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**In The
Supreme Court of the United States**

ROLAND WALLACE BURRIS, U.S. SENATOR,

Petitioner,

v.

GERALD ANTHONY JUDGE, et al.,

Respondents.

**On Petition For A Prejudgment
Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit**

SUPPLEMENTAL BRIEF

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I. Introduction

The United States Court of Appeals for the Seventh Circuit has just issued the third in a trilogy of decisions construing the Seventeenth Amendment to require Illinois to hold a special election for President Barack Obama's Senate seat and empowering the district court to dictate the mechanics of that election.¹ Senator Roland W. Burris, who former Illinois Governor Rod Blagojevich appointed to fill the seat, has petitioned for a writ of certiorari before judgment to review a permanent injunction issued by the United States District Court for the Northern District of Illinois that prevents Senator Burris from running in the election. Senator Burris now supplements his petition because the Seventh Circuit's latest decision affirmed the district court's injunction restricting the special election to those candidates already qualified to run in the general election scheduled the same day for the next full Senate term.

It is ironic that the Seventh Circuit justifies one violation of the Seventeenth Amendment to rectify another. The framers of the Amendment clearly contemplated that any Senate vacancy filled by election would be "as the legislature may direct" – the elected body of the citizenry – rather than a single federal judge. And, as to the principal issue here,

¹ *Judge v. Quinn*, 612 F.3d 537 (7th Cir. 2010) ("*Judge I*"); *Judge v. Quinn*, 2010 WL 2853645 (7th Cir. July 22, 2010) (unpublished order) ("*Judge II*"); *Judge v. Burris, et. al.*, No. 10-2836 (7th Cir. September 24, 2010) ("*Judge III*").

blocking access to the ballot, the district court did not need to usurp the role of the Illinois General Assembly by defining the candidate pool as Illinois law already provides an alternative means that no party claimed is unconstitutional and, indeed, satisfied the plaintiffs who were pursuing the injunction.²

II. Impact of the Seventh Circuit Decision on the Petition

The district court's permanent injunction order and the Seventh Circuit's trilogy of *Judge* decisions are built upon a false dilemma – that judicial intervention is necessary to avert a constitutional crisis created by inaction on the part of the Illinois General Assembly, a body never a party to this litigation. Both courts acknowledge that the Seventeenth Amendment to the U.S. Constitution empowers the General Assembly to direct the mechanics of any election to fill a vacancy in the U.S. Senate. Yet, their decisions presume inaction where none has occurred to justify court-ordered intervention into the election process.

² Plaintiffs' proposed permanent injunction order cited to an Illinois statute prescribing the candidate selection process for vacancy elections: "The Court also finds that selecting nominees by political parties to be candidates for the U.S. Senate at the special election to be held on November 2, 2010 pursuant to the vacancy provisions of 10 ILCS §5/7-61 . . . is the most appropriate manner for the selection of the nominees[.]"

Intervention was unnecessary under this Court's prior rulings in *Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969) and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10-11, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982). In *Valenti*, this Court sustained the authority of the New York Governor to fill a Senate vacancy for over 29 months by appointment, permitting the appointee to serve the remainder of the term without a special election. In *Rodriguez*, the Court noted "that the Seventeenth Amendment permits a State, if it chooses, to forgo a special election in favor of a temporary appointment to the United States Senate[.]" *Rodriguez*, 457 U.S. at 11.³

In any event, the Seventeenth Amendment mandates that state legislatures, not the federal judiciary, prescribe the mechanics of any vacancy election: "the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election *as the legislature may direct*." (Emphasis added.) Despite acknowledging this power of the General Assembly in *Judge I*, 612 F.3d at 554-55, the Seventh Circuit endorsed the district court's usurpation of that power in *Judge III*. The appellate court explained that

³ Even the Seventh Circuit itself in *Lynch v. Illinois State Board of Elections* construed *Valenti* and *Rodriguez* to "sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term." 682 F.2d 93, 96 (7th Cir. 1982).

“[o]nce a constitutional violation has been proven, federal courts have the power to issue remedial orders tailored to the scope of the constitutional violation.” *Judge III*, slip op. at 12. Neither the district court nor appellate court, however, has identified any constitutional violation by the General Assembly justifying the district court’s interference with its Seventeenth Amendment duty to direct the special election. Instead, the Seventh Circuit presumed that Governor Quinn’s failure to issue a writ of election warranted the district court’s interference in the electoral process through the injunction even after the Governor issued a writ.⁴

As the events in Illinois transpired, the State of West Virginia faced a vacancy in its Senate delegation when Senator Robert Byrd died on June 28, 2010. *Within three weeks*, the West Virginia Legislature defined election procedures for a special election to coincide with Federal Election Day on November 2nd to fill the vacancy. The Special Election Bill establishes a special primary for political parties and

⁴ Under Fed.R.Civ.P. 65(d)(2), an injunction may only bind “(A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).” The district court implemented its order by serving Illinois State Board of Elections and the Illinois Secretary of State pursuant to this rule without identifying which subsection applied. Neither the Board nor Secretary of State, of course, played any role in preventing the Governor from issuing a writ of election.

allows independent candidates to run that file a petition with sufficient signatures and pay a filing fee. Unlike the district court's process here, the West Virginia Legislature thus opened the special election for the Senate vacancy to candidates not already prequalified.

Similarly, the Illinois General Assembly must first be given the opportunity to exercise its own judgment in fulfilling its constitutional responsibilities. The federal courts may only intervene after the legislature has acted or failed to act in a manner that is not consistent with the Constitution. Until then, the Constitution does not permit the preemptive judicial interference embodied in the district court's permanent injunction order and sanctioned by the appeals court.

III. Senator Burriss Did Not Waive His Argument

The Seventh Circuit contends that Senator Burriss waived his principal argument that the district court usurped the constitutional role of the Illinois General Assembly when it decided how candidates should be selected for the special election. *Judge III*, slip op. at 11. Traditionally, this Court will grant certiorari only when a question presented was pressed by the petitioner or passed upon by the courts below. *United States v. Williams*, 504 U.S. 36, 41, 112 S.Ct. 1735, 1738-1739, 118 L.Ed.2d 352 (1992). At the earliest practical time, Senator Burriss asserted his

claim, and the district court rejected it, thus satisfying the “press or pass” requirement.

In *Judge III*, the Seventh Circuit maintained that Senator Burris only questioned the district court’s power to dictate the candidates in the special election so long as he was not one of them. *Judge III*, slip op. at 11-12. This is simply not true. Immediately after remand, Senator Burris joined with Governor Quinn to question the district court’s power to define the candidates for the vacancy election. In the first post-remand hearing, after plaintiffs had moved for a permanent injunction, the Governor’s counsel pointed out that “we can’t just override the Illinois Election Code by fiat. We can’t do that. We can’t just decide who goes on the election.” Transcript of Proceedings of June 23, 2010 at p. 10. When he spoke, Senator Burris’ counsel said, “I agree, your Honor, and on behalf of Senator Burris, we strongly support the position of the Attorney General. We think it’s the appropriate position.” *Id.* at p. 12. Governor Quinn’s counsel then expanded on his argument, an argument that Senator Burris endorsed then and asserts now:

The Constitution itself says that the conduct of elections is regulated by the states . . . and maybe people in the State of Illinois want to vote for one person for the 60-day term and a different person for the six-year term. So we don’t want to have a sham election where it’s the same people. Who decided that by fiat,

that it should be exactly the same people?
(Emphasis added.)

Id. at 25-26.

This, of course, is precisely the argument that Senator Burris advances in this petition for certiorari. For Senator Burris to continue asserting his position would have been fruitless because the Seventh Circuit soon issued *Judge II*, effectively ordering the district court to define the mechanics of the special election. *Judge II*, 2010 WL 2853645, at *1.

Afterwards, as the district court defined the mechanics of the special election in the two hearings that followed, Senator Burris did not simply promote his own interests by advocating that adding him to the ballot would satisfy the Constitution. To the contrary, at both hearings where the issue was discussed after *Judge II*, his counsel insisted that all interested candidates must be entitled to seek nomination. Indeed, until the final hearing, the district court was leaning toward a resolution that plaintiffs had earlier proposed based upon 10 ILCS §5/7-61 of the Illinois Election Code.

Four days after expressing this preference, the district court issued its permanent injunction, which ignored the Illinois statute by restricting the candidates for the vacancy election to those already qualified for the general election. Under the circumstances, Senator Burris did all that he could do to preserve his position on appeal, both as to the district court's usurpation of the legislature's constitutional

power to define the special election and the unconstitutional denial of ballot access to all candidates besides those already qualified for the general election.

More to the point, as the hearing excerpts establish, Senator Burris pressed these issues before the district court and the court passed on them when it issued an injunction that ignored the Illinois Election Code to block Senator Burris and other interested candidates from participating in the special election for the seat that the Senator now holds.

IV. Conclusion

For the foregoing reasons and those in Senator Burris' original petition, this Court should grant the petition for writ of certiorari.

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III. Senator Burris Did Not Waive His Argument

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IV. Conclusion

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