No. 21-1271

In the Supreme Court of the United States

TIMOTHY K. MOORE, in His Official Capacity as Speaker of the North Carolina House of Representatives, *et al.*,

Petitioners,

v.

REBECCA HARPER, *et al.*,

Respondents.

On Writ of Certiorari to the Supreme Court of North Carolina

Brief of the Honorable John R. Ashcroft, Secretary of State of Missouri, as *Amicus Curiae* in Support of Neither Party

Jesus A. Osete
General Counsel
Counsel of Record

HON. JOHN R. ASHCROFT
Secretary of State
600 W. Main St.
Jefferson City, MO 65101
Tel. (573) 751-4875
Jesus.Osete@sos.mo.gov

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTIONAL PROVISIONS:

STATUTES:

OTHER AUTHORITIES:

INTEREST OF *AMICUS CURIAE*[1]

John R. Ashcroft was elected as Missouri's 40th Secretary of State in November 2016, and reelected in November 2020. In Missouri, the Secretary of State is considered the "chief state election official." *See, e.g.*, MO.REV. STAT. § 28.035.1; MO. REV. STAT. § 115.136.1; MO. REV. STAT. § 115.158.1(5); MO. REV. STAT. § 115.160.3; *accord* MO. CONST. art. IV, § 14 (secretary shall perform duties "in relation to elections"). In this role, Secretary Ashcroft has spent almost six years implementing state and federal election laws, and overseeing elections within Missouri. Thus, Secretary Ashcroft has particular experience and expertise that would be helpful to this Court in construing the Elections Clause.[2] U.S. CONST. art. I, § 4, cl. 1.

Secretary Ashcroft has a strong interest in a reading of the Elections Clause that is consistent with the text, structure, and original public meaning of that Clause. To that end, while Secretary Ashcroft does not dispute that congressional redistricting

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[1] No person, other than *amicus curiae* and his counsel, authored this brief in whole or in part, nor has any person, other than *amicus curiae* and his counsel, contributed money intended to fund the preparation or submission of this brief. This brief is filed with the written consent of all parties.

[2] In the interest of brevity, this Brief refers to Article I, Section 4, Clause 1 of the United States Constitution as the "Elections Clause," even though "there are a number of Clauses in the Constitution dealing with elections[.]" *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 29 n.1 (2013) (Thomas, J., dissenting).

authority is vested in state legislatures, *see, e.g.*, *Pearson v. Koster*, 359 S.W.3d 35, 39 (Mo. 2012) (per curiam) ("[R]edistricting is predominately a political question" that is "best left to political leaders, not judges"), the Elections Clause is not the source of that authority. Put differently, redistricting does not fall within the ambit of the phrase "Manner of holding Elections," as used in the Elections Clause. To hold otherwise—as some of this Court's precedents have assumed (without textual analysis)—would be to subject state legislatures' map drawing to congressional oversight. This is a result the ratifying public advocated against.

Even if the Elections Clause is not the source of authority for congressional redistricting, that doesn't mean other provisions of the Constitution aren't either. Consider the Tenth Amendment. Where, as here, "the Constitution is silent about the exercise of a particular power, the Federal Government lacks that power and the States enjoy it." *Chiafalo v. Washington*, 140 S. Ct. 2316, 2333 (2020) (Thomas, J., concurring in the judgment) (cleaned up). Relevant here, the people of Missouri have assigned the congressional redistricting power to their legislature, MO. CONST. art. III, § 45, because, "historically," it has served as "the branch of government closest to the people and the branch that most directly represents the citizens of" Missouri. *Rebman v. Parson*, 576 S.W.3d 605, 609 (Mo. 2019).

SUMMARY OF ARGUMENT

The question presented in this case is whether state courts may "nullify" regulations prescribed by state legislatures governing the "Manner of holding Elections" for Congress and "replace" such regulations with the courts' own. Pet. for Writ of Cert., at i. The answer to that question is unequivocally no: "redistricting is predominately a political question" that is "best left to political leaders, not judges." *Pearson*, 359 S.W.3d at 39. State legislatures—not state courts—are thus vested with the authority to "prescribe[] … Regulations" regarding "[t]he Times, Places and Manner of holding Elections for Senators and Representatives[.]" U.S. CONST. art. I, § 4, cl. 1.

The more critical question, however, is whether congressional redistricting constitutes regulation over the "Manner of holding Elections." Based on the text, structure, and original public meaning of the Elections Clause, it does not. State legislatures' redistricting authority, therefore, does not come from that Clause. Put another way, redistricting does not fall within the ambit of the phrase "Manner of holding Elections," as used in the Elections Clause. Instead that authority may be vested in state legislatures—the representative bodies closest to the people—under traditional Tenth Amendment principles.

This is all true despite some of this Court's cases passively suggesting or concluding otherwise, without offering any textual analysis. Indeed, those cases did not even directly address this particular

reading of the Elections Clause. They are, therefore, entitled to little or no weight here.

Construing the Elections Clause to not include redistricting does not leave individuals affected by redistricting without a remedy to complain about all kinds of map drawing. Existing law provides an avenue for redistricting grievances in certain areas. But construing the Elections Clause to *include* redistricting raises difficult, troubling questions about congressional oversight the ratifying public voiced at the founding. The judgment should be reversed.

ARGUMENT

I. The Elections Clause is not the source of state legislatures' redistricting authority.

A. The text and original public meaning of the phrase "Manner of holding Elections" suggest that redistricting has nothing to do with *how* congressional elections should be held.

Start with the text of the Elections Clause: "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, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. The Clause makes no express reference to redistricting. And the "line drawing process does not affect the times of

elections, nor does it 'prescribe' the 'places' where elections are 'held.' " Nathaniel Persily et al., *When Is A Legislature Not A Legislature? When Voters Regulate Elections by Initiative*, 77 OHIO ST. L.J. 689, 714 n.189 (2016). "At most, … redistricting" arguably "prescribes the 'manner' of congressional elections, but it does not regulate the manner in which such elections are 'held.' " *Id.* The Elections Clause is thus "limited to the timing of elections, the location of polling places, and other facets of administration on the days elections are held." *Id.* That plain and straightforward reading of the Elections Clause's text should be the beginning and end of this inquiry. *See United States v. Sprague*, 282 U.S. 716, 731 (1931) ("The Constitution was written to be understood by the" public, and "its words and phrases were used in their normal and ordinary as distinguished from technical meaning").

Indeed, "there are good reasons for concluding that Article I, § 4's use of 'Manner' is considerably … limited." *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 30 (2013) (Thomas, J., dissenting). For instance, "[t]he Constitution does not use the word 'Manner' in isolation; rather, after providing for … times[] and places," it "describe[s] the residuum as 'the Manner of holding Elections.' " *Id.* "This precise phrase seems to have been newly coined to denote a subset of traditional 'manner' regulation." *Id.* Therefore, those who claim that the Clause covers

redistricting must show redistricting nonetheless falls within the scope of the text used. They cannot.

Under the Elections Clause, state legislatures are vested with the authority to "prescribe[] … Regulations" regarding "[t]he Times, Places and Manner of holding Elections for Senators and Representatives[.]" U.S. CONST. art. I, § 4, cl. 1. Redistricting plainly has nothing to do with either the "Times" or "Places" for "holding Elections[.]" In fact, "as originally understood," these terms merely address the "when" and "where" of holding congressional elections. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1850 (2018) (Thomas, J., concurring) (cleaned up). To that end, the Missouri legislature has enacted laws setting the dates for elections, MO. REV. STAT. § 115.121, the times for elections, MO. REV. STAT. § 115.407, and the locations for elections. MO. REV. STAT. §§ 115.113, .115, .117, & .119.

The salient question then is the following: when a state legislature draws its congressional map after each decennial census, *see, e.g.*, *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003); *Growe v. Emison*, 507 U.S. 25, 34 (1993) (citing U.S. CONST. art. I, § 2, cl. 3); *accord* U.S. CONST. amend. XIV, § 2, is the legislature necessarily "prescrib[ing] … Regulations" that deal with the "Manner of holding Elections for" Congress? No.

"At the time of the founding, the term 'manner' referred to a form or method." *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring in the judgment) (cleaned up). A "correct" reading of the term "Manner" in the Elections Clause, thus, is that the term simply addresses regulation over "*how* federal elections are held[.]" *Inter Tribal*, 570 U.S. at 16 (Scalia, J.); *id.* at 29-30 (Thomas, J., dissenting) (the Clause only talks about the " 'when, where, and how' of holding congressional elections") (collecting historical materials); *id.* at 35 (the " 'Manner of holding Elections' is limited to regulating events surrounding the when, where, and how of actually casting ballots"); *accord Husted*, 138 S. Ct. at 1850 (Thomas, J., concurring) (same). Indeed, the "Manner of holding Elections" for Congress "was understood to refer to the circumstances under which elections were held and the mechanics of the actual election." *Id.* (cleaned up); *see also Inter Tribal*, 570 U.S. at 30-31 (Thomas, J., dissenting) (collecting historical materials).

"In short, the historical context and contemporaneous use of the term 'Manner' seem to indicate that the Framers and the ratifying public both understood the term in accordance with its plain meaning." *Chiafalo*, 140 S. Ct. at 2330 (Thomas, J., concurring in the judgment). That plain meaning is that state legislatures, through redistricting, are not regulating how congressional elections are held.

The drafting of the Elections Clause provides further evidence that "Manner" really only meant how

congressional elections were to be held. An early draft produced by the five-member Committee of Detail "focused only on the timing of congressional elections." Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. 997, 1004-05 (2021). "Over the next four drafts, the Committee of Detail coalesced around broader language that grew to include authority over the manner of elections." *Id.* at 1005. That language was that elections "be biennially held on the same day through the same state(s)," that the "place shall be fixed by the (national) legislatures from time to time, or on their default by the national legislature," and that "[v]otes shall be given by ballot, unless 2/3 of the national legislature shall choose to vary the mode." 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 139 (Max Farrand ed., 1911). Drafters of the Clause thus understood "Manner" to merely refer to the casting of ballots.

Modern jurisprudence confirms this plain meaning of "Manner of holding Elections." This Court has said that the Elections Clause assigns state legislatures the "responsibility for the mechanics of congressional elections." *Inter Tribal*, 570 U.S. at 9 (quoting *Foster v. Love*, 522 U.S. 67, 69 (1997)). And it has reinforced "the Framers' view" that the Elections Clause was intended "to grant States authority to create procedural regulations[.]" *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 (1995). This involves facets of administration on the days

congressional elections are held and thus has nothing to do with the line drawing process.

More importantly, the original public meaning of the term "Manner" illustrates its "procedural focus." *Id.* at 833; *see New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2132 (2022) (the Constitution's "meaning is fixed according to the understandings of those who ratified it"); Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 268 (2019) (under public meaning originalism, one "shift[s] the focus away from mere intentions of the framers" and instead "inquire[s] … into the public meaning of the constitutional text"); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 551 (1994) ("[T]he text of the Constitution, as originally understood by the people who ratified it, is the fundamental law of the land."); *id.* at 552 n.35 ("Original understanding," Robert Bork explains, is "manifested in the words used and in secondary materials, such as debates at the ratifying conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like") (cleaned up).

Not only did James Madison believe the term "Manner" covered "whether the electors should vote by ballot or vivâ voce," but more importantly the ratifying public understood the term to have a specific, narrow scope: "The power over the manner only enables

[States] to determine *how* these electors shall elect—whether by ballot, or by vote, or by any other way." *U.S. Term Limits*, 514 U.S. at 833 (cleaned up). For instance, at the Pennsylvania ratifying convention, it was observed that, with respect to the manner of holding elections, "[i]n some states the electors vote viva voce, in others by ballot." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 535 (Jonathan Elliot ed., 2d ed., 1836). At the Massachusetts ratifying convention, it was stated that "the manner" in that state "was by ballot[.]" *Id.* at 50. And at the North Carolina ratifying convention, it was explained that "the manner of electing is different in different states" because "[s]ome elect by ballot, and others viva voce." 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 60 (J. Elliot 2d ed. 1836); *id.* at 67 (referring to "manner" as "the particular mode in which elections are to be held, as whether by vote or ballot").

Notably, records from the New York ratifying convention demonstrate that the public did *not* understand the Elections Clause to regulate redistricting within the States. The delegates there passed a non-debated resolution providing that "nothing in this Constitution shall be construed to prevent the legislature of any state to pass laws, from time to time, to divide such state into as many convenient districts as the state shall be entitled to elect representatives for Congress[.]" 2 Elliot, *supra*,

at 329; *see also* Robert G. Natelson, *The Original Scope of the Congressional Power to Regulate Elections*, 13 U. PA. J. CONST. L. 1, 40 n.189 (2010) (same).

Accordingly, the text and original public meaning of the phrase "Manner of holding Elections," as used in the Elections Clause, strongly suggest that redistricting is not included within the Clause's scope.

B. The structure of the Constitution supports an interpretation that redistricting falls outside the scope of the Elections Clause.

The text of the Elections Clause confirms that redistricting falls outside its scope. So too the Constitution's structure. In fact, the Elections Clause's silence over redistricting—the process by which a state legislature draws congressional boundaries within a State—is no anomaly. Indeed, the closest provisions to redistricting in the Constitution are really talking about *reapportionment*—the allocation of congressional seats among the States after each decennial census. *See* Travis Crum, *Deregulated Redistricting*, 107 CORNELL L. REV. 359, 369-74 (2022) (distinguishing "reapportionment" from "redistricting, even though the terms are often used interchangeably").

Consider the Apportionment Clause. In 1789, it provided: "Representatives … shall be apportioned among the several States which may be included

within this Union, according to their respective Numbers." U.S. CONST. art. I, § 2, cl. 3. "The Number of Representatives," the Clause further stated, "shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative." *Id.* The Fourteenth Amendment echoed this language in 1868: "Representatives shall be apportioned among the several States according to their respective numbers[.]" U.S. CONST. amend. XIV, § 2. So the Constitution specifically talks about apportionment (the act that precedes redistricting), and does not talk about redistricting (the act that follows apportionment).

The founding generation understood this critical distinction. And discussions about apportionment—not redistricting—took precedence. *Compare, e.g.*, THE FEDERALIST NO. 56, at 250 (Clinton Rossiter ed., 1961) ("Divide the largest State into ten or twelve districts"), *with* THE FEDERALIST NO. 54, at 335 (Clinton Rossiter ed., 1961) (the "inhabitants" of "every State" will "be included in the census by which the federal Constitution apportions the representatives"), *and* THE FEDERALIST NO. 58, at 356 (Clinton Rossiter ed., 1961) ("Within every successive term of ten years a census of inhabitants is to be repeated. The unequivocal objects of these regulations are, first, to readjust, from time to time, the apportionment of representatives to the number of inhabitants[.]"); *id.* ("As these States will, for a great length of time, advance in population with peculiar

rapidity, they will be interested in frequent reapportionments of the representatives to the number of inhabitants."). This difference in terminology, therefore, reflects a critical difference in meaning. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 418 (1821) (Marshall, C.J.); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat) 304, 334 (1816) (Story, J.).

One further note about the structure of the Constitution. Construing the Apportionment Clause, Justice Story, writing for the Court, has explained that while it undoubtedly creates a "duty" to apportion congressional seats based on new census data, "the power to apportion representatives … is nowhere found among the express powers given to congress[.]" *Prigg v. Com. of Pennsylvania*, 41 U.S. (16 Pet.) 539, 619 (1842). That's similar to other parts of the Constitution that "simply impose[] an affirmative duty" or obligation on States, without necessarily "expressly delegate[ing] power to States[.]" *Chiafalo*, 140 S. Ct. at 2329 (Thomas, J., concurring in the judgment) (construing U.S. CONST. art. II, § 1, cl. 2); *but compare U.S. Term Limits*, 514 U.S. at 804-05 (characterizing the Elections Clause as both imposing a "duty" on the States and an "express delegation[] of power to the States to act with respect to federal elections"), *with id.* at 862-63 (Thomas, J., dissenting) (the Clause "simply imposes a duty" on the States and "does not delegate any authority to the States"). Four Justices—albeit in dissent—have said that "[c]onstitutional provisions that impose affirmative

duties on the States are hardly inconsistent with the notion of reserved powers." *Id.* at 863.

Thus, even if the Apportionment Clause creates an affirmative *duty* to apportion representatives, that says nothing about the *power* to apportion representatives. The Elections Clause is no different: even if the Elections Clause imposes a *duty* to draw lines, that doesn't mean the Clause has granted the *power* to draw lines. That power, then, if not expressly delegated to the States in Article I may nevertheless be reserved to them, as recognized in the Tenth Amendment. *See* Part II, *infra*, at 19-23.

C. Historical context shows that the dominant purpose of the Elections Clause was simply to ensure that states held congressional elections in the first place.

In interpreting the Constitution's text, "one ought to begin with the text." Calabresi & Prakash, *supra*, at 550. The text (and structure) here strongly suggest that when state legislatures exercise their redistricting power, they are not regulating the manner in which congressional elections are held. That should be the end of the inquiry. But assuming, *arguendo*, that a plausible ambiguity exists within the text of the Elections Clause, historical context supports this reading too. *See id.* ("One should have recourse to history only where one could assert plausibly that an ambiguity exists.").

The history behind the Elections Clause suggests that the Clause was not meant to be the source of authority for state legislatures' redistricting responsibilities. To be sure, congressional or legislative districting was known at the time of the founding—certainly during the drafting and ratification of the Constitution. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-97 (2019). But it wasn't understood as the impetus for the Elections Clause.

Rather, "[t]he dominant purpose of the Elections Clause, the historical record bears out, was to empower Congress to override state election rules, not to restrict the way States enact legislation" like redistricting. *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 814-15 (2015); *see* MO. CONST. art. III, § 45 (redistricting requires a legislative enactment). In *Inter Tribal*, this Court explained that the Elections Clause "was the Framers' insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress." 570 U.S. at 8. Otherwise, States "could at any moment annihilate" the Union "by neglecting to provide for the choice of persons to administer its affairs." THE FEDERALIST NO. 59, at 362-63 (Clinton Rossiter ed., 1961). James Madison explained that this authority was added "in case the States should fail or refuse altogether" to hold congressional elections. 2 Farrand, *supra*, at 242.

"This fear," that state legislatures may not hold congressional elections at all "permeated state ratification debates[.]" Sweren-Becker & Waldman, *supra*, at 1006.

Indeed, James Wilson of Pennsylvania, who served on the Committee of Detail, claimed that the Elections Clause was necessary for "the very existence of the federal government." THE PENNSYLVANIA CONVENTION: PROCEEDINGS AND DEBATES OF THE CONVENTION, *in* 2 RATIFICATION OF THE CONSTITUTION BY THE STATES: PENNSYLVANIA, at 565 (Merrill Jensen ed., 1976). George Cabot of Massachusetts argued that, without congressional oversight, "state lawmakers" could "first diminish, and finally annihilate … the general government[.]" THE MASSACHUSETTS CONVENTION: CONVENTION DEBATES (Jan. 16, 1788), *in* 6 RATIFICATION OF THE CONSTITUTION BY THE STATES: MASSACHUSETTS, at 1217 (John P. Kaminski et al. eds., 2000). Richard Morris of New York "suggested that … it was absolutely necessary that the existence of the general government should not depend, for a moment, on the will of the state legislatures." THE NEW YORK CONVENTION: DEBATES (June 25, 1788), *in* 22 RATIFICATION OF THE CONSTITUTION BY THE STATES: NEW YORK, at 1906 (John P. Kaminski et al. eds., 2008). And William Davie of North Carolina stated that, without congressional oversight, "[i]t would have been a solecism, to have a government without *any means* of self-preservation." 4 Elliot, *supra*, at 60; *see*

also THE FEDERALIST NO. 59, at 362-63 (arguing that "every government ought to contain in itself the means of its own preservation" and providing that "an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy").

That makes sense: "The Framers" trusted "Congress more than the States when it came to preserving the Federal Government's own existence" and, "to advance this interest, they had to give Congress the capacity to prescribe both the date and the mechanics of congressional elections." *U.S. Term Limits*, 514 U.S. at 894 (Thomas, J., dissenting). The ratifying public shared that sentiment too and viewed Congress' oversight power as both serving "a coordination function" and ensuring "States had at least rudimentary election laws." *Id.* at 894-95 (collecting historical materials).

Providing a means for self-preservation in the federal government is hardly suspect. That may be accomplished through Congress' ability to "make or alter" elections regulations so that States don't abolish the federal government by not holding elections, as the founding generation feared. Extending that power to redistricting, however, is suspect. One can only get there by stretching the plain meaning of the Elections Clause to conclude line drawing somehow can potentially abolish the federal government. Adopting that construction would make

the Clause virtually unrecognizable to the founding generation.

D. This Court's precedents assuming—without analysis—that the Elections Clause includes the power to draw congressional districts are entitled to little or no weight.

To be sure, some of this Court's precedents suggest or conclude, without analysis, that congressional redistricting is at the margin of election regulations captured by the Elections Clause's reference to the "Times, Places and Manner of holding Elections." At least three cases make clear statements to that effect. *Accord Rucho*, 139 S. Ct. at 2496-97, 2506, 2508; *Arizona State Legislature*, 576 at 812; *Vieth v. Jubelirer*, 541 U.S. 267, 275-76 (2004) (plurality opinion); *but see O'Lear v. Miller*, 222 F. Supp. 2d 850, 859 (E.D. Mich.), *aff'd*, 537 U.S. 997 (2002) (holding that a "state's power to subdivide itself into districts … does not stem from [Article I,] section 4" because that power "stems from Article I, section 2," and thus the latter "governs intrastate redistricting" and the former simply "has no role to play").

But none of these precedents directly addressed, as a matter of interpretation, whether congressional line drawing constitutes a "Manner of holding Elections." Instead, these cases primarily addressed whether partisan gerrymandering claims are nonjusticiable political questions, *Rucho*, 139 S.

Ct. at 2506-07; *Vieth*, 541 U.S. at 305, and whether the term "legislature," as used in the Elections Clause, referred exclusively to state legislatures. *Arizona State Legislature*, 576 U.S. at 813.

At most, these cases make passing statements in response to other more relevant arguments in the cases. They are "curiously bereft of reasoning or" textual "analysis of Article" I. *Chiafalo*, 140 S. Ct. at 2331 (Thomas, J., concurring in the judgment). This Court has "generally look[ed] to the text to govern [its] analysis rather than insouciantly follow stray, incomplete statements in … prior opinions." *Id.* (citing *Thryv, Inc. v. Click-To-Call Technologies, LP*, 140 S. Ct. 1367, 1377 (2020) (quotation marks omitted)). Accordingly, because the Court was not "guided by the text" in *Rucho*, *Arizona State Legislature*, and *Vieth*, *id.*, these cases are entitled to little or no weight over the specific merits question at hand.[3]

II. State legislatures may be vested with redistricting authority under traditional Tenth Amendment principles.

State legislatures possess redistricting authority even if such authority doesn't derive from

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[3] To the extent the Court concludes *Rucho*, *Arizona State Legislature*, and *Vieth* nevertheless control, for the reasons articulated in this Brief, those cases should be overruled to the extent they conclude redistricting falls within the ambit of the Elections Clause. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2265 (2022) ("An erroneous interpretation of the Constitution is always important" under existing stare decisis doctrine).

the Elections Clause. That's because powers not enumerated in the Constitution for the federal government may nevertheless be vested in state legislatures—the representative bodies closest to the people. *See, e.g.*, *Arizona State Legislature*, 576 U.S. at 836 (Roberts, C.J., dissenting).

The Tenth Amendment reflects this bedrock structural principle: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In other words, where, as here, "the Constitution is silent about the exercise of a particular power, the Federal Government lacks that power and the States enjoy it." *Chiafalo*, 140 S. Ct. at 2333 (Thomas, J., concurring in the judgment) (cleaned up). And, as shown by the ratification debates, state legislatures were understood to be the representative bodies closest to the people: "state legislatures were more numerous bodies, usually elected annually, and thus more likely to be in sympathy with the interests of the people." *Arizona State Legislature*, 576 U.S. at 836 (Roberts, C.J., dissenting) (cleaned up); *Rebman*, 576 S.W.3d at 609 ("The legislative branch is historically the branch of government closest to the people and the branch that most directly represents the citizens of this state."). Relevant here, the people of Missouri have assigned the congressional redistricting power to their legislature. MO. CONST. art. III, § 45.

This "allocation of power" is unsurprising; it is a truism "both embodied in the structure of our Constitution and expressly required by the Tenth Amendment." *Chiafalo*, 140 S. Ct. at 2333 (Thomas, J., concurring in the judgment). "When the States ratified the Federal Constitution, the people of each State acquiesced in the transfer of limited power to the Federal Government[,]" ceding "only those powers granted to the Federal Government by the Constitution." *Id.* Based on its structure, the Constitution treats the federal government as a sovereign with "enumerated powers," *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819) (Marshall, C.J.), but does not treat the States similarly. Indeed, "the powers delegated by the ... Constitution to the federal government are few and defined," whereas those belonging to the States are "numerous and indefinite." THE FEDERALIST NO. 45, at 292 (Clinton Rossiter ed., 1961). Put simply, "the Constitution does not delineate the powers of the States," and thus they are "free to exercise all powers that the Constitution does not withhold from them." *Chiafalo*, 140 S. Ct. at 2334 (Thomas, J., concurring in the judgment) (cleaned up); *accord* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1900, at 752 (1833) (similar).

Applying Tenth Amendment principles here, even if redistricting does not constitute regulation prescribing the "Manner of holding Elections" for Congress—and, therefore, the Elections Clause says

nothing about state legislatures' authority to redistrict—the redistricting authority may nevertheless reside in state legislatures. This is a quintessential example of the Constitution's silence over a particular power, meaning that such power undoubtedly rests with the States or the people, who have more often than not assigned that power to state legislatures. *See Chiafalo*, 140 S. Ct. at 2333 (Thomas, J., concurring in the judgment) (cleaned up).

Construing the Elections Clause to not include redistricting does not leave individuals affected by redistricting without a remedy to complain about all kinds of map drawing. As this Court acknowledged in *Rucho*, existing law gives courts a role in redistricting for certain areas. 139 S. Ct. at 2495-96 (highlighting "one-person, one-vote and racial gerrymandering"). On the other hand, construing the Elections Clause to *include* redistricting raises troubling questions: Suppose the Missouri legislature passes a 7R-1D map; absent compactness or racial concerns, can Congress nevertheless revise that map as a 4R-4D map? If Congress can "make or alter" state maps, can it do so for purely partisan reasons? If so, are there any limits to Congress' power here? If no limits, then isn't this the kind of "omnipotent" Congress the ratifying public feared? *See, e.g.*, *Rucho*, 139 S. Ct. at 2495.

Difficult questions such as these simply reinforce the demand for a clear and unambiguous statement of constitutional intent. As written, the

Elections Clause does not meet that demand to bring redistricting within its ambit.

CONCLUSION

The Court should reverse the judgment below. Even assuming, *arguendo*, that state legislatures—not state courts—are vested with the authority to prescribe regulations regarding the Times, Places and Manner of holding Elections for Congress, the text, structure, and original public meaning of the Elections Clause strongly suggest that state legislatures' redistricting authority does not derive from the Elections Clause. That authority may nevertheless be given to state legislatures under traditional Tenth Amendment principles.

Respectfully submitted,

Jesus A. Osete
General Counsel
Counsel of Record

HON. JOHN R. ASHCROFT
Secretary of State
600 W. Main St.
Jefferson City, MO 65101
Tel. (573) 751-4875
Jesus.Osete@sos.mo.gov

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Counsel for Amicus Curiae