July 3, 2022
To: DWPA
Fr: Kathleen Sauer, DWPA Board Member, Chair of the Women's Rights Team

Happy 4th of July weekend! It seems fitting on this weekend of celebration of the birth of our nation as a democratic republic that I sound the alarm over the decision of SCOTUS last week to take up the case of Moore v. Harper in their next session.

I know that most of you are still reeling from the slap in the face that SCOTUS gave to all American women with the Dobbs opinion. Not only did the majority take away a 50-year-old right, one that was enshrined in precedent (and proudly proclaimed as such by the majority in their confirmation hearings) but they did so seemingly on no other basis that they personally do not like or believe in abortion and with almost reckless abandon of the real-world consequences that this decision will wreck on pregnant people and the people who love them.

Now comes the decision to take up Moore v. Harper, a case in which the congressional district maps drawn by the GOP North Carolina legislature was challenged on the basis that they violate the NC constitution. The opposition of the GOP led legislature to this legal attack rests on the invocation of the "independent state legislature" doctrine, and the ramifications of SCOTUS taking this case should scare the hell out of you.

As the minority faction in many states, the GOP has spent years fighting for and winning state houses, giving themselves enormous power to drawn electoral maps when redistricting is done every ten years. They have used this power to draw maps that guarantee a set number of seats to their own party, maintaining their majority in these houses. This is called gerrymandering. This practice also serves to disenfranchise the voters of the opposite party and creates seats that are inhabited by politicians that never have to engage in a competitive race or feel accountable in any way, except to voters of their own party.

Some states, seeing the effect of gerrymandering, have changed their constitutions to attempt to eliminate this practice. In the past, when confronted with appeals involving gerrymandered congressional districting as being in violation of the US Constitution, SCOTUS has refused to hear them, falling back on the long-standing doctrine that they do not decide cases involving political questions. This position has taken these legal battles back to the state courts, and those fighting for fairer maps have relied on the provisions of state constitutions to bring these legal challenges.

When they started losing these cases, the GOP resuscitated an obscure, mostly disputed legal theory called the "independent state legislature" doctrine.

As background, there are two provisions in the US Constitution that deal with the implementation of federal elections. The first is the Elections Clause, which reads, "The Times, Places and Manner of holding Elections for Senators and Representatives shall by prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."

The second is the Presidential Electors Clause, which reads, "Each State shall appoint, in such Manner as the Legislature thereof my direct, a Number of Electors."

The dispute in Moore v. Harper comes down to exactly what the term "Legislature" means in these clauses. Does it mean the entirety of a state's lawmaking process, including the referendum process, the courts and the governor? Or does it mean that just the two houses of the state congress wield all the power? The "independent state legislature" doctrine mandates that the term "legislature" in the elections clauses of the US Constitution means only the two houses of the state congress and this body, and only this body, has the authority over federal elections in each state.

This theory is not grounded in any real legal, factual or historical basis, but consider the implications if SCOTUS sides with the GOP on this issue. Each state's congressional body would have sole authority over the elections for US Congress and President. The ability of the people or the governor of each state would be powerless to check this authority by way of referendum, constitutional amendment or veto power. This idea becomes even more frightening when you consider that many state houses are already stacked in the GOP's favor by unfair gerrymandering. Therefore, the minority, gerrymandered into power, would have the absolute right to implement whatever voter suppression laws they desire and to continue to draw gerrymandered maps. Finally, if SCOTUS adopts the "independent state legislature" doctrine, they will have given the green light for the congress of a state to implement the overthrow of the votes of their own citizens, simply because they do not like the outcome. This is what Trump and his supporters were trying to do when they attempted to overturn the last election.

If you think I am trying to scare you, you are absolutely correct. You should be scared. We stand on the precipice of losing our democracy. We can fight back, however. First, by the very words of the Elections Clause, the US Congress can alter state laws pertaining to the elections of the US Congress. While Democrats are in the majority in the US Congress, they should exercise this right and pass voting legislation. Do away with the filibuster to do so, just do it.

Second, we can and should keep this front and center in everyone's mind. All candidates for office should be asked what state laws they would support if SCOTUS adopts the "independent state legislature" doctrine. ("Do you support legislation that would allow the state congress to nullify the voice of the people?")

Finally, we must pay attention to state house races and try as best we can, regardless of the current gerrymandered seats, to capture more majorities in the 2022 election.