No. 09-2219

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

GERALD ANTHONY JUDGE and DAVID KINDLER,

Plaintiffs/Appellants

v.

PAT QUINN, Governor of the State of Illinois,
and ROLAND W. BURRIS, U.S. Senator,

Defendants/Appellees.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division

Case No. 09 C 1231

The Honorable Judge John F. Grady

BRIEF AND REQUIRED SHORT APPENDIX OF PLAINTIFFS-APPELLANTS, GERALD ANTHONY JUDGE AND DAVID KINDLER

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Circuit Rule 26.1 Disclosure Statement

Appellate Court No. 09-2219

Short Caption: Judge v. Quinn

The undersigned counsel of record furnishes the following list in compliance with Circuit Rule 26.1:

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I. JURISDICTIONAL STATEMENT

This appeal is taken from the order the U.S. District Court for the Northern District of Illinois, Eastern Division, entered on April 16, 2009, denying Plaintiffs Gerald Anthony Judge and David T. Kindler's Motion For Preliminary Injunction. The United States Court of Appeals has jurisdiction to decide this matter pursuant to 28 U.S.C. § 1292(a)(1). The notice of appeal was timely filed on May 6, 2009.

II. STATEMENT OF THE ISSUES

1. Whether under the plain language of the Seventeenth Amendment, the Governor is required to issue a writ of election or act to set the date of an election to fill a vacancy in the U.S. Senate, or whether, instead, the legislature can require the Governor to make a temporary appointment to fill a vacancy or otherwise bar the Governor from issuing a writ of election.

2. Whether the District Court abused its discretion by denying plaintiffs' motion for a preliminary injunction requiring the Governor to issue a writ of election for such date as he determines to be appropriate, notwithstanding any contrary or conflicting provision of the Illinois Election Code.

III. STANDARD OF REVIEW

Plaintiffs bring this appeal pursuant to 28 U.S.C. §1291(a)(1) because the dismissal of plaintiffs' complaint by the District Court on April 16, 2009 was also a denial of plaintiffs' request for a preliminary injunction. The standard of review is abuse of discretion, although the District Court made a definitive ruling that plaintiffs' complaint to enforce the Seventeenth Amendment's provision that the Governor shall issue a writ of election failed to state any claim for which relief can be granted. Accordingly this appeal raises exclusively a question of law.

IV. STATEMENT OF CASE

On February 26, 2009, plaintiffs Gerald Judge and David Kindler, two Illinois voters who are seeking to require the Governor to set a date for an election to fill a Senate vacancy, filed this action in the United States District Court for the Northern District of Illinois. The original complaint sought both declaratory and injunctive relief that notwithstanding Section 25-8 of the Illinois Election Code, 10 ILCS 5/25-8, the Governor has the duty and power to set an election date to fill the Senate vacancy created on November 16, 2008, by the resignation of President Barack Obama as Senator.

On March 4, 2009, plaintiffs moved for a preliminary injunction to enjoin the Governor of Illinois to comply with his constitutionally mandated duty to issue a writ of election setting an election to be held as soon as practicable. Appearing in court on March 11, 2009, the District Court directed plaintiffs to join Burris as an indispensable party defendant. The plaintiffs then filed a First Amended Complaint adding Burris as a defendant.

On April 16, 2009, the District Court dismissed the case on the ground that under *Valenti v. Rockefeller*, 393 U.S. 405 (1969), the state legislature may preclude the Governor from issuing an election writ for the balance of an unexpired Senate term. In dismissing the complaint, the District Court also denied the plaintiffs' request for both a preliminary and permanent injunction.

On this appeal, plaintiffs seek to overturn the District Court's denial of a preliminary injunction which would have required the Governor to perform his constitutional responsibility to set a date for a special election – either as soon as practicable or at such other date selected in his discretion – without the constraint of Section 25-8 of the Illinois Election Code. 10 ILCS 5/25-8. On this appeal, plaintiffs argue that Quinn must at least issue a writ of election setting some election date without necessarily requesting an order that it be as soon as practicable.

V. STATEMENT OF FACTS

On November 16, 2008, President Barack Obama resigned his seat in the United States Senate. (R. #1, ¶2) His term expires in early January, 2011, leaving, two years, one month, and three weeks remaining at the time his seat became vacant. (R. #1, ¶26) After President Obama Senate seat became vacant, then Governor Rod Blagojevich did not issue a writ of election. (R. #1, ¶25, 27) He did make a "temporary appointment" of Roland Burris to the Senate on December 31, 2008. (R. #1, ¶3,24,26) On January 15, 2009, Roland Burris was sworn in as the junior U. S. Senator for Illinois. (R. #1, ¶4)

Governor Blagojevich left office on January 29, 2009, on conviction of impeachment by the Illinois Senate. (R. #14-2, p. 1) On the same day, defendant Pat Quinn became Governor. (R. 14-2. p.1) Since becoming Governor, defendant Quinn has not issued a writ of election. (R#1,¶ 25)

Under Section 25-8 of the Illinois Election Code, Roland Burris will serve as U.S. Senator until President Obama's term expires at the end of 2010. (R. #1, ¶ 26) Under Section 25-8, there will be no election to fill the vacancy in President Obama's Senate seat. An election will be held in November 2010 to fill that seat when President Obama's term expires. (R. #1, ¶ 26).

There is no dispute, and this Court may take judicial recognition of the fact, that since becoming Governor, Governor Quinn has on various occasions expressed his dissatisfaction with this result and the constraint imposed on him by Section 25-8 of the Election Code. The Governor has even attempted at least on one occasion to obtain legislative authorization to change Section 25-8 so that a more prompt election could be held to elect a permanent replacement to President Obama's Senate seat.

The Attorney General has cooperated with the Governor in seeking authorization for a special election. On February 25, 2009, Attorney General Madigan issued an 11-page opinion stating that Burris did not hold the Senate seat by right for any fixed period but only as the Governor's appointee, and that a special election could be held at any time to fill the vacancy if the state legislature chose to do so. The Attorney General stated in her opinion that the Seventeenth Amendment shows a "preference" for a special election in lieu of a temporary appointment. (Plaintiffs referenced this opinion below, but did not attach the opinion. The Court may take judicial notice of this opinion which is attached in the required short appendix at page A-24.) On February 26, 2009, Governor Quinn called on the state legislature to send him a bill to set up a special election to fill the vacancy and thereby end the temporary appointment of Burris. No such bill was enacted.

As of late 2008, there is significant evidence that allowing the Governor to appoint a Senator invites corruption and abuse of power. Former Governor Rod R. Blagojevich is currently under indictment for alleged acts including attempting to use this power to sell the Senate seat vacated by President Obama for substantial sums, or alternately to trade it for other personal gain. (R. #14-2, Exhibit E)

Even more recently, Senator Burris has revealed publicly that he offered to fundraise for former Governor Blagojevich while he was simultaneously seeking to be appointed by former Governor Blagojevich to the then to-be-vacated Senate seat of President Obama. (R. #14-2, p.10 and Exhibit F)

Given Illinois' unfortunate history of governors being convicted for crimes committed while in office, there having been two such governors, not including Mr. Blagojevich, convicted

since 1968, there is a very real potential for such corruption and abuse in the filling of vacancies in the Unites States Senate under future Illinois governors.

VI. SUMMARY OF ARGUMENT

Under the "plain language" of the second paragraph of the Seventeenth Amendment to the U.S. Constitution, this Court should require that when the Senate vacancy arose on November 16, 2008, the Illinois Governor had and continues to have a duty to issue a "writ of election" to set an appropriate election date in his discretion. To date, the defendant Illinois Governor has failed to issue such a writ or make any other determination as to an election date, because he is unconstitutionally barred from doing so by Section 25-8 of the Illinois Election Code. The Seventeenth Amendment is precise that the governor, and not the state legislature, shall have the role of setting an election date. It ensures that a single executive official elected by the entire people of the state is accountable to them for protecting their right to vote under the Seventeenth Amendment. U.S. Const. amend. XVII.

The Amendment's proviso does not diminish but increases the governor's power over the election process. The proviso "empowers" but does not require the Governor to make a temporary appointment until an election may be had "as the legislature may direct." The phrase "as the legislature may direct" does not logically, grammatically or sensibly grant the legislature the principal or ultimate power for setting the election. To the contrary, the phrase "as the legislature may direct" only allows the legislature to limit any grant to the governor of the power to make a temporary appointment, so that the governor does not use such a power to make a temporary appointment for an unduly lengthy period. That phrase cannot be read to allow the Illinois legislature to override the Amendment's mandate that the governor issue a writ of election.

Valenti v. Rockefeller, 292 F. Supp. 851 (WDNY 1968), aff'd without op., 393 U.S. 405 (1969), holds only that a "State" – without delineating which institution of the State – may permit a temporary appointee to serve until the next regular election. But it does not hold or even address whether a legislature may compel the governor to make such a "temporary" appointment, or whether a state law like Section 25-8 of the Illinois Election Code may preclude the governor from carrying out his Seventeenth Amendment duty of making a formal decision as to the election date by issuing a writ of election.

VII. ARGUMENT

Introduction

Neither the Governor nor the legislature has acted to ensure that the citizens of Illinois are accorded their constitutional right to directly elect the Senator to fill the vacancy created by President Obama's resignation. Governor Quinn was unsuccessful in obtaining legislative authorization and has stated he will not attempt to fight for such authorization unless and until Burris resigns. Accordingly, plaintiffs have proceeded with this legal action to require Governor Quinn to set an election date notwithstanding the existence of Section 25-8 or the failure of the legislature to amend Section 25-8 to restore to Quinn his constitutional duty and prerogative to set a date for a special election and clarifying that while the Governor of Illinois may make a temporary appointment, such an appointment does not otherwise preclude the Governor's duty and power to set an election date to fill the Senate vacancy.

As in the District Court below, plaintiffs continue to contend that under the plain language of the Seventeenth Amendment, the Governor, and not the state legislature, has the obligation to make such a determination, that the Governor has not made such a determination, contrary to the plain language of the Seventeenth Amendment, and that plaintiffs as citizens of

Illinois are entitled to the performance of such a duty or obligation as required by the Seventeenth Amendment. By holding the Governor individually and personally accountable for making such a determination, the Seventeenth Amendment increases the likelihood that the official who is responsible to all the citizens of the State will effectuate the purpose of the Seventeenth Amendment and provide plaintiffs with the opportunity to vote.

I. Under The Plain Language Of The Seventeenth Amendment, The State's Governor And Not The Legislature Has The Duty To Issue A Writ Of Election And Has The Primary Role In Setting A Date Of An Election To Fill A Vacancy In The U.S. Senate. The Legislature Cannot Bar The Governor From Issuing Such A Writ Or Require The Governor To Make A Temporary Appointment For Up To A Two-Year Period.

In their complaint, plaintiffs seek a preliminary and permanent injunction to enforce the plain meaning of the Seventeenth Amendment that the Governor issue a writ of election and to declare that Section 25-8 of the Illinois Election Code unconstitutionally usurps this duty by precluding the Governor from issuing an election writ because the statute sets the election date. The relevant language of the Seventeenth Amendment states:

> 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

The Amendment declares it to be national policy that the Senate "shall be composed of two Senators from each State, elected by the people thereof." U.S. Const. amend XVII. To effectuate this policy, the Amendment issues an unqualified directive to state governors, and not to state legislatures, that when a vacancy arises, governors, without exception, "shall issue writs of election to fill such vacancies." Id. The most direct reading of the Amendment is that when a vacancy arises, a "writ of election" must be issued by the governor in every case.

The writ is the same writ required by the identical language in Article I, section 2 of the U.S. Constitution when a vacancy in the House occurs. In this case, defendant Governor has

agreed that the function of a “writ of election” is to set the date. Indeed, in the recent special election to fill a vacancy in the House seat created when Rahm Emanuel resigned to become White House chief of staff, the Illinois Governor issued a writ of election to various election officials at the county level. (R. 14-2, Exhibit G.) The writ of election stated in part:

> Whereas, because of the resignation of the Honorable Rahm Emanuel effective January 2, 2009, a vacancy now exists in the Office of Representative of the Fifth District [of Illinois]…
>
> Now, therefore, I, Rod Blagojevich, Governor of the State of Illinois, do hereby command you to cause a Special Election to fill such vacancy to be held in the County of Cook on Tuesday, April 7, 2009…

Under the Seventeenth Amendment, for U.S. Senate vacancies, setting the election date by writ is exclusively the prerogative not of the state legislature, or even of the State, but of the Governor alone. However, Section 25-8 of the Illinois Election Code precludes the Governor from any role in setting the date of the election when a vacancy in the Senate occurs. It states:

> When a vacancy shall occur in the office of United States Senator, the Governor shall make temporary appointment to fill such vacancy until the next election of representatives, at which time such vacancy shall be filled by election…

Prior to the filing of this action, Governor Quinn stated he would prefer instead to set a date for a special election to fill the vacancy. But unless Section 25-8 of the Illinois Election Code is declared unconstitutional and unless the plain meaning of the Seventeenth Amendment is enforced by this Court, there will be no such special election. There will be no opportunity for the plaintiffs to vote, as they would be able to if Section 25-8 of the Illinois Election Code is declared unconstitutional.

In its April 16, 2009 opinion, the District Court held that the proviso allows the state legislature, by statute, to preclude the Governor from issuing the writ of election. But the Seventeenth Amendment proviso does not say that a state legislature can preclude a governor

from exercising his or her discretion by issuing a writ. Rather, the proviso simply offers the governor an optional procedure:

> Provided, 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)

In discussing this language, a noted constitutional scholar has pointed out the obvious: that the word "empower" in the proviso does not mean "require." Section 25-8 does not in fact "empower" but *requires* the Governor to make a temporary appointment whether the Governor wishes to or not. In questioning whether state laws like Section 25-8 can *require* the Governor to make a temporary appointment for a fixed term, Professor V.D. Amar states:

> "Empower" does not mean "require;" rather, it means to create the power to do or *not do* something. The Constitution generally distinguishes between powers and duties, and the Seventeenth Amendment's words seem to speak only to possible gubernatorial powers, not to any gubernatorial duties.

See Vikram David Amar, "Are Statutes Constraining Gubernatorial Power to Make Temporary Appointments to the United States Senate Constitutional under the Seventeenth Amendment?" 35 Hastings Const. Law. Q. 727, 736 (2008). Indeed, Black's Law Dictionary is also clear that "Empower" is "A grant of authority rather than a command of its exercise." See Black's Law Dictionary, 4th ed. (1957)

Let us take, then, a complete "plain language" approach to the second paragraph of the Seventeenth Amendment. The main clause does not "empower" but "requires" the Governor to issue a writ of election when the "vacancy occurs." There is no proviso, no provision that cancels out this first obligation. The proviso does allow the state legislature to "empower" or give an additional power to the Governor in connection with this duty. It allows the legislature to authorize, but not require, the Governor to make a temporary appointment "until the people fill the vacancies by election as the legislature may direct."

Grammatically, in the normal diagram of the sentence, the relevant subordinate clause which modifies or conditions the grant of this extra authority is the entire clause: "until the people fill the vacancies by election as the legislature may direct." Grammatically, the only possible or logical meaning of this clause is to put a limit on the discretionary power to make a special appointment, i.e, that the governor's temporary appointee may serve only until an election "to fill the vacancy" can be held. This is consistent with the entire logic of the Constitution, which is not to put excessive power into the hands of a single individual.

Unfortunately, the clause has been twisted to do just the reverse of what the grammar, logic and underlying philosophy of the Constitution dictate. Based on this twisted reading, the Governor ends up with the unchecked power to put in a crony or contributor without any terminal date being set by the legislature or any accountability to the people for failing to issue an election writ.

By the plain language (and any reasonable diagram of the sentence), the function of the proviso as a whole is to supplement the Governor's power to issue a writ and not to override it. Had the Amendment's drafters intended to override the Governor's power to set an election date, they could have simply used the word "require" instead of "empower," to make clear that the legislature could do more than merely provide the Governor with an additional option. Furthermore, the reference to the legislature's power to direct an election appears in a subordinate clause that is obviously intended in a temporal sense to put a limit on the duration of the Governor's option of using a temporary appointee to serve until an election can be held.

In the District Court, the defendant Governor did not focus on the entire subordinate clause: "… until the people fill the vacancies by election as the legislature may direct." Rather, the defendant Governor focused only on the last five words: "… as the legislature may direct."

The defendant Governor takes these words out of the context of limiting the power to put off a special election indefinitely and argues that the words allow the state legislature to direct the entire election process, from soup to nuts, and to totally eliminate the Governor's duty to set an election date.

The Governor argued that the last five words ("as the legislature may direct") confer the same power on the state legislature to set the "Time, Place and Manner" of the election, as set out in Article I, section 4 of the U.S. Constitution. U.S. CONST, art. 1, § 4. But if that is all the language does, it obviously does not, by itself, override the Governor's duty to issue a writ when a vacancy occurs. For when a vacancy in the House arises, the state legislature retains the general power to set the "Time, Place and Manner" (as in polling times, polling places, etc.), but no one has ever argued and no court has ever held that this *general* language would override the *specific* language of Article I, Section 2 that the Governor "shall issue writs of election." Indeed, this Circuit has held that when a House vacancy arises, the Governor has a specific enforceable duty to issue a writ of election. *See Jackson v. Ogilvie,* 426 F.2d 1333 (7th Cir 1970).

In the Seventeenth Amendment's legislative history, the drafters state emphatically that the language in the second paragraph of the Amendment means the same, exactly the same, as it does in Article I, section 2 mandating the Governor to issue writs of election in the case of a House vacancy. So if the "Time, Place and Manner" regulation does not trump the Governor's obligation to issue a writ in connection with a House vacancy, there is no reason to hold it can do so in connection with a Senate vacancy. The argument that based on "Time, Place and Manner" regulation, Section 25-8 of the Illinois Election Code can "effectively pre-empt" the Governor's constitutional obligation to "issue writs of election" is contrary to the plain meaning of the Seventeenth Amendment and inconsistent with *Jackson v. Ogilvie, supra*, and other precedent.

As a matter of constitutional and statutory interpretation, general language is never controlling over specific language. See *Fourco Glass Co. v. Transmirra Corp*., 353 U.S. 222, 228-29, 77 S.Ct. 787, 1 L.Ed.2d 786 (1957) ("However inclusive may be the general language of a statute, it will not be held to apply to a matter specifically dealt with in another part of the same enactment.... Specific terms prevail over the general in the same or another statute which otherwise might be controlling.")

Further, the defendant Governor's construction of the phrase "as the legislature may direct" requires a leap over at least two prior antecedent clauses to get back to limiting the Governor's express duty to issue a writ. This is simply illogical as any diagram of the sentence would show. In the article cited above, Professor Amar refers to the doctrine of "the last antecedent." See Amar, supra, at page 731. However, one need not adhere to this particular doctrine to see that the defendant Governor's interpretation is illogical. Either the phrase "as the legislature may direct" modifies "until the people fill the vacancy by election…" or it modifies *that* phrase which modifies how long the Governor's temporary appointee may serve. But it just strains the meaning too far to say it actually modifies an even prior phrase, the Governor "shall issue writs of election..." Far more sensibly and more logically, the phrase "as the legislature may direct" refers only to the right of the state legislature to put a limit or duration on the Governor's "empowerment" to make a temporary appointment in the proviso, and not to "preempt" his obligation to issue a writ in the main clause.

The plain language interpretation also makes the most sense in terms of policy. The state legislature might well fear the Governor would abuse the power by trying to keep a temporary appointee in office for a two year period and not, say, for only six months until an

election could be held. Indeed, it seems many state legislatures have not made use of this option and have given the governor either an unlimited power or none at all.

In a plain language interpretation, the Court should arguably not even consider the legislative history. *Lake County v. Rollins*, 130 U.S. 662, 670-671 (1889.) Nonetheless, the legislative history reinforces the plain language reading urged here. Senator Joseph Bristow, the drafter of the Amendment in 1911, stated:

> My amendment provides that the legislature may empower the governor of the State to appoint a Senator to fill a vacancy until the election occurs, and he is *directed* by this amendment to 'issue writs of election to fill such vacancies.'
>
> That is, I use the same language in directing the governor to call special elections for the election of Senators to fill vacancies that is used in the Constitution in directing him to issue writs of election to fill vacancies in the House of Representatives."

See *Valenti v. Rockefeller*, supra, at 878 (quoting legislative history). In other words, Senator Bristow made it clear that the governor's "power" to make a temporary appointment ran parallel with and not in conflict with the "direction" that the same governor would also issue a writ of election. Furthermore, he stated that the language means the same as under Article I, section 2, where the state legislature has no power to override the specific duty to issue a writ under "Time, Place and Manner" regulation.

Both under Article I, section 2, and under the second paragraph of the Seventeenth Amendment there is also a perfectly good reason to follow the plain language and hold the Governor and not the legislature accountable for setting an election date. Yes, in the case of the Senate, the procedure is different, in that it allows a temporary appointment as well as setting an election date. However, as pointed out by Professor Amar, there was a special consideration in the case of the Senate – a possible need for a temporary appointment even if an election date was set promptly. At the time the Seventeenth Amendment was approved in 1911, there was still a

heightened post-Civil War concern in the Southern States to retain a "regional veto" in the U.S. Senate over any legislative attempts to undermine Jim Crow that might issue from the House. Even if a Governor sought an expedited election (especially in a Southern State), there may well be concern to keep up the full strength of Southern representation in the Senate. Furthermore, the Senate, unlike the House, represents not the people directly but the states. And there is an express Constitutional clause to keep equal suffrage of the States at all times. See U.S. CONST., art. 5. A power of temporary appointment ensures such equal suffrage even for a period as short as a Presidential "Hundred Days."

At any rate, the language of the Seventeenth Amendment is plain enough, and it should not be stretched out of shape to preclude the Governor from his primary role in setting the election date. As Professor Amar argued, the precision of the Seventeenth Amendment in allocating the distinct roles of the governor and legislature is unusually explicit:

> Do the terms 'legislature' and 'executive authority' in the Seventeenth Amendment have to be read so strictly? ….
>
> … The crucial point here is that Section 2 does not simply mention state 'legislatures' in a way that might be interpreted as casual; its terms on their face textually differentiate within a single sentence between the legislature and [the executive]…
>
> …[I]f we were to line up all the Constitution's references to state 'legislatures' along a spectrum of state institutional specificity, Section 2 of the Seventeenth Amendment's use of the terms 'legislature' and 'executive' presents perhaps the clearest textual demarcation of particular federal powers conferred on specific state institutions…

In the identical language of Article I, section 2, the Founders were specific that the Governor should be held accountable for setting the election date. At the time, in 1787, Hamilton and others expressed their fear that the State Legislatures, jealous of the powers of the Congress, might choose not to hold any elections at all. See *Federalist* No. 59. As a practical matter, it makes more sense to hold the Governor individually accountable for conducting the

special election than to enforce the duty on the individual members of a recalcitrant state legislature. Even in our own day, the rationale for holding an individual officer accountable continues to exist.

To impose this role on the Governor, on one individual, makes it easier for the public to hold at least someone accountable in any delay in filling the vacancy. The whole purpose of the Seventeenth Amendment was to pry away the selection of a Senator from the political elite and return it directly to the people. Furthermore, the Governor is the only elected official accountable to all the people in the State, and the commitment of this duty to the Governor by the Seventeenth Amendment increases the visibility of the decision to call or not call a special election.

Even assuming that *Valenti* applies here and assuming that under that case, the Governor may have the discretion to: (1) make a temporary appointment until the next regular election and (2) postpone the special election even if he has authority to require it, the Seventeenth Amendment entitles the voters to hold the Governor accountable for such decisions. However, under Section 25-8 of the Illinois Election Code, the Governor is precluded from carrying out the duty or exercising the power imposed on him by the Seventeenth Amendment. The plaintiffs have a direct stake in the outcome of "who decides" whether they have the right to vote because the plain language of the Seventeenth Amendment ensures that the decision as to a special election is taken in a highly visible and transparent way by one elected official, the Governor, who will be accountable to all the people in the State. As it is, unless the plain language of the Seventeenth Amendment is enforced, the Governor can properly disclaim responsibility for the fact that the plaintiffs and others are not entitled to a special election.

Accordingly, plaintiffs as voters are entitled to an order from this Court that the Governor must exercise the discretion committed to him by the plain language of the Seventeenth Amendment and determine whether and at what point the people of the State of Illinois as a whole will be entitled to vote for Senator, pursuant to the strong policy of the Seventeenth Amendment – the "preference" to quote the Illinois Attorney General – for the use of a special election in lieu of a lengthy temporary appointment.

II. *Valenti V. Rockefeller* Does Not Decide Or Even Address Whether A Law Like Section 25-8 Of The Illinois Election Code May Bar The Governor From Making A Formal Determination As To The Date Of The Election As Required By The Seventeenth Amendment.

The District Court was in error when it found that under *Valenti v. Rockefeller,* 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd without op., 393 U.S. 405 (l969), the state legislature can take away the Governor's duty to issue the writ of election or act as the primary decision-maker as to when the special election occurs. The *Valenti* three-judge district court did not consider the point since the plaintiffs did not raise it. They did not raise the issue of "who-decides" because Governor Rockefeller, in fact, issued a writ of election. Whether the New York law "required" or merely "empowered" the Governor to make a temporary appointment, the court in *Valenti* did not have to decide – and did not in fact decide.

The "precise issue" in *Valenti* was whether "the State" – not specified as the Governor or legislature – could hold off the election for a two-year period. Indeed, to be more precise, it was whether the "State" had an obligation to schedule a general election for the vacant Senate seat in November 1968 without requiring the candidates to go through a primary election process.

Plaintiffs contended in the District Court below that the Supreme Court's summary affirmance in *Valenti* is not binding here because it is more likely than not that the Supreme Court summarily affirmed the three judge court without opinion because the case was moot.

Indeed, the State of New York filed a motion with the Supreme Court arguing that the decision should be affirmed because it was moot. (R. 17-3, exhibit H.)

That motion to affirm is significant, here, because the Supreme Court has cautioned that all the papers in a summarily affirmed case must be examined to discern the precedential impact, if any, of the decision. *See Mandel v. Bradley*, 432 U.S. 173, 176, 97 S.Ct. 2238, 2240 (1977):

> Because a summary affirmance is an affirmance of the judgment only, the rationale of the affirmance may not be gleaned solely from the opinion below.

Thus, the Supreme Court itself examines motions to affirm when determining the scope of its prior summary affirmances.

In *Mandel v. Bradley*, *supra*, Justice Brennan (concurring) explained the analysis this Court must undertake here to determine whether it is bound by the *Valenti* decision:

> [B]efore deciding a case on the authority of a summary disposition by this Court in another case, [lower courts] must . . . determine that the judgment in fact rests upon decision of those [constitutional] questions *and not even arguably upon some alternative nonconstitutional ground. The judgment should not be interpreted as deciding the constitutional questions unless no other construction of the disposition is plausible.* (emphasis added) 432 U.S. at 179-80, 97 S.Ct. at 2242.

Accordingly, since mootness is the "alternative nonconstitutional ground" on which the Supreme Court "arguably" decided *Valenti*, mootness is both the most likely and sound interpretation of the summary affirmance.

Justice Brennan's admonition that this Court should not assume that the constitutional question was reached in *Valenti* is, of course, nothing more than a reaffirmation that the Supreme Court generally avoids deciding constitutional issues when a case can be decided on a narrower nonconstitutional ground.

In relying on *Valenti*, the District Court cited the later case of *Rodriguez v. Popular Democratic Party,* 457 U.S.1 (1982) in which the Supreme Court stated, in *dicta*:

> In *Valenti v. Rockefeller,* 393 U.S. 405 (1969), the Court sustained the authority of the *Governor of New York* to fill a vacancy in the United States appointment pending the next regularly scheduled congressional election…. *Valenti,* of course, unlike this case, involved an interpretation of the Seventeenth Amendment, which explicitly outlines the procedures for filling vacancies in the United States Senate. However, 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 State Senate suggest that a state is not constitutionally prohibited from exercising similar latitude with respect to vacancies in its own legislature.

While citing to *Valenti*, *Rodriguez* had nothing to do with the Seventeenth Amendment or whether governors or legislatures had the power to set special elections under the Seventeenth Amendment. *Rodriguez* was confined to the power to fill vacancies in the Puerto Rican legislature. Thus, in *Rodriguez*, in a pure *dictum*, the Supreme Court noted only that the "the State" may decide to hold off an election for a two year period but also indicates that this is a decision made by authority of the Governor and not the state legislature. In other words, *Rodriguez* is consistent with the argument made here. It is the Governor who determines the "latitude with regard to vacancies" by making a temporary appointment or not. The problem is that Section 25-8 bars the Governor from making this determination.

Assuming, *arguendo*, that *Valenti* is binding on this Court (and it is not), the actual holding is only that the "State" of Illinois could delay this election to fill the vacancy of President Barack Obama until the next regular election. But consistent with *Valenti*, this Court should hold that (1) the Governor, not the legislature, must make the decision as to how long a temporary appointee can serve, and (2) the Governor alone ultimately decides when to set the election date. Even the District Court recognized that *Valenti* did not decide these issues but avoided a decision because it believed plaintiffs had not raised this issue in the first amended complaint. Therefore, it denied the preliminary injunction.

In fact, plaintiffs adequately allege in the First Amended Complaint that the Governor alone has the responsibility for setting the election date and that the proviso did not justify a state law like Section 25-8 of the Election Code precluding him from exercising the duty to issue a writ. And while the District Court said that the State was not given a chance to respond to the argument that a state legislature cannot require a temporary appointment, the State itself never objected to the plaintiffs' argument or even asked for a reply brief with respect to it because the meaning of the proviso is intertwined completely with the claim that the main clause of the Amendment's second paragraph requires the Governor to issue a writ, an issue vigorously argued by both sides.

III. *Valenti* Is Not Binding On This Court When Recent History In The State Of Illinois Calls Into Question Whether The Governor's Unreviewable Power To Make A Temporary Appointment For A Two-Year Period Is "Reasonable" Or Likely To Be Free Of Corruption.

Plaintiffs also argue that *Valenti* is not binding on this Court because the *Valenti* court did not consider the serious potential for corruption ensuing from governors' power to appoint "temporary" Senators for lengthy terms. It is well settled that a summary affirmance without opinion by the U.S. Supreme Court has a limited precedential effect. Whatever the basis for the summary affirmance in *Valenti*, even a lower court may consider a similar or even identical legal claim if there has been a change in the factual circumstances. *See Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). Since 1979, and especially in the State of Illinois, the role of money in politics has grown, and in such circumstances, where even honest politicians must raise millions of dollars in state wide campaigns, the use of a temporary appointment for a two year period allows a Governor in effect to "sell" a Senate seat directly or indirectly. The Seventeenth Amendment was an attempt to reform a corrupt election process and should not be strained to allow an even more corrupt process to take its place.

The circumstances of this case, the wiretapping of Rod Blagojevich, the arrest of the Governor, his subsequent appointment of Roland Burris, the promises made by Burris to raise money on behalf of the since-disgraced Governor,, without any opportunity for the people of Illinois to intervene in this transaction by means of a popular election, is a scandal that would be made worse if this Court approved such a travesty as "reasonable" under *Valenti.* Plaintiffs respectfully submit that in view of the facts that have come to light about the appointment process, *Valenti* is no longer binding, and this Court is free to consider anew whether the proviso should be interpreted so expansively to allow the sale of a Senate seat to the highest bidder.

VIII. CONCLUSION

Plaintiffs seek a preliminary injunction only to suspend the application of Section 25-8 of the Election Code so as to allow the Governor to exercise his discretion on the ground that Section 25-8 of the Election Code, which so completely removes the Governor from any role in setting the election date, is manifestly unconstitutional under the plain meaning, context, and purpose of the Seventeenth Amendment. Plaintiffs do not seek an injunction to remove the current appointee or take any judicial action with respect to the current appointee. Even if the statute under which he is appointed is unconstitutional, the plaintiffs seek only the limited and prospective relief of an election date determined by the Governor's appropriate exercise of his discretion, and it is not necessary to this case and would not serve the public interest to seek any other relief than an order that notwithstanding Section 25-8 of the Illinois Election Code, the Governor may take such action as appropriate to set an election date, with or without specific authorization by the legislature.

For the above reasons, this Court should remand this case to the District Court with orders to issue an injunction instructing the Governor of Illinois to perform his mandatory

Constitutional duty on behalf of the people of this State and to issue a writ of election that determines in his own judgment the most appropriate date for an election by the people to fill the Senate vacancy created on November 16, 2008.

Respectfully

____

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. RULE 32(a)(7)

The undersigned, counsel of record for Plaintiffs-Appellants, Gerald Anthony Judge and David Kindler, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,288 words.

Dated: June 1, 2009

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CIRCUIT RULE 31(e)(1) CERTIFICATION

I hereby certify that the documents in the Required Short Appendix are not available in an unscanned format.

Dated: June 1, 2009

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PROOF OF SERVICE

The undersigned, counsel for Plaintiffs-Appellants, Gerald Anthony Judge and David Kindler, hereby certifies that on June 1, 2009, two copies of the Brief and Required Short Appendix of Appellant as well as a digital version containing the brief, were delivered by U.S. mail to counsel for the Defendants-Appellees, Pat Quinn, Governor of the State of Illinois, and Roland W. Burris, U.S. Senator.

Dated: June 1, 2009

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CIRCUIT RULE 30(d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all material required by Circuit Rule 30(a) and (b) are included in the appendix.

Dated: June 1, 2009

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SHORT APPENDIX

This short appendix contains all of the material required by parts (a) and (b) of Circuit Rule 30.

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