IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 804

KENNETH W. COLEGROVE, *et al.*,
Petitioners,

vs.

DWIGHT H. GREEN, as a Member Ex-Officio of the Primary Certifying Board of the State of Illinois, *et al.*,
Respondents

BRIEF OF AMICUS CURIAE, AMERICAN CIVIL LIBERTIES UNION, IN SUPPORT OF PETITION FOR REHEARING AND OF MOTION FOR REARGUMENT

JOHN F. FINERTY,
Counsel for American Civil Liberties Union, *Amicus Curiae.*

ARTHUR GARFIELD HAYS
CLIFFORD FORSTER
Of Counsel

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I.

This case can and should be disposed of as a mere matter of statutory construction, thereby avoiding the necessity of deciding the grave constitutional question on which the Court has here divided.

The Court should hold that the Reapportionment Act of 1929, as well as the Reapportionment Act of 1941,* in order to avoid unconstitutionality under

*The Reapportionment Act of 1941 is the act specifically involved in the case at bar That Act, like the 1929 Act, lacks the express provision contained in Section 3 of the 1911 Act requiring that congressional districts shall have as nearly as possible an equal number of inhabitants

However since in this case, as in *Smiley* v *Holm* and *Wood* v. *Brown,* the Court's specific discussion was confined to the 1929 Act, the discussion in this brief will for convenience be primarily confined to the 1929 Act, but unless otherwise specifically indicated will also apply to the 1941 Act.

both Article I, Section 2, and the Fourteenth Amendment of the Constitution, must be construed as requiring by necessary implication that congressional districts shall contain as nearly as practicable an equal number of inhabitants.

Those Acts should be so construed even though, as held in *Wood* v. *Broom*, 287 U. S. 1, 7, the specific Requirements to this effect of Section 3 of the Reapportionment Act of 1911 expired with that Act by self-limitation, and even though, as there held, it was not the intention of Congress expressly to reenact such requirements.

Amicus respectfully submits that in addition to the grounds for rehearing and reargument set out in the petition and motion filed by petitioners, there is a further and compelling reason for such rehearing and reargument. This is to consider whether this case can, and, therefore, should be disposed of as a mere matter of statutory construction without the necessity of deciding the grave constitutional question on which the Court has here divided.

The statutory construction of the Act of 1929 which would obviate the necessity of deciding such constitutional question is that set out in the heading. It is to be noted that neither in *Wood* v. *Broom,* nor in any of the opinions in this case, was such statutory construction either considered or expressly decided. If, however, the Court should now hold that the Act of 1929, in order to avoid unconstitutionality, must be construed to require by necessary implication that congressional districts must contain as nearly as practicable an equal number of inhabitants, the Court would thus avoid the necessity of deciding the grave con-

stitutional question on which it has divided. That question is, whether *in the assumed absence of either an express or implied requirement to this effect in the Act of 1929,* the Court can declare the Illinois Apportionment Act of 1901 invalid because of its conceded failure to provide such equality of inhabitants in the congressional districts prescribed by that Act, or whether, under such circumstances, the power to correct any conflict between the Illinois Act and the Federal Constitution in this respect is a "political question" and not a justiciable one and therefore lies exclusively within the jurisdiction of Congress.

It is imperative to note that this constitutional question would seem to arise only because of the apparent assumption in all of the opinions of this case, including the dissenting opinion of Mr. Justice Black as well as in the two opinions supporting the present judgment of the Court, that the Act of 1929 lacks not only any express requirement that congressional districts shall have as nearly as practicable an equal number of inhabitants, but lacks also any such implied requirement. This assumption would seem to underlie the present disagreement in the Court as to whether the correction of what all of the opinions seem to concede to be the unconstitutional situation created by the Illinois Apportionment Act of 1901, is a "political question" within the exclusive jurisdiction of Congress, or is a justiciable question within the equity powers of the Court

Even if it be conceded that in the absence of any action by Congress, express or implied, to protect the constitutional right to substantial equality of inhabitants in congressional districts, the protection of such right would be a "political question" exclusively within the jurisdiction of Congress, it seems obvious that no such "political ques-

tion" remains if Congress must be held to have resolved that question by necessary implication. Amicus assumes that in such event the Court as a whole would agree that the courts would have full power to enforce the implied as well as the expressed will of Congress.*

Accordingly, amicus will undertake to show:

1. That in order to avoid unconstitutionality under both Article I, Section 2, and the Fourteenth Amendment to the Constitution, the Reapportionment Act of 1929 must be construed to require by necessary implication that congressional districts shall contain as nearly as practicable an equal number of inhabitants.

2. That such a construction of the Act of 1929 will conflict neither with any express holding in *Wood* v. *Broom* nor with any declared congressional policy, but on the contrary would be consistent with the legislative history of congressional acts generally and with *Smiley* v. *Holm,* 285 U. S. 355.

3. That since under such construction of the Act of 1929 the Illinois Apportionment Act of 1901 would be invalid, the Court, under that portion of its opinion in *Smiley* v *Holm* which is not challenged even in the two opinions

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*Mr. Justice Frankfurter's opinion in this case seems possibly to question, whether even had the 1929 Act expressly required that congressional districts should have substantial equality of population, the courts would have power even to declare invalid a State act violating such express congressional requirement (See p 12449, 90 Law Ed Adv Op)

If this implication is intended it would seem to disregard not only Article I, Section 2, of the Constitution, but the apparent acquiescence of Congress in the holding of this Court in *Smiley* v *Holm,* 285 U S 355, that in the absence of a valid state redistricting act all representatives must be elected at large

supporting the present judgment of the Court in this case, should hold that, there being no valid state redistricting act, all representatives allocated to Illinois must be elected at large.

II.

The Reapportionment Act of 1929, to be constitutional, must be construed as requiring by necessary implication that congressional districts shall contain as nearly as practicable an equal number of inhabitants.*

1. It will hardly be contended that Congress constitutionally could have expressly required or authorized in the Reapportionment Act of 1929 that congressional districts should contain grossly unequal numbers of inhabitants. It can need no argument to show that such express requirement would directly conflict with both the express and implied provisions of Article I, Section 2 and with the Fourteenth Amendment of the Constitution

2. If it be conceded that such express requirement or authorization would have been unconstitutional, such unconstitutional provision cannot be read by implication into the Act of 1929. It is axiomatic that an act of Congress must, if possible, be construed so as to make it constitutional. To read into the Act of 1929 by implication either a requirement or an authorization which, if expressly made, would concededly have been unconstitutional, would directly contravene this basic canon of statutory construction.

3. Even the two opinions in this case supporting the present judgment of the Court do not seem seriously to

*As already noted this applies as well to the Act of 1941.

question that the Illinois Apportionment Act of 1901 is unconstitutional in prescribing congressional districts containing grossly unequal numbers of inhabitants. The opinion written by Mr Justice Frankfurter and concurred in by Mr. Justice Reed and Mr. Justice Burton, seems rather to deny the power of the courts to declare or correct such unconstitutionality, rather than the existence of the unconstitutionality itself The opinion of Mr. Justice Rutledge, on the other hand, would seem neither to question the unconstitutionality of the state act nor the theoretical power of the courts to correct such unconstitutionality, but rather the wisdom of exercising, and perhaps the efficacy, of the equity powers of the courts for this purpose.

4. If the Illinois Apportionment Act be unconstitutional in prescribing grossly unequal numbers of inhabitants of congressional districts, it would seem clear that the Reapportionment Act of 1929 would likewise be unconstitutional if construed either to authorize or require such unconstitutional inequality Such a construction should, therefore, be avoided by construing that act as requiring by necessary implication that congressional districts shall contain as nearly as possible an equal number of inhabitants.

III.

The construction of the Reapportionment Act of 1929, here contended for, will conflict with no express holding in *Wood* v. *Broom*, nor with any intention of Congress as construed in that decision, and would be consistent with *Smiley* v. *Holm*.

In considering whether the construction of the Reapportionment Act of 1929, here contended for, would conflict

either with the decision in *Wood* v. *Broom,* or with any declared intention of Congress, it is important to have the following points in mind:

1 All that this Court expressly held in *Wood* v. *Broom* was, as stated in the dissenting opinion of Mr. Justice Black in this case, that the State Redistricting Act of Mississippi did not violate the Congressional Reapportionment Act of 1929, since the latter Act did not expressly require election districts of equal population.

2. All this Court expressly held in *Wood* v. *Broom* as to the intention of Congress in failing to reenact in the Act of 1929, Sections 3 and 4 of the Act of 1911, was, as stated at page 7 of that decision, that

> "It was manifestly the intention of the Congress not to reenact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the Act of 1929".

This, it is to be noted, is far from any holding by this Court in *Wood* v *Broom* that it was the intention of Congress in the Act of 1929, either expressly or impliedly, to prescribe or authorize congressional district of grossly unequal population.

3. While the legislative history of the Act of 1929, as referred to at pp. 6-7 of the opinion in *Wood* v. *Broom,* fully supports the construction placed upon the intention of Congress in the foregoing quotation from page 7 of that decision, that history would afford no support whatever for the conclusions that Congress intended to go further, and either to require or to authorize congressional districts of grossly unequal population

4. Most important, the real conflict between the decision of the Court in *Smiley* v. *Holm* and its decision in *Wood* v. *Broom* is not, as it would seem erroneously to be assumed in the present case, that in the former the Court undertook to decide a "political question" and in the latter that it refused to do so The real conflict is that in the two cases the Court gave exactly opposite effects to exactly the same legislative history of the 1929 Act The legislative history of that Act shows that Congress not only expressly refused to reenact from Section 3 of the 1911 Act the requirement involved in *Wood* v *Broom,* that congressional districts have substantial equality of population, but expressly refused to enact the requirement involved in *Smiley* v. *Holm* that elections be at large where representation was reduced and where the State had not been validly redistricted. In *Smiley* v *Holm,* however, the Court, in order to protect constitutional rights, nevertheless refused to treat the action of Congress as conclusive against the constitutional requirement, and read into the 1929 Act by necessary implication the requirement there involved.* In *Wood* v. *Broom,* as in this case, the Court, apparently not recognizing that the protection of constitutional rights similarly required

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*In *Smiley* v *Holm,* the Court said, pp 374-375

"Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large This would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled * * *"

The legislative history of the Act of 1929, later discussed in this brief, will show that Congress rejected an express requirement to this effect

reading into the 1929 Act by necessary implication the requirement there involved, treated the refusal of Congress to reenact such express requirement as conclusive against the requirement

Furthermore, the construction in *Smiley* v *Holm* of the Act of 1929, eliminated any necessity for the Court to decide a "political question", since the Court there assumed that Congress had by necessary implication already decided that question. In *Wood* v *Broom,* on the other hand, the Court, holding that the 1929 Act did not expressly require that congressional districts have substantial equality of population, refused, p. 8, to decide whether had the Act so required, the enforcement of such requirement would have presented a justiciable or a "political question".

The only discussion of the foregoing points which would seem to be required, therefore, is to show the identity of the legislative history of the Act of 1929 in connection with the respective requirements considered in *Smiley* v. *Holm* and *Wood* v. *Broom,* and the opposite effects given to exactly the same legislative history in those two decisions.

IV.

The apparent conflict between the decision of the Court in *Wood* v. *Broom* and its decision in *Smiley* v. *Holm*, arises from the fact that the Court has given exactly opposite effects in those respective decisions to exactly the same legislative history of the Act of 1929.

The Congressional Reapportionment Act of 1929 originated as H R. 11725 in the First Session of the 70th Congress. It was introduced by Mr. Fenn, as Chairman of the Committee on Census (Congressional Record, 70th Congress, First Session, Vol. 69, p. 4054). The Bill was

reported with amendments at the Second Session and printed in the Record (70th Congress, Second Session, Vol. 70, p. 1490). Only Sections 3, 4 and 5 of H.R. 11725 are pertinent here and they and Sections 3 and 4 of the Reapportionment Act of 1911, (Chap. 5, 37 Stat at L. 13) are set out in the footnote.*

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*H R 11725

* * * SEC 3 In each State entitled under this act to more than one Representative, the Representatives to which such State may be entitled in the Seventy-third and each subsequent Congress shall be elected by districts equal in number to the number of Representatives to which such State may be entitled in Congress, no one district electing more than one Representative Each such district shall be composed of contiguous and compact territory and contain as nearly as practicable the same number of individuals.

SEC 4 In the election of Representatives to the Seventy-third or any subsequent Congress in any State which under the apportionment provided for in section 2 of this act is given an increased number of Representatives, the additional Representative or Representatives apportioned to such State shall be elected by the State at large, and the other Representatives to which the State is entitled shall be elected as theretofore, until such State is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of section 3 of this act

SEC 5 In the election of Representatives to the Seventy-third or any subsequent Congress in any State which under the apportionment provided for in section 2 of this act is given a decreased number of Representatives, the whole number of Representatives to which such State is entitled shall be elected by the State at large until such State is redistricted in the manner provided by the laws thereof, and in accordance with the provisions of section 3 of this act

CONGRESSIONAL REAPPORTIONMENT ACT OF 1911

* * * * * *

SEC. 3 That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts

It will be noted that Sections 3 and 4 of H.R 11725 are in substance, though not in exact language, identical with Sections 3 and 4 of the 1911 Act It will be particularly noted, however, that Section 5 of H.R. 11725, providing for elections at large where representation is reduced, did not appear in the 1911 Act.* This, it will be subsequently seen, is of particular importance in considering *Smiley* v. *Holm.*

During the debates at that Session on H.R. 11725, various representatives objected to Sections 3, 4 and 5, on the ground that they would have no binding effect on the States, it being alleged that the power of Congress extended only to apportionment of representatives and not to telling the States how to select them (Vol 70, pp. 1496, 1499). It is to be noted, however, that the minority report of the Census Committee did not question the validity of Section 3, 4 or 5 of the Bill (idem , p 1501) Finally, Chairman Fenn

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composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative

SEC 4 That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or Representatives shall be elected by the State at large and the other Representatives by the districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act, and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed

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*Section 5 of the 1911 Act corresponded to section 6 of H R. 11725 and neither is particularly relevant here.

gave notice that he would move to strike Sections 3, 4 and 5 from the Bill, which he accordingly did. The House agreed, (idem., pp. 16202-1604) The Bill then passed with those sections deleted, and a motion to reconsider was tabled (idem., p. 1605). It is to be noted that Chairman Fenn gave no reason for his motion, and that neither he nor anyone else up to that time referred to the fact that the provisions of Section 3 of H R. 11725 with reference to equality of representation had in substance appeared not only in the 1911 Act but in every apportionment act since 1872. The Bill as passed was then reported to the Senate and placed on the calendar but failed of passage at that Session (idem , p 1711)

In the 71st Congress, the Bill as passed by the House, with sections 3, 4 and 5 deleted, was reintroduced in the Senate as S.312 (71st Congress, First Session, Vol. 71, p. 254). After passage by the Senate, it again came before the House and an effort was made by Mr. Reed of New York to amend the Bill so as in substance to reinstate Sections 3 and 4, but not Section 5 of H.R. 11725, (Congressional Record, 71st Congress, First Session, Vol. 71, p. 2280).*

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*Mr Reed's proposed amendment to S 312, read as follows

> "Sec 23 Nothing in this act contained shall be construed to prevent the legislature of any State (subject, however, to the initiative and referendum law in any State wherein such a law exists), at any time after the approval of this act, in order to secure contiguous and compact territory and equalization of population in accordance with the rules enumerated in Section 3 of the apportionment act, approved August 8, 1911, by concurrent resolution, redistricting the State for the purpose of electing Representatives to Congress, and upon each and every such redistricting the Representatives to Congress shall in any such State be elected from the new districts so formed."

It is to be noted that the particular purpose of Mr. Reed's amendment was to prevent precisely what afterward occurred in Minnesota, in his own State of New York, and in Missouri, and which occurrences were the subject of the decisions of this Court in *Smiley* v *Holm,* in *Koenig* v. *Flynn,* 285 U. S 375, and in *Carroll* v. *Becker,* 285 U. S. 280. Mr. Reed stated:

> "Provision is made in S 312 to prevent a deadlock between the House and the Senate with respect to apportionment legislation, but no provision is made in the Senate bill to prevent a possible deadlock in the State when the legislature attempts to redistrict and the executive might prevent Let us take New York State as an illustration of what might happen. It is predicted that under the reapportionment based upon the 1930 census, New York State may and probably will lose a representative A deadlock between the legislature and the executive might prevent a redistricting of the state. This, if it should occur, would require that all of the members, 42 in number, be elected at large This would be manifestly unfair to the people of the State and the Nation."

It thus appears from Mr. Reed's amendment and his statement of its purpose, that Mr Reed by his amendment hoped to accomplish two things, but failed in both: first, by permitting redistricting of states by mere concurrent resolutions of the legislatures, and therefore presumably without executive approval, to prevent the failure of redistricting which afterward occurred in the States of Minnesota, New York and Missouri because of the deadlock between the legislatures and executives of those states; second, by not undertaking to reinstate Section 5 of H.R.

11725, to avoid expressly requiring in the 1929 Act exactly what the Court, nevertheless, in *Smiley* v *Holm,* in *Koenig* v. *Flynn* and in *Carroll* v. *Becker,* held must by necessary implication be read into that Act, the requirement that where representation was reduced, all elections must be at large in the absence of a valid state redistricting act In support of his amendment, Mr. Reed offered an elaborate brief by a former member of the House, Honorable Marion K. Rhodes, which appears at pages 2280-2282 of the same volume of the Congressional Record. There appears at the end of that brief, the following:

> "Reviewing the history of congressional elections, it is found that in a vast majority of cases members of Congress were elected at large in all the states prior to 1842. In that year, however, Congress for the first time provided that in every case where a State was entitled to more than one representative in Congress, the number to which such State was entitled should be elected by congressional districts composed of contiguous territory, equal in number, to the number of representatives to which such State was entitled, according to the provisions of the Act.
>
> In the reapportionment act of February 2, 1872, Congress not only provided that congressional districts should be composed of contiguous territory but that such districts should be composed as nearly as practicable of equal population. From that day to this, in every reapportionment act, Congress has provided that the several States shall be laid out in congressional districts composed of contiguous territory and of equal population."

A point of order, nevertheless, was made against the amendment by Representative O'Connor of New York, on

the ground that the amendment was not germane to the Bill, (idem, p. 2365). At a subsequent session, the point of order was elaborately discussed (idem, p. 2443-2445). In the course of the discussion, reference was made to Section 21 of S.312, reading as follows:

> "that the act entitled 'an act to provide for the fourteenth and subsequent decennial census'; approved March 3, 1919, and all other laws and parts of laws inconsistent with this act are hereby repealed."

Fear was expressed that Section 21, if enacted, would repeal Sections 3, 4 and 5 of the Act of 1911. Mr. Reed said (idem. p 2444):

> "They are now the law and what I am pointing out to the House is that under Section 21 of this Bill there is a possible construction by which they may be repealed, and we will go to the country with an apportionment act that leaves it absolutely free to the legislature to put in shoe-string districts, saddleback districts and achieve all the vicious things of the jerrymanderers in the days of old * * * I say there is that possible construction."

Representative French, speaking in support of Mr. Reed's amendment, took the position that all that Section 21 of S 312 would repeal would be Section 1 of the 1911 Act, stating:

> "I do not think it provides directly or indirectly for repeal of other sections of the act."

He then pointed out that Mr. Reed's amendment was germane to S.312 because, as subsequently noted by this Court

in *Smiley* v *Holm,* Sections 4 and 5 of the Act of 1911 applied only to two contingencies, i e , where representation was undisturbed or increased, but did not apply where decreased.

The Chairman, Mr. Chindbloom sustained the point of order. His remarks (idem pp. 2444-2445) in so doing are so pertinent here that they are set forth in full in the subjoined footnote.*

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*"On Tuesday last the Chair ruled upon the same amendment when offered at another point, and stated there is nothing in the present bill which relates to the subject matter of the amendment, which subject matter is the action of State legislatures and of State authorities in redistricting a State upon the basis of a reapportionment of members of the House made by Congress No argument has been made today which controverts the position the Chair took at that time The Chair takes it that no one now is prepared to claim that there is anything in the bill before us—S 312—which directly relates to the matter of the redistricting of the States

"However the gentleman from New York (Mr Reed) now claims that the provision in section 21 is applicable, which reads as follows 'That the act entitled "an act to provide for the fourteenth and subsequent decennial census", approved March 3, 1919, and all other laws and parts of laws inconsistent with the act are hereby repealed '

"The gentleman from New York calls attention to that provision and claims that that relates to certain sections of the act of August 8, 1911, which bore on the subject of redistricting by the States, but it seems to the Chair that the gentleman overlooked the effect of the words—'all other laws and parts of laws inconsistent with this act are hereby repealed '

"If there is nothing in the bill relating to redistricting there can be nothing in it which is inconsistent with the act of 1911 on that subject There can be no repeal by this bill of any law or parts of law which are not inconsistent with that act on the subject of redistricting by State legislatures

"Furthermore the gentleman from Idaho (Mr French) stated that in his opinion section 1 of the act of August 8, 1911, is repealed by the words which the Chair has just quoted in section 21 of the pending bill, but he said that sections 2, 3 and 4 are

It will be observed from the Chairman's remarks that he held that Mr Reed's amendment was not germane to S 312 because the Senate bill related only to apportionment of Representatives among the States, and did not directly relate to the manner in which the State should redistrict themselves following such reapportionment He, therefore, ruled that there could be nothing inconsistent between Sections 2, 3 and 4 of the 1911 Act and S. 312, and accordingly that the enactment of Section 21 of S 312 would not repeal Sections 2, 3 and 4 of the 1911 Act. He ruled, however, that Sections 2, 3 and 4 of the 1911 Act, being by their express terms limited to the apportionment under that Act, the provisions of those sections expired with that apportionment.

Following the sustaining of the point of order against Mr Reed, S 312 passed the House without either Sections 3, 4 or 5 of the 1911 Act or Section 5 of H R. 11725 (idem, 2458).

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not so repealed If they are not repealed, of course they are not affected by S 312, now before us, and if section 1 is the only one affected, the only one that is repealed, it seems to the Chair that the gentleman's argument is without avail

"In addition the Chair calls attention to the language of the act of August 8, 1911, in section 4 'That in case of an increase in the number of Representatives in any state under this apportionment, and such additional Representative or Representatives shall be elected'—And so forth And to the language in section 3 'That in each State entitled under this apportionment to more than one Representative'—And so forth

"All the way through every provision of the act of August 8, 1911, relates to 'this apportionment', that is, the apportionment provided for in the act of August 8, 1911

"Therefore, it seems to the Chair very clearly that the amendment offered by the gentleman from New York (Mr Reed) is not germane to the pending bill, and the Chair sustains the point of order"

Amicus has already conceded that this legislative history of the Act of 1929 justified the Court in finding in *Wood* v. *Broom,* p 7, that "it was manifestly the intention of the Congress not to reenact" the provision of Section 3 of the 1911 Act requiring substantial equality in population between election districts. Amicus believes, however, that this conclusion might be more fairly phrased if it read, "it was manifestly *not* the intention of the Congress to reenact" such provision. Whichever phraseology is adopted, however, it obviously is equally applicable to the provision of H R. 11725 which would have required elections at large where representation was reduced and there was no valid state redistricting act Nevertheless, the Court in *Wood* v *Broom* gave exactly opposite effect to the legislative history of Section 3 of the 1911 Act to that which it had given in *Smiley* v *Holm* to substantially the same legislative history of Section 5 of H. R 11725.

In *Smiley* v. *Holm* the Court was not called upon to decide, and did not expressly decide whether Section 3 of the 1911 Act, requiring that congressional districts have substantially equal population, expired with that Act or survived in the Act of 1929. The implication seems clearly to be, however, that, as the Court subsequently expressly held in *Wood* v. *Broom,* Section 3 of the 1911 Act expired by self-limitation The Court, however, did have occasion to decide whether in order to protect constitutional rights it was necessary to read into the 1929 Act a provision requiring elections to be at large where representation was reduced and there was no valid state redistricting act. It has been seen that this was the provision of Section 5 of H R. 11725 which Congress in enacting the 1929 Act had refused to expressly enact, just as it had refused to

expressly reenact Section 3 of the 1911 Act. Nevertheless, in *Smiley* v *Holm* the Court held that such a provision must be read into the 1929 Act, although the Court noted that even the 1911 Act contained no such express provision The Court said in *Smiley* v. *Holm,* pp. 374-375·

> "Where, as in the case of Minnesota, the number of representatives has been decreased, there is a different situation as existing districts are not at all adapted to the new apportionment. It follows that in such a case, unless and until new districts are created, all representatives allotted to the State must be elected by the State at large. That would be required, in the absence of a redistricting act, in order to afford the representation to which the State is constitutionally entitled, and the general provisions of the Act of 1911 cannot be regarded as intended to have a different import"

In *Wood* v. *Broom,* on the contrary, the Court not only held, pp. 6-7, that the requirement of Section 3 of the 1911 Act that congressional districts have substantial equality of population expired by self-limitation with that Act, but the Court failed even to consider whether, nevertheless, such requirement of equality of population must be read into the 1929 Act in order to preserve constitutional rights, just as it had in *Smiley* v. *Holm* read into that Act the requirement that elections be at large where representation was reduced and there was no valid State redistricting act Therefore it cannot be said that the Court in *Wood* v *Broom* even expressly held that a requirement that election districts should have substantial equality of population could not be read into that Act. All it expressly held in this respect was as shown at p. 8 of that opinion:

> "There is thus no ground for the conclusion that the Act of 1929 reenacted or made applicable to new districts the requirements of the Act of 1911. That Act in this respect was left, as it had stood, and the requirements it had contained as to compactness, contiguity and equality in population of districts did not outlast the apportionment to which they related."

If it therefore be said that in *Wood* v. *Broom* the Court treated the mere refusal of Congress to expressly reenact the requirements of Section 3 of the 1911 Act that election districts have substantial equality of population as equivalent to providing expressly in the 1929 Act that congressional districts may be grossly unequal in population, this would seem to be neither good logic nor good law. It is respectfully submitted that if the decision in *Wood* v. *Broom* must be so construed, it should now be overruled.

V.

If the decision in *Wood* v. *Broom* is to be construed as holding, at least by implication, that a State Redistricting Act prescribing congressional districts grossly unequal in population is constitutional, that decision should now be overruled.

It is to be observed that in *Wood* v. *Broom* the Court did not even expressly decide the basic contention there made that the State redistricting act violated Article I and the Fourteenth Amendment of the Constitution in prescribing districts which did not have as nearly as possible the same number of inhabitants, but which on the contrary, as

found by the District Court*, had grossly unequal numbers of inhabitants.

It may be argued that while the Court did not expressly decide this basic contention, it did decide it adversely by necessary implication, since otherwise presumably it would have been compelled to declare the State Redistricting Act unconstitutional.

As already noted, however, all the Court actually decided in *Wood* v. *Broom* was that the State act did not conflict with the Congressional Reapportionment Act of 1929, since the Court construed the 1929 Act as not requiring that congressional districts have substantial equality of population. The Court, as already noted, expressly refused to decide, p. 8, whether had the 1929 Act expressly required such equality, the enforcement of such an express provision would have presented a justiciable controversy.

If *Wood* v. *Broom,* nevertheless, is to be taken as holding by necessary implication that the Mississippi Redistricting Act, in prescribing congressional districts grossly unequal in population, did not violate either Article I or the Fourteenth Amendment of the Constitution, it would seem to conflict with even the two opinions in the case at bar supporting the present judgment of the Court. As already

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*The District Court, as shown at page 5 of the decision of this Court in *Wood* v *Broom,* enjoined the State Redistricting Act on the ground that since the new districts were not composed of compact and contiguous territory having as nearly as practicable the same number of inhabitants, the Act failed to comply with the mandatory requirements of Section 3 of the Congressional Reapportionment Act of August 8, 1911 The District Court, therefore, had no occasion to pass on the question of constitutionality of the State Redistricting Act under Article I and the Fourteenth Amendment to the Constitution.

noted, even those two opinions do not seem seriously to question that the Illinois Apportionment Act of 1901 is unconstitutional in prescribing congressional districts grossly unequal in population. One opinion would seem merely to question the power, and the other the propriety, of intervention by the courts to correct a situation which neither seems to question is unconstitutional. Certainly, neither such opinion in the case at bar either expressly or by necessary implication holds that the Illinois Apportionment Act is constitutional in this respect. Therefore, if the decision in *Wood* v. *Broom* is to be construed as holding by necessary implication that the Mississippi Act prescribing election districts grossly unequal in population was constitutional, and therefore to be a bar to holding the Illinois Act unconstitutional, it is submitted that to this further extent the opinion in *Wood* v. *Broom* should now be overruled.

VI.

Even were the two opinions in the case at bar supporting the present judgment of the Court, justified in suggesting that the remedy of elections at large in Illinois might be worse than the disease of grossly unequal population of election districts in that State, it is respectfully submitted that if such remedy exists, any such consideration would be no proper concern of the Court.

In the opinion written by Mr. Justice Frankfurter, it is stated (p. 1244, 90 Law Ed. Adv Op.):

> "Of course, no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a repre-

sentative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state wide ticket *The last stage may be worse than the first.* The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting." (italics supplied)

In the opinion of Mr. Justice Rutledge (idem., pp. 1252-1253) appears the following

"As a matter of legislative attention, whether by Congress or the General Assembly, the case made by the complaint is strong. But the relief it seeks pitches this Court into delicate relation to the functions of state officials and Congress, compelling them to take action which heretofore they have declined to take voluntarily or to accept the alternative of electing representatives from Illinois at large in the forthcoming elections.

"The shortness of the time remaining makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek. To force them to share in an election at large might bring greater equality of voting right. It would also deprive them and all other Illinois citizens of representation by districts which the prevailing policy of Congress commands. 46 Stat 26, c 28, as amended, 2 USCA § 2a, 2 FCA title 2, § 2a.

* * *

"The right here is not absolute. *And the cure sought may be worse than the disease.*" (italics supplied)

Amicus respectfully submits that even were the remedy of a general election in Illinois worse than the disease of congressional districts in that State grossly unequal in population, this, nevertheless, would be no proper concern of this Court if the remedy exists.

It is important to note, therefore, that both opinions apparently assume that the remedy does exist, or, at least, do not deny its existence. Indeed, they could hardly do otherwise, unless the court intends directly to overrule, *Smiley* v. *Holm,* which neither opinion even suggests should be done.

Moreover, it is to be noted that Congress itself has not considered the alternative of a general election worse than the disease of improper or inappropriate districting.

Section 5 of the 1911 Act expressly provided that, where the apportionment of representatives to a state was increased, the election of additional representatives should be at large "until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this Act."

The 1941 Act, by Section 2a (c), (1), (4), (5), provides for elections at large in situations there specified "until a state is redistricted by law thereof after any apportionment * * *". It is particularly to be noted that (5) provides for the election of all representatives at large if there is a decrease in the number of representatives and if the number of districts in such state exceeds such decreased number of representatives.

Moreover, as already noted, this Court, in *Smiley* v. *Holm,* in *Koenig* v. *Flynn* and in *Carroll* v *Becker,* applied the remedy of elections at large in the States of Minnesota,

New York, and Missouri, where representatives apportioned to those States had been decreased by the 1929 Act and where those States had not, because of a deadlock between their legislatures and their executives, been able to enact appropriate redistricting acts.

In this connection, therefore, it is respectfully submitted:

First, that both Congress and this Court have heretofore recognized that the remedy of elections at large is not worse than the disease of improper districting, and have specifically provided for that remedy in certain instances.

Second, that since Congress has expressly provided that such remedy shall exist in certain instances, and since this Court, in *Smiley* v. *Holm,* held it to exist, by necessary implication, in an instance where Congress had refused to expressly provide for it, it is no proper concern of this Court whether such remedy of elections at large be better or worse than the disease of improper districting, where such remedy is necessary for the protection of constitutional rights.

Third, that the two opinions in the case at bar, in undertaking to consider whether the remedy of elections at large is worse than the disease of improper districting, in fact undertook to consider a "political question", the very thing which the opinion of Mr. Justice Frankfurter holds is beyond the jurisdiction of the Court.

VII.

The fact that Congress did not itself undertake to enforce the provisions of Section 3 of the 1911 Act and similar provisions of preceding acts since 1872, requiring that election districts have substantial equality of population, may well constitute a recognition by Congress that enforcement of such provisions is a justiciable matter within the jurisdiction of the courts.

Counsel, when attempting to draw valid deductions from Congressional history of legislation, is frequently reminded of an article which appeared in the *Atlantic Monthly,* by Simeon Strunsky, entitled, "The Freudian Theory of Euclid." That article, of course, had particular reference to the "inevitable triangle". In the course of it, however, Mr Strunsky illustrated the extreme application of the Freudian theory, by saying that a certain type of Freudian might deduce from the fact that a man in Chicago bought a railroad ticket to San Francisco, he really wanted to go to New York.

Amicus is thus mindful that caution should be exercised in drawing implications either from individual or from Congressional conduct. Nevertheless, amicus believes that from the facts recited in the last two paragraphs in the opinion of Mr. Justice Frankfurter in the case at bar, showing that Congress never undertook to enforce the express provisions of Section 3 of the 1911 Act, or similar provisions of preceding apportionment acts requiring that congressional districts shall have substantial equality of population, the implication may well be drawn that this constitutes a recognition by Congress that by such express enactments the enforcement of such required equality, became a justiciable matter within the jurisdiction of the

courts, and ceased to be a political matter exclusively within the jurisdiction of Congress Amicus further submits that if such implication is to be drawn in connection from such express requirements of Congress, it may equally be drawn from the similar implied requirements which it is submitted should be read into the 1929 and the 1941 Acts

CONCLUSION.

Amicus, therefore, respectfully submits:

1. That the Act of 1929, as well as the Act of 1941, to be constitutional, must be construed to require, by necessary implication, that congressional districts have substantial equality of population

2. That, by such mere statutory construction, the Court will avoid the necessity of deciding the grave constitutional question upon which the Court is now divided.

3. That under that portion of the decision in *Smiley* v. *Holm,* not questioned in any of the opinions in the case at bar, the courts under such a construction of the 1929 Act and of the 1941 Act, would have jurisdiction not only to declare the Illinois Apportionment Act of 1901 unconstitutional, but to require that until a constitutional redistricting act be enacted by the State of Illinois, all congressional elections in that State must be at large.

Respectfully submitted,

JOHN F. FINERTY,
Counsel for American Civil
Liberties Union, *Amicus Curiae.*

ARTHUR GARFIELD HAYS
CLIFFORD FORSTER
Of Counsel.