

## BACKGROUND ON THE INDEPENDENT STATE LEGISLATURE THEORY

The ISL theory pertains to two separate provisions of the Constitution.

The first is the Electors Clause – Article II Section 1 which reads:

“Each State shall appoint, in such manner as the Legislature thereof may direct, a number of Electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress...” This is the Constitutional provision Rehnquist was addressing in his concurring opinion in Bush v. Gore.

The second is the Elections Clause – Article I Section 4 which reads:

“The times, places and manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof...” This was the provision at issue in the recent (2023) Supreme Court case titled Moore v. Harper. This case underwent many twists and turns, with the outcome having a potentially significant impact on American elections.

Retired conservative U.S. Court of Appeals Judge J. Michael Luttig has called it “the single most important case on American democracy – and for American democracy – in the nation’s history.”

To simplify this extremely complicated case, the Republican controlled North Carolina General Assembly (led by Timothy Moore) had drawn new Congressional district maps after the 2020 census awarded North Carolina one more representative (and electoral vote). In a suit brought by a number of state residents, including Rebecca Harper, a real estate agent from Cary, NC, the state Supreme Court ruled the Assembly’s proposed maps unconstitutional, saying they were racially gerrymandered and therefore violated the 14<sup>th</sup> Amendment.

The General Assembly sought Supreme Court review arguing that Article I Section 4 gave it sole authority to draw Congressional districts. After much procedural backing and forthing, including state elections in 2022 that changed the composition of the state Supreme Court from a Democratic to a Republican majority, the U.S. Supreme Court issued its ruling on June 27, 2023. In an opinion authored by Chief Justice Roberts, the court, by a 6 to 3 vote, rejected the General Assembly’s Independent State Legislature theory. The key sentence from Roberts was “the Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.” But his opinion then went on to say “we hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.” So, while the most extreme version of the Independent State Legislature theory was rejected, where the actual jurisdictional boundaries are between state legislatures and state courts will continue to be fought out in future litigation.