No. 10-821

In the Supreme Court of the United States

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

v.

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

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

BRIEF OF THE STATES OF LOUISIANA, COLORADO, IOWA, KENTUCKY, MAINE, MARYLAND, MASSACHUSETTS, MISSOURI, NEW MEXICO, NEVADA, OHIO, SOUTH CAROLINA, AND UTAH, *AMICI CURIAE* IN SUPPORT OF PETITIONER

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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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INTERESTS OF *AMICI* STATES

This case poses a recurring question of critical importance to the states and their citizens: how to fill senate seats left vacant by death or resignation. Exercising their considerable discretion over the times, places, and manner of holding senate elections, every state has enacted laws for electing replacement Senators. These laws and derivative practices reflect nearly a century of state experience. The Seventh Circuit's decision in this case interprets the Seventeenth Amendment in complete isolation from that accumulated practical wisdom. Its unheard-of rule requiring a special election for every senate vacancy, regardless of its timing, threatens to upend the vacancy-election laws of every state.

In the face of this potentially significant disruption to nationwide election practices, the *amici* states urge the Court to grant Illinois' petition.

SUMMARY OF ARGUMENT

Senate vacancies are a historical certainty. Since the 1913 ratification of the Seventeenth Amendment, which provides for direct popular election of senators, vacancies have occurred, on average, once every 174 days.[1] States have long exercised their constitutional discretion to fill those vacancies in a manner that best protects compelling state and voter interests. That discretion derives

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[1] There were 35,697 days between the ratification of the Seventeenth Amendment on April 8, 1913 and January 1, 2011. This calculation assumes 205 vacancies during that period.

from two sources. The Elections Clause empowers states to prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, §4, cl. 1; *see also Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 451 (2008) ("The States possess a *broad* power to prescribe the Times, Places, and Manner of holding Elections for Senators and Representatives.") (emphasis added) (internal quotation marks omitted). And the Seventeenth Amendment itself directs 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 para. 2 (emphasis added); *see also Valenti v. Rockefeller*, 292 F. Supp. 851, 856 (W.D.N.Y. 1968), *aff'd*, 393 U.S. 405 (1969) (reasoning that the Seventeenth Amendment's drafters did not intend to depart from the normal rule of state discretion to regulate the time and manner of elections).

Vacancies occurring late in a six-year senate term pose unique problems for states. Elections to fill the soon-to-expire term are impractical given the fast-approaching regular election for the following term. While states have developed various strategies for filling these vacancies, one sensible option has always been to bypass a special replacement election and fill the vacancy via the regularly scheduled election for the following six-year term. This

practice has become nearly uniform in recent decades, *see infra* Part I(C), and no court has ever seriously disputed that it lies within the states' constitutionally guaranteed power to "direct" the filling of senatorial vacancies. Until now.

When President Obama resigned his senate seat, Illinois planned to fill the vacancy via the regular November 2010 election for the new term. That route was consistent with its vacancy-election law, and with those of most states. But the Seventh Circuit rejected that practice and, in doing so, announced an unprecedented and misguided rule of constitutional law: that states must always stage a replacement election for the unexpired senate term no matter the timing of the vacancy.

As detailed by petitioner, *see* Pet. 13-16, the Seventh Circuit's decision conflicts with this Court's decisions in *Valenti*, *supra*, and *Rodriguez v. Popular Democratic Party*, 457 U.S. 1 (1982). That conflict alone merits review. SUP. CT. R. 10(c). But the Seventh Circuit's error goes far deeper in its practical implications for state practice generally, making review particularly urgent.

Flatly stated, the Seventh Circuit's unprecedented rule contradicts the well-established interpretation of the Seventeenth Amendment as manifested by the longstanding laws and practices of the states. If applied nationwide, its rule would facially invalidate the vacancy-election laws of 19 states and cast serious constitutional doubt on the application of the laws of the remaining states. *See infra* Parts I(A) & I(B).

But the disruptive impact of the Seventh Circuit's rule is most dramatically illustrated by fact that it would nullify what has become the prevalent approach for dealing with late-term vacancies. *See infra* Part I(C). Since 1913, there have been 83 late-term[2] senate vacancies caused by resignation or death. In 34 of those instances, pursuant to a state's vacancy law, the governor has appointed a replacement senator to serve out the remainder of the term until election of a new senator at the next congressional election. The Seventh Circuit has now declared that common, and common-sense, historical practice flatly unconstitutional.

In other words, according to the rule adopted by the Seventh Circuit, the following 34 appointed senators—unbeknownst to them—have served unconstitutional senate terms:[3]

George B. Martin (KY), appointed 1919
Frank B. Willis (OH), 1921
Elijah S. Granmer (WA), 1932
Rose McConnell Long (LA), 1936
Thomas M. Storke (CA), 1938
Berkley L. Bunker (NV), 1940

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[2] That is, vacancies occurring in the final two years of the term.

[3] The state *amici* have set forth the full data for vacancies since 1913 in tabular form as an appendix to this brief. The data are derived from the Biographical Directory of the United States Congress, http://bioguide.congress.gov/biosearch/biosearch.asp; and Senate Historical Office, Senators of the United States 178-2011, http://www.senate.gov/artandhistory/history/resources/pdf/chronlist.pdf (sites last visited January 12, 2011).

G. Lloyd Spencer (AR), 1941
Wilton E. Hall (SC), 1944
Hugh B. Mitchell (WA), 1945
Frank P. Briggs (MO), 1945
Edward P. Carville (NV), 1945
Spessard L. Holland (FL), 1946
Ralph E. Flanders (VT), 1946
Vera C. Bushfield (SD), 1948
Charles E. Daniel (SC), 1954
Joseph H. Bottum (SD), 1962
Pierre Salinger (CA), 1964
Walter F. Mondale (MN), 1964
Robert P. Griffin (MI), 1966
Charles E. Goodell (NY), 1968
Elaine S. Edwards (LA), 1972
Howard M. Metzenbaum (OH), 1974
Wendell R. Anderson (MN), 1976
Kaneaster Hodges, Jr. (AR), 1977
Paul G. Hatfield (MT), 1978
George J. Mitchell (ME), 1980
Nicholas F. Brady (NJ), 1982
David K. Karnes (NE), 1987
Lincoln Chafee (RI), 1999
Dean Barkley (MN), 2002
Lisa Murkowski (AK), 2002
Robert Menendez (NJ), 2006
Michael F. Bennett (CO), 2009
George S. Lemieux (FL), 2009

An interpretation of the Seventeenth Amendment that overturns such a widespread, longstanding, and common-sense practice cannot be right.

Clarifying the proper scope of state discretion under the Seventeenth Amendment will remove the

cloud of uncertainty hanging over state election practices created by the Seventh Circuit's opinion. While no other circuit has (yet) adopted the Seventh Circuit's approach, waiting is not the wise course here. For when the next senatorial vacancy inevitably occurs, the Seventh Circuit's opinion virtually assures a challenge to the appointment. And however that challenge fares, it will inevitably sow chaos, confusion, and cost into the state's election machinery. The Court can avoid that unhappy and predictable result by reviewing the Seventh Circuit's decision now.

ARGUMENT

I. THE OPINION BELOW CONFLICTS WITH LONG-ESTABLISHED STATE LAWS AND PRACTICES.

A. Past practice is an indispensible guide to constitutional construction.

While the Seventh Circuit minutely parsed the inconclusive language of the Seventeenth Amendment, it did so in isolation from the most authoritative guide to what that language means: the long-established practices of the states in implementing it. On the one hand, the court relied on an abstract examination of the Amendment's text to craft an unheard-of rule requiring replacement elections in every instance. The states, on the other hand, have long interpreted the Amendment as affording them discretion to bypass special replacement elections under certain common-sense circumstances. When interpreting the text of the

Seventeenth Amendment, the Seventh Circuit simply "disregard[ed] the gloss which life has written upon it." *Nashville, C. & St. L. Ry. v. Browning*, 310 U.S. 362, 369 (1940).

In contrast to the Seventh Circuit's approach, this Court has long drawn on state practices to help construe open-textured constitutional language:

> The framers of the constitution employed words in their natural sense . . . . But where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction [by the states] is entitled to the greatest weight.

McPherson v. Blacker, 146 U.S. 1, 7 (1892); *see also, e.g., M'Culloch v. Maryland*, 17 U.S. 316, 401 (1819) (reasoning that a "doubtful question" of constitutional construction, "if not put at rest by the practice of the government, ought to receive a considerable impression from that practice"). Most relevant to this case, for instance, the Court has deferred to states' longstanding interpretation of their powers under the Elections Clause, cautioning that "the terms of the constitutional provision provide no such clear and definite support for a contrary construction as to justify disregard of *the established practices of the states.*" *Smiley v. Holm*, 285 U.S. 355, 369 (1932) (emphasis added).

These interpretive principles were on display in the three-judge panel opinion in *Valenti*, which this

Court affirmed. *See* Pet. at 13-15 (explaining significance of *Valenti*). In upholding the constitutionality of a New York vacancy-election law that would have resulted in a 29-month interim senate appointment before a replacement election, *Valenti* recognized that decades of practical experience had allowed the states to subject the vacancy-election problem to "careful scrutiny" and to adjust their laws accordingly. 292 F. Supp. at 859. The court relied heavily on the fact that New York's statute was the product of a growing historical consensus. *Id.* at 858 ("there is ample authority for relying on this evidence [of historical practices] as one persuasive guide to constitutional construction"). Consistent with the court's decision, no election was ever held to fill the unexpired term. The seat was instead filled in the already-scheduled election for the following six-year term.

Over 40 years after *Valenti*, New York's 1968 approach to filling senate vacancies continues to represent that of a large majority of states, including Illinois. Thus, in rejecting Illinois' common practice, the Seventh Circuit disregarded the same historical consensus that *Valenti* found determinative. An examination of the extent to which the Seventh Circuit's unprecedented mandatory-election rule contradicts established state practices reveals the flaws in its constitutional interpretation.

B. More than a third of states have formally codified the very practice the Seventh Circuit has forbidden.

The clearest manifestation of the consensus against late-term replacement elections is that a third of the states have proscribed them. The vacancy-election laws of 19 states prohibit special replacement elections for senate seats under certain circumstances. Louisiana law, for example, provides that:

> If a vacancy occurs in the office of United States senator and the unexpired term is one year or less, *no special election shall be called by the governor* and, if a senator is appointed to fill the vacancy, he shall serve for the remainder of the unexpired term, and his successor shall be elected at the next regular election for United States senator.

LA. REV. STAT. ANN. § 18:1278(C) (West 2011) (emphasis added).[4] Other states, such as Alaska,

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[4] *See also* CAL. ELEC. CODE § 10720 (West 2010); CONN. GEN. STAT. ANN. § 9-211(a)(3) (West 2010); IOWA CODE §§ 69.8, 69.11, 69.13 (2010); MD. CODE ANN., ELEC. LAW § 8-602(a)(3) (West 2010); MASS. GEN. LAWS ch. 54, § 140 (2010); MINN. STAT. § 204D.28 (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 2011); 26 OKL. ST. ANN § 12-101(B) (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).

more explicitly time their cutoff dates to allow for primaries:

> [I]f the vacancy occurs on a date that is less than 60 days before or is on or after the date of the primary election in the general election year during which a candidate to fill the office is regularly elected, the governor may not call a special election.

ALASKA STAT. ANN. § 15.40.140 (West 2010). Taking yet another approach, Missouri makes no mention of the length of the unexpired term, but instead requires appointees to serve until the January following the general election, precluding a special election in the interim:

> [T]he person appointed . . . shall continue in office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of the term, *or for the ensuing regular term*, as the case may be, and the person so elected shall enter upon the discharge of the duties of the office the first Monday in January next following his election . . . .

MO. REV. STAT. §§ 105.030, 105.040 (2010) (emphasis added).

Whatever their formulation, these provisions manifest states' judgments that holding multiple elections in close succession for the same senate seat

would do more harm than good. *See infra* Part II. The Seventh Circuit's departure from this formerly uncontroversial consensus could not be more radical: its rule, if applied nationally, would facially invalidate all 19 of these statutes. That sweeping rejection would, perhaps, be less disconcerting if the vacancy-election laws of the other two-thirds of the states took the opposite approach. But that is emphatically not the case. As explained in the following section, these 19 states have simply formalized the consensus position demonstrated by the practices of the remaining states.

C. The Seventh Circuit's rule conflicts with the practices of the overwhelming majority of the remaining states.

The provisions discussed above leave no doubt about those states' position on late-term vacancy elections: they categorically reject them. But even if states do not formally prohibit such elections, they can—and do—opt to bypass them in practice. Illinois' vacancy election law is, after all, silent on the issue. It reads, in its entirety:

> 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 ILL. COMP. STAT. 5/25-8 (2010). Illinois sensibly interpreted its statute to allow it to fill President Obama's vacant seat via the upcoming general election for the 2011-17 term—e.g., the "next election of representatives in Congress." *Id.* This application of its law, rather than the explicit terms of that law, reflected the same considerations that led 19 other states to codify the practice.

States with laws similar to Illinois have, until now, had no reason to believe that they could not apply their laws as Illinois does. Twenty-two states'[5] laws are identical to Illinois' in that they provide for the vacancy to be filled in the next regularly scheduled statewide general election.[6] The eight

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[5] Out of the 33 states not already discussed in Part II(B), *supra*.

[6] See ARIZ REV. STAT. ANN. § 16-222 (2010); COLO. REV. STAT. ANN. § 1-12-201 (West 2010); DEL. CODE ANN. tit. 15 § 7321 (West 2010); FLA. STAT. § 100.161 (2010); GA. CODE ANN. §21-2-542 (West 2010); HAW. REV. STAT. § 17-1 (2010); IDAHO CODE ANN. § 59-910 (2010); IND. CODE § 3-13-3-1 (2010); KAN. STAT. ANN. § 25-318 (2010); KY. REV. STAT. ANN. § 63.200 (West 2010); ME. REV. STAT. tit. 21, § 391 (2009); MICH. COMP. LAWS § 168.105 (2010); MONT. CODE ANN. § 13-25-202 (2009); NEV. REV. STAT. § 304.030 (2010); N.H. REV. STAT. ANN. § 661:5 (2010); N.J. STAT. ANN. § 19:3-26 (West 2010); N.M. STAT. ANN. § 1-15-14 (West 2010); N.C. GEN. STAT. § 163-12 (West 2010); 25 PA. STAT. ANN. § 2776 (West 2010); TENN. CODE ANN. § 2-16-101 (2010); UTAH CODE ANN. § 20A-1-502 (West 2010); VA. CODE ANN. § 24.2-207 (2010). All but three of these states mirror Illinois in defining "general election" to mean the biennial congressional election. Only Michigan, Pennsylvania, and Virginia tie the replacement election to a *yearly* statewide election, either the congressional election in even-numbered

remaining states require a special election within a certain time period after the vacancy, typically several months.[7] But even those states, like Illinois, set the replacement election on the date of the general election whenever possible in light of the overall time limit. All of these laws demonstrate the flexibility inherent in vacancy statutes. Even if a particular state has not taken a firm position on how to handle late-term vacancies, Illinois' approach of bypassing the replacement election is always an implicit and common-sense option. The Seventh Circuit's rule would erase it.

This would be a cause for concern even if the limitation on state practice were purely theoretical. But it is not: the impact of the Seventh Circuit's rule would be widespread and concrete. Recent historical practice shows that most states would almost certainly apply their statutes exactly as Illinois does, and would therefore experience the same kind of disruption that Illinois has already faced from application of the Seventh Circuit's misguided rule.

The Seventh Circuit attempted to downplay the disruption its rule would cause. The court claimed that, out of 193 vacancies since the Seventeenth Amendment's ratification, there were only 27

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years, or the gubernatorial or municipal election in odd-years.

[7] See ALA. CODE §§ 36-9-7 to -9 (2010); ARK. CODE ANN. § 7-8-102 (West 2010); OR. REV. ST. § 188.120 (2010); R.I. GEN. LAWS § 17-4-9 (2010); TEX. ELEC. CODE ANN. §§ 203.004; 204.001 to 005 (West 2010); VT. ST. ANN. tit. 17, § 2621 (2010); WASH. REV. CODE § 29A.28.041 (2011); WISC. STAT. § 8.50 (2010).

instances in which a replacement election never occurred. App. 36a-37a. The court did not properly frame the data, however. Instead of looking at vacancies in general, the court should have focused on the far more relevant class of *late-term* vacancies. Out of 83 such vacancies since 1913, the term expired without a replacement election 34 times.[8] Narrowing the focus to seats vacated in the final year shows the terms expiring without a replacement election in 18 of out of 37 instances. In other words, the Seventh Circuit's rule would have invalidated roughly *40 percent* of the appointments made in response to late-term vacancies since the ratification of the Seventeenth Amendment.

Even more significant than the raw numbers is the marked historical trend in state practice: over the past thirty years, late-term appointees have almost always filled out the term. Since 1980, there have been ten late-term vacancies. In all but three instances, the states opted to bypass a special replacement election. The last example of the sort of simultaneous regular and special election forced on Illinois in 2010 seems to have occurred in 1986. *See* Part II, *infra*.

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[8] In most of these cases, the appointee served out the remainder of the term. In some instances, however, the appointee resigned slightly early to allow the winner of the next full term to take office early and thus gain seniority. These cases are distinct from the so-called "technical resignations" that were excluded from both the Seventh Circuit's and petitioner's data, App. 36a; Pet. 21, in that the original vacancies in the seat took place prior to the election for the next term.

Simply put, experience matters. Decades of addressing the vacancy problem have led the states to a consensus that late-term vacancy elections are a bad idea. Whether manifested explicitly through statutes or implicitly through practice, this consensus is a "persuasive guide to constitutional construction." *Valenti*, 292 F. Supp. at 858. The Seventh Circuit's refusal to follow that guide casts critical doubt on the soundness of its novel reading of the Seventeenth Amendment.

II. States Have Compelling Interests in Avoiding the Type of Late-Term Election Imposed on Illinois.

The consensus against late-term vacancy elections did not develop in a vacuum. States have a powerful interest in ensuring a smoothly functioning election process. *See John Doe No. 1 v. Reed*, 130 S. Ct. 2811, 2819 (2010) ("The State's interest in preserving the integrity of the electoral process is undoubtedly important."); *Anderson v. Celebrezze,* 460 U.S. 780, 796 (1983) ("There can be no question about the legitimacy of the State's interest in fostering informed and educated expressions of the popular will in a general election"). Avoiding redundant elections for soon-to-expire senate seats would further this overarching interest in a variety of significant ways. *See* Pet. at 19-20 (explaining that the Seventh Circuit's rule would lead to unnecessary vacancies in other offices and would distort campaign contribution limits). This section highlights two of the most compelling: facilitating primary elections and avoiding voter confusion.

Direct primary elections serve the critical function of encouraging full democratic participation in choosing candidates. *See, e.g., Valenti*, 292 F. Supp. at 862. The need for a delay between a vacancy and the replacement election to allow for primaries is either explicit or implicit in most vacancy-election statutes.[9] But the Seventh Circuit's mandatory-election rule would force states faced with late-term vacancies to skip primaries in order to hold a replacement election before the term expires. That is exactly what happened in Illinois last November. Pet. at 10-11.

A state's decision to select replacement candidates through primaries is "supported by policy considerations even more compelling that those which justify the prohibition of vacancy elections in 'off-years.'" *Valenti*, 292 F. Supp. at 861. Indeed, as the *Valenti* court noted, "[t]he clear purpose of the Seventeenth Amendment was to give effect to the direct voice of the people in the selection of Senators." *Id.* at 864 (citing Sen. Rep. No. 961, 61st Cong., 1st Sess. (1911)). In light of this goal, the

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[9] *See Valenti,* 292 F. Supp. at 861 ("surely the need for at least some delay to allow for the nomination of candidates is implicit in all of the statutes"). Some states' statutes explicitly provide for a particular interval before an election can be held. *See, e.g.,* WISC. STAT. § 8.50 (2010) (election to be held between 62 and 77 days after vacancy). Others ensure for minimum intervals through rollover provisions. *See, e.g.,* ME. REV. STAT. tit. 21, § 391 (2009) (if a vacancy occurrs less than 60 days before the statewide primary, the replacement election is deferred to the *second* successive general election).

Amendment's drafters and ratifiers left it to the states to choose whether to delay—or forego—a replacement election in order to allow the public, rather than party-committee members, to select candidates for this important office. *Id.* at 862. The Seventh Circuit's rule would take this discretion away from the states—exactly the result that *Valenti* rejected.

Beyond primaries, however, the Seventh Circuit's rule also threatens the proper functioning of the elections themselves. Most states' vacancy-election laws either require or prefer that a senate vacancy be filled in the next general election. *See supra* Part I(C). Thus, the only way for these states to comply with the Seventh Circuit's rule without rewriting their laws would be to hold the same sort of simultaneous special and general elections Illinois was forced to hold in 2010. Such dual elections pose a significant threat of voter confusion. *See Bullock v. Carter*, 405 U.S. 134, 145 (1972) (holding that each state has a legitimate interest in regulating the number of candidates on the ballot in order to "prevent the clogging of its election machinery, [and] avoid voter confusion").

Requiring voters to place two votes on the same ballot for a single senate seat virtually guarantees errors. Already-crowded ballots would include two lists of largely redundant names. Many voters are likely to be unsure whether the double listing is a printing error, or if they should select the same name twice. As petitioner noted, the results of Illinois' 1970 election seem to document such voter

confusion. That year, a court order required the state to stage simultaneous general and special elections for the same House of Representatives seat. Returns showed that 2000 more votes were cast to fill the unexpired term, which was listed first on the ballot, than for the upcoming full term. Pet. at 18.

More recent elections bear out this concern. Voters in the Rochester, New York area were called upon in November 2010 to make two selections for the same House seat—one to fill out the remainder of the term and one for the following term. Local news reports warned of the potential for confusion and referred voters to sample ballots.[10] Nonetheless, of 210,146 ballots cast in the election, 12,044 more contained "blank" or "void" entries for the replacement selection than for the full term.[11]

That same day, voters in Pennsylvania's 12th Congressional District participated in simultaneous special and general elections for John Murtha's

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[10] See, e.g., *29th Congressional District: Vote Twice on Election Day*, WHEC.com, http://www.whec.com/news/stories/s1809722.shtml?cat=565; Sean Carroll, *Confusion Winning This Race*, WHAM.com, http://www.13wham.com/news/local/story/NY-29-Confusion-Winning-This-Race/ a17fo4ISQkq_4V9aT_VEHw.cspx (last visited January 7, 2011).

[11] Compare http://www.elections.state.ny.us/NYSBOE/elections/2010/general/2010Congress.pdf (results for general election, showing 11,204 "blank" or "void" votes out of 210,145 cast), with http://www.elections.state.ny.us/NYSBOE/Elections/2010/ Special/29thCDResults.pdf (results for special election, showing 23,249 "blank & void" votes out of 210,146 cast).

former seat in the House of Representatives. Reporting on the earlier special primary—likewise a simultaneous general/special affair—a local newspaper commented:

> Primary day is usually a cut-and-dried affair: Democrats vote for Democrats, Republicans vote for Republicans, and that's that. But there is nothing normal about Tuesday's vote in the 12th Congressional District. For starters, there are two ballots—a special and a primary—for the same congressional seat. There are six total candidates, but one of them appears only on the special ballot and three others appear only on the primary. Two candidates will be listed on both. People registered with third parties or those who are unaffiliated—voters who normally cannot participate in Pennsylvania primaries—can vote Tuesday, but only in the special election. Got all that?

Mike Faher, *Unusual Ballot May Cause Confusion in the 12th District*, Tribune-Democrat, May 15, 2010 (paragraphs condensed).[12] Voter confusion appears to have affected the November election day, as well: whereas 185,226 votes were tallied for candidates in the general election, candidates in the special

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[12] Available at http://tribune-democrat.com/local/x712209306/Unusual-ballot-may-cause-confusion-in-the-12th-district (last visited January 12, 2011).

election only received 137,189 votes.[13] The drop-off between the two votes was roughly 26%.

Voter participation statistics for simultaneous general/special senate elections are more difficult to come by. The last simultaneous such election before Illinois' 2010 court-ordered election appears to have occurred in North Carolina in November 1986. Voters chose between the same two candidates to fill the unexpired term ending in January 1987 as well as the following full term. Returns showed that 56,455 more votes were cast for the full term than for the replacement election.[14]

These statistics do not prove definitively that voter confusion affected these elections—voter confusion, after all, is notoriously difficult to document. But why else would voters leave their ballots blank for an office as important as United States senator? Such *de facto* disenfranchisement is exactly what states have hoped to avoid by

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[13] Compare http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=39&OfficeID=11 (general election returns), *with* http://www.electionreturns.state.pa.us/ElectionsInformation.aspx?FunctionID=13&ElectionID=35&OfficeID=11 (special election returns). Note that the Pennsylvania Department of State's Elections website only displays votes recorded for candidates, and does not provide any information on votes counted as "blank" or otherwise.

[14] Workbook #1: Voter Turnout, Voter Registration, Party Affiliation, and General Election Results, 1960-2004, University of North Carolina, http://southnow.org/research-and-data/datapacks/NC_VotingData (showing 1,591,330 votes cast in general election and 1,534,875 in special election) (last visited January 7, 2011).

developing the strategy of bypassing snap special elections altogether. The Seventh Circuit's rule would erase the states' discretion to do so by ignoring those many years of practical experience. Its novel rule therefore cannot be a correct interpretation of the Seventeenth Amendment.

CONCLUSION

The Court should grant the petition for certiorari.

Respectfully submitted,

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