding this Court's express statements and petitioners' repeated concessions to the contrary, the Elections Clause of the U.S. Constitution entitles state legislatures to draw congressional districts "in defiance of provisions of the State's constitution." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015).

2. Whether *Growe* v. *Emison*, 507 U.S. 25 (1993) was incorrect that "the judiciary of a State" has the "power * * * to formulate a valid redistricting plan" in order to remedy violations of "the State and Federal Constitutions." *Id.* at 29, 33 (internal quotation marks omitted).

3. Whether the Pennsylvania Supreme Court misinterpreted the Pennsylvania Constitution.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

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BRIEF IN OPPOSITION

INTRODUCTION

In January of this year, the Pennsylvania Supreme Court invalidated Pennsylvania's congressional districting plan, holding that it "clearly, plainly and palpably" violated the Pennsylvania Constitution. Pet. App. 208. The court instructed the Pennsylvania General Assembly to enact a new, constitutional map in time for the 2018 election cycle, and stated that it would issue its own remedial plan if the legislature failed to do so. Petitioners immediately sought a stay from this Court. Their stay briefing acknowledged that "[a] state's constitution * * * may promulgate [redistricting] criteria," and that it is permissible for "state courts" to "draw the new plan" when a legislature fails to do so. Applicants' Reply Br. at 9, 15, *Turzai* v. *League of Women Voters of Pa.*,

No. 17A795 (Feb. 3, 2018) (emphasis omitted) ("Feb. 3 Stay Reply"). Petitioners therefore predicated their stay request on the argument that the Pennsylvania Supreme Court had misinterpreted the Pennsylvania Constitution and thereby engaged in "legislat[ing]" rather than "adjudicating." Emergency Application for Stay at 1-2, *Turzai*, No. 17A795 (Jan. 26, 2018). Justice Alito denied the stay without referring the matter to the full Court.

Following that denial, the General Assembly did not enact a constitutional redistricting plan, nor did petitioners request more time to do so from the Pennsylvania Supreme Court. Accordingly, after the deadline for a legislative remedy came and went, the Pennsylvania Supreme Court issued its own remedial plan. Petitioners immediately sought a second stay from this Court. Once more, they acknowledged that "a state court has the authority to strike down a redistricting plan that violates clearly applicable state constitutional provisions" and that a state court may remedy the violation after the legislature has been given an adequate opportunity to do so itself. Stay Reply Br. at 1-2, 9, *Turzai*, No. 17A909 (Mar. 6, 2018) ("Mar. 6 Stay Reply"). And once more, they predicated their stay request on the contention that the Pennsylvania Supreme Court had misinterpreted the Pennsylvania Constitution. *Id.* at 1-2. Justice Alito referred the second stay request to the full Court, and it was again denied.

Undeterred, petitioners now return to this Court for a third time seeking certiorari review of the Pennsylvania Supreme Court's decision. But—remarkably—their certiorari petition abruptly shifts course from their prior filings. Petitioners' primary arguments are now that the Court should grant

certiorari to hold that substantive state constitutional provisions *do not* apply in the redistricting context and that state courts *may not* adopt remedial redistricting plans.

Petitioners were right the first time. This Court has already held that a state may not adopt a redistricting plan "in defiance of provisions of the State's constitution." *Ariz. State Legislature* v. *Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). And the Court has emphasized the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Growe* v. *Emison*, 507 U.S. 25, 33 (1993) (quoting *Scott* v. *Germano*, 381 U.S. 407, 409 (1965) (per curiam)). Further, even if petitioners' main arguments were not barred by this Court's precedent, they would be waived and estopped because of petitioners' prior filings in this Court and because petitioners obtained a stay of parallel federal litigation by advancing the very arguments they now disclaim.

That leaves petitioners with nothing more than the same meritless, splitless argument that led this Court to deny two stay requests: They assert that this Court should grant certiorari to consider whether the Pennsylvania Supreme Court misinterpreted the Pennsylvania Constitution. But doing so would be a blatant affront to our Federal system; would run contrary to centuries of precedent recognizing that state courts are the ultimate arbiters of state law; and would cause confusion and uncertainty among voters on the eve of the 2018 general election.

The petition for certiorari should be denied.

STATEMENT

1. In 2011, Pennsylvania had a one-party government, with a Republican Governor and Republicans holding the majority in both houses of the Pennsylvania General Assembly. Pet. App. 8. That year, the General Assembly enacted a statute ("the 2011 Plan") that reapportioned Pennsylvania's congressional districts in light of the 2010 census. *Id.* The 2011 Plan received no Democratic votes in the Pennsylvania Senate, passed the Pennsylvania House on a largely party-line vote,[1] and was signed into law by the Governor on December 22, 2011. *Id.* at 9-10.

The 2011 Plan effected a partisan gerrymander that is evident even on "lay examination." Pet. App. 156; *see* Pet. App. B 20. It divided the State into 18 "tortuously drawn" congressional districts that split nearly half of the State's counties and 68 of its municipalities. Pet. App. 29-30, 156. Most of the State's Democratic voters were packed into just five districts, while Democrats were distributed among the remaining 13 districts to ensure that Republicans would command a solid majority of the votes. *Id.* at 33-35. The Seventh District, popularly known as "Goofy Kicking Donald Duck," featured three jagged segments, connected by narrow land bridges that cut across five counties. Pet. App. B 27. The First District, centered in the Democratic stronghold of Philadelphia, reached tentacles into suburban counties to pull in a number of Democratic-leaning communities. *Id.* at 21. Other districts had similarly

[1] Although the bill attracted some Democratic votes in the House, nearly all were from districts that were "safe Democratic districts" under the 2011 Plan. Pet. App. 10 n.14.

bizarre shapes designed to maximize partisan advantage.

The 2011 Plan achieved its intended result. In the three elections following the Plan's enactment, Republican candidates won between 49.2% and 55.5% of the statewide congressional vote, and only 6 of 24 statewide offices. Pet. App. 33-35. Yet, in each election, Republicans won the same 13 congressional districts, and Democrats the same five, in every case by lopsided margins. *Id.*

2. In June 2017, the League of Women Voters and a group of Pennsylvania voters ("Challengers") filed suit challenging the 2011 Plan in the Pennsylvania Commonwealth Court. *Id.* at 36. Challengers contended that, by "packing" Democratic voters into congressional districts in which their votes would be substantially diluted, and "cracking" districts to ensure that Democrats could not elect representatives of their choice, the Plan violated several provisions of the Pennsylvania Constitution, including the Free and Equal Elections Clause. 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. Challengers did not assert any claims under federal law.

The Governor, the Secretary of the Commonwealth, and Commissioner Jonathan Marks declined to defend the law, agreeing that Challengers had demonstrated that the plan was an unconstitutional partisan gerrymander. But petitioners—the Speaker of the Pennsylvania House of Representatives and

the President Pro Tempore of the Pennsylvania Senate—defended the law's constitutionality.

At trial, Challengers introduced the testimony of four experts to demonstrate that the 2011 Plan was designed to maximize partisan advantage. These experts testified that statistical analysis demonstrated with virtual "certainty" that the map did not result from "traditional districting principles," Pet. App. 54; that it had greater partisan bias than nearly every other available map, *id.* at 61-62; and that the map resulted in an efficiency gap of between negative 15% and 24%, meaning it gave Republicans as much as "a 24-percentage-point advantage," *id.* at 64-65. Petitioners called two witnesses to attempt to rebut this testimony, but the Commonwealth Court found their testimony "incredible." *Id.* at 67-68, 69-71.

Consequently, the Commonwealth Court found ample evidence that "the 2011 Plan was drawn to give Republican candidates an advantage in certain districts within the Commonwealth." *Id.* at 252. Nonetheless, the court stated that it could not identify a "judicially manageable standard by which [it] c[ould] discern whether the 2011 Plan crosses the line between permissible partisan considerations and unconstitutional partisan gerrymandering." *Id.* at 254; *see id.* at 72-85. It therefore denied Challengers' claims. *Id.* at 254.

3. The Pennsylvania Supreme Court promptly ordered briefing and heard oral argument. On January 22, 2018, it issued a *per curiam* order holding that the 2011 Plan "clearly, plainly and palpably violates the Constitution of the Commonwealth of Pennsylvania," and stating that "on that sole basis,

we hereby strike it as unconstitutional." *Id.* at 208. The court also set forth its mandate so that the parties could "act accordingly" without waiting for issuance of its full published opinion. *Id.* at 6 & n.9. It enjoined use of the 2011 Plan in the upcoming May 15 primary, ordered the General Assembly to issue a remedial districting plan by February 9, and set a February 15 deadline for the Governor to decide whether to approve that plan. *Id.* at 208-209. (At oral argument, petitioners had stated that they would "like at least three weeks" to draw a new map. *Id.* at 229 n.2.) The Court explained 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." *Id.* at 209.[2]

Petitioners filed an emergency stay application in this Court.[3] In their stay briefing, petitioners acknowledged that the Pennsylvania Supreme Court has authority to "decid[e] whether a redistricting plan complies with the state constitution," but faulted its interpretation of the Pennsylvania Constitution. Feb. 3 Stay Reply at 9-10. Justice Alito, acting

[2] Three Justices consistently dissented from the Pennsylvania Supreme Court's orders. Two disagreed with the court on the merits. One dissenter concurred that the 2011 Plan was unconstitutional but objected to the Court's remedial timeline.

[3] The Applicants also sought a stay before the Pennsylvania Supreme Court, which that court denied on January 25. Order, *League of Women Voters of Pa.* v. *Commonwealth*, No. 159 MM 2017 (Pa. Jan. 25, 2018).

in chambers, denied the stay application. No. 17A795 (Feb. 5, 2018).

4. On February 7, the Pennsylvania Supreme Court released an opinion explaining its January 22 order. *See* Pet App. 6. That opinion stated that "nothing in this Opinion is intended to conflict with, or in any way alter, the mandate set forth in our Order of January 22, 2018." *Id.* Rather, it simply explained the rationale for that order: The 2011 Plan, the court wrote, "clearly, plainly, and palpably violates the Free and Equal Elections Clause of our Constitution." *Id.* at 118.

The court began its analysis by construing the Free and Equal Elections Clause using ordinary tools of constitutional interpretation, including text, history, precedent, and purpose. *Id.* at 119-120. The court noted that, because "the Free and Equal Elections Clause has no federal counterpart," case law construing the federal Constitution was "not directly applicable." *Id.* at 120.

All of the relevant considerations pointed to the same conclusion. The "plain language" of the Free and Equal Elections clause "mandates that all voters have an equal opportunity to translate their votes into representation." *Id.* at 123. The Clause's history makes clear that it was designed to prevent "the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered." *Id.* at 133; *see id.* at 123-132 (examining history at length). Further, the court explained that this interpretation accorded with "nearly 150 years" of precedent: Since

1869, the Pennsylvania Supreme Court had consistently held that the Clause requires that the legislature make all votes "'equally potent in the election,'" and bars any legislative enactment that "'dilutes the vote of any segment of the constituency.'" *Id.* at 134-135 (quoting *Patterson* v. *Barlow*, 60 Pa. 54, 75 (1869); *City Council of City of Bethlehem* v. *Marcincin*, 515 A.2d 1320, 1323-24 (Pa. 1986)).

It follows, the court explained, that the Free and Equal Elections Clause permits "challenges to the enactment of a congressional redistricting plan predicated on claims of impermissible political gerrymandering." *Id.* at 138. When the legislature gerrymanders districts so that "the non-favored party's votes are diluted," it deprives those voters of "an equal opportunity to translate their votes into representation." *Id.* at 145. The court acknowledged that, in *Erfer* v. *Commonwealth*, 794 A.2d 325 (Pa. 2002), it had rejected a political gerrymandering claim based on a different state constitutional provision—the State's analogue to the federal Equal Protection Clause. But that opinion "did not foreclose future challenges under [the Free and Equal Elections Clause] resting solely on independent state grounds." Pet. App. 140. That latter Clause, the court reiterated, has a "unique histor[y]," and unlike the state's Equal Protection Clause is "specifically intended to equalize the power of voters in our Commonwealth's election process." *Id.*

The court then described the "benchmarks" relevant to adjudicating claims of political gerrymandering under the Free and Equal Elections Clause. *Id.* at 149. It explained that, since the ratification of the Clause, "certain neutral criteria have, as a general matter, been traditionally utilized to guide the

formation of our Commonwealth's legislative districts in order to prevent the dilution of an individual's vote," including "compactness, contiguity, and the maintenance of" existing political boundaries. *Id.* at 146, 150. Those standards "are deeply rooted in the organic law of our Commonwealth," are "fundamentally impartial in nature," and indeed are reflected in other provisions of the Pennsylvania Constitution. *Id.* at 149-150. Thus, the court explained, when these neutral considerations are "subordinated, in whole or in part, to extraneous considerations such as gerrymandering for unfair partisan political advantage," a violation of the Free and Equal Elections Clause has occurred. *Id.* at 152.

Applying these benchmarks, the court concluded that the 2011 Plan violated the Free and Equal Elections Clause. Both "the compelling expert statistical evidence presented before the Commonwealth Court," and a straightforward "examination of the Plan itself," demonstrated that "the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population." *Id.* at 154. The expert testimony presented at trial made clear that "the 2011 Plan subordinated the goals of compactness and political-subdivision integrity to other considerations." *Id.* at 155. And "a rudimentary review" of the Plan revealed "a map comprised of oddly shaped, sprawling districts" that "rend municipalities from their surrounding metropolitan areas," "ignore the integrity of political subdivisions," and subordinate "traditional redistricting considerations" to partisan considerations. *Id.* at 156-158. "Such a plan, aimed at achieving unfair partisan gain, undermines voters' ability

to exercise their right to vote in free and 'equal' elections," and so violated the Pennsylvania Constitution. *Id.* at 160.

The court concluded by addressing the appropriate remedy. The legislature and the Governor, it affirmed, have "primary responsibility and authority" to draw a legislative map, and if they "timely enact a remedial plan and submit it to our Court, our role in this matter concludes." *Id.* at 162-163. But the court added that, if "the legislature is unable or chooses not to act, it becomes the judiciary's role to determine the appropriate redistricting plan." *Id.* at 163.

5. In the wake of the court's order and opinion, neither house of the Pennsylvania General Assembly introduced, voted on, or enacted a remedial plan. Nor did any party seek an extension of the dates set forth in the court's *per curiam* order. *Id.* at 232.

Thus, the Court conducted proceedings to determine an appropriate remedial plan. Several individual parties, including petitioners, submitted proposed plans to the court on February 9. *See id.* The court then "carefully reviewed" all the proposed plans, and on February 19, it issued a remedial plan that "draws heavily upon the submissions provided by the parties, intervenors and *amici*." *Id.* at 232-233. The court explained that this plan adheres to the "traditional redistricting criteria of compactness, contiguity, equality of population, and respect for the integrity of political subdivisions." *Id.* In stark contrast to the 2011 Plan, it "splits only 13 counties," and "is superior or comparable to all plans submitted by the parties, the intervenors, and *amici*, by whichever Census-provided definition one employs." *Id.* at 233-234; *compare* Pet. App. B 1 (Remedial Plan),

with id. at 20 (2011 Plan). The court ordered that all 2018 primary and general elections be conducted in accordance with this plan. Pet. App. 234-235.

Petitioners once again sought a stay from this Court. As in their prior stay papers, Respondents disclaimed any contention that the Pennsylvania Supreme Court lacked authority to review the constitutionality of the 2011 Plan under the Pennsylvania Constitution. To the contrary, they affirmatively conceded that "a state court has the authority to strike down a redistricting plan that violates clearly applicable state constitutional provisions," and again merely faulted the Pennsylvania Supreme Court's interpretation of the Pennsylvania Constitution. Mar. 6 Stay Reply at 1-2, 9. This Court denied petitioners' stay request. No. 17A909 (Mar. 19, 2018).

In addition, while petitioners' second stay request was pending, a group of legislators and congressional candidates brought a suit in federal district court in Pennsylvania. The suit raised precisely the same arguments petitioners forwarded in their stay petition. On the same day this Court denied petitioners' stay request, that suit was dismissed for lack of Article III standing. *Corman* v. *Torres*, 287 F. Supp. 3d 558 (M.D. Pa. 2018) (per curiam).

In the months since the Pennsylvania Supreme Court adopted its remedial map, Pennsylvania's Bureau of Commissions, Elections and Legislation has implemented the new map and conducted a successful primary election under it. The general election under that plan is scheduled to occur on November 6, 2018. The Pennsylvania General

Assembly has not taken any steps to adopt a new, constitutional plan of its own.

ARGUMENT

I. THE COURT SHOULD NOT GRANT CERTIORARI TO REVIEW WHETHER STATE COURTS MAY ENFORCE AND REMEDY STATE CONSTITUTIONAL VIOLATIONS IN THE REDISTRICTING CONTEXT.

Petitioners set themselves a difficult task. Just three years ago, this Court emphasized that "[n]othing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 135 S. Ct. at 2673. And the Court has long recognized the "legitimacy of state *judicial* redistricting," *Growe*, 507 U.S. at 34, and the "power of the judiciary of a State * * * to formulate a valid redistricting plan," *Germano*, 381 U.S. at 409. Nonetheless, petitioners primarily contend that this Court should grant certiorari to hold that state constitutional provisions do *not* apply in the redistricting context, and to further hold that state courts are *barred* from enacting remedial redistricting plans.

Remarkably, the fact that petitioners' positions are flatly contrary to this Court's precedent may not even be the greatest hurdle their petition faces. Not only has this Court rejected petitioners' arguments, but petitioners themselves have previously disclaimed them. Earlier in this litigation, petitioners repeatedly and unequivocally repudiated the arguments they are now advancing; indeed, they obtained

a stay of parallel federal-court litigation by making the opposite claims. Petitioners' arguments are therefore waived and barred by judicial estoppel. And, even if this Court were to consider them, they would be unmeritorious and unworthy of this Court's review.

A. Petitioners Waived Their Arguments And Are Estopped From Making Them.

A pair of implacable obstacles forecloses petitioners' main arguments right out of the gate. Petitioners waived the two central contentions on which their petition rests. They are also estopped from making those arguments because they pressed inconsistent claims in parallel litigation. Certiorari ought to be denied on that basis alone.

1. In their stay briefing before this Court, petitioners repeatedly rejected any suggestion that they were arguing against the application of state constitutional provisions in the redistricting context, or that they were contesting a state court's right to issue a remedial redistricting plan. When petitioners first sought a stay from this Court in late January and early February, they chastised respondents for "*mischaracteriz[ing]* Applicants' argument as supposedly barring a state court from deciding whether a redistricting plan complies with the state constitution." Feb. 3 Stay Reply at 9 (emphasis added). Petitioners stated in no uncertain terms that "[a] state's constitution *** *may* promulgate [redistricting] criteria," and that "to the extent a state court affords [those criteria] a legitimate interpretation faithful to their plain meaning, *it acts consistent with the Elections Clause*." *Id.* at 9-10 (emphases added).

Petitioners doubled down on this position in their second stay request. In the second stay reply brief, petitioners stated that they "agree with Opposition Parties that *Arizona State Legislature* requires legislatively enacted districting plans, like the 2011 Plan, to comply with the state constitution." Mar. 6 Stay Reply at 3 (citation omitted). Thus, they explained, "a state court has the authority to strike down a redistricting plan that violates clearly applicable state constitutional provisions." *Id.* at 9. And they added that, if a provision of the Pennsylvania Constitution "stat[ing] that congressional districts must be 'compact and contiguous' *** had been drafted to apply to congressional districts, a state court *would not run afoul of the Elections Clause by enforcing it*." *Id.* at 11 (emphasis added).[4]

Furthermore, petitioners' stay briefing made clear that petitioners believed state courts may adopt appropriate remedial redistricting maps to correct a violation of the state constitution. Petitioners observed that in a prior case, *Mellow* v. *Mitchell*, 607 A.2d 204 (Pa. 1992), the Pennsylvania Supreme Court "was properly entrusted with drawing a congressional map." Feb. 3 Stay Reply at 12 n.7. And

[4] These statements are consistent with petitioners' position before the Pennsylvania Supreme Court. In their merits brief in that court, petitioners acknowledged that the "role of th[e] [Pennsylvania Supreme] Court" under the Elections Clause is "interpreting the constitutionality of enacted legislation." Respondents' Brief (Turzai & Scarnati, III) at 60, *League of Women Voters of Pa.*, No. 159 MM 2017 (Pa. Jan. 10, 2018). The only limit on judicial review that they identified was that the Pennsylvania Supreme Court could not "adopt [redistricting] criteria *not* found in the Pennsylvania Constitution." *Id.* at 59 (emphasis added).

they acknowledged that where a "state legislature fail[s] to pass *any* plan once the former plan [i]s deemed malapportioned," it is permissible for "state courts" to "draw the new plan" themselves. *Id.* at 15.

Petitioners thus disclaimed their present position several times over. In direct contradiction to their current arguments, petitioners acknowledged that "a state court has the authority to strike down a redistricting plan that violates * * * state constitutional provisions"; that a court acts "consistent with the Elections Clause" by enforcing state constitutional redistricting criteria; and that a state court may "draw [a] new plan" to remedy a violation of the state constitution. By making these statements, petitioners "intentional[ly] relinquish[ed]" the claim that a state court is prohibited from enforcing substantive constitutional provisions against a redistricting plan, or that a court cannot issue a remedial plan to remedy a violation. *United States* v. *Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks omitted). Those arguments are thus flatly waived.

2. Principles of estoppel present an equally insuperable bar. As this Court has explained, judicial estoppel bars a party from making an argument in one proceeding when it has prevailed in a prior proceeding by making the contrary argument. *See New Hampshire* v. *Maine*, 532 U.S. 742, 749 (2001). In *Diamond* v. *Torres*, No. 5:17-cv-5054-MMB (E.D. Pa.), Petitioners successfully obtained a stay of parallel litigation challenging the 2011 Plan under the U.S. Constitution by taking a position clearly inconsistent with the arguments they wish to press here.

In that suit, the same litigants represented by the same counsel filed a motion arguing that the district court should "stay its hand" in favor of the proceedings then pending before the Pennsylvania Supreme Court. Legislative Defendants' Motion to Stay at 17, *Diamond*, No. 5:17-cv-05054-MMB (E.D. Pa. Jan. 11, 2018) ("Jan. 11 Stay Motion"). In their *Diamond* motion, petitioners acknowledged that the Pennsylvania Supreme Court proceedings "exclusively" involved "provisions of the Pennsylvania Constitution," but asserted that the results of the state-court challenge would likely decide the federal case. Jan. 11 Stay Motion at 17. Furthermore, petitioners asserted that, under *Growe*, the federal court was "*required*" to defer to the Pennsylvania Supreme Court because state courts have the "primary" role in addressing and remedying redistricting challenges. Jan. 11 Stay Motion at 16-17; *see also* Reply In Further Support of Motion to Stay or Abstain at 3-5, *Diamond*, No. 5:17-cv-05054-MMB (E.D. Pa. Jan. 22, 2018).

Petitioners' arguments worked. The federal court granted the stay, and the order expressly recognized that the stay was issued in light of the Pennsylvania Supreme Court's decision in the case below. Order, *Diamond*, No. 5:17-cv-05054-MMB (E.D. Pa. Jan. 23, 2018).

Petitioners are therefore estopped from arguing the contrary here. Petitioners succeeded in persuading the federal court to stay litigation on the ground that the Pennsylvania Supreme Court was not only permitted but entitled to consider the state constitutional challenges to the 2011 Plan, and that the challenges could potentially "moot" the federal case. And they premised these arguments almost entirely

on the applicability of this Court's precedent in *Growe*. Petitioners cannot now be permitted to do an about-face by arguing that *Growe* does not apply *at all*, *see* Pet. 30-33, and that the Pennsylvania courts were actually barred from resolving the state constitutional challenges and disabled from issuing an efficacious remedy. That would confer on petitioners precisely the sort of "unfair advantage" that the doctrine of judicial estoppel prohibits. *New Hampshire*, 532 U.S. at 751.

B. Even If The Court Could Consider Petitioners' Arguments, They Do Not Merit Certiorari Review.

In any event, neither of petitioners' primary arguments is meritorious or worthy of this Court's review.

1. Petitioners claim that their first question presented warrants certiorari because of uncertainty as to the role of state constitutional provisions in redistricting. Pet. 19-20. In fact, this Court has clearly recognized that state redistricting laws must comply with a state's constitution, and lower courts have uniformly adopted the same position.

a. This Court has explained that "[n]othing in the Elections Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." *Ariz. State Legislature*, 135 S. Ct. at 2673. On the contrary, a state legislature lacks the "power to enact laws" governing federal elections "in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley* v. *Holm*, 285 U.S. 355, 368

(1932). Thus, in *Smiley*, the Court held that, "where the state Constitution * * * provided" for a gubernatorial veto as "a check in the legislative process," the state legislature was required to enact a redistricting plan "in accordance with" that requirement. *Id.* at 367-369. Likewise, in *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), the Court held that because the Ohio constitution granted voters the power to "approve or disapprove" a redistricting plan by referendum, a congressional map voted down by referendum had "no effect whatever." *Id.* at 566.

These precedents foreclose petitioners' arguments. The Pennsylvania Constitution establishes the Free and Equal Elections Clause as a "check in the legislative process." *Smiley*, 285 U.S. at 368. And "[n]othing in [the Elections] Clause" permits the Pennsylvania Legislature to ignore that check when drawing congressional districts for the state. *Ariz. State Legislature*, 135 S. Ct. at 2673.

There is no merit to petitioners' attempt to distinguish *Smiley* and its progeny on the ground that they concerned *procedural* rather than substantive limits on electoral legislation. In *Arizona State Legislature*, the Court explained at length that the Elections Clause permits the enforcement of provisions of "state constitutions" that regulate "[c]ore aspects of the electoral process," including rules governing voter registration, ballot design, and victory thresholds. *Id.* at 2676-77 & nn.27-31; *see also id.* at 2673-74 (discussing *Shiel* v. *Thayer*, Bartlett Contested Election Cases, H.R. Misc. Doc. No. 57, at 349-352 (1861)). Furthermore, as the Court explained in *Arizona State Legislature*—and as petitioners *twice* admitted to this Court—a state constitution is itself "the product of the 'State's prescriptions for lawmak-

ing,' and therefore may promulgate [redistricting] criteria." Mar. 6 Stay Reply at 9 (quoting *Ariz. State Legislature*, 135 S. Ct. at 2668); *see* Feb. 3 Stay Reply at 9 (same). A constitutional provision ratified by the people is not an intrusion on the Legislature's role; it is an equally valid means of invoking the authority delegated to the States by the Elections Clause.

Moreover, even if the state legislature *were* the sole body capable of exercising legislative authority under the Elections Clause, petitioners would still be incorrect. The Free and Equal Elections Clause does not "displace[ ]" the state legislature "from the redistricting process." *Ariz. State Legislature*, 135 S. Ct. at 2686 (Roberts, C.J., dissenting). Rather, much like the gubernatorial veto in *Smiley* or the referendum in *Hildebrant*, it places constraints on the way in which the state legislature may exercise power over redistricting. *Id.* at 2686-87. Just as Congress does not cease to exercise legislative powers simply because it is required to act within the limits of the Commerce Clause, the Pennsylvania Legislature remains the entity that controls redistricting in Pennsylvania notwithstanding that it must act within constitutional limits.

If there is any remaining doubt, 2 U.S.C. § 2a(c) removes it. That statute provides that a state must be "redistricted in the manner provided by *the law thereof* after any apportionment." The Court has explained that the words "the law thereof" in this provision encompass all of a state's procedures for lawmaking, including "judicial decisions," *Branch* v. *Smith*, 538 U.S. 254, 271 (2003), and "initiative[s]," *Ariz. State Legislature*, 135 S. Ct. at 2669 (internal quotation marks omitted). Thus, Congress—which

has plenary authority under the Elections Clause—has "left the question of redistricting 'to the laws and methods of the States.'" *Id.* Where, as in Pennsylvania, those laws require compliance with the Free and Equal Elections Clause, the state legislature may not ignore them.

b. Unable to put forward a meritorious argument, petitioners attempt to gin up a split among the state courts. Those efforts fail.

State constitutional provisions setting rules governing the time, place, and manner of federal elections have existed since the Founding. Pet. App. 143 n.71 (giving examples). And courts have long enforced those provisions to review—and in some cases invalidate—state legislation. In *Brown* v. *Saunders*, 166 S.E. 105 (Va. 1932), for instance, the Virginia Supreme Court invalidated a congressional redistricting plan containing districts of varying population, on the ground that it violated the requirement in Virginia's Constitution that congressional districts be "'composed of contiguous and compact territory, containing as near as practicable an equal number of inhabitants.'" *Id.* at 106, 111 (quoting Va. Const. § 55). Other cases, going back decades, are to the same effect. *See* Pet. App. 143-144 n.71.

Petitioners attempt to show disagreement on this question by citing a treatise published in 1903 that supposedly "discuss[es] the split," along with a smattering of cases between 70 and 150 years old. Pet. 20-21. On its face, that hardly has the makings of a valid or non-stale split. Indeed, if the question presented were in need of this Court's attention, surely it would have produced at least *one* arguable conflict in the last seven decades.

Moreover, petitioners' claim of a split would have been a stretch even 70 or 115 years ago. The 1903 treatise they cite does not actually identify a split on this question; instead, it offers a string cite of cases that *invalidated* state elections laws that conflicted with the state constitution. *See* Thomas M. Cooley et al., Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union 903 & n.1 (7th ed. 1903). The one case it described as "not in harmony" with these authorities differed only in that it found no conflict between the state statute and the state constitution in the first place. *Id.*; *see Morrison* v. *Springer*, 15 Iowa 304, 348 (1863).

The cases petitioners cite are equally unhelpful to them. One of those cases struck down a state election law on the ground that it conflicted with the state constitution. *Chase* v. *Miller*, 41 Pa. 403, 425 (1862). Another case found that there was no conflict between the relevant state statute and the state constitution. *See In re Opinions of Justices*, 45 N.H. 595, 605 (1864). Three more cases involved the scope of the Presidential Electors Clause,[5] which—as this Court recently reiterated—fundamentally differs from the Elections Clause on the central question petitioners raise. *See Ariz. State Legislature*, 135 S. Ct. at 2667-68 (explaining that when the Constitution assigns the legislature an "electoral" function rather than a "lawmaking" function, it must "perform that function to the exclusion of other partici-

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[5] *See State ex rel. Beeson* v. *Marsh*, 34 N.W.2d 279 (Neb. 1948); *Parsons* v. *Ryan*, 60 P.2d 910 (Kan. 1936); *PG Publ'g Co.* v. *Aichele*, 902 F. Supp. 2d 724 (W.D. Pa. 2012).

pants"). Yet other cases declined to resolve the question presented, and were instead disposed of on independent grounds. *See Wood* v. *State ex rel. Gillespie*, 142 So. 747, 754 (Miss. 1932) (per curiam) (finding no equitable basis for writ of mandamus); *Commonwealth ex rel. Dummit* v. *O'Connell*, 181 S.W.2d 691, 696 (Ky. 1944) (applying strong presumption of constitutionality in light of impending election).

Petitioners' best case is probably *In re Plurality Elections*, 8 A. 881 (R.I. 1887). That opinion did at least express a view on the question presented. But it did so in a single sentence of dicta, in an advisory opinion that has virtually never been cited in the past 130 years. *Id.* at 882. That does not, to say the least, have the makings of a split calling out for the Court's intervention.

2. Petitioners fare even worse with respect to their second major argument: that state courts are prohibited from adopting remedial congressional redistricting plans. Pet. 29-30. This Court's precedents expressly recognize the "legitimacy of state *judicial* redistricting" to correct unconstitutional congressional maps. *Growe*, 507 U.S. at 34. And petitioners do not even attempt to point to a split on the question.

a. *Growe* squarely refutes petitioners' contention that state courts may not use their remedial authority to develop redistricting plans when a legislature has failed to adopt a map in a timely manner. In *Growe*, a Minnesota court held that Minnesota's legislative and congressional districts "violated both the State and Federal Constitutions." *Id.* at 29. Because of the possibility that the state legislature

would not adopt a constitutional plan in time for an impending election, the state court initiated the process of developing remedial redistricting plans. *Id.* at 29-30. But, while the state court's remedial efforts were under way, a federal district court hearing a parallel challenge to Minnesota's map enjoined the state-court proceedings and produced its own redistricting plans.

This Court held that the federal court violated the Constitution by depriving the State of its "primary responsibility for apportionment of [its] federal congressional and state legislative districts." *Id.* at 34. In explaining its holding, the *Growe* Court reiterated the "power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan." *Id.* at 33 (quoting *Germano*, 381 U.S. at 409). The Court further explained that "elementary principles of federalism and comity" require federal courts to give state redistricting plans "legal effect." *Id.* at 35-36 (emphasis omitted). And it emphasized that state courts should have "primacy" over federal courts in remedial redistricting efforts. *Id.* at 35.

There is no need for this Court to grant certiorari to announce what the *Growe* Court already held: State courts have the power to adopt remedial redistricting schemes. Nor is there any question that, under *Growe*, the Pennsylvania Supreme Court had the authority to adopt a remedial congressional map when it became clear that the Pennsylvania Legislature would not adopt a constitutional plan in time for the 2018 elections.

Petitioners' attempts to distinguish *Growe* do not hold water. They first assert that the state court in

Growe was permitted to engage in remedial redistricting efforts because it had been explicitly granted that authority by the Minnesota legislature. But that rationale is completely absent from *Growe*. Indeed, the *Growe* Court never once mentioned any legislation authorizing the state court's actions. That is because *Growe*'s holding is not predicated on the particulars of Minnesota's scheme; it is predicated on the general principle that "state courts have a significant role in redistricting" under the Constitution. *Id.* at 33.

Petitioners' other effort to distinguish *Growe* is merely a recapitulation of its failed argument that state constitutional provisions do not apply in the elections context. Petitioners claim that *Growe* may permit state courts to adopt maps to remedy federal constitutional defects, but *Growe* does not permit those courts to remedy *state* constitutional infirmities because state constitutional provisions are inapplicable. Pet. 32-33. In addition to the numerous problems with petitioners' premise, *see supra* pp. 18-20, petitioners ignore the fact that the Minnesota court in *Growe* held that the prior map violated both the "State and Federal Constitutions." 507 U.S. at 29. Yet the *Growe* Court never suggested that the remedial efforts were permissible only to the extent they addressed a *federal* constitutional problem.

Unable to distinguish *Growe*, petitioners fall back on a muted version of their argument, asserting that the Court should at least grant certiorari to consider whether a state court must be guided by legislative prerogatives in its exercise of remedial authority. But the Pennsylvania Supreme Court attempted to defer to the legislature in this case, offering the General Assembly an opportunity to enact its own

map. The court stepped in only after the General Assembly failed to do so. Moreover, petitioners do not point to any particular legislative prerogatives that the Pennsylvania Supreme Court allegedly ignored in its redistricting efforts. And, in adopting its own map, the Court could hardly be guided by the primary legislative prerogative on display in the prior invalidated map because—as the Commonwealth Court found—the guiding principle for that map appears to have been an unconstitutional aim to favor Republicans.[6]

b. Petitioners do not even argue that there is a real split as to the authority of state courts to adopt remedial redistricting plans, and for good reason. As petitioners themselves have acknowledged in their past briefing, state courts often engage in redistricting when a legislature has failed to enact a constitutional map in a timely manner. *See* Feb. 3 Stay Reply at 13 n.8; *see also, e.g.*, *In re 2003 Apportionment of State Senate & U.S. Cong. Dists.*, 827 A.2d

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[6] In their prior stay filings, petitioners argued that the Pennsylvania Supreme Court did not give the General Assembly an adequate opportunity to develop its own legislative plan. Because petitioners no longer advance that argument, it is waived. In any event, the argument lacks merit. The Pennsylvania Supreme Court gave the General Assembly three weeks to develop its own plan, a time period petitioners themselves had deemed adequate. *See* Pet. App. 229 & n.2, 232. During the three weeks, petitioners made no effort to pass a new, constitutional plan, or to seek additional time from the Pennsylvania Supreme Court. And, tellingly, to this very day the General Assembly has made no attempt to enact a constitutional map of its own. In these circumstances, petitioners can hardly argue that they were stymied by the Pennsylvania Supreme Court's timeline.

844, 845 (Maine 2003) (redistricting on legislature's failure to enact a new plan under Maine Revised Statutes tit. 21-A, ch. 15, § 1206); *In re Reapportionment Comm'n*, 36 A.3d 661 (Conn. 2012) (per curiam) (redistricting after legislature failed to enact a new map to account for census changes); *Jepsen* v. *Vigil-Giron*, No. D-0101-CV-2001-02177, 2002 WL 35459962 (N.M. Dist. Ct. Jan. 8, 2002) (same); *Mellow* v. *Mitchell*, 607 A.2d 204 (Pa. 1992) (same).

Petitioners lamely point to a single district court case in support of their novel argument to the contrary. *See Smith* v. *Clark*, 189 F. Supp. 2d 548, 555 (S.D. Miss. 2002). Petitioners can point to no courts that have adopted *Smith*'s reasoning, and the relevant portion of the *Smith* decision was vacated by this Court in *Branch*. 538 U.S. at 265-266. While the Supreme Court did not explicitly reach the merits of this argument, *Branch* did reaffirm *Growe*'s holding that a federal court may not deprive a state court of an "adequate opportunity to develop a redistricting plan." *Id.* at 262.

In short, the two arguments at the heart of the petition are waived, estopped, meritless, and splitless. Denial of certiorari review is plainly warranted.

II. THIS COURT SHOULD NOT GRANT CERTIORARI TO SECOND-GUESS A STATE COURT'S INTERPRETATION OF ITS OWN STATE CONSTITUTION.

Petitioners also argue—as they did in their two unsuccessful stay applications—that certiorari is warranted because the Pennsylvania Supreme Court, in interpreting the relevant provisions of the State's Constitution, "strayed well beyond what the * * * text can support." Pet. 25. And, according to

Petitioners, because the State Supreme Court misinterpreted the State Constitution, it usurped the role of the State "Legislature" in violation of the Elections Clause. That argument is at odds with our basic federal structure and the role of this Court in that structure. It does not warrant review.

1. It is a bedrock principle of federalism that "state courts are the ultimate expositors of state law." *Mullaney* v. *Wilbur*, 421 U.S. 684, 691 (1975). In particular, "[i]t is fundamental * * * that state courts be left free and unfettered by us in interpreting their state constitutions." *Florida* v. *Powell*, 559 U.S. 50, 56 (2010) (internal quotation marks omitted). In keeping with that principle, this Court has long recognized that it lacks authority to review whether a state court has correctly interpreted that State's own laws. *See Murdock* v. *City of Memphis*, 87 U.S. (20 Wall.) 590, 626, 633 (1874). Indeed, this Court's own jurisdictional statute bars it from exercising such review. *See* 28 U.S.C. § 1257(a) (permitting review only "where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States").

That elemental rule applies with full force to state-court decisions concerning redistricting. "[T]he Constitution leaves with the *States* primary responsibility for apportionment of their federal congressional and state legislative districts." *Growe*, 507 U.S. at 34 (emphasis added). Accordingly, over a century ago, this Court said that it was "obvious" that a state court's interpretations of its constitutional provisions regarding electoral districts was "conclusive on that subject." *Hildebrant*, 241 U.S. at 567-568; *see Smiley*, 285 U.S. at 363-364 (likewise

treating the Minnesota Supreme Court's understanding of the requirements of the Minnesota constitution as dispositive on that issue). No decision, before or since, has deviated from that understanding.

That rule defeats petitioner's claim. In the decision below, the Pennsylvania Supreme Court interpreted Pennsylvania's Constitution and concluded that it bars partisan gerrymandering. Pet. App. 3. As petitioners themselves concede, "[t]he Pennsylvania Supreme Court's judgment depends *solely* on the state's constitution." Pet. 34 (emphasis added). And the Pennsylvania court itself made clear that its decision rested, from start to finish, "sole[ly]" on state-law grounds. Pet. App. 3, 208. Its decision is accordingly "conclusive on th[e] subject," and this Court has no basis to review it. *Hildebrant*, 241 U.S. at 568.

2. Petitioners counter that the federal Elections Clause limits state supreme courts to "appl[ying] only explicit textual constitutional language." Pet. 26. In other words, in petitioners' view state courts are confined to a wooden application of constitutional text in any "decision[] addressing state-law challenges to congressional districts," lest they "usurp[] a legislative function." *Id.* at 26-27. Petitioners, again, are wrong.

A court does not engage in "legislation" when interpreting a constitution simply because the precise rule of law in a particular case does not appear in the document's text. Deriving specific doctrines from open-textured provisions is the basic task of constitutional adjudication. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 406-407 (1819). That task involves looking not only at the constitutional text, but at

history, structure, precedent, and prudential concerns too. To insist, as petitioners do, that state constitutional "requirements" must be expressly "enumerated" to be justiciable in the elections context is to insist that the constitution "partake of the prolixity of a legal code." *Id.* at 407. That goes against the "nature" of a constitution, which is "that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves." *Id.* Constitutional decisions of all stripes employ a similar methodology. *See, e.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 557 (1964) (deriving the one-person, one-vote principle from the Equal Protection Clause). And petitioners' argument is not just antithetical to judicial practice, but would also undercut the valuable role that constitutional interpretation at the state level can play in the development of federal constitutional law and in the protection of liberty. *See generally* Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law (2018).

3. Petitioners rely on *Bush* v. *Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam), for the proposition that this Court can sit in judgment of a state supreme court's interpretation of a state constitution. Petitioners overreach. In *Palm Beach*, the Court merely remanded the case to the Florida Supreme Court because there was "considerable uncertainty as to the precise grounds for the decision" below, making "review [of] the *federal* questions asserted to be present" premature. *Id.* at 78 (emphasis added and internal quotation marks omitted). That modest disposition did not upend two-and-a-half centuries of federalism. And, in any

event, *Palm Beach* concerned a separate provision of the Constitution involving the selection of Presidential Electors. As noted above, *supra* p. 22, the Constitution places substantially greater restrictions on state constitutional processes when the legislature is exercising its "'electoral' function" than when it is carrying out "redistricting." *Ariz. State Legislature*, 135 S. Ct. at 2667 (quoting *Smiley*, 285 U.S. at 365-366).[7]

3. Petitioners also claim a division of authority between the Colorado and California Supreme Courts on the one hand—which supposedly "appl[y] only explicit textual constitutional language" in election cases—and a different case from the Colorado Supreme Court on the other hand—which supposedly applied "aggressive extra-textual inferences." Pet. 26. The split is as fabricated as it sounds.

Starting with the "text-only" courts: In the first case, *Beauprez* v. *Avalos*, 42 P.3d 642, 651 (Colo. 2002), the Colorado Supreme Court merely noted that a state constitutional provision regulating state elections did not apply to federal elections of its own force. It did not purport to straightjacket constitutional interpretation in the future. And the second

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[7] Petitioners also quote *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457 (1958), for the proposition that state court interpretation must have "some reasonable connection with the constitutional text" such that "the legislature could 'fairly be deemed to have been apprised' of the 'existence' of the rules the state court imposes." Pet. 28. The *NAACP* case has no bearing whatsoever on this one. It involved an attempt by an Alabama court to "thwart" this Court's review through manipulation of its own procedural rules. 357 U.S. at 457. It did not place methodological limits on state constitutional interpretation.

case, *Legislature* v. *Reinecke*, 516 P.2d 6 (Cal. 1973), is even further afield. Indeed, the decision is contrary to petitioners' most basic contention regarding the powers of a state court: There, the California Supreme Court, with the help of a special master, actually redrew the State's legislative districts wholesale because the political branches had failed to pass a map in time. And the court certainly made no grand pronouncements about the need to stick to explicit text; to the contrary, the court *waived* an explicit textual constitutional requirement that a candidate be a resident of a district for a year, given the particular exigency. Thus, neither case supports petitioners, and neither case suggests that state courts are bound to follow any particular methodology of constitutional interpretation in election cases.

That is confirmed by the fact that the lone case on the other side of the supposed split also comes from the Colorado Supreme Court, and was issued just a year after the decision that is supposedly on petitioners' side of the ledger. *See People ex rel. Salazar* v. *Davidson*, 79 P.3d 1221 (Colo. 2003). That case, which decided questions about the state reapportionment process, did nothing unusual or untoward: It merely followed the traditional modes of constitutional interpretation, including "plain language" and "127 years of experience." *Id.* at 1225-26.

4. In any event, even if this Court could engage in some form of merits review of the Pennsylvania Supreme Court's interpretation of its own State Constitution, the decision below would easily survive it. The Pennsylvania Supreme Court applied all of the ordinary tools of constitutional interpretation in reaching its decision. *See supra* pp. 8-11. And its conclusion—that the Free and Equal Elections

Clause bars partisan gerrymandering—is comparable to one that numerous justices of this Court have long considered a reasonable construction of the U.S. Constitution's substantially more general guarantee of equal protection. *See Vieth* v. *Jubelirer*, 541 U.S. 267, 306-307 (2004) (Kennedy, J., concurring in the judgment); *id.* at 317-318 (Stevens, J., dissenting); *id.* at 343 (Souter, J., dissenting); *id.* at 355-356 (Breyer, J., dissenting).

Petitioners object again that the relevant provisions of the Pennsylvania Constitution do not explicitly use words such as contiguity and compactness. Pet. 25. But the Pennsylvania Supreme Court explained that these "neutral criteria," "deeply rooted in the organic law of our Commonwealth," merely constituted "benchmarks" for assessing whether a legislative plan violates the constitution's textual requirement of "free and equal" elections. Pet. App. 146-149. The articulation of benchmarks of this kind is a commonplace of constitutional interpretation. It was no error—let alone an error of federal constitutional magnitude—for Pennsylvania's courts to apply this approach in interpreting their own constitution.

Finally, petitioners intimate that the Pennsylvania Supreme Court departed from its own precedent. Pet. 6. But as the Pennsylvania court (again) explained, its earlier decisions did not in fact preclude partisan gerrymandering challenges. Pet. App. 138-143. And, in any event, *stare decisis* is not an inexorable command; it is the "prerogative" of a court "to overrule one of its precedents." *Bosse* v. *Oklahoma*, 137 S. Ct. 1, 2 (2016) (per curiam) (internal quotation marks omitted). This Court has done so time and again. *See, e.g.*, *Citizens United* v. *FEC*, 558 U.S.

310, 365 (2010) (overruling *Austin* v. *Mich. Chamber of Commerce*, 494 U.S. 652 (1990)); *Lawrence* v. *Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers* v. *Hardwick*, 478 U.S. 186 (1986)). Under our system of federalism, the Pennsylvania Supreme Court was well within its rights to likewise interpret its constitution, and either extend or refine its precedents. Petitioners' request that this Court intrude on that sovereign function is grossly improper and should be rejected.[8]

III. THIS CASE WOULD BE AN EXCEEDINGLY POOR VEHICLE FOR CERTIORARI REVIEW.

Even if this Court were inclined to address the questions presented by this petition, this case would be an exceedingly poor vehicle for doing so.

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[8] Petitioners also suggest, in a free-standing argument, that the Pennsylvania Supreme Court's decision is suspect because one of the justices had made campaign statements decrying the fact that "[t]here [were] a million more Democrats in this Commonwealth" and yet "only 5 Democrats in the Congress as opposed to 13 Republicans." Pet. 14 (emphasis omitted). Petitioners made an unsuccessful recusal motion on this basis, and they have not sought certiorari review of that decision. In any event, the campaign statements are well within the norm for judicial elections, and this Court has held that statements of this kind do not reasonably cast doubt on a judge's impartiality. *See Republican Party of Minn.* v. *White*, 536 U.S. 765, 777 (2002) ("A judge's lack of predisposition regarding the relevant legal issues in a case has never been thought a necessary component of equal justice, and with good reason."). Further, Justice Wecht's comments primarily concerned *state* redistricting, in which the Pennsylvania Supreme Court plays an important administrative role.

As noted, the primary arguments are foreclosed by waiver and estoppel. Those problems should pose an insuperable barrier to the Court's consideration of the arguments. At minimum, they would stymie this Court's efforts to reach the merits of petitioners' claims. The parties would be required to brief, and this Court would be required to consider, these extraneous threshold issues before even reaching the merits arguments.

Moreover, this Court twice denied stays in this case. In the intervening months, petitioners' arguments have not grown any stronger. But Pennsylvania has conducted a primary election and prepared for the November 6 general election under the Pennsylvania Supreme Court's remedial map. Granting certiorari now could confuse voters and call into doubt the legitimacy of the impending election.

In the face of these major vehicle problems, petitioners offer no convincing reason why the Court should grant certiorari now. They posit that the questions presented are exceedingly important, but their inability to point to any splits belies that contention. And, if the issues are as important as petitioners suggest, they are likely to arise again in the future. If and when they do, the Court may consider them in a case where petitioners have not already repudiated their main arguments, and where the State is not on the eve of an election.

CONCLUSION

For the foregoing reasons, certiorari should be denied.

Respectfully submitted,

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