No.

IN THE SUPREME COURT OF ILLINOIS

PAT BRADY, individually as a registered voter and as Chairman of the Illinois Republican Party and the ILLINOIS REPUBLICAN PARTY	) Original Act) Article IV, Section 3(b) of) the Illinois Constitution of) 1970
Plaintiffs,	)
vs.	)
LISA MADIGAN, in her official capacity as Illinois Attorney General; JESSIE WHITE, in his official capacity as Illinois Secretary of State; the STATE BOARD OF ELECTIONS and its members, WANDA L. REDNOUR, BRYAN A. SCHNEIDER, ALBERT S. PORTER, JOHN R. KEITH, WILLIAM F. MCGUFFAGE, JESSE R. SMART, PATRICK A. BRADY, and ROBERT J. WALTERS, all named in their official capacities; MICHAEL J. MADIGAN, in his official capacity as Speaker of the Illinois House of Representatives; JOHN J. CULLERTON, in his official capacity as President of the Illinois Senate; THOMAS CROSS, in his official capacity as Minority Leader of the Illinois House of Representatives; and CHRISTINE RADOGNO, in her official capacity as Minority Leader of the Illinois Senate.	)
Defendants.	)

Kenneth E. Johnson
KENNETH E. JOHNSON, LLC
303 N. 2nd Street, Suite 25
St. Charles, Illinois 60174
(630) 945-3814
(630) 945-3806 (fax)
Attorney Number: 6211237
One of the Attorneys for Plaintiffs

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NATURE OF THE CASE

This is an original action pursuant to Article IV, Section 3 of the Illinois Constitution. On May 9, 2011, Plaintiffs Pat Brady and the Illinois Republican Party filed a motion for leave to file a complaint pursuant to Illinois Supreme Court Rule 382. Plaintiffs' complaint alleges the tie-breaking method of selecting the ninth member of the Illinois Legislative Redistricting Commission under Article IV, Section 3(b) of the Illinois Constitution of 1970 violates the Guarantee Clause and the Privileges or Immunities Clause of the Fourteenth Amendment to the U.S. Constitution. Plaintiffs further allege that Article IV, Section 3(b) and the redistricting efforts by the General Assembly infringe upon the rights of free speech and free association guaranteed by the First Amendment.

Plaintiffs' complaint requests a declaration that Article IV, Section 3(b) of the Illinois Constitution of 1970 is unconstitutional. In addition, that this Honorable Court exercise supervision over the redistricting process.

ISSUES PRESENTED

1. WHETHER THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION.

2. WHETHER THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT.

3. WHETHER THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE FIRST AMENDMENT OF THE U.S. CONSTITUTION.

STATEMENT OF JURISDICTION

This Court has original jurisdiction over the state law issues in this matter pursuant to Article IV, Section 3 (b) of the Illinois Constitution which provides this Court with "original and exclusive jurisdiction over actions concerning redistricting the House and Senate." IL CONST. art. IV, § 3(b).

Supreme Court Rule 382 governs actions filed before this Court pursuant to IL CONST. art. IV, § 3(b). Supreme Court Rule 382(b) provides that this Court may "dispose of the case on the papers filed or may order further briefing or may order oral argument on the motion for leave to file or on the complaint or on the pleadings or on the pleadings supplemented by pertinent documentary evidence, or may call for additional evidence and for briefs and argument after such evidence has been received." Ill. S. Ct. R. 382(b).

Article VI of the U.S. Constitution mandates that this Court is bound by the U.S. Constitution and the Laws of the United States. US CONST. art. VI.

CONSTITUTIONAL PROVISIONS CONSTRUED

IL CONST. art. IV, § 3, as amended:

(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.

(b) In the year following each Federal decennial year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party.

The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly.

The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission.

Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.

Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

An approved redistricting plan filed with the Secretary of State shall be presumed valid, shall have the force and effect of law and shall be published promptly by the Secretary of State.

The Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate, which shall be initiated in the name of the People of the State by the Attorney General.

STATEMENT OF FACTS

Article IV, § 3(b) of the Illinois Constitution sets forth the manner in which the State of Illinois reapportions its legislative and representative districts. If the Illinois General Assembly is unable to agree on a redistricting plan, the task is charged to a Legislative Redistricting Commission ("the Commission"). The Commission is initially composed of eight members, no more than four of whom may be members of the same political party. Should the eight-member Commission deadlock and fail to approve a redistricting plan by majority vote before August 10, a ninth, tie-breaking member is appointed. To choose the ninth member, article IV, § 3(b) directs the Illinois Supreme Court to submit the names of two persons, not of the same political party, to the Secretary of State. The Secretary of State is then called upon to publicly "draw by random selection" the name of one of the two persons, who then becomes the ninth Commission member.

Since the passage of the 1970 Illinois Constitution, the Illinois General Assembly and the Governor have failed to pass a redistricting plan based on the federal census data for the Illinois Legislative and Representative Districts. Pursuant to constitutional directive, Legislative Redistricting Commissions were constituted. The Commissions, except for 1970, have always failed to adopt a redistricting plan by the constitutionally mandated vote of five members.

As directed by art. IV, § 3(b) of the Illinois Constitution, this Honorable Court has submitted the names of two individuals, not of the same political party, to the Secretary of State to serve as the ninth member of the Commission. The Illinois Secretary of State

has drawn by random selection the name of one of the two persons to serve as the ninth member of the commission.

It is this so-called tie-breaking provision, requiring the ninth Commission member to be picked at random, that precipitated Pat Brady and the Illinois Republican Party to file suit. Plaintiffs request that this Court declare that the tie-breaking provision of article IV, § 3(b) of the Illinois Constitution violates the Guarantee Clause, the Privileges or Immunities Clause of the Fourteenth Amendment and First Amendment of the U.S. Constitution. Plaintiffs do not assert a due process or equal protection argument.

ARGUMENT

I.

THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION

A. Selecting The Ninth Member Of The Illinois Legislative Redistricting Commission By Chance Is Unconstitutional.

The ninth member of the Legislative Redistricting Commission is chosen by random selection between two individuals from separate political parties. IL CONST. art. IV, § 3(b). The tie-breaking member of the commission is randomly chosen. A republican form of government is a government of representatives chosen by the people, not a government chosen by chance. There exists a structural defect that allows for the dilution of rights of voters and the candidates they support.

This system of selection is a violation of the basic sense of a republican form of government. There is no set guarantee that all voters in Illinois will be properly represented during the redistricting process. The most fundamental part of representative government is left to chance.

U.S. Constitution Article IV, Section 4 provides "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence". US CONST. art. IV, § 4. Illinois' tie- breaking provision does not allow for a republican form of government and therefore, is unconstitutional.

B. The Issue Of The Constitutionality Of The Tie-Breaking Provision Is A Justiciable Issue.

The Guarantee Clause should be interpreted to protect basic individual rights. The U.S. Supreme Court has dismissed claims alleged under the Guarantee Clause as posing a nonjusticiable political question in the past. *Baker v. Carr*, 369 U.S. 186 (1962). The *Baker* Court held that "the Guarantee Clause is not a repository of judicially manageable standards which a court could utilize independently in order to identify a State's lawful government." Baker, 369 U.S. at 223.

However, subsequent to *Baker*, the U.S. Supreme Court has suggested that not all claims under the Guarantee Clause present nonjusticiable political questions. See *Reynolds v. Sims,* 377 U.S. 533, 582, (1964) ("some questions raised under the Guarantee Clause are nonjusticiable"). See also *Nixon v. United States*, 506 U.S. 224 (1993) (if the Senate were to act in a manner seriously threatening the integrity of its results, judicial interference may be appropriate).

The strongest argument that a Guarantee Clause argument should not be summarily dismissed comes from the opinion of the Court delivered by Justice O'Connor in *New York v. United States*, 505 U.S. 144 (1992). Justice O'Connor wrote the following:

> The view that the Guarantee Clause implicates only nonjusticiable political questions has its origin in *Luther v. Borden,*. . .Over the following century, this limited holding metamorphosed into the sweeping assertion that "[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts. . .
>
> This view has not always been accepted. In a group of cases decided before the holding of *Luther* was elevated into a general rule of nonjusticiability, the Court addressed the merits

> of claims founded on the Guarantee Clause without any suggestion that the claims were not justiciable. . .
>
> More recently, the Court has suggested that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions. . . Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *New York, 505 U.S. at 184-85.*

In *Nixon v. United States,* the Court held that a judge's challenge to the method by which he was impeached presented a nonjusticiable political question. *Nixon*, 506 U.S. at 238. However, Justice Souter held the claim may have been justiciable if the impeachment process involved a coin toss. *Nixon*, 506 U.S. at 238. The judge's claim in *Nixon* was based on the Impeachment Clause, art I., sec. 3, cl. 6, which provides that the "Senate shall have the sole power to try all impeachments." The Court's holding of nonjusticiability was based in part on separation of powers concerns, but also on the Court's conclusion that "the word 'try' in the Impeachment Trial Clause does not provide an identifiable textual limit on the authority which is committed to the Senate." *Nixon*, 506 U.S. at 238.

Justice Souter recognized in *Nixon* that if the judge's impeachment had been tried by a method involving random chance, there would have been a justiciable question.

> One can ... envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin toss, ... judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence. "The political question doctrine, a tool for maintenance of governmental order, will not be so applied as to promote only disorder."

Nixon, 506 U.S. at 238 (Souter, J., concurring) (quoting Baker, 369 U.S. at 215) (emphasis added).

Although, "republican form of government" normally does not "provide an identifiable textual limit" on the redistricting process, but if that phrase means anything, it means that districts cannot be drawn by a process that rests on random chance. The process of selecting a tie-breaking vote is conducted in a manner seriously threatening the integrity of its results. *Nixon*, 506 U.S. at 238.

In addition, other state courts have held that not all claims under the Guarantee Clause present nonjusticiable political questions. Accordingly, state courts have ruled on Guarantee Clause claims on the merits. See, e.g., *Morrissey v. State*, 951 P.2d 911 (Colo. 1998) (invalidating Colorado initiative on Guarantee Clause grounds); *State v. Montez*, 789 P.2d 1352, 1377 (Or. 1990) (federal "political question" case law "does not mean that the states may not adjudicate the compatibility of state law with the guarantee clause."); *Van Sickle v. Shanahan*, 511 P.2d 223 (Kan. 1973) (entertaining Guarantee Clause challenge to Kansas constitutional amendment reorganizing the state's executive branch).

The issue of whether the tie-breaking provision of Article IV, Section 3 of the Illinois Constitution violates the Guarantee Clause is a justiciable issue.

II.

THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT

A. The Privileges Or Immunities Clause Starts with the Declaration Of Independence And Article IV.

"It cannot be presumed that any clause in the constitution is intended to be without effect." *Marbury v. Madison,* 5 U.S. 137, 174 (1803). The Privileges or Immunities Clause was intended by the drafters to have effect.

The Fourteenth Amendment to the U.S. Constitution provides federal remedies for state violations of individual rights. Section one of the amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> US CONST. amend. 14.

The Privileges or Immunities Clause of the Fourteenth Amendment holds that "[n]o State ... shall abridge the privileges or immunities of citizens of the United States." US CONST. amend. 14. One must look to the history of the Privileges or Immunities Clause to understand its meaning.

The Privileges or Immunities Clause was developed in part from 1) the Declaration of Independence, 2) the Privileges and Immunities Clause of article IV, Section 2 of the U.S. Constitution and 3) the construction of that clause by Justice Bushrod Washington in *Corfield v. Coryell,* 6 F. Cas. 546 (C.C.E.D Pa.1823). See Kimberly C. Shankman and Roger Pilon, Policy Analysis, *Reviving the Privileges or Immunities Clause to Redress the Balance Among States, Individuals, and the Federal Government*, Cato Institute Publication (1998).

The Declaration of Independence began with a Natural Rights philosophy; the idea of natural equality: no one by nature has a right to rule anyone else. Every

individual has a right, equal to that of everyone else to be free. The Declaration states in part as follows:

> We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness--That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.
> US Declaration Ind.

The Declaration of Independence made clear that government has to be justified. The starting point is not government. The starting point is free individuals. Natural rights transform into government only with the consent of the governed.

After the Declaration of Independence, the newly formed states replaced their colonial charters with constitutions and state bills of rights protecting their citizens' natural, inherent and inalienable rights. See *McDonald v. City of Chicago,* 130 S.Ct. 3020 (2010), citing Pa. Declaration of Rights(1776), Va. Declaration of Rights (1776), Del. Declaration of Rights (1776), Md. Declaration of Rights (1776) and N.C. Declaration of Rights (1776).

Eleven years after the Declaration of Independence, the Northwest Ordinance, was adopted on July 13, 1787, by the Second Continental Congress. Northwest Ordinance (1787). The Northwest Ordinance chartered a government for the Northwest Territory, provided a method for admitting new states to the Union from the Territory, and listed a bill of rights guaranteed in the Territory. This Ordinance covered the land that was to become the State of Illinois. Guaranteed in the Ordinance was the right to

elect a representative and to proportionate representation. Northwest Ordinance, preamble and art. 2.

The Illinois Constitution of 1818 codified the Natural Rights of individuals existing in the Territory in Article VIII which reads in part:

> 1. That all men are born equally free and independent, and have certain inherent and indefeasible rights; among which are those of enjoying and defending life and liberty, and of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.
> 2. That all power is inherent in the people, and all free governments are founded on their authority, and instituted for their peace, safety, and happiness.
> IL CONST. art. VIII, §1-2 (1818).

In 1791 (prior to Illinois becoming a state), the Bill of Rights was ratified. The amendments added to the U.S. Constitution a ratification of the need to protect the natural rights recognized by the states from federal government interference.

Although the Bill of Rights did not apply to the states in 1791, other provisions of the U.S. Constitution limited state interference with individual rights. The provision of the U.S. Constitution that limits state interference with individual rights is Article IV, § 2, the Privileges and Immunities Clause.

> Article IV, § 2, cl. 1 provides that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The text of this provision resembles the Privileges or Immunities Clause, and it can be assumed that the public's understanding of the latter was informed by its understanding of the former.
>
> Article IV, § 2 was derived from a similar clause in the Articles of Confederation, and reflects the dual citizenship the Constitution provided to all Americans after replacing that "league" of separate sovereign States. *Gibbons v. Ogden,* 9 Wheat. 1, 187, 6 L.Ed. 23 (1824); see 3 J. Story, Commentaries on the Constitution of the United States § 1800, p. 675 (1833). By virtue of a person's citizenship in a particular State, he was guaranteed whatever rights

> and liberties that State's constitution and laws made available. Article IV, § 2 vested citizens of each State with an additional right: the assurance that they would be afforded the "privileges and immunities" of citizenship in any of the several States in the Union to which they might travel.
> *McDonald,* 130 S.Ct. at 3066.

The guarantees of the Privileges and Immunities protection of citizens prior to the Civil War were addressed in only one significant decision. See *Corfield v. Coryell,* 6 F.Cas. 546 (C.C.E.D Pa.1823). In *Corfield,* Supreme Court Justice Bushrod Washington, sitting as a Circuit Justice, rendered an opinion that was considered the authoritative interpretation of Article IV's Privileges and Immunities Clause. *McDonald,* 130 S.Ct. at 3067. *Corfield* held the Privileges and Immunities Clause protects rights

> which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign.
> *Corfield,* 6 F.Cas. at 551.

Contending that it would be "more tedious than difficult" to enumerate those rights, Washington offered illustrative categories, such as "protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety". *Corfield,* 6 F.Cas. at 551-52. Article IV, § 2 does not guarantee equal access to all benefits a state may choose to make available, only to those rights which are, in their nature, fundamental. *Corfield,* 6 F.Cas. at 551-52. Justice Washington through his detailed opinion clearly viewed the Privileges and Immunities Clause as a clause with substance. His opinion echoes the Natural Law language of the Declaration of Independence.

Although not discussed in *Corfield*, the Privileges and Immunities Clause of Article IV, does not require a state to recognize these fundamental rights in their own citizens. *Paul v. Virginia,* 75 U.S. 168, 180 (1868). However, the Fourteenth Amendment was designed to protect state citizens against state infringement of rights. The Privileges or Immunities Clause of the Fourteenth Amendment provides that protection.

The Plaintiffs assert that the tie-breaking provision Article 4, Section 3 of the Illinois Constitution is unconstitutional under the Privileges or Immunities Clause of the Fourteenth Amendment.

Plaintiffs' argument is consistent with Justice Thomas' concurring opinion in *McDonald v. City of Chicago. McDonald,* 130 S.Ct. at 3062. (Thomas, J., concurring). Justice Thomas opines that returning to the original meaning of the Fourteenth Amendment would allow the Court to enforce the rights the Amendment is designed to protect with greater clarity and predictability than substantive due process has in the past. *McDonald,* 130 S.Ct. at 3062.

The plaintiffs acknowledge the volume of precedents involving the Fourteenth Amendment built upon substantive due process, equal protection and *stare decisis. McDonald,* 130 S.Ct. at 3063; *Winters v. Illinois State Board of Elections,* 197 F.Supp.2d 1110, 1117-18 (N.D. 2001). The court in *Winters* held the tie-breaking provision does not violate due process or equal protection but acknowledged the provision's failures:

> The delegates of the 1970 Illinois Constitutional Convention reasonably thought they could avoid this (redistricting) problem with the use of a random drawing. Unfortunately, as it turned out, they were wrong, ... (Plaintiffs) spend a great deal of time trying to prove just how wrong they were by recounting the rather ignominious past of the tie-breaking provision and the sharp criticism it has received over the years. History

> proves it has had just the opposite of its desired effect. Rather than forcing the parties to find common ground for fear of losing the random drawing, they are apparently willing to dig in their heels with the hope of *winning* the drawing. In fact, the Commission has resorted to the tie-breaking provision in each of the last three rounds of reapportionment in Illinois. ...Accepting them as true, these arguments illustrate well that the tie-breaking provision has not done what it was supposed to do: prevent deadlock in the Commission.
> *Winters v. Illinois State Board of Elections*, 197 F.Supp.2d 1110 (N.D. 2001) (emphasis added).

The Illinois Supreme Court held that the tie-breaking provision does not rise to the level of a due process violation as well in *People ex rel. Burris v. Ryan,* 147 Ill.2d 270 (1992). However, the Supreme Court noted the failures in the tie-breaking process.

> Before addressing either of the proposed plans, we must make certain findings in light of the extraordinary circumstances of the case at hand with the hope that this situation will not again be before this court and place in jeopardy the voting rights of the people of this State. Throughout the process, we noted the troubled winds that have unfailingly roared through the legislature, the Commission and the media; . . .
> The tortuous process which we have just experienced is not in the best interests of the voters of this State. The legislature has eight years, if it is sincere, to correct this process in order that the voters with special interests will have an opportunity to participate in the election process. . . 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. The consequences of such a method affect everyone.
> *Burris,* 147 Ill.2d at 293-94.

Justice Bilandic, in *Burris,* argued the tie-breaking provision was unconstitutional because it impacts the rights of Illinois citizens to participate on a fair and equal basis in the electoral process. *Burris,* 147 Ill.2d at 312-13. (Bilandic, J., dissenting). Justice Bilandic held "I believe this is a bad process and bad government. The People of Illinois deserve better, and they deserve representation that's not by lottery." *Burris,* 147 Ill.2d at 313. The process remains broken and the people deserve better.

Notwithstanding, *stare decisis* is only a part of this Court's duty when deciding what the U.S. Constitution means, it is not absolute. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 963 (1992). Plaintiffs' assertion is not a due process or equal protection argument.

The issue presented here is not whether the entire Fourteenth Amendment should be revised, but only whether and to what extent the U.S. Constitution protects the right to a fair election process as applied to Article IV, Section 3 of the Illinois Constitution. Application of the Privileges or Immunities Clause of the Fourteenth Amendment to the tie-breaking provision accomplishes that goal.

B. The Plaintiffs Have Rights Granted To Them By The U.S. Constitution And Federal Law.

Illinois became a state of the union in 1818. Its constitution was adopted at Kaskaskia in convention, August 26, 1818. Prior to being admitted as a State, it had been a part of the Northwest Territory. Northwest Ordinance (1787). The Federal government through the Ordinance granted the Territory residents rights under the U.S. Constitution and Federal law. Northwest Ordinance (1787). The residents of the Territory had only federal rights, no state rights. Among that bundle of rights inherent in federal citizenship of Northwest Territory residents were that the public officials stand for periodic elections, the number of representatives would be fairly proportioned and individuals had the right to vote.

> So soon as there shall be five thousand free male inhabitants of full age in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect a representative from their counties or townships to represent them

> in the general assembly... the number and proportion of representatives shall be regulated by the legislature...
>
> Art. 2. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the legislature; and of judicial proceedings according to the course of the common law.
> Northwest Ordinance (1787).

The right to vote is held as one of the privileges or rights granted by the federal government, protected by the Fourteenth Amendment. See, e.g., *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (noting that "among the rights and privileges of national citizenship recognized by this court [is] ... the right to vote for national officers") (citing *Ex parte Yarbrough*, 110 U. S. 651 (1884), and *Wiley v. Sinkler*, 179 U.S. 58 (1900)). See, e.g., John Benjamin Schrader, Note, *Reawakening "Privileges or Immunities": An Originalist Blueprint for Invalidating State Felon Disenfranchisement Laws*, 62 VAND. L. REV. 1285, 1307-09 (2009) (observing that the majority of state legislatures that ratified the Fourteenth Amendment concluded that the right to vote was among the privileges or immunities protected by the Amendment).

As stated earlier, the Illinois Constitution of 1818 codified the Natural Rights of individuals existing in the Territory in Article VIII. IL CONST. art. VIII, §1-2 (1818). In addition, the Illinois Constitution of 1818 codified the existing federal right that "elections shall be free and equal". IL CONST. art. VIII, §5 (1818). On Illinois ascension into statehood in 1818, the residents could not have suffered a reduction of rights, only an increase.

The tie-breaking provision Article 4, Section 3 of the Illinois Constitution violates the Privileges or Immunities Clause because the provision violates Plaintiffs'

right to an election process that is fair and equal, not subjected to selection by lot. The Plaintiffs have rights given by federal law and the U.S. Constitution. The selection provision for the tie-breaker violates those rights that are protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

C. Granting Government Power By A Method of Chance Violates Natural Law Principles.

Immediately prior to Illinois becoming a state, there existed a requirement between the union and state seeking entry, that the union guaranteed the citizens continued enforcement of the natural and existing rights. The framers and the citizens they were delegated to represent, gave up the executive power to exercise many rights and in return were promised certain civil rights.

Government's power comes from the people. The framers of the U.S. Constitution and the Illinois Constitution gave to government specifically enumerated and delegated powers. An individual yields his liberty, a Natural Right, to the creation of executive powers - that there be three branches of government and that unless otherwise constitutionally stated, requires public officials stand periodic election. US CONST. art. I, § 4 and US CONST. art. IV, § 4, IL CONST. art. I and VIII (1818). Government's power must come from the people and not from a coin toss.

The core social contract between individuals and government is premised upon the understanding that the officials are elected in a republican, constitutional and fair manner. Selection of an official by chance is not republican, constitutional or fair.

The actions of the State of Illinois under the Illinois Constitution of 1970 have led to an unbroken string of failures and an abdication of duty when it comes to reapportionment. The State has a long history of attempts at redistricting, all leading to failure as set forth in the Illinois Constitution. *Winters,* 197 F.Supp.2d at 1115. These failures result in the unconstitutional tie-breaker.

This is the essence of the social contract that must be protected. The social contract is herein breached. A breach of the original social contract between free men and government, are a failure under Natural Law. Although that breach may not violate due process or equal protection, it does abridge the fundamental rights protected by the Privileges or Immunities Clause of the Fourteenth Amendment.

III.

THE TIE-BREAKING PROVISION OF ARTICLE IV, SECTION 3 OF THE ILLINOIS CONSTITUTION VIOLATES THE FIRST AMENDMENT

The Illinois Constitution provides that "in the year following each Federal decennial year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts". IL CONST., art IV, § 3. The Illinois General Assembly, since 1970, failed to file and pass a legislative redistricting plan. The Illinois Constitution further provides "If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted...If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons,...the Secretary of State publicly shall draw by random

selection the name of one of the two persons to serve as the ninth member of the Commission", the tie-breaker. IL CONST., art IV, § 3.

No redistricting plan since 1970 has ever received the requisite votes from the Commission necessary to avoid the tie-breaking vote. The tie-breaking vote has always been cast along party lines. The tie-breaker will draw redistricting lines in such a fashion to dilute the impact of the voters with the opposite partisan association or view. These districts will infringe upon the rights of free speech and free association guaranteed by the First Amendment because they will be designed to limit the effectiveness of the organized political activity of the party that did not win the tie-breaking process.

A. The First Amendment Protects Political Association As Well As Political Expression.

The Republican Party and the candidate choices they offer voters, present the most important means for including voter preferences into decisions on public policy. The U.S. Supreme Court recognizes the need to protect political parties and their party members' right of free political association. "The First Amendment protects political association as well as political expression." *Buckley v. Valeo*, 424 U.S. 1, 15 (1976). "[P]olitical belief and association constitute the core of those activities protected by the First Amendment." *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (plurality opinion). "The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

Accordingly, political parties may claim First Amendment protection against state infringement by the Fourteenth Amendment. See, e.g., *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989) (invalidating a statute prohibiting

political parties from endorsing, supporting, or opposing candidates in primary elections); *California Democratic Party v. Jones*, 530 U.S. 567 (2000) (invalidating a state law requiring political parties to allow individuals who are not members of the party to vote in the party's primary). In addition, government employees and contractors have successfully alleged that government officials violated the First Amendment by making decisions to hire, promote, transfer, recall, discharge, or retaliate against them on the basis of the individual's partisan affiliation or speech. See *Board of Comm'rs, Wabaunsee Cty. v. Umbehr*, 518 U.S. 668, 674-675 (1996); *O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712, 716-717 (1996); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 64-65 (1990); *Branti v. Finkel*, 445 U.S. 507, 519-520 (1980); *Elrod*, 427 U.S. at 355-363.

In the U.S. Supreme Court's most recent case addressing "partisan gerrymandering," *Vieth v. Jubelirer*, 541 U.S. 267 (2004), the four justices in the plurality, Chief Justice Rehnquist, Justice Scalia, Justice O'Connor, and Justice Thomas, would have declared partisan gerrymandering claims nonjusticiable under the political question doctrine. The four dissenting justices, Justice Stevens, Justice Souter, Justice Ginsburg, and Justice Breyer, would have held such claims justiciable, although they were divided as to what standard to apply. The deciding vote belonged to Justice Kennedy, who agreed with the four dissenters that partisan gerrymandering claims are justiciable in general, but joined the plurality because he concluded that the particular plaintiffs before the Court had failed to state a claim. Indeed, Justice Kennedy went so far as to say that, in his view, no manageable standard yet existed by which to adjudicate partisan gerrymandering claims. *Vieth*, 541 U.S. at 315 (Kennedy, J., concurring).

However, Justice Kennedy acknowledged the First Amendment as the potential avenue for partisan gerrymandering claims. His discussion of this point is worth quoting at some length:

> The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. See *Elrod v. Burns*, 427 U. S. 347 (1976) (plurality opinion). Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. See id., at 362. "Representative democracy in any populous unit of government is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U. S. 567, 574 (2000). As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights. . . The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest. Of course, all this depends first on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters.
>
> Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a

> more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens. The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. *Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring).

Here, the Plaintiffs do state a claim. Plaintiffs allege that Article IV, § 3(b) of the Illinois Constitution burdens their representational rights for reasons of ideology, belief or political association violating their First Amendment rights.

B. The Illinois Republican Party Is An Identifiable Political Class.

Every two years elections occur in the State of Illinois. Voting patterns can be established identifying voters who tend to vote for candidates in the Republican Party. The Republican Party is a readily identifiable voting group based on political affiliation to establish protection for First Amendment purposes under the Fourteenth Amendment. In addition, party affiliation is taken into consideration when drawing Illinois redistricting boundaries allowing the party to seek relief from overreaching redistricting by the party controlling the process. See *Karcher v. Daggett*, 462 U.S. 725 (1983) (STEVENS, J., concurring).

C. Pre-Enforcement Review Of Laws That May Infringe On First Amendment Right Is Permissible.

The Plaintiffs here raise the issue of First Amendment infringement. The question of ripeness is not an issue.

When the First Amendment is raised, the U.S. Supreme Court "has enunciated other concerns that justify a lessening of prudential limitations on standing." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Thus, notwithstanding the usual ripeness requirements, pre-enforcement review of laws that may infringe on First Amendment rights is more readily allowed, because of the Court's concern about the "chilling effect" of restrictive laws on such rights, which are "of transcendent value to all society." *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965).

Plaintiffs acknowledge that the Court has in recent years expressed a strong preference for as-applied constitutional challenges as compared to facial, pre-enforcement challenges, even in the election-law arena. See, e.g., *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008) (rejecting facial, pre-enforcement challenge to Indiana "voter ID" law).

However, in the First Amendment claim, the Plaintiffs in the case at bar are not required to show the redistricting laws in Illinois are valid under no set of circumstances. See *United States v. Salerno,* 481 U.S. 739, 745 (1987) (expressly exempting First Amendment overbreadth claims from the "no set of circumstances" test).

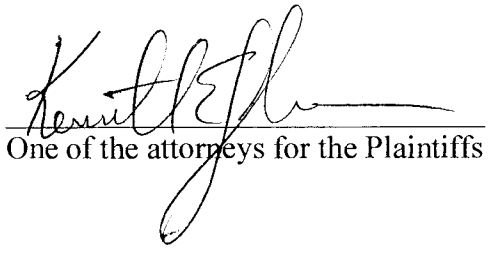
The U.S. Supreme Court has long held that the U.S. Constitution forbids the government from granting individual officials discretion to burden First Amendment rights in the absence of carefully delineated standards to guide the exercise of that discretion. See, e.g., *Lovell v. Griffin*, 303 U.S. 444, 450-51 (1938); *Saia v. New York*, 334 U.S. 558, 560 (1948); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969); *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 769-70 (1988).

The tie-breaking provision unconstitutionally gives a single member of the commission the opportunity to choose the redistricting map of his or her choice, with the possibility of infringing upon the rights of free speech and free association guaranteed by the First Amendment of voters across the state.

CONCLUSION

The tie-breaking provision of article IV, § 3(b) of the Illinois Constitution violates the Guarantee Clause, the Privileges or Immunities Clause of the Fourteenth Amendment and the First Amendment. Therefore, Plaintiff respectfully requests that this Honorable Court declare article IV, § 3(b) of the Illinois Constitution unconstitutional.

Respectfully Submitted,



One of the attorneys for the Plaintiffs

Kenneth E. Johnson
KENNETH E. JOHNSON, LLC
303 N. 2nd Street, Suite 25
St. Charles, Illinois 60174
(630) 945-3814
(630) 945-3806 (fax)
Attorney Number: 6211237
One of the Attorneys for Plaintiffs

Brien J. Sheahan
Law Office of Brien J. Sheahan, Ltd.
5 Saint Regis Court
Elmhurst, IL 60126
(630) 728-4641
(866) 796-5676 (fax)
Attorney Number. 6256664
One of the Attorneys for Plaintiff

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 27 pages.

By: _____
One of the attorneys for the Plaintiffs

Kenneth E. Johnson
KENNETH E. JOHNSON, LLC
303 N. 2nd Street, Suite 25
St. Charles, Illinois 60174
630/945-3814
630/945-3806 (fax)
Attorney Number: 6211237
One of the Attorneys for Plaintiffs