10-821 DEC 20 2010

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No. 10-

In the Supreme Court of the United States

PAT QUINN, GOVERNOR OF THE STATE OF ILLINOIS,
PETITIONER,

v.

GERALD A. JUDGE, DAVID KINDLER, AND ROLAND W. BURRIS, U.S. SENATOR, RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to longstanding practice and the laws of many States, the Seventeenth Amendment requires a special election to fill a vacant Senate seat "every time that a vacancy happens in the state's senate delegation"—as the decision below holds—even where the vacated term will expire in the normal course following the next, biennial Congressional election.

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PETITION FOR A WRIT OF CERTIORARI

Pat Quinn, Governor of the State of Illinois, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1a-40a) is reported at 612 F.3d 537 (7th Cir. 2010). That court's order amending its opinion on denial of rehearing (App. 60a-63a) is unpublished but reported at 2010 WL 2853645 (7th Cir. Jul. 22, 2010). The memorandum opinion of the United States District Court for the Northern District of Illinois (App. 41a-59a) is unreported.

JURISDICTION

The court of appeals entered judgment on June 16, 2010, and denied petitioner's timely petition for rehearing on July 22, 2010. On October 19, 2010, Justice Kagan extended until December 19, 2010, the time within which to file a petition for writ of certiorari. Because December 19 falls on a Sunday, this petition is timely filed on Monday, December 20, 2010. See SUP. CT. R. 30.1. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In relevant part, the Seventeenth Amendment to the United States Constitution provides:

> 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.

The Illinois Election Code provides:

> 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.

10 ILCS 5/25-8 (2008).

STATEMENT

The decision below construes the Seventeenth Amendment to impose a newfound obligation on the States, one that conflicts with this Court's precedent and departs sharply from historical practice and extant law in many States. Without this Court's intervention, the court of appeals' decision will unsettle the law on an issue of importance to voters, candidates, and States nationwide.

1. Effective November 16, 2008, President-elect Barack Obama resigned his seat in the United States Senate, with two years and 48 days remaining on his Senate term. App. 3a. Pursuant to authority conferred on the State by the Seventeenth Amendment, Illinois law authorizes the Governor to appoint a replacement Senator in the event of such a vacancy, see 10 ILCS 5/25-8 (2008), and on December 31, 2008, then-Governor Rod Blagojevich appointed Roland Burris to the vacant seat. App. 3a. Mr. Burris was sworn in as a U.S. Senator on January 15, 2009. App. 4a. Under Illinois law, Senator Burris would have served out the remainder of President Obama's original Senate term—*i.e.*, until the new six-year Senate term begins on January 3, 2011.[1]

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[1] Section 25-8 of Illinois' Election Code provides that a Senate vacancy shall be filled by appointment until the next biennial Congressional election, at which point the Senator

2. Shortly thereafter, respondents Gerald Judge and David Kindler, Illinois voters, filed suit against petitioner Governor Pat Quinn in the U.S. District Court for the Northern District of Illinois, alleging that § 25-8 violates the Seventeenth Amendment by permitting a Governor's Senate appointee to serve for an improperly long period of time, and by not requiring the Governor to issue a writ of special election to fill the seat.[2] App. 5a. Respondents sought a declaration that § 25-8 violates the Seventeenth Amendment and an injunction directing petitioner to "'issue a writ for a special election to be conducted as soon as practical to fill the vacancy.'" App. 4a, 5a. Respondents also moved for a preliminary injunction ordering petitioner to "'issu[e] a writ setting an election to fill the vacancy in the Senate seat, not in November, 2010,'" as Illinois law required, "'but at the earliest practical date.'" App. 5a.

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elected "shall take office as soon thereafter as he shall receive his certificate of election." 10 ILCS 5/25-8 (2008). Petitioner reads this provision to require an election to fill a vacancy before a Senate term's expiration unless, as here, the term naturally expires the January following the next general election.

[2] As used herein, "respondents" refers to plaintiffs Judge and Kindler. Though technically a respondent, see SUP. CT. R. 26.1, Senator Burris (like petitioner) was a defendant below, and the petition refers to him by name, rather than as "respondent," to avoid confusion.

Petitioner moved to dismiss the complaint, and Senator Burris was joined as a required party under Federal Rule of Civil Procedure 19. App. 5a, 44a.

Respondents replied, and their reply brief raised a new constitutional claim: that § 25-8 violates the Seventeenth Amendment because it requires petitioner to appoint an interim Senator, rather than giving him the choice *whether* to do so. App. 6a. Respondents also changed their request for preliminary injunctive relief from a demand for a prompt special election, to one "'on a reasonable, but relatively early date,'" or at least an order directing petitioner "'to exercise his discretion by acting to set some date for a special election.'" App. 6a.

In a memorandum opinion and order filed on April 16, 2009, the district court denied respondents' motion for preliminary injunction and dismissed their complaint without prejudice.[3] App. 6a. The court declined to address respondents' new theory, raised for the first time in their reply brief, that § 25-8 runs afoul of the Seventeenth Amendment by forcing petitioner to appoint a replacement Senator, and the court rejected respondents' original claim that the time between

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

President Obama's Senate resignation and the next general election on November 2, 2010 was unreasonably long. App. 6a, 49a-50a & n.7, 57a-58a.

For the latter holding, the court relied heavily on *Valenti v. Rockefeller*, 292 F. Supp. 851 (W.D.N.Y. 1968), aff'd, 393 U.S. 405 (1969) (*per curiam*), which "[b]oth parties acknowledge[d] * * * [was] central to this case." App. 51a. There, in a decision summarily affirmed by this Court, a three-judge district court rejected a Seventeenth Amendment challenge to New York's law for filling Senate vacancies, which did not permit voters to elect a replacement Senator following Robert Kennedy's assassination in 1968 until the 1970 general election, 29 months after Senator Kennedy's death. *Ibid.* As the district court in this case recognized, *Valenti* "expressly rejected the argument that the Seventeenth Amendment requires a special election," and stressed the several "'substantial state interests'" advanced by waiting to fill a vacant Senate seat until the next, biennial Congressional election date. App. 52a-53a. The district court also cited this Court's reliance on *Valenti* as "relevant and persuasive" authority in *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982), which upheld Puerto Rico's law permitting political parties to appoint interim replacements to vacant seats in the Puerto Rico legislature. App. 55a-56a.

The district court concluded that "*Rodriguez* and *Valenti* squarely contradict [respondents'] textual interpretation, pursuant to which they argue that Illinois *cannot* 'forgo a special election in favor of a temporary appointment.'" App. 57a (quoting *Rodriguez*, 457 U.S. at 11) (emphasis in original). Because the period between President Obama's Senate resignation and the next Congressional election in November 2010 was shorter than the 29 months upheld in *Valenti*, the court rejected respondents' constitutional challenge, dismissed their complaint without prejudice, and denied their motion for preliminary injunction. App. 57a-59a.

3. Respondents appealed, and although the Seventh Circuit affirmed the denial of their motion for preliminary injunction (because respondents could not show irreparable harm, App. 39a-40a) the court used its discussion of respondents' likelihood of success on the merits to order "two elections" for the same Senate seat on November 2, 2010. Specifically, the court ordered a regular election for the new, six-year term beginning in January 2011, and a special election for the remaining weeks of President Obama's original Senate term, App. 38a, relief that the parties had not addressed in their briefs or at oral argument. Respondents did not urge, and the court did not find, that the less than 27 months between President Obama's Senate resignation and January 2011 was an unconstitutionally long period for a gubernatorial appointee to serve. App. 20a. Rather,

the Court announced a rule that, under the Seventeenth Amendment, "*every* time that a vacancy happens in the state's senate delegation, the state must hold an election in which the people elect a permanent replacement to fill the vacant seat," App. 33a (emphasis added), even where, as here, the vacated term was ending and a successor would be elected at the next general election without conducting a separate, special election, App. 37a-38a.

Although the court acknowledged the possibility of a *de minimis* exception to its rule, it was "not prepared" to conclude that the period at issue here—the weeks between the certification of the winner of a November 2 special election and the swearing in of the new Congress on January 3, 2011—was *de minimis*. App. 37a. The court also conceded that its new rule was impossible to square with historical practice, whereby many replacement Senators (including the appointee in *Valenti* itself) served until the new Senator was sworn in for his or her full, six-year term. App. 36a-37a. The court further acknowledged that its novel rule would invalidate laws in States that expressly permit a Senate appointee to serve out the remainder of a Senate term when a vacancy arises sufficiently close to the term's natural expiration date. App. 35a (citing Connecticut statute).

Finally, though the court did not resolve "how the state is to decide whose names should be on the

November 2 ballot for the Obama vacancy," the opinion called for a "solution [that] complies with Illinois and federal law" and indicated that, "[h]owever Illinois conducts its election for the vacancy, the replacement senator presumably would present his or her credentials to the Senate and take office immediately, while the senator elected to begin service with the 112th Congress would not take office until January 3, 2011." App. 37a-38a.

4. Petitioner timely moved to amend the panel opinion or, alternatively, for rehearing by the full court *en banc*. The panel had decided an issue that the parties had not addressed, petitioner explained, and the court had committed errors of federal and state law in deciding to order two elections for the same Senate seat on the same day. Petitioner argued that the Seventh Circuit's new rule was impossible to square with this Court's ruling in *Rodriguez*, threatened to confuse voters and to leave an Illinois House district entirely unrepresented (if the Representative from that district won the special Senate election, as he ultimately did, and therefore needed to vacate his House seat *before* January 3, 2011 under the Seventh Circuit's decision), and would facially invalidate the laws of many States if applied in their circuits. Under Illinois law, moreover, the winner of a November 2 special election would not be certified until early December, meaning voters would have to endure the foregoing costs in exchange for a

truly *de minimis* period of service (roughly one month) by a specially elected Senator.

On July 22, 2010, the court declined to rehear the appeal *en banc*, but the panel corrected its earlier "presum[ption]" that the winner of a November 2 special election "would present his or her credentials to the Senate and take office immediately." App. 61a. Petitioner had shown that Illinois law gave election officials at least until early December to certify election results, and the panel amended its opinion to make clear that the State may have to "disregard provisions of state law that otherwise might ordinarily apply" to certify the special election results "as soon as possible, so that the replacement senator may present his or her credentials to the Senate and take office promptly." App. 62a-63a.

5. The parties and the district court took several steps to comply with the Seventh Circuit's ruling. On July 29, 2010, petitioner issued a writ, calling a special Senate election for November 2, 2010, "[b]ecause * * * the United States Court of Appeals for the Seventh Circuit has ruled that a writ of election must issue authorizing a special election to select a successor Senator to serve for the remainder of President Obama's original senate term." Jul. 29, 2010 Writ of Election. And, following several hearings, the district court entered an injunction specifying the manner in which the special election would be conducted, including the fact that the same list of candidates that would

appear for the regularly scheduled Senate election would be used for the simultaneous, special election. Aug. 2, 2010 Permanent Injunction Order. At the November 2 general election, therefore, Illinois voters cast ballots for both an interim Senator and a Senator for the full term beginning on January 3. Then-Congressman Mark Kirk won both elections, and he resigned his House seat and assumed President Obama's vacated Senate seat on November 29, 2010,[4] leaving Illinois' Tenth Congressional District unrepresented until Senator Kirk's successor takes office on January 3, 2011.

6. Meanwhile, petitioner filed a notice of appeal from the district court's permanent injunction order on September 1, 2010. That appeal is stayed pending resolution of this certiorari petition.

Senator Burris appealed separately from the district court's permanent injunction order, arguing that the order resolved a nonjusticiable political question, intruded on the prerogative of the Illinois legislature, and violated Senator Burris' ballot-access rights. See *Judge v. Quinn*, 624 F.3d 352, 357 (7th Cir. 2010). Pursuant to Supreme Court Rule 11, Senator Burris filed a certiorari petition with this Court on September 15, 2010, before the Seventh Circuit entered judgment

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

on his appeal. On September 24, 2010, the Seventh Circuit affirmed the district court's permanent injunction order. *Judge*, 624 F.3d at 362. Senator Burris' certiorari petition remains pending.

REASONS FOR GRANTING THE PETITION

This case poses a recurring constitutional question of critical importance to voters nationwide. The opinion below announces a new constitutional mandate, one that is impossible to square with the three-judge district court's decision in *Valenti,* conflicts squarely with this Court's decision in *Rodriguez* and—as the court of appeals itself acknowledged—would declare pervasive and longstanding state practices unlawful and invalidate election laws in many States. The court of appeals' decision puts States in the untenable position of having to choose between their laws and practices, and the need to avoid voter confusion and other voter harm, on the one hand, and a constitutional command, newly declared by a federal court of appeals, on the other.

As this Court's cases demonstrate, the Seventeenth Amendment does not support the holding below. The Amendment's proviso authorizes States to avoid simultaneous elections for the same Senate seat, as Illinois had hoped to do here, by permitting a Senator appointed sufficiently close to the end of a term to serve out its remainder. And even if the Amendment required

the writ in every instance, a *de minimis* exception would apply where, as here, the vacated term would expire following the next general election. The Court should grant the certiorari petition and overturn the court of appeals' novel construction of the Seventeenth Amendment.

I. The Decision Below Conflicts With This Court's Established Construction Of The Seventeenth Amendment.

The Seventh Circuit's decision is impossible to reconcile with the reasoning in *Valenti*, and it conflicts squarely with *Rodriguez*, where this Court, relying on *Valenti* and its logic, made clear that the Seventeenth Amendment permits States "to forgo" a special election entirely in some cases. Certiorari review is necessary to address this conflict on an issue of substantial public importance.

1. In *Valenti*, the three-judge court held that waiting to elect a new Senator until the next general election—29 months after Senator Kennedy's assassination in June 1968, which was too soon before the upcoming democratic primary to elect a replacement Senator at the November 1968 Congressional election, 292 F. Supp. at 853—fully complied with the Seventeenth Amendment.[5] The court squarely rejected

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[5] Although this Court's summary affirmance in *Valenti* has less precedential value than an opinion in an argued case, see *Southern Ry. Co. v. Seaboard Allied Milling Corp.*,

the argument that the Amendment's proviso—which authorizes a Governor to appoint only a "temporary" replacement to a vacant seat—required a more immediate election.

Although this appeal no longer involves any challenge to the *length* of the appointee's term of service, as opposed to whether there must be a special election at some point for every vacancy, see App. 7a, *Valenti* is at odds with the Seventh Circuit's decision on two grounds. First, *Valenti* anticipated that the rule it announced would permit an appointee "to serve out the remainder of a [Senate] term," so long as that appointment was not of excessive duration. 292 F. Supp. at 856 ("We would have difficulty, for example, squaring the word 'temporary' with a statute providing that the Governor's appointee is to serve out the remainder of a term *regardless of its length*." (emphasis added)). This understanding of the Seventeenth Amendment is impossible to square with the rule announced below, which requires a special election "every time that a vacancy happens in the state's senate delegation," App. 33a, and therefore prohibits an

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442 U.S. 444, 463 (1979), the Court in *Rodriguez* read *Valenti* as a decision on the merits, see 457 U.S. at 10-11, as the court below recognized, see App. 20a n.2. The federal courts of appeals have similarly treated *Valenti* as a decision on the merits. See *Donatelli v. Mitchell*, 2 F.3d 508, 517 (3d Cir. 1993); *Lynch v. Ill. State Bd. of Elec.*, 682 F.2d 93, 96-97 (7th Cir. 1982).

appointee from ever serving out the remainder of the vacated term.

Second, in upholding the 29-month delay in that case, the court in *Valenti* relied heavily on States' historical practice as a "persuasive guide to constitutional construction," 292 F. Supp. at 858, and on the many advantages for voters, candidates, and States in waiting until the next general election: (1) in the run-up to general elections, "voter interest and turnout are at a maximum," making this "a more desirable time to fill as important an office as United States Senator"; (2) "it would be considerably more difficult for Senate candidates to finance a campaign in an off-year"; and (3) experience has shown "that the inconvenience and expense to the state of" having an off-year special Senate election "outweigh[s] any advantages to be derived from having a more prompt vacancy election." *Id.* at 859-860. The decision below undercuts *Valenti* by penalizing the at least 30 States that follow its lead and wait until the next biennial Congressional election to elect a replacement Senator. See U.S. Senate Committee on Rules & Administration, SENATE ELECTION LAW GUIDEBOOK 2006, at 181-251; see also *infra* pp. 17-20.

2. The decision below also conflicts squarely with *Rodriguez*, in which this Court relied on *Valenti* to uphold a Puerto Rico law under which a deceased legislator's political party selected his replacement to serve the more than three years remaining on his term. 457 U.S. at 3 & n.1. Because the case did not involve a U.S. Senate election, the Seventeenth Amendment did not control directly, but the Court relied heavily on the

Amendment, as interpreted in *Valenti*, to uphold Puerto Rico's law. *Id.* at 10-12. The Court reasoned that, if the Seventeenth Amendment "permits a state * * * to forgo a special election in favor of a temporary appointment to the United States Senate," then this "suggests that a state is not constitutionally prohibited from exercising similar latitude with regard to vacancies in its own legislature." *Id.* at 4, 11.

Accordingly, *Rodriguez* upheld "[t]he Commonwealth's choice to fill legislative vacancies by appointment *rather* than by a full-scale special election." *Id.* at 12 (emphasis added). This was so even though the challenged Puerto Rico law, which the Court quoted in full, permitted the replacement legislator to remain in "'office until the term of his predecessor has expired.'" *Id.* at 3 n.2.

The Court's holding in *Rodriguez* would have been impossible under the Seventh Circuit's construction of the Seventeenth Amendment. That construction requires a special election "every time that a vacancy happens," App. 33a, and, by extension, would void a law like Puerto Rico's, which allowed the government to "forgo a special election" and authorized the appointee to serve "'until the term of his predecessor has expired.'" The conflict between the decision below and *Rodriguez* is alone grounds for this Court's review.

II. The Question Presented Is An Important And Recurring One.

If left undisturbed, the decision below threatens election practices nationwide. Most obviously, the Seventh Circuit's rule would facially invalidate election laws in at least 13 States, which in some circumstances permit the Governor's appointee to serve out the remainder of a vacated Senate term.[6]

1. More broadly, most States have laws, like the one upheld in *Valenti*, that advance the "substantial state interests" identified in that decision by permitting the Governor's appointee to serve through the next biennial Congressional election, see *supra* p. 15, and the decision below penalizes that approach. The court of appeals' new rule—and the court acknowledged that its holding runs contrary to the way that States have filled many Senate vacancies historically, App. 36a—requires States that follow *Valenti* to elect *two* Senators for the same seat at the next general election whenever, as here, a vacancy arises during the final two years of the Senate

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[6] See CAL. ELEC. CODE § 10720 (West 2009); CONN. GEN. STAT. ANN. § 9-211 (West 2010); LA. REV. STAT. ANN. § 18:1278(C) (West 2009); MD. CODE ANN., ELEC. LAW § 8-602(a)(3) (West 2010); MISS. CODE ANN. § 23-15-855(2) (West 2010); NEB. REV. STAT. § 32-565(2)(a) (2009); N.Y. PUB. OFF. LAW § 42(4-a) (McKinney 2010); N.D. CENT. CODE § 16.1-13-08 (2009); OHIO REV. CODE ANN. § 3521.02 (West 2010); S.C. CODE ANN. § 7-19-20 (2010); S.D. CODIFIED LAWS § 12-11-6 (2010); W. VA. CODE § 3-10-3 (2010); WYO. STAT. Ann. § 22-18-111(a) (2009).

term. This imposes substantial new burdens on voters and States alike.

First, the rule risks significant voter confusion. "Avoiding voter confusion is * * * a compelling state interest," *Swamp v. Kennedy*, 950 F.2d 383, 386 (7th Cir. 1991) (citing *Bullock v. Carter*, 405 U.S. 134, 145 (1972)), and having two elections for the same seat on the same day is likely to dissuade some voters from selecting anyone from the list that appears second on the ballot. Historical election returns support this prediction. In 1970, a court order required Illinois to conduct two elections on the same ballot for the same seat in the U.S. House of Representatives. See *Jackson v. Ogilvie*, 426 F.2d 1333, 1337 (1970). As in this case, one election was for the remainder of the original term, while the other was for the full term beginning the following January. *Ibid.* More people voted for candidates to fill the remaining portion of the then-current term than voted to elect a House member for the full, upcoming term, presumably because the choices appeared in that order on the ballot. See Sep. App. in Supp. of Mot. to Amend Op. or for Rehearing *En Banc* at 40-41 (reproducing 1970 ballot and election results, showing 123,695 total votes cast in special election, but only 121,424 votes cast in election to fill seat for full, two-year term). The results were even starker this year, where between 4 and 5% more people voted in the first-listed Senate race (the race for the full term appeared first this time) than in the second.[7] While one could

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[7] Compare http://elections.il.gov/Downloads/ElectionInformation/VoteTotals/2010GEOfficialVote.pdf

offer a variety of speculative explanations for this voter behavior, it is impossible to avoid the most obvious explanation—that many voters were disenfranchised because they did not understand why they were asked to pick from the same list of names twice for the same seat.

Second, the Seventh Circuit's rule frequently will leave many constituents unrepresented. More than forty members of the Senate of the 111th Congress came to that body directly from the House of Representatives,[8] as now-Senator Kirk did when he succeeded Senator Burris. Under the new rule announced in this case, however, Senators in this position who win a special election must abandon their House seats prematurely, leaving constituents in their districts entirely unrepresented in that body until January. See generally *Valenti*, 292 F. Supp. at 863 ("a vacancy in the House * * * leaves the affected district's residents completely without representation"). This is precisely what occurred in Illinois, where compliance with the Seventh Circuit's new constitutional

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(official totals for election for full, six-year term, showing 3,704,473 total votes), with http://elections.il.gov /ElectionInformation/GetVoteTotals.aspx (select "Special General Election 2010" then "United States Senator") (official totals for special election, showing 3,545,984 total votes).

[8] See http://senate.gov/pagelayout/reference/three_ column_table/Senators.htm (follow links to biographies of Class I, II, and III Senators).

requirement left the citizens in Senator Kirk's former House district without representation in that chamber.

Finally, the decision below permits candidates to double normal federal campaign funding limits. Federal law limits direct, individual campaign contributions to $2,400 per person, per candidate, per election. See 2 U.S.C. §§ 441a(a)(1)(A), (c). But because the Seventh Circuit ordered *two* Senate elections for the same day, individuals could (and did) double their personal contributions.[9] See 2 U.S.C. § 431(1)(A) (defining an "election" eligible for donations as "a general, special, primary, or runoff election").

2. These adverse effects of the Seventh Circuit's new rule will be widespread. States' use of the Seventeenth Amendment's vacancy-filling provisions is commonplace, and the question that this case poses can be expected to arise in conjunction with fully one-third of those vacancies—namely, those that occur during the final two years of a Senate term.

Since the beginning of 1913, the year that the Seventeenth Amendment was ratified, 188 Senators have been appointed to fill Senate vacancies, and 46 States have appointed at least one Senator in that

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[9] For a list of contributions for the special and general Senate elections, see http://www.fec.gov/finance/disclosure/disclosure_data_search.shtml (follow "Candidate Search" link and subsequent prompts).

time.[10] More than one-fifth of the Senators who began their Senate tenure between January 1, 1913 and January 1, 2011 started out as appointees.[11] And these figures ignore so-called "technical resignations," a practice—discontinued in 1980—whereby outgoing Senators would resign after a successor was elected to enable the Governor to appoint the new Senator-elect to the vacancy, thus gaining a few days' or weeks' seniority over the rest of the incoming freshman Senators. See Thomas Neale, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, FILLING U.S. SENATE VACANCIES: PERSPECTIVES AND CONTEMPORARY DEVELOPMENTS 7 (2009).

This year alone illustrates the regularity with which the issue presented here arises. Two of the Senators now completing service in the 111th Congress were appointed to serve out the remainder of a vacated term ending January 3, 2011: Senator George S. LeMieux of Florida, appointed on September 10, 2009,[12] and Senator Michael F. Bennet of Colorado, appointed on January 21, 2009.[13] Neither Florida nor Colorado held

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[10] See http://senate.gov/artandhistory/history/ common/ briefing/senators_appointed.htm.

[11] See http://senate.gov/pagelayout/senators/f_two_ sections_with_teasers/states.htm.

[12] See http://lemieux.senate.gov/public/?p=Home.

[13] See http://www.colorado.gov/governor (follow "Press Releases" to "View 2009 Press Releases Here" to January 3

a second, special election on November 2 to replace these appointees for the remaining weeks of 2010, as the Seventh Circuit's rule requires.

Among other current Senators, Robert Menendez of New Jersey (appointed in 2006) and Lisa Murkowski of Alaska (appointed in 2002) received appointments within two years of the natural end of the vacated Senate term, and neither State held two, side-by-side elections for the same seat on the next Congressional election day, as the decision below commands.[14] Rather, as in Colorado and Florida this year—and as Illinois would have done in the absence of the Seventh Circuit's ruling—voters in New Jersey and Alaska elected a Senator for the new, six-year term beginning the following January, when the vacated term expired.

In short, this case presents a recurring and significant constitutional question. The Seventh Circuit's unprecedented rule imposes substantial costs on voters and States alike, breaks dramatically from historical state practices, would invalidate the election laws of at least 13 States, and would overturn the way two States treated Senate vacancies in 2010 alone. Left undisturbed, the decision below creates an intractable uncertainty for the States, which must choose between

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and 21, 2009 Press Releases regarding Senate appointment).

[14] See http://menendez.senate.gov/biography; http://www.washingtonpost.com/wp-srv/elections/2004/candidates/22914; http://murkowski.senate.gov/public/index.cfm?p=Biography.

the need to avoid voter confusion, potential lack of representation in the House, and past practice, on the one hand, and a federal appellate court decision announcing a new rule of constitutional law, on the other.

III. The Decision Below Is Wrong On The Merits.

The Seventh Circuit's novel interpretation is not only incompatible with this Court's precedent, see *supra* Part I, but it also misreads the Seventeenth Amendment. The Amendment's proviso, which governs gubernatorial appointments, sets out an exception to the requirement that the Governor issue a writ of election for every vacancy. And even if the Amendment required such a writ as a general matter, a *de minimis* exception would apply where, as here, the vacated term expires in the normal course following the upcoming general election.

1. The Seventeenth Amendment makes clear that the Governor need not call a special election every time a vacancy occurs. To be sure, its second paragraph begins with the directive that, "[w]hen 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." That is the Amendment's default rule for filling Senate vacancies, and it is nearly identical to the constitutional rule for filling House vacancies. See U.S. CONST., art. I, § 2, cl. 4. But later in the same sentence of the Seventeenth Amendment, the proviso, which has no analogue in Article I, Section 2, gives States an alternative, whereby "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." See generally *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2190 (2009) (noting that a proviso may "except something from the enacting clause, or * * * qualify and restrain its generality" or may set out its own "general, independent rule") (internal quotation marks omitted).

This clause grants substantial power to state legislatures to respond to Senate vacancies. As *Valenti* recognized, the Amendment "allow[s] the states to conduct Senate vacancy elections in accordance with their regular election procedures, so long as those procedures further substantial state interests." 292 F. Supp. at 861. To be sure, the authority that the proviso confers is not unlimited; the Governor's appointment is only "temporary," and as *Valenti* recognized, use of this term necessarily limits the duration of a gubernatorial appointee's period of service. See *id.* at 856. But the Amendment clearly grants a state legislature (that is willing to give a temporary appointment power to the Governor) authority to "fill the vacancies by election as [that] legislature may direct." Nothing in this language prohibits the legislature from "direct[ing]"—in cases like this one, where the vacated Senate term expires following the next general election—that "the people fill the vacanc[y]" in that seat "by elect[ing]" a new Senator to begin the next full, six-year term starting the following January.[15] And at least 13 States require

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[15] In the alternative, even if the phrase "fill the vacancies by election" were understood to refer exclusively to elections

precisely that on the face of their election codes, allowing an appointed Senator to complete a vacated Senate term if that term expires following the next November election. See *supra* p. 17 & n.6.

This has been a common practice historically, as the decision below observed, with at least 27 instances in which States left the gubernatorial Senate appointee in place until the new Senate term began. App. 36a. These laws and practices not only give effect to the plain language of the proviso but, to the extent that the Amendment is susceptible to more than one reasonable construction, the States' time-honored practices properly inform the proviso's interpretation. See *Valenti*, 292 F. Supp. at 858; see also *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (finding evidence of law's meaning in "long and continuous interpretation in the course of official action under the law"); *Cooley v. Bd. of Wardens*, 53 U.S. (12 How.) 299, 315 (1851) (laws existing in States since Constitution's adoption are "entitled to great weight, in determining whether such a law is repugnant to the Constitution"), overruled on other grounds by *Complete Auto Body Transit, Inc. v. Brady*, 430 U.S. 274 (1977).

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to fill the seat during some portion of the original, vacated Senate term, the proviso authorizes the legislature to fill vacancies "by election as the legislature may direct," and surely this permits the legislature to "direct" that there be no such election where holding one would run contrary to the public interest.

2. Even if the Amendment required a special election for every Senate vacancy—but see *Rodriguez*, 457 U.S. at 11 ("the Seventeenth Amendment permits a state * * * to forgo a special election")—a *de minimis* exception would bar application of that general rule where the vacated term expires following the next general election. This Court has recognized consistently that constitutional protections, including voting rights, are not implicated when the infringement is *de minimis*. See, *e.g.*, *Davis v. Bandemer*, 478 U.S. 109, 133-134 (1986) (plurality op.) ("more than a *de minimis* effect" on voting rights is required to implicate Equal Protection Clause); *Abrams v. Johnson*, 521 U.S. 74, 98 (1997) (same with regard to "one person, one vote" requirement of Article I, Section 2); see also *Hudson v. McMillan*, 503 U.S. 1, 9-10 (1992) (Eighth Amendment "necessarily excludes from constitutional recognition *de minimis* uses of physical force"); *Bell v. Wolfish*, 441 U.S. 520, 539 n.21 (1979) ("There is, of course, a *de minimis* level of imposition with which the Constitution is not concerned.")

This reasoning is fully applicable here, as State regulation of elections inevitably imposes some burdens on voters and candidates, and rational, minimal impositions are not unconstitutional. See *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); see generally *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, *J.*) ("The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints."). And the need for some *de minimis* exception

to an otherwise rigid rule requiring the Governor to call a special election in the case of every Senate vacancy is beyond dispute. Imagine the vacancy that arises just weeks or days before the Senate term's expiration. It would be impossible in such a case to hold an organized election that conformed to the bare minimum federal and state election laws.

Indeed, the decision below itself acknowledges the likely need for some "*de minimis*" exception under the Seventeenth Amendment. App. 37a; see also *ACLU v. Taft*, 385 F.3d 641, 650 (6th Cir. 2004) (recognizing that "there may be situations where an executive's duty [to call a special House election under U.S. CONST. art. I, § 2, cl. 4] is excused because the time remaining on the Congressional term is truly *de minimis*"). Without analysis, however, the court of appeals here stated that it was "not prepared" to recognize the period between the certification of election results following the November 2 election and January 3 as *de minimis*.

But this period—between the general election and the swearing in of the new Congress—should be considered *de minimis* as a matter of law. These two months fall well short of the 29 months upheld in *Valenti*, or the more than three years without an election that this Court sustained as a "minimal" intrusion on voting rights in *Rodriguez*.

Nor is it truly a two-month period, for election authorities use the weeks following a general election to count absentee ballots, conduct recounts, and certify results, while parties questioning the accuracy or propriety of initial results use this time to mount legal

challenges. In Illinois, for example, under ideal conditions—without lawsuits or recounts—the Illinois State Board of Elections does not certify results from a November general election until early December. See 10 ILCS 5/18A-15(a), 19-8, 22-1, 22-5, 22-8, 22-9, 22-9.1 22-15 (2008). Indeed, even with a court order directing state election officials to "disregard" state law and seat Senator Kirk, who won the November 2 special election for the remainder of President Obama's Senate term, "as soon as possible," App. 62a-63a, he did not take office until November 29. And that was on the tightest of schedules. Recounts and legal challenges could have pushed that date later, reducing the Senate tenure of the winner of the special election from just over four weeks to mere days, if anything. Meanwhile, all of this presumes that the Senate will be in session in December, something that has been true only about 50% of the time between 1978 and 2009 (17 out of 32 sessions), and on those occasions when there have been such sessions, its average length has been little more than 11 days.[16]

Under the Seventh Circuit's new rule, voters in most States—which seek the "substantial * * * benefits" recognized in *Valenti* by waiting until the next Congressional election to fill a vacant Senate seat—will have to endure the risk of confusion and non-representation in exchange for this (at best) *de minimis* period of service, a period during which the State would

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[16] See http://thomas.loc.gov/home/ds/index.html#senate (192 total session days across 17 December hold-over sessions from 1978 to 2009).

have been represented by an appointee without incurring these costs. Under the Seventh Circuit's rule, the only alternative is to abandon the advantages that *Valenti* identified and hold freestanding, special elections, at significantly greater expense to taxpayers and likely substantially lower voter turnout. See 292 F. Supp. at 859-860.

IV. This Case Provides A Proper Vehicle For Resolving The Question Presented.

1. Not only is the question presented a critical and recurring one for States and voters nationwide, but this case provides an ideal vehicle for resolving it. The Seventh Circuit's published opinion thoroughly analyzes the issue. And significantly, respondents have abandoned any argument that the period between President Obama's Senate resignation and the election of his successor in November 2010 was unconstitutionally protracted (a claim that *Valenti* forecloses in any event). See App. 7a, 20a. As a result, the threshold question (a challenge to the length of service by the gubernatorial appointment) that can be expected to surface in most cases raising the question presented here, would not play any part in this appeal. Rather, the sole question that this case asks is the one that now demands a clear resolution—whether States must hold a special election every time a Senate vacancy arises, even where the vacated term expires following the next general election.

2. Nor is this question immunized from this Court's review under the mootness doctrine. Although the 2010 Illinois general election has passed, this case

"fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007). This "exception applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Ibid.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)); accord *Davis v. FEC*, 128 S. Ct. 2759, 2769 (2008). Not surprisingly, election cases routinely satisfy these criteria. See *Davis*, 128 S. Ct. at 2769-2700; *Wisc. Right to Life*, 551 U.S. at 462-464; *Storer v. Brown*, 415 U.S. 724, 737 n.8 (1974); see also Eugene Gressman, *et al.*, SUPREME COURT PRACTICE 928-929 (9th ed. 2007) (citing *Democratic Party v. Wisconsin*, 450 U.S. 107, 115 n.13 (1981); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973); *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969)). And this case is no exception.

First, petitioner's request for this Court's review of the decision below could not reasonably have been resolved before the 2010 election, demonstrating that the controversy is of a type that threatens to evade review. By the time the Seventh Circuit issued its opinion on June 16, 2010, and its order on rehearing on July 22, 2010, petitioner could not seek relief in this Court prior to the November 2 election without further jeopardizing the integrity of that election. If petitioner had applied for a stay from this Court in late July, after the Seventh Circuit denied rehearing, and this Court had stayed enforcement of the district court's order

while reviewing petitioner's certiorari petition, only to deny that petition and lift the stay in October, it would have left the State and its voters in an impossible position just weeks or days before the general election. As of late July, Illinois election authorities had less than two months to determine candidates and print and ready ballots for absentee and other military voters, see 10 ILCS 5/16-5.01(a) (2008); 42 U.S.C. § 1973ff-1(a)(8), and in-person Grace Period Voting and Early Voting began in Illinois on October 6 and October 11, 2010, respectively, see 10 ILCS 5/4-50, 5/5-50, 5/6-100, 5/19A-15 (West 2010). Even a short delay in preparations would have threatened the integrity of the November elections, and petitioner therefore had no choice but to prepare for the two Senate elections that the Seventh Circuit had ordered and challenge that court's constitutional error after November 2.

Second, there is a reasonable likelihood that this dispute will recur, showing that the question presented is capable of repetition. This second prong of the mootness exception "requires a 'reasonable expectation' or a 'demonstrated probability' that 'the same controversy will recur involving the same complaining party.'" *Wisc. Right to Life*, 551 U.S. at 463 (quoting *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (*per curiam*)) (internal quotation marks omitted). Petitioner easily satisfies this requirement. As history has shown, Senate vacancies followed by gubernatorial appointments are common. See *supra* Part II. Indeed, in the November 2010 election alone, two States with vacancy appointees elected Senators to new, six-year

terms without the extra, special election that the Seventh Circuit now requires. See *ibid.*

3. Moreover, it is irrelevant that petitioner technically prevailed in the Seventh Circuit, insofar as that court affirmed the district court's order denying respondents preliminary injunctive relief. Only the party who "'receives all that he has sought'" from the lower court and thus "'is not aggrieved by the judgment affording the relief'" lacks standing to challenge that judgment on appeal. *Forney v. Apfel*, 524 U.S. 266, 271 (1998) (quoting *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980)). But where, as here, a party receives "some, but not all, of the relief * * * requested," the party—although technically "'prevailing'"—"is 'aggrieved' and ordinarily can appeal." *Ibid.*; see also *United States v. Jose*, 519 U.S. 54, 56 (1996) (*per curiam*) (party may appeal decision "granting in part and denying in part the remedy requested"); *Roper*, 445 U.S. at 334 n.6 ("party who has prevailed on the merits" may appeal "so long as that party retains a stake" in the litigation).

Nor is petitioner seeking merely to correct adverse dicta below. Cf. *Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, *J.*, dissenting from denial of certiorari) (Court disfavors petitions seeking solely "to correct errors in dicta"). On the contrary, the Seventh Circuit construed the Seventeenth Amendment to require petitioner "to issue a writ of election" that will "announce to voters that there will be, in effect, two elections on [November 2, 2010]—one to elect a replacement to fill the vacancy and one to elect a senator to the next Congress," App. 34a, 37a, and the

court directed the State to "endeavor to certify the results of that election as soon as possible, so that the replacement senator may * * * take office promptly," App. at 62a-63a.[17] The Seventh Circuit denied preliminary relief only because there was "still time" for petitioner to issue the writ on his own, precluding respondents from showing irreparable injury absent a preliminary injunction. App. 39a-40a. The district court, however, like petitioner (who issued the writ without awaiting a separate order from the district court, see *supra* p. 10), understood the Seventh Circuit to have ordered petitioner to issue a writ of special election. Tr. of 6/23/10 Hearing at 33 (district court, on remand, construing panel decision to "hold[] that we must" issue a writ of election). There can be no question that the Seventh Circuit's decision imposed additional, tangible burdens on petitioner, and that this case presents an ideal vehicle for resolving the significant and recurring question presented.

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[17] That the Seventh Circuit understood its opinion to *mandate* particular relief is confirmed by the fact that the court construed petitioner's June 28, 2010 "Motion to Amend Opinion or, in the Alternative, Petition for Rehearing *En Banc*" as a request for rehearing or rehearing *en banc*, even though petitioner had not technically sought modification of the Seventh Circuit's judgment (as opposed to amendment of its opinion). App. 61a. Such a construction was permissible only because the Seventh Circuit understood the panel opinion to have ordered a special Senate election, with only the details of that election left for the district court to decide.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2010