No. 21-1271

IN THE

SUPREME COURT OF THE UNITED STATES

REPRESENTATIVE 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 North Carolina Supreme Court

BRIEF AMICUS CURIAE FOR THE PUERTO RICO HOUSE OF REPRESENTATIVES IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The appearing *amicus curiae*, the Hon. Rafael Hernández-Montañez, has held, since January 2021 the position of Speaker of the Puerto Rico House of Representatives. The House of Representatives is the oldest democratic institution in Puerto Rico, created by the 1900 Organic Act, 31 Stat. 77[2]. This Nineteenth Legislative Assembly[3] is the most diverse in modern Puerto Rico's history with 5 different political parties having elected members to the House. Pursuant to Article 5.2(p) of the current House Rules (House Resolution 161), the Speaker is authorized to make court appearances on behalf of the legislative body.

Under Speaker Hernández-Montañez' leadership, the House has been a staunch and passionate advocate of legislative prerogatives and has appeared both as a party and as *amicus* in multiple judicial proceedings to contest the encroachment of its prerogatives by the Financial Oversight and Management

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[1] As the record shows, all parties have issued blanket consent statements regarding the appearance of *amici*. *Amicus* hereby further certifies, as per this Honorable Court's Rule 37.6 that no party or counsel for a party has authored any part of the foregoing brief nor has any of the parties and/or their attorneys made a monetary contribution to fund the filing of this brief. No person other than the *amicus* or his counsel have made a monetary contribution to its preparation or submission.

[2] Under this legislation the "House of Delegates", as it was then called, was the only government institution whose members were selected through popular vote as all other components of the territorial government were either appointed by the President of the United States or by the Governor.

[3] Although the House has been in continuous operation since 1900, the Number Nineteen corresponds to the terms since the post-1952 constitutional era. Both houses of the Puerto Rico Legislature serve 4-year terms with elections held on November of every leap year and the elected bodies being inaugurated on January 2nd of the post-election year.

Board for Puerto Rico, created under the Puerto Rico Oversight, Management and Financial Stability Act, 48 U.S.C. § 2101, et seq[4]. While, at first blush, petitioners would seem to be advocating a defense of state legislative prerogatives and thus acting in a manner that is consistent with the policies usually supported by the *amicus*, upon closer examination, this case is about an unauthorized power grab that is incompatible with the basic constitutional design for state governments that every state in the Union maintain a republican form of government. U.S. Const. Art. IV, § 4. The American federal republic was designed with a federal and a state government that have distinct roles. There is no such thing as a federal entity that performs a state role or, as petitioners propose, a state entity that performs federal duties. More importantly, there is no state legislation that is either unconstrained by the state's constitutional provisions or immune from review by the state courts.

The delegation of the authority to set the rules governing federal elections within the state (including the task of carrying out congressional redistricting) cannot be conceived as an authorization for state legislatures to ignore the provisions of the state constitutions under which they are created nor to prevent the exercise of its coequal branches, particularly the state's judiciary's exercise of its main duty of rendering binding interpretations of state law. Because such a result would be utterly inconsistent with the Founder's design, legal precedent and the most fundamental tenets of democracy, the Puerto Rico House of Representatives supports respondents' position in this case.

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[4] *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1655 (2020) (explaining the Board's creation and role).

SUMMARY OF ARGUMENT

In the instant case, petitioners advance a perilous proposition during a time in which American democratic institutions are under unrelenting attack. Those institutions barely held in 2020 when state legislators in key swing states were pressured to certify "alternate" slates of presidential electors on the grounds of "voter fraud" allegations that the losing candidate soundly and consistently lost dozens of state and federal cases espousing the same arguments under which lawmakers were being pushed. While the instant case is based on a different constitutional clause regarding the regulation of congressional elections, in both instances the Founders deferred to state legislatures. In this important respect, the outcome of the instant case will very likely play a key part in the next dispute regarding a presidential election and may even encourage antidemocratic behavior by disappointed majority members in a state legislature whose party lost a statewide race.

In the case at bar, the legislative leadership and other members of both chambers of the North Carolina General Assembly attempt to cast their Supreme Court's striking of a congressional redistricting map as unconstitutional under that state's Carta Magna as a *usurpation* of the legislature's prerogatives under the Elections Clause (U.S. Const. Art. I, § 4, cl. 1). In reality what occurred was nothing more than a state court carrying out its most primordial constitutional duty of reviewing state legislative actions to ensure that they pass constitutional muster.

Being creatures of the respective state constitutions, state legislatures cannot invoke the Elections Clause to act in a manner that is unconstrained by the state's founding document. Nothing that this Honorable Court has ever said supports petitioners' argu-

ment that state legislators are federalized or deputized when acting under the Elections Clause. Quite to the contrary, the Court has held that the state's exercise of authority under the Elections Clause is not limited to the traditional concept of a legislative decree and includes, where applicable, constitutional provisions and ballot initiatives. Moreover, in the very recent decision that established that there is currently no possible justiciable federal claim for partisan gerrymandering, the Court explicitly recognized that states may and have placed restrictions on their legislatures' discretion to draw congressional districts, restrictions that obviously may only be enforced by the state courts.

ARGUMENT

In seeking the unheard-of remedy of being allowed to legislate federal electoral matters that are shielded from any possible judicial review by the courts of its state, petitioners contend that because the Elections Clause (U.S. Const. Art. I, § 4, cl. 1) *delegated* this task, such delegation somehow turns state legislatures into federal actors performing a federal duty and, consequently, unconstrained by their state constitutions. *See* Petitioner's Brief at 22-26.

The instant case arises from a dispute regarding a gerrymandered redistricting proposal that was successfully challenged in the courts of North Carolina, all the way up to its highest tribunal. Article II, Section 1 of the North Carolina State Constitution provides that "[t]he legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives". On the other hand, Article IV, Section 1 of that very same document codifies basic separation of powers principles by establishing that "[t]he General Assembly *shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to*

it as a co-ordinate department of the government, nor shall it establish or authorize any courts other than as permitted by this Article" (emphasis added). In other words, petitioners are asking for this Honorable Court to grant them that which is expressly denied by their founding document.

As an initial matter, petitioner seems to suggest that the Framer's choice of language in referring to "state legislatures" instead of "the states" shows a desire to leave the remaining two branches of the state governments or at least the state judiciary, away from processes carried out under the Elections Clause. Reference to a matter being "determined by the state legislature" has traditionally been understood as meaning that the issue is to be regulated *by the state, through legislation*. This is precisely the interpretation that stems from this Honorable Court's precedent. *See e.g. Arizona v. Inter Tribal Council of Ariz., Inc.,* 570 U.S. 1, 8 (2013) ("The Elections Clause has two functions. *Upon the States* it imposes the duty ("shall be prescribed") to prescribe the time, place, and manner of electing Representatives and Senators; upon Congress it confers the power to alter those regulations or supplant them altogether") (emphasis added).

State legislatures cannot, for even one second, act in a manner that does not conform to the state constitution. As this Honorable Court has observed since the very early days of the Republic:

> What are Legislatures? *Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void.* The Constitution is the work or will of the People themselves, in their original, sovereign, and unlimited capacity. Law is the

> work or will of the Legislature in their derivative and subordinate capacity. The one is the work of the Creator, and the other of the Creature. *The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move.* In short, gentlemen, the Constitution is the sun of the political system, around which all Legislative, Executive and Judicial bodies must revolve. Whatever may be the case in other countries, yet in this there can be no doubt, that *every act of the Legislature, repugnant to the Constitution, as absolutely void*.

Vanhorne's Lessee v. Vance, 2 U.S. 304, 308 (1795) (emphasis added)

In other words, "[a] state, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and *organized under a government sanctioned and limited by a written constitution*, and established by the consent of the governed". *Texas v. White*, 74 U.S. (7 Wall.) 700, 721 (1868).

The North Carlina Legislature, as that of all other 49 states and the Commonwealth of Puerto Rico[5] exists only because the state constitution willed it so. It necessarily follows that a state legislature's adherence to its founding document cannot be set aside when it acts pursuant to the Elections Clause. When prescribing the "Times, Places and Manner of holding Elections for Senators and Representatives" under the Elections Clause, state legislatures are not acting as *federal deputies*, but rather exercising their

[5] On July 25, 1952, Puerto Rico became the first and so far, only territory to handle its internal affairs pursuant to a constitutional regime. Puerto Rico v. Sánchez Valle, 579 U.S. 59, 63-65 (2016).

policy-making roles under the state constitution to enact state law. U.S. Const. Art. I, § 4, cl. 1. What the U.S. Constitution merely does is *defer* to how the people of each state, represented by their legislature, understands should be the appropriate way to conduct federal elections. This deference is, of course, not absolute, as the constitutional text itself provides that "*the Congress may at any time by Law make or alter such Regulations*" *Id.* (emphasis added). The primordial example of Congress stepping in to preempt electoral legislation devised by the states is the adoption of the Voting Rights Act of 1965, 52 U.S.C. § 10301, et seq., as an effort to erase the remaining vestiges of post-reconstruction voter suppression of the so-called "Jim Crow" era.

Petitioner's brief goes out of its way to argue that the U.S. Constitution contains a system of "carefully drawn lines [that] place the regulation of federal elections *in the hands of state legislatures, Congress, and no one else*". Petitioners' Brief at 4 (emphasis added). Obviously the judiciary need not be mentioned by name for it to exercise judicial review when a legislative act is challenged through a justiciable legal action. Federal electoral legislation is quite frequently challenged in Court, sometimes successfully. For a recent example, in *Shelby County v. Holder*, 570 U.S. 529, 556-557 (2013), this Honorable Court held that the "preclearance" requirements in Section 4(b) of the Voting Rights Act, 52 U.S.C. § 10303(b)[6], were unconstitutional, as applied to current conditions on the ground in the covered jurisdictions. In other words, the federal judiciary exercised its role to hold

[6] This provision required certain states with a proven history of voter suppression along racial lines to eliminate certain "tests and devices" required from voters and subjected new regulations regarding various aspects of voting and registration to first be cleared by the U.S. Attorney General and the Census Bureau.

Congress to the limitations of its founding document, notwithstanding the fact that it is not mentioned in the Elections Clause. In the sense that petitioners purport to be able to act free from the constraints of the state's founding document, they seek a privilege that not even Congress enjoys. Of course, petitioners attempt to cast themselves as not opposed to state legislation enacted under the Elections Clause being subject to judicial review by arguing that they agree to such review, so long as it is limited to the U.S. Constitution, without regard to the state constitution. We now explain why this is untenable.

When a state legislature exercises its authority to regulate the times, places and manner of federal elections, it does not act within the confines of a nationwide council of state legislatures that crafts a uniform national standard, but rather to create policies that are unique to that state and confined to its boundaries. *Hawke v. Smith*, 253 U.S. 221, 230 (1920) (observing that "the power to legislate in the enactment of the laws of a State is derived from the people of the State").

The reiterated legal rule is that, like any other legislation of state-wide application, the regulation of state laws is a legislative action that is not restricted to the legislative body and obviously includes state constitutional provisions and binding ballot initiatives. Precisely as a reiteration of this basic legal rule, in *Ariz. State Legis. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 804-809 (2015), held that, as per the Arizona Constitution, a ballot initiative transferring congressional redistricting authority from the state legislature and delegating it to an independent commission *is compatible with the Elections Clause*. This is a square and unambiguous rejection of petitioner's theory that the Elections Clause immunizes state legislatures from the limitations that upon its powers are imposed by the state constitution and

other binding sources. For obvious reasons, petitioners do not devote much time to discussing this decision except at page 40 of their brief, which includes a discrete footnote inviting for the case to be overruled and the assertion that "a 'State's prescriptions for lawmaking,' *id.* at 808 (majority), *do not* include the adjudication of cases or controversies in the state courts" (emphasis in the original). In other words, the thesis seems to be that, although the state's prescriptions for lawmaking need to be followed under the Elections Clause, the state judiciary has no role in the process. This completely glosses over the fact "[s]tate courts are quite as capable as federal courts of determining the facts, and *they alone can define and interpret state law*". *Schlesinger v. Councilman*, 420 U.S. 738, 755 (1975) (emphasis added). Hence, to the extent that petitioner reluctantly admits that a state legislature's authority under the Elections Clause is limited by state constitutional constraints, such constraints must necessarily be enforced by the arbiter of state law: its judiciary.

The above reasoning is entirely consistent with this Honorable Court's precedent. In *Caroll v. Becker*, 285 U.S. 380, 381-382 (1932), this Honorable Court affirmed a ruling by the Supreme Court of Missouri concerning the validity of state legislation enacted pursuant to the Elections Clause. Much more recently, in *Rucho v. Common Cause*, 139 S. Ct. 2484, 2507-2508 (2019), the Court held that there is no recourse against partisan gerrymandering in *federal* court but that state constitutions may and have taken measures to avoid such undemocratic conduct. To the extent that the *Rucho* Court held that state constitutions may validly establish limitations to federal redistricting while noting the absence of any such restrictions under the U.S. Constitution it is unavoidable to conclude that such restrictions, where they exist, *may only be enforced by the state courts*. The most recent,

highly consequential, state court decision on this matter was issued just a few months ago by the State of New York's highest tribunal, which held that a democrat-friendly congressional redistricting map did not comply with a state constitutional provision that was introduced in 2014, via amendment. *Harkenrider v. Hochul*, 204 A.D. 3d 1366, 167 N.Y.S. 3d 359 (N.Y. App. 2022).

The existence on-point authority in which this Honorable Court recognizes a role for the state courts in processes under the Elections Clause, obviates the need for petitioners to invoke -ultimately unavailing[7]- cases under the Presidential Electors Clause (U.S. Const. Art. II, § 1, cl. 2).

CONCLUSION

In conclusion, the Elections Clause simply establishes that national congressional elections shall be held in the times, places and manner to be, in the first instance, determined by the state legislatures, in other words, through state law. State laws can only be valid when they adhere to the state's constitution, an exercise the compliance with which may only be determined by the state courts. Were petitioners to be

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[7] At pages 41-42 of their brief, petitioners cite to *McPherson v. Blacker*, 146 U.S. 1 (1892); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000) (per curiam); and to one of the concurring opinions in *Bush v. Gore*, 531 U.S. 98 (2000). None of these cases carry petitioner's position anywhere near to where they would like to go. *McPherson* involved a state law that employed a district-by-district approach of choosing presidential electors that was counter to the federal constitutional design. *McPherson*, 146 U.S. at 24-27. None of the cases regarding the razor-thin margins by which the 2000 presidential election was decided in Florida suggests that state courts (the point of origin in both cases) have no role in presidential elector disputes, which is the crux of the instant case.

allowed to legislate unconstrained by the one enforcement mechanism for the North Carolina Constitution, Justice Marshall's words to the effect that "[i]t is emphatically the province and duty of the judicial department to say what the law is"[8] would be rendered devoid of any practical meaning.

Respectfully submitted,

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[8] *Marbury v. Madison*, 5 U.S. 137, 177, 1 Cranch 137 (1803)