No. 10A272

IN THE SUPREME COURT OF THE UNITED STATES

ROLAND WALLACE BURRIS, U.S. SENATOR, PETITIONER,

v.

GERALD ANTHONY JUDGE AND DAVID KINDLER, AND PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS, RESPONDENTS.

ON EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILING AND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

MEMORANDUM OF GOVERNOR PAT QUINN IN OPPOSITION

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INTRODUCTION

Petitioner's Emergency Application for a Stay of Enforcement of the Judgment Below ("Application") should be denied. Illinois election authorities have taken substantial action to comply with the district court's August 2, 2010 order requiring two elections for President Barack Obama's vacated Senate seat on November 2, 2010—one to fill the seat for the remaining weeks of the original term, and another to elect a Senator for the full, six-year term beginning on January 3, 2011. Because little time remains to complete the pre-election process, granting the Application would impose enormous burdens on the State and its 110 independent election authorities, while risking voter prejudice and threatening to compromise the integrity of Illinois' electoral process. Accordingly, the balance of harms militates powerfully against granting the Application, especially when one considers that petitioner waited a month after the district court entered its order before seeking to stay its enforcement. Finally, petitioner fails to establish a likelihood that this Court will grant his certiorari petition and rule in his favor on the merits. For these reasons, too, the Application should be denied.

BACKGROUND

1. Judge and Kindler, Illinois voters and respondents here, sought a declaration that their rights under the Seventeenth Amendment were violated by the failure of Illinois Governor Pat Quinn, also a respondent, to issue a writ of special election to fill the Senate vacancy created by the resignation of then-Senator Obama, and by section 5/25-8 of the Illinois Election Code, 10 ILCS 5/25-8 (2008),

which authorized the Governor to appoint a replacement Senator until the next general election. Appendix C to Application, April 16, 2009 Order at 2.[1] Judge and Kindler also sought injunctive relief requiring the Governor to issue a writ of election for a date of his choosing. *Ibid.* On April 16, 2009, the district court denied Judge and Kindler's motion for a preliminary injunction, which would have required the Governor to issue the writ for a special election, Appendix C to Application, and plaintiffs brought an interlocutory appeal from that order.

2. The question before the Seventh Circuit on that appeal was whether it is the Governor or the Illinois General Assembly that the Seventeenth Amendment authorizes to schedule a Senate replacement election. Pls. Opening Br. on Appeal 1, 6-20; Governor's Br. on Appeal 19-27. On June 16, 2010 (nearly nine months after the September 27, 2009 oral argument), the Seventh Circuit issued a decision rejecting plaintiffs' theory that the Governor alone has this power, Appendix D to Application, slip op. 10-11, but raising an issue that the parties had not briefed: If the General Assembly lawfully chooses the next general election as the date for electing a replacement Senator (as most States do), then may the Governor's interim appointee serve out the remainder of the Senate term in those cases where, as here, that term ends the January following the next general election?

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[1] Citations to "Appendix to Application" refer to the appendix accompanying petitioner's Application before this Court. "Appendix to Mem. in Opp." refers to the appendix accompanying this Memorandum.

The Seventh Circuit resolved this question in the affirmative, holding that under the Seventeenth Amendment "[t]he governor has a duty to issue a writ of election to fill the Obama vacancy," and "[t]hat writ must include a date." Appendix D to Application, slip op. 35. Because "[s]tate law controls the timing and other procedural aspects of vacancy elections," *id.* at 33, the Seventh Circuit looked to Illinois law, which, in the court's view, "sets November 2, 2010, as the date for the election," *id.* at 37-38. The court thus ordered Illinois to conduct, "in effect, two elections on that day—one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress." *Id.* at 38. And although the court declined to resolve in the first instance "the question how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy," the Seventh Circuit suggested that "[t]he state might propose a solution acceptable to all parties (*e.g.*, using the candidates who have already qualified for the election for the 112th Congress), so long as that solution complies with Illinois and federal law." *Ibid.*

3. On June 28, 2010, the Governor timely filed a petition for rehearing en banc. The Governor's rehearing petition argued that (1) the panel's conclusion that the Seventeenth Amendment does not permit an appointed Senator to complete the current term conflicts with this Court's decision in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), and existing Seventh Circuit precedent; (2) even if the panel were correct that the Seventeenth Amendment generally requires the Governor to call a special election for a replacement Senator, a writ is not required

here, where the time remaining between certification of the November 2 election results and the start of the new six-year term (a period when the Senate is frequently out of session) is *de minimis* and where two elections for the same Senate seat on the same ballot would engender voter confusion; and (3) insufficient time remained to conduct an election for a replacement Senator consistent with the Illinois Election Code. Pet. for Reh'g En Banc 4-15. With regard to the third issue, the Governor explained that the election cycle would normally require at least seven-and-a-half months—224 days for elections involving independent and new party candidates, and a parallel, 198-day sequence for elections involving major party candidates. Pet. for Reh'g En Banc 13-14.[2]

4. The Seventh Circuit denied the rehearing petition on July 22, 2010, but ordered that the panel opinion be amended to emphasize that, "[t]o the extent that Illinois law makes compliance with a provision of the federal Constitution difficult

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[2] Illinois gives independent and new-party candidates 90 days to secure signatures to appear on the general ballot and requires these candidates to file petitions at least 134 days before the general election. 10 ILCS 5/10-4, 10-6 (2008). Meanwhile, established party candidates must file their nomination petitions at least 92 days prior to any primary and, in the case of a "special primary," these candidates have at least 15 days to secure the signatures required to support their petitions. See 10 ILCS 5/7-1(a) (2008) (established parties must nominate candidates); 10 ILCS 5/7-2 (2008) (defining parties); 10 ILCS 5/7-61 (2008) (if a "special primary" is called, party candidates have at least 15 days to secure signatures required to appear on the primary ballot, rather than 90 days normally required under 10 ILCS 5/7-10 (2008)); 10 ILCS 5/7-12(1) (2008) (party candidates must file nomination petitions at least 92 days before primary). The Illinois Board of Elections then has 31 days to certify the primary results following a primary, 10 ILCS 5/18A-15(a) (2008), meaning that, under Illinois law, 138 days are needed to determine the established party candidates who will appear on a special election ballot, which, in the case of a federal election such as this one, must be available for overseas and military voters at least 60 days before the general election, see 10 ILCS 5/16-5.01(a) (2008).

or impossible," Illinois law "must yield." Appendix G to Application, July 22, 2010 Order at 2. The amended opinion also authorized the district court "to order the state to take steps to bring its election procedures into compliance" with federal constitutional law, "even if the order requires the state to disregard provisions of state law that otherwise might ordinarily apply to cause delay or prevent action entirely." *Ibid.*

5. By the time the rehearing petition was denied, less than four months remained until the general election. And state and federal law left less than two months to print and ready ballots for absentee and other military voters. See 10 ILCS 5/16-5.01(a) (2008) (requiring such ballots to be available no less than 60 days before federal election); see also 42 U.S.C. § 1973ff-1(a)(8) (ballots must be transmitted to military and overseas voters no less than 45 days before election). Even under an extraordinarily abridged schedule, that left less than two months for would-be candidates to gather signatures and hold primaries, and for election authorities to certify primary results. Significantly, Illinois law normally requires 115 days even to hold a much smaller special election for a vacant House seat, 10 ILCS 5/25-7 (2008)—more than the 104 days remaining when the court denied rehearing en banc.

6. On July 29, 2010, the Governor issued a writ of election, explaining that he was acting immediately and without further court order "[b]ecause * * * the United States Court of Appeals for the Seventh Circuit has ruled that a writ of election must issue authorizing a special election to select a successor Senator to

serve for the remainder of President Obama's original senate term." Appendix E to Application. Four days later, on August 2, 2010, the district court (after holding hearings, at which counsel for petitioner was present, on June 23, June 30, July 21, July 26, and July 29, 2010 to consider procedures for conducting a special election on such short notice) entered a permanent injunction order specifying the manner for conducting the special election. Given the practical obstacles to holding a primary at that late date, the district court determined that, "as in the case of the special election resulting from the decision of the Court of Appeals in *Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970) [a case involving a vacant seat in the U.S. House of Representatives], no primary is necessary to select the candidates to appear on the ballot for the special election to fill the vacancy in the U.S. Senate." Appendix F to Application, Aug. 2, 2010 Order ¶¶ 9, 11.

The court further held that, to ensure that candidates for the remainder of the Obama Senate term were "limited to a manageable number and * * * chosen, not arbitrarily, but for having demonstrated a measure of popular support for the office of U.S. Senator," candidates would be limited to those who had qualified to appear on the ballot for the full six-year Senate term in the general election. *Id.* at ¶¶ 12-13. The district court thus adopted the election procedures that not only had been used to elect a member of the House of Representatives in *Oglivie* but that the

Seventh Circuit expressly endorsed. On August 4, 2010, petitioner filed a notice of appeal from the district court's preliminary injunction order.[3]

7. Although the district court entered its permanent injunction order on August 2, 2010, petitioner waited more than a month—until September 3, 2010—to file his motion to stay that order and accompanying petition for writ of mandamus in the Seventh Circuit. Appendix A, B to Application. The Seventh Circuit denied the motion and petition on September 8, 2010, but the court expedited briefing of petitioner's appeal: the appellant's brief was due (and filed) on September 15, the appellees' brief is due on September 22, and, if the panel determines that oral argument is necessary, argument will be held during the week of September 27, 2010. Appendix A to Application. Petitioner has not asked the Seventh Circuit for a stay pending review of his certiorari petition in this Court.

ARGUMENT

A stay is a temporary injunction that is granted only in extraordinary cases. *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980) (Brennan, *J.*, in chambers). To warrant this relief, petitioner must establish that (1) there is a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari or note probable jurisdiction; (2) there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous; (3) denial

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[3] On September 2, 2010, Governor Quinn also timely filed a notice of appeal from the district court's August 2, 2010 order. Governor Quinn filed that appeal solely to preserve his right to seek certiorari from the Seventh Circuit's June 16, 2010 opinion, as amended on July 22, 2010.

of the stay will cause irreparable harm; and (4) the balance of hardships between petitioner, on the one hand, and respondents and the public at large, on the other, favors the stay. *Ibid.*

Petitioner cannot satisfy this standard. We do not diminish the potential harm that petitioner contends he will experience absent a stay from this Court, but any potential harm to petitioner is far outweighed by the likely injury to Illinois voters and the threat posed to the integrity of Illinois' November election if a stay issues. Nor has petitioner shown that this Court is likely to grant his certiorari petition and rule in his favor.

I. The Balance Of Harms Counsels Powerfully Against The Requested Stay.

Weighing the relative harms to petitioner and respondents, while also accounting for the public interest, establishes that this is not one of the "extraordinary cases" that demands a stay from this Court. As explained, the district court entered its permanent injunction order on August 2, 2010, and petitioner waited until September 3, 2010 to seek a stay in the Seventh Circuit. In the interim, Illinois state and local election authorities commenced final preparations for the November 2, 2010 election—in which Illinois voters will be asked not only to select among candidates for the Obama vacancy, but also to elect a Governor, Lieutenant Governor, Attorney General, Secretary of State, Treasurer, Comptroller, a United States Senator and all 19 members of the Illinois delegation to the House of Representatives, as well as all 118 members of the Illinois House

and one-third of the Illinois Senate. With the addition of county officials and state judges, more than one thousand offices are at stake. Were this Court now to stay enforcement of the district court's order and thereby effectively halt election preparations, even for a short period, or if the Court ultimately were to order these authorities to conduct the election with a new, changed ballot, it would threaten the integrity of Illinois' electoral process, to the great detriment of the State's voters.

Given the risk of harm associated with altering the State's election process so close to election day, this Court has declined to issue emergency relief akin to that sought by petitioner here—even in a case where the harm to the candidate was substantial. See *Westermann v. Nelson*, 409 U.S. 1236, 1236-1237 (1972) (Douglas, *J.*, in chambers) (recognizing that petitioners' complaint about inability to get on ballot "may have merit," but declining to issue injunctive relief "because orderly election processes would likely be disrupted by so late an action"); see also *O'Brien v. Skinner*, 409 U.S. 1240, 1242 (1972) (Marshall, *J.*, in chambers) (because Court "cannot require state officials to do the impossible," "compelling practical considerations" required denial of late-filed stay application seeking action from state election officials). The Court should do the same here.

In Illinois, the State's 110 local election authorities are responsible for conducting elections—including printing and preparing the ballots. Gough Aff. ¶¶ 1, 5, 10; Kralovec Aff. ¶¶ 1, 5, 10.[4] On August 20, 2010, the Illinois Board of

[4] The affidavits of Lance Gough, Jan Kralovec, and Kenneth R. Menzel are included in Appendix A to Mem. in Opp.

Elections ("State Board") issued an official certification to the State's local election authorities, listing the offices (including the Obama vacancy) and candidates whose names will appear on the November 2, 2010 ballot, and on August 27, 2010 the State Board issued an amended certification reflecting the resolution of ballot access objections. Gough Aff. ¶ 11; Kralovec Aff. ¶ 11; Menzel Aff. ¶¶ 2-3. As candidates for the special election for the Obama vacancy, the State Board's official certification listed those candidates who had qualified to appear on the ballot in the race for the full six-year Senate term in the general election—as dictated by the district court's August 2 order. Gough Aff. ¶ 4; Kralovec Aff. ¶ 4; Menzel Aff. ¶ 2.

Illinois' local election authorities then began to design ballot layouts, program their computer data and tabulating systems, and proof and print ballots. Menzel Aff. ¶ 9. On September 15, 2010, for example, the Chicago Board of Elections ("Chicago Board"), which oversees all elections in the City of Chicago (home to approximately 1.43 million registered voters), ordered proofs of its ballots, which should arrive by September 18. Gough Aff. ¶¶ 4, 6, 13. A state court is expected to decide whether to add members of the new Constitution Party to the ballot for five State-wide offices on September 24, at which point the Chicago Board will give final approval for the printing of ballots and preparation of USB memory sticks (a process that takes between seven and nine days) for more than 600 touchscreen voting devices used in Grace Period Voting (which begins on October 6, 2010) and Early Voting (which begins on October 11, 2010). Gough Aff. ¶¶ 15, 17,

19; Menzel Aff. ¶¶ 6-7.[5] And on October 2, 2010, the Chicago Board is scheduled to begin the roughly 17-day Pre-election Logic and Accuracy Testing process ("Pre-LAT") on the voting equipment that will be deployed to precinct polling places city-wide. Gough Aff. ¶ 20.

Once the Chicago ballots begin printing, and assuming it were even possible to procure sufficient additional quantities of the special, 110-pound paper used to print the 1.727 million paper optical scan ballots required by the Chicago Board, producing a new set of ballots—approving final proofs, printing, drying, cutting, banding, folding of absentee ballots, and final packing—would take at least seven to ten days. Gough Aff. ¶¶ 13, 23, 25-26.[6] And after the re-printed ballots were delivered, the Chicago Board then would have to repeat Pre-LAT testing, requiring another 17 days. Gough Aff. ¶ 27. Thus, any Court-ordered revision to the ballots would not only impose extraordinary costs, Gough Aff. ¶ 29, but it would be impossible to execute in the limited time remaining without compromising the integrity of the election process. Gough Aff. ¶ 27.

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[5] Under Illinois law, a person who fails to timely register to vote or file a change of address may register and cast a ballot in person at specified locations during the "grace period," which begins after the close of registration (the 28th day before an election day) and ends on the 7th day before the election. 10 ILCS 5/4-50, 5/5-50, 5/6-100 (2008). Illinois law also requires election authorities to allow in-person, "early voting," beginning 22 days prior to the election and extending through the 5th day before election day. 10 ILCS 5/19A-15.

[6] In Chicago, voters may use either optical scan voting (done on paper, with the voter marking the ballot with an ink pen to indicate his or her choice) or a computer touchscreen. Gough Aff. ¶¶ 7-9. More than 80% of Chicago votes are cast using the paper, optical scan ballots. Gough Aff. ¶ 8.

The Cook County Clerk ("Clerk"), who conducts elections for the approximately 1.35 million registered voters in suburban Cook County, faces similar practical constraints. Kralovec Aff. ¶¶ 4, 6. On September 17, the Clerk will order proofs of the ballots, which he expects to receive by September 20, 2010. Kralovec Aff. ¶ 13. And once the proofs are approved, it will take between seven and ten days to print, cut, and deliver the ballots, all of which must be complete before Grace Period Voting and Early Voting begin on October 6 and 11, respectively. Kralovec Aff. ¶¶ 13, 16, 18. As with the City, an order to reprint the 1 million paper ballots the Clerk has ordered will be costly and ultimately infeasible, given the need to order more paper stock, the seven-to-ten days needed for print production, and the seventeen days required to test the voting equipment. Kralovec Aff. ¶¶ 13, 19, 23, 25, 27, 28.[7]

Moreover, the Chicago Board and the Cook County Clerk, like other Illinois local election authorities, already have begun to send, or have made preparations to send, absentee ballots consistent with the district court's August 2 order to overseas and military voters. Gough Aff. ¶ 12; Kralovec Aff. ¶ 12; Menzel Aff. ¶ 4. To ensure that these ballots are transmitted sufficiently in advance of a scheduled election to allow their receipt, execution, and return by the state statutory deadline, Illinois law requires election authorities to have absentee ballots available at least 60 days before any election for federal office. 10 ILCS 5/16-5.01(a). This statute ensures

[7] In suburban Cook County, more than 60 percent of ballots cast are cast using touchscreen voting. Kralovec Aff. ¶ 9.

that the State will fulfill its obligations under the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 42 U.S.C. §§ 1973ff to 1973ff-6, which requires that absentee ballots be transmitted to military and overseas voters no less than 45 days prior to any federal election, 42 U.S.C. § 1973ff-1(a)(8). Accordingly, to avoid violating federal law, those ballots must be sent no later than tomorrow, September 18, 2010; indeed, the Chicago Board sent theirs on September 5, 2010. Gough Aff. ¶ 12.

In short, any change to the ballot risks the integrity of a general election for national, statewide, and local offices. Again, Grace Period Voting and Early Voting will begin on October 6 and 11, respectively (19 and 24 days from today), and there is not enough time to reprint ballots and test voting equipment prior to the required start of voting. Accordingly, even if it were possible to re-do the ballots and test the equipment before November 2 (which is unlikely, even at substantial cost), any voter who may have already marked a ballot listing the candidates certified by the State Board may be denied an opportunity to make a correct and informed choice about whom to vote for because of a change in the ballot. And voters who appeared at the polls on November 2, aware of the district court's August 2, 2010 permanent injunction order and expecting to vote accordingly, might be confused. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) ("Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls," a risk that "will increase" "[a]s an election draws closer.").

Because granting petitioner's Application would put the integrity of the November 2 election at risk in Illinois, there can be no question that the harm to the State's millions of voters would be substantial. See *John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2819 (2010) (noting "undoubtedly important" state "interest in preserving the integrity of the electoral process"); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as a means for electing public officials."). See generally *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) ("Other rights, even the most basic, are illusory if the right to vote is undermined.").

Indeed, it is reason enough to deny the Application that petitioner waited a month after the district court entered its August 2 order before moving to stay that order's enforcement in the Seventh Circuit. See *supra* pp. 7-8; *O'Brien*, 409 U.S. at 1241-1242 (Marshall, *J.*, in chambers) (denying application in election case because, *inter alia*, applicants' delay in acting prompts "conclu[sion] that effective relief cannot be provided at this late date"); *Westermann*, 409 U.S. at 1237 (Douglas, *J.*, in chambers) (emergency relief inappropriate in election case because "one in my position cannot give relief in a responsible way when the application is as tardy as this one"); see also *Conforte v. Comm'r of Internal Revenue*, 459 U.S. 1309, 1311 (1983) (Rehnquist, *J.*, in chambers) (denying stay application because, inter alia, "an applicant detracts from the urgency of his situation where he makes a last

minute claim and offers no explanation for his procrastination"); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, *J.*, in chambers) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."). Under these circumstances, and given the Court's traditional reluctance to interfere with state elections so close to election day, the stay application should be denied.

II. Petitioner Has Not Shown A Likelihood That This Court Will Grant His Certiorari Petition And Rule In His Favor On The Merits Of His Claims.

The balance of harms, and petitioner's delay in seeking relief from the district court's order, are alone grounds to deny the Application. But petitioner also fails to show a likelihood of obtaining ultimate relief in this Court. The certiorari petition's first and third questions are unlikely to qualify for further review, and petitioner has not demonstrated a likelihood of prevailing on the merits of these claims. And while the second question encompasses an issue that is worthy of certiorari review—and that will be the subject of a future certiorari petition by this respondent—petitioner does not present the issue in a manner likely to garner Supreme Court review. For this reason, too, the Application should be denied.

A. Petitioner Has Not Shown A Likelihood Of Success On His Separation Of Powers And Ballot Access Claims (Questions One And Three In The Petition).

The argument supporting question one, that the district court had no authority to set the manner for conducting the special election, does not satisfy the standards for certiorari review and is unlikely to succeed on its merits. As an

initial matter, this argument is contrary to the one petitioner raised in the district court—where he urged that court to exercise its authority and set the parameters for the ballot, but disagreed with the particular method the court ultimately chose. See, *e.g.*, Appendix B to Mem. in Opp., July 26, 2010 Tr. at 18. In any event, the district court did not usurp the power of the Illinois legislature. The legislature promulgated rules for special Senate elections when it enacted section 25-8 of the Election Code, providing for a Senate vacancy to be filled at the next general election. 10 ILCS 5/25-8 (2008). The legislature also set forth in great detail the manner in which the primary and general elections for Senator are held.

But the State did not construe its Election Code to require a separate election for the remainder of the Obama term. Once the appellate court, less than five months before the next general election, determined that the Seventeenth Amendment required such an election, it was impossible to hold the election in the manner set forth by the Illinois legislature. In that circumstance, the district court was required to remedy the constitutional violation perceived by the Seventh Circuit, something that was unquestionably within the court's power. See *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984) ("[T]he power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction."), superseded on other grounds by Pub. L. No. 99-372, § 3.

Nor did the district court preclude the Illinois legislature from enacting additional rules tailored to this election. The legislature is an independent branch

of government, not party to this suit, and it was free to act after the appellate court's June 16 decision issued if it believed it could do so effectively in the time remaining before the election. (Petitioner thus cites the recent example of the West Virginia legislature acting to define procedures for a special election within three weeks of the late Senator Robert Byrd's death, asserting that it was possible for the legislature to act. Pet. 17 n.5.) But in the absence of legislative action, the district court properly remedied the constitutional violation identified by the appellate court.

Nor is petitioner likely to prevail on the merits of his contention in question three that the district court's order defining the procedures for the special election violates Illinois voters' associational, due process, and equal protection rights, for petitioner fails to analyze these constitutional issues within the proper legal framework. "'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)). The Court must weigh the "'character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments * * * ' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson*, 460 U.S. at 789).

Here, the district court acted reasonably in choosing as the criterion for appearing on the ballot whether a candidate showed sufficient interest in the Senate seat to satisfy the signature and other requirements that state law imposes to run for the full Senate term beginning in January. The court recognized that conducting a new primary election for the remainder of the term consistent with the Illinois Election Code was impossible, and the Illinois legislature had not acted to establish a different procedure. Balanced against this was the possibility that a candidate might forego the election for the six-year term but desire to be a candidate for a term lasting at most several weeks. Very few candidates likely fit that description, and in any event, given the available options, the district court's order reflects a permissible balancing of interests. To be sure, petitioner contends that he wishes to serve during the remaining weeks of the Obama term, although he does not seek reelection in January, but the fact that a predictably small number of candidates may fall into that category does not make the district court's rule unreasonable. And it should be noted that, as the sitting United States Senator, petitioner was the only potential candidate for the special election who had his views represented by counsel at all of the numerous district court hearings regarding the ballot.

B. The Court Is Unlikely To Grant Certiorari Review On Petitioner's Claim That The Seventeenth Amendment Did Not Require A Special Election (Question Two In The Petition).

The petition's second question asks the Court to decide whether the Seventeenth Amendment compels States to hold a special election where, as here, a vacancy occurs during the final two years of a Senate term. See Pet. i. Petitioner attributes the rule in this case requiring a special election on November 2, 2010 to the district court, see Pet. 17 ("The district court extended the Seventh Circuit's dicta beyond the breaking point by ruling that the Seventeenth Amendment requires a special election to take place (even here, where only two months remain in the vacated term)."). In fact, however, it was the Seventh Circuit's decision of June 16, 2010, as amended on July 22, 2010, that required a special election, notwithstanding that only two months will remain in President Obama's vacated Senate term. See, *e.g.*, Appendix D to Application, slip. op. at 33 ("[E]very time that a vacancy happens in the state's senate delegation, the state must hold an election in which the people elect a permanent replacement to fill the vacant seat."), *id.* at 35 ("The governor has a duty to issue a writ of election to fill the Obama vacancy. That writ must include a date, but it appears that the Illinois legislature has provided only one date from which Governor Quinn may choose: November 2, 2010."), *id.* at 38 (writ that Governor must issue "would announce to voters that there will be, in effect, two elections on that day—one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress"). And while we agree that the Seventh Circuit erred on this score, and that this error raises a

constitutional question warranting Supreme Court review, the Application still should be denied, both because the current petition is not an optimal vehicle for reaching the question, and because changing the ballot at this late date threatens the integrity of the election process and risks prejudicing voters, as explained in Part I.

The certiorari petition does not thoroughly present the Seventeenth Amendment issue posed in question two, for petitioner's recent focus has been on how the special election ballot is formed, not on whether the Constitution requires such an election at all. Indeed, counsel for petitioner conceded before the district court that he has no objection to the Seventh Circuit's June 16 decision, see Appendix B to Mem. in Opp., July 26, 2010 Tr. at 12-13 ("[W]e don't oppose the result from the 7th Circuit," "[b]ut we do have some concerns about the details of this injunction order [setting out the manner for holding the election]"), even though this is the decision that announced the rule—that States must hold a special election for a replacement senator even when that election coincides with the end of the vacated Senate term—that petitioner challenges in question two.[8] Nor has

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[8] The Governor issued the writ calling the November 2 special election on July 29, 2010, Appendix E to Application, shortly before the district court entered the permanent injunction on August 2, 2010. The Governor made clear on the face of the writ itself that he did so because "the United States Court of Appeals for the Seventh Circuit ha[d] ruled that a writ of election must issue authorizing a special election to select a successor Senator to serve for the remainder of President Obama's original senate term." *Ibid.* It was obvious by that time that the district court would be ordering the Governor to issue the writ if he did not otherwise comply with the Seventh Circuit's directive, and the Governor deemed it imperative to initiate preparation for the fast-approaching election by issuing the writ promptly.

petitioner raised this challenge in his pending Seventh Circuit appeal, from which petitioner now seeks Supreme Court review under Rule 11. The pending Seventh Circuit appeal is the one in which petitioner raises his separation of powers and ballot access claims, corresponding to questions one and three in his petition, but his appellant's brief (filed on September 15, 2010 pursuant to the Seventh Circuit's expedited briefing schedule), does not argue the issue raised in question two.

Finally, when the petition addresses this issue, on pages 16 to 20, it does so only briefly and without significant analysis. Respondent intends to file a petition arguing that the Seventh Circuit's decision misreads the Seventeenth Amendment's proviso to require a special election in the case of every Senate vacancy, no matter when in the term it occurs, and that the appellate court's ruling is impossible to square with this Court's decision in *Rodriguez*, 457 U.S. at 11, in which the Court construed the Seventeenth Amendment to permit States "to forgo a special election in favor of a temporary appointment to the United States Senate." In the alternative, the Seventh Circuit's rule admits of no *de minimis* exception for cases where, as here, holding a special election means holding two elections for the same Senate seat at the same time, a recipe for voter confusion, see, *e.g.*, *Timmons*, 520 U.S. at 358 (recognizing that Constitution permits some burdens on voters or candidates in pursuit of important state interests), and it guts *Valenti v. Rockefeller*, 292 F. Supp. 851 (S.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969), which upholds States' constitutional entitlement to wait until the next general election to fill a Senate vacancy, as most States do. Further, the Seventh Circuit's decision implicitly

declares unconstitutional the laws of 14 States, which expressly permit an appointed replacement Senator to serve out the remainder of the vacated term under certain circumstances.[9] A full presentation of the issue raised in question two requires a thorough airing of these arguments.

Finally, for all of the reasons set forth above, staying enforcement of the district court's judgment at this late date would threaten the integrity of the November 2 election. Indeed, it is precisely because so little time remained between the general election and entry of the Seventh Circuit's amended decision on July 22 that the Governor declined to seek immediate relief in this Court at that time. Had the Governor applied for a stay in late July, and had this Court stayed enforcement of the district court's order while reviewing the Governor's certiorari petition, only to deny that petition and lift the stay in October, it would have left the State and its voters in an intractable position just weeks or days before the general election. Instead, the Governor sought to minimize any adverse effect on Illinois voters from the Seventh Circuit's decision by swiftly finalizing the process for a November 2 special Senate election. Given the late date of the Seventh Circuit's final decision, the Governor had no realistic option other than to plan for that election and later seek review of the appellate court's constitutional error in this Court, under the

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[9] See Cal. Elec. Code § 10720 (West 2009); Conn. Gen. Stat. Ann. § 9-211 (West 2010); Iowa Code Ann. §§ 69.11, 13 (West 2010); La. Rev. Stat. Ann. § 18:1278(C) (West 2009); Md. Code Ann., Elec. § 8-602(a)(3) (2010); Neb. Rev. Stat. § 32-565(2) (2009); N.Y. Pub. Off. Law § 42(4-a) (McKinney 2010); N.D. Cent. Code § 16.1-13-08 (2009); Ohio Rev. Code Ann. § 3521.02 (Baldwin 2010); Okla. Stat. Ann. tit. 26, § 12-101(B) (West 2010); S.C. Code Ann. § 7-19-20 (Law. Co-op. 2009); S.D. Codified Laws Ann. § 12-11-6 (2009); W. Va. Code § 3-10-3 (2010); Wyo. Stat. § 22-18-111(a) (2009).

well-recognized exception to mootness—well-suited to election disputes—for cases capable of repetition yet evading review. See, *e.g.*, *Fed. Elec. Comm'n v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-464 (2007). Petitioner's belated request to stay enforcement of the district court's order now poses even more obvious and immediate threats to the integrity of the election process and to the rights of Illinois voters.

CONCLUSION

For all of these reasons, the Application should be denied.

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APPENDIX

TABLE OF CONTENTS TO THE APPENDIX

APPENDIX A

State of Illinois)
) S.S.
County of Cook)

AFFIDAVIT OF LANCE GOUGH

I, LANCE GOUGH, being duly sworn and upon oath, state as follows:

1. I presently serve as the Executive Director to the Chicago Board of Election Commissioners and am responsible for the day-to-day operations of the Board. These duties include the overall supervision of the preparation and conduct of elections in the city of Chicago, including the preparation and production of ballots for use in such elections. I have served as Executive Director for the Board since 1988.

2. In my present capacity, I have personal knowledge of the facts stated herein.

3. This affidavit is being made in connection with a lawsuit contesting the constitutionality of Illinois law governing the filling of a vacancy in the office of United States Senator created when then-U.S. Senator Barack Obama resigned his Senate seat in November 2009.

4. The Chicago Board of Election Commissioners is charged with conducting all elections in the city of Chicago, including the November 2, 2010 general election and the special election to be conducted on the same day to fill the vacancy in the office of United States Senator, as ordered by the United States District Court for the Northern District of Illinois in *Judge v. Quinn*, No. 09 C 1231.

5. The Chicago Board of Election Commissioners is one of 110 local election jurisdictions in the State of Illinois that are responsible for conducting elections throughout the State.

6. As of the beginning of the July 2010 voter registration verification canvass, there were approximately 1.43 million registered voters in the city of Chicago.

7. The Chicago Board of Election Commissioners uses two different voting methods: optical scan and touchscreen.

8. Optical scan voting is done on paper with the voter marking the ballot with an ink pen to indicate his or her choice of candidates or referenda. If the ballot is cast by a voter in the precinct polling place, the ballot is fed through an electronic optical scanner located in each precinct that reads and records the voter's choices, and then tabulates the results of all ballots cast after the polls close. If the ballot is cast by an absentee voter, the ballot is read and processed on election night by a high-speed optical scanner located in the central office of the Board. Over 80% of all ballots cast in Chicago elections are cast on paper optical scan ballots.

9. Touchscreen voting is conducted on a device similar to a computer screen whereby the voter touches the screen to make candidate or referenda selections. There is a paper tape attached to each device that allows the voter to review his or her selections and to confirm that the device has properly recorded the selections made by the voter. Touchscreen voting devices are designed so that voters who have disabilities and voters who are not proficient in English can vote independently and without assistance. There is at least one touchscreen voting device in each of the city of Chicago's 2,570 precinct polling places. In addition, touchscreen voting devices are used in Grace Period voting, which will be conducted at the offices of the Board and at three university campuses in the city of Chicago, and in Early Voting, which will be conducted at 54 locations in the city of Chicago.

10. The Chicago Board of Election Commissioners is required to print and prepare ballots containing the offices and candidates certified by the Illinois State Board of Elections.

11. The Chicago Board of Election Commissioners received an official certification from the Illinois State Board of Elections, dated August 20, 2010, listing the offices and candidates whose names are to be printed on the November 2, 2010 ballot. The Board also received an amended certification from the State Board of Elections dated August 27, 2010.

12. Ballot database and layout programming took approximately 5 days. On September 5, 2010, 7,163 special paper ballots in .pdf format were mailed or emailed to military and overseas civilian voters under the Uniformed and Overseas Civilians Absentee Voting Act and under Illinois law.

13. The Board will order 1.727 million paper optical scan ballots to be printed for use in the City of Chicago for the November 2, 2010 election (1.620 million ballots containing only a Constitutional amendment referendum were also ordered). This order will be placed with Lake County Press, the Board's certified ballot printer. Today, the Board ordered proofs of the candidate ballots. All proofs for all 269 ballot styles in the city of Chicago are expected to be received by Saturday, September 18. Once the proofs are approved it will take approximately 7-10 days to print, cut and deliver all paper ballots to the Board's warehouse. Printing of "test decks" of ballots to be used in the testing of precinct voting equipment will be done concurrently.

14. Programming and preparation of the audio ballots to be used in touchscreen voting devices for use by hearing impaired voters will take approximately 4 days, after which they will be proofed.

15. The Board is holding final approval of ballot printing and programming until September 24, when a state court is expected to rule on a pending case deciding whether the names of candidates of the new Constitution Party should be added to the ballot for five State

wide offices (Governor-Lt. Governor. Attorney General. Secretary of State. State Treasurer. State Comptroller). On that date, the Board will give final approval for the printing of ballots and preparation of USB memory sticks for over 600 touchscreen voting devices to be used in Grace Period and Early Voting. This task will take approximately 7-9 days.

16. Pre-election Logic and Accuracy Testing (or "Pre-LAT") for all touchscreen voting devices for Grace Period and Early Voting will take approximately 3-4 days.

17. Grace Period voting begins October 6, 2010 in the offices of the Board and on three university campuses in the City.

18. Early Voting equipment is scheduled to be delivered on October 8. Testing at 53 remote voting locations will be conducted on October 9 and 10.

19. Early Voting begins October 11, 2010 in the offices of the Board and on three university campuses. Early Voting at the 50 additional voting sites throughout the city of Chicago will begin on October 12.

20. The Pre-LAT testing of voting equipment to be used in precinct polling places is scheduled to begin October 2, 2008 and normally takes approximately 17 days, working 12 hours a day. Normally, three wards can be completed per day. Over 2,600 optical scan voting devices ("Insight"), 2,600 touch screen voting devices ("Edge 2 Plus") and 2,600 hybrid accumulator and transmission devices ("HAAT") will be tested during this process.

21. Following Pre-LAT, voting equipment must be loaded into Election Supply Carriers ("ESC's") for delivery to 2,570 precinct polling places.

22. Delivery of ESC's is scheduled to begin on October 19, 2008.

23. The paper ballot for the November 2, 2010 general election is one of the largest ballots, if not the largest ballot, in the nation. It is 21" long, 9 ¾" wide and is made of 110 lb.

paper stock. Both sides of the ballot contain printing with the identification of all offices and referenda and the names of all candidates to be voted upon. A second ballot is being printed containing only a Constitutional amendment. There are over 269 different ballot styles or codes.

24. Traditionally, over 80% of voters in the city of Chicago use paper optical scan ballot when voting.

25. If a court were to order that the Board re-print all 1.727 million paper optical scan ballots, additional paper stock would need to be ordered (if it is available).

26. Once paper stock is received at the printer, it is customary to stage the paper in the production environment for 48 hours to ensure proper climate and humidity controls are within production standards. The entire print production – from approval of final proofs, printing, drying, cutting, banding, folding of absentee ballots and final packaging -- requires 7 to 10 production days at a minimum.

27. Once re-printed ballots are delivered to the Board, the Board would have to repeat Pre-LAT testing. Based upon the fact that such testing for precinct voting equipment normally takes 17 days to complete, there would not be sufficient time to conduct and complete Pre-LAT testing of optical scan voting equipment prior to the November 2, 2010 general election.

28. Until re-printed ballots are received by the Board, all absentee voting would have to be placed on hold.

29. The cost of re-printing 1.727 million ballots would be over $600,000, including new specimen ballots and new test decks.

30. The direct cost of $600,000 for printing does not include other direct and indirect costs such as staff overtime, computer reprogramming, re-testing, cartage of equipment, additional movers, etc.

31. If an office or a candidate (or referendum) on the ballot were ordered removed from the ballot by a court, an alternative to re-printing ballot is to simply suppress the results of votes cast for such candidate (or referendum) so that no votes cast for such candidate will be counted, canvassed or officially proclaimed.

32. If called upon to testify, I am competent to testify and would so testify as to the facts set forth above.

Lance Gough

Subscribed and sworn to before me this
15th day of September, 2010

Notary Public

"OFFICIAL SEAL"
KATHY ROSS
Notary Public, State of Illinois
My Commission Expires 05/20/14

State of Illinois)
) ss.
County of Cook)

AFFIDAVIT OF JAN KRALOVEC

I, JAN KRALOVEC, being duly sworn and upon oath, state as follows:

1. I presently serve as the Director of Elections for the County Clerk and am responsible for the day-to-day operations of the Election Department. These duties include the overall supervision of the preparation for and conduct of elections in Cook County outside of the city of Chicago, including the preparation and production of ballots for use in all elections. I have served as Director of Elections since 2007.

2. I have personal knowledge of all of the facts stated in this affidavit.

3. This affidavit is being made in connection to an action relating to the filling of a vacancy in the office of United States Senator created when Barack Obama resigned his Senate seat in November 2009.

4. The Cook County Clerk is charged with conducting all elections in the County outside of the city of Chicago, including the November 2, 2010 General Election and the special election to be conducted on the same day to fill the vacancy in the office of United States Senator, as ordered by the United States District Court for the Northern District of Illinois in *Judge v. Quinn*, No. 09 C 1231. The Election Department is directly responsible for conducting these elections.

5. The Cook County Clerk is the election authority in Suburban Cook County (that portion of the County outside of the city of Chicago), which is one of 110 local election jurisdictions in the State of Illinois that are responsible for conducting elections in the State.

6. As of September 1, 2010, there were approximately 1.35 million registered voters in the suburban Cook County.

7. The Election Department of the County Clerk uses two different voting methods: optical scan and touchscreen.

8. Optical scan voting is done on paper with a voter marking the ballot with an ink pen to indicate his or her choice of candidates or referenda. If the ballot is cast by a voter in the precinct polling place, the ballot is fed through an electronic optical scanner located in each of the 1,937 precincts that reads and records the voter's choices, and then tabulates the results of all optical scan ballots cast after the polls close. If the ballot is cast by an absentee voter (all mail absentee voting is done on optical scan ballots), the ballot is read and processed on election night by a high-speed optical scanner located in the central office of the County Clerk.

9. Touchscreen voting is conducted on a device similar to a computer screen whereby the voter touches the screen to make candidate or referenda selections. There is a printer attached to each device that allows the voter to review his or her selections and to confirm that the device has properly recorded the selections made by the voter. Touchscreen voting devices are designed so that voters who have disabilities and voters who are not proficient in English can vote independently and without assistance. There are multiple touchscreen voting devices in each of the County's 1,937 precinct polling places. In addition, touchscreen voting devices are used in Grace Period voting, which will be conducted at the offices of the Clerk, and in Early Voting, which will be conducted at 43 locations in suburban Cook County. Over 60% of all ballots cast in suburban Cook County elections are cast on touchscreens.

10. The Cook County Clerk is required to print and prepare ballots containing the offices and candidates certified to him by the Illinois State Board of Elections.

11. The Cook County Clerk received an official certification from the Illinois State Board of Elections, dated August 20, 2010, listing the offices and candidates whose names are to be printed on the November 2, 2010 ballot. The Clerk also received an amended certification from the State Board of Elections dated August 27, 2010.

12. Ballot database and layout programming took approximately 5 days. By September 18, 2010, approximately 600 special paper ballots in .pdf format will be mailed or emailed to military and overseas civilian voters under the Uniformed and Overseas Civilians Absentee Voting Act.

13. The Clerk has ordered 1 million paper optical scan ballots to be printed for use in suburban Cook County for the November 2, 2010 election (900,000 ballots containing only Retention Judge referenda were also ordered). On September 17, 2010, the Clerk will order proofs of the candidate ballots. All proofs for all 422 ballot styles in suburban Cook County are expected to be received by Monday, September 20, 2010 Once the proofs are approved, it will take approximately 7-10 days to print, cut and deliver all paper ballots to the Clerk's warehouse. Printing of "test decks" of ballots to be used in the testing of precinct voting equipment will be done concurrently.

14. Programming and preparation of the audio ballots to be used in touchscreen voting devices for use by hearing impaired voters will take approximately 4 days, after which they will be proofed.

15. Pre-election Logic and Accuracy Testing (or "Pre-LAT") for all touchscreen voting devices for Grace Period and Early Voting will take approximately 3-4 days.

16. Grace Period voting begins October 6, 2010 in the offices of the Clerk.

17. Early Voting equipment is scheduled to be delivered on October 7. Testing at 43 remote voting locations will be conducted on October 8.

18. Early Voting begins October 11, 2010 in the offices of the Clerk and 4 other locations. Early Voting at the 39 additional voting sites throughout the suburbs will begin on October 12.

19. The Pre-LAT testing of voting equipment to be used in precinct polling places is scheduled to begin October 8, 2008 and normally takes approximately 17 days, working 24 hours a day. Over 1,937 optical scan voting devices ("Insight"), 5,300 touch screen voting devices ("Edge 2 Plus") and 1,937 hybrid activator, accumulator and transmission devices ("HAAT") will be tested during this process.

20. Following Pre-LAT, voting equipment must be loaded into Voting Supply Carriers ("VSC's") for delivery to 1,937 precinct polling places.

21. Delivery of VSC's is scheduled to begin on October 23, 2008.

22. The paper ballot for the November 2, 2010 general election is one of the largest ballots, if not the largest ballot, in the nation. It is 18" long, 9 ¼" wide and is made of 90 lb. paper stock. Both sides of the ballot contain printing with the identification of all offices and referenda and the names of all candidates to be voted upon. A second ballot is being printed containing only Retention Judges. There are over 422 different ballot styles or codes.

23. If a court were to order that the Board re-print all 1 million paper optical scan ballots, additional paper stock would need to be ordered (if it is available).

24. Once paper stock is received at the printer, it is customary to stage the paper in the production environment for 48 hours to ensure proper climate and humidity controls are within production standards. The entire print production – from approval of final proofs,

printing, drying, cutting, banding, folding of absentee ballots and final packaging -- requires 7 to 10 production days at a minimum.

25. Once re-printed ballots are delivered to the Clerk, we would have to repeat Pre-LAT testing. Based upon the fact that such testing for precinct voting equipment normally takes 17 days to complete, there would not be sufficient time to conduct and complete Pre-LAT testing of optical scan voting equipment prior to the November 2, 2010 general election.

26. Until re-printed ballots are received by the Clerk, all absentee voting would have to be placed on hold.

27. The cost of re-printing 1 million ballots would be over $400,000, including new specimen ballots and new test decks.

28. The direct cost of $400,000 for printing does not include other direct and indirect costs such as staff overtime, computer reprogramming, re-testing, cartage of equipment, additional movers, etc.

29. If an office or a candidate (or referendum) on the ballot were to be ordered to be removed from the ballot by a court, the best and most effective alternative to re-printing ballots is to simply suppress the votes cast for such candidate (or referendum) so that no votes cast for such candidate (or referendum) will be counted, canvassed or officially proclaimed.

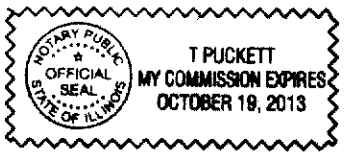
30. If called upon to testify, I am competent to testify and would so testify as to the facts set forth above.

FURTHER AFFIANT SAYETH NAUGHT.

Jan Kralovec

Subscribed and sworn to before me this
15th day of September, 2010

Notary Public



State of Illinois)
) SS
County of Cook)

AFFIDAVIT OF KENNETH R. MENZEL

Kenneth R. Menzel, being first duly sworn states:

1. My name is Kenneth R. Menzel. I am Legal Counsel for the Division of Election Information at the State Board of Elections. I am over 18 years of age. I have personal knowledge of the statements contained herein, and if called to testify would be competent to testify to the same.

2. The Illinois State Board of Elections certified the candidates for the November 2, 2010 General Election, including the special US Senate unexpired term election as to the federal, state, judicial and multi-county special district candidates (the "Election") to the state's one hundred two (102) county election authorities, pursuant to 10 ILCS 5/7-60 and 10-14, on August 20, 2010.[1]

3. The Illinois State Board of Elections amended its certification of the ballot for the Election on August 27, 2010, to reflect the issuance of electoral board decisions relating to certain ballot access objections pursuant to 10 ILCS 5/10-8 et seq.

4. The Illinois absentee voting process for the Election commenced for military and non-resident voters living outside of the United States on September 3, 2010, either by pre-printed ballots or special write-in absentee voter's ballot, pursuant to 10 ILCS 5/16-5.01 and 10 ILCS 5/20-1 et seq.

[1] The certification of candidates to the eight (8) municipal boards of election commissioners in Illinois is done by the county election authorities, and would include the candidates certified by the State Board of Election and candidates running at the county (and/or more local level of government).

5. The Illinois absentee voting process for the Election will commence for voters within the confines of the United States on September 23, 2010 under the state's standard absentee voting option, either by mail or in person at the office of each voter's election authority, pursuant to 10 ILCS 5/19-1 et seq.

6. The Illinois absentee voting process for the Election will commence for voters within the confines of the United States on October 6, 2010 under the state's grace period registration and voting option, in person at the office of each voter's election authority and other locations established by the election authority, pursuant to 10 ILCS 5/4-50, 5-50 and 6-100.

7. The Illinois absentee voting process for the Election will commence for voters within the confines of the United States on October 11, 2010 under the state's early voting option, in person at the office of each voter's election authority and other locations established by the election authority, pursuant to 10 ILCS 5/19A-1 et seq.

8. The Illinois absentee voting process for the Election will commence for voters within the confines of the United States on October 12, 2010 under the state's standard absentee voting option, in person at the office of certain municipal, township and road district clerks, pursuant to 10 ILCS 5/19-2.1.

9. Upon information and belief, the state's one hundred ten (110) election authorities have all commenced, and are at varying stages in, their processes of designing their ballot layouts, programming their computer data and tabulating systems, proofing and printing ballots for the Election.

10. Upon information and belief, any changes to the ballot layout imposed on or after this date will generate significant additional costs upon the state's one hundred ten (110) election authorities for reprogramming and reprinting ballots and associated materials relating to the conduct of the Election.

11. Upon information and belief, a stay of ballot preparation and/or absentee voting process, and any change to the ballot layout which might be ordered, for the Election will cause delays in the absentee voting process that will risk disenfranchising some number of voters, said number to increase as the length of the delay increases.

Further Affiant sayeth not.

Kenneth R. Menzel

State of Illinois)
) SS
County of Cook)

I certify that I have read the foregoing Affidavit and that the matters and facts contained therein are true and correct to the best of my knowledge and belief.

Kenneth R. Menzel

Subscribed and sworn to before me on this 16th day of September, 2010.

OFFICIAL SEAL
ANDY NAUMAN
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:12/12/10

Notary Public

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GERALD ANTHONY JUDGE, et al.,

Plaintiffs,

-vs-

PAT QUINN, ROLAND W. BURRIS,

Defendants.

No. 09 C 1231

Chicago, Illinois
July 26, 2009
4:15 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN F. GRADY

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BY: MR. TIMOTHY W. WRIGHT, III

For ^ Party:
[!FIRM5]
[!ADDRESS-A5]
[!ADDRESS-B5]
[!CITY5] [!STATE5] [!ZIP5]
BY: [!ATTORNEY5]

THE COURT: This is Judge Grady speaking. Let me begin by requesting that anyone who speaks get as close as you can to the microphone. I have had a little trouble from time to time hearing everything that was said our last couple of sessions and I think my -- my ability to hear you will be enhanced if you stand very close to the microphone.

Let me first ask the parties to identify themselves for the record.

MR. OBERMAN: Good afternoon, your Honor. For the plaintiffs Martin Oberman, Tom Geoghegan and Robert Cohen are here.

THE COURT: I can tell you right off the bat that is a remarkable improvement over our past experience, so I think speaking into the microphone is a solution to whatever problem that I have been having.

MR. OBERMAN: All right.

MR. IOPOLLO: Good afternoon, Judge. This is Tom Iopollo with the Attorney General's office, and Peter Koch as well is here with me.

MR. WRIGHT: Good afternoon, your Honor, this is Tim Wright representing Roland Burris, sir.

MR. WALSH: One more, Judge. This is Tom Walsh on behalf of the United States.

THE COURT: Mr. Walsh, what -- what is your status here?

MR. WALSH: That is a good question, your Honor. There is something called the Military & Overseas Voters Empowerment Act which is designed to protect the rights of military and overseas voters. It was a wise choice for a name. And we have been talking to the parties about making sure that whatever timing arrangement ensues is consistent with that Act and it protects the rights of our servicemen overseas to be able to participate through absentee voting.

THE COURT: Give me, just in general terms, what period of time would be required to comply with that, Mr. Walsh.

MR. WALSH: Judge, the main part of that statute -- or actually -- is already -- it seems like it is easily complied with. It requires at least 45 days notice before the election occurs. And since we are well in advance of that, that is not going to be a problem.

The other issue that comes up is how much time after the election is allowed before the results are counted or the results are closed. Typically we look for about 14 days to allow absentee ballots that were mailed, even as late as election day, to be counted. That date -- that numbers of days is not, I don't think, set in stone. And we are willing to talk to the parties about doing something that comes as close as possible to complying with the letter and spirit of the law.

THE COURT: All right. Thank you.

MR. OBERMAN: Your Honor, could I -- your Honor, could I just comment, as long as that issue arose on the time period for the overseas ballots?

THE COURT: Yes.

MR. OBERMAN: Just because it might speed things up down the road. I don't quarrel with anything that Mr. Walsh said, but I thought it was of note that in the cases that were filed that I think were -- where the Court has seen the orders of Judge Der-Yeghiayan and Judge Castillo for the special and man -- contested election in the manual and vacancies in those cases, as Mr. Walsh -- I don't know if they were a party -- but appeared to protect this same concern.

And the order that was -- were entered -- and they are exhibits, by the way, to our filing with the 7th Circuit, so your Clerk and your -- your Honor may have them -- provided that the overseas ballots had to be mailed the day before the election and were to be counted within six or seven days after the election. So they made an accommodation in those cases. I am not sure the plaintiffs feel strongly one way or the other, but I thought the Court should know that that kind of accommodation was made last year.

THE COURT: All right. Thank you.

Let me call the parties' attention to the major

event that has occurred since we last convened, and that is the order of the Court of Appeals dated July 22, which in my view gives us a considerable amount of help in fashioning what we hope will be an appropriate order. Let me ask the plaintiffs and the Governor whether they have had an opportunity to confer together since July 22 in an effort to fashion an injunction order that will be mutually satisfactory to the parties and which will comply with the rulings of the 7th Circuit.

MR. OBERMAN: Your Honor, I could address that. We have talked considerably on Friday and again today and have exchanged some drafts. And at least between the Attorney General's office and the plaintiffs I think we have accord on some points and I would like to lay those two keys points -- I would like to lay those out for you. And it will only take a moment.

As to other provisions in the order, proposed order, we have reached agreement on many. There are a couple of sticking points on a draft we just got -- And no criticism, we were all working fast just before we came into the courtroom -- that will take us past this afternoon to try to work out.

But on, I think, two of the most important matters, if I could lay it out this way: In response to the arguments that had been made in the past, particularly in the Court of

Appeals, that there may need to be a primary under State law, the plaintiffs took the position that a primary is not required, as I am sure the Court knows, and we proposed that the candidates could be selected by simply using the vacancy provision in the existing State Election Code where the State central committees pick the candidates and those people who have already filed petitions as independents, if they are qualified, could run as well.

The State responded by saying they would prefer to follow the model set by Judge Campbell in Jackson against Ogilvie in which he simply declared that the winners of the recent primary for the full term would also be the candidate for the special election.

The plaintiffs have no objection to that approach, if that is what the State would prefer. So to that extent, at least between the Attorney General and the plaintiffs, we do not object to picking that option. Either option would be acceptable to the plaintiffs.

The other part, which is of much lesser import but something that needs to be worked out, is that the State would prefer that the -- on the ballot that the filling of the -- if you can -- six-year term appears first and then a separate line for the filling of the vacancy, instead of the other way around. That is different from the Ogilvie-Jackson -- Jackson against Ogilvie example. We see no problem if the

State thinks it will be easier to work out.

So on those two points there is agreement at least between those two parties. I am not sure Mr. Wright agrees on behalf of Mr. Burris. But that is the progress we have made so far, your Honor.

And we have had discussions with the State on the question of by what date the results must be in and we just haven't had time to complete that homework. But I think we are probably going to be able to reach agreement on that based on some discussions we had earlier. But we all need probably to come back to the Court in the next day or two on that point. Hopefully --

THE COURT: Mr. Iopollo, things sound good to me from what Mr. Oberman says. What do you think?

MR. IOPOLLO: I think that there have been some -- some good progress, Judge. One of the things Mr. Oberman -- just to complete what he said, is that it is not just that we would -- we would say that, as to independent candidates and the party nominee candidates, whoever qualified or qualifies for the six-year term, would be the same people who would be on the ballot for the 60-day term. So that is -- that is our position.

We feel that is the most -- just the fairest way, the most democratic way. All the names that will have -- that will be on the ballot for the sixty-day term will have

been chosen through a primary system where because they set the signature requirements for the -- for the six-year term. So that is through the certification process.

You know, you issued an order last week asking us to explain or justify do we really need 31 days after the election to certify the winner of the -- of the election because it --

THE COURT: Yes.

MR. IOPOLLO: -- it cuts into the authority necessary -- an already short term becomes shorter. And we are working on at least a proposal to see if we can -- Illinois, as it stands now, gives the local election authorities 21 days to certify the results to the State Board and then the State Board has another ten days to actually certify the statewide totals. So there is -- that is 31 days under Illinois law.

So we are seeing if the -- if the local authorities can at least certify this one Senate race, not the whole ballot, because that might be asking too much, but can they at least certify the 60-day term within some period shorter than 21 days. And then we are going to see if the State Board of Elections can certify that race at least a few days earlier than the normal ten days.

So that is our -- that is our -- our statement to you on that, as you asked us if we could try to shorten it.

So we are going to at least see if we can.

But whatever order you -- or whatever time you put in the order, I mean we would ask you to keep some discretion -- leave the state officials with some discretion because elections are often close. We -- we at the State Board of Elections do not control 110 local election authorities. We can't control the timing of when they submit their -- their vote totals. And -- and if election -- if the election is very close, that could conceivably upset any plan to certify more quickly than we normally do.

THE COURT: All right.

MR. OBERMAN: Could I -- your Honor, could I add --

THE COURT: Yes.

MR. OBERMAN: -- something in that might be helpful here on the timing?

We don't really disagree essentially with what Mr. Iopollo said, although I would note the attorney for the State Board did come to the courtroom today and tells us that in the vast majority of cases, of course, the election is clearly decided by the next morning and everybody knows who the winner is, and it doesn't change.

And it is interesting to note that in the Congressman Hastert vacancy the State Board of Elections passed a motion -- it was actually attached as an exhibit to our 7th Circuit filing -- in which the State Board agreed to

send the unofficial returns of the Foster-Oberweis election to the House Clerk immediately if -- assuming they were clear. And, in fact, that is what they did. And the House Clerk accepted them and Congressman Foster was sworn in three days after the election. He was sworn in on March 11th. The election was Saturday, March 8th.

We -- we are concerned that the Senate Clerk may be pickier. We have heard that he is. We don't know this.

THE COURT: May be what?

MR. OBERMAN: May be a little pickier. And we really don't know this. We may -- he may not be. And we have all agreed to try to communicate with the Senate Clerk to see that if, in fact, the State Board is willing to send unofficial results, assuming the result is clear, whether they will swear in our Senator sooner than 21 or 31 days. So we would like to get that information back to the Court. It may take a day or two before we can do it. We just haven't had time.

MR. IOPOLLO: I mean remember, Judge, that under Illinois law absentee votes can come in and be counted, I believe, up to 14 days after the election. Provisional votes are counted after the election. Military votes can be postmarked before the election but can be counted after the election. So, you know, we don't want to be in the unseemly position -- I don't care whether it is a landslide or not a

landslide -- that people's votes who duly voted, who expect their votes to be counted, who understood and have an expectation that their votes will be counted, even if they arrive in the mail after the election, are simply discounted and not counted.

THE COURT: All right. Well, all of these points are correct and are worthy of consideration and further discussion.

Let me give you a few thoughts, not ruling, but just thoughts that may aid you in your further negotiations.

MR. WRIGHT: Your Honor, this is Tim Wright.

THE COURT: Yes, Mr. Wright.

MR. WRIGHT: I would like to speak before you would advise us to your thoughts because we have a position here that is inconsistent with the other parties.

THE COURT: All right, Mr. Wright.

MR. WRIGHT: I know that we weren't --

THE COURT: What does Senator Burris think?

MR. WRIGHT: I know we were not an original party in this matter. We weren't invited to the party, in fact, but had asked that we come, and we did come. And so we have sat through the proceedings that have mostly been conducted by plaintiffs and defendants and we have sat back and watched. We have seen a result of the 7th Circuit. And we don't oppose the result from the 7th Circuit.

But we do have some concerns about the details of this injunction order. We think that, in fact -- I should say, your Honor, that we oppose the order as we have seen it for several different reasons. One, that we think that by setting up such an election and by limiting those who might participate in the election, that what we are doing is that we are potentially violating the constitutional rights in order to address a redress, if you will, some of the constitutional violations that have been found, at least by the 7th Circuit Court of Appeals, and we think that is not right. We think that, in fact, they have not -- that not only should Senator Burris have the opportunity to participate, but for that matter it should be open.

This Court is now declaring an election that hasn't occurred before. They are determining today that this election, at whatever your order would issue, that an election should stand, and yet you are limiting those who might participate in this election, not only with respect to Mr. Burris but for any other citizen of the State of Illinois that might want to have participated in this election.

And this is particularly so in Mr. Burris' case because as a benefit to the State of Illinois, number one, you are talking about a 60-day term in which this person that is going to be elected to that 60-day term for a person who has no Senate staff, has no Senate appointments, has no

Senate experience, has no seniority within the City. I think that Mr. Burris, Senator Burris, might be a more ideal candidate under the circumstances and the People of the State of Illinois ought to have the right to vote for him.

In addition to that, your Honor, I think when we are talking about candidates who are running for Senate and -- and candidates that are already on the ballot, there is a danger of further constitutional violation in that article -- amendment -- the 17th Amendment suggests that a Senator can only run for one a six-year term. To the extent that there is a six-year plus a two-month term, we may well be violating the Constitution ourselves by virtue of this order.

So, your Honor, what I suggest is that at least we have an opportunity to address these issues, the constitutionality of this proposed order, and that we be given seven days. And I think that is a short enough time. Nobody is prejudiced by virtue of it. And I think that there are some important issues.

Again, in 1978 the State of Minnesota passed a statute after Mondale was elected as president, and in that statute they sought to combine the six-year term and the unexpired special term in one election. All right. In that sense it was struck down. It would not be -- the candidate who won was not seated in the Senate.

And if it is your Honor's, and I think it is all of

our efforts, to ensure that whoever is elected as the -- to this interim term be seated in the Senate, I think we need to do it properly and with some forethought.

THE COURT: All right. Thank you, Mr. Wright. Actually what you have done is to anticipate a -- a preference that I was about to express myself as between the -- the Governor's desire to limit the participants in this special election to those who were selected in the primaries for the six-year term to be determined or to follow the method of allowing -- allowing the State Central Committees to designate participants, not limited to those two primary winners.

My preference would be for the State Central Committee method. It seems to me that it is more democratic. It allows for people who wish to run for this special term to do so. And it seems to me that there is no downside to doing that. The -- the State statute, I take it, spells out exactly how that works. And the injunction order entered by this Court could simply specify that that is the method that should be used.

The main thing that the Court of Appeals' orders have made clear is that we do not need to have a primary for this special election. And in so ruling the Court of Appeals made it perfectly clear that the anticipated method and expense associated with this will not occur. There will be

some expense, but it will be minimal because the -- the primary and the election takes place on the same date as the election for the six-year term. So my preference would be to use the State Central Committee method.

And then as far as the other matters are concerned, I am all in favor of accommodating Mr. Iopollo's understandable desire not to disenfranchise anybody who would otherwise be able to vote by absentee or some other method represented by Mr. Walsh, allow a reasonable time to accommodate those interests, as was done in the case that these other elections that have occurred recently by -- by agreement.

Now, Mr. Iopollo points out these other elections didn't involve statewide races and that it may not be as simple to shorten the dates for certification in those instances or in the instance of a Senate race as it was in the case where we were only dealing with one single Congressional district. If that is the case, the parties should be able to find out, A, whether that is so and, B, if so, why it is so and what can be done to allow the time necessary, but no more than necessary, so that this special term can be as long and meaningful as possible in order to accommodate the interests of the 17th Amendment.

Now --

MR. IOPOLLO: Judge, could -- this is Tom Iopollo.

Could I comment on what you just said or --

THE COURT: Go ahead.

MR. IOPOLLO: You know, one of the difficulties -- we thought about the Central Committee option. One of the difficulties is it addresses candidates who are members of political parties. But what about ballot access for independents and new political parties? You are setting up sort of a distinction or a difference in the way this is handled. So that, you know, three months ago we didn't know there was going to be a 60-day term. The political parties are going to be given an opportunity to react to that.

THE COURT: But what is going to happen to the independents in the case of simply allowing the winners of the party primaries to be the candidate?

MR. IOPOLLO: I mean normally independents get ballot access, not through a primary, through signatures, through petition process. I -- so the virtue of what we suggested is there is across-the-board fairness to everybody who meets the hurdle for the November six-year term will be put on the ballot for the 60-day term. That way if you have the party Central Committees involved, the parties could theoretically choose different people or other people if you are a member of those established political parties.

If you are an independent candidate, how are they going to get on the ballot for the 60-day term? We don't

have time to have a 25,000-signature petition requirement. We don't have time to to do that. We don't have time to vet all those signatures, which can be done now for the six-year term, and we don't want to create a situation where there is that sort of difference.

THE COURT: Mr. Wright, let me get back to you. How do you propose that the -- the ballot be structured for the special election in a way that would allow Senator Burris to participate?

MR. WRIGHT: Well -- and I think it is not just limited to Senator Burris, your Honor. I think it is anybody who wants to participate in this. And I think maybe what we can do is if we have a minute, maybe we can look at some type of abbreviated petition drive. I think I saw a petition to intervene where they suggested a different approach by paying a certain fee. But that might have some impact on those who couldn't pay the fee. But I think that we could probably work through, if we are given -- if we can work outside of the structure that is provided for us in these proposed orders, we would probably propose a way that we can agree that it is fair that those who have an access.

THE COURT: Mr. Oberman, what do you think about that?

MR. OBERMAN: I am sorry?

THE COURT: What do you think about what Mr. Wright

is proposing?

MR. OBERMAN: Are you addressing that to the plaintiffs, your Honor?

THE COURT: Yes.

MR. OBERMAN: Well, if you -- you know, there were ten people who filed 25,000 signatures either to run as new parties or as independents in June of this year. That is -- we know that is an onerous task. We felt -- you know, you can't have -- given the amount of time that has gone by, there is no perfect solution here. But it seemed to me that anybody who was motivated to go out and collect 25,000 good signatures for a six-year term, there won't be more of those people who would have done 25,000 signatures for a two-month term.

And so our initial proposal was that the parties' candidates could be selected through the vacancy provision. And the independents are fairly treated by saying if their signatures are good, they could be candidates in the special election. I am one who has always believed that these 25,000 signature requirements are onerous anyway. And so, you know, if -- if it was the Court's discretion to say, well, let's let people run if they can get five or eight or 10,000 good signatures, have an abbreviated time period, I don't see that the plaintiffs would have any reason to oppose that as well. We would probably welcome it. But I am not sure it is

necessary, but we certainly wouldn't oppose it.

MR. IOPOLLO: I mean there is an awful lot of moving parts to a statewide election, and to propose another separate signature requirement on all the election authorities, when we are just weeks away from getting the ballot ready for the regular general election in November, would really be unduly burdensome.

Judge, I don't know if you are aware, but we did get a pro se intervention petition today from an individual by the name of Andy Martin who wants --

THE COURT: I am going to get to that later.

MR. IOPOLLO: Okay.

THE COURT: I am going to ask for the comments the parties about that.

MR. IOPOLLO: Okay.

THE COURT: But first I want to --

MR. OBERMAN: Judge, I would guess, just to add one other point here -- as I understand it, the shape of these ballots has to be known at the absolute latest sometime in around -- just after Labor Day. Mr. Iopollo informed us last week that the Legislature actually changed the date when certification of the ballot is supposed to be done to August 20th.

But in the real world I think if it weren't known until a couple weeks later, there would still be time to meet

the further five-day mailing periods for the service people overseas and so forth. But it is now end of July, so you are only talking about four or five weeks for people to gather signatures, file them, have them challenged, have them ruled on. That is really the problem with the signature part.

The State Central Committee, assuming we act soon, could meet, presumably, and act by August 20th. So we thought that was practical. Although, again, we didn't object to the Attorney General's request for modification. But I think this may be -- the best balance would be, if the Court thinks that the best way to go is what we initially suggested, to have the State Central Committees do it, is to allow the people who have already petitioned with 25,000 signatures, if they survive the challenges, to be candidates in addition to the party nominees. That might be a good middle ground.

THE COURT: Mr. Iopollo, what do you think about that suggestion that we have the Central Committee method supplemented by the people who have already collected 25,000 signatures?

MR. IOPOLLO: People who have collected 25,000 signatures for the November election for the six-year term would, by our proposal, be on the 60-day term as well. There would not be a separate hurdle for them to meet. But there would not be new -- there was not be an opportunity for new

independents.

THE COURT: To start collecting signatures.

MR. IOPOLLO: To start collecting signatures just for the 60-day term.

THE COURT: I agree with that.

MR. IOPOLLO: We want to keep across-the-board fairness in this respect. If you want a party primary for the November election for a six-year term, then you are -- then you should be put on the ballot for the 60-day term. If you selected 25,000 valid signatures running for the six-year term, then you should be on the ballot for the 60-day term, but no one else.

THE COURT: All right.

MR. WRIGHT: Well, that is only fair if you knew there was going to be a special election, not fair for those who did not, which is the rest of the world.

THE COURT: Let me tentatively say that I think that is a -- possibly a productive compromise that I would like the plaintiffs and the defendant to work on. Now, that, of course, doesn't give Senator Burris a place on the ballot. On the other hand, consider how Senator Burris fared in the primary in which he ran.

MR. IOPOLLO: No, he didn't run. He did not run in the primary.

THE COURT: Oh -- okay. Thank you for correcting

me. He did not run in the primary. What does that say --

MR. WRIGHT: What it says --

THE COURT: -- about his rightful place on the special election ballot?

MR. WRIGHT: What it says, your Honor, is that he made a commitment and he kept it. He committed to just being Senator as the Interim Senator until a new Senate election was held, and so that is what he has done and he did not seek to run again. So what we are talking about here -- and you talk about the ballot, what does it say with respect to this issue. What we are talking about here is the ability to finish his interim term.

THE COURT: What do the plaintiff and defendant -- plaintiff and defendant think about one more addition to the intention of special balloting? There would be the -- the party nominees, the -- the additional people who got 25,000 signatures and Senator Burris simply on the basis that he is the present occupant of the vacancy?

MR. OBERMAN: Well, do you want to respond to that? I will take a crack at it, Judge.

MR. WRIGHT: I don't think anybody opposes that.

MR. OBERMAN: The -- you know, it is an interesting question. This -- the question of Senator Burris' right to hold this office was raised to the Attorney General about a year and a half ago. And the Attorney General issued, in a

formal Attorney General's opinion, which actually is in the record of this case -- nobody paid much attention to this part of it because it wasn't central to what the case was about at the time. But the question was, could the Legislature change the statute and provide for an election to fill the Senate vacancy, let's say, in the fall of 2009 or the summer or some early period, like these other states have done in Massachusetts and West Virginia.

And the Attorney General issued an opinion saying there was no problem at all under the Constitution of shortening the time that Senator Burris thought he was going to serve for he had no constitutional right to hold the office for any particular period of time because the Constitution left to the states to set the terms of the election.

So I think as far as Illinois law is concerned, you know, as a matter of substance the plaintiffs filed this case without having any particular objection as to who should be the Senator. We wanted an election. So I don't say this to say that Senator Burris should or should not be on the ballot, but it strikes me as a lawyer it is a little odd to accord someone who has no particular standing on -- under the Constitution a special place on the ballot.

If the Court -- and it was one of the reasons for the plaintiffs' additional proposal, if the Court were to

adopt the mechanism that the party committees would pick the candidates for the special election because those nominations are vacant. The opt out opportunity to run is open to the entire population of Illinois over the age of 30. The Court may have taken judicial notice of the fact that when the Lieutenant Governor's spot became vacant earlier in the year, the party actually went around the State and held hearings and accepted applications from anybody who wanted to run and then it picked somebody from that field.

So if the Court were to adopt the provision that the party vacancy provisions apply, Senator Burris would be accorded the same opportunity as any other person in Illinois to present himself to the party and say, "Pick me." And so he wouldn't be excluded for any reason.

MR. WRIGHT: Tim Wright.

MR. OBERMAN: That is my view of how it ought to work, if that is the approach we take.

MR. WRIGHT: Your Honor, Tim Wright. And I know counsel didn't answer the question you asked, and that is whether he would oppose Senator Burris on that ballot by agreement. I think that is my position, that we would find that to be agreeable.

MR. IOPOLLO: Judge --

MR. OBERMAN: We would all like to be on the ballot by Court fiat, your Honor.

THE COURT: You didn't answer the question if you would oppose.

MR. IOPOLLO: Judge, this is Tom Iopollo. Let me just mention one other thing. If we did it the way you suggested, we would have two ballot positions, one on top of the other. The first ballot position would be for the six-year term, which would have the major party candidates, any independents. The second ballot position would have -- for the 60-day term would have the major party candidates plus independents, plus Senator Burris.

I guarantee you that -- and again I repeat, the -- as I said in an earlier hearing, the avoidance of voter confusion is a very significant State interest which the State can -- can assert. And I guarantee you that people will be confused by that ballot alignment. They will be voting for Roland Burris, thinking that he is going -- that he is running for the six-year term. I think some percentage of people will do that. And that is a significant concern to us.

MR. WRIGHT: Judge --

THE COURT: I am satisfied, for the present at least, Mr. Wright, that Mr. Oberman's point is a fair one, namely, that Senator Burris can apply to the Central Committees to be placed on the ballot, just as anybody else can do so. And they can choose to put him on there or not.

And I -- I am also with Mr. Oberman's point that, after all, Senator Burris achieved no standing in regard to this vacant position by virtue of his having been the beneficiary of a temporary appointment by Governor Blagojevich. Therefore, here is what I am going to suggest to the parties:

MR. WRIGHT: Your Honor, before --

THE COURT: Before we get to the question of the petition to intervene -- I will address that in a few moments -- I would like the parties to attempt to come to agreement on an injunction order that would incorporate the Illinois statutory provision concerning filling key vacancies by way of the party central committees, plus any candidate who has accumulated 25,000 signatures. It will not include any reference to Senator Burris, although as counsel points out, there is nothing to prevent him from applying to be on the -- the special ballot.

I have no objection to the Governor's desire that the order of the ballot be that the election for the full term will appear first on the ballot and the -- the election for the special term will appear second. It seems to me that that does not affect the matter of substance and if that is something that the State thinks will work better, that is -- that is perfectly all right with me.

Then I would like for the certification process to be as short as possible while still accommodating the concern

for not disenfranchising anybody who is entitled to be counted as an absentee voter.

and I think those are the -- the principal things that I have in mind. And from what we have been discussing this afternoon, it seems to me that the odds of your being able to reach a -- a satisfactory compromise along those lines are -- are good.

Does either Mr. Oberman or Mr. Iopollo have any further suggestion or requests?

MR. IOPOLLO: When would you like us to come back with an order, Judge?

THE COURT: Let's ask you when you think you can get it done.

MR. WRIGHT: Your Honor, I would also -- I made a request earlier with respect to our opposition to the proposed order.

THE COURT: I am going to hear from you, Mr. Wright, when we get -- I will hear from you at length, but I am not going to take any briefs. I don't need any briefs on this. But I will hear you fully when we have an order that either is totally agreeable to the -- to the parties or comes as close as they have been able to come.

MR. WRIGHT: Okay.

THE COURT: And so don't -- don't be afraid that you won't have an opportunity to be heard. You definitely

will.

MR. WRIGHT: Thank you, sir.

MR. IOPOLLO: Judge, this is Tom Iopollo again. The party Central Committee option has a lot of uncertainty about it in this respect: That I know that under Section 7-61 of the Election Code the party leaders cast a weighted vote according to the number of votes cast in the last election and so on.

What I don't know and what -- and they are not parties to this case -- is, you know, what is the lead time to convene a meeting, how much time do candidates -- they have to give a certain amount of notice to candidates to appear before them and make their -- that make their campaign advocacy to be put on the ballot and so on. And, you know, we do have an August deadline here of August 19th or 20 to certify the ballot. And it throws us into a lot of administrative uncertainty that -- to get this done.

And, you know, we just -- I just go back to the point of -- from a standpoint of across-the-board fairness and administrative convenience and treating party candidates and independents alike, that the option we suggest is -- is preferable.

THE COURT: I think you leave out too many people that way, Mr. Iopollo. You limit it to just two -- two candidates. And it seems to me that a fairer way to do this

is -- is the way I have suggested.

MR. OBERMAN: Your Honor, could I just comment on the time for a moment? After the last court hearing I took the occasion to find what I could find about the party Central Committee's rules about notice and so forth. Both of them have bylaws on their websites. And what I found is the party Central Committee's rules are completely silent on picking candidates to fill a vacancy. There are no notice requirements.

Obviously, in the real world if they are going to have a meeting and consider people, they need some advance time, but I think if we get this order settled in the next day or two or three, there will be ample time. And I do believe that that August 20th deadline for certifying the ballot has a little wiggle room in it in the real world.

I know that the lawyer for the State Board of Elections is in the room and might be able to tell us what the last date that these need to know what the names are so they can get these things printed. But I think it is August 20th, but not much longer.

THE COURT: Why don't we answer that right now. Why don't we ask the attorney to step up here.

MR. OBERMAN: He is here. His name is Kenneth Menzel.

(Discussion held off the record.)

MR. OBERMAN: August 20 is what the statute says. But what is the real-world absolute drop-dead date?

MR. IOPOLLO: I mean the absentee ballots I think go out September, mid-September, September 20. Each local election authority --

(Discussion held off the record.)

MR. IOPOLLO: They have to be printed. They have to be printed, yeah. So, you know, there might be --

MR. OBERMAN: The Judge wanted to ask you this question:

THE COURT: Mr. Oberman, ask whatever question you want.

MR. OBERMAN: Mr. Menzel is here. Why don't we just ask him to inform the Court what he knows of this.

MR. MENZEL: I mean until just a few weeks ago our certification deadline out to the election authorities was set at August 27th. It just recently scaled back to August 20th with the legislation that the Governor signed, I believe, the beginning of this month. So --

MR. OBERMAN: We would live with the 27th if we had to.

MR. MENZEL: I would also note Mr. Iopollo's concern. If you go through the vacancy-filling provisions, vacancies that arise as more than 15 days prior to an election can be filled through action of managing committees.

They have an eight-day time frame to fill a vacancy that occurs that late in the process. I would anticipate that the parties would be capable of acting within the eight-day period, if that is what the statute provides for late-breaking vacancies.

THE COURT: Thank you, Mr. Menzel. I will ask you to cooperate with the parties in their efforts to draft a workable order here, injunction order, within the next -- whatever period of time we agree upon to meet again.

MR. MENZEL: Yes, your Honor.

THE COURT: And let's now get to the question when the parties want to come back with the fruit of their labors.

MR. IOPOLLO: Well, you had us scheduled for Wednesday afternoon. I don't know if we can --

MR. OBERMAN: We ought to do it by then. We are narrowed down to a few phrases, Judge.

THE COURT: That would be okay with me. How about we make it -- what time Wednesday afternoon do you want to make it?

MR. IOPOLLO: It might be better -- if you wanted to give us a day or two extra, I wouldn't oppose that at all.

MR. OBERMAN: Do you want to make it Thursday or Friday?

MR. IOPOLLO: Thursday or Friday, just give us an extra day or two.

MR. OBERMAN: Thursday would be better than Friday I think.

MR. IOPOLLO: Okay.

THE COURT: Let me take just a moment, will you.

MR. IOPOLLO: Yeah, because I have to be in another case with Judge Gottschall on Tuesday afternoon anyway -- Wednesday afternoon anyway.

THE COURT: All right. How about we make it -- let me have just -- just a moment to check something else. Excuse me.

(Brief pause.)

THE COURT: Now -- okay. One of the dates that was suggested was Thursday, the 29th of July?

MR. OBERMAN: Yes, your Honor.

THE COURT: That would be okay with me. What time in the afternoon would you want?

MR. OBERMAN: Tom, pick a time.

MR. IOPOLLO: Is 3:00 o'clock okay?

THE COURT: It works fine with me.

MR. OBERMAN: It is fine with the plaintiff.

Tim?

MR. WRIGHT: It is fine with me.

THE COURT: Now, I want to accommodate, in whatever time we do choose, a response from the parties to the request of Mr. Andy Martin to intervene.

Mr. Martin, are you present this afternoon?

MR. OBERMAN: He doesn't appear to be here, your Honor.

THE COURT: All right. Can the parties fashion their response to the motion to intervene by July 29th?

MR. OBERMAN: Can we do it orally?

THE COURT: Sure.

MR. OBERMAN: Yes, we can.

MR. IOPOLLO: Okay.

MR. OBERMAN: I could probably do it right now, Judge.

THE COURT: Beg pardon?

MR. OBERMAN: I could probably do it right now, but we will do it on Thursday.

THE COURT: All right. Okay. So we are all set then for 3:00 p.m. on Thursday, July 29, for a further status hearing and possible entry of an agreed injunction order.

MR. IOPOLLO: Judge, it really won't be an agreed order, but I mean as to form.

THE COURT: That is true. That is absolutely true.

MR. IOPOLLO: Because we want to maintain our legal position that the 7th Circuit was in error.

THE COURT: I will leave out the word "agreed."

MR. IOPOLLO: Okay.

MR. OBERMAN: And, your Honor, and what I will

endeavor to do is if we have one in form that is agreed on, I will try to get it over to your clerks by Wednesday or Thursday morning.

THE COURT: Very good.

MR. OBERMAN: And if -- if there are any parts of it that we haven't agreed on, taking into account what Tom said, I will indicate that this is language the plaintiffs want and the State or somebody else doesn't want, so the Court can narrow down and we can proceed efficiently on Thursday with what is agreed on.

THE COURT: That would be very helpful.

MR. OBERMAN: All right.

THE COURT: Very good. Then I will see you on -- 3:00 o'clock on Thursday, the 29th.

MR. IOPOLLO: Thank you, Judge.

MR. OBERMAN: Thank you, Judge.

MR. IOPOLLO: Hope you are feeling better.

THE COURT: Court stands adjourned.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

s/Rosemary Scarpelli/ Date: July 27, 2010

CERTIFICATE OF SERVICE

I, Michael A. Scodro, counsel of record for Respondent Pat Quinn, Governor of the State of Illinois, hereby declare that the MEMORANDUM FOR GOVERNOR PAT QUINN IN OPPOSITION was served on:

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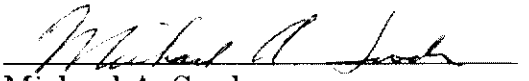
The foregoing document was served by U.S. Mail First Class Delivery, postage prepaid, on this 17th day of September, 2010.



Michael A. Scodro
Solicitor General of State of Illinois