



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/3F7dBPz>.

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.

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