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## 'Decision On Democracy': Supreme Court Unconventionally Split on Election Authority Case

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An unconventionally split Supreme Court heard arguments Wednesday over a Republican appeal to determine whether legislators have the power to set federal voting rules without the oversight from state courts, a consequential question that could drastically change the landscape of future elections.

The 6-3 majority of Republican-appointed justices raised difficult questions about the arguments presented by the counsel for North Carolina's Republican lawmakers, who are essentially asking to remove the power of state courts to strike down legislature-drawn congressional districts following the state Supreme Court ruling the lawmakers illegally gerrymandered.

A broad ruling favoring the Republican lawmakers' argument could require a separate set of rules for federal and state elections on the same ballot and could prompt new efforts to redraw congressional districts to create greater partisan advantages.

However, the majority of justices appeared on track to find a middle ground over the dispute.

The Republican speaker of the North Carolina House of Representatives, Tim Moore, brought up the "independent state legislature theory" after the Democratic-controlled state Supreme Court struck down his party's congressional district map in February. The theory presents a concept in which backers say the U.S. Constitution's election clause gives state legislatures "the federal function of regulating congressional elections" and that states may "not limit the legislature's discretion."

Arguments on Wednesday, which marked the last case before the New Year, were spearheaded by skeptical questions from the court's three-member liberal minority.

Justice Elena Kagan suggested that the lawmakers' theory could have "big consequences" that get "rid of the normal checks and balances." The "independent state legislature" theory, she argued, could allow state legislatures to do extreme gerrymandering and interfere with the certification of elections. Likewise, Justices Ketanji Brown Jackson and Sonia Sotomayor, two other Democratic appointees, appeared adamantly opposed to the lawmakers' position.

Meanwhile, at least three members of the conservative bloc, Justices Samuel Alito, Neil Gorsuch, and Clarence Thomas, appeared more aligned with the theory than the remaining justices, Brett Kavanaugh, Amy Coney Barrett, and Chief Justice John Roberts.

"There's been a lot of talk about the impact of this decision on democracy," Alito said, before asking: "Do you think that it furthers democracy to transfer the political controversy about districting from the legislature to elected supreme courts where the candidates are permitted by state law to campaign on the issue of districts?"

The high court's final decision, which isn't expected until sometime in 2023, could come down to how convinced Kavanaugh, Barrett, and Roberts are about lawyer David Thompson's arguments, who presented the case on behalf of Moore on Wednesday.

For example, Roberts questioned whether the North Carolina Supreme Court's ruling, which found the 14 congressional districts drawn by Republicans to be "unlawful partisan gerrymanders," is what the highest court had in mind when it decided the March 2019 case *Rucho v. Common Cause*.

But Roberts also cited a 1932 high court opinion that said the U.S. Constitution is not violated by a governor's veto of a congressional map enacted by the state legislature, suggesting the decades-old precedent "undermines" Thompson's argument.

Kavanaugh and Barrett asked certain questions of Neal Katyal, an attorney for voting rights groups, that appeared to suggest the justices were looking for a ruling favoring the North Carolina lawmakers without flatly adopting the theory.

Katyal was joined by President Joe Biden's Justice Department in opposition to the request by the Republican lawmakers. They urged the justices not to limit the role for state courts and constitutions in regulating federal elections.

After oral arguments, University of Iowa College of Law professor Derek Muller told the *Washington Examiner* that despite the nearly three-hour discussion, it remains "unclear what the Supreme Court will do."

But Muller noted, "If the legislature wins, it will be a narrow set of circumstances when state courts cannot independently check a state legislature in federal elections."

The "independent state legislature" theory has a range of proponents from outside conservative groups. One proponent is John Eastman, the attorney involved in former President Donald Trump's efforts to overturn the 2020 election, who submitted a brief to the high court in favor of the theory.

Still, Andrew Grossman, an adjunct scholar at the Cato Institute, told the *Washington Examiner* that the justices' comments put cold water on "overblown claims" by the media that the implications of *Moore v. Harper* pose a threat to democracy.

"Moore is an important case for democracy because it concerns whether election rules will be made by democratically elected legislatures or by judges. But, as today's argument reflects, the

overblown claims that this case is about stealing elections or disenfranchising voters have no basis in law or reality," Grossman said.