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Testimony of

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Good morning, distinguished members of the Committee. I thank you for the opportunity to speak at this very important hearing, and for your accommodation in allowing me to join you from a distance. My name is Justin Levitt, and I am an attorney at the Brennan Center for Justice at NYU School of Law. The Brennan Center is a non-partisan organization that unites scholars and advocates in pursuit of a vision of inclusive and effective democracy. Toward that end, the Center's Democracy Program promotes reforms that eliminate barriers to full and equal political participation and that foster responsive and responsible governance.

In particular, the Brennan Center has been at the forefront of research on redistricting procedures, both in the Midwest and across the country. We have extensively studied redistricting practices nationwide, analyzed both successful and unsuccessful attempts at redistricting reform, and produced materials to educate the public about the benefits and consequences of various redistricting methods. We have testified with respect to proposed redistricting legislation, and assisted advocates and elected officials in drafting such legislation. In addition, we have participated as *amici curiae* in many of the major cases addressing the use of redistricting for partisan gain or at the expense of minority voters.

We are very pleased that the Committee has chosen to scrutinize publicly how Illinois draws the boundaries for its state legislative — and, we hope, congressional — districts. We commend you for prioritizing this critically important process, and for airing this debate before the next redistricting cycle is fully upon us. We also commend the Paul Simon Institute, among others, for recognizing the importance of the issue, for drawing public attention to opportunities for change in the process, and for understanding the benefits of a fundamentally pragmatic approach. We urge the Committee to ensure that meaningful follows in a manner as timely as these hearings.

Today, I hope to briefly lay out an overview of the need for reform and some of the more important components that, in our review, effective reform should incorporate. I will describe the structure of the current system by which Illinois district lines are drawn, noting especially the potential for legislators to influence their own districts' boundaries, and the risks of such a system. I will also briefly lay out alternative structures for drawing district lines that are in place in other states, some of which may prove to be useful models.

I will then propose several specific elements that I suggest should guide you in considering reform, directed at addressing the concerns above: meaningful independence, meaningful diversity, meaningful guidance, and meaningful transparency. We feel strongly that there is no single redistricting archetype that fits all 50 states — a system for Illinois must consider the unique demographics and political issues that confront Illinois voters. Still, we hope that the basic principles we focus on today can provide useful guidance as your deliberations continue.

The Illinois redistricting system

Each state's redistricting system is slightly different, in both design and implementation. As you know, in Illinois, the state legislature presently has primary responsibility for drawing the lines of both state legislative districts and Congress, subject to gubernatorial veto. For state legislative districts, if the legislature cannot agree on a plan by June 30, a "backup commission" is convened to take over the process: the commission consists of one legislator and one non-legislator chosen by each of the legislative leadership. If this commission does not produce a plan by August 10, the Supreme Court submits the names of two individuals from different political parties to the Secretary of State, who randomly selects one of these nominees to become the commission's tiebreaker. The random selection process was intended to force compromise, but in each of the last three cycles, both legislature and commission have deadlocked, and the parties have preferred to take a chance on total control — with the resulting districts reflecting those partisan ambitions.

Moreover, there are few constraints on those who draw the lines beyond the particular process outlined above. Congressional districts are subject only to the particular limitations of federal constitutional and statutory law. In addition to federal limitations, the Illinois constitution requires that state legislative districts be contiguous and "reasonably compact," though the latter standard has largely remained undefined and unenforced.

The net effect of the particular manner in which Illinois' redistricting system has developed is that, as you know, many state legislators become extensively involved in determining the bounds by which they and their congressional colleagues are elected. Moreover, this process unfolds in ways not readily transparent to the public.

Such a process contains substantial flaws. The process of drawing legislative lines affects the interests of individual legislators, the interests of political parties, and the interests of represented communities — or, put differently, the public good. When legislators personally are able to set the lines by which they are elected, there arises a natural temptation to conflate the three, even when those officials act with the purest of motives. That is, even conscientious elected representatives might be tempted to draw electoral lines that insulate their districts from effective challenge and promote their party's fortunes — because they believe themselves and their party best able to serve their constituents.

Such temptations — whether fueled by self-interest or zealous advocacy — weaken the democratic process and blunt the voice of the electorate. By drawing district lines to promote

individual and party security, legislators with a hand in the process become enmeshed in the task of building districts based on favored constituents and disfavored ones. That is, representatives get into the business of choosing their constituents, rather than the other way around.

Just as important is the way that this process appears to the public. Even if some individuals choose to forgo self-interested temptation, a system that encourages legislators to design their own districts fosters the public perception that improper self-dealing is at work.

The appearance of rampant self-interest is driven, in part, by visible outcomes: districts are drawn in bizarre shapes, and elections are won with overwhelming margins. Neither factor would likely be as worrisome, alone or together, if legislators were not themselves responsible for drawing their own districts. However, with the structural opportunity for self-interest, it looks to many as if the contest has been rigged.

First, consider the appearance of Illinois' districts. In the abstract, a district's shape yields little information about the population therein. Communities conducive to coherent representation rarely emerge in neat geometric patterns. Moreover, fair and effective representation, particularly for minority voters, sometimes calls for combining pockets of specific populations into irregularly shaped districts. However, some of Illinois' districts, far from areas impacted by the Voting Rights Act, take twists and turns so strange that it appears that the most compelling reason for the district's shape is simple electoral advantage. If legislators were not themselves involved in constructing the districts, the shapes themselves would give rise to less suspicion. But when legislators draw districts in a process lacking any meaningful transparency, and the districts zig and zag for no obvious reason to produce lopsided majorities, it is natural to assume that the districts are intentionally designed to undermine effective political challenge.

Second, Illinois' recent electoral outcomes also feed the intuition that the districts are drawn for self-protection. After the last redistricting, for example, 30 out of the 59 state Senate races were not contested by one of the major parties in the 2002 elections. This is worth repeating: *half* of the seats in the state Senate were not even challenged after the last redistricting, by either Republicans or Democrats. This is at least in part because, on average, those 30 districts were drawn so that they leaned toward one party or the other by an average of more than 30 percentage points. With districts so heavily slanted, it is not surprising that it is difficult to find candidates willing to mount a meaningful challenge.

As with district shape, the lack of effective competition might not be quite as disturbing if legislators were not drawing their own lines. In many cases, constituents are undoubtedly pleased with the representation they receive, and return incumbents to office by healthy margins. And in order to represent particular distinctive communities, it will often be necessary to link like-minded voters together, which will usually result in districts that are less competitive. Moreover, legislators like Senator Syverson have shown that it is certainly possible to win an election in districts slanted toward the opposing party, even outside of the portions of southern Illinois where party affiliation is more flexible. Still, half of the Senate districts without so much as a challenger is an alarming rate for those concerned with democratic choice. When legislators are in charge of the process, it is difficult to explain the lopsided district composition and the resulting lopsided elections in terms that put the public interest foremost.

Alternatives

There are many alternatives to the status quo already successfully implemented in other states. Some of these alternatives concern the process by which individuals are selected to draw district lines, or guidelines governing where the lines are to be drawn, or both.

Who draws the lines

Five states, for example, employ an advisory commission to help advise the legislature on where state legislative lines should be drawn. The most widely analyzed of these is in Iowa, where the legislature's bureau of nonpartisan civil servants, normally responsible for legal drafting, budget analysis, and technical advice, is charged with preparing drafts of redistricting plans. This bureau prepares a draft redistricting map, which the legislature may accept or reject as is, but may not modify. If the map is rejected, the nonpartisan bureau will try again, with another opportunity for the legislature to vote up or down without change. If the legislature rejects two sets of plans, and the nonpartisan bureau returns with a third map, the legislature is then, on the third try, able to accept, reject, or modify the plan it has given. Since the procedure was put in place in 1980, the Iowa legislature has not used its authority to draw its own maps from scratch on the third attempt.

Other states put even more distance between individual legislators and the redistricting process. For example, seven states — Arkansas, Colorado, Hawaii, Missouri, New Jersey, Ohio, and Pennsylvania — draw state legislative districts with so-called "politician commissions," distinct from the legislature but on which elected officials may serve as members.[1] Each is designed differently. In Arkansas and Ohio, specific elected officials have designated seats on the commission.[2] In the other states, the legislative or party leadership nominates commissioners, usually with balanced numbers from each party, and sometimes with a role for the Governor or Chief Justice of the state Supreme Court to select nominees or appoint additional commission members.

Six other states — Alaska, Arizona, California, Idaho, Montana, and Washington — draw state legislative districts using an independent commission, with regulations limiting direct participation by elected officials.[3] No member of these commissions may be a legislator or public official; each state also prohibits commissioners from running for office in the districts they draw, at least for a few years after the commission completes its work. Some of the states further limit commission members' direct link to the legislature: Arizona and California, for example, also bar legislative staff from serving on the commission; California, Idaho, and Washington bar lobbyists from serving on the commission as well.

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[1] Hawaii and New Jersey also draw their congressional districts through "politician commissions."

[2] In Arkansas, the commission consists of the Governor, Secretary of State, and Attorney General. In Ohio, the commission consists of the Governor, Secretary of State, and State Auditor, as well as one member chosen by each major party's legislative leadership.

[3] Arizona, Idaho, and Washington also use independent commissions to draw congressional districts. California allows its legislature to draw congressional districts; Alaska and Montana have only one congressional representative, and therefore do not need to draw district lines.

Though each of these states attempts to ensure that commissioners are not beholden to particular legislators, that does not mean that the legislature has no role in the process: each of the above models preserves some ability for either the legislative leadership or the legislature as a whole to select individual commissioners or modify commission lines on the margin. The objective is not to remove politics entirely from the process, but rather to insulate politicians with the most direct self-interest from the appearance that their own personal or partisan fortunes are put ahead of the well-being of their constituents.

Where the lines are drawn

Other states also present different models for giving guidance to whichever entity is tasked with drawing the district lines, beyond the bare constraints of federal law. Illinois currently presents few articulated criteria for the redistricting process, beyond what federal law requires. This is decidedly outside of the national norm.

Twenty-four states, for example, ask redistricting bodies drawing state legislative districts to consider preserving "communities of interest" — communities that share common features relevant to the legislative enterprise.[4] This represents an important means to enhance vigorous representation, making it easier for legislators to speak for distinct groups of constituents with shared preferences, rather than collections of voters with little in common. Such communities are flexibly defined: in Kansas, for example, map drawers are asked to consider "[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation."[5] Montana's guidelines are similarly broad: "Communities of interest can be based on trade areas, geographic location, communication and transportation networks, media markets, Indian reservations, urban and rural interests, social, cultural and economic interests, or occupations and lifestyles."[6] Alabama adds the helpful reminder that "[i]t is inevitable that some interests will be recognized and others will not, [but] the legislature will attempt to accommodate those felt most strongly by the people in each specific location."[7]

There are also several coarse proxies for representing communities of common interest that frequently appear in state redistricting guidelines. For example, forty-two states require some accounting for political boundaries — county, township, municipal, or ward lines — in state legislative districts; eighteen states ask the same for congressional districts. Municipal boundaries, in particular, often approximate shared legislative interests; depending on the state, county or township lines may have a similar function. Most often, state laws that require consideration of political boundaries in redistricting leave flexibility in the mandate, instructing the redistricting body to maintain political boundaries "to the extent practicable."

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[4] Twelve states do the same for their congressional districts. In general, fewer states articulate distinct criteria for drawing congressional lines, simply because the congressional districting process is seldom reflected in state constitutions, statutes, or legislative guidelines.

[5] *See* Guidelines and Criteria for 2002 Kansas Congressional and Legislative Redistricting , *at* http://skyways.lib.ks.us/ksleg/KLRD/Redistrct/documents/Guidelines.pdf.

[6] Mont. Districting and Apportionment Comm'n, Criteria and Operational Guidelines for Legislative Redistricting, April 18, 2001, at http://tinyurl.com/montanacommunities.

[7] Ala. Reapportionment Comm. Guidelines for Legislative, State Bd. of Education & Congressional Redistricting, § IV, *at* http://www.legislature.state.al.us/reapportionment/Guidelines.html.

Almost as many states — thirty-six in all, including Illinois — use an even rougher proxy for common interest, by requiring their legislative districts to be reasonably "compact"; seventeen states ask that congressional districts be compact as well. Here too, state law is usually flexible, without a precise definition of "compactness." Most courts and commentators understand compactness to refer to a district's geometric shape; in general, a district in which constituents live more or less near each other is considered more compact than one in which they do not, and a district with a regular convex shape is considered more compact than one with multiple extended tendrils.

When compactness is further specified, as it is currently in six states, proposed measures can generally be sorted into three categories. Arizona and Colorado, for example, elevate the importance of contorted boundaries, and focus on the district's perimeter. Michigan and Montana instead focus on dispersion, or the degree to which a district spreads from a central core. California elevates the importance of citizen housing patterns in relation to the district's boundaries, giving more flexibility for district tendrils if they exist in sparsely populated areas. And Iowa embraces both a boundary measure and a dispersion measure, without establishing a preference between them.

Fourteen states, including Illinois and many of its Midwest neighbors, supplement the criteria above with a "nesting" requirement, tying the district lines of a state's two legislative houses to each other. In states with a nesting requirement, the districts of the upper house are constructed by aggregating multiple lower house districts (usually two or three), or the districts of the lower house are constructed by subdividing each upper house district. In contrast, without nesting, the districts of each legislative house are wholly independent; they may follow the same boundary lines, but they need not do so.

In addition to the above criteria, several states attempt to limit the impact of partisanship in the redistricting process. Nine states — California, Delaware, Hawaii, Iowa, Idaho, Montana, Nebraska, Oregon, and Washington — have prohibited their redistricting bodies from drawing state legislative districts in order to "unduly" favor a candidate or political party; all but California do the same for Congress.[8] Five states — Arizona, California, Iowa, Idaho, and Montana — attempt to implement the restriction by precluding the consideration of the residence of an incumbent in drawing district lines. Arizona and Washington instruct their redistricting bodies to design districts so that competition is affirmatively encouraged, when practicable, and when doing so would not detract from other state priorities.[9]

Several of the states above also limit the use of further political data, which I understand has received significant attention in some proposals proffered in Illinois, even to the extent of allowing a computer to draw lines without regard for partisanship. Iowa, Idaho, and Montana purport to preclude the use of partisan voter history in drawing districts; New Jersey allows the use of voter history but declares that it may not support deviations from other districting

[8] Idaho's formulation of the requirement is that counties may not be divided in order to protect a party or incumbent. IDAHO CODE § 72-1506(8). If a county must be divided for other reasons (including the equal population mandate), however, it is not clear that a redistricting body would be precluded from drawing these lines for partisan benefit.
[9] ARIZ. CONST. art. IV, pt. 2, § 1(14)(F); Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 208 P. 3d 676, 686-87 (2009); REV. CODE WASH. § 44.05.090(5).

principles; and Arizona states that "[p]arty registration and voting history data shall be excluded from the initial phase of the mapping process but may be used to test maps for compliance" with other priorities.[10]

In considering limits on the use of partisan voter data, it is important to remember that it will almost always be necessary to consider such data in assessing responsibility under the Voting Rights Act. Only with partisan voter history is it possible to tell if racially polarized voting exists to an extent that incurs liability under the Act; if so, only with partisan voter history is it possible to know whether a particular remedy will likely be effective. The Voting Rights Act's mandate will therefore supersede state law restricting the use of political data, at least in regions where minority populations present the possibility of Voting Rights Act obligations.

It is also worth noting that restricting partisan voter data does not result in "neutral" partisan consequences, even if it is assumed that those who draw the lines do not understand the partisan implications of their decisions, with or without precise data. Every decision about where to draw the lines will have partisan consequences, most of which are predictable. I know that you have already heard testimony from Dr. Michael McDonald of George Mason University, describing among other things recent research concerning Illinois and several other Midwest states; his findings suggest that in Illinois, a strict constraint to produce maps that follow county boundaries or that maximize certain assessments of compactness will result in plans that produce a statewide partisan imbalance — even to the extent of favoring the state's minority party with a predictable statewide legislative majority. Drawing district lines that are ostensibly entirely blind to partisan consequences is not a way to produce districts that achieve partisan fairness.

Prospects for reform

The above overview was intended to lay out the basic landscape for redistricting, in Illinois and beyond. There is much in the current process to generate substantial public suspicion, and much in the process elsewhere in the way of commendable alternatives. I know that various proposals have been floated in Illinois, some currently before the Committee, and many with positive attributes. Analyses of two such proposals accompany this written submission.

Although I am happy to comment on particular attributes of particular plans that you are considering, my purpose today is not to present a single preferred process for redistricting in Illinois. I believe that there are many potential ways to change the status quo that would benefit Illinois voters at the end of the day. Rather, I would like to close by highlighting four components of the redistricting process in particular that we believe to be crucial in any effort to restore constituents' faith in the fairness of the districting exercise.

First, an independent process. We have already described the appearance of impropriety that results when legislators are intimately involved in drawing their own district lines. For the benefit of the institution as a whole, and for the public good, we encourage the Committee to

[10] ARIZ. CONST. art. IV, pt. 2, § 1(15).

suggest placing redistricting authority beyond the temptation of individual manipulation. The authority responsible for redistricting in Illinois — and just as important, the staff supporting that process — should be meaningfully independent from undue legislative influence.

We stress the limiting adjective "meaningful" with the understanding that cosmetic independence will not suffice. Meaningful independence means freedom from obligation, influence, and possibly even ex parte contact. Furthermore, meaningful independence may require multipartisan balance to enforce.

There are at least three further substantial caveats to implementing a system that guarantees those who draw the district lines some measure of independence. First, I am not suggesting simply importing wholesale the procedure of another state. Elements of many of these systems discussed above might be productively deployed in Illinois, but they will likely need to be adapted to Illinois' particular political climate. Differences between states are meaningful for their redistricting institutions as well.

Second, meaningful independence is not simply produced by bipartisanship, even if the bipartisanship in question is meaningful. (And on this score, I have concerns that despite their best intentions, some of the pending proposals will maintain or increase the opportunities for rampant partisanship, rather than limiting its impact.) The latest Congressional map was widely understood to involve bipartisan compromise, but cannot be said to have gained the confidence of the public that the map was created primarily for the public good.

Third, the fact that Illinois should benefit from a meaningfully independent redistricting body does not mean that the state should be carved into neat automated rectangles or circles. District lines serve a community only when they reflect the community, and communities do not evolve with mathematical exactitude. There will still be ample need for political compromise: the arbiters of district lines will be called upon to seek fair and equitable representation for racial and ethnic minorities, and grant representation to real communities of interest spread out in irregular fashion. Independence does not attempt to take the politics entirely out of the redistricting process. Nor, indeed, does it attempt to eliminate entirely politicians' role. The difference is that, in a body with independence, those with a particular incentive to lock out competent challengers are not given unfettered access to the keys.

Second, a diverse representative body. The need to reconcile competing and complementary interests in the redistricting process demonstrates the second element of success: the redistricting body must be meaningfully diverse. An independent body that is designed in an exclusionary fashion is not likely to represent an improvement on the status quo, particularly in a state with the diversity of Illinois. Those responsible for drawing district lines must reflect ample geographic, racial, and political diversity, so as to prevent charges of self-dealing similar to those that have found a foothold in the current system, but on a group level rather than an individual level. That is, the redistricting body must be sufficiently diverse to be legitimate in the eyes of the citizens districted by its action. There is, naturally, no lawful formula that will guarantee diversity across all dimensions. Nevertheless, in a body of substantial size, with some part of the selection process in the hands of those with a political incentive to foster diversity, it should be possible to provide a rich array of constituent representation.

Third, meaningful redistricting criteria. We recommend a diverse and independent redistricting body, because without the right set of arbiters, well-tailored goals will fail to produce desirable results. Similarly, without a set of meaningful and workable goals, the ideal group of line-drawers will be left unmoored. A redistricting body must be guided by specific criteria, to adequately assess whether any given plan has succeeded in achieving the public good.

Certainly, any attempt to draw district lines must at least conform to applicable federal law. This includes the Constitutional equipopulation requirement, and the obligation to justify disparities even within a 10% deviation for state legislative districts.[11] It also, of course, includes all of the protections of the Voting Rights Act. However, even within these bounds, there are endless permutations of district lines. Any redistricting body requires further agreed-upon criteria to guide its choices and render them legitimate in the eyes of the population.

There are many available options. Some present affirmative requirements, such as the mandate to hew to pre-existing political geography, to develop districts that are reasonably compact, or to draw lines in order to further the representation of particular communities of interest. Others are negative injunctions, such as the obligation to avoid drawing lines in order to disadvantage a particular incumbent or challenger. One stands out as particularly important in the context of the current conversation in Illinois: given our American political commitment to the fundamental principle of majority rule, it is necessary to pay some attention to the likely partisan balance of a redistricting map, so that a minority of the state's population does not reliably and durably control the majority of the legislature.

The need for clear governing criteria should not be confused with a demand that the criteria in question dictate a particular result. It is a common, but mistaken, instinct to attempt to bind a redistricting body to maximize one or two readily quantified factors; such a mandate usually produces undesirable unanticipated consequences in particular portions of a state. Rather, the criteria should retain enough flexibility to allow trusted decisionmakers — the diverse and independent redistricting body mentioned above — to apply the overall state priorities to peculiar local circumstances, sensibly and in the broader public interest.

Fourth, meaningful transparency. At the moment, most citizens feel excluded from the redistricting process, which concerns not merely public policy, but the aggregation of group interests that are the foundation of all policy discussions. Communities are splintered and electoral fortunes tailored, by and large, without meaningful opportunity for input.

The legislature should commit to making the redistricting process more transparent in 2011 and 2012, with the components common to basic due process protections: public hearings and open meetings, and the opportunity to respond to drafts before they are enacted. The redistricting body should endeavor to make data and even redistricting software broadly available, and allow citizen members of the public to submit full or partial proposals, to inform the primary body's deliberations. These are modest steps indeed for a process so fundamental to democratic representation.

[11] *See, e.g.*, Cox v. Larios, 542 U.S. 947 (2004).

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In reviewing the way in which Illinois' districts are drawn, this Committee has set itself a commendable and necessary task. Citizens strongly support the need to promote independent decisionmaking and remove the taint of potential self-dealing. We understand the need for pragmatic solutions, and do not wish to allow the perfect to become the enemy of the good … but we also firmly believe that the state will be well served by truly meaningful reform, and wish the Committee well in its efforts directed at that end. As with other states across the country, the Brennan Center stands ready to assist the people of Illinois and their representatives with comparative research, legal analysis, and drafting of particular provisions – among other services – in the interest of furthering redistricting reform. I thank you very much for your time – and I am more than happy to answer any questions that you may have.