No. -___

IN THE
Supreme Court of the United States

ROLAND WALLACE BURRIS, U.S. SENATOR
Petitioner,

v.

GERALD ANTHONY JUDGE, ET AL.
Respondent.

EMERGENCY APPLICATION FOR A STAY OF ENFORCEMENT OF THE JUDGEMENT 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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QUESTIONS PRESENTED

1. Whether the Seventeenth Amendment's express delegation of the power to "direct" an election to fill a vacant seat in the United States Senate to state legislatures precludes a federal judge from selecting the candidates that shall appear on the ballot.
2. Whether categorically excluding any would-be candidate from the ballot in a newly announced special election to fill a vacant seat in the United States Senate unless that individual had already registered and been certified by the Illinois State Board of Elections as a candidate for the regular November election is consistent with the First and Fourteenth Amendments.

PARTIES TO THE PROCEEDING

The petitioner is the Honorable Roland W. Burris, United States Senator, the defendant in the courts below. The respondents are Gerald Anthony Judge and David Kindler, the plaintiffs in the courts below, and Patrick J. Quinn, Governor of the State of Illinois and defendant in the courts below.

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TO THE HONORABLE STEPHEN BREYER, ASSOCIATE JUSTICE AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

I. INTRODUCTION

Petitioner Roland Wallace Burris, United States Senator, respectfully submits this 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. A stay is appropriate under Supreme Court Rules 22 and 23, and 28 U.S.C. §§ 1651(a) and 2101(f).

The judgment below divested the Illinois General Assembly of the power the Seventeenth Amendment expressly grants to state legislatures to direct the mechanics of an election to fill a vacant seat in the United States Senate, including the right to define the procedures by which candidates are to be selected to appear on the ballot. Moreover, the permanent injunction order issued by the district court conflicts with the decisions of this Court, as well as the First and Fourteenth Amendments, because it wholly eliminates the opportunity for any would-be candidate to run only to fill the vacant Senate seat (rather than for both the vacant

seat and the subsequent six-year term), and deprives Illinois citizens of the rights to Due Process and Equal Protection, and to unfettered access to the ballot.

Election day is November 2nd—less than sixty days away. Counsel for Petitioner is unable to locate a single other instance in the history of the nation where a federal judge has completely sidestepped a state legislature and selected the candidates to appear in a congressional election. This should not be the first instance, certainly not without the Court's review.

A stay is the only way to avert the imminent harm that Senator Burris and the citizens of Illinois will suffer as a direct consequence of the judgment below. The 7th Circuit denied Senator Burris' Stay Request and Writ of Mandamus on September 8, 2010. See exhibits A and B respectively. An Appeal is pending before the 7th Circuit. Senator Burris will file a Petition for a Writ of Certiorari to the United States District Court for the Northern District of Illinois within the next 72 hours. Alternatively, the Court could treat this application as a petition for a writ of certiorari. *See Bush v. Gore*, 531 U.S. 98, 100 (2000) (noting that the Court "granted the [emergency] application [for a stay], treated the application as a petition for a writ of certiorari, and granted certiorari").

OPINION BELOW

The opinion issued by the United States District Court for the Northern District of Illinois (Judge Grady, presiding) is unreported and is reprinted in the Appendix at C.

JURISDICTION

Rules 22 and 23 of this Court provide the authority to stay enforcement of the judgment below. The district court entered its opinion on August 2, 2010. Senator Burris filed an appeal, a petition for a writ of mandamus, and an application for a stay in the United States Court of Appeals for the Seventh Circuit. That court has denied the Stay Request and the Writ of Mandamus and has not heard arguments on the appeal. This Court has jurisdiction under 28 U. S. C. § 2101(e).

CONSTITUTIONAL PROVISIONS INVOLVED

The Elections Clause of the United States Constitution provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.

U.S. Const., Article I, §4, Clause 1.

The First Amendment to the United States Constitution provides in relevant part:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble.

U.S. Const. Amend. I. The First Amendment is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1925).

The Seventeenth Amendment to the United States Constitution provides in relevant part:

> 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: Provided, That 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.

U.S. Const. Amend. XVII.

STATEMENT

Absent swift intervention Illinois citizens who cast a ballot in the November 2 special election to complete the last two months of President Barack Obama's vacated Senate term will earn the dubious distinction of becoming the first voters in the history of our federalist republic to elect a United States Senator from a pool of candidates selected by a member of the federal judiciary.

The Seventeenth Amendment expressly delegates to state legislatures the obligation to "direct" an election to fill a vacant seat in the United States Senate. Nonetheless, the judgment below effectively holds that federal courts are obligated under the Seventeenth Amendment to act in the stead of a state legislature if, by the calculation of the presiding judge, insufficient time remains for the legislature to act before the date of the special election. Such action fundamentally alters the allocation of power between federal and state governments.

The Court should grant a stay and then decide the question of whether the Seventeenth Amendment transfers the power to "direct" elections from state legislatures to the federal courts in the event of a perceived shortage of time. The issue is one that lends itself to repetition, is capable of evading review, and is of pressing public importance

A. *Factual and Procedural History*

The week after winning the Presidential election, then-Senator Barrack Obama informed then-Illinois Governor Rod Blagojevich that he would resign his position as the junior Senator from Illinois effective November 16, 2008. Governor Blagojevich promptly appointed Roland W. Burris to fill the vacancy. On January

15, 2009, Roland Burris became a member of the United States Senate. Senator Burris continues to serve the people of Illinois, and is prepared to do so for the remainder of the Obama term.

The Illinois legislature removed Blagojevich as Governor on January 29, 2009. Lt. Governor Pat Quinn assumed the Governorship that same day. Shortly thereafter, Gerald Judge and David Kindler, two Illinois registered voters, sued Governor Quinn in the United States District Court for the Northern District of Illinois. Judge and Kindler alleged that the Illinois Election Code (particularly, 10 ILCS 5/25-8) violates the Seventeenth Amendment by obviating the need for a special election where, as here, the Senate term expires at the same time the current Congress recesses. 10 ILCS 5/25-8 reads:

> When a vacancy shall occur in the office of United States Senator from this state, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives in Congress, at which time such vacancy shall be filled by election, and the senator so elected shall take office as soon thereafter as he shall receive his certificate of election.

Judge and Kindler urged the district court to grant a temporary injunction requiring Governor Quinn to "issue a writ for a special election to be conducted as soon as practical to fill the vacancy." The Governor filed a motion to dismiss, asserting that neither his refusal to issue a writ of election nor the Illinois statute requiring a single election to be held on November 2, 2010, violates the Seventeenth Amendment. Senator Burris submitted an amicus brief suggesting that the special election could only be held on November 2, 2010, Federal election day. Rather than

consider Senator Burris a friend of the court, the district court ordered plaintiffs to amend their complaint naming Senator Burris as a defendant in the litigation.

On April 16, 2009, the district court "conclude[d] that § 25/8 does not violate plaintiffs' right under the Seventeenth Amendment to vote in the direct election of their Senator," and refused to grant a temporary injunction, ruling that the plaintiff's First Amended complaint failed to state a constitutional violation. See Appendix C. The district court granted the motion to dismiss without prejudice and invited the plaintiffs to amend the complaint by May 1, 2009.

Judge and Kinder filed an amended complaint. The plaintiffs also appealed the denial of the preliminary injunction to the United States Court of Appeals for the Seventh Circuit. On June 16, 2010, the court affirmed the district court's denial of the preliminary injunction, but issued a detailed advisory opinion on the underlying constitutional question. See Appendix D.

The Appeals Court interpreted the plaintiffs' "argument that Governor Quinn must issue a writ calling for an election to fill the senate vacancy on a date as soon as possible [to] encompass the claim that the governor must issue a writ of election." The court noted that Illinois disagrees that a special election must occur:

> In an opinion letter to leaders in the Illinois legislature, Illinois Attorney General Lisa Madigan wrote: "Under the current language of [10 ILCS 5/25-8], U.S. Senator Burris's temporary appointment will conclude in January 2011 following an election in November 2010, the next election of representatives in Congress." In addition, the Illinois State Board of Elections' current list of offices that will appear on the November 2, 2010, ballot in Illinois does not specify that there will be an election on that date to fill the balance of President Obama's senate term.

The appellate court declared that "[t]he governor has a duty to issue a writ of election to fill the Obama vacancy." It explained:

> the second paragraph of the Seventeenth Amendment establishes a rule for all circumstances: it imposes a duty on state executives to make sure that an election fills each vacancy; it obliges state legislatures to promulgate rules for vacancy elections; and it allows for temporary appointments until an election occurs. This demarcation of constitutional powers and duties between state executives and state legislatures advances the Seventeenth Amendment's primary objective of guaranteeing that senators are selected by the people of the states in popular elections.

The Seventh Circuit clarified that a single election to decide who shall serve as the junior Senator from Illinois in the 112th Congress would not suffice, explaining that the Governor must issue a writ in order to "announce to voters that there will be, in effect, two elections on that day-one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress."

The Court of Appeals next addressed the question of how candidates should be chosen for the special election. Though the court technically refused to answer the question ("No one has raised, and we therefore do not address, the question how the state is to decide whose names should be on the November 2 ballot for the Obama vacancy"), it suggested: "The state might propose a solution acceptable to all parties (*e.g.,* using the candidates who have already qualified for the election for the 112th Congress), so long as that solution complies with Illinois and federal law." The court then noted that the district court had the power to direct the state to ensure that a special election complied with the Constitution:

> 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. . . 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.

At no point did the Seventh Circuit declare that the federal court has the right to "direct" the mechanics of the vacancy election. Instead, the appeals court clearly felt that that power is vested in the Illinois General Assembly under the last sentence of the Seventeenth Amendment, which states "[t]hat 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 supplied).

Ultimately, the appeals court decided not to overturn the district court's refusal to issue a preliminary injunction, finding: "There is still time for the governor to issue a writ of election that will call for an election on the date established by Illinois law and that will make it clear to the voters that they are selecting a replacement for Senator Obama. The district court can easily reach and resolve the merits of this request before any of the harm that the plaintiffs forecast comes to pass."

On June 21, 2010, Judge and Kindler filed a motion for a permanent injunction "mandating the defendant Governor to issue a writ setting date for an election to fill the vacancy in the United States Senate created by the resignation of Barrack Obama on or about November 16, 2008 which seat is temporarily filled by Senator Burris."

Governor Quinn issued a writ of election after the decision in the Seventh Circuit but before the district court issued a permanent injunction. Both the special election and the regular election are set to take place on November 2, 2010. See Appendix E. The absentee ballots for both elections will be printed and mailed in advance of the election date.

On August 2, 2010, the United States District Court for the Northern District of Illinois (Judge Grady, presiding) issued a permanent injunction even though Governor Quinn had already ordered a special election through his writ. See Appendix F. Instead, the district court used the injunction, one not requested by the plaintiffs, to define the mechanics of the special election. Despite the fact that the Seventeenth Amendment grants only the state legislature the power to "direct" an election to fill a vacant Senate seat, the district court found that it could unilaterally "formulate, as necessary, mechanisms for the conduct of a special election . . ." After refusing Senator Burris's request for full briefing on the issues, the district court proceeded to limit the field of candidates for the special election to those candidates who already had been added to the ballot for the regular election and to define other aspects of the special election.

To be clear, the Governor of Illinois had not yet issued a writ of election by the time the candidate field for the regular election had been cemented, and, in fact, the Governor challenged the plaintiffs' position that an election was necessary. Thus, no would-be candidate had notice that failure to register as a

candidate for the regular election would forfeit the right to run in the entirely separate election to fill the Senate seat for the remainder of the Obama term.

Senator Burris did not register as a candidate for the regular election. Thus, the district court order prohibits Burris from running in the special election and deprives his supporters from voting for him to finish the remainder of the term in service to the people of Illinois as their junior Senator.

Senator Burris filed written objections to the district court order. On August 4, 2010, Senator Burris filed a timely appeal, and on September 3, 2010 filed a petition for a writ of mandamus and a request for a stay in the 7th Circuit. **On September 8, 2010, the 7th Circuit denied Senator Burris' Stay Request and Writ of Mandamus. This Petition ensues.**

REASONS FOR GRANTING THE STAY

Imminent harm will result to the citizens of Illinois, as well as to Senator Burris and any other would-be candidate for the special election, unless a stay is granted. *California v. American Stores Co.*, 492 U.S. 1301, 1304-07 (1989) (O'Connor, J., in chambers). A stay is appropriate here because the district court issued a novel interpretation of the Seventeenth Amendment that appears to facially conflict with the text of that Amendment. Moreover, the issue has a "reasonable probability" of garnering four votes to grant a petition for a writ of certiorari, *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers), and a "fair prospect" of obtaining five votes to reverse the judgment below. *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). A single Justice may grant a stay after "balanc[ing] the equities to determine whether the

injury asserted by the applicant outweighs the harm to other parties or to the public." Lucas, 486 U.S. at 1304. A stay should be granted here.

I. FOUR JUSTICES ARE LIKELY TO FIND THAT REVIEW IS WARRANTED TO RESOLVE WHETHER THE DISTRICT COURT LACKED POWER TO SELECT CANDIDATES FOR THE SPECIAL ELECTION.

The Seventeenth Amendment explicitly vests the Illinois General Assembly with the power to dictate the mechanics of a vacancy election. The district court usurped this power by unilaterally selecting the candidates for the special election. This Court should grant a stay and then vacate the injunction order.

The last sentence of the second paragraph of the Seventeenth Amendment provides that the person appointed by the state executive to fill a vacant Senate seat shall serve "until the people fill the vacancies by election as the legislature may direct." The power to "direct" elections (absent intervention by Congress) is detailed in the Elections Clause contained in Article I, §4, cl. 1 of the Constitution[1]:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature

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[1] *See Valenti v. Rockefeller*, 292 F. Supp. 851, 855-856 (W.D.N.Y. 1968) ("If the drafters of the Seventeenth Amendment had intended to bring about a radical departure from this normal rule of state discretion in the . . . manner of holding vacancy elections . . . it is likely that they would have employed clear language to that effect"); *Judge v. Quinn*, --- F.3d ---, 2010 WL 2652204, at *11 (7th Cir. 2010) ("We note, before moving on, that the power of state legislatures to regulate elections to fill vacancies in the Senate is not established by the second paragraph of the Seventeenth Amendment alone. To the contrary, the Elections Clause in Article I, Section 4 of the Constitution instructs the states to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress' power to override those regulations."); *id.* at *14 ("The phrase 'as the legislature may direct' affirms that the amendment was not intended to change the Elections Clause of the original Constitution, U.S. CONST. art. I, § 4, cl. 1; after all, the Seventeenth Amendment, as a later enactment, might have modified it. Under the Elections Clause, the states have 'broad power' to prescribe the procedural mechanisms for holding congressional elections.").

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Chusing Senators.

The Court in *Newberry v. United States*, 256 U.S. 232, 252, 41 S.Ct. 469, 472, 65 L.Ed. 913 (1921), expressly held that the Seventeenth Amendment does modify the power of legislatures and Congress to regulate the time, places, and manner of all congressional elections under the Elections Clause. Consistent with *Newberry,* this Court summarily affirmed the district court decision in *Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (1968), which found that the power to regulate the "Time, Places, and Manner" of senatorial elections includes the right to prescribe the mechanisms by which candidates become eligible to be placed on the ballot. *See Valenti v. Rockefeller*, 393 U.S. 405 (1969) *affirming Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968)(noting that state legislature enjoy a "reasonable degree of discretion concerning . . . *the procedures to be used in selecting candidates for such elections.*") (Emphasis supplied); *see also Trinsey v. Pennsylvania*, 941 F.2d 224 (3d Cir. 1991) (quoting *Valenti* and concluding: "The available precedent suggests that the Supreme Court views the manner in which the nominees are selected to have been left to the discretion of the states.").

Tellingly, the Seventh Circuit's extensive treatment of the issue on appeal from the original denial of a preliminary injunction did not even suggest that the district court take upon itself the task of selecting candidates for the special election. *See Judge v. Quinn,* --- F.3d ---, 2010 WL 2652204, at *18 (7th Cir. 2010). ("[T]he question how *the state* is to decide whose names should be on the November 2 ballot for the Obama vacancy. *The state* might propose a solution acceptable to all

parties . . . so long as that *solution complies with Illinois* and federal law.) (Emphasis supplied). Not even the plaintiffs asked the district court to select the mechanism (much less the actual candidates) for selecting the special election candidates.[2]

The Court often confronts state legislatures that have overreached by enacting a regulation that undermines the right of citizens to associate, *Anderson v. Celebrezze*, 460 U.S. 780 (1983), or to be provided equal protection *Bush v. Gore*, 531 U.S. 98 – (2000). Similarly, the Court has invalidated actions of state legislatures that compile additional qualifications on the eligibility of particular candidates to be placed on the ballot. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). But this case is different altogether. The district court did not act here to rebuff actions of a state legislature that trespassed into the constitutional protections afforded to individual citizens; instead, the district court is the party who trespassed here, selecting candidates for a special election despite the constitution's express delegation of the power to do so to state legislatures.[3]

This Court should grant the stay and then grant review to clarify that the Seventeenth Amendment exclusively vests the right to select the mechanism for

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[2] Plaintiffs' Motion for Permanent Injunction at p.6: "Further, the Court of Appeals raised a possible mechanism for selecting candidates for the election. [Citation omitted.] Plaintiffs would not object if the *State* selected that approach or any other reasonable approach that has been used under similar circumstances." (Emphasis supplied).

[3] *See U.S. Term Limits, Inc.* 514 U.S. at 779 ("[T]he provisions governing elections reveal the Framers' understanding that powers over the election of federal officers had to be delegated to, rather than reserved by, the States. It is surely no coincidence that the context of federal elections provides one of the few areas in which the Constitution expressly requires action by the States[.]").

selecting candidates in Senatorial elections with the state legislature (save pre-emptive action taken by Congress).

II. FOUR JUSTICES ARE LIKELY TO VOTE TO REVIEW WHETHER THE PERMANENT INJUNCTION IMPEDES THE RIGHTS OF ILLINOIS CITIZENS TO ASSOCIATE AND TO VOTE, AND DENIES THEM DUE PROCESS AND EQUAL PROTECTION.

Even if the Seventeenth Amendment did require Illinois to hold a special election *and* if the district court had the power to unilaterally select which candidates shall appear on the special election ballot, the permanent injunction issued by the district court nonetheless is inconsistent with the First and Fourteenth Amendments.

First, the procedure dictated by the district court does not comport with rudimentary principles of Due Process. The district court restricted access to the ballot based on whether a candidate already had registered and been certified for the altogether separate general election to select the person who will serve the next six year Senate term. Importantly, the deadline for becoming a candidate for the regular election ballot had passed *before* the special election had been ordered, so would-be candidates who did not want to run in the regular election but did want to become a candidate for the term that expires at the end of the 111th Congress had no notice that failure to register for the regular election forfeited placement on the special election ballot. Indeed, when the time for registration passed, the State of

Illinois, the district court, and the parties presumed that no special election would even take place.

In *Anderson*, the Court emphasized that the "primary concern is not the interest of [the] candidate, but rather, the interests of the voters who chose to associate together to express their support for [his] candidacy and the views he espoused." *Anderson* 460 U.S. at 806. The district court order ignores the potential for divergent voter preferences in the two separate elections, and affirmatively disregards the mechanisms that Illinois already had in place for deciding the names to appear on the ballot.

The no-new-candidate approach taken by the district court discriminates against new candidates and the citizens that support them, and also interferes with "the right of individuals to associate for the advancement of political beliefs." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979). The permanent injunction requires two separate elections on the same day. The candidates are listed on two distinct places on the ballot. Double the campaign contributions can be sought.[4] If Illinois must hold two elections, then rights of

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[4] Campaign finance laws limit individual contributions to a candidate for election to federal office to $2,400. [While the limit for individual contributions is $2,000 under 2 U.S.C.A. § 441a (a)(1)(A), that figure is adjusted for inflation by 2 U.S.C.A. § 441a(c).] An "election" includes "a general, special, primary, or runoff election." [2 U.S.C.A. § 431(1)(A).] Because of the district court's injunction, two elections for the same Senate seat, a special and general election, will take place simultaneously. Thus, individuals can contribute twice as much to the same candidate for the same seat, contrary to the spirit of the campaign finance laws. This Court has recognized that statutory limits on direct contributions to candidates perform a "sufficiently important" governmental interest. *Buckley v. Valeo,* 424 U. S. 1, 25-26, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976); see *Citizens United v. FEC*, 558 U.S. 50, 130 S.Ct. 876, 901-03 (2010).

citizens to associate and vote effectively must be recognized in *each* election. This means that ballot access must be addressed separately for the special election.

Voters very well might have different preferences for what is desirable in a person who will fill the remaining 62 days of the current Senate term and the person who will fill the subsequent six-year term. Moreover, a candidate who matches the political preferences of a group of citizens in Illinois might be willing to run in the special election but not willing to serve for the subsequent six years. And finally, many Illinois voters might prefer Senator Burris – who took on the obligation of Senator Obama's seat – to finish the job he signed up for, while respecting his well-founded view that he would not run for re-election. Failure to create a mechanism by which would-be candidates can run only in the special election deprives citizens with interests not met by the candidates in the regular election the opportunity to associate for political purposes and effectively vote for the candidate who matches their interests.

Similarly, the Democratic Party in Illinois might opt to choose a different candidate for the special and regular elections. After all, important legislation is set for the concluding session, and the Democratic Party of Illinois might wish to have the Senator who is already in Washington and well steeped in the pending issues to advocate for the people of Illinois without the need to brace for the inevitable rapid learning curve that comes with starting a new job in the United States Senate. More basic still, Illinois has selected a primary as the mechanism for selecting the

nominee for each major party in each election.[5] The Court's jurisprudence allows states to opt to dispense with the traditional primary requirement, but does not allow a federal judge to order the state to dispense with their chosen mechanism for deciding the names that shall appear on the ballot.

Of course, we are not dealing in abstractions here. In *Storer v. Brown*, 415 U.S. 724 (1974), the Court underscored the "proposition that the requirements for an independent's attaining a place on the general election ballot can be unconstitutionally severe." In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Court upheld a state law that requires candidates to demonstrate a "significant modicum of support" before being placed on the ballot. Whatever the distance between restrictions that are too severe and state laws that require a "significant modicum of support," the district court here allowed *no* mechanism for qualifying for the special election ballot. Moreover, Senator Burris surely can meet any reasonable threshold for demonstrating public support.

In fact, Senator Burris was the first African American elected to statewide office in Illinois, becoming comptroller in 1978, and was elected to statewide office on three subsequent occasions. He was elected as the first African American Attorney General in the State of Illinois and the second African American to be elected to such office in the country. Senator Burris was also the first African American Vice Chairman of the Democratic National Party. Clearly, Senator Burris has shown public support and could do so in this instance. Thus, Senator Burris

[5] 10 ILCS 5/Art. 7

must (at a minimum) have some opportunity to qualify to be placed on the ballot. The permanent injunction order leaves him with none.

III. NO HARM WILL RESULT IF A STAY IS GRANTED.

The district court acted when no action was required by issuing a permanent injunction defining the mechanics of the special election. Plaintiffs' claims focused exclusively upon whether the Seventeenth Amendment required the Illinois governor to issue a writ of election to fill the Senate vacancy, never seeking any declarative or injunctive relief as to the electoral process itself. By the time the district court ordered the injunction, Governor Quinn had already issued a writ of election, as the district court points out, "because of the rulings of the Court of Appeals in this case requiring that the Governor issue a writ."[6]

Despite the Governor's action, the district court ruled that the Seventeenth Amendment required a special election be held for the Senate vacancy and Governor Quinn issue a writ to order the election. Permanent Injunction Order of August 2, 2010 by Honorable John F. Grady at para. 2. And the district court found that the Governor's writ complies with the Seventeenth Amendment. *Id.* at para. 5. Thus, a stay of the injunction will free the Governor to determine whether an election is appropriate and, if so, the legislature to dictate the mechanics of that election.

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[6] Permanent Injunction Order of August 2, 2010 by Honorable John F. Grady at para. 6. On appeal, the Seventh Circuit reviewed the district court's denial of plaintiffs' motion for a preliminary injunction, sustaining the order. However, in *dicta*, the appeals court concluded that the Seventeenth Amendment required Governor Quinn to issue a writ of election for the Senate vacancy. *Judge v. Quinn,* 2010 WL 2652204, at *15.

Of course, at this late date, it is possible the Illinois General Assembly will choose simply to forego the job of putting into place the mechanics of the special election. The judgment below sought to avoid that possibility—then more remote, as proved by the recent experience of West Virginia.[7] But no constitutional harm would accrue if no federal-judge-concocted special election took place.

While the district court states that its order granting a permanent injunction is required given the short time-frame and the need to bring the election in line with the 17th Amendment, the fact remains that the Seventeenth Amendment does not require a separate election at all under these circumstances. In fact, Colorado and Florida both will elect a new United States Senator this November 2 without holding a special election to fill the vacated seats for the remainder of the term. Instead, both states will allow the temporarily appointed Senator to remain in the Senate until the start of the 112th Congress. History supports this approach, as 27 of the 193 vacancies in the Senate from the ratification of the Seventeenth Amendment to the election of President Obama were filled by an appointee who served the remainder of the senate term in question without a special election to fill the vacancy.[8]

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[7] When Senator Robert Byrd died on June 28, 2010, the West Virginia Legislature enacted legislation within three weeks to define election procedures for a special election to coincide with federal election day on November 2nd to fill the vacancy.

[8] *Judge v. Quinn,* --- F.3d ---, 2010 WL 2652204, 17 (7th Cir. 2010).

This application of the Seventeenth Amendment is consistent with the Court's prior interpretations of that provision. "In *Valenti v. Rockefeller*, 393 U.S. 405, 89 S.Ct. 689, 21 L.Ed.2d 635 (1969), the Court sustained the authority of the Governor of New York to fill a vacancy in the United States Senate by appointment pending the next regularly scheduled congressional election-in that case, a period of over 29 months."[9] Despite requiring a special election here, the Seventh Circuit conceded that the appointee in *Valenti* served the remainder of the term without a special election. *Judge v. Quinn,* --- F.3d ---, 2010 WL 2652204, f.n.2 (7th Cir. 2010).

Indeed, the Seventh Circuit in *Lynch v. Illinois State Board of Elections,* 682 F.2d 93, 96 (7th Cir. 1982), noted that this Court in *Rodriguez v. Popular Democratic Party* "expressly adopted the rationale of *Valenti*." The *Lynch* opinion quotes with favor this key passage from *Rodriguez*: "the fact 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 suggests that a State is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature." [10]. The *Lynch* court went on to hold that *Valenti* and *Rodriguez* "sustain the authority to fill vacancies in elective offices by appointment, even though the appointee will hold office for the duration of the term."[11]

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[9] *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 10-11, 102 S.Ct. 2194, 72 L.Ed.2d 628 (1982) (discussing the impact of the decision in *Valenti.*)

[10] *Lynch,* 682 F.2d at 96

[11] *Id.*

This approach makes imminent sense given that there will be only 62 days remaining in the 111th Congress following the November 2 election. By contrast, the judgment below cannot be reconciled with a plain reading of the Seventeenth Amendment, is contrary to the express wishes of the Governor of Illinois, may very well be contrary in substance to the wishes of the Illinois General Assembly, and has the negative side effect of perverting federal campaign limits by allowing the candidates to double federal contribution limits because there will be, in effect, two distinct federal elections of November 2. Ironically, the steps taken by the district court to ensure compliance with the Seventeenth Amendment seem only to guarantee that a constitutionally infirm election will take place in Illinois this November.

CONCLUSION

For the foregoing reasons, the application for a stay should be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon the counsel listed below in compliance with Supreme Court Rule 29.3 via First-Class U.S. Mail, postage prepaid, on September 8, 2010.

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