



**U.S. Department of Justice**

Office of the Solicitor General

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*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.<sup>1</sup>

## **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

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<sup>1</sup> 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.<sup>2</sup>

### **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

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<sup>2</sup> 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

cc: See Attached Service List