No. 21-1509

In the Supreme Court of the United States

RYAN COSTELLO, PETITIONER

v.

CAROL ANN CARTER, ET AL., RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

WALTER S. ZIMOLONG III
Zimolong LLC
Post Office Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

GENE P. HAMILTON
Vice President &
General Counsel
America First Legal Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

Counsel for Petitioner

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The petition should be held for *Moore v. Harper*, No. 21-1271, and GVR'd if the Court decides that the Elections Clause constrains or eliminates a state judiciary's map-drawing authority. None of the respondents' arguments against certiorari do anything to undermine the propriety of a hold for *Moore*.

I. THE COURT SHOULD HOLD THE PETITION FOR MOORE V. HARPER

The Court granted certiorari in *Moore* to decide whether and to what extent the Elections Clause limits the state judiciary's authority to impose congressional maps of its own creation in response to an actual or perceived constitutional violation in the legislatively enacted plan. The question presented in *Moore* is:

> Whether a State's judicial branch may nullify the regulations governing the 'Manner of holding Elections for Senators and Representatives . . . prescribed . . . by the Legislature thereof,' U.S. Const. art. I, § 4, cl. 1, and replace them with regulations of the state courts' own devising . . . .

Pet. for Cert., *Moore v. Harper*, No. 21-1271, at i. And the petitioners in *Moore* are insisting that the Elections Clause *categorically prohibits* state courts from drafting or imposing congressional maps. *See* Pet. Br., *Moore v. Harper*, No. 21-1271, at 49 ("[T]he General Assembly is the only entity with the authority to draw North Carolina's congressional districts."); *id.* at 44 ("Only the General Assembly Has Authority To Draw Congressional Districts."). According to the petitioners in *Moore*, the very idea of a court-drawn congressional map usurps a prerogative that the Elections Clause assigns exclusively to "the legislature" of each state. *See id.* at 1 (arguing that the Election Clause does not "assign any role in this policymaking process to state judges" (emphasis removed)); *id.* at 2 (arguing that only "*state legislatures* were to exercise that [map-drawing] power, not any other state entity and not the State as a whole."); *id.* at 18 ("[N]o *other* state organ is authorized to exercise that power."); *id.* at 39 ("[T]he power to regulate federal elections lies with State legislatures alone"). The petitioners in *Moore* claim that the Elections Clause renders the state judiciary impotent in matters of congressional redistricting, and that it cannot even enforce state constitutional provisions or impose a court-drawn map under

the guise of judicial review. *See id.* at 2–3 (denying that the state judiciary may use state constitutional provisions or state judicial review to impose a court-drawn congressional map); *id.* at 11–12 (same); *id.* at 22 (same).

The petitioners in *Moore* may or may not be right to espouse this interpretation of the Elections Clause. But it cannot be denied that a ruling that accepts the petitioners' argument will necessarily call into question the constitutionality of the court-drawn map imposed by the Supreme Court of Pennsylvania. *If* the Elections Clause forbids the state judiciary to impose a court-drawn congressional map because only "the Legislature" may do so, then the "Carter Plan" is as unconstitutional as the court-imposed map in *Moore*, and the Court should GVR for the state judiciary to consider these constitutional limitations. And even if the Court were to adopt a more modest holding in *Moore* that merely constrains rather than entirely eliminates the state courts' congressional map-drawing prerogatives,[1] a GVR would *still* be in order so that the Supreme Court of Pennsylvania could reconsider its decision in light of this newly minted constitutional pronouncement. *See Lawrence v. Chater*, 516

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1. *See, e.g.*, *Moore v. Harper*, 142 S. Ct. 1089, 1091 (2022) (Alito, J., dissenting from the denial of application for stay) ("[T]here must be *some* limit on the authority of state courts to countermand actions taken by state legislatures when they are prescribing rules for the conduct of federal elections."); Br. for America First Legal as Amicus Curiae, *Moore v. Harper*, No. 21-1271 (urging a more modest holding that invokes the Elections Clause and 2 U.S.C. § 2a(c) to limit the discretion of state courts when imposing remedial congressional maps).

U.S. 163, 167 (1996) (GVR is appropriate "[w]here intervening developments . . . reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation."); *id.* at 191–92 (Scalia, J., dissenting) (acknowledging that GVR is appropriate "where an intervening factor has arisen that has a legal bearing upon the decision").

The respondents oppose holding this petition for *Moore*, but none of their arguments hold water.

A. 28 U.S.C. § 1257(a) Does Not Deprive This Court Of Jurisdiction To Consider The Petition

The Chapman respondents claim that a hold for *Moore* is unwarranted because (in their view) this Court lacks jurisdiction to consider the petition. *See* Chapman BIO at 31; *id.* at 12–15. The jurisdictional objection is meritless. 28 U.S.C. § 1257(a) says:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States.

28 U.S.C. § 1257(a). The Chapman respondents claim that this Court lacks jurisdiction under section 1257(a) because: (1) Section 1257(a) requires that that the federal-law issue be "specially set up or claimed" not only in

the certiorari petition, but also in the state-court proceedings below; and (2) The argument in Mr. Costello's petition was not "specially set up or claimed" in those state-court proceedings. *See* Chapman BIO at 12–15. Both the major premise and the minor premise of this argument are wrong.

1. Section 1257(a) Does Not Require Issues To Be "Specially Set Up Or Claimed" In The State-Court Proceedings

As for the major premise: Section 1257(a) requires only that the federal-law issue be "specially set up or claimed"; it does *not* say that the federal-law issue must have been "specially set up or claimed" in the state-court proceedings below. Nor has this Court ever interpreted the "specially set up or claimed" language in section 1257 to require that the federal-law issue be initially presented to the state courts. Instead, this Court has held that as a matter of policy, it will not (as a general matter) consider issues that were not "either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997). This is not a jurisdictional or statutory prerequisite of section 1257, but a court-created rule of practice similar to the rules of forfeiture and waiver, which is subject to exceptions that the Court has allowed and recognized of its own volition.

This Court has—on numerous occasions—reviewed and reversed state-court judgments on grounds that were not presented or considered in the state-court proceedings. *See, e.g.*, *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Vachon v. New Hampshire*, 414 U.S. 478, 479 n.3

(1974) (invoking the "plain error" doctrine to reverse a state-court judgment on a ground that had not been preserved below); *see also Illinois v. Gates*, 462 U.S. 213, 219 (1983) ("In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court reversed a state criminal conviction on a ground not urged in state court, nor even in this Court. Likewise, in *Vachon v. New Hampshire,* 414 U.S. 478 (1974), the Court summarily reversed a state criminal conviction on the ground, not raised in state court, or here, that it had been obtained in violation of the Due Process Clause of the Fourteenth Amendment."). These cases, which are nowhere to be found in the Chapman respondents' brief, are incompatible with their claim that section 1257 precludes this Court from asserting jurisdiction over petitions unless the federal-law claim was "specially set up or claimed" in the proceedings below. If the text of section 1257 required that a federal-law claim be "specially set up or claimed" not only in the petition for certiorari, but *also* in the underlying state-court proceedings, then this Court would be powerless to create "exceptions" to this statutory limitation on its jurisdiction. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 538 (2021) ("[O]ne thing this Court may never do is disregard the . . . limits on the jurisdiction of federal courts"); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 n.3 (1988) ("[A] litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court.").[2] Yet the Court has openly acknowledged that it

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2. *See also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("'Jurisdiction is power to declare the law, and when it

(continued…)

makes exceptions to this pressed-or-passed-upon rule, so it cannot be a statutory jurisdictional obstacle derived from the language of section 1257:

> *With 'very rare exceptions,'* we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.

Adams, 520 U.S. at 86 (emphasis added) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992)).

The pressed-or-passed-upon doctrine is therefore a "practice of this Court" rather than a jurisdictional obstacle imposed by the text of 28 U.S.C. § 1257. *See McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). To the extent that the pressed-or-passed-upon doctrine may be implicated, it concerns only whether this Court should grant certiorari to consider and rule upon the issues presented in Mr. Costello's petition. *See id.* It does not in any way preclude this Court from holding the petition for *Moore*—or from GVRing in response to a ruling that constrains or elimi-

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ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'") (*quoting Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869)); *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution.").

nates the state judiciary's powers in congressional redistricting litigation.

2. The Claims in Mr. Costello's Petition Were Presented To The State Supreme Court In Teddy Daniels's Application For Intervention

The minor premise of the Chapman respondents' argument is also wrong, because the issues in Mr. Costello's petition were "specially set up" and presented to the state supreme court in Teddy Daniels's application for intervention. Pet. App. 397a–429a. The Chapman respondents acknowledge Mr. Daniels's filing in a footnote, but they claim that its arguments were never "presented" because the state supreme court summarily denied Mr. Daniels's application to intervene. *See* Chapman BIO at 14 n.4. That contention is nonsensical. An argument is "presented" to a court even if that court rejects or refuses to consider it, and the Chapman respondents cite no authority that equates a state court's back-of-the-hand treatment of a court filing with a failure to "present" an argument under the pressed-or-passed-upon doctrine.

The Chapman respondents also want this Court to assume that the state supreme court rejected Mr. Daniels's application for procedural reasons, even though the state supreme court provided no explanation for its decision to deny intervention. *See* Chapman BIO at 14 n.4. They also assert that Mr. Daniels waited too long to file his application for intervention, because a previous order from the Commonwealth Court had required all petitions for intervention to be filed by December 31, 2021. *See id.*; *see also* Pet. App. 403a. But Mr. Daniels explained in his application that he could not have sought interven-

tion any sooner, because his legal interests as a candidate were not affected until February 9, 2022, when the Supreme Court of Pennsylvania entered an order suspending the General Primary Election Calendar, and his legal interest as a voter did not arise until January 26, 2021, when Governor Wolf vetoed the congressional map passed by the General Assembly. Pet. App. 404a. In all events, the state supreme court did not say why it denied Mr. Daniels's application for intervention, and this Court cannot determine whether a federal claim was rejected on "adequate" or "independent" state-law grounds unless it has some way of knowing the state court's reasons for ruling as it did—and it cannot assume the existence of adequate and independent state-law grounds in the absence of a state-court explanation. *See Michigan v. Long*, 463 U.S. 1032 (1983).

Finally, the Chapman respondents observe that Mr. Costello did not "adopt[]" or otherwise present Mr. Daniels's arguments in the state-court proceedings. *See* Chapman BIO at 14 n.4. But they do not explain how that presents a jurisdictional obstacle under 28 U.S.C. § 1257(a). The statute requires only that the federal-law issue be "specially set up" without requiring that the petitioner himself present those issues in the state-court proceedings. And they cite no authority that precludes a petitioner from invoking arguments presented by others in the lower courts.

3. The Pressed-Or-Passed-Upon Doctrine And The Adequate-And-Independent-State-Law Grounds Doctrine Do Not Preclude A Hold For Moore Or A GVR In Response To Moore

Even if the Chapman respondents were right to invoke the pressed-or-passed-upon doctrine or the adequate-and-independent-state-law grounds doctrine, their objections concern only whether this Court should grant certiorari to "consider" and "review" the issues Mr. Costello's petition. *See, e.g.*, *Adams*, 520 U.S. at 86 ("[W]e will not *consider* a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review." (emphasis added)); *Long*, 463 U.S. at 1041 (1983) ("[W]e will not *review* judgments of state courts that rest on adequate and independent state grounds" (emphasis added)). None of this prevents the Court from merely holding the petition for *Moore* and GVRing if *Moore* announces constitutional limits on the state courts' redistricting powers.

B. The Respondents' Remaining Arguments Against Holding The Petition For *Moore* Are Without Merit

The Chapman respondents argue against a hold for *Moore* because they claim that Mr. Costello's petition "does not involve any direct application of the Elections Clause,"[3] but instead concerns two federal statutes—2 U.S.C. § 2a(c) and 2 U.S.C. § 2c—that the Elections Clause requires the state judiciary to enforce. *See* U.S.

3. Chapman BIO at 32.

Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations . . . ." (emphasis added)). The Chapman respondents also note that neither of these statutes (nor *Branch v. Smith*, 538 U.S. 254 (2003)) is mentioned by the *Moore* petitioners, so they claim that "[t]here is thus no reason to believe that *Moore* will have any bearing on the questions of statutory interpretation at issue here." Chapman BIO at 32. The Costa respondents make a similar argument. *See* Costa BIO at 30–31.

But *Moore* will assuredly have bearing on the legality of the Carter Plan if this Court holds that the Elections Clause categorically prohibits state courts from imposing congressional redistricting plans—which is exactly what the petitioners in *Moore* are asking for. *See supra* at 2–3. The Chapman and Costa respondents do not deny this, and they present no argument for why this Court should decline to hold the petition when the litigants in *Moore* are asking this Court to oust the state judiciary entirely from the congressional map-drawing business. The Chapman respondents also note that the state judiciary in *Moore* was reviewing a legislatively enacted map rather than imposing a map in response to a legislative impasse,[4] but that makes no difference under the argument presented in the petitioners' brief in *Moore*. Their claim is that the state legislature is the *only* entity with authority to draw a congressional map, and that the state

4. Chapman BIO at 32.

judiciary has *no* congressional map-drawing powers—regardless of whether the judiciary is acting to remedy a legislative impasse or a perceived constitutional violation in the map adopted by the legislature. *See* Pet. Br., *Moore v. Harper*, No. 21-1271, at 49 ("[T]he General Assembly is the only entity with the authority to draw North Carolina's congressional districts."). The petitioners in *Moore* may or may not be right to make this claim, but it cannot be denied that their argument (if accepted by this Court) will render the Carter Plan unconstitutional. And even if this Court issues a more limited holding in *Moore* that merely constrains the remedial discretion of the state judiciary rather than depriving the courts of any role in congressional redistricting,[5] that would still call into question the legality of the Carter Plan and trigger a GVR. In all events, the mere possibility of this is enough to warrant a hold, and none of the respondents deny the possibility of such an outcome in *Moore*.

Finally, the Chapman respondents claim that Mr. Costello's argument for a hold "depends on an argument that he waived and forfeited,"[6] but that has no bearing on the propriety of a hold and subsequent GVR if this Court announces new limits on the state courts' redistricting powers. The entire point of a GVR is to allow the litigants to argue the impact of a Supreme Court ruling that did not exist at the time of the state-court proceedings; it is entirely unremarkable that a litigant request-

5. *See* note 1 *supra*.

6. Chapman BIO at 31.

ing a hold (and subsequent GVR) would have failed to present or anticipate those precise issues at a time when this Court had not even granted certiorari to decide them.

CONCLUSION

The petition for writ of certiorari should be held for *Moore v. Harper*, No. 21-1271.

Respectfully submitted.

WALTER S. ZIMOLONG III
Zimolong LLC
Post Office Box 552
Villanova, Pennsylvania 19085
(215) 665-0842
wally@zimolonglaw.com

GENE P. HAMILTON
Vice President &
General Counsel
America First Legal
Foundation
300 Independence Avenue SE
Washington, DC 20003
(202) 964-3721
gene.hamilton@aflegal.org

JONATHAN F. MITCHELL
Counsel of Record
Mitchell Law PLLC
111 Congress Avenue
Suite 400
Austin, Texas 78701
(512) 686-3940
jonathan@mitchell.law

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