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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 Question Presented in this case is “important” and it 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). Petitioners’ independent state legislature theory calls into question hundreds of state constitutional provisions and as many (or more) election laws. The dispute over that theory must be resolved in time to prepare maps, ballots, and election rules well in advance of the 2024 elections. It is therefore exceptionally important that the Court address the Question Presented as quickly as possible. The North Carolina Supreme Court’s April 28, 2023 order has no effect on this Court’s jurisdiction, nor does it moot the controversy between the parties over the independent state legislature theory. The Court should decide this case this Term.

The Court retains jurisdiction under 28 U.S.C. § 1257(a) because the North Carolina Supreme Court’s decision in *Harper I* is a final judgment, and that court’s April 28 order did not rob *Harper I* of finality. Indeed, the existence of a final judgment in this case is even clearer now than when certiorari was granted, because proceedings before the North Carolina Supreme Court have concluded.

Nor does the April 28 order render this case moot. Petitioners’ core contention before this Court is that the Elections Clause prohibits state constitutions—and state courts—from imposing limits on the authority of state legislatures over congressional redistricting. But the North Carolina Supreme Court has now *twice* rejected that contention, ruling against Petitioners in *Harper I* and again rejecting Petitioners’ Elections Clause theory in its April 28 decision. Although the April 28 decision rules

in Petitioners' favor on state-law grounds, the decision flatly rejects the independent state legislature theory that Petitioners have advanced in this Court. Instead, the April 28 decision requires Petitioners to create a new redistricting map that is limited by the constraints imposed by the North Carolina Constitution and that will be subject to judicial review in the North Carolina courts. That asserted harm is precisely what Petitioners ask this Court to remedy. It is not impossible for this Court to grant effectual relief; to the contrary, if this Court rules in Petitioners' favor, Petitioners will be permitted to redistrict in North Carolina unconstrained by the North Carolina Constitution and without review by North Carolina courts. This Court's decision will have concrete and immediate consequences for Petitioners, who are now tasked with redrawing North Carolina's congressional maps and who ask this Court to rule that they may do so without regard to their state constitution.

There is a clear Article III case or controversy, and there are exceptionally compelling reasons for the Court to exercise its authority to resolve that controversy. Petitioners' interpretation of the Elections Clause implicates fundamental questions of self-governance, and the independent state legislature theory has contributed to growing public doubt about the lawfulness and integrity of federal elections. There is a powerful public interest in putting that doubt to rest well before another round of federal elections—and another round of challenges to those elections—occurs. Because of the two-year federal election cycle and the need to resolve election disputes well in advance of elections, it is not clear that this Court could resolve this issue with a different vehicle. Dismissing this case would thus create a danger that the issue would evade this Court's review yet again or that this Court would be required to address the issue in the context of an emergency application with limited briefing, no argument, and insufficient time to decide an issue of this importance.

BACKGROUND

In February 2022, the North Carolina Supreme Court issued its decision in *Harper I*. *Harper I* held as a matter of state law that the North Carolina Constitution prohibits extreme partisan gerrymandering. It also held as a matter of federal law that the Elections Clause of the U.S. Constitution does not prevent state courts from enforcing state constitutional requirements for congressional districting through judicial review. *See* Pet. App. 1a-223a. Petitioners sought certiorari on the federal Elections Clause question to this Court. Although Respondents opposed certiorari in part on the ground that this Court lacked jurisdiction, this Court granted certiorari, received plenary briefing, heard oral argument, and is presumably in the process of drafting its opinion resolving that important federal question.

Meanwhile, remand proceedings took place in the North Carolina courts. In December 2022, the North Carolina Supreme Court issued an opinion in *Harper II* upholding the General Assembly's remedial state House map and rejecting its remedial congressional and state Senate maps. Petitioners then sought rehearing of

Harper II, which the North Carolina Supreme Court granted in February 2023. On April 28, 2023, the court issued an order and opinion (*Harper III* or “Op.”) holding as a matter of state law that partisan gerrymandering is a nonjusticiable political question under the North Carolina state constitution. The court “withdr[ew] and superseded” the decision in *Harper II* and “overruled” *Harper I* on the question whether the state constitution contains enforceable prohibitions on partisan gerrymandering. Op. 10, 145-146.

Harper III, however, did not overrule *Harper I* on the federal Elections Clause question that this Court has granted certiorari to review. To the contrary, *Harper III* reaffirmed that the North Carolina Constitution constrains the General Assembly in state and federal redistricting, and that those constraints are enforceable through judicial review. *Harper III* explained that the General Assembly exercises its redistricting authority “subject to the express limitations in our constitution,” Op. 70, and endorsed state statutes subjecting the General Assembly’s legislative maps to the authority of state courts to conduct “judicial review,” Op. 53.

Harper III did not, and could not, withdraw or vacate *Harper I*. *Harper III* was before the North Carolina Supreme Court on rehearing of *Harper II*—not *Harper I*. *Harper I* had long since become final as a matter of North Carolina law. See 3/20/23 Suppl. Letter Br. of Common Cause at 3. The *Harper III* Court could thus withdraw or vacate *Harper II*, but the most it could do to *Harper I* was overrule its reasoning. And that is what the North Carolina Supreme Court did with respect to partisan gerrymandering.

ARGUMENT

I. This Court Has Jurisdiction Under Section 1257(a).

This Court continues to have jurisdiction to review the North Carolina Supreme Court’s decision in *Harper I*. That decision is a “[f]inal judgment[] or decree[] rendered by the highest court of a State in which a decision could be had.” 28 U.S.C. § 1257(a). *Harper I* became final when Petitioners chose not to seek rehearing before the North Carolina Supreme Court, see 3/20/23 Suppl. Letter Br. of Common Cause at 3, and it remains final. Indeed, there can be no dispute that there is a final judgment in this case now that the proceedings before the North Carolina Supreme Court have concluded—meaning the case for finality is even stronger now than when certiorari was granted. See *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 477-483 (1975) (analyzing whether a final judgment exists where “there are further proceedings in the lower state courts to come”).

The North Carolina Supreme Court’s decision in *Harper III* does not render *Harper I* non-final. In *Harper III*, the North Carolina Supreme Court “overruled” *Harper I*. Op. 10, 145. It did not vacate or withdraw that decision. In contrast, the

North Carolina Supreme Court held that “*Harper II* is *withdrawn* and superseded,” Op. 10, 146 (emphasis added), demonstrating that *Harper II* was *not* a final decision at the time the North Carolina Supreme Court granted rehearing. That makes sense: The time to seek rehearing in *Harper I* has long expired, and that court lacked authority under state law to withdraw its decision in *Harper I*.

In *Harper III*, the North Carolina Supreme Court stated that it was “affirm[ing] the three-judge panel’s 11 January 2022 Judgment concluding, *inter alia*, that claims of partisan gerrymandering present nonjusticiable, political questions.” Op. 145-146. This statement affirms the *reasoning* of the three-judge panel; it does not render *Harper I* non-final. Otherwise, the North Carolina Supreme Court would have had no reason to “overrule” *Harper I*, as opposed to “withdraw” it. And in any event, the North Carolina Supreme Court affirmed the three-judge panel’s reasoning that, under state law, claims of partisan gerrymandering are nonjusticiable. The North Carolina Supreme Court did not disturb *Harper I*’s reasoning that the federal Elections Clause does not prohibit state constitutions from imposing constraints on state legislatures. Indeed, *Harper III* agreed that the General Assembly exercises its redistricting authority “subject to the express limitations in our constitution.” Op. 70.

The portion of *Harper I* rejecting Petitioners’ Elections Clause theory thus remains the law in North Carolina. That portion of *Harper I* is a final ruling on a federal constitutional question, and that federal constitutional question remains before this Court on review of *Harper I*. That is why this Court had jurisdiction under the second *Cox* factor while the North Carolina Supreme Court’s decision in *Harper III* remained pending, and that is why the Court continues to have jurisdiction now. See 3/20/23 Suppl. Letter Br. of Common Cause at 4-7.

This Court should not interpret *Harper III* to vacate or withdraw the judgment of the North Carolina Supreme Court in *Harper I*, or to render the North Carolina Supreme Court’s resolution of the federal Elections Clause issue in *Harper I* non-final. There is no indication that the North Carolina Supreme Court intended such a result, and such an interpretation would raise grave constitutional concerns. Once a federal question comes before this Court on certiorari, state courts lack authority to revisit the aspects of the case this Court has agreed to review. *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>. Otherwise, this Court’s jurisdiction would be subject to manipulation by the state courts. Such a result would be at odds with the Court’s “jurisdiction of national causes,” which the Framers created to combat “the prevalency of a local spirit” that “may be found to disqualify the local tribunals” as final arbiters. The Federalist No. 81 at 486 (Alexander Hamilton) (Clinton

Rossiter ed., 1961). This Court has jurisdiction over the federal question fully and finally decided by the North Carolina Supreme Court in *Harper I*.

II. This Case Is Not Moot.

A case becomes moot “only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.” *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quotation marks omitted). “As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot.” *Id.* (quotation marks omitted). This case is not moot. Petitioners are in the process of redrawing North Carolina’s congressional districts, and this Court’s decision will decisively resolve what rules govern that redistricting process.

Petitioners’ theory before this Court is that “the power to regulate federal elections lies with state legislatures *exclusively*” and that state courts cannot subject a legislature’s redistricting power to “judicial review” under state constitutions. Pet’rs’ Opening Br. 11-12. The North Carolina Supreme Court’s decision in *Harper III*—like the decision in *Harper I*—decisively rejects that argument. Although *Harper III* overruled *Harper I* on the state-law question whether partisan gerrymandering claims are justiciable, *Harper III* repeatedly underscored its agreement with *Harper I* on the federal Elections Clause question that this Court has granted certiorari to consider.

Harper III rejected the suggestion that the state constitution imposes no constraints on the legislature’s regulation of federal elections—noting, for example, that the General Assembly exercises its redistricting authority “subject to the express limitations in our constitution.” Op. 70. *Harper III* then identified such “express” limitations that continue to constrain the General Assembly in congressional redistricting. *See* Op. 117 (state Free and Fair Elections Clause prevents the General Assembly from enacting a law that “prevents a voter from voting according to one’s judgment” or interferes with an accurate vote); Op. 120-123 (state Equal Protection Clause guarantees the “fundamental right of each North Carolinian to substantially equal voting power” (quotation marks omitted)). *Harper III* similarly made clear that these state constitutional constraints are enforceable through judicial review—endorsing North Carolina’s detailed statutory scheme for state-court review of state and congressional redistricting, Op. 62, and holding that this “limited role of judicial review *comports with the fact* that our constitution expressly assigns the redistricting authority to the General Assembly,” Op. 63 (emphasis added).

Harper III thus affirms the North Carolina Supreme Court’s rejection of Petitioners’ position before this Court. Petitioners allege harm as a result of that rejection. Even though Petitioners prevailed on state-law grounds in *Harper III* with respect to partisan gerrymandering, Petitioners continue to be subject to state constitutional constraints and judicial review in the ongoing redistricting process.

And this Court could redress that asserted harm through a ruling agreeing with Petitioners' interpretation of the Elections Clause. A concrete Article III controversy therefore survives between the parties. *See Note, Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1678 (1970) (when the intervening event is "a change in controlling law," the mootness question turns on "whether the issues raised in litigating the validity of activities under the old provision are still presented").

Petitioners' asserted harm is not "conjectural or hypothetical." *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 801 (2015) ("*AIRC*") (quotation marks omitted). This Court in *AIRC* held that a similar dispute over the scope of a state legislature's redistricting authority gave rise to standing. The state legislature there claimed that it was harmed by a citizen initiative that granted control of redistricting to an independent commission. The Court held that this "asserted deprivation" could "be remedied by a court order" ruling for the legislature, and rejected the argument that the "alleged injury is insufficiently concrete to meet the standing requirement absent some specific legislative act that would have taken effect but for" the initiative. *AIRC*, 576 U.S. at 800-801 (quotation marks omitted).

Under *AIRC*, Petitioners have standing to seek this Court's review of the North Carolina Supreme Court's resolution of the federal Elections Clause question, even though Petitioners prevailed separately on state-law grounds. *See Camreta v. Greene*, 563 U.S. 692, 702 (2011) ("an appeal brought by a prevailing party may satisfy Article III's case-or-controversy requirement"). The case for finding jurisdiction here is even stronger than in *AIRC*, moreover, because the question at this juncture is not whether Petitioners have standing in the first instance, but whether the case is moot. And for the case to be moot, it must be "absolutely clear" that there is no harm to Petitioners—a standard that is not met given the ongoing redistricting process. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000).

A simple example demonstrates why there is a concrete controversy in this case. Imagine you are a member of the North Carolina General Assembly. You would of course be bound by the U.S. Constitution. *See* U.S. Const. art. VI, cl. 3. Under *Harper III*, you would also be bound by state constitutional provisions when passing legislation about federal elections, from drawing maps to setting ballot rules. You could therefore not adopt rules that substantially diminished "equal voting power" because they would violate the State's Equal Protection guarantee, nor could you adopt rules that interfere with an accurate vote, due to the State's Free and Fair Elections Clause. And even if some substantive constraints (such as prohibitions on partisan gerrymandering) are nonjusticiable, you would still be bound by oath to comply with all state constitutional constraints. *Cf. Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) (legislators must abide by their oath to uphold the

constitution even when the constitutional requirement cannot be enforced in court); N.C. Const. art. II, § 12 (“Each member of the General Assembly * * * shall take an oath or affirmation that he will support * * * the Constitution of the State of North Carolina”). By contrast, the rule that Petitioners seek would give our hypothetical member of the General Assembly a free hand—unconstrained by the state constitution—to write rules governing federal elections. This is a live dispute that goes to the heart of our system of government, and it is squarely presented to this Court for review. This Court’s resolution of that dispute is plainly warranted.

III. Prudential Considerations Weigh Strongly In Favor Of Resolving This Case.

Because it is possible to grant effectual relief to the parties, there is an Article III controversy. And there are at least three exceptionally compelling prudential reasons for declining to dismiss the case.

First, as Chief Justice Rehnquist explained in his concurrence in *Honig v. Doe*, 484 U.S. 305 (1988), 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.* at 332. Dismissing a case at the eleventh hour after this Court has undertaken plenary review and begun preparing its decision not only wastes the Court’s resources, but also leaves important constitutional questions unanswered. It invites gamesmanship and provides a ready method for thwarting this Court’s review if oral argument does not go the way a side wants it to. This outcome undermines “the unique and valuable ability of this Court to decide a case” and prevents review by “the only Art. III court which can decide a federal question in such a way as to bind all other courts.” *Id.*

Dismissal in such circumstances serves no prudential purpose. This Court has evaluated mootness by considering whether the parties retain an ongoing “personal stake” in the case to assure “that the questions will be framed with the necessary specificity” and “that the issues will be contested with the necessary adverseness.” *Flast v. Cohen*, 392 U.S. 83, 101, 106 (1968). But where, as here, the intervening event occurs after this Court has already received briefing and oral argument, there is no conceivable risk of a failure in the adversarial process. To the contrary, as the Court has recognized, “by the time mootness is an issue, the case has been brought and litigated,” and to “abandon the case at an advanced stage” would “prove more wasteful than frugal.” *Laidlaw*, 528 U.S. at 191-192. This sunk-cost concern “does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest,” but it underscores the reasons for keeping jurisdiction where a continuing interest survives. *Id.* at 192 (citing Chief Justice Rehnquist’s *Honig* concurrence).

Second, retaining jurisdiction would protect against the troubling incentives that would arise if state courts could defeat this Court's jurisdiction after the Court has granted certiorari and heard argument. Even assuming the North Carolina Supreme Court retained authority to conduct rehearing proceedings after this Court granted certiorari, this Court should not lightly conclude that these rehearing proceedings require dismissal.

Dismissal would create glaring incentives for state courts to manipulate this Court's jurisdiction. As the Solicitor General noted in her supplemental letter brief filed on March 20, there are "reasons to hesitate before concluding that subsequent state-court action has divested this Court" of its authority to resolve a case it has granted for review. *See* 3/20/23 Suppl. Letter Br. of United States at 5. The opportunities for abuse are evident. Even if operating in good faith, state courts may succumb to the temptation to moot a case rather than risk reversal in this Court. That temptation may be particularly high if the state court waits until after this Court has heard oral argument. Even setting aside the possibility of such overt manipulation, it would substantially disrupt this Court's decision-making process if state courts could moot cases after this Court has heard argument. Prudential concerns do not favor such disruption of "the orderly operation of the federal judicial system." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 27 (1994).

Third, the considerations weighing against dismissal are particularly compelling given the importance of the constitutional issue at stake and its propensity to evade review. This case presents the question whether state legislatures may operate unconstrained by their state constitutions when regulating federal elections. This case therefore implicates fundamental questions of self-governance and our constitutional structure. As numerous Members of the Court have noted, it is important to resolve this constitutional question, provide guidance to state officials about the scope of their authority over federal elections, and restore public confidence that elections are conducted in compliance with the law. *See Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay); *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732, 733 (2021) (Thomas, J., dissenting from the denial of certiorari) (the question is of "national importance" (quotation marks omitted)); *id.* at 739 (Alito, J., dissenting from the denial of certiorari) ("a decision would provide invaluable guidance for future elections").

This issue will recur every two years, and it is "almost certain to keep arising until the Court definitively resolves it." *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). But because of the short window for litigating such disputes, the issue has evaded this Court's resolution. *See Degraffenreid*, 141 S. Ct. at 737-738 (Thomas, J., dissenting from denial of certiorari) ("The issue presented is capable of repetition, yet evades review."). If this Court does

not resolve this case this Term, it is unclear whether the issue could be resolved in time for congressional maps to be finalized for the 2024 elections. That is particularly doubtful given that “this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election.” *Moore*, 142 S. Ct. at 1089 (Kavanaugh, J., concurring in denial of application for stay). Although the Court has pending before it another petition for certiorari raising a similar question from Ohio, *see Huffman v. Nieman*, No. 22-362, it is not clear that the Elections Clause question was preserved in that case, and this Court would need to accelerate its review dramatically to resolve the case in time for maps to be finalized for the 2024 election cycle. Such accelerated review would be regrettable in resolving an issue of this magnitude.

If the Court does not resolve the issue in this case, it may face an untenable dilemma. It may wait until after the 2024 election cycle to address the issue, after which the process would start anew and the issue may well yet again evade review. Alternatively, the Court may be forced to address the issue in an emergency posture without argument or plenary briefing on the eve of the election. *See Degraffenreid*, 141 S. Ct. at 732 (Thomas, J., dissenting from the denial of certiorari) (noting that “we received an unusually high number of petitions and emergency applications” raising Elections Clause issues before the 2020 election). The Court has the opportunity to resolve this issue now and, by rejecting Petitioners’ independent state legislature theory, avoid this dilemma.

IV. If This Court Considers Another Case, It Should Expedite Review And Retain Jurisdiction Here.

Should this Court decide that it is appropriate to address the independent state legislature theory in a different case, we respectfully urge the Court not to dismiss this case while it considers another vehicle and to consider them both together. Having available the record in this case, along with the dozens of amicus briefs and party briefs filed under a non-compressed schedule, could greatly assist the Court in its resolution of the Question Presented. And because election cases are subject to twists and turns—as this case demonstrates—having a second vehicle that is fully briefed could ensure that future developments do not thwart this Court’s review.

CONCLUSION

This Court has jurisdiction to decide the vital constitutional question presented in this case.

Respectfully submitted,

/s/ Neal Kumar Katyal

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Counsel for Respondent Common Cause

cc: All counsel of record