No. 21-1271

IN THE

Supreme Court of the United States

TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES, *ET AL.*,

Petitioners,

v.

REBECCA HARPER, *ET AL.*,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

Attorneys for Amicus Curiae

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae Public Citizen is a nonprofit organization that, on behalf of its nationwide membership, advocates before Congress, administrative agencies, and courts on a wide range of issues. Public Citizen works for enactment and enforcement of laws to protect consumers, workers, and the public and to foster open and fair governmental processes.

The integrity of our nation's electoral system has long been one of Public Citizen's central concerns, both because of the importance of that issue in itself and because of its direct impact on Public Citizen's other policy concerns. As a result, Public Citizen's advocacy often focuses on legislation affecting the conduct of elections, and Public Citizen has frequently submitted briefs as amicus curiae to this Court in cases presenting election-law issues. *See*, *e.g.*, *FEC v. Cruz*, 142 S. Ct. 1638 (2022); *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833 (2018); *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015).

Public Citizen submits this brief because petitioners' arguments that the Elections Clause preempts application of substantive state constitutional law to state legislation regulating the time, place, and manner of holding congressional elections are unsupported by ordinary Supremacy Clause principles. Adoption of those arguments would impose unnecessary and unjustified limits on the ability of state constitutions and state courts to "actively address[ ] the issue" of

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

"excessive partisan gerrymandering" to protect the fairness of elections conducted in accordance with state law. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507 (2019).

SUMMARY OF ARGUMENT

The Constitution's 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, except as to the Places of chusing Senators." U.S. Const., art. I, § 4, cl. 1. In this case, North Carolina's legislative body, the General Assembly, exercised authority to prescribe the manner of electing United State Representatives by enacting a law establishing new congressional districts after the 2020 Census. The North Carolina Supreme Court reviewed the validity of that law in a case brought in state court pursuant to state statutes that were also enacted by the Assembly to regulate the manner of holding elections and that authorize judicial review of state congressional redistricting laws and imposition of provisional remedies when legislatively drawn districts are unconstitutional. The state court set the redistricting law aside as a violation of the state constitution's guarantees of free elections, the rights of assembly and petition, freedom of speech, and equal protection because the law embodied an extreme partisan gerrymander that denied North Carolina citizens the right to vote on equal terms.

In this Court, petitioners appear at first blush to advance two distinct theories for their novel argument that a state court's review of congressional redistricting plans under the state's own constitution violates

the Elections Clause: First, they suggest that if a state court sets aside a legislative redistricting plan and issues a remedial order, the court usurps the legislature's prescriptive authority under the Elections Clause. Second, they argue that the Elections Clause forecloses application of state constitutional limits on a state legislature's prescription of the time, place, or manner of holding congressional elections. At the same time, petitioners concede away the independent weight of the first theory by acknowledging that state courts, like federal courts, may (and in a proper case, must) review the lawfulness of congressional redistricting plans under the U.S. Constitution and applicable federal statutes, and provide appropriate remedies for any violations. Thus, petitioners acknowledge that the involvement of state courts as adjudicatory bodies in matters involving the time, place, or manner of federal elections does not in itself usurp the "independent" institutional role that they seek to assign to state legislatures under the Elections Clause.

Petitioners' arguments thus hinge entirely on their notion that the Elections Clause precludes application of state constitutional limits on a state legislature's authority to enact laws regulating the time, place, or manner of congressional elections. That notion is, as respondents demonstrate, unsupported by the words of the Clause, the Framers' understanding of those words, the practical construction of the Constitution from the years immediately following its ratification down to the present, and the precedents of this Court. It also rests almost entirely on a single unsupported assumption: the assumption that, just as the *federal* government is not subject to *state* constitutional limits when exercising its powers under the U.S. Constitution, a *state's* legislative power cannot be controlled by

its *own* constitution when the legislature is performing its duty under the Elections Clause to regulate the time, place, or manner of elections.

That assumption is both unexamined by petitioners and unsupported by precedent or logic. The reason that state constitutions and laws do not apply to the federal government is that the Constitution's structure, grounded on the principle of federal supremacy within the limits that the Constitution imposes on federal authority, does not allow subordinate sovereigns within the Union to impose their law on the government of the United States. But state institutions, even when performing functions or duties under the U.S. Constitution, remain state institutions; they do not acquire the federal government's immunity from application of state constitutional or statutory law.

Of course, state constitutional or statutory principles to which state actors are otherwise subject must, under the Supremacy Clause, give way to contrary commands of the U.S. Constitution and laws. When the U.S. Constitution assigns a state the duty to use its preexisting legislative (or judicial or executive) authority to carry out some function, however, the operation of the constraints that its own constitution imposes on that authority is not, as petitioners suggest, inherently preempted by the Constitution. On the contrary, in such circumstances, the Constitution takes state institutions as it finds them and presupposes that they will fulfill their federal duty in conformity with their own constitution and laws, absent a conflict between state and federal law.

Here, there is no conflict between the Election Clause's edict that states exercise their legislative power to regulate the time, place, and manner of

federal elections and state constitutional principles determining how that power is to be exercised.

ARGUMENT

I. Judicial review, in itself, does not usurp the role of state legislatures under the Elections Clause, whether it occurs in state or federal court.

Petitioners spend much of their brief asserting that the Elections Clause's assignment of authority to state legislatures "excludes other state entities" from playing any role in regulating the time, place, and manner of federal elections, Pet. Br. 18, and specifically excludes "[c]ourts" from "[u]surp[ing]" that authority, *id.* at 17. Indeed, petitioners go so far as to assert that reading the Elections Clause to recognize that "state courts have the authority to strike [legislatively enacted] regulations down" would "empty that provision's assignment of election-regulating authority to *state legislatures* of all meaning." *Id.* at 21.

Nonetheless, petitioners ultimately acknowledge that their assertion that the Elections Clause excludes state courts from engaging in judicial review of state redistricting laws is wrong. They recognize that federal-court adjudication of challenges to state redistricting plans under federal law does not usurp the exclusive authority of state legislatures (or of Congress when it exercises its own authority under the Elections Clause). *See* Pet. Br. 23. And they further acknowledge that "state courts are open to hear *federal* constitutional challenges to congressional districts." *Id.* at 48 (citing *Tafflin v. Levitt*, 493 U.S. 455, 458–59 (1990)).

Indeed, state courts of otherwise competent jurisdiction not only can but *must* entertain such challenges. *See*, *e.g.*, *Haywood v. Drown*, 556 U.S. 729, 734–42 (2009); *Howlett v. Rose*, 496 U.S. 356, 367 (1990). And when a state court does so, it must, like a federal court, provide an appropriate remedy, which may include drawing up a provisional redistricting plan when the state legislature has failed to enact a lawful plan in time for elections to be held under it. *See*, *e.g.*, *Branch v. Smith*, 538 U.S. 254, 272 (2003) (affirming authority of "state and federal courts" to provide remedies including redistricting "when the prescribed legislative action has not been forthcoming"). Further, this Court unanimously held in *Growe v. Emison*, 507 U.S. 25, 42 (1993), that *federal* courts must defer to a *state* court's creation of a districting plan to remedy federal and state constitutional violations infecting a state apportionment statute.

Thus, as petitioners effectively concede, state courts do not usurp the legislature's institutional role under the Elections Clause just by engaging in judicial review of legislation establishing congressional districts. And although the remedy provided by the North Carolina courts is not properly before this Court in this case (*see* State Resp. Br. 21–22), it follows that the issuance of proper judicial remedies in such cases similarly does not infringe on the legislature's power to regulate the manner of holding elections. Courts, federal or state, that adjudicate cases and provide judicial remedies do not improperly assume the power of the legislature to enact laws regulating elections.

II. State legislatures do not act independently of state constitutional constraints when fulfilling their duty under the Elections Clause to enact state laws governing congressional elections.

Because petitioners concede that the Elections Clause does not deprive state courts of competence to review state redistricting legislation, their case rests entirely on a different argument: that the Elections Clause preempts state constitutional provisions that apply to the exercise of a state's legislative authority to regulate the time, place, and manner of congressional elections. As respondents' briefs demonstrate, that argument is unsupported by the language of the Clause, historical practice that illuminates the intentions of the Framers, and practice and precedent throughout the history of the United States.

Petitioners' argument also rests heavily on a proposition that they assert as self-evident but that is unsupported by either logic or authority: their assertion that, just as *Congress* is "obviously independent of any state constitutional limits" when it exercises "power vested in it by" the U.S. Constitution, "[s]o too," state legislatures are not bound by their own constitutions when performing their duty under the Elections Clause to enact laws regulating the congressional elections. Pet. Br. 23–24. For that proposition, petitioners *seem* to rely on Chief Justice Rehnquist's concurring opinion in *Bush v. Gore*, 531 U.S. 98, 112 (2000). According to petitioners, "when 'the Constitution imposes a duty or confers a power on a particular branch of a State's government,' *Bush*, 531 U.S. at [112] (Rehnquist, [C.J.], concurring), that branch's exercise of the power 'cannot be controlled by' the 'constitution and laws of the respective states.' *Id*." Pet.

Br. 23–24. The *Bush* concurrence says no such thing. The sentence in petitioners' brief is a mash-up of a phrase from the *Bush* concurrence, which starts the sentence, and two phrases from *McCulloch v. Maryland*, 17 U.S. 316, 426 (1819), which end it.[2] Put together in that fashion, the phrases appear to state a proposition that is neither found in, nor supported by, either the *Bush* concurrence or *McCulloch*.

Rather, Chief Justice Rehnquist's concurrence in *Bush* nowhere suggests that a state legislature is not subject to the constitution and laws of its state when enacting legislation regulating the manner of conducting a federal election.[3] Indeed, whether the Florida legislature was subject to state constitutional constraints in enacting legislation determining the manner of conducting federal presidential elections was not even at issue in *Bush*. The passages in the *Bush* concurrence cited by respondents asserted only that this Court had the authority to review a state court's interpretation of state law in that context to ensure that a claimed statutory construction was not a subterfuge for invading the legislative role. *Bush*, 531 U.S. at 112. And even that far more modest proposition was endorsed only by three Justices.

As for *McCulloch*, it likewise said nothing about whether state governmental bodies must act without regard to their own constitution and laws when carrying out duties or functions under the U.S.

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[2] *McCulloch* is cited on the previous page of petitioners' brief, before the citation to *Bush v. Gore*, and the use of "*id.*" presumably reflects an error in the editing process.

[3] *Bush* involved the Presidential Electors Clause, art. II, § 1, cl. 2, which provides that state legislatures shall enact laws directing the manner of appointing Presidential electors.

Constitution. Rather, the phrases from *McCulloch* that respondents join with the prefatory phrase from the *Bush* concurrence state only that the Supremacy Clause establishes the "great principle," that "the constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective states, and cannot be controlled by them." *McCulloch*, 17 U.S. at 426. *McCulloch* said nothing to suggest that *state governments* and *state laws* cannot be controlled by their own constitutions when carrying out functions under the U.S. Constitution.

Thus, respondents cite *no authority* for the analytical move that is key to their argument—the assertion that because state constitutional constraints do not apply to the federal government when it exercises powers under the Constitution, it follows that state constitutional constraints cannot apply to state laws enacted by state legislatures under the Elections Clause. Petitioners' inability to muster support for the syllogism they proffer is no accident: The reason that state constitutions are wholly inapplicable to Congress and other organs of the federal government does not support the assertion that state constitutions are inapplicable to state governments and state laws. As this Court has long recognized, the Constitution's creation of a sovereign federal union under a government that, "within its own sphere," is "supreme," necessarily "exempts [that government's] operations from [the] influence" of "power vested in subordinate governments." *McCulloch*, 17 U.S. at 427. That is, "there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which

exerts the control." *Id.* at 431. Put more succinctly, "the activities of the Federal Government are free from regulation by any state," *Mayo v. United States*, 319 U.S. 441, 445 (1943), because a "subordinate sovereign" cannot control the government of the United States without its consent, *Hancock v. Train*, 426 U.S. 167, 179 (1976). As this Court put it most recently, "[t]he Constitution's Supremacy Clause generally immunizes the Federal Government from state laws that directly regulate or discriminate against it." *United States v. Washington*, 142 S. Ct. 1976, 1982 (2022).

There is no similar repugnance in subjecting a state's legislative power, the state governmental bodies that exercise it, or the resulting state laws to the authority of the state's constitution. States do not cease to be states when they fulfill duties imposed on them by the U.S. Constitution. On the contrary, as this Court long ago recognized, even when "act[ing] under and pursuant to the constitution of the United States," state legislators and other state actors do not act as "officers or agents of the United States." *Fitzgerald v. Green*, 134 U.S. 377, 379 (1890). State legislative regulation of the manner of federal elections is, in the first instance, a matter of "the power and jurisdiction of the state," *McPherson v. Blacker*, 146 U.S. 1, 36 (1892), not an exercise of federal government authority immune from state regulation.

Petitioners' claim that state governmental bodies, when carrying out their duties under the U.S. Constitution, necessarily cease to function as state actors and acquire the federal government's immunity from state constitutional and legal constraints is contrary to familiar principles governing the most common setting in which state institutions carry out such federal duties: state-court adjudication of federal claims. This

Court has long held that, absent a federal statute granting exclusive jurisdiction to federal courts, the Supremacy Clause compels state courts of competent jurisdiction to adjudicate federal claims, as well as to follow federal law when it is applicable to the matters before them. *See*, *e.g.*, *Haywood*, 556 U.S. at 734–35; *Howlett*, 496 U.S. at 367; *Tafflin*, 493 U.S. at 458; *Claflin v. Houseman*, 93 U.S. 130, 136–37 (1876). Thus, just as the Elections Clause and the Presidential Electors Clause of Article II, § 1, cl. 2, instruct states to use their pre-existing legislative authority to enact laws regulating the manner of electing Senators, Representatives, and presidential electors, the Supremacy Clause requires state courts to adjudicate matters turning on federal law by exercising the judicial power they already possess.

That constitutional instruction does not, however, turn a state's courts into federal courts when they adjudicate federal issues or render the state's constitution and laws inapplicable to their actions. State courts, for example, are not subject to Article III standing requirements when deciding federal claims. *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("[T]he constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or, in this case, a federal statute."). State courts apply their own laws concerning original and appellate jurisdiction and the structure of their judicial systems. *See Johnson v. Fankell*, 520 U.S. 911, 918–23 (1997). And state courts may provide different or additional remedies for violations of federal law than would be available in federal court.

See Danforth v. Minnesota, 552 U.S. 264, 288 (2008) ("[T]he remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law.").

As these cases illustrate, state governmental bodies that exercise authority or perform duties under the Constitution do not, unlike the federal government, do so independently of the obligations imposed on them by their governing state constitutions and laws. Rather, they do so *subject to* state law, except when state law is "contrary" to the U.S. Constitution or laws made under its authority. Only in those circumstances does the Supremacy Clause displace otherwise applicable requirements of state constitutions and laws. *See* U.S. Const., art. VI, cl. 2. In the context of state-court adjudication of federal claims, such conflict between state and federal law generally arises when state laws discriminate against federal claims or contradict an affirmative requirement or mandatory limitation imposed by federal law. *See Howlett*, 496 U.S. at 369–71. These examples reflect the generally applicable principle that "when federal and state law conflict, federal law prevails and state law is preempted." *Murphy v. NCAA*, 138 S. Ct. 1461, 1476 (2018).

The same principle applies here. The Elections Clause and its counterpart, the Presidential Electors Clause of Article II, do not confer a new form of authority on state legislatures. By their express terms, both clauses invoke the states' already existing authority to enact legislation and direct that authority to specific subjects as to which the Constitution creates a need for regulation: congressional and presidential elections. The language of the Elections Clause—calling for legislatures to "prescribe" what it terms "regulations" governing the "manner" in which

elections are to be held, U.S. Const., art. I, § 4, cl. 1—plainly requires the enactment of laws, which is how legislatures prescribe binding regulations. That the Clause uses a term used elsewhere in the Constitution to describe Congress's power to enact laws—"regulation," *id.*, art. I, § 8, cls. 3, 5, 14; art. III, § 2, cl. 2; art. IV, § 3, cl. 2—underscores that it calls for the exercise of the already existing lawmaking authority of the states' legislative institutions.[4] Thus, as this Court held in *Smiley v. Holm*, 285 U.S. 355 (1932), the Elections Clause did not confer on state legislatures any "function different from that of lawgiver," but instead "contemplated" performance of the function that they already performed: "that of making laws." *Id.* at 365–66. *Smiley* thoroughly parsed the language of the Clause and explained that both its description of the "subject matter" to be regulated and its specification of the "method of action"—prescription by the legislature—"point[ ] to the making of laws." *Id.* at 367; *accord Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 808 (2015); *Hawke v. Smith*, 253 U.S. 221, 231 (1920); *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916).

Just as a state court fulfilling its duty to adjudicate cases under federal law retains its essential nature as a state entity defined by the state's constitution and laws, a state legislature fulfilling its duty to enact laws to regulate the manner in which congressional elections are held remains a creature of the state

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[4] The Presidential Electors Clause similarly invokes the states' legislative authority to "direct" the "manner" in which presidential electors are appointed, terms that clearly call on the states to exercise, with respect to that subject matter, their already extant power to enact laws. *See McPherson*, 146 U.S. at 25.

subject to the state constitutional provisions and principles that define and constrain its lawmaking powers. By invoking the states' lawmaking authority to perform a federal function, the Constitution necessarily incorporates a presumption that, "in the absence of an indication of a contrary intent, … the exercise of the authority must be in accordance with the method which the state has prescribed for legislative enactments." *Smiley*, 285 U.S. at 367. The Elections Clause's conferral of a duty to exercise the states' lawmaking authority on a specific subject does not imply "an attempt to endow the Legislature of the state with power to enact laws" outside of state constitutional limits on that authority. *Id*. at 368. Rather, the Elections Clause contemplates that state legislatures will perform their function "in accordance with the State's prescriptions for lawmaking." *Arizona*, 576 U.S. at 808. Only in the event of an actual conflict between state and federal law must the state's constitution and laws give way under the Supremacy Clause.

No such conflict is apparent here. The existence of constitutional "check[s]" on legislation, in themselves, "cannot be regarded as repugnant to the grant of legislative authority." *Smiley*, 285 U.S. at 368. Nothing in the text of the Elections Clause points to any substantive or procedural requirements of state constitutional law governing the enactment of state laws that are incompatible with its fundamental requirement that elections proceed under laws enacted pursuant to the states' legislative authority. State constitutional principles, both procedural and substantive, through which the people instruct their state's legislative institutions *how* to legislate are not contrary to the Election Clause's requirement *that* they legislate. Indeed, even the dissenting Justices in the *Arizona* case

acknowledged that states may adopt principles that define "the legislature's role in the legislative process" as long as they do not "*supplant* the legislature altogether." *Arizona*, 576 U.S. at 841 (Roberts, C.J., dissenting).[5] The application of state constitutional guarantees of free elections to redistricting legislation neither supplants the role of the legislature in enacting redistricting laws in the first instance nor is contrary to the Elections Clause in any other respect.

Ordinary Supremacy Clause principles therefore dictate the conclusion that the Elections Clause does not preempt application of the substantive principles of state constitutional law relied on by the North Carolina Supreme Court to overturn state laws enacted by the General Assembly in an attempt to fulfill its duty of prescribing regulations of the manner of conducting congressional elections. Put another way, because "nothing in the Constitution prevents States" from requiring that their own laws governing congressional elections conform with their constitutions, the states retain the power to do so. *Chiafalo v. Washington*, 140 S. Ct. 2316, 2335 (2020) (Thomas, J., concurring in the judgment).

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[5] The disagreement between the majority and dissenters in the *Arizona* case centered on whether Arizona had "supplanted" the role of the legislature by enacting legislation through an initiative that assigned redistricting to an independent commission—a disagreement that turned in large part on whether the term "state legislature" includes the exercise of the legislative power directly by voters, as the majority held. That issue is not present here, and there is no argument that the constitutional principles applied by the North Carolina Supreme Court supplant the legislature altogether under either the *Arizona* majority's or the dissenters' understanding of the term "state legislature."

Critically for this case, moreover, the applicability of state constitutional principles to state legislation under the Elections Clause does not turn on whether those principles are categorized as procedural or substantive. Recognizing that the claim that state constitutions are categorically inapplicable to Elections Clause legislation is at odds with *Smiley* and *Hildebrant*, petitioners suggest as a fallback that procedural provisions of state constitutions may apply to state legislatures' enactment of laws regulating federal elections, but substantive provisions do not. That fallback position, however, belies their own submission that state legislatures take on the federal government's immunity from control by state constitutions and laws when they act under the Elections Clause. Once that fundamental premise of their argument is abandoned, there remains no basis for holding substantive state constitutional provisions inapplicable to state Elections Clause legislation. Under the Supremacy Clause, what matters is whether a state constitutional provision conflicts with the U.S. Constitution or federal law, not whether it is procedural or substantive. And nothing in the Elections Clause conflicts with either procedural or substantive state constitutional provisions that constrain the legislature but do not displace it.

CONCLUSION

This Court should affirm the judgment of the Supreme Court of North Carolina.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org
Attorneys for Amicus Curiae

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