No. 13-1314

IN THE
Supreme Court of the United States

ARIZONA STATE LEGISLATURE,
Appellant,
v.
ARIZONA INDEPENDENT REDISTRICTING COMMISSION, ET AL.,
Appellees.

On Appeal from the United States District Court for the District of Arizona

BRIEF OF FORMER GOV. JIM EDGAR, ET AL., AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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INTEREST OF THE *AMICI CURIAE*[1]

The *amici curiae* are individuals and non-profit organizations that are government, civic, and business leaders in Illinois, all of whom have a strong interest in promoting fair elections in Illinois.

Several of the individual *amici* are former high-ranking Illinois State officals from both the Democratic and Republican parties. The Honorable Jim Edgar was the Republican Governor of Illinois from 1991 to 1999. The Honorable Sheila J. Simon was the Democratic Lieutenant Governor of Illinois from 2011 to 2015. The Honorable Corinne J. Wood was the Republican Lieutenant Governor of Illinois from 1999 to 2003.

Other *amici* are civic, government, and business leaders in Illinois. Peter B. Bensinger served as Director of the Illinois Department of Corrections from 1970 to 1973. He also served as Administrator of the U.S. Drug Enforcement Administration from 1976 to 1981, and was the U.S. Department of Justice Representative to Interpol in 1978.

Ronald Gidwitz served as President, Chief Executive Officer and Director of Helene Curtis, a Fortune 500 consumer products company based in Chicago, Illinois. In 1998, he co-founded GCG

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Appellant Arizona State Legislature and Appellees Arizona Independent Redistricting Commission, et al. filed blanket consents to the filing of *amicus curiae* briefs, which were docketed on November 7, 2014, and January 13, 2015, respectively.

Partners, a strategic consulting and equity firm in Chicago, and has since served as partner at that firm.

Newton N. Minow served as Chairman of the Federal Communications Commission under President John F. Kennedy. He was subsequently a partner in the law firm of Sidley Austin LLP in Chicago from 1965 to 1991, and is currently senior counsel with the firm.

CHANGE Illinois is a non-profit organization working to help make Illinois a national model for fair, honest government. The organization leads coalition-driven policy research, public education, and advocacy initiatives on democracy and political reform issues. CHANGE Illinois produces detailed research reports on the State's redistricting process, and recently drafted a model redistricting amendment that incorporates an independent commission.

Illinois Campaign for Political Reform ("ICPR") is a non-profit and non-partisan public interest organization that conducts research and advocates reforms to promote public participation and to encourage integrity, accountability, and transparency in both Illinois government and election processes. ICPR facilitates bipartisan dialogue around a range of reform issues in order to advance honest, open, and accountable government and reinvigorate public confidence and civic involvement. ICPR has been deeply involved in several efforts to reform the redistricting process in Illinois.

Common Cause of Illinois is a non-partisan watchdog group whose mission is to promote open, ethical, and accountable government at the local, state, and national levels by educating and mobilizing

the people of Illinois. As part of those goals, Common Cause of Illinois actively supports reform of the congressional and state legislative redistricting process in Illinois. Most recently, Common Cause of Illinois was a founding member of the non-partisan coalition that worked to place an initiative to create an independent redistricting commission on the 2014 Illinois general election ballot.

The League of Women Voters of Illinois is a non-partisan political organization that encourages informed and active participation in government and elections, works to increase understanding of public policy issues and influences public policy through education and advocacy.

The Citizen Advocacy Center ("CAC") is an award-winning, non-profit, non-partisan free community legal organization. Founded in 1994, CAC's mission is to build democracy for the 21st Century by strengthening the citizenry's capacities, resources, and institutions for self-governance. CAC seeks to increase democratic protocols at every level of government and develop the voice of the public.

Amici submit this brief to highlight how the peculiar nature of Illinois's constitutional and political history has allowed a single party, based on a random drawing every ten years, to dominate the redistricting process and draw partisan maps that do not give the voters of Illinois meaningful choices about who will represent them in Congress. *Amici*'s experience with Illinois politics and reform efforts has shown that the lack of independent voice in congressional redistricting in Illinois allows the single-party controlled legislature, and that party's congressional delegation, to choose their constituents, rather than having constituents choose their

representatives. *Amici* stress the critical importance of allowing Illinois voters to have the option to organize and implement a voter-sponsored initiative for independent redistricting to change Illinois's long history of partisan redistricting.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Illinois faces a major political dilemma. State and congressional redistricting in Illinois is performed by the State's bicameral General Assembly. However, the redistricting process frequently ends up being controlled completely by one or the other political party, depending on a random drawing. Not surprisingly, the party winning that random drawing can and has used its resulting control of the process to attempt to entrench itself and its incumbents in power. While both parties have abused their positions when they have won the random drawing (Democrats in 1981 and 2001 and Republicans in 1990), currently the dominant party in the General Assembly, the Democratic party, has sole control of both state and federal legislative district lines. As a result of single party dominance of the redistricting process, there has been a steep decline in the number of competitive congressional elections in which Illinois voters have meaningful choices about who will represent them in Congress.

Illinois voters have few remedies, because the State Constitution does not offer broad or numerous opportunities for voters to effect policy change through referenda or voter initiatives. The Illinois Constitution does, however, contain a "safety valve" by allowing a voter initiative to amend one article of the Illinois Constitution—the Legislative Article. See

Ill. Const. art. XIV, § 3. This provision exists in recognition of voters' potential need to act independently to "overcome" any "reluctance on the part of the General Assembly to propose changes in its own domain." 7 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 2: Committee Proposals, Member Proposals* 2677-78 (1972). Thus, despite its overall limitations on voter initiatives, the Illinois Constitution grants voters the authority to act independently—bypassing the legislature—in the face of legislative entrenchment. It thus authorizes voters to, for example, seek a constitutional amendment to establish an independent redistricting commission to oversee the drawing of legislative maps.

The Appellant's position, however, would nullify that authority in relation to congressional redistricting. The Arizona Legislature argues that under the Elections Clause of the U.S. Constitution, U.S. Const. art. I, § 4, cl. 1, a state's elected legislature (in Illinois, the General Assembly) is the sole "component of state government authorized to prescribe the necessary regulations, including those for congressional redistricting." Appellant Br. 30. The election by the people of a state to place redistricting authority anywhere other than the body denominated the "legislature"—even where that election is expressly permitted by the state constitution—is null and void, the Arizona Legislature says, because the Elections Clause does not permit it.

The Arizona Legislature's reading is not supported by the text, original understanding, or purpose of the Elections Clause. See Appellees Br. 23-27, 33-38, 39-44. It also fails to account for the federalist structure

of government established in the federal Constitution. That document does not purport to control how states and their citizens structure state government. To the contrary, the federal Constitution "'split[s] the atom of sovereignty'"—both preserving states' sovereignty and protecting it from incursion by the federal government. *Saenz* v. *Roe*, 526 U.S. 489, 504 n.17 (1999) (quoting *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). At the heart of state sovereignty—one of its defining features—is the state's authority to set forth the structure and processes of its own government, and to assign power internally within it.

This Court's decisions interpreting the Elections Clause confirm that that Clause does not effect a departure from the fundamental federalist principles underlying our constitutional structure. In both *Ohio ex rel. Davis* v. *Hildebrant*, 241 U.S. 565 (1916), and *Smiley* v. *Holm*, 285 U.S. 355 (1932), the Court explained that the Elections Clause permits states to assign legislative power over congressional redistricting, and a role within the state's legislative process, to actors other than the representative body denominated as the state's "legislature." In each instance, the Court made clear that the Elections Clause does not expand the power of a federal court to instruct a sovereign state as to how to structure internal state governmental operations. To be sure, the Elections Clause permits Congress to "make or alter" whatever "regulations" result from the state's governmental processes, but it does not undermine the state's sovereignty to establish its own state governmental processes in the first instance. U.S. Const. art. I, § 4, cl. 1.

Contrary to the Arizona Legislature's arguments, the Elections Clause does not constrain all states to adopt a single, federally mandated form of legislative process. To the contrary, the Elections Clause leaves each sovereign state and its citizens the power and flexibility to meet the unique needs presented by their situation. The Elections Clause thus does not hamstring the people of Illinois to accept an irrational and partisan redistricting process as their federally mandated lot—but instead preserves their power to overcome this Illinois-specific problem in the manner that Illinois, in the exercise of its sovereign authority and judgment, deems fit.

ARGUMENT

I. THE SOVEREIGN STATES RETAIN SOLE AUTHORITY OVER SELECTING THE STRUCTURE AND PROCESSES OF STATE GOVERNMENT.

A. States Are Self-Governing Sovereigns.

The federal Constitution creates a system of dual sovereignty, in which both the federal government and the states retain sovereignty. "By 'split[ting] the atom of sovereignty,' the Founders established 'two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.'" *Alden* v. *Maine*, 527 U.S. 706, 751 (1999) (quoting *Saenz*, 526 U.S. at 504 n.17) (internal quotation marks omitted). This federalist system requires that the federal government refrain from trespassing on state sovereignty, and instead "treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Id.* at 748.

At the core of state sovereignty is the State's ability to determine its own government structure and composition. As this Court has explained, "the people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence . . . . [T]he preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Texas* v. *White*, 74 U.S. 700, 725 (1868) (citations omitted) (internal quotation marks omitted). Indeed, the authority to engage in self-determined governance is inherent in the very meaning of sovereignty: It is "[t]hrough the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991).

Accordingly, this Court has consistently held that "[a] State is entitled to order the processes of its own governance." *Alden*, 527 U.S. at 752; *accord Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (recognizing "a State's constitutional responsibility for the establishment and operation of its own government"); *Sweezy* v. *New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurring in result) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the . . . States."). The Constitution does not permit "plenary federal control of state governmental processes" because such an allowance would "denigrate[] the separate sovereignty of the States." *Alden*, 527 U.S. at 749. Instead, "the means and instrumentalities employed

for carrying on [States'] operations of their governments, for preserving their existence, and fulfilling the high and responsible duties assigned to them in the Constitution, should be left free and unimpaired . . . ." *Collector* v. *Day*, 78 U.S. 113, 125 (1870), *overruled in part on other grounds by Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939); *accord Dreyer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.").

B. The Elections Clause Reflects This Basic Constitutional Principle.

The well-recognized principle of states' sovereignty over their own governmental structure must inform this Court's interpretation of the Elections Clause. That Clause provides: "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 question before the Court is whether the Elections Clause should be read to permit states the flexibility to determine their own governmental process in connection with congressional redistricting, as they do in all other areas, or whether that Clause creates a unique federal authority over internal state governmental processes that pertain to congressional redistricting. The Arizona Legislature advocates the latter reading—contending that the

Elections Clause dictates precisely how states must assign their lawmaking power. The power to make laws in connection with congressional elections, the Arizona Legislature says, must be assigned to a single body of elected representatives denominated "the Legislature"—no matter what assignment of lawmaking power the state's own law may require.

As the Appellees demonstrate, the Arizona Legislature's self-serving interpretation is inconsistent with the text, original understanding, and purpose of the Elections Clause. Appellees Br. 23-27, 33-38, 39-44. It is also countermanded by the fundamental principle respecting the states' exclusive right to structure their governments.

The Court's decisions interpreting the Elections Clause make this clear. See *Hildebrant*, 241 U.S. 565; *Smiley*, 285 U.S. 355. Those cases hold that a state's self-determined governmental process for enacting legislation is permissible under the Elections Clause—even where the state's legislative process does not assign the decisive role to a lawmaking body denominated "the legislature."[2] In other words, as the Court's precedents establish, the Elections Clause preserves states' sovereignty, and allows states to retain flexibility, by authorizing states to place determinative authority over

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[2] Of course, whatever action a state may take concerning congressional redistricting remains subject to revision by the U.S. Congress. The Elections Clause provides that "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. However, while Congress may override any "[r]egulations" promulgated through state governmental processes, the Elections Clause does not dictate in the first instance what form state governmental processes must take.

congressional redistricting in other players in states' legislative process beyond the entity called "the legislature."

In *Hildebrant*, the Court considered an argument from the Ohio General Assembly similar to that advanced by Appellant here. "By an amendment to the Constitution of Ohio . . . the legislative power was expressly declared to be vested not only in the senate and house of representatives of the state, . . . but in the people, in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the general assembly." 241 U.S. at 566. The Ohio General Assembly passed an act redistricting the state for congressional elections, but the law was disapproved and nullified by popular referendum. *Id.* The general assembly contended that under the Elections Clause, it alone had power to legislate in connection with congressional redistricting, and "the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void." *Id.* at 567.

The Court rejected that argument. *Id.* at 570. As the Court explained, the argument was a challenge to the State's determination of how to organize its legislative power—and such a challenge was outside the purview of federal courts. The argument "must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government, and causes a state where such condition exists to be not republican in form, in violation of the guaranty of the Constitution." *Id.* at 569 (citing U.S. Const. art. IV,

§ 4). By long-settled law, that is a non-justiciable question. *Id.*

The Court reached a similar result in *Smiley*. There, the Court rejected an argument that, when the Minnesota Governor vetoed a legislative map drawn by the Minnesota legislature, he unconstitutionally intruded on power delegated by the Elections Clause to the Minnesota legislature alone. The Court explained that the Elections Clause does not purport to federalize states' use of their legislative power in the area of congressional redistricting: "We find no suggestion in the federal constitutional provision of an attempt to endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley,* 285 U.S. at 367-68. To the contrary, "[w]hether the Governor of the state, through the veto power, shall have a part in the making of state laws, is a matter of state polity. Article 1, § 4, of the Federal Constitution, neither requires nor excludes such participation." *Id.* at 368. The Court went on to explain that any contrary reading of the Elections Clause would require "clear and definite support"—which was lacking. *Id.* at 369. In sum, the Court explained, "there is nothing in article 1, § 4, which precludes a state" from using its established governmental processes for legislating in connection with congressional redistricting "as in other cases of the exercise of the lawmaking power." *Id.* at 372-73.

The Arizona Legislature's reading of the Elections Clause as dictating states' governmental structure cannot be squared with these decisions. The Arizona Legislature argues that *Smiley* and *Hildebrant* are

consistent with its position because they "contemplate a continuing role—indeed, a continuing, preeminent role—for the state legislature in prescribing congressional districts." Appellant Br. 44. But in neither case did the Court even suggest that the quantum of authority retained by the body denominated as the State "legislature" made any difference. To the contrary, in both cases, the Court emphasized that the involvement of other political actors—in the form of voters directly, or the Governor—was a matter for the State, not a federal court, to decide.

The Arizona Legislature further argues that *Hildebrant* and *Smiley* are distinguishable because those cases "sought a special exception from the ordinary legislative process for laws dealing with congressional elections." Appellant Br. 45. This, too, is error. Those cases do not hold that a state acts consistent with the Elections Clause only when it provides for "ordinary" legislative processes in connection with congressional redistricting. Instead, they hold that what legislative processes apply to congressional redistricting "is a matter of state polity"—and that the Elections Clause does not "endow the Legislature of the state with power to enact laws in any manner other than that in which the Constitution of the state has provided that laws shall be enacted." *Smiley*, 285 U.S. at 368. Thus, just as the Elections Clause required no exception from state-determined legislative processes in those cases, the Elections Clause likewise requires no exception for the Arizona Legislature from the legislative process that its State has established for congressional redistricting.

The Arizona Legislature's reading of the Elections Clause to severely constrain the states' sovereignty in the area of congressional redistricting is a remarkable departure from the basic federalist principles that underlie the entire federal Constitution. If the Elections Clause means what the Arizona Legislature says, then that Clause requires federal courts to rewrite state constitutional provisions that assign state governmental power to state entities, even over the voters' express decisions through initiatives or referenda. Such an action by a federal court is a direct violation of "the etiquette of federalism." *United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). And this interpretation could be supported only by a clear statement that the Framers actually intended such a departure. See *Smiley*, 285 U.S. at 369; cf. also *Gregory*, 501 U.S. at 460. "Certainly, the terms of the constitutional provision furnish no such clear and definite support" for that construction. *Smiley*, 285 U.S. at 369. The Elections Clause must instead be read, consistent with our nation's federalist structure, to allow each state to "define[] itself as a sovereign" by determining its own governmental structure and processes. *Gregory*, 501 U.S. at 460.

II. ILLINOIS'S EXPERIENCE DEMONSTRATES THE NEED OF EACH SOVEREIGN STATE TO RETAIN CONTROL OVER ITS OWN GOVERNMENT PROCESSES.

As this Court has recognized, the Constitution's "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory*, 501 U.S. at 458. In particular, the federalism created by the Constitution "assures a decentralized government that will be more sensitive to the diverse needs of a

heterogenous society." *Id.* By creating localized, smaller-scale sovereigns; our federalist structure ensures that state governments respond to concerns presented in a particular region—even where those concerns do not pose an issue of importance to the entire nation. Additionally, by establishing more locally controlled government, federalism "increases opportunity for citizen involvement in democratic processes." *Id.* And significantly, by allowing every state to chart its own course in self-governance, our federalist structure "allows for more innovation and experimentation in government." *Id.*; *accord Bond* v. *United States*, 131 S. Ct. 2355, 2364 (2011) ("Federalism . . . allows States to respond, through the enactment of positive law, to the initiative of those who seek a voice in shaping the destiny of their own times . . . .").

Each of these benefits of federalism is furthered through full recognition of state sovereignty in the context of the Elections Clause. Throughout the nation's history, the various states have encountered diverse political obstacles and have devised a wide variety of responsive measures. One problem broadly faced is partisan gerrymandering. See *Vieth* v. *Jubelirer*, 541 U.S. 267, 292 (2004) (agreeing that "severe partisan gerrymanders" are "incompatib[le]" with "democratic principles") (Scalia, J.) (plurality opinion); *id.* at 361 (Breyer, J., dissenting) ("The democratic harm of unjustified entrenchment is obvious."). While the ill effects of partisan gerrymandering are undoubted, the Court has made clear that this is fundamentally a question for political—not judicial—resolution. *Id.* at 292-94 (plurality opinion).

Our federalist system allows states the freedom to devise their own political solutions to this profound problem. With individual states addressing the issue separately, states can achieve solutions that are innovative, that address the local forces behind gerrymandering in that state's experience, and that conform to the state's history and the political preferences of the state's citizens. In short, the interpretation of the Elections Clause that this Court has adopted not only is compelled by the federalist structure of the Constitution, but—unsurprisingly—achieves the very aims that that federalist structure was designed to promote.

This is exemplified by the experience of the State of Illinois. In Illinois, partisan legislative redistricting has—over the last few decades—contributed to the decrease in voter choice in legislative and congressional elections. As explained below, because of a peculiar provision in the Illinois Constitution and a confluence of history and politics, the party that controls the legislative redistricting process is often determined by the flip of a coin. The Democrats won that coin toss in 1981, and the Republicans in 1991, resulting in maps that favored whichever party controlled it. The Democratic Party now has had sole control of drawing state and congressional legislative maps for two consecutive cycles—in 2001 and 2011. This extended duration of single-party redistricting has allowed that party to solidify its power in both the Illinois House and Senate to create veto-proof Democratic majorities since 2010, which means that Democratic control of redistricting for both state and congressional elections is secured for the indefinite future.

If this endless cycle of partisan redistricting is to be overcome in Illinois, it may well require that action be taken by someone other than the General Assembly, which is the legislative body that currently draws the map of state legislative and congressional districts. And the framers of the Illinois Constitution provided for just such a circumstance. Unlike Arizona, where citizen initiatives are relatively common and easy to undertake, see Appellees Br. 6, voter-led amendments to the Illinois Constitution are rarely permitted. In Illinois, voter-led amendments are available only to amend the Legislative Article of the Illinois Constitution, and are "limited to structural and procedural subjects contained in Article IV." Ill. Const. art. XIV, § 3. The Official Text with Explanation of the Proposed 1970 Constitution explains that the Illinois Constitution made allowance for such amendments in this one vital area to ensure that "a reluctance on the part of the General Assembly to propose changes in its own domain can be overcome." 7 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 2: Committee Proposals, Member Proposals*, *supra*, at 2677-78.

Thus, while Illinois has not, like some of its sister states, broadly adopted voter referenda as a means of self-governance, Illinois's constitution establishes a voter-led legislative process to overcome the very problem that now faces the State: partisan gerrymandering by the party that dominates the General Assembly. The federalist principles outlined above require that the people of the sovereign State of Illinois be permitted to exercise this authority pursuant to the processes that the State has established.

A. In Illinois, A Random Drawing Allows A Single Political Party To Draw The Legislative Map.

"The redistricting process in Illinois has always been a source of unrivaled political gamesmanship as the state's own redistricting procedure helps to accommodate partisanship." Joe Cervantes & Logan Fentress, *Redistricting in Illinois: A Comparative View on State Redistricting*, The Simon Review, April 2012 at 11. The current redistricting process in Illinois was set in place by the 1970 Illinois Constitution. Ill. Const. art. IV, §§ 2, 3. In the year following each census year, the Illinois General Assembly[3] "by law" shall redistrict the legislative and representative districts. Ill. Const. art. IV, § 3(b). The General Assembly can pass a bill containing new district boundaries, and that bill can become law in the same manner as any other piece of legislation. Ill. Const. art. IV, § 3; Cynthia Canary & Kent Redfield, CHANGE Illinois, *Backroom Battles & Partisan Deadlock: Redistricting in Illinois* 12 (2014).

In 1971, just one year after the new 1970 Constitution was ratified, the Republicans and Democrats in the General Assembly could not agree on a legislative map because, despite the declining population of Chicago, Democrats sought to retain their 21 city-controlled districts. Paul M. Green, Ill. Comm'n on Intergovernmental Cooperation, *Legislative Redistricting in Illinois: An Historical Analysis* 18-19 (1987). Suburban Republicans resisted Chicago Democratic map efforts, and the

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[3] The Illinois General Assembly is the state legislature of the State of Illinois and comprises the Illinois House of Representatives and the Illinois Senate. Ill. Const. art. IV, § 1.

divided Illinois General Assembly failed to put forth a new map. *Id.*

Under the 1970 Constitution, if the General Assembly fails to act, a "Legislative Redistricting Commission" ("LRC") must be created. Ill. Const. art. IV, § 3(b). The LRC consists of eight members, "no more than four of whom shall be members of the same political party." *Id.* Each of the State's four legislative leaders names two members—one Representative and one person who is not a member of the General Assembly. *Id.* The LRC is therefore evenly divided by political party, and evenly divided by members and non-members of the General Assembly. There are no "independent" members of the LRC.

Because the LRC is composed of an equal number of members from each party, the constitutional delegates recognized that it could produce a tie, and the Illinois Constitution therefore provides for a "tie-breaker" provision that is unique to Illinois. *Id.*; Canary & Redfield, *supra*, 12-13; John S. Jackson & Lourenke Prozesky, *Redistricting in Illinois*, The Simon Review, April 2005 at 1. If the LRC cannot agree on a map, the Illinois Supreme Court provides two names—one from each political party, one of those names is randomly and publicly drawn, and that person becomes the ninth member of the LRC. Ill. Const. art. IV, § 3(b). Under this "tie-breaker," the outcome of the legislative map is effectively the same as the flip of a coin. The nine-member Redistricting Commission—no longer evenly divided—is then required to submit a map approved by at least five members. *Id.*

The framers of the 1970 Illinois Constitution believed that the "tie-breaker" provision would be

rarely invoked because both parties would recognize that a compromise map would better serve their interests than one controlled by the other party. Canary & Redfield, *supra*, at 13-14; 6 *Record of Proceedings of 1969-1970, Sixth Illinois Constitutional Convention, Part 1: Committee Proposals, Member Proposals* 1566b–66d (1972). In 1971, the Illinois Supreme Court explained:

> It is abundantly clear that the intent of the delegates to the 1970 Constitutional Convention was to create a redistricting commission composed of four legislators and four public members, and that their purpose in doing so was to bring into the commission a fresh, perhaps more objective, approach to the apportionment problems which had deadlocked the legislature. By requiring one half of the commission's membership to be individuals not therefore involved in the legislative redistricting struggles, the prospects of the commission's success were thought to be enhanced.

People ex rel. Scott v. *Grivetti*, 277 N.E.2d 881, 885 (Ill. 1971). In 1971, the "tie-breaker" provision appeared to have the effect the delegates to the 1970 Constitutional Convention intended, and the 1971 LRC agreed on a compromise map. Green, *supra*, at 19.

But 1971 was the last year that the LRC could agree on a map without the tie-breaker. In 1981, after a highly contentious LRC failed to agree on a map, the Illinois Supreme Court was forced to submit two names, which were placed in a black top hat once worn by Abraham Lincoln. *Id.* at 22. The absurdity of this process has been aptly described as follows:

> After months of debate, hours of strategy sessions, thousands of dollars of computer time, the collected wisdom gained from 110 years of reapportionment history, and the reform redistricting procedures placed in the 1970 constitution, the 1981 legislative reapportionment process came down to its single most important act: Secretary Edgar drew [Democrat] Governor Shapiro's name out of a hat.

Id.[4] The LRC approved the Democratic legislative map on a straight 5-4 party vote. *Id.* at 23. The map was challenged in court, but a three-judge panel decided not to "discard the entire Commission Plan because part of it [was] infected by an unconstitutional purpose to dilute." *Rybicki* v. *State Bd. of Elections of the State of Ill.*, 574 F. Supp. 1082, 1125 n.106 (N.D. Ill. 1982).

In 1991, the tie-breaker provision was again invoked, but this time a Republican name was drawn from the hat. Jackson & Prozesky, *supra*, at 9. The Democratic Attorney General challenged the validity of the Republican-friendly map under the Illinois Constitution. *Ryan*, 588 N.E.2d 1033. The Illinois Supreme Court, by a 4-3 vote, fundamentally upheld the map, but a number of justices acknowledged that the map had been "drawn with a view to securing a partisan political advantage." *Id.* at 1038 (Heiple, J.,

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[4] For its part, the Illinois Supreme Court has described the tie-breaking process as "tortuous . . . not in the best interests of the voters of this State . . . we do not find that a lottery or a flip of a coin is in the best interests of anyone except the party which has won the toss. The rights of the voters should not be part of a game of chance." *People ex rel. Burris* v. *Ryan*, 588 N.E.2d 1033, 1035 (Ill. 1992).

concurring); see also *id.* at 1041 (Clark, J., dissenting on the ground that the "type of political gerrymandering" evident in all maps submitted by Commission members impermissibly put the members' "own political self-interests above the citizens' right to a fair and representative form of government"). In the 1992 election, the Republicans gained seats in the Senate and controlled that chamber through 2002. Canary & Redfield, *supra*, at 14.

The Democrats then had the opportunity to draw the map for two cycles in a row. In 2001, the Democrats won the tie-breaker. *Id.* at 14-15; Jackson & Prozesky, *supra*, at 10. And in 2011, the tie-breaker was an unnecessary step because the Democrats held veto-proof majorities in both chambers, allowing them to draw and pass the map without any votes from Republican legislators. Canary & Redfield, *supra*, at 15; Cervantes & Fentress, *supra*, at 12.

In every election immediately following the drawing of a new legislative map, the party that drew the map made gains in the legislature. Canary & Redfield, *supra*, at 18. But the gains made by the Democrats after controlling the legislative map for two consecutive cycles were particularly striking. After winning the "tie-breaker" in 2001, Democrats in the 2002 election won 56% of the seats in the House, and 54% of the seats in the Senate. These numbers closely mirrored the percentage of aggregate votes for Democratic candidates statewide (53% and 55%, respectively). *Id.* at 19. In the 2012 election, after the Democrats controlled the map without an intervening Republican-leaning election, the Democrats won 60% of House seats and 68% of

Senate seats—but the percentage of aggregate votes for Democratic candidates statewide slightly *decreased*, to 52% and 54%, respectively. *Id.*; see also James Slagle et al., Midwest Democracy Network, *Redistricting and Representation in the Great Lakes Region* 42 (2013).

Illinois Republicans challenged the 2011 Democratic map in federal court, alleging, among other things, claims for political gerrymandering in violation of the U.S. Constitution. *Radogno* v. *Ill. State Bd. of Elections*, No. 1:11-cv-04884, 2011 WL 5025251, at *3 (N.D. Ill. Oct. 21, 2011). The court rejected these challenges, declaring them "currently unsolvable" as a judicial matter. *Id.* at *6. Thus, the 2011 Democratic map was upheld, and the Democrats secured their veto-proof majorities in the House and the Senate in the 2012 election.

The partisan legislative district mapmaking process in Illinois has severely undermined competition in the Illinois legislative districts. Canary & Redfield, *supra*, at 20. Since 1982, there has been a dramatic drop in contested general elections in Illinois—meaning, an election with candidates from each major party on the ballot. For example, in 1982, there were 90 contested House races out of 118 House seats. By 2012, that dropped by almost half, to 47. *Id.* The Senate followed a similar trend—in 1982, there were 47 contested Senate races out of 59, which dropped to 29 out of 59 in 2012. *Id.*

The party that controls the state legislative redistricting process also, as a practical matter, controls congressional redistricting. The complete lack of independent voice in congressional redistricting in Illinois has led to incumbent

protection maps resulting from allowing representatives to choose their constituents, rather than having constituents choose their representatives. And incumbents have indeed been protected: 104 out of 105 congressional incumbents in Illinois were re-elected between 1998 and 2008. Slagle, *supra*, at 8. In 1998 and 2000, there were no close congressional elections in either the primary or the general elections in any of Illinois's 19 congressional districts. Kent Redfield, *Drawing Congressional Districts in Illinois: Always Political, Not Always Partisan*, *in The Political Battle Over Congressional Redistricting* 369, 378 (William J. Miller & Jeremy D. Walling eds., 2013).

The 2001 congressional map is a prime example of incumbent protection. All of Illinois's incumbents (10 Democrats and 10 Republicans) were expected to seek reelection to the U.S. House of Representatives in 2002, depending on the outcome of the 2001 redistricting process. *Id.* However, 2000 census data revealed that Illinois would lose a congressional seat for the 2002 election. The General Assembly Democrats allowed the congressional leaders to draw the map for Illinois congressional districts, and they ultimately negotiated a map that protected all incumbents except two, a Democrat and a Republican who were thrown into the same district. Jackson & Prozesky, *supra*, at 7-8.

Ten years later, in 2011, Democrats redrew the districts alone. The Democratic map redrew the congressional districts in ways that made it harder for Republican members, both newcomers elected in 2010 and veterans, to hold onto their seats. Slagle, *supra*, at 42-45. A group of Republican U.S. House Representatives brought suit to invalidate the map

under several theories, including partisan gerrymandering. *Comm. for a Fair & Balanced Map* v. *Ill. State Bd. of Elections*, 835 F. Supp. 2d 563 (N.D. Ill. 2011). In their Amended Complaint, the plaintiffs alleged:

> [T]he Proposed Congressional Plan—which the New York Times has called "[p]erhaps the most aggressive example of partisan maneuvering" to arise out of the 2010 national census—effectively reverses the results of the 2010 congressional elections by redrawing districts so that the citizens of Illinois that gave Republicans an 11 to 8 advantage in Illinois's congressional delegation only one year ago would see the state's congressional delegation transformed to one with 12 Democrats and only 6 Republicans (with Illinois having lost one seat in national reapportionment).

Am. Compl. at 2, *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d 563 (Nov. 4, 2011) (No. 1:11-CV-5065). The court dismissed the partisan gerrymandering claims. *Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 574, 593. In the 2012 elections, Democrats, who won 55% of the votes, took two-thirds of the U.S. House seats (12 out of 18), as predicted. Slagle, *supra*, at 44.

B. To Overcome Sole Partisan Control Of Redistricting In Illinois's General Assembly, Flexible Solutions Must Be Available.

In January 2009, then-Lieutenant Governor Pat Quinn established the Illinois Reform Commission ("IRC"), which was tasked with recommending meaningful ethics reform for the State of Illinois in

100 days. Ill. Reform Comm'n, *100-Day Report* 1 (2009). The IRC reviewed materials from experts on governmental structure and the legislative process and heard testimony from a number of witnesses. *Id.* at 48-53. The IRC made the following findings about Illinois's redistricting process:

> The current system in Illinois for drawing congressional and state legislative districts following a federal decennial census places Illinois voters in direct conflict with the legislators who are supposed to represent them. Behind closed doors, political operatives scrutinize the voting history of constituents to draw boundaries intended to protect incumbents or draw "safe" districts for either the Democratic or Republican parties. The results are gerrymandered districts that are neither compact nor competitive and do not serve the best interests of the people of Illinois.

Id. at 48.

The IRC unanimously recommended comprehensive redistricting reform for both state legislative and congressional redistricting processes, and proposed a number of specific legislative reforms, including the establishment of a Temporary Redistricting Advisory Committee and a non-partisan Redistricting Consulting Firm. *Id.* at 54-57. The IRC recommended adopting legislation to restore fairness to the process by which state and congressional legislative districts are drawn. *Id.* at 57. Despite the IRC's recommendations, no solution to partisan entrenchment has yet emerged from the Illinois General Assembly.

In the event the attempts to achieve reform through the legislative process failed, the IRC recommended "that a direct voter petition drive be led to get this constitutional amendment on the November 2010 general election ballot." *Id.* As described above, the Illinois Constitution allows only one form of voter-proposed constitutional amendments—amendments to article IV, the Legislative Article. And such an amendment is permissible only if it is (i) "limited to structural and procedural subjects contained in Article IV" and (ii) is supported by a petition that is signed by a large number of voters (equal in number to at least 8% of the total votes cast in the last gubernatorial race). Ill. Const. art. XIV, § 3.

Facing the prospect that partisan entrenchment would persist until and unless voters took control, Illinois voters acted. In 2014, a citizen group called Yes for Independent Maps gathered more than half a million signatures from registered voters in Illinois for a proposed constitutional amendment that would substitute an independent commission and non-partisan guidelines for Illinois's highly politicized redistricting process. Mem. of Def. Yes for Independent Maps in Supp. of its Mot. for J. on the Pleadings at 2, *Clark* v. *Ill. State Bd. of Elections*, No. 14-CH-07356 (Ill. Cir. Ct. Cook Cty. May 20, 2014). The amendment was struck down by an Illinois court because it contained one provision that fell outside the limited allowance for voter initiatives. *Clark*, No. 14-CH-07356, slip op. at 3-11 (June 27, 2014). But the court made clear that a "differently drafted redistricting initiative could be valid" under the Illinois Constitution's allowance for amendments needed to overcome legislative inaction. *Id.* at 11.

Thus, for now, the Democratic majority in the General Assembly retains sole control of state and congressional legislative district maps in Illinois. And no solution to partisan redistricting has been forthcoming from that institution. However, the Illinois Constitution offers voters a safety valve. And Illinois voters have shown themselves willing and able to circumvent partisan entrenchment through a voter-sponsored initiative for independent redistricting that is within the bounds of the Illinois Constitution.

This is precisely the form of innovative solution devised through intra-state self-governance that our federalist structure anticipates is the exclusive province of the state and its citizens. Illinois's path to this point—including its unique provisions for state legislative redistricting and the individuals and circumstances that make up Illinois's political history—require an Illinois-specific solution to the Illinois-specific problem of partisan redistricting and entrenchment. Arizona voters used their authority under that State's constitution to establish an independent redistricting commission. Illinois voters may take a similar tack—or they may adopt an entirely different solution.

How Illinois chooses to organize its legislative process "is a matter of state polity," *Smiley*, 285 U.S. at 368—not a matter of federal concern. The Elections Clause authorizes states to create laws concerning congressional elections, and it does not purport to restrain states in their internal delegation of state legislative power. In short, the Elections Clause does not deprive states of the sovereignty that the Constitution's federalist structure guarantees.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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