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EXPLAINER

Moore v. Harper: May State Laws Concerning Federal Elections Be Subject to State Judicial Review?

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The Government Law Center's explainers concisely map out the law that applies to important questions of public policy.

Among the most important cases the Supreme Court of the United States will hear this term is *Moore v. Harper*. The issue squarely presented is whether state courts have the authority to consider any claim relating to an action taken by a state legislature that concerns federal elections. The decision might also affect the mechanism for choosing electors from the states to the electoral college. This is possibly the most significant election case ever heard by the Court.

The case arises from a challenge to the drawing of new congressional districts by the state legislature in the State of North Carolina following the 2020 census. The North Carolina League of Conservation Voters, along with a number of individual plaintiffs, brought a challenge to the newly drawn districts. The case eventually reached the North Carolina Supreme Court. On February 14, 2022, that court invalidated the new districts because it found that they violated several provisions of the state constitution.[1] Timothy Moore, Speaker of the North Carolina House of Representatives, presented an application for a stay of that decision to the United States Supreme Court. Moore argued that state courts do not have the authority to review the actions of state legislatures when they relate to federal elections.

On March 7, 2022, the Supreme Court denied the stay on the basis that there was insufficient time to resolve the matter prior to the upcoming primary elections.[2] Justice Samuel Alito dissented, joined by Justices Clarence Thomas and Neil Gorsuch. After examining the arguments offered by the parties, Justice Alito stated, "I think it likely the applicant would succeed." Justice Brett Kavanaugh agreed with the denial of the stay because of time considerations, but also agreed with the dissenting opinion that the issue presented needed to be decided. He urged that any future application for certiorari[3] in this or another case raising the issue should be granted.

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[1] *See Harper v. Hall,* 380 N.C. 317, 868 S.E.2d 499 (2022).

[2] *See Moore v. Harper,* 142 S. Ct. 1089 (2022).

[3] An application for certiorari is a petition that asks a higher court, such as the Supreme Court, to grant a writ of certiorari, which orders a lower court to deliver its record in a case so that the higher court may review it.

This denial of the stay application was followed by an application for certiorari, which was granted on June 30, 2022. Thus, the case will be heard during the current term of the Court. Argument has been scheduled for December 7, 2022.

The issue to be argued is based on what is sometimes called the "independent state legislature" theory. It is premised on Article I, Section 4 of the federal constitution, which provides that "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…." The appellants argue that this provision precludes any entity in a state government other than its legislature from involvement in federal election law. Thus, according to this theory, changes to any laws enacted by a state legislature may be reviewed only by Congress.

If the Court accepts this argument, a state legislature would be free to enact any law related to a federal election without being subject to state judicial review regarding its adherence to the provisions of its state constitution or other restrictions on its authority. The concept of judicial review, first established by the Supreme Court in *Marbury v. Madison,*[4] would no longer apply within the states in any case in which an issue concerning legislative action related to a federal election is presented to a state court. In addition, if accepted, this argument might well preclude the governor from any participation in the electoral process, thereby eliminating the usual executive power to approve or veto any bill that falls within this subject matter. In short, the judicial and executive branches of state governments would be precluded from playing any role after the legislature acts.

A decision in this case also might apply to a separate federal constitutional provision concerning the choice of electors by a state. Article II, Section 1 provides that "Each state shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors." It is possible that a decision restricting judicial or executive review under the so-called "elections clause" would also apply to this clause.

Whether the Court will accept the independent state legislature theory is an open question. If it does, it would constitute one of the most momentous historical changes in the functioning of state governments, at least in cases related to federal elections.

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