

# State Legislatures, State Courts, and Federal Elections: U.S. Supreme Court to Consider *Moore v. Harper*

October 12, 2022

During the fall 2022 term, the U.S. Supreme Court is scheduled to hear arguments in a case that could significantly affect how states regulate federal elections. In *Moore v. Harper*, the Court is poised to consider the scope of a state court’s authority under the Elections Clause of the U.S. Constitution to overturn laws enacted by a state legislature that regulate congressional elections based on state constitutional provisions. Depending on how the Court rules, the decision could clarify under what circumstances state legislatures have the authority to establish laws regulating federal elections—including the drawing of congressional redistricting maps—without review by state courts.

This Sidebar previews the legal dispute in *Moore v. Harper*, beginning with a discussion of the constitutional framework at issue in this case and related Supreme Court background. The Sidebar then discusses the North Carolina Supreme Court’s decision in this case, followed by arguments made by the parties to the U.S. Supreme Court seeking and opposing the Court’s review of the state court ruling. The Sidebar concludes with a discussion of possible outcomes, implications, and considerations for Congress.

## Constitutional Framework

Although congressional and presidential elections have national impact, they are primarily administered according to state laws. Article I, Section 4, clause 1, of the U.S. Constitution, known as the [Elections Clause](#), authorizes to the states the initial and principal authority to administer elections within their jurisdictions. Specifically, the 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.” As a result of this decentralized authority, states vary significantly in how they administer the federal voting process and elections. For example, states have enacted differing laws addressing whether and to what degree voters can cast ballots prior to the day of an election, known as [early voting](#); [absentee voting](#); deadlines for voter registration; [voter identification \(ID\) laws](#); and [standards for drawing congressional redistricting maps](#). At the same time, the Elections Clause provides

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LSB10838

Congress with the authority to “override” state laws for regulating federal elections. Under that authority, Congress has enacted laws such as the [Help America Vote Act](#) and the [National Voter Registration Act](#), which dictate how states must administer certain aspects of the election process. In addition, Congress has enacted laws setting the time for elections to the [House of Representatives](#) and the [Senate](#).

A parallel provision addressing presidential elections—the Electors Clause in [Article II, Section 1, clause 2](#), of the Constitution—provides that “[e]ach state shall appoint” electors for President and Vice President in the manner “as the Legislature thereof may direct.” Further, [Article II, Section 1, clause 4](#), provides Congress with the power to determine when the states choose their electors and “the Day on which they shall give their Votes; which Day shall be the same throughout the United States.” Accordingly, federal law requires that every four years, [electors](#) are chosen on the first Tuesday after the first Monday in November and [electors](#) vote on the first Monday after the second Wednesday in December.

## Supreme Court Background

The Supreme Court rulings regarding the 2000 contested presidential election addressed a state court’s scope of authority under the Electors Clause to review state laws governing a presidential election. In *Bush v. Palm Beach County Canvassing Board* (*Bush I*), the Court vacated and remanded a ruling by the Florida Supreme Court, while distinguishing its decision in that case from those where it would generally defer to a state court’s interpretation of a state law. In *Bush I*, the Court emphasized that in deciding the method for choosing electors, the state legislature had acted under an express grant of authority from the Electors Clause, thereby raising [the question of how much a state constitution can limit](#) a state legislature acting under that authority. Further, in *Bush v. Gore* (*Bush II*), a [concurrence](#) by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, articulated additional grounds supporting the Court’s decision to reverse a Florida Supreme Court ruling. Referencing the language of the Electors Clause, the concurrence reasoned that “the text of the [state] election law itself, and not just its interpretation by the courts of the States, takes on [independent significance](#).” Quoting from an 1892 Supreme Court decision, *McPherson v. Blacker*, the concurrence observed “that Art. II, §1, cl. 2, ‘convey[s] the broadest power of determination’ and ‘leaves it to the legislature exclusively to define the method’ of appointment.” The concurrence concluded that the approach it supported did “not imply a disrespect for state *courts* but rather a respect for [the constitutionally prescribed role of state legislatures](#).” Following *Bush I* and *Bush II*, in researching whether a historical basis exists for the concept that the Electors Clause grants state legislatures a certain degree of independent authority, a [legal scholar](#) coined the term, *the Article II “independent state legislature” doctrine*.

In a 2015 ruling, *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court held by a 5–4 vote that the Elections Clause permitted Arizona citizens to delegate the drawing of congressional redistricting maps to an independent commission through a voter-initiated constitutional amendment. In reaching its decision, the Court relied in part on a 1916 case, *Davis v. Hildebrandt*, in which the Court interpreted the term *legislature* more broadly and held that a referendum that was authorized by a state constitution “was part of the legislative power of the State.” The Court in *Arizona State Legislature* also invoked a 1932 case, *Smiley v. Holm*, where the Court reversed a Minnesota Supreme Court decision holding that the Elections Clause disallowed a governor’s veto of a congressional redistricting map drawn by the state legislature. According to the Court in *Smiley*, the Elections Clause does not “endow the legislature of the State with power to enact laws in any manner other than that in which the constitution of the State ha[d] provided that laws shall be enacted.” Therefore, in *Arizona State Legislature*, the Court concluded that “precedent teaches that redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum and the Governor’s veto.”

More recently, in a Supreme Court case relating to the 2020 presidential election, *Republican Party of Pennsylvania v. Boockvar*, a statement of Justice Alito, joined by Justices Thomas and Gorsuch, similarly addressed the power of state legislatures in federal elections. In *Boockvar*, the Court denied a motion to expedite consideration of a petition to hear a case challenging a [decision](#) by the Pennsylvania Supreme Court that required election officials, in view of the COVID-19 pandemic, to tabulate mail-in ballots that were received three days following Election Day. Although a state law required that all mail-in ballots [be received by Election Day](#), the state court based its decision on the “[broad text](#)” of the state’s “[Free and Equal Elections Clause](#),” guaranteeing that “[e]lections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right to suffrage.” According to Justice Alito’s statement, there was “[a strong likelihood](#)” that the ruling by the state court violated the Elections Clause and the Electors Clause because “[t]he provisions of the Federal Constitution conferring on state legislatures, not state courts, the authority to make rules governing federal elections would be meaningless if a state court could override the rules adopted by the legislature simply by claiming that a state constitutional provision gave the courts the authority to make whatever rules it thought appropriate for the conduct of a fair election.”

In another decision regarding the 2020 presidential election, *Democratic National Committee v. Wisconsin State Legislature*, Justice Kavanaugh wrote a [conurrence](#) in the denial of the application to vacate the lower court’s stay, similarly outlining his views on the meaning of the Electors Clause. In a [footnote to his concurrence](#), Justice Kavanaugh warned that “state courts do not have a blank check to rewrite state election laws for federal elections.” Quoting Chief Justice Rehnquist’s concurrence in *Bush II*, Justice Kavanaugh stated that “Article II means that ‘the clearly expressed intent of the legislature must prevail’ and that a state court may not depart from the state election code enacted by the legislature.” Further, he opined that “the Constitution requires federal courts to ensure that state courts do not rewrite state election laws.”

## Overview of *Moore v. Harper*

North Carolina [gained a seat](#) in the U.S. House of Representatives following the 2020 decennial [census](#). Accordingly, on November 4, 2021, the North Carolina legislature drew a new congressional redistricting map. Shortly thereafter, plaintiff voters and organizations sought to enjoin the new map in state court, alleging, among other things, that the map created “[severe](#)” partisan gerrymandering in violation of provisions of the North Carolina Constitution. In February 2022, following litigation at the county court and state appellate court levels, in a consolidated case, the North Carolina Supreme Court [stayed](#) the congressional redistricting map for the 2022 congressional elections and remanded the cases to the trial court for additional proceedings. As a threshold matter, the court determined that the claims of partisan gerrymandering were justiciable under the state constitution, which “can be carefully discerned and governed by manageable judicial standards.” Then, the court held that by engaging in partisan gerrymandering, the legislature had violated four provisions of the North Carolina Constitution: depriving voters of the fundamental right “to substantially equal voting power” in violation of the [free elections and equal protection clauses](#) of the state constitution and establishing “viewpoint discrimination and retaliation based on protected political activity” in violation of the [free speech and the freedom of assembly clauses](#) of the state constitution. In view of the fundamental rights violated, the court applied the most stringent level of judicial review—strict scrutiny—and [held](#) that the redistricting map failed to meet that standard. The court, therefore, [ordered](#) the trial court to oversee redrawing of the map, which was conducted by three experts appointed by the trial court.

On February 25, 2022, in the U.S. Supreme Court, North Carolina legislators [sought a temporary stay](#) pending a request to review the case (in effect, a reinstatement of the congressional redistricting map) or, alternatively, a grant to review the case and a stay pending a decision on the merits. Without issuing an opinion, on March 7, 2022, the Supreme Court [denied](#) the legislators’ request for a stay. [Concurring](#) in the

denial of the stay, Justice Kavanaugh wrote that the underlying question in this case regarding the scope of a state court's authority under the Elections Clause "is important, and that both sides have advanced serious arguments on the merits." He further predicted that "[t]he issue is almost certain to keep arising until the Court definitively resolves it," opining that if the Court receives future petitions for review involving this issue, it should grant review, thereby affording the Court sufficient time to evaluate the issue after oral argument and full briefing. In this case, however, in view of the impending North Carolina primary elections, Justice Kavanaugh believed it "too late" to order the legislature to redraw the map, citing precedent establishing that federal courts should generally avoid enjoining state election laws close to an election, *Purcell v. Gonzalez*.

In a [dissent](#), joined by Justices Thomas and Gorsuch, Justice Alito argued that the Court should have granted a stay because the applicants were likely to have prevailed on the merits and had satisfied the Court's criteria for granting review. According to the dissent, the Elections Clause "could have said" that the times, places, and manner of holding congressional elections be set forth "by each State," resulting in each state deciding which branch of the government would exercise that authority. Instead, the dissent emphasized that the Elections Clause specifically provides "the legislature" with that authority, arguing that if the Clause is to be taken seriously, "there must be *some* limit on the authority of state courts to countermand actions taken by the state legislatures." Further, the dissent criticized the North Carolina Supreme Court for invalidating the redistricting map as an unconstitutional partisan gerrymander in violation of "a congeries of state constitutional provisions" that do not specifically address partisan gerrymandering. According to the dissent, the court's justification for its ruling—that the courts are the only way to address partisan gerrymandering because the process for amending the constitution is difficult—has "the hallmarks of legislation." While characterizing the arguments made on both sides in this case as "serious," the dissent concluded that the applicants' argument is stronger. That is, in the dissent's view, the state legislator applicants' argument that the court decided the "manner" for holding North Carolina's congressional elections constitutes appropriating the power that the Elections Clause of the U.S. Constitution gives to the legislature. Lastly, while acknowledging that the case came before the Court within seven days of the candidacy filing deadline, the dissent maintained that a prompt stay "would have been only minimally disruptive."

## Arguments to the Supreme Court Seeking and Opposing Review of the Case

On March 17, 2022, the legislators returned to the Supreme Court [seeking review](#) of the decision by the North Carolina Supreme Court. Among other things, the legislators argued that the question of whether state legislatures alone have the authority to enact laws governing "the times, places, and manner" of congressional elections "is a matter of the [most vital importance](#) to our system of government" and that the lower courts are divided in their interpretations. The legislators cautioned that until the Supreme Court resolves the question of "whether a State's courts or other entities [may nullify, alter, or replace the election regulations](#) enacted 'by the Legislature thereof,'" the issue will continue to arise. In the legislators' view, the language of the Elections Clause and relevant Supreme Court precedent make clear that a state court cannot invalidate a redistricting map that was drawn by the legislature "[on the basis of broad generalities](#) in the State's constitution."

[Arguing against the Supreme Court granting review](#), the state officials maintained that this case does not present the question proffered by the legislators because the state legislature has enacted statutes that [authorize state courts](#) to draw temporary redistricting maps. Instead, the officials argued that this case presents the question of whether the Elections Clause prevents a state court from evaluating a congressional redistricting map "even where the [legislature itself has expressly authorized](#) such review." On that question, the state officials opine that the state court decided this case correctly because U.S.

Supreme Court precedent permits a legislature to delegate some of their authority over elections to state officials. Further, according to the state officials, Court precedent holds that non-legislative officials can assist in regulating federal elections; that legislatures are subject to their state constitutions when they regulate federal elections; and that state courts can draw remedial congressional redistricting maps. Finally, the state officials warned that should the Supreme Court adopt the interpretation of the Elections Clause proposed by the legislators, it “would wreak havoc across the country,” because all states rely on various state officials to administer federal elections. On June 30, 2022, the Supreme Court [granted review](#), characterizing the [question presented](#) as

Whether a State’s judicial branch may nullify the regulations governing the “Manner of holding Elections for Senators and Representatives ... prescribed ... by the Legislature thereof,” U.S. CONST. art. I, § 4, cl. 1, and replace them with regulations of the state courts’ own devising, based on vague state constitutional provisions purportedly vesting the state judiciary with power to prescribe whatever rules it deems appropriate to ensure a “fair” or “free” election.

In July 2022, the Court [granted](#) a motion to extend the deadline for the parties to file briefs on the merits. The petitioners’ brief on the merits was due and [filed](#) on August 29, and the respondents’ brief is due by October 19. To date, although the Court has not yet scheduled a date for oral arguments in *Moore*, it is likely to hear arguments later this year, which may provide further insights into how the Justices are likely to rule. A decision is expected in 2023.

## Possible Outcomes, Implications, and Considerations for Congress

While it can be difficult to predict the contours of any Supreme Court decision, a spectrum of possible outcomes in this case seem possible. As a threshold matter, it is useful to note that, as discussed, four Justices on the Court—Justices Thomas, Alito, Gorsuch, and Kavanaugh—have signaled that the Constitution requires a degree of deference by state courts to state legislatures when regulating federal elections.

Toward one end of the spectrum, a broad ruling by the Court might hold that a state legislature can establish laws regulating federal elections without review by the state’s judicial and executive branches based on state constitutional provisions. Therefore, in addition to congressional redistricting maps, other state voting laws applicable to federal elections—such as early voting procedures and voter ID requirements—would not be subject to state court review or gubernatorial veto. In such an instance, the Court would likely address whether or to what extent the *Arizona State Legislature* precedent is distinguishable or should be overruled. Under such a ruling, unless a state legislature enacts new laws to replace state constitutional provisions and voter-initiated laws that regulate federal elections, the result in some states would be different rules for state and federal elections. In addition, by effectively removing the opportunity for state court review, it seems likely that federal court review of state laws regulating federal elections and congressional redistricting maps would increase.

In contrast, a narrower ruling in this case might be limited to the context of redistricting under certain circumstances. For example, the Court could hold that the Elections Clause prohibits state court review of congressional redistricting maps unless a constitutional provision, instead of being “vague,” clearly establishes redistricting standards. (Recall that in this case, the North Carolina Supreme Court struck down the congressional redistricting map based on four state constitutional provisions that did not expressly address redistricting.) Such a ruling could raise questions as to the level of specificity needed in a state constitutional provision for a state court to have the authority to review. Moreover, in the wake of such a ruling, for example, a 2018 [Pennsylvania Supreme Court decision](#) that invalidated a congressional redistricting map under the “[Free and Equal Elections Clause](#)” in the Pennsylvania Constitution could be



vulnerable to being overturned. In contrast, a ruling of this type could bolster, for example, a 2015 [Florida Supreme Court](#) decision holding a congressional redistricting map unconstitutional under the “[Fair Districts Amendment](#),” which specifically addresses partisan gerrymandering. The Court might also address its 2019 opinion in *[Rucho v. Common Cause](#)*, which held that claims of unconstitutional gerrymandering are [not subject to federal court review](#). Writing for the majority in that case, albeit in dicta, Chief Justice Roberts observed that in evaluating claims of extreme partisan gerrymandering, “[p]rovisions in state statutes and state constitutions can provide standards and guidance for state courts to apply.”

Conversely, the Court might affirm the North Carolina Supreme Court in this case. In such a ruling, the Court could reject the argument that the Elections Clause constrains a state court from overturning a law enacted by a state legislature based on a state constitutional provision or a voter-initiated law.

Regardless of how the Court rules in *Moore*, in view of the [Elections Clause](#) expressly providing Congress with authority to “[override](#)” state laws regulating congressional elections, Congress would retain broad authority to enact legislation to regulate the “Times, Places and Manner” of congressional elections. In that vein, in the 117<sup>th</sup> Congress, legislation is pending that would regulate congressional elections in various ways, including establishing standards for congressional redistricting. Examples of such proposals include [H.R. 1](#), [H.R. 4](#), [H.R. 5746](#), [S. 1](#), [S. 2093](#), and [S. 2670](#). In contrast, Congress may wish to defer to state legislatures regarding federal election voting rules and standards for drawing congressional redistricting maps.

Finally, as the dispute in *Moore v. Harper* involves the Elections Clause, it is unclear whether the Court would extend its ruling to apply in the context of presidential elections. As discussed, under [Article II, Section 1, clause 4](#), of the Constitution, Congress has the authority to legislate regarding when states choose their presidential electors and when those electors vote.

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