



U.S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

May 11, 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 May 4, 2023, this Court invited the parties and the United States to file supplemental letter briefs addressing the effect of the North Carolina Supreme Court's April 28, 2023 order on this Court's jurisdiction. In that order, the North Carolina Supreme Court held that the North Carolina Constitution imposes no judicially enforceable limits on partisan gerrymandering, overruled the court's contrary decision in *Harper I*, and dismissed the underlying suit with prejudice. In our view, that order moots the question this Court granted certiorari to decide because it means that the Court's resolution of that question could have no effect on the outcome of this case.

1. This Court granted certiorari to review the North Carolina Supreme Court's February 4, 2022 order in *Harper I*, which held that the congressional and legislative maps adopted by the North Carolina General Assembly in 2021 were partisan gerrymanders that violated the North Carolina Constitution. Pet. 5; see Pet. App. 224a-242a (order); Pet. App. 1a-223a (opinion). In reaching that conclusion, *Harper I* rejected petitioners' contention that the Elections Clause of the U.S. Constitution prohibits state courts from reviewing state laws governing congressional elections for compliance with state constitutions. Pet. App. 121a-122a. *Harper I* was interlocutory insofar as it contemplated further remedial proceedings to determine the maps to be used in future elections. *Id.* at 231a-233a. But the Court's grant of certiorari presumably reflected at least a provisional determination that *Harper I* nonetheless qualified as a "[f]inal judgment" reviewable under 28 U.S.C. 1257(a). See U.S. Letter Br. 2. Specifically, it appears that this Court determined that *Harper I* fit within the second category set forth in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), because the federal issue had been "finally decided by the highest court in the State" and would "survive and require decision regardless of the outcome of future state-court proceedings." *Id.* at 480; see U.S. Letter Br. 2-3.

The state-court remedial proceedings contemplated in *Harper I* continued after this Court's grant of certiorari. Specifically, on December 16, 2022, the North Carolina Supreme Court issued

Harper II, which upheld the state legislature’s remedial plan for the state house but rejected the legislature’s senate and congressional plans. See *Harper v. Hall*, 881 S.E.2d 156, 162 (2022).

On February 3, 2023, however, the North Carolina Supreme Court issued an order granting rehearing in *Harper II*. This Court directed the parties and the United States to file supplemental letter briefs addressing the effect of that order on this Court’s jurisdiction under 28 U.S.C. 1257(a) and *Cox*. Our letter brief explained that the grant of rehearing in *Harper II* made it difficult to conclude that the North Carolina Supreme Court had entered a final judgment reviewable under Section 1257(a). U.S. Letter Br. 3-5. We observed that the questions on which the North Carolina Supreme Court had granted rehearing included the Elections Clause issue, which suggested that it could no longer be said that the State’s highest court had “finally determined the federal issue” in this case. *Cox*, 420 U.S. at 477. In addition, and of most relevance here, we explained that if the court concluded on rehearing that the state constitution contains no judicially enforceable limits on partisan gerrymandering, “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.” U.S. Letter Br. 5; see *id.* at 3, 6.

2. The North Carolina Supreme Court’s April 28 decision resolved the issues on rehearing in exactly that manner, holding “that partisan gerrymandering claims present a political question that is nonjusticiable under the North Carolina Constitution.” Slip op. 10; see, e.g., *id.* at 53-54. The court referenced the federal Elections Clause only briefly and in passing, in the course of explaining its conclusion that partisan gerrymandering claims are nonjusticiable under the North Carolina Constitution. See *id.* at 61; see generally *id.* at 52-96. In that discussion, the court concluded that “redistricting is explicitly and exclusively committed to the General Assembly” and that the state constitution “does not provide any judicially discernible or manageable standards for determining how much partisan gerrymandering is too much.” *Id.* at 53; see *id.* at 71. The court further held that none of the provisions of the North Carolina Declaration of Rights it had relied upon in *Harper I* imposes judicially enforceable limits on the use of partisan considerations in redistricting. *Id.* at 96-129. The court therefore determined that “*Harper I* was wrongly decided.” *Id.* at 136. The court “overruled” *Harper I* and “withd[re]w” *Harper II*, superseding it with the court’s opinion on rehearing. *Id.* at 145-146. The court also “affirm[ed] the [trial court’s] 11 January 2022 Judgment”—*i.e.*, the judgment that *Harper I* had reversed. *Ibid.* And the court “dismissed” the non-State respondents’ claims “with prejudice.” *Id.* at 146.

3. The North Carolina Supreme Court’s April 28 decision means that the federal Elections Clause question on which this Court granted review no longer has any live significance in this case. The Court granted certiorari to decide whether the Elections Clause prohibits state courts from reviewing state legislation governing federal congressional elections for compliance with state constitutions. U.S. Amicus Br. I; see Pet. i. Here, that question arises in the context of the non-State respondents’ claims that the North Carolina General Assembly violated the North Carolina Constitution by engaging in partisan gerrymandering. Pet. App. 19a-20a. But in its April 28 decision, the North Carolina Supreme Court held that the North Carolina Constitution imposes no judicially enforceable limits on partisan gerrymandering and dismissed the non-State respondents’ claims with prejudice. Slip op. 145-146. A decision of this Court determining whether and under what circumstances the Elections Clause might limit state courts’ authority to review state

election legislation for compliance with state constitutions could have no effect on the resolution of those already-dismissed claims. The Court should therefore dismiss the writ of certiorari because the question presented “is now moot in [t]his case.” *Aikens v. California*, 406 U.S. 813, 814 (1972) (per curiam); cf. *ibid.* (dismissing writ of certiorari after oral argument because an intervening decision of the California Supreme Court holding that capital punishment violated the California Constitution meant that “the issue on which certiorari was granted—the constitutionality of the death penalty under the Federal Constitution—is now moot in [t]his case”).

4. A few potential counterarguments warrant mention, but none changes our view that the North Carolina Supreme Court’s April 28 decision on rehearing moots the Elections Clause question in this case.

First, in suggesting that the North Carolina Supreme Court’s grant of rehearing would not affect this Court’s jurisdiction, petitioners previously stated that although the court’s rehearing decision could “overrule[*Harper I*] as precedent,” it could “not disturb the [*Harper I*] judgment.” Pets. Letter Br. 3 (emphasis omitted). In its April 28 opinion, however, the North Carolina Supreme Court not only overruled *Harper I* as precedent, but also affirmed the trial court order that *Harper I* had reversed and dismissed the non-State respondents’ claims with prejudice. Slip op. 145-146. Whatever the status of the *Harper I* order as a matter of state law, therefore, it remains true that the question this Court granted certiorari to decide is now moot because the Court’s resolution of that question could not affect the disposition of this case.

Second, petitioners have also previously argued that this Court would retain jurisdiction notwithstanding the outcome of the rehearing proceedings because the North Carolina Supreme Court’s decision in *Harper I* and its subsequent denial of a stay affected the districts used in the 2022 congressional elections. Pets. Letter Br. 4 (asserting that “[r]egardless 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”). But because the 2022 congressional election has passed and the court-drawn map will not be used again, see slip op. 139, this Court can no longer redress that injury. And in light of the North Carolina Supreme Court’s decision on rehearing, there is no reason to think that *Harper I* and the subsequent denial of a stay will have any effect on the rules governing North Carolina’s congressional elections going forward. See, e.g., *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam) (finding challenge to state election provision moot because the relevant election was “history” and changes to the legal regime made it unlikely that injury would recur).

Third, the Elections Clause question in this case does not come within the mootness exception for issues that are capable of repetition yet evade review. “A dispute falls into that category, and a case based on that dispute remains live, if ‘(1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subjected to the same action again.’” *Turner v. Rogers*, 564 U.S. 431, 439-440 (2011) (brackets and citation omitted). The federal Elections Clause issue in this case has become moot not because of the duration of the challenged action—decennial districting—but rather because of the North Carolina Supreme Court’s unusual grant of

rehearing. And the court's rehearing decision also makes it highly unlikely that a dispute like this one will recur between the parties. Petitioners are North Carolina legislators; respondents are North Carolina voters, a North Carolina-focused organization, and North Carolina executive officials. Any partisan gerrymandering claim the non-State respondents would bring in the future would be foreclosed by the North Carolina Supreme Court's holding that such claims are nonjusticiable as a matter of state law. That same holding means that petitioners are unlikely to suffer the same alleged injury—state courts' invalidation of the State's congressional map as a partisan gerrymander, see Pet. i—in the future.

Finally, our prior letter brief explained that although this Court might determine that there are limits on a state court's ability to take actions that would deprive this Court of jurisdiction after it has granted certiorari, any such limits do not appear to warrant the continued exercise of jurisdiction in this case. U.S. Letter Br. 5-6. We continue to maintain that view. As we previously observed, even if this Court were to conclude that its grant of certiorari deprived the North Carolina Supreme Court of authority to reconsider the federal Elections Clause issue in the context of the ongoing rehearing proceedings, the state court retained jurisdiction to reconsider its antecedent state-law determination that the North Carolina Constitution prohibits partisan gerrymandering. *Id.* at 6. Because the North Carolina Supreme Court's reconsideration of that antecedent state-law issue on rehearing foreclosed non-State respondents' claims and fully resolved this litigation, the federal Elections Clause question is moot.

Sincerely,

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