No. 10-367

In the Supreme Court of the United States

ROLAND WALLACE BURRIS, UNITED STATES SENATOR,
PETITIONER,

v.

GERALD ANTHONY JUDGE, DAVID KINDLER, AND GOVERNOR
PAT QUINN, RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether certiorari review is warranted where petitioner's claims are moot as to him, petitioner took contrary positions below or otherwise forfeited the arguments in the petition, and another pending petition provides a far better vehicle for answering the only issue in this case warranting Supreme Court review.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. The November 2, 2010 election is now past, and President Obama's original Senate term has expired. Accordingly, the claims in his petition are moot, and petitioner does not qualify for an exception to the mootness doctrine. Nor has petitioner properly preserved the claims in his petition. As to each, he took a contrary position below or otherwise forfeited the argument that he seeks to advance in this Court. Moreover, the first and third questions presented lack merit and are not worthy of Supreme Court review.

Governor Quinn agrees that the second question raises an issue warranting certiorari review, and it is the subject of the Governor's own petition (No. 10-821), now pending before this Court. This issue—whether the Seventeenth Amendment requires a special election whenever a Senate vacancy arises, even when the original Senate term expires immediately following the next general election—is of critical importance to Illinois and other States. Granting Senator Burris' petition to decide that issue, either alone or in conjunction with Governor Quinn's petition, would needlessly complicate an important case with threshold questions involving mootness, forfeiture, and the failure to preserve points below.

STATEMENT

1. Effective November 16, 2008, President-elect Barack Obama resigned his seat in the U.S. Senate, with two years and 48 days remaining on his Senate term. Pet. App. 6a. Pursuant to authority conferred on the State by the Seventeenth Amendment, § 25-8 of Illinois' Election Code authorizes the Governor to appoint a replacement Senator in the event of such a vacancy, see 10 ILCS 5/25-8 (2008), and on December 31, 2008, then-Governor Rod Blagojevich appointed petitioner to the vacant seat. Pet. App. 6a. Petitioner was sworn in as a U.S. Senator on January 15, 2009. Pet. App. 7a.

2. Shortly after petitioner's appointment, respondents Gerald Judge and David Kindler, Illinois voters (hereinafter "plaintiffs"), filed suit against respondent Governor Pat Quinn in the U.S. District Court for the Northern District of Illinois, alleging that § 25-8 violates the Seventeenth Amendment by permitting a Governor's Senate appointee to serve for an unreasonably long period of time, and by not requiring the Governor to issue a writ of special election to fill the seat. Pet. App. 7a-8a. Plaintiffs sought (1) a declaration that § 25-8 violates the Seventeenth Amendment and (2) an injunction directing petitioner to "'issue a writ for a special election to be conducted as soon as practical to fill the vacancy.'" Pet. App. 8a. Plaintiffs also moved for a preliminary injunction ordering the Governor to "'issu[e] a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010,'" as Illinois law required, "'but at the earliest practical date.'" Pet. App. 8a.

Governor Quinn moved to dismiss the complaint, and Senator Burris sought leave to file a brief *amicus curiae* in support of the Governor's motion. Pet. App. 8a. Rather than grant him leave to participate as an *amicus*, however, the district court added Senator Burris as a necessary party to plaintiffs' suit under Federal Rule of Civil Procedure 19, and treated his putative *amicus* brief as a motion to dismiss plaintiffs' complaint. Pet. App. 48a & n.2.

3. In a memorandum opinion and order filed on April 16, 2009, the district court denied plaintiffs' motion for preliminary injunction and dismissed their complaint without prejudice. Pet. App. 47a.[1] The court rejected plaintiffs' claim that the time between President Obama's Senate resignation and the next general election on November 2, 2010 was unreasonably long. Pet. App. 61a-62a. The court agreed with the Governor that *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd, 393 U.S. 405 (1969) (*per curiam*), and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), "squarely contradict plaintiffs' textual interpretation, pursuant to which they argue that Illinois *cannot* 'forgo a special election in favor of a temporary appointment.'" Pet. App. 61a (quoting *Rodriguez*, 457 U.S. at 11) (emphasis in original).

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[1] Plaintiffs have since filed an amended complaint, raising, among other claims, a new constitutional theory, first advanced in their reply brief in support of their motion for preliminary injunction, and this complaint remains pending in the district court.

Because the period between President Obama's Senate resignation and the next Congressional election in November 2010 was shorter than the 29 months upheld in *Valenti*, the court rejected plaintiffs' constitutional challenge, dismissed their complaint without prejudice, and denied their motion for preliminary injunction. Pet App. 61a-62a.

4. Plaintiffs appealed, and although the Seventh Circuit affirmed the denial of their motion for preliminary injunction (because they could not show irreparable harm, Pet. App. 44a-45a) the court ordered "two elections" for the same Senate seat on November 2, 2010. The court ordered a regular election for the new, six-year term beginning in January 2011, and a special election for the remaining weeks of President Obama's original Senate term. Pet. App. 43a-44a. The court did not resolve "how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy" but suggested that "[t]he state might propose * * * 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." Pet. App. 43a. On July 22, 2010, in response to a motion by Governor Quinn to amend the panel opinion or, alternatively, for rehearing by the full court *en banc*, the panel amended its opinion to make clear that the State may have to "disregard provisions of state law that otherwise might ordinarily apply" to certify the special election results "as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly." Pet. App. 2a-3a.

5. Meanwhile, beginning on June 23, 2010, the district court held a series of five hearings to implement the Seventh Circuit's decision. In the midst of these proceedings, and following the Seventh Circuit's July 22, 2010 ruling, the Governor issued a writ calling for a special election on November 2, 2010, "[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." Pet. App. 74a.

6. On August 2, 2010, following the completion of all five hearings, the district court entered an injunction setting out the mechanics of the special election, including the fact that the same list of candidates slated to appear for the regularly scheduled Senate election would also be used for the simultaneous, special election. Pet. App. 67a-73a. At the November 2 general election, therefore, Illinois voters cast ballots for both an interim Senator and a Senator for the full term beginning on January 3. Then-Congressman Mark Kirk won both elections, and he resigned his House seat and assumed President Obama's vacated Senate seat on November 29, 2010.[2]

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[2] See http://bioguide.congress.gov/scripts/biodisplay.pl?index=K000360.

7. Meanwhile, petitioner appealed from the district court's permanent injunction order,[3] arguing that the order resolved a nonjusticiable political question, intruded on the prerogative of the Illinois legislature, and violated petitioner's ballot-access rights. Supp. App. 10a. On September 15, 2010, before the Seventh Circuit entered judgment on his appeal, Senator Burris filed his certiorari petition pursuant to this Court's Rule 11, which permits the Court to review cases "pending in a United States court of appeals, before judgment is entered in that court, * * * upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Petitioner also filed an application (No. 10A272) in this Court seeking an order staying enforcement of the district court's August 2, 2010 injunction. Supp. App. 9a. Justice Breyer, then-Circuit Justice for the Seventh Circuit, denied that application on September 20, 2010. Supp. App. 9a.

8. On September 24, 2010, the Seventh Circuit affirmed the district court's permanent injunction order. Supp. App. 1a-22a. The court first rejected

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[3] Governor Quinn also appealed, solely to preserve his right to relief should this Court grant his certiorari petition (No. 10-821) and reverse the Seventh Circuit's June 16, 2010 decision requiring a special election in the case of every Senate vacancy. The Seventh Circuit has stayed that appeal pending this Court's disposition of the Governor's certiorari petition.

petitioner's claim that the district court's injunction implicated a nonjusticiable, political question. Although the court was required to address this issue, even if forfeited, because it challenged the court's subject matter jurisdiction, the court found it meritless under the political-question analysis set forth in *Baker v. Carr*, 369 U.S. 186 (1962). See Supp. App. 10a-14a.

Next, the court rejected petitioner's claim that the district court's injunction intruded on the province of the Illinois General Assembly. This claim was forfeited, the Seventh Circuit held, because "[i]n the district court, Senator Burris was perfectly content with [that] court's power to fashion an order dictating what candidates would participate in the November 2 special election, so long as he was included among those candidates." Supp. App. 15a. The court elaborated:

> He asked the district court to implement a signature-gathering mechanism that would allow him to earn a place on the ballot; and, when that idea failed, he encouraged the court to add him to the ballot by virtue of the fact that he was the temporary appointee. Not once in the five hearings before the injunction issued did Senator Burris argue that the district court lacked the authority to establish a slate of candidates, and his written objections to the injunction * * * do not mention this point either. This court will not overturn an injunction based on an argument not presented to the district court, and there is no good reason to make an exception in this case, where Senator Burris took a position in the lower

> court that is the opposite of the one he advances here.

Supp. App. 15a-16a (citation omitted). Even if the court were willing to overlook petitioner's forfeiture, it made clear that the claim would fail on its merits. Indeed, the court observed that there are "countless other areas" where "federal courts have the power to issue remedial orders" involving matters generally committed to the States. Supp. App. 16a.

Finally, the court rejected petitioner's ballot-access challenge. Petitioner had failed to present this issue properly in his brief on appeal, "giv[ing] no indication about which provisions of the Constitution he [was] relying on or how his exclusion ha[d] caused the violation," in contravention of the Federal Rules of Appellate Procedure, which "require[] more than a generalized assertion of error." Supp. App. 18a (internal quotation marks omitted). And this claim failed on its merits, too, for "nothing in the permanent injunction exclude[d] a particular class or group of candidates in a manner that suggests that an identifiable group of voters will be left out of the special election," and, "more importantly, the district court's order [was] narrowly tailored to address only one occasion; it will have no effect on future elections in Illinois." Supp. App. 19a.

REASONS FOR DENYING THE PETITION

I. Senator Burris' Petition Does Not Provide A Vehicle For Reaching Any Of The Questions Presented.

There are insurmountable obstacles to this Court's review of each question presented in the petition. Not only did petitioner file his petition under this Court's Rule 11, which requires an extraordinary "showing that the case is of * * * imperative public importance," but this case is now moot as to him and, unlike the Governor, petitioner does not qualify for a mootness exception. Even if petitioner's claims were not moot, moreover, petitioner failed to preserve them below, at times taking positions in square conflict with arguments he seeks to advance in this Court.

A. This Case Is Moot, And Petitioner Does Not Qualify For The "Capable Of Repetition, Yet Evading Review" Exception To Mootness.

On November 2, 2010, Illinois voters elected then-Congressman Mark Kirk to serve as interim Senator for the remainder of President Obama's vacated Senate term and as Senator for the subsequent, six-year term. On November 29, 2010, Senator Kirk resigned his House seat and assumed President Obama's vacated Senate seat. See *supra* p. 5. Senator Kirk began as a full-term Senator on January 3, 2011. Because both the 2010 general election and President Obama's vacated Senate term are over, petitioner no longer has a stake in the outcome of this case. Certiorari should be denied on this ground alone.

1. "The Constitution's case-or-controversy limitation on federal judicial authority, Art III, § 2, underpins * * * [this Court's] mootness jurisprudence." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000). "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them.'" *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990) (quoting *North Carolina v. Rice*, 404 U.S. 244, 246 (1971)). And the "'case-or-controversy requirement subsists through all stages of federal judicial proceedings. * * * [I]t is not enough that a dispute was very much alive when suit was filed.'" *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 461-462 (2007) (quoting *Lewis*, 494 U.S. at 477) (internal alterations in original); accord *Davis v. FEC*, 554 U.S. 724, 732-733 (2008) ("'To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)). "The parties must continue to have a 'personal stake in the outcome' of the lawsuit" for the suit to remain justiciable. *Lewis*, 494 U.S. at 478 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)). Petitioner's stake in this case expired when President Obama's Senate term expired. Petitioner cannot, and does not, ask this Court to change his status in any way.

2. Nor can petitioner satisfy the "'exception to mootness for disputes capable of repetition, yet evading review.'" *Davis*, 554 U.S. at 735 (quoting *Wisc. Right to Life*, 551 U.S. at 462). This exception is satisfied only

"'where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* The "second prong" of this "exception requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Wisc. Right to Life*, 551 U.S. at 463 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*)). And unlike the Governor, petitioner cannot satisfy this second element.

In the election context, a complaining party may meet the second element by asserting that he or she plans to participate in future elections and thus will again be subject to the challenged law. *See Davis*, 554 U.S. at 736 (challenge to self-financing provisions of federal campaign finance law not mooted by election's conclusion because plaintiff "made a public statement expressing his intent" "to self-finance another bid for a House seat"); *Wisc. Right to Life*, 551 U.S. at 463 (same regarding challenge to advertising restrictions in federal campaign finance law where plaintiff "credibly claimed that it planned on running 'materially similar' * * * broadcast ads" in future election); *Chandler v. Miller*, 520 U.S. 305, 313 n.2 (1997) (election case not moot because plaintiff "represented, as an officer of this Court, that he plans to run again"); *Norman v. Reed*, 502 U.S. 279, 287-288 (1992) (same because "[t]here would be every reason to expect the same parties to generate a similar, future controversy"); *Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) (same because "[r]espondent has run for office

before and may do so again"); see also *Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 187-188 (1979) (in case challenging certain actions by state board of elections, holding that case was mooted by election's completion because there was "no evidence creating a reasonable expectation that the [board of elections] will repeat its purportedly unauthorized actions in subsequent elections").

Further, the Court has looked past the same-complaining-party requirement where a plaintiff sought class-wide relief. Compare *Brockington v. Rhodes*, 396 U.S. 41, 43 (1969) (*per curiam*) (election's completion mooted ballot-access challenge because plaintiff did not allege "he intended to run for office in any future election" and "did not attempt to maintain a class action on behalf of himself and other putative independent candidates"), with *Richardson v. Ramirez*, 418 U.S. 24, 39-40 (1974) (challenge to felon disenfranchisement law not mooted by clerk's decision to register named plaintiffs because "remaining members of the class" had not obtained relief); *Rosario v. Rockefeller*, 410 U.S. 752, 755-756 & nn.4-5 (1973) (class-action challenge to voting eligibility requirement not mooted by named plaintiff becoming eligible to vote); and *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972) (same).

But petitioner does not purport to represent a class of would-be future Senate appointees, and he does not (and cannot) claim that any of the questions the petition poses are reasonably likely to affects his interests in a future case. The first and third questions—which challenge the district court's decision limiting the

candidates on the special election ballot to those running for the six-year term—are not "capable of repetition" at all. As the Seventh Circuit recognized, the district court's slating of the special election candidates was necessary because, by the time the appellate court issued its opinions ordering the special election (on June 16, 2010) and denying rehearing (on July 22, 2010), the November 2, 2010 election was "fast approaching," and state election authorities had little time to conduct a "manageable election." Supp. App. 2a; see also Supp. App. 20a (describing district court's slating order as "the most democratic and constitutionally sound approach" available "to supply a remedy in an expeditious fashion"). Under these circumstances, the district court had to weigh the competing concerns of the parties, potential candidates, and the public in crafting a prompt, equitable remedy that gave effect to the Seventh Circuit's unprecedented new construction of the Seventeenth Amendment. See Supp. App. 21a-22a; see also *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944) (describing nature of court's equitable jurisdiction). As the appellate court noted, the district court entered a "narrowly tailored" order to address this "one occasion," and that order "will have no effect on future elections" and thus presents no recurring issue. Supp. App. 19a.

Finally, as for petitioner's second question, which seeks review of the Seventh Circuit's holding that a special election is necessary even when the Senate term expires naturally following the next general election, petitioner has not asserted any reasonable expectation that "the same controversy will recur" in a case

involving him as "the same complaining party." Nor could petitioner credibly forward such a claim. There is no likelihood (much less a reasonable expectation) that petitioner will again be appointed to serve out the final third of a Senate vacancy, and thus no likelihood that petitioner will face the prospect of a special election to fill that vacancy.

In short, all of petitioner's claims are moot, and he cannot qualify for a mootness exception. The petition should be denied on this ground alone.

B. Petitioner Has Not Preserved, And Has Even Disavowed, The Claims In His Certiorari Petition.

Petitioners' claims are not only moot, but they suffer from other defects as well, making this petition the wrong vehicle for reaching any of the three questions presented. Following the Seventh Circuit's June 16, 2010 decision, petitioner informed the district court that he had no objection to the court of appeals' reading of the Seventeenth Amendment, so long as the district court afforded petitioner a chance to run in the special Senate election. This position is in square conflict with points now raised in the petition.

1. The second question presented challenges the Seventh Circuit's ruling that States must hold a special election for every Senate vacancy, but petitioner's counsel took the contrary review below, where he represented that he did not "oppose the result from the

7th Circuit." 7/26/10 Tr. at 12-13.[4] Indeed, even though the district court encouraged the Governor and petitioner, specifically, to seek reconsideration or clarification from the Seventh Circuit following that court's June 16, 2010 decision, see 6/23/10 Tr. at 12, 17, only Governor Quinn did so. Nor did petitioner file a certiorari petition seeking review of that decision, as the Governor has, and when petitioner appealed from the

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[4] When petitioner first moved to file a brief *amicus curiae* in the district court, see *supra* p. 3, he did so to advance a theory that the Governor had not—that this Court's decision in *Foster v. Love*, 522 U.S. 67 (1997), was "dispositive" of plaintiffs' request for a prompt special election. Mot. of Sen. Burris to Appear as *Amicus Curiae* at 2. *Foster* relied upon federal law setting Congressional election dates to void a Louisiana statute that enabled voters to elect members of Congress in "open primaries" held prior to those federally scheduled dates. 522 U.S. at 69-73. Senator Burris' claim was that, following *Foster*, "Governor Quinn cannot order a special election before" November 2, 2010, the next federally scheduled date for the election of U.S. Senators. Br. *Amicus Curiae* of Sen. Burris at 3. While the district court properly rejected this claim, Pet. App. 49a-52a, and the Seventh Circuit never reached it, Pet. App. 44a, it is noteworthy that petitioner's reliance on *Foster* is not inconsistent with the Seventh Circuit's decision requiring two Senate elections on November 2, 2010. See, *e.g.*, Pet. of Sen. Burris for Writ of Mandamus (7th Cir.), at 2 ("Senator Burris submitted an amicus brief suggesting that the special election could only be held on November 2, 2010, Federal election day.").

district court's August 2, 2010 injunction—the appeal that forms the basis for this certiorari petition—he again failed to raise any objection to the Seventh Circuit's June 16, 2010 decision.

Rather, as petitioner has repeatedly conceded, his interest in the case following the Seventh Circuit's decision arose only when the district court began discussions about which candidates to include on the ballot for the special Senate election. Petitioner's counsel indicated that he did not "think that we really had a dog in this fight" until the court began "talking about fashioning a remedy that provides for certain candidates to be on the ballot." 6/30/10 Tr. at 22. And although he did not "oppose the result from the [Seventh] Circuit," he had "some concerns about the details of [the] injunction order" that the parties were discussing—namely, the proposed use of the candidate list for the full, six-year term on the special election ballot, a list that excluded petitioner and others who had not filed to run as candidates for the full term. 7/26/10 Tr. at 12-13; see also Appellant's Br. of Sen. Burris (7th Cir., No. 10-2836) at 13 ("When it became clear that the injunction might block Senator Burris, the incumbent, from running to finish out the term, Senator Burris asked the court for leave to brief his views on the constitutionality of the proposed injunction."); Pet. of Sen. Burris for Writ of Mandamus (7th Cir.), at 10 n.21 (same). Consistent with petitioner's limited interest in the case, moreover, his counsel has asked the district court to excuse him from future proceedings in that court on plaintiffs' remaining

challenges to Illinois' Senator-replacement law. See 7/29/10 Tr. at 40.

Thus, while petitioner contends that he endorsed the Governor's argument below when, during the first of the district court's five hearings on remand, petitioner's counsel "'agree[d]'" with and "'strongly support[ed] the position of the Attorney General,'" Supp. Pet. 6 (quoting 6/23/10 Tr. at 12), this ignores the later representation by petitioner's counsel that he did not oppose the Seventh Circuit's decision, and his concession that he was concerned solely with the list of candidates for the special election. Accordingly, petitioner may not proceed in this Court on the second question presented. See *U.S. v. Galletti*, 541 U.S. 114, 120 n.2 (2004) (party forfeited argument by failing to raise it in court below and instead taking contrary position).

2. Petitioner's position below also complicates, if not forecloses, his position on questions one and three. As the Seventh Circuit held, petitioner did not oppose the notion that the district court would decide who would appear on the ballot. He first encouraged the court to implement "some type of abbreviated petition drive" for the special Senate election. 7/26/10 Tr. at 18; see Supp. App. 7a. Next, he supported the idea of the court's adding his name, alone, to the list of candidates from the full-term election on the special election ballot. Supp. App. 7a; 7/26/10 Tr. at 23, 25 (petitioner's counsel: "I don't think anybody opposes that" proposal, and "we would find that to be agreeable"); 7/29/10 at 14 ("There is no more confusion by adding Senator Burris' name to one of those elections for the special term than

we would have by virtue of having two elections."). These arguments are impossible to square with petitioner's current claim that the district court had no authority to decide how to select names for the ballot (the petition's first question presented), as the Seventh Circuit held. See Supp. App. 15a-16a. And petitioner's request to add his name alone to the special election slate cannot be reconciled with his current ballot-access claim (the petition's third question presented), which seeks broad access for would-be candidates.

* * *

At best, even if petitioner could somehow overcome mootness, his legal positions in the district court following the Seventh Circuit's June 16, 2010 decision would complicate proceedings in this Court dramatically. Plaintiffs are sure to argue that petitioner has forfeited his current claims, as plaintiffs have already done in the Seventh Circuit and in opposition to petitioner's emergency application in this Court. See Plaintiffs-Appellees' Br. (7th Cir., No. 10-2836), at 4-5 ("In contrast" to "the Governor," "[a]t no time in the ensuing and extensive [post-remand] district court proceedings, which included five hearings between June 16 and July 29, did [Senator] Burris ever object to the district court's exercising its power to determine the mechanics of the election."); *id.* at 7-10; Plaintiffs' Br. in Opposition to Sen. Burris' Emergency Application (U.S., No. 10A272) at 4-11. Accordingly, this petition is a poor vehicle for reaching any of the questions presented.

II. Questions One And Three Are Not Otherwise Worthy Of Certiorari Review.

Although this petition does not offer a vehicle for resolving the second question presented, the Governor agrees that this question warrants Supreme Court review, and the Governor's certiorari petition, devoted entirely to this issue, is currently pending. Even absent mootness and forfeiture, however, the petition's first and third questions, which address the implementation of the special election in the unique circumstances of this case, see Pet. i, 12-16, 20-24, lack merit and are not worthy of certiorari review.

1. To start, petitioner identifies no split in authority as to either question, and the fact-dependent nature of these claims make inter-court conflicts impossible. In both the first and third questions, petitioner challenges the district court's manner of ordering the special election under a singular set of circumstances. See *supra* pp. 12-13. Because the injunction that petitioner challenges is limited in scope to the particular, unusual facts of this now-past special election, certiorari is unwarranted.

2.a. Petitioner's legal arguments in support of questions one and three also lack merit. The former asserts that the Seventeenth Amendment precludes a federal court from selecting candidates for a special Senate election. Pet. 12-16. And, to be sure, the Amendment authorizes state legislatures to direct the manner of holding these elections. But this ignores the more fundamental point that, once a violation of a constitutional right has been established, the court may

remedy that violation. The "jurisdictional grant" in 28 U.S.C. § 1331 "provides not only the authority to decide whether a cause of action is stated by a plaintiff's claim that he has been injured by a violation of the Constitution * * * but also the authority to choose among available judicial remedies in order to vindicate constitutional rights." *Bush v. Lucas*, 462 U.S. 367, 374 (1983) (internal citations omitted). Indeed, "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution," and federal courts have the authority "to adjust their remedies so as to grant the necessary relief" to remedy a constitutional violation. *Bell v. Hood*, 327 U.S. 678, 684 (1946); see *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984). And as the Seventh Circuit recognized, the court's authority to remedy constitutional violations extends to matters traditionally within a State's control, such as taxation and the creation of school districts. See Supp. App. 13a-14a, 16a-17a (collecting cases). In short, the district court had the authority to remedy what the Seventh Circuit concluded was a violation of plaintiffs' Seventeenth Amendment rights.

Nor did the district court exceed this authority. "A remedy is justifiable * * * insofar as it advances the ultimate objective of alleviating the initial constitutional violation." *Freeman v. Pitts*, 503 U.S. 467, 489 (1992). The district court fashioned its relief to alleviate the purported Seventeenth Amendment violation that the Seventh Circuit identified in failing to hold a separate, special election for the remaining weeks of President Obama's Senate term.

Petitioner's reliance on *Newberry v. U.S.*, 256 U.S. 232 (1921), see Pet. 13-14, is misplaced. The plurality in that case held that Congress has no "indefinite, undefined power over elections for Senators and Representatives," 256 U.S. at 249, and no authority "to control party primaries or conventions for designating candidates," *id.* at 258. *Newberry* is silent, however, on the issue presented here: whether the district court's authority to remedy a constitutional violation includes fashioning the means to conduct an election.

b. The petition's third question also lacks merit. Here, petitioner asserts that his constitutional rights were violated because the district court's injunction left him and other would-be candidates off the special election ballot. "'[A]s a practical matter,'" however, "'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)). Indeed, if a State were required to put everyone on the ballot who so desired, "then ballots would be the size of telephone books." *Protect Marriage Ill. v. Orr*, 463 F.3d 604, 607-608 (7th Cir. 2006).

To determine whether a ballot-access restriction violates the First or Fourteenth Amendment, the court weighs the severity of the restriction on the right to vote against the interests served. See *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). The focus is on the interests of the voters. See *Anderson*, 460 U.S. at 806. Here, the district court, with very little time remaining before finalizing the ballot, reasonably limited the list of

special-election candidates to those who had already satisfied the public-support and other eligibility requirements to run for the full, six-year Senate term. Pet. App. 70a-71a.

Among other benefits, it was reasonable for the district court to conclude that using the same list for both elections would minimize voter confusion. See *Am. Party of Tex. v. White*, 415 U.S. 767, 782 & n.14 (1974) (limiting candidates to those demonstrating sufficient public support serves "compelling" state interest in minimizing voter confusion). And the limited time remaining before the general election made other options—additional primary elections, party conventions, or petition drives—impractical, as the Seventh Circuit held. See Supp. App. 20a. Under the circumstances, the district court's practical solution to a unique and challenging set of circumstances was not an abuse of the court's equitable discretion. See *Winter v. Natural Res. Def. Council, Inc.*, 129 S. Ct. 365, 381 (2008).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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