No. 413PA21-2 TENTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

REBECCA HARPER, et al.,

Plaintiffs,

NORTH CAROLINA LEAGUE OF CONSERVATION VOTERS, INC.; HENRY M. MICHAUX, JR., et al.,

Plaintiffs,

COMMON CAUSE,

Plaintiff-Intervenor,

v.

REPRESENTATIVE DESTIN HALL, in his official capacity as Chair of the House Standing Committee on Redistricting, et al.,

Defendants.

From Wake County

****

NOTICE OF FILINGS IN THE SUPREME COURT OF THE UNITED STATES

****

Attached as Exhibits 1 through 6 are supplemental filings made today in the Supreme Court of the United States in *Moore v. Harper*.

This 20th day of March 2023.

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Electronically Submitted

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CERTIFICATE OF SERVICE

Pursuant to Rule 26 of the North Carolina Rules of Appellate Procedure, I hereby certify that the foregoing document has been filed with the Clerk of the North Carolina Supreme Court by electronic submission. I further certify that a copy of this document has been duly served upon the following counsel of record by email:

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This the 20th day of March 2023.

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March 20, 2023

Honorable Scott S. Harris
Supreme Court of the United States
1 First Street NE
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Re: ***Moore v. Harper*, Case No. 21-1271**

Dear Mr. Harris:

Petitioners respectfully submit this supplemental letter brief addressing the U.S. Supreme Court's continued jurisdiction in *Moore v. Harper*, No. 21-1271, in light of "the North Carolina Supreme Court's February 3, 2023 order granting rehearing, and any subsequent state court proceedings."

The North Carolina Supreme Court's decision to rehear *Harper v. Hall*, 383 N.C. 89, 2022-NCSC-121, 881 S.E.2d 156 (Dec. 16, 2022) ("*Harper II*"), has no effect on this Court's continued jurisdiction. This Court granted certiorari to review two *other* decisions of the North Carolina Supreme Court, neither of which will be subject to rehearing: the North Carolina Supreme Court's decision invalidating the North Carolina General Assembly's original congressional redistricting map, *Harper v. Hall*, 380 N.C. 317, 2022-NCSC-17, 868 S.E.2d 499 (Feb. 14, 2022) ("*Harper I*"), Pet.App.1a–223, and the North Carolina Supreme Court's February 23, 2022 Order Denying Temporary Stay and Writ of Supersedeas (the "Stay Denial"), Pet.App.243–46, which denied a stay of the court-drawn remedial congressional redistricting map. *See* Pet. at 5 (section titled "Jurisdiction").

This Court has jurisdiction over "[f]inal judgments . . . rendered by the highest court of a State in which a decision could be had." 28 U.S.C. § 1257(a). While a final judgment exists where no further state court proceedings are possible, this Court has also "recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477 (1975). In such circumstances, the Court "has treated the decision on the federal issue as a final judgment for the purposes of 28 U.S.C. § 1257 and has taken jurisdiction without awaiting the completion of the additional proceedings anticipated in the lower state courts." *Id*. This is true of cases, like this one, where a state's highest court has finally decided the federal issue presented and where that federal issue will survive and require decision regardless of the outcome of future state-court proceedings. *Id*. at 480. Applying this Court's precedents, both *Harper I* and the Stay Denial are final judgments subject to this Court's review.

Harper I is a final judgment over which this Court is properly exercising jurisdiction as to all of the issues this case presents. In *Harper I*, the North Carolina Supreme Court decided

Petitioners' Elections Clause claim on the merits, concluding that Petitioners' original congressional redistricting map could be invalidated by the North Carolina courts. The North Carolina Supreme Court "reverse[d] the trial court's judgment" affirming the original map "and remand[ed] this case to [the North Carolina Superior Court] to oversee the redrawing of the map[ ] by the General Assembly or, if necessary, by the court." Pet.App.142a. That decision rendered a final judgment as to the use of the original map and the lower courts' authority to draw a new one, and no further decision is possible in the North Carolina courts with respect to that judgment.

By granting certiorari to review *Harper I*, this Court has properly (and continues to properly) exercise jurisdiction over *both* the North Carolina Supreme Court's decision that, despite the federal Elections Clause, it could invalidate Petitioners' original map *and* its decision that the North Carolina courts could draw their own map as a replacement. These decisions fall within two categories of final judgments that this Court has recognized.

First, these decisions are among those "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox,* 420 U.S. at 479. In *Harper I*, the North Carolina Supreme Court conclusively decided that the Elections Clause permitted North Carolina courts both to invalidate redistricting maps *and* to draft new ones, and it was preordained that further state-court proceedings would adhere to those holdings. *See*, *e.g.*, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 306–07 (1989) (holding that a decision of the Pennsylvania Supreme Court was a final judgment because that court had adjudicated the federal constitutional issue presented and, although rate-setting proceedings were yet to be conducted in state court, this Court was convinced that it was "presented with the State's last word on the constitutionality of Act 335 and that all that remains is the straightforward application of its clear directive to otherwise complete rate orders"); *Mills v. Alabama*, 384 U.S. 214, 217 (1966) (deeming a decision of the Alabama Supreme Court a "final judgment" because it fully resolved the federal constitutional issues presented, even though further proceedings were needed in state court, including a trial). Nothing that could have happened in the North Carolina courts after *Harper I* could have revived the General Assembly's original congressional map or removed the authority of the trial court to draw a new map if necessary. The outcome was thus foreordained to that extent.

Second, *Harper I* is among those decisions "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox,* 420 U.S. at 480. Again, nothing that could have happened in the North Carolina courts after *Harper I* could have revived the General Assembly's original congressional map. Thus, even if the North Carolina courts had held that the General Assembly's remedial map was acceptable, the General Assembly would still suffer injury from the invalidation of its original congressional map, in violation of the Elections Clause. This Court has similarly exercised jurisdiction in other cases that fall in this category. *See*, *e.g.*, *Montana v. Imlay*, 506 U.S. 5, 7 (1992) (holding that "there can be no doubt that the decision below is a 'final judgment'" where the Montana Supreme Court had decided a federal constitutional issue, despite also remanding for the defendant's resentencing); *ASARCO Inc. v. Kadish*, 490 U.S. 605, 611–12 (1989) (holding that a final judgment exists over which to assert jurisdiction because "on remand

the trial court does not have before it any federal question" and "the trial court's further actions cannot affect the Arizona Supreme Court's ruling" on the federal question).

Although *Harper I* is sufficient to provide this Court jurisdiction over all the issues this case presents, the North Carolina Supreme Court's stay denial provides a second final judgment over which this Court has jurisdiction to decide whether the Elections Clause allows North Carolina courts to draw remedial maps. By denying Petitioners a temporary stay of the court-drawn remedial map, the North Carolina Supreme Court rendered a final judgment as to which map would govern the 2022 election cycle. The 2022 election has now taken place using the court-drawn remedial map. The stay denial is therefore a separate final judgment over which this Court is properly exercising jurisdiction. *See*, *e.g.*, *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (exercising jurisdiction over a stay denial as a final judgment because that denial "finally determined the merits of petitioners' [First Amendment] claim" during appellate review).

Accordingly, both *Harper I* and the stay denial are final judgments for purposes of this Court's jurisdiction. And because those decisions are final for purposes of this Court's jurisdiction, additional proceedings in the North Carolina Supreme Court cannot make either *Harper I* or the stay denial somehow "non-final."

On February 3, 2023, the North Carolina Supreme Court granted rehearing of a third decision, *Harper II*, 881 S.E.2d 156 (N.C. 2022), but that rehearing order (and any proceeding that follows it) will not change any of these conclusions. In *Harper II*, the North Carolina Supreme Court, as relevant here, affirmed the trial court's rejection of the General Assembly's remedial congressional map following *Harper I*. The rehearing grant pertains to that judgment and, as relevant here, the rehearing will decide *only* whether the North Carolina trial court properly rejected the General Assembly's remedial congressional map. The court's decision on rehearing will not undo the judgment in *Harper I*; the General Assembly's initial congressional map will not be revived. Indeed, as a matter of North Carolina law, the North Carolina Supreme Court cannot undo the judgment in *Harper I*. It cannot now rehear *Harper I* because the time for seeking rehearing of that judgment has long ago passed. A petition for rehearing must be filed within fifteen days after the mandate of the court has been issued, and the *Harper I* mandate issued on February 24, 2022, by order of the North Carolina Supreme Court. N.C. R. App. P. 31(a) ("A petition for rehearing may be filed in a civil action within fifteen days after the mandate of the court has been issued."); *Harper v. Hall*, No. 413PA21, Order of Feb. 15, 2022 ("Pursuant to Appellate Rule 32(b), it is HEREBY ORDERED, that the clerk shall enter judgment in this matter and issue the mandate of the Court, on 24 February 2022." (emphasis in original)).

The rehearing also does not render the stay denial non-final. Nothing the North Carolina Supreme Court does on rehearing can turn back time and rerun the 2022 congressional election on a map other than that written by the North Carolina court.

To be sure, Petitioners have called in their rehearing briefing for *Harper I*'s legal conclusions allowing partisan gerrymandering claims to be *overruled as precedent*. But they acknowledge that even if the North Carolina Supreme Court does so, that holding will not disturb the *judgment* of *Harper I*. Feb. 17, 2023 Legislative Defs.' Suppl. Br. on Rehearing at 55 ("To overrule *Harper I* would not alter the [North Carolina Supreme] Court's injunction against the

[original] 2021 plans."). Respondents have not disagreed. *See* March 3, 2023 Suppl. Br. of Pls. and Pl.-Intervenor on Rehearing. *Harper I* and the stay denial are simply beyond the reach of rehearing, and no party to this case has claimed otherwise. Rehearing in *Harper II* thus could affect the state of the law in North Carolina moving forward, but it will not affect the finality of the decisions under review in this case. Regardless of what the North Carolina Supreme Court does in *Harper II*, it will remain the case that the North Carolina Supreme Court in *Harper I* invalidated the General Assembly's duly drawn congressional map under an improper understanding of the Elections Clause and in its subsequent stay denial allowed the 2022 congressional election in North Carolina to be conducted under a court-drawn map adopted in violation of the Elections Clause. Under *Cox*, those are final decisions within this Court's jurisdiction.

This Court is therefore fully possessed of jurisdiction to decide all of the issues this case presents based on the North Carolina Supreme Court's final judgment in *Harper I* and the stay denial. The North Carolina Supreme Court's grant of rehearing in *Harper II* and any proceedings that follow it cannot change that fact.

Respectfully,

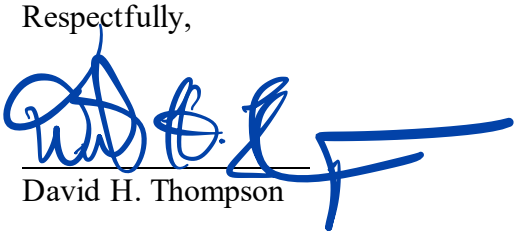

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EXHIBIT 2

March 20, 2023

Honorable Scott S. Harris
Clerk of Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Moore v. Harper*, No. 21-1271

Dear Mr. Harris:

The North Carolina Supreme Court's February 3, 2023 order granting rehearing in *Harper v. Hall* confirms that the decisions on review here are not final. Further proceedings remain in state court, and none of the four exceptions to finality from *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), applies. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257(a) and should dismiss this case.

I. Background

This litigation has taken place in two phases—a liability phase and a remedial phase. Petitioners sought this Court's review of North Carolina Supreme Court decisions from both phases. First, Petitioners sought review of the state supreme court's decision holding that the State's November 2021 congressional map violated the state constitution. Pet. at 5; *see Harper v. Hall*, 868 S.E.2d 499 (N.C. 2022) ("*Harper I*"). Second, Petitioners sought review of the state supreme court's decision denying their motion for a temporary stay of the trial court's order holding that the General Assembly's February 2022 remedial congressional map violated the state constitution and adopting an interim map for the 2022 election cycle. Pet. at 5.

In their brief in opposition, State Respondents pointed out that these decisions were nonfinal. BIO at 36-38. As for the liability decision, State Respondents explained that the state supreme court had remanded the case to the trial court for further proceedings. BIO at 5-8, 36-38. As for the remedial decision, State Respondents explained that Petitioners had filed a notice of appeal from the trial court's remedial order, an appeal that remained pending before the state supreme court. BIO at 8-10, 36-38. All told, State Respondents argued that these ongoing

state proceedings rendered the decisions nonfinal and that this lack of finality could "substantially complicate this Court's review." BIO at 36.

Despite these arguments, this Court granted certiorari before the state-court remedial proceedings concluded. Then, after this Court heard oral argument on December 7, 2022, the state supreme court affirmed the trial court's remedial-phase order with respect to the congressional map on December 16, 2022. *Harper v. Hall*, 881 S.E.2d 156 (N.C. 2022) ("*Harper II*").

Petitioners then sought rehearing in the North Carolina Supreme Court. *See* N.C. R. App. P. 31(a). They asked the court to withdraw its decision in *Harper II* as wrongly decided. Reh'g Pet. at 4-12, *Harper v. Hall*, No. 413PA21-2 (N.C.), bit.ly/3YCdwLA. Petitioners also argued that the state supreme court should overrule its prior liability-phase decision in *Harper I*. Reh'g Pet. at 12-20.

The state supreme court granted rehearing in February 2023. *Harper v. Hall*, 882 S.E.2d 548 (N.C. 2023) (mem.). The court also ordered supplemental briefing on the issues raised in the petition and on the appropriate remedy. *Id.* at 550. In their supplemental brief, Petitioners reiterated their arguments that the state supreme court should overrule both *Harper I* and *Harper II*. Petr. Supp. Br. on Reh'g at 19-49, *Harper v. Hall*, No. 413PA21-2 (N.C.), https://bit.ly/3F7dBQz.

On March 14, 2023, the North Carolina Supreme Court heard oral argument on rehearing. The state supreme court has not yet issued a decision, and state law does not require the court to rule on rehearing within any set timeframe. *See generally* N.C. R. App. P. 31.

For the reasons discussed below, the North Carolina Supreme Court's decision to grant rehearing confirms that the decisions on review are nonfinal and that this Court therefore lacks jurisdiction.

II. The decisions on review are not final under 28 U.S.C. § 1257(a).

This Court has jurisdiction over "[f]inal judgments or decrees" of a state high court. 28 U.S.C. § 1257(a). A state-court judgment must be final "in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Market Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). In other words, the judgment must be "the final word of a final court." *Id.*

As State Respondents noted in their brief in opposition, the decisions on review did not meet this finality requirement. The decisions were expressly interlocutory. BIO at 8-10. The state supreme court's decision in *Harper I* remanded the case to the

trial court for further remedial proceedings. *Harper I*, 868 S.E.2d at 559. And the order denying Petitioners' motion for a temporary stay left unresolved Petitioners' appeal from the trial court's remedial order. *Harper v. Hall*, 868 S.E.2d 95, 97 (N.C. 2022) (mem). In addition, further review by the state supreme court was not only possible but effectively inevitable. BIO at 10, 37. State Respondents explained to this Court at the certiorari stage that briefing and argument on Petitioners' appeal was likely to take place in 2022 or 2023. BIO at 10. State Respondents further cautioned that this appeal could result in a "range of possible outcomes" affecting either the state supreme court's liability decision or the trial court's remedial order. BIO at 37. State Respondents urged this Court to deny certiorari on that basis. BIO at 36-38. The North Carolina Supreme Court's order granting rehearing confirms that the decisions on review in this case are not—and never have been—final.

III. No *Cox* exception to finality applies.

In a "limited set of situations," this Court has "found finality as to the federal issue despite . . . further proceedings in the lower state courts." *Jefferson v. City of Tarrant*, 522 U.S. 75, 82 (1997) (internal quotation marks omitted). This Court's decision in *Cox* groups these cases into "four categories." 420 U.S. at 477. At the certiorari stage, Petitioners did not argue that any of the *Cox* exceptions to the final-judgment rule were implicated here. *See* Pet. at 5; Reply at 1-3. None applies in any event.

First, this Court may exercise jurisdiction despite ongoing state-court proceedings when a state high court's decision is final "for all practical purposes" and "the outcome of further proceedings [is] preordained." *Cox*, 420 U.S. at 479. Neither of these prerequisites applies to this case. The decisions on review were never final for all practical purposes—not at the time this Court granted certiorari and not today: Petitioners' appeal from the trial court's remedial-phase order was still pending before the North Carolina Supreme Court when this Court granted certiorari. BIO at 10. And even now, that appeal remains unresolved. The outcome of the still-ongoing state-court proceedings, moreover, has never been preordained. The state supreme court's recent decision to grant rehearing only underscores the unpredictability of the ongoing proceedings in this case.

Second, this Court may exercise jurisdiction despite ongoing state-court proceedings when the federal issue has been finally decided by the state high court and will "survive" the litigation "regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. The federal issue here has not been finally decided. In their supplemental brief on rehearing, Petitioners argued that the Elections Clause should have barred judicial review of the original congressional map under the state constitution. Petr. Supp. Br. on Reh'g at 49. How (or even whether) the state supreme court will resolve Petitioners' claim remains to be seen. After all, the state supreme court could decide the pending appeal in a manner that renders

the federal question academic or ducks the issue entirely. An outcome of that kind would render any holding from this Court on the Elections Clause issue advisory.

Third, this Court may exercise jurisdiction when additional proceedings are yet to take place in state court but "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox*, 420 U.S. at 481. As State Respondents previously noted, however, Petitioners can seek this Court's review on the federal questions raised in their petition once the state-court proceedings truly do reach a final judgment. BIO at 37-38. For example, if Petitioners are unsuccessful on rehearing, and the state supreme court reaffirms *Harper I* and *Harper II*, this Court would have jurisdiction to review that final judgment at that point.

Fourth, this Court may exercise jurisdiction when (1) despite further state-court proceedings, refusal to immediately review the state-court decision would "seriously erode federal policy" and (2) reversal of the state court on the federal issue would end the litigation. *Cox*, 420 U.S. at 482-83. No federal policy would be seriously eroded by waiting for a final state-court judgment here. The State's 2022 congressional elections have already taken place under the state court's interim map, and Petitioners will suffer no prejudice from letting the ordinary appeals process play out. Thus, there is no "sufficient justification for immediate review." *See id.* at 479.

* * *

Although the Court has already received briefing and heard oral argument in this case, "[c]ompliance with the provisions of § 1257 is an essential prerequisite to [this Court's] deciding the merits of a case brought . . . under that section." *Johnson v. California*, 541 U.S. 428, 431 (2004) (per curiam). The decisions on review are nonfinal, and this Court should therefore dismiss the case for lack of jurisdiction.

If it would aid the Court's decision-making process, State Respondents would welcome the opportunity to submit supplemental briefing when the North Carolina Supreme Court issues its decision on rehearing.

Respectfully,

/s/ Sarah G. Boyce
Sarah G. Boyce

Counsel for State Respondents

cc: See attached service list

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-1271

TIMOTHY K. MOORE, ET AL.,
Petitioners,
v.
REBECCA HARPER, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE NORTH CAROLINA SUPREME COURT

PROOF OF SERVICE

I, Sarah G. Boyce, a member of the bar of this Court, hereby certify that, on this 20th day of March 2023, all parties required by the Rules of this Court to be served, set out in the below service list, have been served by email and by first-class mail, postage prepaid. In addition, three paper copies have been mailed via overnight mail to the Clerk of this Court.

/s/ Sarah G. Boyce
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March 20, 2023

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EXHIBIT 3

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March 20, 2023

Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Moore v. Harper*, No. 21-1271

To the Clerk of the Court:

We represent Respondents the North Carolina League of Conservation Voters, Inc., et al. ("NCLCV Respondents"). We respectfully submit this supplemental letter brief addressing the question the Court posed on March 2, 2023: "What is the effect on this Court's jurisdiction under 28 U.S.C. § 1257(a) and *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), of the North Carolina Supreme Court's February 3, 2023 order granting rehearing, and any subsequent state court proceedings?"

NCLCV Respondents respectfully submit that the North Carolina Supreme Court's February 3rd rehearing order itself has no material effect on this Court's jurisdiction. For jurisdictional purposes the case's procedural posture today is similar to its posture on May 20, 2022, when NCLCV Respondents opposed the petition for certiorari by arguing that this Court lacked jurisdiction, and on June 30, 2022, when this Court granted the petition over Respondents' jurisdictional objections.

As further background, in our brief in opposition, we argued that this Court lacked jurisdiction over the question presented by Petitioners because there were ongoing state-court proceedings regarding the proper remedy for the state constitutional violations and therefore there was no "[f]inal judgment[]" to give rise to this Court's jurisdiction under 28 U.S.C. § 1257(a). *See* NCLCV Opp. i, 3, 12, 17–20. We noted that the orders forming the basis for Petitioners' question presented were quintessentially interlocutory—"classic nonfinal orders, particularly given that Petitioners [were] continuing to raise Elections Clause arguments in the ongoing state-court proceedings." *Id.* at 17.

We likewise noted (*id.*) that while the North Carolina Supreme Court's February 23, 2022 denial of Petitioners' stay request had been a "final judgment for purposes of [this Court's] jurisdiction," that was because the stay denial had "finally determined" the congressional map for the 2022 election. *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43, 44 (1977) (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). However, our brief in opposition stated that there had been no final determination by the North Carolina Supreme Court as to the congressional map for 2024 and beyond (*see* NCLCV Opp. 17), which remains at issue in the ongoing proceedings.

Our brief in opposition also argued that there was no exception to the final-judgment rule here under *Cox Broadcasting*. We stated that the "only exception that is even arguably relevant is the second *Cox* category—for cases where 'the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.'" NCLCV Opp. 17–18 (quoting *Cox*, 420 U.S. at 480). And we argued that this exception did not apply for multiple reasons. *See id.* at 18–20.

Despite Respondents' arguments that this Court lacked jurisdiction under 28 U.S.C. § 1257(a), the Court granted certiorari, 142 S. Ct. 2901 (2022), and did not direct the parties to address any jurisdictional question in their merits briefing. "In granting certiorari, [the Court] necessarily considered and rejected [Respondents' arguments] as a basis for denying review." *United States v. Williams*, 504 U.S. 36, 40 (1992) (describing respondents' nonjurisdictional forfeiture argument).

Nevertheless, in our merits brief filed on behalf of all Non-State Respondents, we preserved our prior jurisdictional arguments and also made a narrower jurisdictional argument. *See* Br. for Non-State Respondents 5, 18, 69–70 & n.22, 80. Specifically, we noted that "Respondents argued at the certiorari stage that this Court lacks jurisdiction entirely." *Id.* at 70 n.22 (citing, *e.g.*, Harper Opp. 11–15; NCLCV Opp. 17–20). We further argued that "Petitioners' remedial-phase claims [were] outside this Court's jurisdiction" because at that point "[o]nly the trial court ha[d] reached a final judgment on [those] claims" and "Petitioners' remedial appeal remain[ed] pending in the state supreme court." *Id.* at 69–70; *see also* U.S. Amicus Br. 28–29.

The North Carolina Supreme Court's February 3rd order did not vacate, withdraw, supersede, or modify the court's 2022 decisions on either liability or remedy. Indeed, Petitioners told the court that the time to rehear its liability rulings had long passed. *See* N.C. R. App. P. 31(a); Defs.' Resp. to Mot. to Dismiss 1 (N.C. Feb. 3, 2023). And the February 3rd order did not specify any federal issue that the court had "overlooked or misapprehended." N.C. R. App. P. 31(a). So the February 3rd rehearing order itself has no material effect on this Court's jurisdiction.

As to the effect on this Court's jurisdiction of "any subsequent state court proceedings," NCLCV Respondents cannot answer that question at this time, as we do not yet know what the nature of those proceedings might be, nor when a final judgment may issue from the North Carolina Supreme Court on rehearing. However, we would be pleased to promptly submit a supplemental brief addressing any questions this Court might have once the North Carolina Supreme Court rules on the pending rehearing.

Sincerely,

Jessica Ring Amunson

EXHIBIT 4

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March 20, 2023

By Electronic Filing and Hand Delivery

Honorable Scott S. Harris
Clerk of the Court
Supreme Court of the United States
Washington, D.C. 20543

Re: *Moore* v. *Harper*, No. 21-1271

Dear Mr. Harris,

The Court asked the parties to address the effect of subsequent "proceedings" before the North Carolina Supreme Court on this Court's jurisdiction. Those proceedings have no effect on the Court's jurisdiction, and a dismissal of the Petition would be premature at best.

In February 2022, the North Carolina Supreme Court held in *Harper I* that the Elections Clause does not prevent the state courts from upholding the state constitution's prohibition on partisan gerrymandering. *See* Pet. App. 1a-223a. The time to seek rehearing of that decision has long since expired. *See* N.C. R. App. P. 31(a) (petition for rehearing must be filed within 15 days). *Harper I* is currently the binding precedent of the North Carolina Supreme Court, and that decision is not subject to withdrawal. The North Carolina Supreme Court's February 3, 2023 rehearing order in *Harper II* does not change that. *Harper I* is the state court's "final judgment or decree" on the constitutional question before this Court, and this Court has jurisdiction to review it under *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). *See, e.g.*, *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 54-55 (1989).

Cox addresses this Court's jurisdiction when "the highest Court of a State has finally determined the federal issue present *in a particular case*, but in which there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477 (emphasis added). Here, *Harper I* is a final determination of a federal issue in a "particular case." This Court has an "unflagging obligation" to exercise its jurisdiction, *Colo. River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817 (1976), and nothing in the "proceedings" has altered the Court's jurisdiction at this

time. Speculation about what the North Carolina Supreme Court may do at some future point does not affect this Court's jurisdiction now, and it would be imprudent for this Court's future cases to open the door to such possibilities here. This Court can address any further decision by the North Carolina Supreme Court after further supplemental briefing, if appropriate.

At the time this Court granted certiorari in *Harper I*, the North Carolina courts had not yet determined which redistricting maps should apply to future elections. As Non-State Respondents have explained, this Court accordingly lacks jurisdiction to review that question. *See* Non-State Resp'ts' Br. 69. The rehearing order does not change that, either. The North Carolina Supreme Court issued its decision in *Harper II* on December 16, 2022, and Petitioners timely sought rehearing, which was granted on February 3, 2023. As a result, there is no final decision in *Harper II*.

Petitioners' position in this case is that state courts have *no role to play* in reviewing congressional redistricting maps. Regardless of how the state court resolves the state-law questions presented in *Harper II*, that question will remain live before this Court. And even if *Harper II* were to somehow render that question moot, this Court should still reach this crucial constitutional question, which is fully briefed and argued before this Court, and which is capable of repetition but has continued to escape this Court's review. The Court should, if at all possible, decide this question now, rather than on an emergency basis during the 2024 election cycle. All of that is why this Court should not dismiss this case at this point based on speculative possibilities that may not ever materialize.

BACKGROUND

1. In November 2021, the North Carolina General Assembly enacted new redistricting plans for the state House, state Senate, and Congress. Pet. App. 18a. Respondents challenged those maps in state court as unlawful partisan gerrymanders under the North Carolina Constitution.

In January 2022, the trial court held that all three maps were extreme partisan gerrymanders, but it concluded that partisan-gerrymandering claims are non-justiciable under the state constitution. Pet. App. 24a, 49a-53a. The North Carolina Supreme Court reversed. In *Harper I*, the court analyzed whether the Elections Clause "forbids state courts from reviewing a congressional districting plan" that "violates the state's own constitution." Pet. App. 121a. The court concluded that the Elections Clause permits state-court review, fully and finally resolving the only federal issue in the case. *See id.* The North Carolina Supreme Court separately analyzed whether the specific maps enacted by the legislature violated the state constitution. Pet. App. 122a-138a. The court answered that state-law question in the affirmative, and it "remand[ed]" to the trial "court to oversee the redrawing of the maps by the General Assembly or, if necessary, by the court." Pet. App. 142a.

Under North Carolina's Rules of Appellate Procedure, Petitioners had 15 days to seek rehearing. *See* N.C. R. App. P. 31(a). Petitioners did not seek rehearing, and the North Carolina Supreme Court's decision in *Harper I* became final as a matter of state law. After the time to seek rehearing expired, Petitioners filed a certiorari petition in this Court. In their reply brief in support of certiorari, Petitioners argued that this Court had jurisdiction over *Harper I* because "[n]o further decision is possible in the North Carolina courts" and "[t]his Court has jurisdiction to determine whether the North Carolina Supreme Court's opinion and order invalidating the legislature's original maps violates the Elections Clause." Cert. Reply 1.

2. In addition to fully and finally resolving the federal Elections Clause issue, *Harper I* resolved the state-law question whether the specific maps enacted by the state legislature were extreme partisan gerrymanders prohibited by the North Carolina Constitution. The North Carolina Supreme Court remanded for further proceedings to determine which maps should be enacted in their place.

On remand, the North Carolina General Assembly enacted remedial legislative and congressional plans. In February 2022, the trial court approved the state House plan and the state Senate plan, but it held that the congressional plan was unconstitutional. Pet. App. 290a-293a, 278a-279a, 301a. The trial court modified the congressional map to bring it into constitutional compliance. Pet. App. 292a-293a. The trial court ordered that this remedial plan be used on an "[i]nterim" basis solely for the 2022 election, with the legislature to enact a new plan thereafter. *Id.*

Petitioners appealed that decision to the North Carolina Supreme Court. That appeal involved solely issues of state law; Petitioners' briefing did not cite or discuss the Elections Clause. *See* Non-State Resp'ts' Br. 13. When this Court granted certiorari in June 2022 to review *Harper I*, the proceedings before the North Carolina Supreme Court in *Harper II* were ongoing. After oral argument in this Court on the federal question presented by *Harper I*, the North Carolina Supreme Court issued its decision in *Harper II* addressing the state-law question of which remedial maps should govern future elections in North Carolina, remanding to the trial court for further proceedings. *See* 881 S.E.2d 156, 162 (N.C. 2022).

3. Petitioners sought rehearing. In their rehearing petition, Petitioners asked the North Carolina Supreme Court to "withdraw its *Harper II* opinion" and "overrule *Harper I*." Pet. for Reh'g 3.[1] The North Carolina Supreme Court granted rehearing. Following the grant of rehearing, *Harper II* remains good law unless and until the North Carolina Supreme Court withdraws or modifies its decision in *Harper II*. *Harper I* is not subject to rehearing; it is the final decision of the North Carolina Supreme Court on the federal question presented here.

[1] Filings from the rehearing proceedings are available on the online docket, https://bit.ly/3ZODH35.

The parties have submitted their rehearing briefs, and the North Carolina Supreme Court held argument on March 14, 2023. The North Carolina Supreme Court has not yet issued its decision on rehearing.

ARGUMENT

Harper I represents the North Carolina Supreme Court's final determination of the federal issue this Court granted certiorari to resolve. *Harper II* is an ongoing state-court proceeding concerning state law and state law alone. *Harper II* was not final when this Court granted certiorari, and the North Carolina Supreme Court's decision to grant rehearing in *Harper II* does not affect this Court's jurisdiction under 28 U.S.C. § 1257(a) to review *Harper I*. By granting certiorari, this Court "necessarily considered and rejected" the argument that it lacked jurisdiction to review *Harper I* due to the ongoing remand proceedings before the North Carolina courts. *United States* v. *Williams*, 504 U.S. 36, 40 (1992). The fact that the North Carolina Supreme Court may choose to overrule *Harper I* at some future point does not affect the finality of that judgment or prevent this Court from reviewing it, just as this Court's grant of certiorari in a case where the question presented asks this Court to overrule one of its prior decisions does not render that prior decision any less binding on lower courts. This case is in precisely the same posture as when the Court granted certiorari. *Harper I* is a final decision subject to this Court's review, whereas the ongoing state-court proceedings in *Harper II* are not final and are not subject to this Court's jurisdiction. It may have been a different matter had Petitioners filed a rehearing petition in *Harper I*, but since the time for that has long elapsed, the decision is final.

A. This Court Has Jurisdiction Over *Harper I* Under *Cox*.

This Court "has recurringly encountered situations in which the highest court of a State has finally determined the federal issue present in a particular case, but in which there are further proceedings in the lower state courts to come." *Cox*, 420 U.S. at 477. "There are now at least four categories of such cases in which the Court has treated the decision on the federal issue as a final judgment * * * and has taken jurisdiction without awaiting the completion of additional proceedings anticipated in the lower state courts." *Id.* At least two of those categories apply here.

First, this Court has jurisdiction under the second *Cox* category, which applies when "the federal *issue*, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480 (emphasis added). State court decisions falling into this category have "adjudicated" all the "federal questions [in the case] that could come" to this Court, while "the state proceedings to take place on remand 'could not remotely give rise to a federal question * * * that may later come here.' " *Florida* v. *Thomas*, 532 U.S. 774, 779 (2001) (quoting *Cox*, 420 U.S. at 480); *see, e.g.*, *ASARCO Inc.* v. *Kadish*, 490 U.S. 605, 612 (1989) (finding jurisdiction because all federal questions "have been

adjudicated by the State court and the remaining issues * * * will not give rise to any further federal question" (quotation marks omitted)); *Am. Exp. Lines, Inc.* v. *Alvez*, 446 U.S. 274, 279 & n.7 (1980) (plurality op.) (holding that "[t]he fact that * * * other claims are nonfinal" "need not preclude" the Court "from considering the final determination" by a state high court on a specific claim).

In *Harper I*, the North Carolina Supreme Court fully decided the sole federal "issue" in this case: whether the Elections Clause prohibits state courts from enforcing state constitutional provisions that ban partisan gerrymandering. Once the time for seeking rehearing expired, that decision was "subject to no further review or correction in any other state tribunal" and was "final as an effective determination of the litigation" on that federal question. *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 81 (1997) (citation omitted). *Harper I* is a "final judgment or decree" by a state high court; it is subject to review by this Court. *Cox*, 420 U.S. at 476-477 (cleaned up). North Carolina law confirms this. If, for example, a litigant were to cite *Harper I* in state court right now, it would be binding law. Notably, at this stage, that would be true even if *Harper I* were being reheard, which it is not. *See, e.g.*, *Weisel* v. *Cobb*, 30 S.E. 312, 312 (N.C. 1898) (on rehearing, "every presumption is in favor of the judgment already rendered"); *Alford* v. *Shaw*, 358 S.E.2d 323, 328 (N.C. 1987) (withdrawing earlier decision during course of rehearing proceedings and holding that the earlier "decision is *no longer* authoritative and this opinion now becomes the law of the case" (emphasis added)).

The theoretical possibility that the North Carolina Supreme Court may at some uncertain future date adopt a different interpretation of the Elections Clause does not deprive this Court of jurisdiction. The finality of a state-court judgment "is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." *Market St. Ry. Co.* v. *R.R. Comm'n of State of Cal.*, 324 U.S. 548, 551 (1945). And although a grant of rehearing "open[s]" the "judgment," *id.* at 552, the February 3 grant of rehearing *only* reopened *Harper II*—not *Harper I*. *Cox* asks whether a state high court has "finally determined the federal issue present in a particular case." 420 U.S. at 477. The state court did that in *Harper I*, and *Harper I* remains the final law on the Elections Clause in North Carolina. Finality cannot turn on whether the state court may reach a different conclusion in some later proceeding. Otherwise, this Court would lose jurisdiction every time a litigant asks a state court to overrule an earlier decision on a federal question that is pending before this Court. That cannot possibly be the law.

There is no indication, let alone a certainty or even probability, that the North Carolina Supreme Court intends on rehearing of *Harper II* to revisit the federal question before this Court. The dissent in *Harper I* would have decided the case on state-law grounds. *See* Pet. App. 145a-223a. In their supplemental rehearing brief, Petitioners spent one paragraph describing their federal Elections Clause argument,

but did not ask the state court to overrule its prior interpretation of the Elections Clause. *See* Legis. Defs.' Supp. Br. on Reh'g 49. The "remedies" section of their rehearing brief makes this clear: Petitioners asked the state court to overrule *Harper I* on the ground "that partisan gerrymandering claims are non-justiciable and non-cognizable." *Id.* at 63. At oral argument before the North Carolina Supreme Court, Petitioners reiterated that they do not seek rehearing of *Harper I*; they instead asked the court to overrule "as precedent" the portion of *Harper I* holding that there are state-law "standards" to assess partisan gerrymandering. N.C. Sup. Ct. Oral Arg. Tr. 8:26-9:40.[2] At argument, Associate Justice Morgan noted that the North Carolina Supreme Court granted rehearing only on *Harper II*, not *Harper I*. *See id.* at 5:23-5:45. And Associate Justice Dietz indicated that under longstanding principles of North Carolina law, the North Carolina Supreme Court may not have jurisdiction to reach a federal question that is pending before this Court. *See id.* at 9:42-11:15.

There are serious questions under federal law, too, about whether the North Carolina Supreme Court has authority to overrule *Harper I* in light of this Court's grant of certiorari. *Cf. Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam); Will Baude, *The Other Jurisdictional Question in* Moore v. Harper, The Volokh Conspiracy (Mar. 3, 2023 12:39 AM), https://bit.ly/42mYk7Y. Should this Court dismiss this case, it would essentially be deciding those issues about divestiture under both federal and state law, without the benefit of fulsome briefing or argument. Under the unique circumstances here—where a state high court has issued a final decision on a federal question, the court is not required to reach the federal question in pending proceedings, and there is no indication that the court intends to overrule its earlier decision on that federal question—this Court does not lose jurisdiction.

A dismissal of the petition now also raises other practical problems. If the North Carolina Supreme Court's decision on rehearing in *Harper II* rests on state-law grounds, this Court may not have jurisdiction to review the federal question decided in *Harper I* on certiorari from the rehearing decision. *See Rio Grande W. Ry. Co.* v. *Stringham*, 239 U.S. 44, 47 (1915) (holding that certiorari was properly sought from first state high-court judgment addressing federal question, rather than subsequent state high-court decision that presented "nothing reviewable here"); *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 513-516 (1950) (similar). Thus, if this Court holds that it lacks jurisdiction over *Harper I*, and the North Carolina Supreme Court does not reach any federal question on rehearing in *Harper II*, there could be *no avenue to obtain review of a crucial question of federal law*. This "stranding problem" further demonstrates that this Court has jurisdiction to reach the federal question presented here. Given this possible outcome, the Court should either issue its decision on the merits or hold this case pending the decision on rehearing in *Harper II*, rather than dismissing it for lack of jurisdiction.

[2] *Available at* https://www.youtube.com/watch?v=cp-zlPxuu2I.

The North Carolina Supreme Court's ruling in *Harper I* that the Elections Clause does not prohibit state courts from applying state constitutional prohibitions on partisan gerrymandering will survive and require decision regardless of the outcome of the North Carolina state-court proceedings addressing the remedial maps. Petitioners' position is that state courts have *no role to play* in evaluating congressional districting maps. *See* Pet'rs' Opening Br. 18 (arguing that "the state legislatures' authority" is "exclusive" and "excludes other state entities"). As the Non-State Respondents have explained, that is wrong as a matter of text, structure, history, and precedent. *See* Non-State Resp'ts' Br. 19-57.

If Petitioners are correct, however, it would mean that the North Carolina Supreme Court has no authority to even *adjudicate* the questions before it concerning the congressional map on rehearing in *Harper II*, regardless of how the state court ultimately resolves those questions. Thus, even if the state court holds as a matter of state law that the state constitution does not prohibit partisan gerrymandering, that ruling will not resolve the federal question whether the state court may adjudicate that question in the first place. The federal "issue" for purposes of *Cox* would still be decided, and the same need for this Court to resolve the meaning of the Elections Clause would persist. This Court thus retains jurisdiction to decide that federal question regardless of how the North Carolina Supreme Court rules on the state-law questions before it on rehearing. *See Local No. 438 Constr. & Gen. Laborers' Union, AFL-CIO* v. *Curry*, 371 U.S. 542, 548-550 (1963) (holding that the Court had jurisdiction to determine whether a state court had the "power to conduct" further proceedings). This case thus falls within the second *Cox* category.

Second, even if the proceedings in *Harper II* could "render[ ] unnecessary review of the federal issue by this Court," this Court has jurisdiction under the fourth *Cox* category. *Cox*, 420 U.S. at 482-483. That category applies when "the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and where "refusal immediately to review the state court decision might seriously erode federal policy." *Id.*

Here, the federal issue at stake in *Harper I* has been finally decided by the North Carolina Supreme Court. That ruling is the law of the land in North Carolina and will persist regardless of how the North Carolina Supreme Court rules on rehearing in *Harper II*. Even if the state court's decision could "render[ ] unnecessary review of the federal issue by this Court," however, this Court would still have jurisdiction. *Cox*, 420 U.S. at 482-483. The fourth *Cox* category governs situations where the reversal of a "state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.*; *see, e.g.*, *id.* at 485-486;

Goodyear Atomic Corp. v. *Miller*, 486 U.S. 174, 179 (1988) ("a reversal of the Ohio Supreme Court's holding would preclude any further proceedings"); *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983) ("a reversal here would terminate the state court action"). In this case, reversal of the North Carolina Supreme Court's ruling that state courts have authority under the Elections Clause to review congressional redistricting maps for state constitutional compliance would preclude further litigation. It would mean that state courts have no substantive role to play in congressional redistricting, and that state constitutions have no bearing on federal elections conducted in that state.

This Court's refusal to address that question now would "seriously erode federal policy." *Cox*, 420 U.S. at 483. This Court has held that permitting "proceedings to go forward in the state court without resolving" a National Labor Relations Act "preemption issue would involve a serious risk of eroding the federal statutory policy of requiring the subject matter of respondents' cause to be heard by the [National Labor Relations] Board, not by the state courts." *Belknap*, 463 U.S. at 497 n.5 (quotation marks omitted). Likewise, this Court has held that a state-court decision implicating the constitutionality of a state RICO statute "calls into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government," and that it was "intolerable to leave" such a question "unanswered." *Fort Wayne Books*, 489 U.S. at 55-56 (citation omitted).

The federal policy at issue here is far weightier than the jurisdiction of the NLRB or the validity of a state criminal statute. Allowing the state court to resolve this case without review by this Court would "leave unanswered" the crucial federal question whether the Elections Clause prohibits state courts from evaluating state elections laws for compliance with state constitutions. *Cox*, 420 U.S. at 484-485 (citation omitted). Petitioners' position on this question "calls into question the legitimacy" of centuries of state-court practice, as well as the validity of the earliest state constitutions. *Fort Wayne Books*, 489 U.S. at 55. If this Court fails to reach that question, it will leave state courts and state legislatures "operating in the shadow" of this unresolved issue. *Cox*, 420 U.S. at 486. That outcome is "intolerable." *Fort Wayne Books*, 489 U.S. at 56 (citation omitted). The authority of state courts to uphold state constitutions with respect to federal elections "should not remain in doubt." *Id.* Redistricting disputes—and in particular, the jockeying over which map applies—can persist for years; this Court should not delay review of a crucial federal question until that litigation ends, potentially years after the next election cycle.

This "issue is almost certain to keep arising until the Court definitively resolves it." *Moore* v. *Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring in denial of application for stay). And the next time it arrives before this Court, it may be on an emergency basis in the lead-up to the primaries for the 2024 elections.

"Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges." *Merrill* v. *Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring in grant of applications for stays). "[S]tate and local election officials need substantial time to plan for elections." *Id.* Members of this Court have recognized that federal courts should refrain from "re-do[ing] a State's elections laws in the period close to an election." *Id.* at 880-881 (citing *Purcell* v. *Gonzalez*, 549 U.S. 1 (2006) (per curiam)). This Court should thus address the question presented now, rather than several months from now, when preparations for the 2024 primaries will be well underway. If this Court rules for Petitioners, the impact will be extraordinarily disruptive, invalidating potentially hundreds of state constitutional provisions. *See, e.g.*, Br. of Amicus Curiae Brennan Center for Justice 9-11 (Oct. 26, 2022); Br. of Amicus Curiae Benjamin L. Ginsberg 15-18 (Oct. 26, 2022). This potential for disruption further counsels in favor of the Court resolving the parties' dispute in this case and at this time, rather than in the shadow of a pending election where state and local officials will have insufficient time to act.

B. This Court Has Never Had Jurisdiction Over *Harper II*.

This Court has never had jurisdiction over the state courts' decisions with respect to which redistricting map applies. Respondents explained in their merits briefs that this issue was "outside this Court's jurisdiction" because "[o]nly the trial court ha[d] reached a final judgment" on that question. Non-State Resp'ts' Br. 69; *see* State Resp'ts' Br. 22 (similar); U.S. Br. 28-29 (similar). Counsel for the State Respondents made the same point at oral argument. *See* Oral Arg. Tr. at 160:13-161:1 ("[W]e don't think there's a final judgment [on the remedial issue] yet.").

Nothing has changed. There is still no final decision from the state courts on this question. This Court thus lacks jurisdiction to review the decisions of the North Carolina courts with respect to which redistricting map applies in 2024 and beyond. The North Carolina Supreme Court's February 3 order allowing Petitioners to seeking rehearing of *Harper II* merely confirms that there is no final state-court decision, as required for this Court to exercise jurisdiction under Section 1257(a). If this Court decides the federal question presented here, it will resolve the federal question before this Court, while allowing the North Carolina Supreme Court to address any state-law questions that remain for resolution on rehearing.

C. This Court Retains Jurisdiction Over This Case Regardless Of The Outcome Of Further Proceedings In *Harper II*.

This Court retains jurisdiction over this case regardless of the outcome of the North Carolina Supreme Court's rehearing proceedings in *Harper II*. Petitioners ask this Court to decide whether state courts can play *any role* in adjudicating

congressional redistricting maps. No matter how the North Carolina Supreme Court rules on rehearing of *Harper II*, that issue will remain live before this Court.

As Chief Justice Rehnquist explained in his concurrence in *Honig* v. *Doe*, 484 U.S. 305 (1988), this Court enjoys "the last word on every important issue under the Constitution and the statutes of the United States." *Id.* at 332 (quotation marks omitted). This Court's "unique resources—the time spent preparing to decide the case by reading briefs, hearing oral argument, and conferring—are squandered in every case in which it becomes apparent after the decisional process is underway that [this Court] may not reach the question presented." *Id.* Even if the Court were to conclude that the controversy between the parties is mooted by some future action of the North Carolina Supreme Court, the Court should hold that it retains jurisdiction, preserving "the unique and valuable ability of this Court to decide a case" involving a fundamental question of constitutional law that is capable of repetition but has so far evaded review. *Id.* This would also avoid the problems earlier discussed with *Griggs*. To the extent Petitioners seek to moot their own case by asking the North Carolina Supreme Court to overrule a decision currently before this Court on certiorari, litigants do not get "to play ducks and drakes with the [federal] judiciary." *Baker* v. *Carr*, 369 U.S. 186, 268 (1962) (Frankfurter, J., dissenting).

This Court should not wait until this question comes before it on an emergency basis in the lead up to the 2024 election cycle. The question presented is fully briefed, thoroughly argued, and ripe for decision. This Court is the only forum that can definitively resolve it and provide guidance to state legislatures and state courts across the country.

CONCLUSION

This Court should hold that it has jurisdiction to decide the vital constitutional question presented in this case, regardless of the North Carolina Supreme Court's decision on rehearing in *Harper II*.

Respectfully submitted,

/s/ Neal Kumar Katyal
Neal Kumar Katyal

Counsel for Respondent Common Cause

cc: All counsel of record

EXHIBIT 5

ELIAS LAW GROUP

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March 20, 2023

BY ELECTRONIC FILING

Clerk of the Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Re: *Moore v. Harper*, No. 21-1271

To the Clerk of the Court:

In response to the Court's March 2, 2023, request for supplemental letter briefs in the above-captioned case, we write on behalf of the *Harper* Respondents.

On May 20, 2022, *Harper* Respondents submitted their brief in opposition to the petition for a writ of certiorari arguing that this Court lacked jurisdiction under 28 U.S.C. § 1257(a) because the case under review was not final and no exceptions applied under *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469 (1975). *See* Br. for *Harper* Resps. in Opp'n to Pet. for Certiorari at 11–15. The February 3, 2023 order from the North Carolina Supreme Court and subsequent proceedings to date do not change this conclusion.

To the extent the Court is concerned that Elections Clause disputes will "keep arising until the Court definitively resolves" the issue, *Moore v. Harper*, 142 S. Ct. 1089, 1089 (2022) (Kavanaugh, J., concurring), such that it is inclined to issue a decision here, it should do so only to conclusively—and finally—reject fully the independent state legislature theory.

Sincerely,

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CERTIFICATE OF SERVICE

I, Abha Khanna, hereby certify that I emailed the foregoing Letter Brief for Harper Respondents in 21-1271, *Timothy K. Moore, in his official capacity as Speaker of the North Carolina House of Representatives, et al. v. Rebecca Harper, et al.*, this 20th day of March, 2023 to:

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EXHIBIT 6

U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

March 20, 2023

Honorable Scott S. Harris
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Timothy K. Moore, et al. v. Rebecca Harper, et al., No. 21-1271

Dear Mr. Harris:

On March 2, 2023, this Court ordered the parties and the United States to file supplemental letter briefs addressing the effect of "the North Carolina Supreme Court's February 3, 2023 order granting rehearing, and any subsequent state court proceedings," on this Court's jurisdiction under 28 U.S.C. 1257(a) and *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). The present posture of this case is unusual, and we are not aware of any precedent addressing the application of Section 1257(a) and *Cox* in circumstances like these. In the view of the United States, the North Carolina Supreme Court's grant of rehearing makes it difficult to conclude that the state court has entered a "[f]inal judgment[]" reviewable by this Court under 28 U.S.C. 1257(a). But we acknowledge that it is anomalous for a state court's action to divest this Court of jurisdiction after the Court has already granted certiorari (and, in this case, heard oral argument). We identify below arguments that would avoid that result, either in this case or in future cases raising the same general issue. As we explain, we do not believe that those arguments warrant the continued exercise of jurisdiction under the circumstances presented here. But we acknowledge that no precedent squarely governs this issue, and that the Court could reasonably reach a different conclusion.

I. This Court Appears To Have Granted Certiorari On The Understanding That The Decision In *Harper I* Was Final Under The Second *Cox* Category

Congress has given this Court certiorari jurisdiction to review "[f]inal judgments or decrees" of "the highest court of a State in which a decision could be had." 28 U.S.C. 1257(a). The statutory reference to *final* judgments could be understood "to preclude reviewability * * * where anything further remains to be determined by a State court." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). This Court, however, has long taken a more "'pragmatic approach' to the question of finality." *Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 180 (1988) (citation omitted). Consistent with that approach, the Court has treated "certain state-court judgments * * *

as final for jurisdictional purposes, even though further proceedings [we]re to take place in the state courts." *Pierce Cnty.* v. *Guillen*, 537 U.S. 129, 140-141 (2003).

In *Cox*, this Court distilled its relevant precedents into "four categories" of cases in which a decision on a federal issue by a State's highest court may be treated "as a final judgment for the purposes of 28 U. S. C. § 1257" even though "there are further proceedings in the lower state courts to come." 420 U.S. at 477. "In the first category are those cases in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Id.* at 479. "Second, there are cases * * * in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480. "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* at 481. "Lastly, there are those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action." *Id.* at 482-483. "In these circumstances, if a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." *Id.* at 483.

In this case, the Court granted certiorari to review the North Carolina Supreme Court's February 4, 2022 order in *Harper I*, which held that the congressional map adopted by the North Carolina legislature in 2021 constituted a partisan gerrymander that violated the North Carolina Constitution. Pet. 5; see Pet. App. 224a-242a (order); Pet. App. 1a-223a (accompanying opinion issued on February 14, 2022). In reaching that conclusion, *Harper I* rejected petitioners' contention that the Elections Clause of the U.S. Constitution prohibits applying the state constitution to laws governing congressional elections. Pet. App. 121a-122a. *Harper I* was interlocutory in the sense that it contemplated further remedial proceedings to determine the congressional and legislative maps to be used in future elections, *id.* at 231a-233a, and respondents argued at the certiorari stage that this Court lacked jurisdiction. But the Court's grant of certiorari presumably reflected at least a provisional determination that *Harper I* qualified as a final judgment under Section 1257(a). Cf. *United States* v. *Williams*, 504 U.S. 36, 40 (1992).

That determination appears to have rested on a conclusion that *Harper I* fit within the second *Cox* category. Cf. N.C. League of Conservation Voters, Inc. et al. Br. in Opp. 17 (arguing that "the only exception that is even arguably relevant is the second *Cox* category"). As noted above, that category covers cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings." *Cox*, 420 U.S. at 480. Here, the state-law questions regarding remedy that remained to be litigated after *Harper I* arguably fit within that category when the Court granted certiorari: Regardless of how the state courts resolved questions about the appropriate remedy, it would remain

necessary to decide whether the federal Elections Clause precluded the state courts from imposing any remedy at all for violations of a state constitutional prohibition on partisan gerrymandering.[1]

II. The North Carolina Supreme Court's Grant Of Rehearing Makes It Difficult To Conclude That The State Courts Have Entered A Final Judgment Subject To This Court's Jurisdiction

On December 16, 2022, shortly after this Court heard oral argument, the North Carolina Supreme Court issued a decision in the ongoing remedial proceedings. See *Harper* v. *Hall*, 881 S.E.2d 156 (2022) (*Harper II*). On January 20, 2023, petitioners sought rehearing of *Harper II*. Their petition urged the North Carolina Supreme Court to "grant rehearing in *Harper II*, withdraw its opinion, issue a new opinion overruling *Harper I* by holding that partisan-gerrymandering claims present non-justiciable political questions, vacate the Superior Court's judgment, and remand the case with directions to dismiss this action with prejudice." Pet. N.C. Sup. Ct. Pet. for Reh'g 21. The North Carolina Supreme Court granted rehearing and ordered supplemental briefing and oral argument, which was held on March 14.

Those subsequent developments make it difficult to conclude that *Harper I* remains a "[f]inal judgment[]" within the meaning of 28 U.S.C. 1257(a) for two reasons. First, the threshold requirement shared by all of the *Cox* categories is that the highest state court has finally determined the relevant federal issue—here, whether the Elections Clause bars the application of a state constitutional prohibition on partisan gerrymandering to congressional maps. But the North Carolina Supreme Court is currently entertaining petitioners' request to reconsider that federal issue in the course of further proceedings in this case. Second, the North Carolina Supreme Court's grant of rehearing also means that it is difficult to say that the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings," as required under the second *Cox* category. 420 U.S. at 480. If the North Carolina Supreme Court agrees with petitioners and rejects *Harper I*'s holding that the North Carolina Constitution prohibits partisan gerrymandering, that development would effectively moot the Elections Clause issue.

A. This Court Cannot Be Confident That The North Carolina Supreme Court Has Finally Decided The Federal Elections Clause Issue

All four of the *Cox* categories share the same threshold requirement: This Court will exercise jurisdiction under Section 1257(a) only if "the highest court of a State has *finally determined* the federal issue present in [the] case." *Cox*, 420 U.S. at 477 (emphasis added); see, *e.g.*, *id.* at 480

[1] At the certiorari stage, petitioners also argued (Cert. Reply Br. 2-3) that this Court had jurisdiction to review the North Carolina Supreme Court's February 23, 2022 order denying a stay of the remedial maps adopted by the North Carolina Superior Court to govern the 2022 election. Because the 2022 election has already occurred, however, the dispute over that denial of a stay is now moot. And contrary to petitioners' suggestion (*id.* at 3), the exception to mootness for "disputes capable of repetition, yet evading review," *Federal Elections Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 462 (2007), does not preserve their challenge to the denial of a stay. The dispute has not evaded review because petitioners have continued to assert their Elections Clause claim in the context of the live, forward-looking dispute over the maps to govern future elections.

("federal issue" has been "finally decided by the highest court in the State"); *id.* at 481 ("federal claim has been finally decided"); *id.* at 482 ("federal issue has been finally decided in the state courts"). The reason for that requirement is obvious: If the state courts are still actively considering the federal issue in the course of ongoing proceedings, it is difficult to say that an interlocutory state-court decision addressing that issue qualifies as a "[f]inal judgment[]," 28 U.S.C. 1257(a).

At the certiorari stage, the Court presumably concluded that the North Carolina courts' consideration of the federal Elections Clause issue in this case was final. The North Carolina Supreme Court had squarely rejected petitioners' Elections Clause argument, see Pet. App. 121a-122a, and while it remanded to the trial court for further remedial proceedings, the trial court could not revisit the North Carolina Supreme Court's resolution of the issue. Nor was there any apparent reason to expect the North Carolina Supreme Court itself to reconsider its prior resolution of that issue in the course of any further proceedings on the appropriate remedy in this case.

Following the North Carolina Supreme Court's grant of rehearing, however, it is not clear that the court's February 2022 rulings represent "the State's last word on" the federal Elections Clause issue in this litigation. *Duquesne Light Co.* v. *Barasch*, 488 U.S. 299, 307 (1989). Under North Carolina law, an appellate court may grant a petition for rehearing "as to all or fewer than all points suggested in the petition," and briefing on rehearing is then "addressed solely to the points specified in the order granting the petition to rehear." N.C. R. App. P. 31(c) and (d). Here, petitioners' request for rehearing focused primarily on state-law issues, but also asserted that *Harper I* "conflicts with the U.S. Constitution's Elections Clause." Pet. N.C. Sup. Ct. Pet. for Reh'g 20. The North Carolina Supreme Court's order granting rehearing directed the parties to brief all "issues raised in the petition for rehearing," as well as several additional questions identified by the court. 2/3/23 N.C. Sup. Ct. Order 4; see *id.* at 4-5. And petitioners and respondents then filed supplemental briefs that address the federal Elections Clause issue, albeit briefly. See Pet. N.C. Sup. Ct. Supp. Reh'g Br. 49 (Pet. Supp. Reh'g Br.); Resp. N.C. Sup. Ct. Supp. Reh'g Br. 37-38.

The grant of rehearing and the ongoing rehearing proceedings thus mean that the North Carolina Supreme Court has before it petitioners' request to reconsider the federal issue that the court previously appeared to have resolved. And although the court could decide the case solely on state-law grounds without revisiting *Harper I*'s Elections Clause holding, there is some possibility that its forthcoming decision on rehearing will address that issue. Under the circumstances, it is difficult to conclude that the state court "has finally determined the federal issue" in this case. *Cox*, 420 U.S. at 477.

B. The North Carolina Supreme Court's Grant Of Rehearing Means That It Is No Longer Clear That The Federal Issue Will Survive Further Proceedings

The ongoing rehearing proceedings further make it difficult to conclude that this case satisfies the second *Cox* category's requirement that the federal issue "will survive and require decision regardless of the outcome of future state-court proceedings." 420 U.S. at 480. At the certiorari stage, the Court presumably found that requirement satisfied because the ongoing state proceedings appeared to be limited to remedial questions. But the North Carolina Supreme Court's grant of rehearing means the court is now actively reconsidering the question whether the state

constitution imposes judicially enforceable limits on partisan gerrymandering at all. See, *e.g.*, Pet. Supp. Reh'g Br. 40 (arguing that "politics in redistricting do not violate the state constitution") (capitalization and emphasis omitted). If the North Carolina Supreme Court decides that the state constitution contains no such limits, its decision would effectively moot the federal Elections Clause issue in this case: There would be no need to decide whether the Elections Clause prevents state courts from enforcing particular types of state-law requirements in a case where the state courts have found that no such state-law requirements exist. And this Court has previously recognized that the second *Cox* category does not apply where "[r]esolution of the state-law claims could effectively moot the federal-law question raised" in this Court. *Jefferson* v. *City of Tarrant*, 522 U.S. 75, 82 (1997). Thus, in the present procedural posture, it is difficult to conclude that the North Carolina Supreme Court has finally resolved the Elections Clause issue or that the issue will necessarily survive and require review in this case.[2]

III. This Court May Conclude That There Are Limits On A State Court's Ability To Deprive This Court Of Jurisdiction After It Has Granted Certiorari, But Those Limits Do Not Appear To Warrant The Continued Exercise Of Jurisdiction Here

We recognize that a conclusion that the North Carolina Supreme Court's grant of rehearing deprives this Court of jurisdiction would come at a significant cost. A grant of certiorari by this Court reflects a judgment that a case presents an important federal question that the Court should resolve, and the interest in securing that resolution is frustrated when post-certiorari developments prevent this Court from issuing a decision. Such developments also result in a waste of this Court's scarce resources—especially where, as here, those developments come late in this Court's consideration of a case. See *Honig* v. *Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring). There thus may be reasons to hesitate before concluding that subsequent state-court action has divested this Court of jurisdiction. And although this Court has not previously considered the relevant issues, there are at least two jurisdictional principles that might limit the circumstances in which such a divestment could occur. In our view, those principles do not warrant the continued exercise of jurisdiction in the particular circumstances presented here. But we recognize that the issue is a novel one, and that this Court might reasonably reach a different conclusion.

First, other cases before the Court this Term have implicated the rule that an appeal of an interlocutory district-court decision "divests the district court of its control over those aspects of the case involved in the appeal." *Griggs* v. *Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). See Pet. at i, *Coinbase, Inc.* v. *Bielski*, No. 22-105 (oral argument scheduled for

[2] This case also does not fall within the first or third *Cox* categories. The first category covers cases in which, once the federal issue has been resolved, "the outcome of further proceedings [is] preordained" and "the case is for all practical purposes concluded." *Cox*, 420 U.S. at 479. That does not apply here, where it remains unclear whether petitioners or respondents will prevail on rehearing before the North Carolina Supreme Court. And analysis under the third *Cox* category is similarly straightforward: It encompasses cases in which "the federal claim has been finally decided" in an interlocutory state-court decision, and "later review of the federal issue cannot be had" because, for example, double-jeopardy principles would bar state prosecutors from taking an appeal after a retrial. *Id.* at 481; see, *e.g.*, *Kansas* v. *Marsh*, 548 U.S. 163, 168-169 (2006). No such bar applies here. We address the fourth *Cox* category in Part III, *infra*.

Mar. 21, 2023); Pa. et al. Exceptions to Second Interim Rep. of Spec. Master at 15, *Delaware* v. *Pennsylvania*, No. 145, Orig. (Jan. 10, 2023). A similar rule may apply in certain circumstances when this Court grants a writ of certiorari. See, *e.g.*, *Brewer* v. *Quarterman*, 474 F.3d 207, 209-211 (5th Cir. 2006) (per curiam) (Dennis, J., dissenting from the attempt to exercise jurisdiction) (discussing authorities). The Court might thus conclude that once this Court has granted a writ of certiorari to review a state court's decision on a federal question, the state court lacks authority to revisit that question in any further proceedings in the case while the case remains pending in this Court.

The parties have not raised or briefed those novel jurisdictional questions in the ongoing rehearing proceedings in the North Carolina Supreme Court. And we have not reached a definitive view on those questions here, because they would not alter our ultimate conclusion. If this Court's grant of certiorari deprived the North Carolina Supreme Court of authority to reconsider the Elections Clause issue in the context of the ongoing rehearing proceedings, that might justify treating *Harper I* as the state courts' final resolution of the federal issue. But the North Carolina Supreme Court would still retain jurisdiction to reconsider its antecedent state-law determination that the North Carolina Constitution prohibits partisan gerrymandering: This Court's grant of a writ of certiorari under 28 U.S.C. 1257(a) cannot divest the state courts of *all* authority to take further action in the case—after all, the very premise of *Cox* is that this Court can in some circumstances grant review even though state-court proceedings will continue. And because the North Carolina Supreme Court plainly has jurisdiction to reconsider *Harper I*'s state-law holdings, this case no longer fits within the second *Cox* category because it is no longer clear that the Elections Clause issue will survive the ongoing state-court proceedings. See pp. 4-5, *supra*.

Second, the Court might in some circumstances conclude that subsequent state-court action that would otherwise affect this Court's jurisdiction calls for the application of the fourth *Cox* category. That category covers cases where, among other things, "the federal issue * * * has been finally determined by the state courts for purposes of the state litigation" and "a refusal immediately to review the state-court decision might seriously erode federal policy." *Cox*, 420 U.S. at 483. The Court could reasonably conclude that, at least in some circumstances, it would "seriously erode federal policy," *ibid.*, to allow subsequent state-court action to divest this Court of jurisdiction after this Court has granted certiorari and invested substantial resources in the case. And if the other requirements of the fourth *Cox* exception were satisfied, such a conclusion could justify the retention of jurisdiction to decide a federal question even though that question might not survive the ongoing state proceedings.

Here, however, the other requirements for the fourth *Cox* exception do not appear to be satisfied, because the North Carolina Supreme Court's grant of rehearing on a petition encompassing the Elections Clause issue makes it difficult to conclude that the federal issue has been "finally determined by the state courts." *Cox*, 420 U.S. at 483. And even if this Court were to conclude that the North Carolina Supreme Court lacks authority to reconsider the federal issue, it is not clear that federal policy would be served by the continued exercise of jurisdiction in this case. As noted, the North Carolina Supreme Court heard argument on March 14, 2023. If that Court were to issue a decision on rehearing reversing *Harper I* before this Court issues its opinion in this case, it appears likely that the state court's decision would effectively moot the federal issue. Given that possibility, it is not clear that it would advance the relevant federal policies for this Court to invest

additional time and effort in a case where future events may prevent the Court from resolving the federal question it granted certiorari to decide. Again, however, we acknowledge that the consideration of federal policy embodied in the fourth *Cox* category calls for an exercise of judgment that is not capable of being reduced to clear rules, and if this Court concludes that the other requirements of that category are satisfied it could reasonably reach a different conclusion.

Sincerely,

Elizabeth B. Prelogar
Solicitor General

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