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May 11, 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:

At the Court's request, Petitioners respectfully submit this supplemental letter brief to address "the effect on this Court's jurisdiction of the April 28, 2023 order of the North Carolina Supreme Court[.]" May 4, 2023 Order.

The North Carolina Supreme Court's April 28 rehearing decision has no effect on this Court's jurisdiction. This appeal continues to present two final judgments for the U.S. Supreme Court's review, *see* Petr's March 20, 2023 Suppl. Letter Br., and the issues presented are not moot. While the North Carolina legislature is free to enact a new congressional map to govern the 2024 election cycle and subsequent elections, if this Court reverses *Harper I* then the original congressional map adopted by the North Carolina legislature before the outset of this controversy will be restored as the default map governing congressional elections in North Carolina. This case is not moot, and this Court is fully possessed of jurisdiction to decide it.

Background

Following the 2020 census, the North Carolina legislature enacted a new congressional redistricting map, which Respondents challenged in state court. In January 2022, a three-judge panel in the trial court held that partisan-gerrymandering claims were not justiciable under the North Carolina Constitution. Pet.App.49a–53a. The North Carolina Supreme Court reversed in *Harper I*, Pet.App.121a, and sent the case back to the trial "court to oversee the redrawing of the [congressional] map[] by the General Assembly or, if necessary, by the court." Pet.App.142a. On remand, the three-judge panel rejected the North Carolina legislature's remedial map and adopted a court-drawn map instead. Pet.App.292a–93a.

Petitioners sought a stay from the North Carolina Supreme Court, which was denied. Pet.App.243a. Petitioners also sought a stay from this Court, which was denied. *Moore v. Harper*, 142 S. Ct. 1089 (2022) (Mem.). Thereafter, Petitioners filed the instant cert petition, seeking review of *Harper I* and the North Carolina Supreme Court's stay denial, which are the two final judgments under review in this Court.

Meanwhile, Petitioners appealed the trial court's decision on remand to the North Carolina Supreme Court. That court issued an opinion in December 2022, affirming the trial court's decision

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on remand that the North Carolina legislature’s remedial congressional map was a partisan gerrymander in violation of the North Carolina Constitution. *Harper v. Hall*, 881 S.E.2d 156 (N.C. 2022) (“*Harper II*”). Petitioners sought rehearing of that decision, which was granted.

On April 28, 2023, the North Carolina Supreme Court issued a rehearing decision in *Harper v. Hall*, ___ N.C. ___, No. 413PA21-2, ___ S.E.2d ___, 2023 WL 3137057 (“*Harper III*”). *Harper III* did not disturb the final judgments before this Court. Instead, that decision withdrew and replaced the North Carolina Supreme Court’s previous opinion in *Harper II*, affirmed the three-judge trial court panel’s January 11, 2022 judgment, and vacated the three-judge trial court panel’s February 23, 2022 remedial order, *id.* at *3—none of which are presently before this Court. While *Harper III* did overrule the reasoning of *Harper I* as a matter of precedent, holding that partisan gerrymandering claims are nonjusticiable under North Carolina law, it did not purport to disturb the judgment of *Harper I*.

As a matter of North Carolina law, a decision by this Court reversing *Harper I* would restore the map drawn by the General Assembly before the outset of this case to be the default congressional map in North Carolina. There are three congressional maps that are relevant to this litigation. Map 1 is the original congressional map enacted by the General Assembly. Map 2 is the remedial map enacted by the General Assembly after the North Carolina Supreme Court invalidated Map 1 in *Harper I*. And Map 3 is the map drawn by the three-judge trial court after it rejected Map 2. If this Court were to reverse *Harper I*, Map 1 would again become the default congressional map in North Carolina by operation of law. *See* 2022 N.C. Sess. Laws 3, sec. 2.

The North Carolina Supreme Court separately addressed a remedy question in *Harper III* that has relevance to North Carolina’s state legislative maps. *Harper III*, 2023 WL 3137057, at *50–53. The North Carolina Constitution provides that once districts for state senators and state representatives are “established,” they “shall remain unaltered until the return of another decennial census of population taken by order of Congress.” *See* N.C. CONST. art. II, §§ 3(4) and 5(4). The North Carolina Supreme Court held that this provision would not restrict the General Assembly’s authority to draw new state legislative maps because no such maps had been “established” for this decade for purposes of North Carolina law. *Harper III*, 2023 WL 3137057, at *51. This issue has no relevance for the matters before this Court, and therefore will not be affected by any decision of this Court, because the state constitutional provision in question by its terms applies only to redistricting for the state legislature.

Analysis

The North Carolina Supreme Court’s decision in *Harper III* has no effect on this Court’s continuing jurisdiction in this case.

Finality. As Petitioners have previously explained, the judgments under review in this case are final. *See* Petr’s March 20, 2023 Suppl. Letter Br. *Harper III* does not disturb that finality in any way. Indeed, *Harper III* does not even purport to disturb the final judgments that are before this Court.

As explained in our earlier supplemental brief, the North Carolina Supreme Court’s decision in *Harper I* is a final decision sufficient to provide this Court with jurisdiction over all of the issues this case presents. Pet.App.1a–223a. *Harper I* decided Petitioners’ Elections Clause claim on the merits, concluding both that the original congressional redistricting map could be invalidated by the North Carolina courts and that, if necessary, the North Carolina courts could craft a remedial map to replace it. Pet.App.142a. See Petr’s March 20, 2023 Suppl. Letter Br. at 1–3.

Petitioners have also sought review of the North Carolina Supreme Court’s stay denial, Pet.App.243a–46a, which is a second final judgment over which this Court has jurisdiction. The stay denial effectively determined that the court-drawn congressional map would govern the 2022 election cycle. That election has now taken place, rendering the stay denial a separate, final decision. See Petr’s March 20, 2023 Suppl. Letter Br. at 3.

Thus, this case appeals *two* final judgments over which this Court exercises jurisdiction. Respondent Common Cause agrees that *Harper I* is a final judgment for jurisdictional purposes. See March 20, 2023 Common Cause Supplemental Letter Br. at 1 (“*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.”).

The U.S. Solicitor General has claimed that the rehearing grant in *Harper II* “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,’” March 20, 2023 U.S. S.G. Suppl. Letter Br. at 3, but that position misunderstands the proceedings—and is now disproven by the result of *Harper III*. While *Harper III* overruled the reasoning of *Harper I*, it did not decide the Elections Clause issue that this case presents, nor did it purport to disturb the judgment in *Harper I*. *Harper III* decided only that partisan gerrymandering presents a nonjusticiable political question under North Carolina’s constitution, not that the federal Elections Clause prohibits state courts from nullifying state regulations governing the “Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof.” U.S. CONST. art. I, § 4, cl. 1. Thus, the Elections Clause issue presented in this case has “survived” the state-court proceedings and still requires decision here, for the reasons explained in the following discussion of mootness.

Mootness. *Harper III* has not rendered this case moot, for the same reason the enactment of a remedial congressional plan did not moot the case before this Court in *Hunt v. Cromartie*, 526 U.S. 541 (1999). If this Court rules in favor of Petitioners, the General Assembly’s original congressional map, see 2021 N.C. Sess. Laws 174, will once again become the default congressional map in North Carolina by operation of law. On February 17, 2022, the General Assembly replaced the original map with a remedial map by amending the statute that describes the composition of congressional districts in the State (N.C.G.S. § 163-201(a)). Although *Harper III* overruled the *reasoning* of *Harper I*, it did not disturb its judgment nor did it (or could it) alter the presently operative statutes of North Carolina.

The original congressional map will be restored, however, if this Court rules in favor of Petitioners and reverses *Harper I*. In the same law that enacted the remedial congressional map,

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the North Carolina legislature provided that the original congressional map would once again be effective if this Court reverses *Harper I*: If,

the United States Supreme Court . . . reverses or stays the 4 February 2022 order or 14 February 2022 opinion of the Supreme Court of North Carolina in No. 413PA21 holding unconstitutional G.S. 163-201(a) as it existed prior to the enactment of this act (or the decision is otherwise enjoined, made inoperable, or ineffective),

then “in such case the prior version of G.S. 163-201(a) is again effective.” 2022 N.C. Sess. Laws 3, sec. 2. “Because the State’s [remedial] law provides that the State will revert to the [original] districting plan upon a favorable decision of this Court, . . . this case is not moot.” *Hunt*, 526 U.S. at 545 n.1.

In other words, if this Court reverses *Harper I* the original congressional map will spring back into operation and will remain in effect unless and until the General Assembly amends it. Thus, there are real-world consequences that will follow from this Court’s decision in this matter, and the case accordingly is not moot. *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (“[A] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.”) (internal citation omitted); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307–08 (2012) (“As long as the parties have a concrete interest . . . in the outcome of the litigation, the case is not moot.”) (internal citation omitted).

Even if this case were moot under traditional definitions, it would “fit comfortably within the established exception to mootness for disputes capable of repetition, yet evading review.” *Fed. Election Comm’n v. Wis. Right to Life Inc.*, 551 U.S. 449, 462 (2007). This exception applies where “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Id.* Both aspects of the exception apply here.

As members of this Court have accurately noted, the issue this case presents “is almost certain to keep arising until th[is] Court definitively resolves it.” *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay); *see also id.* at 1089–90 (Alito, J., dissenting from the denial of application for stay) (this case presents a “recurring question of constitutional law” that “[w]e will have to resolve . . . sooner or later”). Each time it arises, it likely will be in an emergency posture in anticipation of an upcoming election (as occurred here with respect to the 2022 elections), which does not allow sufficient time to litigate the issues fully in the ordinary course and still render a decision before the election (as also occurred here with respect to the 2022 elections).

It is also reasonable to expect that the North Carolina General Assembly itself will be a party to similar litigation in the future. The North Carolina legislature is bound to redraw North Carolina’s congressional maps at a minimum after every decennial census, U.S. CONST. art. I, § 2, cl. 3 & amend. XIV, § 2, cl. 1, and even though *Harper III* puts to rest some questions related to partisan gerrymandering as a matter of state law, it did not decide the federal Elections Clause issues that this case presents, and a future North Carolina Supreme Court could overrule or depart from *Harper III* or attempt to apply state law to invalidate a congressional map (or any other law

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regulating congressional elections enacted by the General Assembly) in a manner that conflicts with the Elections Clause.

Therefore, the issues this case presents are “capable of repetition yet evading review” and suitable for this Court’s continued jurisdiction even if the issues could otherwise be considered moot. *See* March 20, 2023 Common Cause Suppl. Letter Br. at 2. (“And even if *Harper II* were to somehow render [this case] 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.”).

* * *

Lastly, this case remains a good vehicle for deciding the Elections Clause issues it presents. First, as described here, this Court’s jurisdiction over this case is secure. Second, this case is fully briefed and argued in the regular course rather than in an emergency posture with an election looming. Third, any alternative vehicle likely *would* arise in an emergency posture, because even if this Court were to grant another cert petition that presents the same issues, the ordinary course would be to argue the case next term and decide it squarely in the midst of the 2024 election cycle—exactly the sort of timing pressure that this case does not carry.

In short, by granting certiorari this Court indicated that it believes the issues this case presents are worthy of deciding, and a better vehicle for doing so may never arise.

This Court is fully possessed of jurisdiction to decide all of the issues this case presents, and Petitioners respectfully urge the Court to do so.

Respectfully,


David H. Thompson

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