No. 10A272

IN THE
SUPREME COURT OF THE UNITED STATES

ROLAND WALLACE BURRIS, U.S. SENATOR
Petitioner,

v.

GERALD ANTHONY JUDGE, ET AL.
Respondents.

PLAINTIFFS'-RESPONDENTS' BRIEF IN OPPOSITION TO 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

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INTRODUCTION

On June 16, 2010, the Seventh Circuit issued a decision in this case holding that the plain language of the 17th Amendment---"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies"---means exactly what it says and that Illinois' Governor was required to issue a writ of election.

On July 29, 2010, prior to the entry of any injunction order by the district court to implement the Seventh Circuit's ruling, the defendant Governor issued a writ of election setting a special election to fill the Obama Senate vacancy on November 2, 2010. Thus, the State of Illinois has now set in motion the machinery for the conduct of that election on November 2, 2010.

Because the election is now only 46 days away, Senator Burris ("Burris"), by his own admission in his stay application, asks this Court effectively to halt that election, ensuring it will never take place, solely because he cannot be a candidate. In other words, according to Burris, it would be better to have no election at all, allowing him to serve out the Obama Senate term as an un-elected replacement, than to have any election in which he is not a candidate. Burris says that in order to vindicate his alleged right to be a candidate, all Illinois voters must be deprived of their 17th Amendment right to vote for a replacement Senator to fill the Obama vacancy. Entering a stay to achieve this result would be a drastic action by this or any other Court. Burris cites no authority and no case in which this Court has ever ordered a State's election for a U.S. Senator never to occur.

In considering Burris' application for a stay, the Court should give paramount consideration to balancing the equities, assuming Burris even has a colorable claim to be a

candidate which was somehow infringed by the district court's order. Barring all voters from participating as voters because Burris cannot participate as a candidate is not the balance this Court should strike.

Plaintiffs Judge and Kindler thus oppose the application for a stay of the August 2, 2010 order of District Judge John F. Grady (App. Ex. F).[1] The stay should be denied for the following reasons:

1. Burris violated Supreme Court Rule 23(3) and FRAP 8 because he never asked the district court for a stay pending appeal and has offered no reason why such a request would be impractical.

2. Burris' application is founded on entirely new legal arguments never presented to the district court.

3. The Seventh Circuit has set an expedited schedule to hear Burris' appeal, culminating during the week of September 27, 2010, which will consider the identical argument Burris is presenting in his stay application.

4. Burris' application is untimely. He waited more than a full month after the district court ruled to ask any court for a stay or any other relief.

5. Burris' delay has been prejudicial to the public interest because it would result in the cancellation of the special election ordered by the Governor for November 2, 2010 and would cause substantial extra expense for Illinois election authorities.

6. This Court is unlikely to grant Burris' certiorari petition and, if it does, is unlikely to reverse the lower courts.

Given the shortness of time for filing this response to the stay application, plaintiffs will not set forth a complete statement of facts in this brief. Rather, in arguing the above points,

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[1]References to exhibits attached to Burris' stay application will be cited as "App. Ex. __." References to exhibits submitted by plaintiffs with this memorandum will be cited as "Ex.__."

plaintiffs will draw the Court's attention to those material facts which are either omitted from Burris' papers or which are incorrectly stated in his application.

I. Burris Violated Supreme Court Rule 23(3) and FRAP 8.

Rule 23(3) of this Court provides:

> Except in the most extraordinary circumstances, an application for a stay will not be entertained unless the relief requested was first sought in the appropriate court or courts below or from a judge or judges thereof. (emphasis added)

FRAP 8 also requires that a "party must ordinarily move first in the district court for" a stay or "show that moving first in the district court would be impracticable."

Here, Burris never sought a stay from the district court and more importantly, as discussed further below, never even raised the issue now presented both to this Court and to the Seventh Circuit that the district court should not have set the rules for the election, but rather should have ordered the state legislature to do so.

Burris never explains in his application to this Court why he did not first seek a stay in the district court. In his motion for a stay in the Seventh Circuit (Ex. A), Burris says only that "moving first for a stay in the district court is impracticable" because "the election is fewer than 60 days away." (Ex. A, p. 2). But having waited from August 2 until September 3 to file his stay motion, his "fewer than 60 days" problem is self-inflicted.

Moreover, having failed to argue to the district court that the court should defer to the state legislature to enact the rules of the election, there is no way of knowing whether the district court would have granted a stay if asked. Indeed, during June and July, 2010, over plaintiffs' objection, the district court repeatedly agreed to delay entering the final injunction order pending the Seventh Circuit's ruling on the Governor's motion for a rehearing in which the Governor

asked the Seventh Circuit to relieve the State from actually conducting a special Senate vacancy election, a request ultimately denied by the Seventh Circuit (see, e.g., Ex. B, Transcript, July 21, 2010, pp. 19-20).

Thus, if Burris had any cogent argument to make to the district court that the court lacked power to set any rules for the special election, as he now makes to this Court, the district court may well have listened and responded to Burris' request. But no such request was made.

II. Burris' Stay Application and Petition for Writ of Certiorari are Improper because they are Founded on Arguments Never Raised Below.

Burris' stay application and certiorari petition are founded on his contention that the district court exceeded its authority in determining the mechanics of the special Senate vacancy election and that the court should have instead ordered the Illinois legislature to pass laws establishing those mechanics. (Cert. Petition, p. 12). Burris never made this argument to the district court and cannot raise it for the first time in this Court:

> We ordinarily "do not decide in the first instance issues not decided below." *National Collegiate Athletic Assn. v. Smith*, 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999). See also *Glover v. United States*, 531 U.S. 198, 205, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("In the ordinary course we do not decide questions neither raised nor resolved below"); *Youakim v. Miller*, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701 (1976) *(per curiam)* (same).

Adarand Constructors, Inc. v. Mineta, 534 U.S. 103, 109, 122 S. Ct. 511, 514 (2001). See also Patrick v. Burget, 486 U.S. 94, 106, 108 S. Ct. 1658, 1666 (1988): "This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered

by the lower court. See, *e.g.*, *Youakim v. Miller*, 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) *(per curiam)*."[2]

Here, Burris' improper attempt to have this Court overturn the district court's injunction on grounds never raised in the district court is particularly egregious because, as shown by the following discussion of the record, in the district court Burris asserted the exact opposite of the position he now advocates in this Court.

The Seventh Circuit issued its initial decision on June 16, 2010. While affirming the district court's denial of plaintiffs' request for a preliminary injunction, the Seventh Circuit noted that, in analyzing the factors weighing in favor of the issuance of a preliminary injunction, it was required to evaluate the plaintiffs' "likelihood of success" on the merits, Judge v. Quinn, 612 F.3d 537, 555 (7th Cir. 2010). On this issue, in the June 16 opinion, the Court stated:

> Our analysis of the Seventeenth amendment convinces us that the plaintiffs have shown a strong likelihood of success on the merits. The governor has a duty to issue a writ of election to fill the Obama vacancy.

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[2] Indeed, Burris should not even be permitted to raise these arguments in the Seventh Circuit:

> In civil litigation, issues not presented to the district court are normally forfeited on appeal. See *Humphries v. CBOCS West, Inc.*, 474 F.3d 387, 391 (7th Cir.2007), *aff'd*, 553 U.S. 442, 128 S.Ct. 1951, 170 L.Ed.2d 864 (2008). We may consider a forfeited argument if the interests of justice require it, but it will be a "rare case in which failure to present a ground to the district court has caused no one-not the district judge, not us, not the appellee-any harm of which the law ought to take note." *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746, 749-50 (7th Cir.1993).
>
> . . . .
>
> It is not appropriate for this court to overturn an injunction on the basis of a defense that the district court had no opportunity to consider. (emphasis added)

Russian Media Group, LLC v. Cable Am., Inc., 598 F.3d 302, 308-09 (7th Cir. 2010).

Id.[3]

Immediately following this ruling, on June 23, 2010, plaintiffs sought a permanent injunction requiring the Governor to issue a writ of election. Because the Illinois legislature had never enacted legislation setting forth the procedures for a special Senate vacancy election (that is what this law suit was all about), it was obvious to all parties that the district judge would be required to fashion a remedy which included the mechanics of the special election, as foreseen by the Seventh Circuit in its June 16 decision: "We conclude that the issue [of whose names should be on the ballot for the special election] is better addressed in the first instance by the district court." 612 F.3d at 556.

At no time in the ensuing district court proceedings, which included five hearings between June 16 and July 29, did Burris ever object to the district court's exercising its power to determine the mechanics of the election, claiming, as he now does, that only the legislature can set the rules for the special election. By contrast, the Governor did object to holding any election and moved the Seventh Circuit to amend its decision to remove the requirement of a special election this year, or, in the alternative, to grant a rehearing *en banc*.

The Governor argued it was too burdensome on the State to conduct a special election by November 2, 2010, particularly if the State were to hold primary elections to select the nominees

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[3]Burris' references to this ruling as an "advisory opinion" (App., p. 7) and as "*dicta*" (App., p. 19, n.6) are far off the mark. The Seventh Circuit's ruling on the requirement of the issuance of a writ of election was an obviously essential part of the Court's analysis of determining whether plaintiffs were entitled to a preliminary injunction.

in the short time remaining, although the Governor never argued a primary was required.[4] In response to the Governor's motion, plaintiffs filed a detailed brief laying out the feasible alternatives for selecting nominees for the special election. (Ex. C).

Plaintiffs showed that the district court could treat the nominations as vacant under state law which would result in the established political parties' state committees selecting those parties' nominees (plus allowing those independents to be candidates who had already collected the 25,000 signatures required for independent candidacies). Or the district court could determine that those candidates who had already qualified (through primary victory or petitioning) as candidates for the full new six year Senate term beginning on January 3, 2011 would also be the candidates for the special vacancy election. (See Ex. C, pp. 5-7).

Burris filed no papers in the Seventh Circuit in opposition to plaintiffs' brief in connection with the Governor's motion to amend or for an *en banc* rehearing and never argued that the district court did not have the kind of authority urged by plaintiffs to determine who would be candidates in the special election. Eventually, the Seventh Circuit denied the Governor's request but issued a further order on July 22, 2010 (App. Ex. G), stating, most importantly:

> The district court has the power to order the state to take steps to bring its election procedures into compliance with rights guaranteed by the federal Constitution, 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. It is elementary that the Seventeenth Amendment's requirement that a state governor issue a writ of election to guarantee that a vacancy

[4]There is no question that the 17th Amendment does not require primary elections to select candidates for Senate vacancy elections. Trinsey v. Commonwealth of Pennsylvania, 941 F.2d 224, 234 (3rd Cir. 1991).

> in the state's senate delegation is filled by an election is an aspect of the supreme law of the land. U.S. Const. art VI, cl. 2. To the extent that Illinois law makes compliance with a provision of the federal Constitution difficult or impossible, it is Illinois law that must yield. [citations omitted] (emphasis added)

Judge v. Quinn, 2010 WL 2853645, *1 (7th Cir. July 22, 2010).

Subsequent to this ruling, there were two hearings before the district court on July 26 and 29, 2010. (Transcripts, Ex. D and Ex. E, respectively). At these hearings, the district court considered the alternative mechanisms suggested by plaintiffs and by the Governor for selecting nominees for the special election. The Governor urged the court to order that the candidates in the special election would be those who had won their party's primary to be candidates for the full six year term or who had qualified by petition to be candidates in that election.

This alternative was the one ultimately chosen by the district court. As the district court stated, given the exigencies of Illinois election law and the uncertainty inherent in other options, this approach was the more reasonable. (Ex. E., p. 23) The court further noted in its findings that there was precedent for this decision. (App. Ex. F, ¶13). It was the identical solution chosen by the district court in 1970 to implement the Seventh Circuit's ruling in Jackson v. Ogilvie, 426 F.2d 1333 (7th Cir. 1970) and has stood unchallenged and uncriticized for 40 years. (The injunction order in Jackson v. Ogilvie is Exhibit A to plaintiffs' Seventh Circuit brief in response to the Governor's request for a rehearing (Ex. C to this brief).[5]

Throughout the district court proceedings, Burris never argued, as he now does in his stay application and certiorari petition in this Court, that the district court did not have the power or authority to choose this mechanism to implement the 17th Amendment's command for a vacancy

[5]Burris is thus wrong in his asserted premise that no court has ever issued such an order before.

election on the asserted ground that only the legislature can make the rules for such an election. To the contrary, Burris did not object to the approach chosen by the district court, limiting his argument to asking the district court to enter an order which would also guarantee him a place on the ballot. Burris urged the Court to exercise its power to either (a) include in its injunction order that, in addition to those candidates who won the primary elections for the full six year term and who qualified by petition, Burris would also be on the ballot, or (b) create an entirely new petition process with a signature requirement far less than the 25,000 ordinarily required under state law so that Burris could be a candidate through such a mechanism.

Burris' failure to complain about the district court's exercising its power as long as that exercise benefitted him is clearly apparent from the transcript of the July 26 hearing. In reference to a then pending petition to intervene by a would-be candidate for the special election (eventually not pursued by that candidate), Burris' attorney adopted the suggestion that the district court should, by court order, create an entirely new petition process:

> 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 [by plaintiffs and the Governor], we would probably propose a way that we can agree that it is fair that those who have an access [sic]. (emphasis added)

Ex. D, p. 18.

Later in the hearing, this exchange occurred:

> 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? (emphasis added)
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> . . . .
>
> MR. WRIGHT: I don't think anybody opposes that.

Ex. D, p. 23. After plaintiffs' counsel responded, Burris' counsel stated:

> MR. 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. (emphasis added)

Ex. D., p. 25.

Finally, at the last hearing on July 29, 2010, after the district court stated it would be issuing a written injunction order implementing its oral decisions of that date, Burris' counsel advised the court:

> MR. WRIGHT: . . . [I]f your Honor develops an order along the line of our discussions here today, we may have no objection because it may give Senator Burris and any other citizen that chooses the access to the ballot, . . . (emphasis added)

Ex. E., p. 26. Ultimately, on the same day as that hearing, Burris filed a brief with the district court expressing his displeasure with not being able to be a candidate in the special election (Ex. F). In that brief, Burris also never raised the argument on which he now bases is stay application and certiorari petition, that the district court lacked the power to enter the injunction order.[6]

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[6]In his stay application, Burris complains that the district court did not allow him to file a brief. It is true that the district court declined to set a briefing schedule on the contents of the injunction order because the court accurately understood that, after the Seventh Circuit's rulings, very little time remained to implement the Seventh Circuit's decision. The district court was clear

Burris' appeal to this Court now to stop the entire election is nothing more than a cynical and disingenuous attempt solely to benefit him while depriving all Illinois voters of their 17th Amendment right to elect a replacement Senator. This Court should not permit such a result.

III. This Court Should Decline the Requested Stay and Defer to the Seventh Circuit that is Presently Considering Burris' Same Argument on an Expedited Basis.

When the Seventh Circuit denied Burris' motion for a stay and his petition for a writ of mandamus, it simultaneously, *sua sponte*, set a much expedited briefing schedule that will be completed next Wednesday, September 22, and the case will be argued if necessary, during the week of September 27, 2010. (App. Ex. A). Under these circumstances, this Court should defer to the Seventh Circuit. As Justice Ginsburg stated:

> Although the applicants' arguments are cogent, I have taken into account several countervailing considerations in declining to vacate the stay kept in place by the Second Circuit pending its disposition of the appeal. I am mindful, first, that "interference with an interim order of a court of appeals cannot be justified solely because [a Circuit Justice] disagrees about the harm a party may suffer." *Certain Named and Unnamed Non-Citizen Children v. Texas*, 448 U.S. 1327, 1330-1331, 101 S.Ct. 12, 65 L.Ed.2d 1151 (1980) (Powell, J., in chambers). Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition. The principal briefs have been filed and I anticipate that the Court of Appeals will hear argument promptly and render its decision with appropriate care and dispatch. (emphasis added)

Doe v. Gonzales, 127 S. Ct. 1, 4 (2005).

See also Gressman et al., Supreme Court Practice, 9th Ed., Ch. 17.6, p. 857:

> Normally . . . a single Justice would be reluctant to intervene in a proceeding still pending in a court of appeals in the absence of most compelling and unusual circumstances,

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throughout, however, that it would hear any oral argument Burris or anyone else desired to make. Moreover, the district court ultimately permitted Burris to file his brief and stated: "I will read it before I enter my order." (Ex. E, pp. 25-26)

> particularly to review a determination by that court that a district court order should not be stayed pending appeal. *O'Rourke v. Levine*, 80 S.Ct. 623, 4 L.Ed.2d 615 (1960) (Harlan, J.) [footnote omitted]

Here, the Seventh Circuit, by its *sua sponte* order expediting consideration, has given every indication it will promptly rule on Burris' new arguments. More importantly, the Seventh Circuit's action shows that had Burris not delayed an entire month, but appealed promptly to the Seventh Circuit after the district court's August 2, 2010 injunction order, a similar expedited schedule by the Seventh Circuit would likely have resulted in a decision prior to September 1, still leaving time for this Court's emergency consideration, if needed. Under these circumstances, any time problems for Burris are self-inflicted and should not be remedied to the detriment of plaintiffs, the Illinois election authorities, and all other Illinois voters.

IV. Burris Delayed More than a Month before Seeking Relief.

On July 29, 2010, at the fifth *hearing in* the district court after the Seventh Circuit's June 16, 2010 decision, the district court made clear its oral ruling as to the mechanics of the special Senate election to be conducted on November 2, 2010 (Ex. E, Transcript, July 29, 2010). The Court subsequently issued a written injunction order on August 2, 2010 precisely incorporating its July 29 oral rulings.

Yet Burris took no action to seek a stay in any court of these rulings until more than a month later on September 3, 2010 when he filed two separate pleadings in the Seventh Circuit, a petition for a writ of mandamus (Ex. F) and a motion for stay (Ex. A) pending the disposition of the mandamus and the appeal. In those papers, Burris never stated why he waited from July 29 to September 3 or why it was impractical to first ask the district court for a stay other than that only 60 days remained until the election. On September 8, 2010, the Seventh Circuit denied the

stay request and the petition for writ of mandamus (App. Exs. A and B). Thereafter, Burris filed his application with this Court on September 10, 2010.

Although Burris argues he needs extraordinary relief from this Court because, as he says, the election is "less than sixty days away," had Burris proceeded promptly after the district court's injunction order, he would have had 90 days until the election, enough time to obtain expedited relief, if not from the district court, then from the Seventh Circuit. Any time limitations on Burris' now obtaining the relief he seeks are of his own making.

Stays in this Court have been denied because of unexplained or unjustified delay in seeking relief. See Conforte v. Commissioner of Internal Revenue, 459 U.S. 1309, 1311, 103 S.Ct. 663, 664 (1983) where Justice Rehnquist denied a stay, stating: "[A]n applicant detracts from the urgency of his situation where he makes a last minute claim and offers no explanation for his procrastination." See also Ruckelshaus v. Monsanto Co., 463 U.S. 1315, 1318, 104 S.Ct. 3, 5 (1983):

> While certainly not dispositive, the Administrator's failure to act with greater dispatch tends to blunt his claim of urgency and counsels against the grant of a stay.

See also Beame v. Friends of the Earth, 434 U.S. 1310, 1313, 98 S. Ct. 4, 7 (1977): "The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."

V. Burris' Delay is Prejudicial to the Public Interest.

Burris' waiting a whole month to ask for relief is prejudicial to the public interest because, if granted, the stay would cause the cancellation of the special election on November 2, 2010 and result in a disruption of the orderly election procedures of the State of Illinois, causing a substantial increase in cost to Illinois taxpayers.

1. Burris' delay has caused the difficulty of obtaining the relief he seeks.

It is clear that Burris' real goal is not to remedy his claimed concern that the Illinois legislature was deprived of the opportunity to pass legislation setting the rules for the special Senate election, but rather to have the special election cancelled so that he can continue to serve as an appointed Senator until January 3, 2011. That is because if a stay were entered, the special election to fill the Senate vacancy on November 2, 2010 will never take place, as Burris candidly states. The election is only 46 days away. Absentee voting has already begun and early voting begins soon. Any delay in ballot preparation for the special election, even by a few days, would, at this time, effectively prevent the election authorities from carrying out all the necessary steps for absentee and early voting, as well as hindering preparations for the November 2 election day voting.

The foundation for Burris' argument for a stay is that the district court erred by determining, in its injunction order, the rules and logistics for the conduct of the special election. Burris says the district court, instead, should have ordered the state legislature to devise those rules, an argument never raised by Burris in the district court. Burris' first mention of this argument is in his mandamus petition filed in the Seventh Circuit, where he expressly asked the Court to issue a writ of mandamus "to order the Illinois General Assembly 'to take steps to bring its election procedures into compliance with the rights guaranteed by the federal Constitution' by defining the mechanics of the special election." (Ex. F., p. 13).

Apparently, Burris now wants this Court to infer that if this Court grants the requested stay, the Illinois legislature would then have time to pass legislation "dictat[ing] the mechanics of [the special] election." (App., p. 19).

But Burris could not seriously be advancing such an argument because he clearly acknowledges the practical impossibility of such action actually occurring. Burris admits the district court was faced with "insufficient time remain[ing] for the legislature to act before the date of the special election." (App., p. 5). Further, Burris acknowledges that "the Illinois General Assembly [might] choose simply to forego the job of putting into place the mechanics of the special election." (App., p. 20). But, if the district court had ordered the legislature to act and the legislature instead chose to "forego" creating the mechanisms for a special election, it would be violating the very rights plaintiffs have to vote in a special election under the 17th Amendment, as upheld by the Seventh Circuit's June 16 decision. Under that decision, the legislature cannot forever "forego" a special election.

Assuming there were any merit to the substance of Burris' contention (which there is not, as discussed below), had Burris not delayed a month in seeking this stay, there would have at least been 30 more days for the legislature to consider what Burris is now requesting.

The obvious goal of Burris' tactics, including his application for a stay to this Court, is to obtain sufficient delay to insure there will be no special election, ever, to fill the Obama Senate vacancy, in clear violation of the plain language of the 17th Amendment.

2. Burris' requested stay would disrupt the State's election procedures and cause substantial additional cost.

Under Illinois statutes, the State Board of Elections was required to certify the names of those to be listed on the November 2, 2010 ballot by August 20, 2010. This point was specifically made to the district court in the July 26, 2010 hearing by the counsel to the State Board of Elections (Ex. D, Transcript, July 26, 2010, p. 31). Burris' lawyer was present in court that day and was well aware of the statutory time limitations for certifying the names on the

ballot. Thus, when Burris delayed until September 3 to first seek a stay, he well knew he had allowed the August 20 deadline for certifying the ballot to expire.

Plaintiffs understand that in the Governor's opposition to Burris' stay application, filed simultaneously with this brief, the Governor is submitting affidavits from election authorities confirming that in fact, the State did finalize the ballot on August 20, with an amendment to it on August 27. In addition, plaintiffs understand the affidavits submitted on behalf of the Governor establish, in detail, that the process for printing the ballots, arranging for absentee balloting and early voting, and complying with the Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. §1973ff *et seq.* ("UOCAVA"), requiring absentee ballots be distributed to overseas voters, including members of the armed forces, at least 45 days before the election, are well underway. Rather than duplicate the submissions by the Governor with respect to these matters, plaintiffs adopt those submissions by the Governor and urge the Court to give the most serious consideration to the logistical obstacles created by Burris' very late application for a stay.

If this Court were to enter a stay, the only reason to do so would be to permit sufficient time to litigate this matter to completion. But based on the fact that election machinery is well under way and that only 46 days remain until the election, any stay entered by this Court would mean the cancellation of the special election because there would never be enough time for the election authorities to re-start the process of preparing the ballots in order to actually conduct the November 2 election on time.

Under all of these circumstances, this Court should deny the stay, as it has done in election cases in the past. See Westermann v. Nelson, 409 U.S. 1236, 1236-37, 93 S.Ct. 252 (1972), where Justice Douglas noted facts similar to those here:

> The complaint may have merit. But the time element is now short and the ponderous Arizona election machinery is already under way, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial and it may well be that no decision on the merits can be reached by the Court of Appeals in time to reprint the ballots excluding petitioners, should they lose on the merits.

Justice Douglas denied the requested stay:

> On the basis of these papers I have concluded that in fairness to the parties I must deny the injunction, not because the cause lacks merit but because orderly election processes would likely be disrupted by so late an action. The time element has plagued many of these election cases; but one in my position cannot give relief in a responsible way when the application is as tardy as this one. (emphasis added)

Id. See also O'Brien v. Skinner, 409 U.S. 1240, 1242, 93 S.Ct. 79, 80 (1972), involving an alleged deprivation to prison inmates of the right to vote by absentee ballot. Justice Marshall denied the requested stay in that case:

> Compelling practical considerations nonetheless lead me to the conclusion that this application must be denied. Applicants waited until the last day of registration before submitting their registration statements to election officials, and they filed this application a scant four days before the election.

In sum, in election cases, where the government's operation of the complex and cumbersome election machinery would be seriously disrupted by last minute stays of lower court rulings, the Supreme Court has been loath to intervene, particularly where the applicant, as did Burris here, engaged in unexplained and unjustified delay.

VI. This Court is Unlikely to Grant Burris' Certiorari Petition and, if It Does, is Unlikely to Reverse the Lower Courts.

In considering Burris' stay application, the Court must consider the likelihood that four Justices of the Supreme Court will vote to grant certiorari, and, if granted, the likelihood that five

Justices will vote to reverse. Here, there is little likelihood of either action on the two arguments offered by Burris: 1) that the district court exceeded its authority by not directing the legislature to set the rules for the election; and 2) that the 17th Amendment does not require a special election in any event.

First, a principal reason this Court is unlikely either to grant the certiorari petition or to reverse is, as set forth in detail above, Burris' position is founded on an argument never raised below and indeed, is contrary to his position below. Burris' contentions are thus waived and beyond consideration by this Court. See Adarand Constructors, Inc. v. Mineta, supra, 534 U.S. 103, 109, 122 S.Ct. 511, 514 (2001).

Second, there is no split in the Circuits as to the district court's authority to enter the injunction order in issue. Burris has cited to none. On the contrary, it is well settled that the district court has broad equitable powers to protect plaintiffs' Constitutional rights:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.
> 'The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.' Hecht Co. v. Bowles, 321 U.S. 321, 329-330, 64 S.Ct. 587, 592, 88 L.Ed. 754 (1944), cited in Brown II, supra, 349 U.S., at 300, 75 S.Ct., at 756.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15, 91 S.Ct. 1267, 1276 (1971). In Connor v. Coleman, 425 U.S. 675, 679, 96 S.Ct. 1814, 1816 (1976), this Court expressly upheld the district court's power to order local elections to comply with the Constitution:

> [I]n our view the District Court should . . . enter[] a final judgment embodying a permanent plan reapportioning the Mississippi Legislature in accordance with law to be applicable to the election of legislators in the 1979 quadrennial elections, and also ordering any necessary special elections to be held to coincide with the November 1976 Presidential and congressional elections, or in any event at the earliest practicable date thereafter. (emphasis added)

While the instant case presents matters of public importance, the injunction order in issue is not one which will affect future elections but is limited to remedying the Constitutional violation for this one election in 2010. The legislature will have ample time to establish statutory procedures for the conduct of future Senate vacancy elections.

By contrast, Burris cites no case holding that a district court must first order a state legislature to enact rules for an election for a U.S. Senator before setting those rules itself to vindicate a Constitutional right where there is so little time remaining before an election that legislative action is completely impractical. Here, the district court was well within its broad equitable powers to enter the injunction which vindicated the plaintiffs' 17th Amendment rights to vote in an election to fill the Obama vacancy.

Had Burris even urged the district court to take no action and instead order the state legislature to act, such an order would almost certainly have failed. Consider the scenario created by Burris' contention. Ballots are required to be certified under state law by August 20 and ballots are required to be printed during mid to late September 20. Yet, Burris' new contention would have required the district court first to order the state legislature into session because the legislature was in recess during July and August. Then, assuming the legislature actually convened, there would have been no assurance the legislature would have found a majority of votes to act timely to set rules for an election---such as petition requirements or other mechanisms to choose nominees---in time for would-be candidates to meet those requirements

and obtain a position on the ballot. Indeed, given the amount of time required to carry out those tasks, it is virtually certain that no matter how quickly the legislature acted, no other mechanism than the one chosen by the district judge could have been practically implemented.

More importantly, Burris' contention ignores the gravamen of plaintiffs' complaint and the reason for the Seventh Circuit's decision. For nearly 100 years, Illinois has failed to adopt legislation providing for the conduct of special elections to fill U.S. Senate vacancies. Recognizing this failure, the Seventh Circuit in its June 16, 2010 decision declared that, nevertheless, a special election was required. From that date forward, there was no bar on the legislature's enacting rules for the conduct of such an election if it so desired. By July, when the district court entertained plaintiffs' request for a permanent injunction, the legislature had shown no signs of acting nor did the legislature express any request that the district court delay entering an injunction for the purpose of giving the legislature time to act.

Under these circumstances, with statutory as well as real-world practical election deadlines rapidly approaching, the district court was well within its discretion to enter the injunction order in issue, having made appropriate findings (App. Ex. F). It was the very failure of the legislature ever to enact legislation in compliance with the 17th Amendment which deprived plaintiffs of their 17th Amendment rights. If Burris' present contention were correct, a state legislature could forever frustrate the voters' right to elect a replacement Senator under the 17th Amendment by enacting an election code which completely omits procedures to implement a special election and the Federal courts would be powerless to effect a remedy. Such is not and never has been the law. See National Ass'n for Advancement of Colored People v. Thompson, 357 F.2d 831, 833 (5th Cir. 1966):

> [A]ny State law, which is in conflict with the United States Constitution or a law enacted by Congress in pursuance thereof, cannot be enforced. Nor can a valid State law be applied in a way to thwart the exercise of a right guaranteed by the Constitution and laws enacted by Congress in pursuance thereof. (emphasis added)

Thus, it could not be more clear that Burris' present argument that he is entitled to a stay to allow the legislature to act is nothing more than an after-the-fact invention aimed at completely avoiding an election so that he can serve as an appointed, not elected, Senator all the way to January 3, 2011. This Court should not countenance such gamesmanship.

Burris now also argues that the 17th Amendment "does not require a separate election at all under these circumstances." (App. p. 20). It should be noted that Burris never made such an argument in the Seventh Circuit, instead arguing only that any election to fill the Obama vacancy could only take place on November 2, 2010. Indeed, in the hearings in the district court on the proper form of the injunction order, Burris expressly disavowed any challenge to the Seventh Circuit's June 16 decision that a special election is required:

> 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. (emphasis added)

Ex. D., p. 12.

Thus, Burris' belated reversal of position, in which he now claims that somehow, the Seventh Circuit misapplied the 17th Amendment to require a special election, also smacks of nothing more than a last minute self serving argument to allow him to remain in office until January 3, 2011.

As to the likelihood of the Court's granting certiorari on the substance of the Seventh Circuit's interpretation of the 17th Amendment, or the likelihood of five Justices reversing that decision, there is no different interpretation of the 17th Amendment from any other Circuit. Burris however argues that Valenti v. Rockefeller, 292 F.Supp. 851 (S.D.N.Y. 1968), *aff'd without opinion*, 393 U.S. 405 (1969), shows there will be no constitutional harm, here, if the special election is cancelled because, he says, the Senate appointee at issue in Valenti "served the remainder of the term without a special election." (App., p. 21). Burris' contention lacks merit.

In Valenti, the Court never considered whether the 17th Amendment requires the Governor to issue a writ for a special election, because, unlike here, in that case "a writ of election was issued [by Governor Rockefeller] for the November 1970 election to fill the vacancy for the remainder of the unexpired term (December 1, 1970 to January 3, 1971)." (See Ex. C to this brief at Ex. H, p. 4). Further, unlike here, the New York statute at issue in Valenti required a special election to be held in 1970 to fill the vacancy before the end of the term, permitting the Governor's temporary appointee to serve only until December 1 following the special election, not through the end of the term, 292 F.Supp. at 853. This fact was explicitly noted by the Supreme Court in Rodriguez v. Popular Democratic Party, 457 U.S. 1, 102 S.Ct. 2194 (1982).[7]

Apparently, the State of New York simply ignored Governor Rockefeller's writ and its own statute calling for a November, 1970 election to fill the vacancy and the appointed Senator,

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[7]"In *Valenti* . . . an election to fill the vacancy would not be held until the general election in the next even-numbered year, *i.e.*, November 1970. The Governor was empowered to make an interim appointment, effective until December 1, 1970." Rodriguez v. Popular Democratic Party, supra, 457 U.S. 1, 14, 102 S.Ct. 2194, 2202, n.11 (1982)

Charles Goodell, actually did serve until January, 1971. There was no subsequent litigation over this issue and therefore Valenti obviously does not stand for the proposition that, under the 17th Amendment, a special vacancy election is never required. The Seventh Circuit's opinion in this case holding that the Governor must issue a writ of election is in no way inconsistent with Valenti because there, Governor Rockefeller had issued a writ.

There is no basis to argue the Seventh Circuit was wrong. Given the limits on time and space, plaintiffs will not re-argue the merits of their case here. Rather, plaintiffs rely on the in depth and well reasoned decision of the Seventh Circuit, carefully parsing the Amendment's language and thoroughly evaluating its legislative and policy history. It should be noted that the Seventh Circuit's decision was unanimous and, on the Governor's motion for rehearing *en banc*, no judge of the Seventh Circuit voted for an *en banc* rehearing (App. Ex. G). The Seventh Circuit's conclusion that the plain language of the Amendment requires governors to issue writs of election whenever vacancies occur in the Senate is sound and there is no reason to think five Justices of this Court would come to a different conclusion.

CONCLUSION

For the reasons set forth above, Burris has utterly failed to establish entitlement to a stay which would have the drastic effect of cancelling the State of Illinois' election of a U.S. Senator to fill the Obama vacancy and nullifying the Governor's July 29 writ of election. The stay application should be denied.

Respectfully submitted,

Date: September 17, 2010

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Certificate of Service

I hereby certify that I served the attached PLAINTIFFS'-RESPONDENTS' BRIEF IN OPPOSITION TO EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGMENT BELOW PENDING THE FILINGAND DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS on the attorneys listed below via email on September 17, 2010.

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