SIDEBAR

Supreme Court May Hear '800-Pound Gorilla' of Election Law Cases

Next week the justices will consider whether to resolve a long-simmering dispute about the power of state legislatures in federal elections.

By Adam Liptak

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WASHINGTON — In October 2020, with the presidential election looming, four conservative justices issued opinions that seemed prepared to endorse a legal theory that would radically reshape how federal elections are conducted. The theory would give state legislatures independent power, not subject to review by state courts, to set election rules at odds with state constitutions, and to draw congressional maps warped by partisan gerrymandering.

But the Supreme Court did not resolve the existence or scope of the theory, often called the independent state legislature doctrine, in cases concerning the 2020 election.

The question arose again this March in an emergency application from Republicans in North Carolina who wanted to restore a voting map drawn by the State Legislature and rejected as a partisan gerrymander by the State Supreme Court.

"The question presented here," the application said, "goes to the very core of this nation's democratic republic: what entity has the constitutional authority to set the rules of the road for federal elections."

Three justices said they would have granted the application.

"This case presents an exceptionally important and recurring question of constitutional law, namely, the extent of a state court's authority to reject rules adopted by a state legislature for use in conducting federal elections," Justice Samuel A. Alito Jr. wrote, joined by Justices Clarence Thomas and Neil M. Gorsuch.

Justice Brett M. Kavanaugh agreed that the question was important. "The issue is almost certain to keep arising until the court definitively resolves it," he wrote.

But he said the court should consider it in an orderly fashion, outside the context of an approaching election. He wrote that the court should grant a petition seeking review on the merits "in an appropriate case — either in this case from North Carolina or in a similar case from another state."

The petition in the case from North Carolina, Moore v. Harper, No. 21-1271, has now arrived at the court, and the justices are set to consider whether to grant review at their private conference next week. It takes only four votes to grant review, and four justices have already indicated that they are interested in the case.

Indeed, the court seems to be itching to act. When the parties urging the court to deny review asked for a 60-day extension to file their briefs, the court granted them just 30 days, ensuring that it could consider the petition before the justices leave for their summer break. If the court grants review this month, the case could be argued in the fall and decided in 2023.

The consequences of the decision could be enormous, said Richard L. Hasen, a law professor at the University of California, Irvine, who is about to relocate to U.C.L.A.

“The independent state legislature theory has been an 800-pound gorilla brooding in the background of election law cases working their way up from state courts,” he said.

“In its most extreme form, it would not only rework the balance of power in protecting voting rights in states from state supreme courts and executive agencies to state legislatures,” he said. “It would also give the Supreme Court a potential excuse to interfere with presidential election results any time a state court or agency has relied on a state constitution to give voters more protections than those afforded by the U.S. Constitution.”

The North Carolina case concerns the Constitution’s Elections Clause. It says: “The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof.”

That means, the pending petition argued, that the state legislature has sole responsibility among state institutions for drawing congressional districts and that state courts have no role to play.

Phil Strach, an attorney for Republican legislators in North Carolina, in January. The North Carolina case concerns the Constitution’s Elections Clause, and argues that state legislatures have sole responsibility among state institutions for drawing congressional districts. Travis Long/The News & Observer, via Associated Press

Lawyers defending the North Carolina Supreme Court’s ruling said that was a profound misreading of the clause. They added that the case was a poor vehicle for resolution of the question, as the legislature had itself authorized state courts to review redistricting legislation.

They cited a new article by two prominent constitutional scholars — Vikram David Amar, the dean of the University of Illinois College of Law, and Akhil Reed Amar, a law professor at Yale — to be published in The Supreme Court Review. It argued that focusing on the word "legislature" in isolation did violence to the original meaning of the clause.

"The public meaning of state 'legislature' was clear and well accepted at the founding: A state's 'legislature' was not just an entity created to represent the people; it was an entity *created and constrained by the state constitution*," the two professors, who are brothers, wrote.

The North Carolina Supreme Court also rejected the argument that it was not entitled to review the actions of the state legislature, saying that would be "repugnant to the sovereignty of states, the authority of state constitutions and the independence of state courts, and would produce absurd and dangerous consequences."

Some precedents of the U.S. Supreme Court also tend to undermine the independent state legislature doctrine.

When the court closed the doors of federal courts to claims of partisan gerrymandering in Rucho v. Common Cause in 2019, Chief Justice John G. Roberts Jr., writing for the five most conservative members of the court, said state courts could continue to hear such cases — including in the context of congressional redistricting.

In 2015, in Arizona State Legislature v. Arizona Independent Redistricting Commission, the court ruled that Arizona's voters were entitled to try to make the process of drawing congressional district lines less partisan by creating an independent redistricting commission notwithstanding the reference to "legislature" in the Elections Clause.

"Nothing in that 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," Justice Ruth Bader Ginsburg, who died in 2020, wrote in the majority opinion in the 5-to-4 decision.

Justice Amy Coney Barrett, who filled the seat previously held by Justice Ruth Bader Ginsburg, may hold the decisive vote in the election law case. Stefani Reynolds for The New York Times

The balance of power on the court has shifted since then, and Justice Amy Coney Barrett, who filled the seat previously held by Justice Ginsburg, may now hold the decisive vote.

Even some scholars who think the independent state legislature doctrine is pernicious nonsense say they would like a definitive resolution of the issue, and preferably not in an election year.

“I think they should take it,” Vikram Amar said of the North Carolina case. “This thing is just brewing and bubbling.”