Supreme Court Set to Hear Term's Most Consequential Elections Case

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(Photo by Dan McCue)

WASHINGTON — The Supreme Court on Wednesday will hear perhaps its most consequential elections case of the term, one that could dramatically increase the power state legislatures have in how federal electoral contests are carried out.

The case, *Moore v. Harper*, out of North Carolina, tests an atypical approach to state legislative power over congressional elections called the independent state legislature theory.

Adherents of the theory hold that the U.S. Constitution gave state legislatures absolute power over congressional elections, regardless of any constraints imposed by their own state constitutions.

The question the justices have been asked to decide is whether state election laws and political district maps passed and/or adopted by state legislatures should continue to be subject to judicial review in state courts.

If the court decides the independent state legislature theory is valid — effectively striking down state courts' ability to intervene in election cases — it would have sweeping impacts on efforts to advance election freedoms and curb electoral gerrymandering nationwide.

Given the stakes, it's no surprise that several groups, including Common Cause, the National Redistricting Foundation, the Southern Coalition for Social Justice and the North Carolina League of Conservation Voters, plan to rally outside the court Wednesday morning.

While several of the protesting groups argue the fruits of gerrymandering are all too obvious, with 28 state legislatures having Republican majorities, 19 Democratic and two that are split, they are also concerned that the current conservative tilt of the court will make it more likely to endorse a theory favored by some hardcore conservatives.

In recent court history, the theory made its highest-profile appearance in former Chief Justice William Rehnquist's concurring opinion in *Bush v. Gore*.

Rehnquist at the time was concurring with a per curiam decision reversing the Florida Supreme Court's order requiring manual recounts in the 2000 presidential election.

In his concurrence, the chief justice invoked the elections clause, which says a state's legislature has authority to regulate federal

elections, including drawing legislative maps for congressional districts.

That clause is the basis upon which legislative leaders and other state officials claim state legislatures have the power to do whatever they want in terms of regulating elections.

Voting-rights groups maintain that the word "legislature," as used in the clause, refers to the entire state lawmaking apparatus, consistent with state law and the state constitution, as interpreted and enforced by the state courts.

Only one justice who joined Rehnquist's concurrence remains on the court — Justice Clarence Thomas. But that is not to suggest the independent state legislature theory has been moldering on some shelf the past 22 years.

In 2015, Chief Justice John Roberts passionately defended a version of the theory in his dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.

In that dissent, Roberts chewed over the text, history and precedent of the elections clause to argue that an independent redistricting commission, created by a voter-driven ballot initiative, impermissibly stripped authority from the state legislature to draw congressional districts.

However, the chief justice was only willing to go so far, and he allowed that there may be some instances where restrictions on a state legislature's power might be warranted.

He was joined in his dissent by two of his current colleagues, Thomas and Justice Samuel Alito Jr.

Nevertheless, the court in that case, after its own lengthy examination of the text, history and precedent of the elections

clause, flatly rejected the theory.

Most recently, in this very case, the theory had an appearance when the court first declined to intervene on an emergency basis.

At the time — last March — the applicants were asking justices to order North Carolina to change its existing congressional election districts for the upcoming 2022 primary and general elections.

Ultimately, the justices concluded there simply was no time left for that to happen without disrupting the elections cycle.

Justice Brett Kavanaugh concurred, but wrote that "the underlying elections clause question … is important" and that the court should "definitively resolve it."

Alito, joined by Thomas and Justice Neil Gorsuch, dissented.

In that dissent, Alito wrote, "Both sides advance serious arguments, but based on the briefing we have received, my judgment is that the applicants' argument is stronger.

"The question presented is one of federal not state law because the state legislature, in promulgating rules for congressional elections, acts pursuant to a constitutional mandate under the elections clause," he continued.

"And if the language of the elections clause is taken seriously, there must be some limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections. I think it is likely that the applicants would succeed in showing that the North Carolina Supreme Court exceeded those limits," Alito wrote.

Stepping out of the legal theory and into the real world, what North Carolina Republicans are seeking in the narrowest terms is to restore a map of the state's 14 congressional districts that the state Supreme Court ruled earlier this year was an unconstitutional political gerrymander.

But North Carolina Gov. Roy Cooper, a Democrat, has said ruling in favor of the GOP legislators would "give them a free ticket to do what they want."

He has noted that the strongest version of the theory says that state legislatures have absolute control over elections, an interpretation that would deny governors like himself, courts, election administrators or independent redistricting commissions any say in how election-related matters are handled.

As for what Republicans in his state want, Cooper has offered a list that includes more gerrymandering, the elimination of same-day voter registration, a shorter period for early voting and stricter voter ID requirements.

On Sunday, former Attorney General Eric Holder spoke about the case with Margaret Brennan on CBS' "Face the Nation."

During their segment, Holder noted that not all Republicans agree with the petitioners in *Moore*, and that many are divided on the validity of the theory and many conservative scholars, along with Republican lawyers and judges, have rejected it.

They did so, he said, because, "This is a very, very dangerous theory.

"It would put our system of checks and balances at risk," he said.

In a subsequent written statement, released through the National Redistricting Foundation, Holder said with *Moore*, "North Carolina Republicans are using a truly fringe legal theory to try to undermine our system of checks and balances – an extreme and dangerous move in response to the North Carolina Supreme Court decision that held them accountable for violating the state constitution.

"This should not be a difficult decision for the Court in favor of the respondents, one that would protect voters against extreme efforts to manipulate federal elections," he continued. "Anything less than that is unacceptable. Should the Court endorse the petitioners' theory, it would not only damage a cornerstone of our democracy, it could unleash a level of gerrymandering from both parties across the country that would do incalculable damage to our democracy.

"Simply put: an embrace of the so-called independent state legislature theory would be bad for the nation," Holder said. "That plain fact is underscored by the overwhelming bipartisan opposition to the petitioners' arguments, as well as more than a century of precedent, including the recent *Rucho* decision that explicitly recognized state courts' power to interpret and enforce their state's own constitution and laws, including to rein in partisan gerrymandering.

"It is my hope that the Court applies the law without agenda and rejects this fringe idea once and for all in order to protect our essential and long recognized system of checks and balances," he concluded.

Voting-rights groups fear a ruling upholding the independent state legislature theory would immediately void court rulings in several states including North Carolina, Pennsylvania and

Maryland that resulted in "fairer" electoral districts ahead of the midterm elections.

Similarly, such a ruling could invalidate the citizen ballot initiatives that created independent redistricting commissions in California and Michigan, or that expanded voting rights in states like Arizona and Oregon.

Some have even suggested that state legislatures could read a ruling endorsing the independent state legislature theory as authorizing them to appoint presidential electors any way they see fit, irrespective of the popular vote in their state — the very reading former President Donald Trump and his supporters touted when they tried to persuade certain state legislatures to appoint their electors to him in the 2020 presidential election.

In the end, however, the justices could issue a ruling without determining the precise scope of a state legislature's authority.

Writing in a preview of the case for the American Bar Association, Steven D. Schwinn, professor of law at the University of Illinois Chicago School of Law and co-editor of the "Constitutional Law Prof Blog," suggested two possibilities:

One way it could do this would be to conclude that the North Carolina Legislature properly regulated federal elections by delegating authority to review congressional redistricting to the state courts, he wrote.

Or it could also simply acknowledge that the state legislature has regulated congressional elections and that the state's law-making apparatus acted consistently with its regulatory scheme.

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