Cooper & Kirk
Lawyers
A Professional Limited Liability Company

David H. Thompson
dthompson@cooperkirk.com

1523 New Hampshire Avenue, N.W.
Washington, D.C. 20036

(202) 220-9636
Fax (202) 220-9601

March 20, 2023

Honorable Scott S. Harris
Supreme Court of the United States
1 First Street NE
Washington, D.C. 20543

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)).

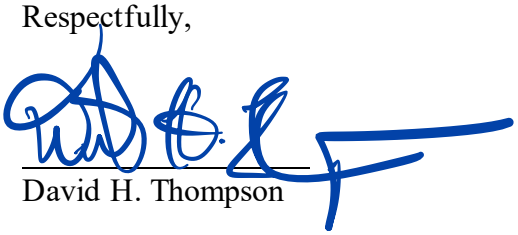
The rehearing also does not render the stay denial non-final. Nothing the North Carolina Supreme Court does on rehearing can turn back time and rerun the 2022 congressional election on a map other than that written by the North Carolina court.

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,



David H. Thompson

cc: Counsel on attached Service List

Service List
Timothy K. Moore, et al. v. Rebecca Harper, et al., No. 21-1271

Jessica Ring Amunson
Jenner & Block LLP
1099 New York Avenue NW
Suite 900
Washington, DC 20001
JAmunson@jenner.com
202-639-6000
Counsel for North Carolina League of Conservation Voters, Inc.

Zachary Charles Schauf
Jenner & Block LLP
1099 New York Ave., NW
Washington, DC 20001
ZSchauf@jenner.com
202-639-6000
Counsel for North Carolina League of Conservation Voters, Inc.

Richard Douglas Bernstein
1875 K Street, N.W.
Washington, DC 20006
rbernsteinlaw@gmail.com
301-775-2064
Counsel for Thomas Griffith, John Danforth, Larry Thompson, Barbara Comstock, Peter Keisler, Stuart Gerson, et al.

Sarah Gardner Boyce
NC Department of Justice
Post Office Box 629
Raleigh, NC 27602
sboyce@ncdoj.gov
919-716-6400
Counsel for State Respondents

Donald B. Verrilli Jr.
Munger, Tolles & Olson LLP
601 Massachusetts Avenue, NW
Suite 500E
Washington, DC 20001-5369
donald.verrilli@mto.com
202-220-1101
Counsel for State Respondents

Neal Kumar Katyal
Hogan Lovells US LLP
555 Thirteenth St., N.W.
Washington, DC 20004
neal.katyal@hoganlovells.com
202-637-5528
Counsel for Common Cause

Abha Khanna
Elias Law Group LLP
1700 Seventh Ave
Suite 2100
Seattle, WA 98101
akhanna@elias.law
206-656-0177
Counsel for Rebecca Harper, et al.

Elizabeth B. Prelogar
Solicitor General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
202-514-2217
Counsel for the United States