

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

JOHN HOOKER, et al.,

Plaintiffs,

vs.

ILLINOIS STATE BOARD OF ELECTIONS,
et al.

Defendants,

and

SUPPORT INDEPENDENT MAPS,

Intervenor-Defendant.

Case No. 16 CH 06539

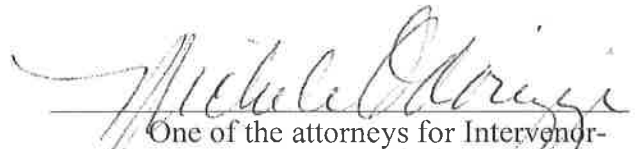
Hon. Diane J. Larsen,
Judge Presiding.

NOTICE OF FILING

To: All Attorneys of Record (See Attached Certificate of Service)

PLEASE TAKE NOTICE that on June 17, 2016, we caused the attached **MEMORANDUM OF INTERVENOR-DEFENDANT SUPPORT INDEPENDENT MAPS IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS** to be filed with the Clerk of the Circuit Court of Cook County, copies of which are hereby served upon you.

Dated: June 17, 2016


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Intervenor-Defendant Support Independent Maps (“Independent Maps”) submits this memorandum in opposition to plaintiffs’ Motion for Judgment on the Pleadings.

INTRODUCTION

Plaintiffs offer only a cursory defense of Count V of their complaint, which repeats an argument Judge Mikva rejected two years ago—that a citizen initiative can *never* be used to propose changes to the redistricting provisions in Article IV of the 1970 Constitution. As Judge Mikva properly noted, redistricting “appears to be fair game for amendment by Article XIV, § 3.” *Clark v. Illinois State Bd. of Elections*, No. 14 CH 07356 (June 27, 2014), Independent Maps’ Motion Ex. C, at 9. Indeed, the legislative history of Article XIV, § 3 could not be clearer: the delegates to the Constitutional Convention believed that redistricting (“apportionment”) was one of the “critical” subjects the citizen initiative process was designed to address.

Most of plaintiffs’ brief is devoted to their argument (in Counts I-IV and VI) that, even if redistricting is “fair game,” the Redistricting Initiative is not “limited to” procedural and structural subjects in the legislative article, as Article XIV, § 3 requires. As explained in Independent Maps’ Motion for Judgment on the Pleadings (at 20-28) and below, plaintiffs’ argument ignores the fact that *all* of the provisions they challenge are directly related to redistricting and *only* redistricting. Furthermore, *none* of the provisions plaintiffs challenge—concerning the roles the Attorney General, the Auditor General and the Supreme Court would play in the amended redistricting process—is a subterfuge to alter other parts of the Constitution or to enact new substantive laws. Thus, plaintiffs’ quarrels with the details of the Redistricting Initiative do not take it out of the scope of a permissible citizen initiative.

Finally, plaintiffs have completely re-vamped their “free and equal” argument under Article III, § 3 of the Constitution. Largely abandoning the arguments alleged in Count VII of

their complaint, plaintiffs now contend that the Redistricting Initiative impermissibly lumps what they describe as three separate and unrelated issues—the standards for drawing the legislative map, the procedures for drawing the legislative map, and the rules for challenging the legislative map. It is indisputable, however, that all three issues relate directly to redistricting; as such, the Redistricting Initiative easily meets the requirements imposed by Article III, § 3. This is once again an issue on which the *Clark* plaintiffs lost before Judge Mikva in 2014. Although plaintiffs have repackaged their argument, it fares no better this time around.

BACKGROUND

The proponents of the Redistricting Initiative believe that the current redistricting process is broken and that it serves the interests of incumbents and political parties, rather than voters.¹ The Redistricting Initiative is designed to fix the process by addressing both structural and procedural issues. First, the Redistricting Initiative changes the standards governing redistricting decisions. The 1970 Constitution requires only that legislative and representative districts be “compact, contiguous and substantially equal in population.” By contrast, the Redistricting Initiative sets forth a variety of considerations the drafters must take into account. It requires districts to be “contiguous and substantially equal in population” and to comply with federal law. Subject to these basic requirements, the Redistricting Initiative provides that the following criteria “shall” be applied:

(1) the redistricting plan shall not dilute or diminish the ability of a racial or language minority community to elect the candidates of its choice, including when voting in concert with other persons; (2) the redistricting plan shall respect the geographic integrity of units of local government; and (3) the redistricting plan shall respect the

¹ The Redistricting Initiative is supported by a long list of civic and community organizations, current and former state and federal officials from both political parties, as well as business, civic and community leaders. See <http://www.mapamendment.org/SUPPORTERS.html>.

geographic integrity of communities sharing common social and economic interests, which do not include relationships with political parties or candidates for office.

Id. Finally, the Redistricting Initiative prohibits the mapmakers from engaging in partisan gerrymandering or redistricting with the goal of protecting incumbents, by providing that “[t]he redistricting plan shall not either intentionally or unduly discriminate against or intentionally or unduly favor any political party, political group or particular person. In designing the redistricting plan, the Commission shall consider party registration and voting history data only to assess compliance with the requirements in this subsection (a).” Compl. Ex. A, subsection (a).

Second, the Redistricting Initiative seeks to de-politicize the redistricting process by eliminating the General Assembly’s ability to take a first crack at the map and entrusting that responsibility instead to an 11-member Independent Redistricting Commission. As explained in Independent Maps’ Motion (at 8), the Auditor General would select a pool of 30 qualified potential reviewers and then, in a random public drawing, select three of them to serve on the Applicant Review Panel. That Panel would select 100 qualified potential Commissioners. The four House and Senate leaders would each be allowed to strike up to five applicants from that pool. The Applicant Review Panel would then select by random draw seven Commissioners based on their political affiliations (two Democrats, two Republicans, and three who are not affiliated with either major party) and residence (three from the First Judicial District and one each from the other four districts). The four legislative leaders would round out the eleven-member Commission by choosing one member each from among the remaining applicants “on the basis of the appointee’s contribution to the demographic and geographic diversity of the Commission.” *See* Compl. Ex. A, subsection (d).

Approval of a redistricting plan would require an affirmative public vote of seven Commissioners, including at least two Democrats, two Republicans, and two Commissioners not

affiliated with either political party. It would also require advance public notice of both the plan and a report explaining how it complies with the criteria set forth above. If the Independent Redistricting Commission did not approve a plan by June 30 of the year following the decennial census, a Special Commissioner would be chosen to draw the map. The Special Commissioner would be selected by the Chief Justice of the Illinois Supreme Court and the most senior justice who was not affiliated with the same political party as the Chief Justice.

An adopted plan would be filed with the Secretary of State and “shall be presumed valid.” The Illinois Supreme Court would have original jurisdiction “in cases relating to matters under this Section.”

ARGUMENT

I. The Redistricting Initiative Relates To Both “Structural And Procedural Subjects Contained In Article IV.”

Article IV, § 3 of the 1970 Constitution provides that “[a]mendments to Article IV of this Constitution may be proposed by a petition signed by a number of electors equal in number to at least eight percent of the total votes cast for candidates for Governor in the preceding gubernatorial election. *Amendments shall be limited to structural and procedural subjects contained in Article IV.*” (Emphasis added). Independent Maps has submitted enough valid signatures to meet the requirements of Article IV, § 3: on June 13, 2016, the Illinois State Board of Elections unanimously concluded that the signature requirement was met. Thus, the only issue that remains is whether the proposed amendment is “limited to structural and procedural subjects contained in Article IV,” as Article XIV, § 3 requires.

In *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill.2d 453, 466 (1976) (“*Coalition for Political Honesty I*”), the Supreme Court concluded that Article XIV, § 3

“limit[s] initiatives to amendments whose subjects would be both structural and procedural.”² After canvassing the constitutional debates, the Court concluded that this requirement was designed to preclude California-style legislation-by-initiative³ and to limit initiatives instead ““to the area of government which it is most likely will not be changed in the constitution by amendment. The legislature, being composed of human beings, will be reluctant to change the provisions of the constitution that govern its structure and makeup, the number of its members, and those sort of provisions.”” *Id.* at 470 (quoting 4 Proceedings 2911).

In Count V of their complaint, plaintiffs reprise some of the arguments they unsuccessfully made in 2014 in the *Clark* case, contending that redistricting is neither a structural nor a procedural subject contained in Article IV. In their Motion, plaintiffs offer a brief and cryptic defense of Count V, devoting only two paragraphs to their sweeping assertion that redistricting can *never* be the subject of a citizen ballot initiative. *See* Pl. Motion at 20. We begin with that argument because whether redistricting can be the subject of a ballot initiative is a foundational issue that affects not only Count V but *all* of the claims plaintiffs make.

² As noted in Independent Maps’ Motion, for the reasons outlined in Justice Schaefer’s dissenting opinion, we believe the Court misread Article XIV’s plain language in *Coalition for Political Honesty I*. We recognize, however, that this Court is bound by the Supreme Court’s decision, which the Court reiterated in *Chicago Bar Ass’n v. Illinois State Bd. of Elections*, 161 Ill.2d 502 (1994). Independent Maps raises the issue simply to preserve it should the Supreme Court grant review in this case.

³ As a report by the Committee on Legislative Article Proposal #1 noted, the delegates wanted to preclude initiatives proposing amendments “of a statutory nature” and, in so doing, avoid the kinds of “highly complex and emotion-charged issues which have plagued the constitutional initiative process in other states.” Independent Maps’ Motion Ex. E, at 1401. One example given during the debates was of propositions submitted to California voters in 1958 by special interest groups, including a “right-to-work” law proposed by business groups and new tax laws eliminating sales taxes and substantially increasing the state income tax and taxes on business, which were proposed by labor unions. Independent Maps’ Motion Ex. F, at 2913.

As demonstrated in Independent Maps’ Motion, redistricting is inherently a structural subject because how districts are drawn is one of the key factors in determining the makeup of the General Assembly. It is a procedural subject as well: in fact, the redistricting process is a quintessential example of a “procedural subject[] contained in Article IV.” Furthermore, the sponsor of the limited initiative process established in Article XIV, § 3 specifically *confirmed* that the redistricting provisions in the legislative article could be amended through the initiative process. During the debates, the sponsor (Delegate Perona) was asked whether Article XIV would apply to “questions of elections” contained in the legislative article:

under the pertinent sections of this proposed [legislative] article, the first grouping of them—power, structure, composition, *and apportionment*—you deal with size and with elections. You deal with cumulative voting—matters of that nature—and is that the kind of thing, also, that would be subject to initiative under this proposed section 15?

Independent Maps’ Motion Ex. F, at 2712 (emphasis added). Delegate Perona responded unequivocally in the affirmative: “Yes. *Those are the critical areas, actually.*” *Id.* (emphasis added).

The legislative history explains why redistricting or apportionment, as it was referred during the debates, is one of the “critical areas” to which the initiative process was intended to apply. As described in greater detail in Independent Maps’ Motion, the delegates to the Constitutional Convention recognized that it is a “fundamental fact of life” that legislators have a “vested interest in the legislative branch” that would make them less likely to propose needed changes in the legislative article. *See* Independent Maps’ Motion Ex. E, at 1399-1400. The limited initiative procedure in Article XIV was designed to provide a “method to circumvent a legislature which might be dominated by interests opposing legislative changes,” because “voters can better decide on the merits of proposals suggesting changes in the Legislative Article since

they are not directly and personally involved.” *Id.* at 1400. These concerns apply with particular force to redistricting, which creates an inherent conflict of interest for legislators, who will inevitably be tempted to prefer their own personal interests in being reelected and in electing as many of their fellow party members as possible. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm’n*, 135 S.Ct. 2652, 2676-77 (2015) (noting the “conflict of interest implicit in legislative control over redistricting”).

A. As Judge Mikva Concluded, Plaintiffs’ Reliance On *CBA II* Is Misplaced.

In their brief (at 20), plaintiffs ignore the plain language of Article XIV and its legislative history, citing instead what the First District has described as the “sparse” discussion of the “structural and procedural” requirement that appeared in the 1994 Supreme Court decision striking down a term limits initiative. *See Clark v. Illinois State Bd. of Elections*, 2014 IL App (1st) 141937, ¶ 24. In *Chicago Bar Ass’n v. Illinois State Bd. of Elections*, 161 Ill.2d 502, 509 (1994) (“*CBA IP*”), the Supreme Court characterized the proposed limit on the number of years a legislator could serve in the General Assembly as an eligibility requirement or a qualification for office. The Court held that “[t]he eligibility or qualifications of an individual legislator does not involve the structure of the legislature *as an institution*. The General Assembly would remain a bicameral legislature consisting of a House and Senate with a total of 177 members, and would maintain the same organization.” *Id.* (emphasis in original). The Court also stated that “[t]he eligibility or qualifications of an individual legislator does not involve any of the General Assembly’s procedures. The *process* by which the General Assembly adopts a law would remain unchanged.” *Id.* (emphasis in original).

Plaintiffs argue that redistricting is no different than term limits because, if the Redistricting Initiative was adopted, “there would still be the same number of Senators and

Representatives” and “[l]aws would be passed in the same manner.” Pl. Motion at 20. But, as Judge Mikva concluded, these references in *CBA II* “are best understood in context as examples of permissible Article XIV, § 3 initiatives, rather than a description of the entirety of permissible subjects.” *Clark*, Independent Maps’ Motion Ex. C, at 9.

The Supreme Court has never said that only an initiative that resulted in a change to the number of total legislators or to a conversion to a unicameral legislature would pass constitutional muster. Nor has it ever said that an initiative had to change the process by which a law is made. Construing Article XIV, § 3 so narrowly would be contrary to its plain language, which nowhere limits the concepts of “structural and procedural subjects” to the size of the General Assembly and the process of making laws. It would also defy common sense: if the drafters of Article XIV, § 3 had intended to allow only initiatives that changed the numbers of members or chambers in the General Assembly, they could easily have said so. And if they wanted to limit citizen initiatives to changes in the process by which the General Assembly makes laws, they would have said that as well. Had the intended scope of Article XIV, § 3 been so narrow, the delegates certainly would not have spent so much time debating how to articulate the line they intended to draw between initiatives that were properly limited and those that risked creating a California-style process, where special interests were able to put numerous ballot initiatives before the voters on issues that were more properly dealt with through legislation. *See generally* Independent Maps’ Motion Ex. E.

Second, the fact that *CBA II* highlighted the impact that a proposed initiative would have on the General Assembly “as an institution” does not alter the analysis. The Supreme Court was contrasting a proposed amendment that affected only *individual* legislators (term limits) with an amendment that would have an effect on the General Assembly itself, as an institution.

Redistricting fits the latter description perfectly because it affects how the General Assembly as an institution is elected and who *all* of the members of the General Assembly represent.

Third, the fact that the Supreme Court quoted with approval its prior decision in *Coalition for Political Honesty I* demonstrates that the Court did not intend to limit citizen initiatives to the specific examples it gave in *CBA II*. In *Coalition for Political Honesty I*, the Court had explained that a citizen initiative seeking to convert from multiple to single-member districts could be put to the voters under Article XIV, § 3 because it would relate to *both* a “structural and procedural subject.” 65 Ill.2d at 466. If changes to the number and size of districts are “structural” changes, then it necessarily follows that changes to the criteria for drawing those very same districts every ten years would also be structural. These changes would not alter either the number of legislators or the organization of the General Assembly. Yet in both situations the makeup of the *entire* General Assembly *as an institution* would be affected by the redrawing of district lines. Similarly, if a proposal to convert from multiple to single-member districts addresses a procedural subject contained in Article IV, as the Supreme Court held in 1976 and reiterated in *CBA II*, then so too does a proposal to fundamentally alter the process by which redistricting is accomplished every ten years. Both kinds of proposed changes relate to the process by which the General Assembly is elected. Yet neither has any impact on the process by which the General Assembly adopts a law.

The Supreme Court’s 1981 ruling on the Cutback Amendment—the only citizen initiative ever put on the ballot—also supports this reading of *CBA II*. In *Coalition for Political Honesty v. State Board of Elections*, 83 Ill.2d 236 (1980) (“*Coalition for Political Honesty II*”), the Supreme Court considered an initiative that proposed three different changes to the legislative article: switching from multiple to single-member districts, eliminating cumulative voting, and reducing

the number of legislative seats. The Supreme Court held that *each* of the three elements of the proposal, including the switch to single-member districts, “relate[d] directly to the ultimate purpose of structural and procedural change in the House of Representatives.” *Id.* at 260.

B. Plaintiffs’ Reliance On *Lousin* Is Also Misplaced.

Plaintiffs also complain that the Redistricting Initiative violates Article XIV, § 3 because it would remove the General Assembly’s right to take the first crack at redistricting and gives it to the Independent Redistricting Commission. In support, plaintiffs cite *Lousin v. State Board of Elections*, 108 Ill.App.3d 496 (1st Dist. 1982), where the First District upheld an injunction against a citizen initiative that would have amended the legislative article to allow voters to propose new legislation by initiative on any subject. As Judge Mikva properly concluded, *Lousin* does not support plaintiffs’ argument. *See* Independent Maps’ Motion Ex. C, at 10.

Although the initiative at issue in *Lousin* purported to offer an amendment only to the legislative article, it was plainly not *limited* to “structural and procedural subjects contained in Article IV.” By its very nature, the proposal would have altered the General Assembly’s powers scattered throughout Articles VIII-XIII, which specifically grant the General Assembly—and the General Assembly alone—the right to make laws on a variety of subjects. Furthermore, the proposal would have effectively repealed Article XIV, § 3 by creating an unlimited right to enact substantive legislation by initiative—precisely the result Article XIV, § 3 was designed to preclude.

As Judge Mikva observed in *Clark*, *Lousin* is irrelevant here because “nothing in the [redistricting] initiative limits the General Assembly’s power to enact substantive laws; rather, it limits redistricting power that derives from Article IV.” Independent Maps’ Motion Ex. C, at 10. *Lousin* stands for the proposition that the General Assembly’s legislative powers on subjects

outside of Article IV cannot be altered or diminished by a ballot initiative. By definition, that type of ballot initiative is not “limited to structural and procedural subjects contained in Article IV.” But nothing in *Lousin* suggests that a ballot initiative cannot be used to change the General Assembly’s legislative powers on issues, like redistricting, that appear *only* in Article IV. To hold otherwise would be directly contrary to the plain language of Article XIV: the General Assembly’s role in redistricting is one of the critical structural and procedural subjects contained in Article IV; it necessarily follows that a proposal to alter that role is properly limited to a “structural and procedural subject” contained in Article IV.

II. The Redistricting Initiative Is Properly “Limited To” Structural And Procedural Subjects Contained In Article IV.

Plaintiffs’ primary argument is that, even if the Redistricting Initiative relates to structural and procedural subjects contained in Article IV, it is not “limited” to those subjects. Plaintiffs cite *Lousin* and the Supreme Court’s decision in *Chicago Bar Association v. State Bd. of Elections*, 137 Ill.2d 394 (1990) (“*CBA I*”), for the proposition that a citizen initiative cannot make “substantive changes” to articles other than the legislative article. Plaintiffs then claim that various provisions in the Redistricting Initiative impermissibly alter other articles of the Constitution relating to the duties of the Attorney General, the Auditor General, and the Supreme Court and the jurisdiction of the Supreme Court.

But the Redistricting Initiative is fundamentally different from the initiatives at issue in *Lousin* and *CBA I*. In those cases, the initiatives purported to amend only the legislative article, but were obviously a subterfuge for changing other articles of the Constitution. As noted above, by allowing legislation by initiative, the ballot proposal in *Lousin* would have effectively repealed Article XIV, § 3 and would have altered the General Assembly’s lawmaking authority under a broad range of constitutional articles. Similarly, the “tax accountability amendment”

initiative the Supreme Court struck down in *CBA I* would have imposed supermajority requirements on the General Assembly to pass any measure that raised revenue, effectively amending Article IX of the Constitution relating to revenue. The Court held that this proposed amendment did not meet Article XIV's requirements because "[w]rapped up in this structural and procedural package is a substantive issue not found in article IV—the subject of increasing State revenue or increasing taxes." 137 Ill.2d at 404. The Court held that allowing this kind of subterfuge would "violate the intent so clearly expressed in the convention committee reports and debates to limit constitutional Amendment by initiative to structural and procedural subjects of the legislative article and to prohibit the incorporation into such amendments of substantive matters." *Id.* at 406.

Here, by contrast, none of the provisions plaintiffs cite as supposedly exceeding structural and procedural subjects contained in Article IV would alter the General Assembly's ability to enact substantive laws. Nor are those provisions a subterfuge for making changes to entirely different articles of the Constitution. On the contrary, all of the provisions plaintiffs challenge relate directly and *solely* to redistricting. Because redistricting is a structural and procedural subject contained in Article IV, it necessarily follows that these provisions are properly limited and do not provide a basis for striking down the initiative.

A. The Omission Of Any Reference To The Attorney General Does Not Affect The Article XIV, § 3 Analysis.

Article IV, § 3 currently provides that the Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting "which shall be initiated in the name of the People of the State by the Attorney General." The Redistricting Initiative deletes any reference to the Attorney General, taking no position on who has the right to bring an action concerning redistricting. Plaintiffs argue that the deletion of this provision alters the Attorney

General's powers and duties under Article V, § 15. They also contend that who may challenge a redistricting plan is neither a structural or procedural subject. Pl. Motion at 20; *see* Compl. Count VI. Both arguments should be rejected.

This is another claim that Judge Mikva found to be without merit. The 2014 redistricting initiative not only deleted the provision relating to the Attorney General's role in initiating an action relating to redistricting, but also expressly provided that the redistricting commission would have the exclusive right to defend its redistricting plan. Judge Mikva rejected plaintiffs' argument that, because the Attorney General is not "part of the legislative branch," altering the powers afforded to the Attorney General by Article IV, § 3 takes the redistricting initiative outside the scope of a permissible citizen initiative. Independent Maps' Motion Ex. C, at 10. Because the Redistricting Initiative itself "is limited to Article IV subjects," "eliminating . . . the Attorney General's role in redistricting litigation does not take this initiative outside of Article IV." *Id.* That analysis is clearly right. Article IV, § 3 is the sole source of whatever constitutional power the Attorney General currently has to bring actions relating to redistricting. Deleting that provision relates directly to redistricting and does not disturb any other constitutional provision.

Plaintiffs argue that the Redistricting Initiative alters the Attorney General's powers as set forth in Article V, § 15. But that section provides only that "[t]he Attorney General shall be the legal officer of the State, and shall have the duties and powers that may be prescribed by law." Compl. ¶ 70. As explained in Independent Maps' Motion, the reference to duties "prescribed by law" means that the General Assembly prescribes the Attorney General's duties by statute, which is precisely what the General Assembly has done in the aptly named Attorney General Act, 15 ILCS 205/4. If that statute is construed to give the Attorney General the power to litigate redistricting issues on behalf of the People of the State of Illinois, the Redistricting

Initiative would not alter that power one whit. Nor would it preclude the General Assembly from giving the Attorney General such power if she does not have it already.

Plaintiff also argues that provisions regarding litigation of redistricting plans are not structural or procedural subjects contained in Article IV. But the Redistricting Initiative merely deletes a provision that is already embedded in Article IV, § 3. The current provision, which sets forth procedures for ensuring that redistricting plans comply with the constitutional requirements imposed by Article IV, § 3 is by its very nature a “structural and procedural subject[] contained in Article IV.”

B. The Provisions Relating To The Auditor General Do Not Affect The Article XIV, § 3 Analysis.

In Count I, plaintiffs argue that the Redistricting Initiative impermissibly imposes new duties on the Auditor General. Citing *Lousin* and *CBA I*, plaintiffs contend that the Redistricting Initiative goes beyond the legislative article by imposing new duties on the Auditor General that are not set forth in Article VIII, § 3, which creates the office of Auditor General and prescribes the duties of that office.

Interestingly, this is *not* an argument the same plaintiffs, represented by the same lawyers, made in *Clark* even though the 2014 redistricting initiative imposed the very same duties on the Auditor General.⁴ For good reason. Unlike the situation in *Lousin* and *CBA I*, the Redistricting Initiative is not being used to change or limit the Auditor General’s existing duties under Article VIII or to change or limit the General Assembly’s duty to provide for audits. If the Redistricting Initiative passes, the Auditor General will still have the same duties he had before the legislative article was amended. As a result, the Redistricting Initiative would not, as

⁴ The 2014 redistricting initiative is reproduced as an appendix to Judge Mikva’s opinion, which is Ex. C to Independent Maps’ Motion. The provisions relating to the Auditor General’s role in selecting the Applicant Review Board appeared in subsection (c) of that initiative.

plaintiffs contend, be used to impermissibly “accomplish substantive changes in the constitution.” Pl. Motion at 16 (quoting *CBA I*, 137 Ill.2d at 403). Instead, it would be used exactly as the framers intended, in a way that “pertain[s] only to the basic qualities of the legislative branch—namely, structure, size, organization, procedures, etc.” *CBA I*, 137 Ill.2d at 403. Because redistricting itself pertains to those basic qualities and is, indeed, a “critical” subject to which the framers intended Article XIV, § 3 to apply, it necessarily follows that the proposed new procedures fall within the scope of a permissible ballot initiative.

That the Auditor General was not previously mentioned in the redistricting provisions of Article IV, § 3 does not change the analysis. Plaintiffs argue that the redistricting initiative would make the Auditor General’s job “dramatically different” than what it is now. But that ignores the fact that redistricting occurs only once each decade and that the Auditor General is tasked only with choosing a pool of 30 applicants for the Review Panel and then randomly choosing three members to sit on that Panel. There is no reason why the Auditor General and his staff should be overwhelmed by that task. But regardless of how onerous the task may be, it is related *only* to the redistricting process and thus falls squarely within the scope of a structural and procedural subject contained in Article IV, § 3. To hold otherwise would mean that ballot initiatives could never offer voters innovative new ideas, but instead would be forced to nibble around the edges of structural and procedural subjects by making small changes to existing procedures. Surely the framers did not intend the initiative process to be a straitjacket in cases like this, where the initiative relates solely to a structural and procedural subject.

At page 16 of their brief, plaintiffs argue that if the Auditor General can be given a new task in Article IV, § 3 through a citizen initiative, then there will be no limits to the kinds of amendments that could be proposed through the initiative process. They suggest that allowing

the initiative here to proceed would permit a citizen initiative to amend Article IV, § 14 to give the Auditor General the powers that are currently conferred on the House to impeach executive officers and the Senate to try executive officers and remove them from office. That argument fails at the outset because the impeachment provision in Article IV, § 14 is clearly *not* a structural and procedural subject contained in Article IV. Unlike redistricting, the power to impeach and try executive officers does not pertain “to the basic qualities of the legislative branch—namely, structure, size, organization, procedures, etc.” *CBA I*, 137 Ill.2d at 403. A change in Article IV, § 14 would not affect the makeup of the General Assembly or its structure as an institution. And unlike redistricting, the power to impeach and try executive officers was not mentioned in the legislative debates as one of the “critical” areas to which the initiative process would apply. Furthermore, legislators have no conflict of interest with respect to the powers vested in them by section 14; as a result, there is no reason to believe that legislators would be reluctant to propose needed changes to that particular section of the legislative article—which again is not the case with redistricting.

As described above, Judge Mikva concluded that an initiative that addresses a structural and procedural subject contained in Article IV, § 3, such as redistricting, does not transgress the boundaries of Article XIV, § 3 simply because it reduces powers granted in Article IV to state officers who are not part of the legislative branch. *Independent Maps’ Motion Ex. C*, at 9-10. The same principle applies where the initiative would assign new duties to state officers like the Auditor General who are not part of the legislative branch. So long as those duties are strictly limited to redistricting—as they are here—the initiative meets the requirement that it be “limited to structural and procedural subjects contained in Article IV.”

C. The Provisions Requiring Two Supreme Court Justices To Choose A Special Commissioner In The Event The Independent Redistricting Commission Cannot Agree Do Not Render The Initiative Unconstitutional.

The Redistricting Initiative provides that, if the Independent Redistricting Commission is unable to adopt a redistricting plan in a timely manner, the Chief Justice of the Supreme Court and the most senior justice “who is not affiliated with the same political party as the Chief Justice” will choose a Special Commissioner to draw a map. This too is a provision that was included in the 2014 redistricting initiative. The *Clark* plaintiffs never objected to it.

In this case, however, plaintiffs argue (in Count III) that this provision impermissibly imposes new duties on two members of the Supreme Court, which is not a “structural and procedural subject of Article IV.” Compl. ¶¶ 40-44. In Count IV, plaintiffs contend that the Redistricting Initiative improperly requires at least two members of the Supreme Court to have a political affiliation, which is also not a “structural and procedural subject of Article IV.” Compl. ¶¶ 51-54. Both arguments should be rejected.

Repeating the argument they make with respect to the Auditor General, plaintiffs contend that the assignment of duties to Supreme Court justices is “not a subject of Article IV at all” and thus cannot be included in any citizen initiative. Pl. Motion at 17. But the redistricting initiative is not a subterfuge to alter or expand the duties of the Supreme Court or its justices as they appear in the judicial article. Those duties will remain undisturbed if the Redistricting Initiative is approved by the voters. Although Supreme Court justices will also have new duties prescribed by Article IV, § 3, those duties relate directly and solely to redistricting. Thus, the changes *belong* in Article IV, § 3 and are “limited to” redistricting, which is a “structural and procedural subject[] contained in Article IV.”

Plaintiffs acknowledge that the current version of Article IV, § 3 already provides a role for the Supreme Court, requiring the Court to appoint two individuals from different political parties to serve as potential tiebreakers in the event the redistricting commission cannot agree; one of them is then selected by picking a name out of a hat. Nevertheless, plaintiffs insist that this is not a structural or procedural subject. As they correctly note, the framers were not constrained by the limits they put on citizen initiatives in Article XIV, § 3. But that is beside the point. The provisions the framers included in Article IV, § 3 relating to the procedures for redistricting are structural and procedural subjects contained in the legislative article even if they concern individuals who are not members of the legislative branch. Again that is a point Judge Mikva made in *Clark*, in rejecting plaintiffs' argument that proposed alterations in the powers afforded to the Attorney General and the Governor by Article IV, § 3 took the redistricting initiative outside of Article XIV, § 3 because "neither of these state officers are part of the legislative branch." Independent Maps' Motion Ex. C, at 10. Judge Mikva agreed with the proponents of the initiative that "the Redistricting Initiative is limited to Article IV subjects and eliminating the Governor's right to veto a plan [enacted by the General Assembly] or the Attorney General's role in redistricting litigation does not take this initiative outside of Article IV." *Id.*

Plaintiffs' argument in Count IV that the Redistricting Initiative somehow requires Supreme Court justices to have or maintain political affiliations (which, plaintiffs say, is not a structural or procedural subject) should also be rejected. As demonstrated in Independent Maps' Motion, this provision simply recognizes that the Illinois Constitution provides for the partisan election of Supreme Court justices and that historically justices have run as Democrats or Republicans when they are elected to the Court. Thus, as we also demonstrated, it is easy to

determine which two justices would select the Special Commissioner—the Chief Justice has only to consider how her colleagues identified themselves when they ran for office. Nothing in the Redistricting Initiative *requires* a sitting justice to announce a current political affiliation—although they are entirely free to do so.⁵ In fact, the Redistricting Initiative puts the selection of the Special Commissioner in the hands of two Supreme Court justices precisely because they are *not* likely to be partisan. As plaintiffs themselves note (at 23), the justices “are by function non-partisan.” The only reason for requiring their political affiliations to be different is to ensure that there is no appearance of partisanship in the selection process.

If there are justices who have run as independents, without any political affiliation, that too does not present a problem. The initiative is framed in the negative—it requires only that the two Supreme Court justices who together will select the Special Commissioner do not share the same political affiliation. Thus, if the Chief Justice or the most senior justice ran as an independent (as the Constitution permits), that justice will not be affiliated with the same political party as a justice who ran as a Republican or Democrat. If all of the justices were independent, then none of them would be affiliated with the same political party because none of them would be affiliated with *any* political party.

Because nothing in the Redistricting Initiative seeks to regulate the conduct of Supreme Court justices, plaintiffs’ argument that the regulation of their conduct is not a structural and

⁵ Plaintiffs note (at 18) that the Illinois Supreme Court regulates the political activity of judges throughout the State, including Supreme Court Justices. But Supreme Court Rule 67 does not prohibit judges from having or disclosing political affiliations. On the contrary, it specifically permits a judge “at any time” to “identify himself or herself as a member of a political party.” Sup. Ct. R. 67(B)(1)(a)(ii). Plaintiffs also complain (at 18 n.3) that the Redistricting Initiative does not define the concept of “affiliation” with a political party, which they say could cause confusion. But there is no mystery about what political affiliation means: a judge who self-identifies as being a member of a political party or runs for judicial office as a Democrat or Republican has thereby “affiliated” with the party of his or her choice.

procedural subject in Article IV necessarily fails.

D. The Fact That The Redistricting Initiative Provides For “Original” Rather Than “Original And Exclusive” Jurisdiction Over Redistricting-Related Disputes Does Not Render The Initiative Unconstitutional.

In Count II, plaintiffs point to the fact that the legislative article currently provides that the Supreme Court has “original and exclusive” jurisdiction over challenges to a redistricting plan, while the Redistricting Initiative provides only that the Supreme Court will have “original” jurisdiction over such a challenge. Plaintiffs contend that the effect of omitting the word “exclusive” is to give the circuit courts concurrent jurisdiction over redistricting challenges and that the extent of the circuit courts’ subject matter jurisdiction is not a structural and procedural subject. Again, this is an argument that plaintiffs chose not to make in *Clark*, where the initiative also omitted the word “exclusive.”

As demonstrated in Independent Maps’ Motion, the problem with this argument is, once again, that the only change being made is to a provision of the Legislative Article that relates directly to (and only to) redistricting, which is a structural and procedural subject contained in Article IV. Plaintiffs say that Article VI, § 9 gives the Supreme Court “mandatory and exclusive jurisdiction to the exclusion of the circuit court on redistricting and removal of the governor.” Pl. Motion at 19. Assuming that is true, the Redistricting Initiative does not purport to alter the jurisdiction conferred by the judicial article. Instead, the Redistricting Initiative is silent on the question of whether the Supreme Court’s original jurisdiction is concurrent or exclusive, leaving that issue to be decided elsewhere.

To put it another way: the fact that the words “and exclusive” do not appear in the Redistricting Initiative would not impliedly repeal section 9 of the judicial article. “Repeal by implication is generally disfavored, and we will presume legislation was intended to be

consistent with existing law. Therefore, this court will apply that principle only when a subsequent statute's terms and operation cannot be reconciled with those of an earlier statute." *U.S. Bank Nat. Ass'n v. Clark*, 216 Ill.2d 334, 344 (2005) (internal citation omitted). The same principle applies to constitutional amendments: if, as in this case, there is no irreconcilable inconsistency between the amendment and the existing constitutional provisions in the judicial article relating to jurisdiction, then there is no implied repeal. See *Coalition for Political Honesty I*, 65 Ill.2d at 464 ("Generally, the rules of statutory construction apply to the construction of constitutional provisions"); Pl. Motion at 24 n.5 (relying on this principle).

There is another way to read Article VI, § 9. That section provides that "Circuit Courts shall have original jurisdiction of all justiciable matters except *when* the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office." (Emphasis added). This section could be read as a reference to the judicial review provisions in the legislative article, such that concurrent Circuit Court jurisdiction is eliminated only "when" original and exclusive jurisdiction is conferred on the Supreme Court by Article IV. If so, the Redistricting Initiative would not alter the judicial article at all; instead, it would simply deal with a subject that is already contained in Article IV, § 3.

Plaintiffs contend that the jurisdiction of the courts over redistricting matters is not a structural or procedural subject contained in Article IV. But that is not true. The current Article IV contains a provision regarding Supreme Court jurisdiction over redistricting-related matters. That provision relates directly to redistricting and only to redistricting; because redistricting is a structural and procedural subject contained in Article IV, the provisions relating to jurisdiction do not cause the Redistricting Initiative to fall outside the scope of Article XIV, § 3.

III. The Redistricting Initiative Does Not Violate The “Free And Equal” Clause Of Article III, § 3.

In their Motion (at 21-24), plaintiffs have recast their claim in Count VII that the Redistricting Initiative violates the “Free and Equal” Clause of Article III, § 3. Plaintiffs continue to argue that the Redistricting Initiative raises “separate and unrelated questions” that voters should have the opportunity to vote on separately. But they recharacterize what those “separate and unrelated questions” supposedly are. Plaintiffs now say that the Redistricting Initiative presents three questions: “(1) should the substantive requirements for legislative maps be changed; (2) should an Independent Redistricting Commission be created to take the power to draw legislative maps from the legislature; and (3) should the manner in which a redistricting plan is challenged be changed.” Pl. Motion at 22.⁶ However plaintiffs may seek to slice and dice the Redistricting Initiative, their “free and equal” argument fails because *everything* in the Initiative relates directly to (and only to) redistricting. As Judge Mikva concluded in 2014 in rejecting the very same argument, “the entire proposition is a new redistricting approach that is focused exclusively on addressing perceived problems in the current Article IV, § 3.” Independent Maps’ Motion Ex. C, at 11. Because the initiative has a “a reasonable, workable relationship to the same subject,” it meets the requirements of the Free and Equal Clause. *Id.* at 10.

It is undisputed that plaintiffs’ free and equal claim is governed by the test the Supreme Court adopted in *Coalition for Political Honesty II*. See *Clark v. Illinois State Board of Elections*,

⁶ Compare Compl. ¶ 79, where plaintiffs said the supposedly separate and unrelated questions pertained to the “General Assembly’s power to draft a redistricting map; the jurisdiction of the Illinois Courts; the duties and political affiliations of Judges of the Supreme Court; the duties of the Auditor General; the powers and duties of the Attorney General; and the duties of the Secretary of State.”

2014 IL App (1st) 141937, ¶ 29 n.2 (following *Coalition for Political Honesty II*);⁷ see also *Richardson v. Leibovitz*, 265 Ill.App.3d 123 (3d Dist. 1994) (same). In *Coalition for Political Honesty II*, the Court rejected a free and equal challenge to the Cutback Amendment. The opponents of that initiative argued that it presented three separate questions: “(1) whether the size of the House of Representatives should be reduced, (2) whether cumulative voting should be abolished, and (3) whether representatives should be elected from single-member districts.” 83 Ill.2d at 253. They claimed that these types of questions could be combined in a single initiative “only if a voter may not reasonably be expected to oppose one part and favor another” and that the Cutback Amendment did not meet that test. *Id.* The Supreme Court rejected this test as “unworkable.” *Id.* at 258. As the Court explained, “[a]lmost any proposition can be broken into simpler questions” on which reasonable voters could vote in different ways. *Id.* But breaking related proposals down into separate ballot questions could create even more confusion and lead to “incongruous results.” *Id.* at 255.

In the end, the Supreme Court adopted a very simple test. It held that “it is only separate and *unrelated* questions which cannot be combined in a single proposition.” *Id.* at 254 (emphasis in original). And it explained that “separate questions may be combined in a single proposition as long as they are reasonably related to a common objective in a workable manner.” *Id.* at 256. Because the questions posed by the Cutback Amendment “relate[d] directly to the ultimate

⁷ Plaintiffs say that *Clark* “questioned the validity of *Coalition II*’s free and equal analysis.” Pl. Motion at 22 n.4. That is not accurate. In *Clark*, the Court stated that it was following *Coalition II*, but “note[d]” that the Illinois Supreme Court’s analysis of a prior Arizona case was criticized in 1990 by the Arizona Supreme Court. 2014 IL App (1st) 141937, ¶ 29 n.2. In any event, whether the Illinois Supreme Court properly interpreted Arizona cases that opponents of the Cutback Amendment relied upon is entirely beside the point. The Illinois Supreme Court has never questioned the test it adopted in *Coalition for Political Honesty II* and thus, as *Clark* recognizes, that test is controlling.

purpose of structural and procedural change in the House of Representatives,” the Court held that voters were entitled to vote on it as a single proposition. *Id.* at 260.

As noted above, plaintiffs identify three “separate” questions raised by the Redistricting Initiative. But all of those questions are related to the common issue of redistricting reform. Indeed, they are inextricably intertwined. To depoliticize the redistricting process requires changes to both the standards for redistricting and the process by which redistricting is accomplished. The Redistricting Initiative does both, by setting forth new standards for redistricting, including a prohibition on partisan gerrymandering, and by taking the redistricting process out of the hands of the legislature and entrusting it instead to an independent commission, which will be less partisan and will not have a built-in conflict of interest.

The fact that the Redistricting Initiative deals with both the substantive standards for redistricting and the process for both drawing the map and reviewing it in the courts cannot possibly create a problem under the Free and Equal Clause. After all, the Supreme Court has interpreted Article XIV, § 3 to require citizen initiatives to address **both** structural and procedural subjects. If structural and procedural subjects were deemed separate and unrelated questions, as plaintiffs seem to contend, then a citizen initiative could **never** be put on the ballot because it would always violate either Article XIV, § 3 or Article III, § 3. The framers could not possibly have intended such an absurd result.

Plaintiffs also try to manufacture unrelated questions by arguing that specific provisions in the Redistricting Initiative are not related to the stated purpose of the Redistricting Initiative that appears on the petitions Independent Maps circulated—to “change the current system of redistricting, where legislators draw the maps of General Assembly districts after each decennial census, and provide for a restructured, independent redistricting commission to draw the maps.”

Pl. Motion at 22-23. But plaintiffs cite no case holding that the brief statement of purpose on the petitions is controlling in deciding whether an initiative meets the requirements of the Free and Equal Clause. In fact, in *Coalition for Political Honesty II*, the petitions said that the purpose of the constitutional amendment was “to reduce the size of the House of Representatives from 177 to 118 members and to provide for the election of one Representative from each of 188 districts.” 83 Ill.2d at 239. Nevertheless, the Court held that the initiative (which also dispensed with cumulative voting) complied with the Free and Equal Clause because all three aspects of the proposed amendment related to the single, unifying purpose of promoting “structural and procedural change in the House of Representatives.” *Id.* at 260. In any event, all aspects of the Redistricting Initiative do relate to the overarching purpose set forth in the petitions, which is to “change the current system of redistricting.”

Plaintiffs complain that the Redistricting Initiative deletes the compactness requirement set forth in Article IV, § 3 and instead requires district lines to “respect the geographic integrity of units of local government” and to “respect the geographic integrity of communities sharing common social and economic interests.” Citing the *dissent* in *Coalition for Political Honesty II*, plaintiffs argue that voters should not be “forced” to an all-or-nothing vote on all aspects of the Redistricting Initiative, but should instead be able to vote separately on the question of whether the compactness requirement should be eliminated and new requirements for respecting the geographic integrity of units of government and communities of interest should be added. Pl. Motion at 23. But that is precisely the approach the Supreme Court *rejected* as “unworkable” and leading to “incongruous” results. Again, the question is not whether voters might want to vote separately on each purported separate question, but rather whether the proposal as a whole is “reasonably related to a common objective in a workable manner.” *Coalition for Political*

Honesty II, 83 Ill.2d at 256. That is clearly the case here: every aspect of the proposal, including all of the standards for redistricting, is reasonably related to the common objective of changing the way in which redistricting is accomplished every ten years.

The Redistricting Initiative does not present separate and unrelated questions simply because it includes a number of affirmative redistricting standards along with prohibitions on partisan line-drawing and incumbent protection. *All* of these standards are interrelated. As the U.S. Supreme Court explained decades ago in *Davis v. Bandemer*, “[d]istrict lines are rarely neutral phenomena.” 478 U.S. 109, 128 (1986). The “location and shape of districts may well determine the political complexion of the area”; particularly with sophisticated, computerized map-making technology, the political consequences of any particular redistricting plan will almost always be apparent. *Id.* That is why the Redistricting Initiative not only tells the Independent Redistricting Commission what it must *not* do (engage in partisan gerrymandering), but also provides it with a coherent set of redistricting principles that it must affirmatively follow. All of these standards are part and parcel of a single, unified proposal designed to enact real redistricting reform.

The same is true of the other pieces of Redistricting Initiative that plaintiffs tease out as presenting separate and supposedly unrelated questions, such as whether the Auditor General should play a role in the redistricting process or whether two Supreme Court justices should choose a Special Commissioner in the event that the Independent Redistricting Commission cannot agree on a map in a timely manner. Each of these issues is directly related to the common question of redistricting reform and specifically to the Redistricting Initiative’s purpose of creating a new process that “limit[s] the conflict of interest implicit in legislative control over redistricting” and, in so doing, promote a “‘core principle of republican government,’ namely,

‘that the voters should choose their representatives, not the other way around.’” *Arizona State Legislature*, 135 S.Ct. at 2676-77. The same is true of the provision relating to judicial review of redistricting plans.⁸

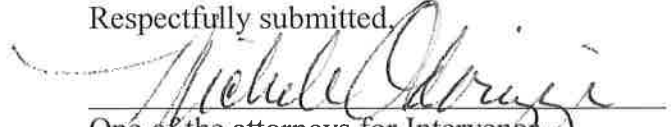
The fact that voters might like some of the proposed standards and procedures but not others is irrelevant. As the Supreme Court observed in *Coalition for Political Honesty II*, to hold otherwise would lead to “incongruous results” and turn the initiative process into an impossible quagmire. If the proponents of a redistricting initiative had to break their proposal up into multiple pieces and ask for separate votes, the already expensive and cumbersome petition process would become impossible. And even if the proponents managed to get signatures on multiple petitions, there would always be a risk of incongruous results at the polls. What if, for example, the Auditor General’s or Supreme Court’s roles were the subject of separate initiatives, along with the remainder of the Redistricting Initiative? If the voters approved the Redistricting Initiative, but not the other two, there would no coherent process for choosing the Independent Redistricting Commission and no fail-safe in the event the Commission could not agree. Proposing different aspects of the proposal over a period of years would work no better: how would the proposed amendments to the legislative article work if only *some* portions of the proposal were approved by the voters and the rest had to wait for later elections? As the Supreme Court properly held in *Coalition for Political Honesty II*, nothing in the Free and Equal Clause requires such an absurd result.

⁸ Plaintiffs note that the Redistricting Initiative does not contain language that appears in the current Article IV, § 3 that a plan adopted in accordance with section 3 and filed with the Secretary of State will have the “force and effect of law.” Instead, it says only that such a plan “shall be presumed valid and shall be published promptly by the Secretary of State.” The language that was omitted is superfluous; in any event, it provides no basis for challenging the constitutionality of the initiative.

CONCLUSION

For the foregoing reasons, Independent Maps urges the Court to deny plaintiffs' Motion for Judgment on the Pleadings.

Respectfully submitted,



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Dated: June 17, 2016

**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION**

JOHN HOOKER, et al.,

Plaintiffs,

vs.

ILLINOIS STATE BOARD OF ELECTIONS,
et al.

Defendants,

and

SUPPORT INDEPENDENT MAPS,

Intervenor-Defendant.

Case No. 16 CH 06539

Hon. Diane J. Larsen,
Judge Presiding.

CERTIFICATE OF SERVICE

I, Alexander Kritikos, one of the attorneys for Intervenor-Defendant Support Independent Maps, hereby certify that on June 17, 2016, I caused the attached **MEMORANDUM OF INTERVENOR-DEFENDANT SUPPORT INDEPENDENT MAPS IN OPPOSITION TO PLAINTIFFS' MOTION FOR JUDGMENT ON THE PLEADINGS** to be served on all counsel of record by causing a copy of said document to be sent via email to:

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