

U.S. Supreme Court Rules on North Carolina Extended Ballot Counting

The Supreme Court recently [left in place](#) a nine-day extension to count absentee ballots in North Carolina. If North Carolina absentee ballots are postmarked on or before election day they may be counted if received up to nine days after the election.

Justices Thomas, Gorsuch, and Alito indicated they would not have allowed this extension to go into effect. Justice Barrett declined to participate in this case.

A North Carolina statute states that absentee ballots must be postmarked on or before election day, and they must be received “not later than three days after” the election to be counted. The North Carolina State Board of Elections extended this requirement to nine days after the election. A state trial court approved a consent judgment formalizing the new receipt deadline. The North Carolina Supreme Court refused to freeze the state trial court decision.

Meanwhile, the extension was also challenged in federal court. A federal district court held it was unconstitutional on a number of grounds.

Before the district court, the challengers noted that the U.S. Constitution’s Elections Clause gives state legislatures the authority to determine the “time, place, and manner of elections.” Among other arguments, the challengers argued that per the Elections Clause the Board of Elections lacked the authority to rewrite North Carolina elections law. The district court agreed noting that while North Carolina law allows the head of the elections board to “exercise emergency

powers to conduct an election” due to a “natural disaster,” a pandemic isn’t a “natural disaster.”

The Fourth Circuit allowed the extension to stand relying on Pullman abstention, which requires a federal court not to decide an issue where state law is unclear and could moot the constitutional issue in the case. According to the Fourth Circuit, the Elections Clause issue in this case involves a “close issue of state law involving competing interpretations of North Carolina’s statutes governing election procedures and implicating complex questions concerning the separation of powers in the state.” Moreover, “[i]f a reviewing state court decides that the Board acted within its authority, then there is plainly no Elections Clause problem.”

In Justice Gorsuch’s dissent, which Justice Alito joined, he noted that this case is just like a case from Wisconsin, decided only days ago, where the Supreme Court “rejected a similar effort to rewrite a state legislature’s election deadlines.” According to Justice Gorsuch, “this case may be even more egregious, given that a state court and the Board worked together to override a carefully tailored legislative response to COVID.”

Justice Gorsuch was very skeptical that the Supreme Court needed to “rifling through state law to understand the Board’s permissible role in (re)writing election laws.” But “even assuming the North Carolina General Assembly could delegate its Elections Clause authority to other officials” the Board of Elections emergency powers only applies in the event of a natural disaster.

While none of the Justices who voted to allow this extension to stay in place explained their reasons it seems possible that at least the Chief Justice saw this case similar to the Fourth Circuit: as an interpretation of state law the Court should stay out of. In the Wisconsin decision the Chief Justice explained that is why he voted not to overturn a Pennsylvania Supreme Court decision extending Pennsylvania's ballot receipt deadline—it involved an interpretation of the Pennsylvania constitution.

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