

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
CHAMPAIGN COUNTY, ILLINOIS

MARK SHELDEN, in his capacity as)
Champaign County Clerk,)
)
Plaintiff,)
)
-vs-) No. 09-CH-432
)
ILLINOIS STATE BOARD OF ELECTIONS,)
)
Defendant.)

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION**

COMES NOW the defendant, Illinois State Board of Elections, by and through its counsel, LISA MADIGAN, Attorney General of the State of Illinois, and hereby submits this memorandum of law in opposition to the motion for temporary restraining order and/or preliminary injunction filed by the plaintiff. In support thereof, the following statements are made.

I. FACTS

Plaintiff, the Champaign County Clerk, in his official capacity, has brought this action to enjoin himself from utilizing the equipment plaintiff has chosen as a means of complying with §17-43(b) of the Election Code (10 ILCS 17-43(b)).¹ Plaintiff also asks this Court to enter a mandatory injunction compelling the State Board of Elections to decertify the equipment plaintiff has chosen to use in the primary election which is scheduled to be held in February 2010.

¹Section 17-43(b) was amended by P.A. 95-699 (effective November 9, 2009). Plaintiff cites to 24B-16(e)(5) (10 ILCS 5/24B-16(e)(5)), which provides that the State Board of Elections shall not certify optical scan rating equipment unless it will identify when a voter has not cast a vote for a statewide constitutional officer.

The essence of plaintiff's complaint is that, in addition to notification of rejection of a ballot, the equipment selected by plaintiff will send an audible beep when a voter fails to vote for a candidate for a statewide constitutional office. The beep will also sound when a voter casts more than one vote for an office.²

While plaintiff ostensibly challenges the Election Code provisions which mandate identification of undervotes, the audible beep, which forms the gravamen of plaintiff's complaint, is not required by the Election Code. Furthermore, plaintiff is not required by the State Board of Elections to use this equipment. In fact, the Board has certified other equipment, which does not sound the audible beep, and plaintiff is free to use that other equipment.

Plaintiff's only other challenge to the statute is that it violates the equal protection clause of the Illinois Constitution of 1970. Plaintiff's equal protection claim is that the statute only requires notification of undervotes for some offices, but not all.

II. ARGUMENT

A. PLAINTIFF LACKS STANDING TO RAISE THE ISSUES CONTAINED IN HIS COMPLAINT

Standing is shown by demonstrating some injury to a legally cognizable interest that is actual or threatened, distinct and palpable, fairly traceable to the defendant's actions, and substantially likely to be prevented or redressed by the grant of relief requested. *Village of Chatham v. County of Sangamon*, 216 Ill.2d 402, 419 (2005).

Plaintiff in this action is the Champaign County Clerk in his official capacity. In an official capacity action, the party is, in effect, the office held by the named official. *Carver*

²The overvote notification is required by federal law, as noted in plaintiff's memorandum.

v. Sheriff of LaSalle County, 203 Ill.2d 497 (2003); *Redwood v. Lierman*, 331 Ill.App.3d 1073, 1088 (2002). Plaintiff is, therefore, the Office of the County Clerk of Champaign County. The rights plaintiff raises are those of the voters, not those of the office of the Champaign County Clerk.

The right to vote is not a common right of the public; rather, it is personal to each voter. *Kluk v. Lang*, 125 Ill.2d 306, 317 (1988). Plaintiff does not allege any authority permitting him to file suit on behalf of the voters of Champaign County, and no such authority exists. See §3-2001 *et seq.* of the Counties Code (55 ILCS 5/3-2001 *et seq.*)(setting forth the powers and duties of the county clerks). In *City of Rockford v. Gill*, 75 Ill. 2d 334, 342–43 (1979), the Supreme Court of Illinois held that the county clerk had no standing to challenge a municipal ordinance on the grounds that it was void for failure to comply with statutorily prescribed procedures. The Court noted that the county clerk’s duties with respect to the extension of taxes were purely ministerial and that no statute authorizes a county clerk to determine whether a tax levy is illegal and void. *Id.* at 342. The county clerk cited no decision, and the Court found none, in which a court allowed the county clerk, rather than the taxpayer, to challenge a taxing ordinance. *Id.* In this case, plaintiff cites no authority, and none has been found, that permits a county clerk, rather than a voter, to challenge an election law on the basis of rights belonging to the voters.

Plaintiff cites *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525 (1975) for the proposition that plaintiff has standing to bring this action. In fact, *Hopf* stands for the opposite proposition. In that case, a complaint for mandamus was brought to compel public officials to comply with the Open Meetings Act. The public officials challenged the Act as unconstitutional on the ground that it violated their equal protection rights. The

essence of the challenge was that it was unconstitutional for the legislature to exempt itself. The *Hopf* Court found that the defendants had standing to raise the defense of unconstitutionality because they were within the class of persons who allegedly suffered discrimination under the Act and because the defendants, as public officials, were subject to possible criminal penalties. The *Hopf* court did not, as plaintiff would suggest, exempt public officials from general principles of standing or allow a public official to assume the rights of his constituents. In fact, it held the general principles of standing limit the issues which officials may raise in proceedings involving their public offices. *Id.* at 532.

Plaintiff also lacks standing as to his constitutional claims in Counts II and III and his declaratory judgment claim in Count IV because the Office of County Clerk is not in any immediate danger of sustaining a direct injury by the enforcement of use of the challenged equipment; does not fall within the class aggrieved by alleged unconstitutionality; and has no personal claim, status, or right capable of being affected by the relief sought. “A court will not determine the constitutionality of a provision of a statute which does not affect the parties to the cause under consideration.” *People v. Hamm*, 149 Ill.2d 201, 214 (1992), *overruled on other grounds by People v. Sharpe*, 216 Ill. 2d 481 (2005).

B. PLAINTIFF CANNOT BRING AN EQUAL PROTECTION CLAIM ON BEHALF OF THE COUNTY OR THE OFFICE OF COUNTY CLERK

Even if plaintiff could make a showing that the county or his office has a cognizable interest in the constitutionality of §24B-16(e), he still cannot bring this action in his capacity as the county clerk. Illinois law does not permit municipal corporations, local units of government, or their officers to challenge the validity of a statute on due process or equal protection grounds. *Cronin v. Lindberg*, 66 Ill.2d 47, 56 (1976); *Meador v. City of Salem*,

51 Ill.2d 572 (1972); *People v. Valentine*, 50 Ill.App.3d 447, 452 (1977); see also Ill. Const. of 1970, art. VII, §1 (defining counties as “local units of government”); 55 ILCS 5/3-2001 to 3-2013 (counties and the offices of county clerk are created by statute).

In *Cronin v. Lindberg*, 66 Ill.2d 47, 56 (1976), neither the school board nor its superintendent had standing to question the validity of statute on due process grounds, being creatures of the legislature and subject to its will. Although *Cronin* suggested that a school board *could* assert a denial of equal protection if it could show that it was a member of a class suffering discrimination, the appellate court, citing *Meador v. City of Salem*, 51 Ill.2d 572 (1972), has questioned the viability of the equal protection holding in *Cronin*. *Village of Schaumburg v. Doyle*, 277 Ill.App.3d 832, 835–837 (1996). The appellate court noted that in *Meador*, the Supreme Court had held that a city had no standing to make constitutional attacks on a statute. *Doyle*, 277 Ill.App.3d at 835. The reasoning behind the Court’s holding was that municipal corporations are created by a state for the better order of government and therefore have no privileges or immunities that they can invoke in opposition to the will of their creator. *Id.* The appellate court explained that although *Meador* is usually cited as a due-process case, the city-defendant had made an equal protection argument against the statute. *Id.* The appellate court also noted that *Cronin* appears to have ignored the earlier-decided *Meador*, and that subsequent standing cases have cited to *Meador* and not *Cronin*.

Other appellate case law holds that political subdivisions and their officers cannot challenge a statute’s constitutionality under due process or equal protection. See *People v. Valentine*, 50 Ill.App.3d 447, 452 (1977) (“In the performance of governmental functions, the State has the power to control units of local government through legislation without

regard to considerations of due process or equal protection of the laws both as to substance and procedure, and it may require a city to perform acts through its officers and employees against its corporate will.”); *Village of Northbrook v. County of Cook*, 126 Ill.App.3d 145, 147–48 (1984)(“A municipality cannot assert a constitutional claim against the State or its statutes, by a direct claim against the state or by a claim against one of its municipalities. The rationale for this denial of due process is the protection of the sovereignty of the state from the subdivisions it has created.”)(citations omitted).

Furthermore, “a litigant may not challenge a classification scheme on the basis that the classifications are discriminatory unless the litigant is a member of the class allegedly being discriminated against.” *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 532 (1975). Here, the Office of County Clerk is not a member of the allegedly disadvantaged class and may not, therefore, bring an equal protection claim. Accordingly, plaintiff, as County Clerk, cannot assert equal protection claims against the State.

C. PLAINTIFF HAS NO RIGHT TO PROCEED UNLESS REPRESENTED BY THE CHAMPAIGN COUNTY STATE’S ATTORNEY

Plaintiff, the Office of the Champaign County Clerk, has brought this action through private counsel who has not been appointed as an Assistant State’s Attorney of Champaign County.³ The State’s Attorney has the exclusive province to represent the county in litigation in which the county is the real party in interest. *County of Cook v. Bear Sterns & Co., Inc.*, 215 Ill.2d 466, 468 (2005). “[T]he State’s Attorney is a constitutional officer whose powers may not be stripped or transferred to others by a legislative body.”

³The complaint was signed by Mark Shelden who is not a licensed attorney and cannot represent his office or anyone other than himself in his individual capacity.

Id. at 475. The State’s Attorney is deemed to have powers like those of the Attorney General. *Id.* at 478.

The State’s Attorney is, pursuant to §3-9005 of the Counties Code (55 ILCS 5/3-9005) the sole attorney authorized to represent county officers in their official capacities. The discretion afforded the State’s Attorney to bring an action necessarily includes the power to decide not to bring the action. Thus, the Supreme Court struck down a statute which authorized private citizens to bring certain actions in the event the State’s Attorney neglected or refused to bring those actions. *People ex rel. Kuntsman v. Nagano*, 389 Ill. 231, 247-51 (1945).

Because plaintiff is not represented by the State’s Attorney or an attorney appointed as an Assistant State’s Attorney, the complaint in this action was not authorized and should be dismissed.

D. PLAINTIFF IS NOT ENTITLED TO A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

“The purpose of a preliminary injunction is to preserve the status quo pending a decision on the merits of a cause. It is an extraordinary remedy which should apply only in situations where an extreme emergency exists and serious harm would result if the injunction is not issued. A party seeking a preliminary injunction must establish that: (1) a clearly ascertained right in need of protection exists; (2) irreparable harm will occur without the injunction; (3) there is no adequate remedy at law for the injury; and (4) there is a likelihood of success on the merits.” *Beahringer v. Page*, 204 Ill.2d 363, 379 (2003); *Sunbelt Rentals, Inc. v. Ehlers*, 394 Ill.App.3d 421, 865–66 (2009).

1. Plaintiff has no clearly ascertained right in need of protection

Although plaintiff is correct that voters in Illinois have a constitutional right to vote in secrecy, plaintiff has not filed suit as a voter. As noted previously, plaintiff, in his official capacity as the County Clerk of Champaign County, has no standing to assert the constitutional claims of voters in his county. Plaintiff argues that he has a protected right in ensuring that the secrecy of all votes cast in Champaign County is preserved. Plaintiff has cited no authority for the existence of such *right* as an officer of the county. The right is also not found in the Counties Code, which sets out the powers and duties of plaintiff's office. Furthermore, the Supreme Court has explicitly held that for a governmental body to have standing to raise an issue, that governmental body must, itself, suffer an actual or threatened injury. *Village of Chatham*, 216 Ill.2d at 421-24. A party must have "a personal stake in the outcome of the controversy" or, with respect to equal protection claims, be a member of the class allegedly facing discrimination. *Id.* at 532. Plaintiff has not made such a showing.

Plaintiff has not pleaded or explained how or why his office will be unable to fulfill his duties. Not only has plaintiff failed to show that his office will suffer any harm, he has admitted that the State Board of Elections has certified the equipment which plaintiff has chosen to use in the primary election.

2. Plaintiff has not shown that irreparable harm will occur without the injunction

Since a preliminary injunction is an extraordinary remedy, it should only be applied where an "extreme emergency exists and serious harm [will] result if the injunction is not issued." *Beahringer*, 204 Ill.2d at 379; *Lumbermen's Mutual Casualty Co. v. Sykes*, 384

Ill.App.3d 207, 230 (2008); *Stenstrom Petroleum Services Group, Inc. v. Mesch*, 375 Ill. App.3d 1077, 1089 (2007); *Jones v. Department of Public Aid*, 373 Ill.App.3d 184, 192–93 (2007). Further, “[a] preliminary injunction concerns only those damages which might arise prior to the final decision of the court.” *Petrzilka v. Gorscak*, 199 Ill.App.3d 120, 124 (1990).

Plaintiff has not explained the harm that will result if a temporary restraining order or preliminary injunction is not issued. No election is scheduled until February 2010. Thus, there is no need for interim relief on less than a full record. Furthermore, the only potential for harm to plaintiff arises from an order granting the relief sought. If relief is granted, plaintiff will be prohibited from using the voting equipment he presently has and will be required to use other means of complying with the law. Plaintiff is not prohibited from choosing other voting equipment without Court intervention. There is no showing of an “extreme emergency” requiring a preliminary injunction.

3. Plaintiff has not shown a likelihood of success on the merits

“Although . . . the purpose of a preliminary injunction is to preserve the status quo between the parties and not to determine the ultimate factual issues, such relief is not warranted where there is no possibility of success on the merits. *Lake in the Hills Aviation Group, Inc. v. Village of Lake in the Hills*, 298 Ill.App.3d 175, 184–85 (1998). Plaintiff’s failure to demonstrate that either it or Champaign County is compelled to choose the voting machine to which it objects is fatal to its claim. See 10 ILCS 5/24B-4 (Precinct Tabulation Optical Scan Technology voting systems *may* be used in elections); see *also* 10 ILCS 5/24-1 (election authorities shall provide *a* voting machine, rather than a *particular* voting machine); 10 ILCS 5/24A-3 (election authorities *may* adopt *any* electronic, mechanical, or

electric voting system approved for use by the State Board of Elections and may use other voting machines). “A court will not determine the constitutionality of a provision of a statute which does not affect the parties to the cause under consideration.” *People v. Hamm*, 149 Ill.2d 201, 214 (1992) *overruled on other grounds*, *People v. Sharpe*, 216 Ill.2d 481 (2005).

a. Right to vote

Even if plaintiff was entitled to assert the rights of voters, plaintiff has failed to show that the use of the notification equipment violates their rights. “[I]t is . . . well established that the legislature has the right to reasonably regulate the time, place and manner in which the citizens exercise their right to vote. Legislation that affects voting in this regard is subject to the rational basis analysis.” *Orr v. Edgar*, 298 Ill.App.3d 432, 438 (1998)(citations omitted). There is a judicial presumption in favor of finding a statute constitutional. *Id.* at 441. The court may dispose of the issue of the constitutionality of §24B-16(e), because “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Id.* at 439.

“In order to survive the rational basis test, the method or means employed in the statute to achieve the stated goal or purpose of the legislation [must be] rationally related to that goal.” *Id.* at 438 (quotation omitted). A system that merely regulates the manner in which citizens exercise the right to vote represents legislation that is rationally related to a legitimate government interest. *Orr*, 298 Ill.App.3d at 439.

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury against the precise interests put forward by the State as justifications for the burden imposed, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights. . . . [W]hen a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the . . . right of voters, the State’s important regulatory interests are generally sufficient

to justify the restrictions.

Burdick v. Takushi, 504 U.S. 428, 433 (1992).

As the courts have recognized, overvotes, undervotes, and other mechanical and human errors may thwart voter intent. See generally *Bush v. Gore*, 531 U.S. 98 (2000); see also *Weber v. Shelley*, 347 F.3d 1101, 1106 (9th Cir. 2003). A system designed to minimize the unintentional presence of undervotes is therefore rationally related to the important state interest of free and fair elections. Election laws will invariably impose some burden upon individual voters, and no balloting system is perfect. *Burdick*, 504 U.S. at 433. However, where a system brings about numerous positive changes, such as increased voter turnout, greater accuracy in the system and decreases in the number of mismarked ballots, without placing a “severe” restriction on the right to vote, that system is constitutional. See *Weber*, 347 F.3d at 1106.

Section 24B-16(e) merely sets out the qualifications for certified voting machines, thereby indirectly regulating the manner in which Illinois citizens exercise their right to vote, if in fact those citizens use machines authorized under Article 24B of the Election Code, and not, for example, machines authorized under Article 24 or 24A. See 10 ILCS 5/24-1 to 24-23, 24A-1 to 24-22 (setting forth permissible uses for voting machines or electronic voting machines *without* precinct tabulation optical scan technology). Because those qualifications are designed to decrease unintentional errors in marking of ballots, §24B-16(e) represents legislation that is rationally related to a legitimate government interest. See *Orr*, 298 Ill.App.3d at 439.

While plaintiff attempts to suggest to the Court that there is a fundamental right to a secret ballot, no such right exists. *Burson v. Freeman*, 504 U.S. 191 (1992), which was

cited by the plaintiff, involved the question of whether the State had a compelling interest in the election process which would justify restricting the free speech rights of those who wanted to campaign within 100 feet of the polls. Not only were secret ballots *not* guaranteed by the Constitution of the United States, but secret ballots were also not used anywhere in the United States until 1888. *Id.* at 203.

Instead, the Supreme Court has recognized that as long as State officials do not discriminate against voters in violation of the fifteenth amendment, the power to regulate State elections shall be left in the hands of State officials. *Northwest Austin Municipal Utility District v. Holder*, ___ U.S. ___, 129 S. Ct. 2504, 2519-20 (2009). The issue of secrecy of the ballot is, therefore, a question of State, not federal, law.

b. Secrecy of voting

Article III, §4 of the Illinois Constitution of 1970 provides that the General Assembly shall “insure secrecy of voting and the integrity of the election process....” That section, then, is a command to the legislature to enact legislation which addresses these objectives. Accordingly, §24B-16 of the Election Code provides that the State Board of Elections shall not approve optical scan precinct tabulation equipment unless the equipment, among other things, “enables a voter to vote in absolute secrecy” and will identify when a voter has not voted for all statewide constitutional offices.

Pursuant to §6 of the Statute on Statutes (5 ILCS 70/6), the statute must be construed to give effect to both of these provisions. Thus, the Election Code must be understood to be a legislative determination that voter notification of an undervote for a State office does not violate the requirement of secrecy of voting. The audible notification by the equipment at issue reflects that a voter has cast too many votes for an unspecified

race, not voted in an unspecified race, or made some other error, which causes the equipment to reject the ballot.

The equipment conveys scant information to an observer and does not impact the ability of a voter to cast his vote in secrecy. While plaintiff presumes that the right to vote in secrecy encompasses secrecy in the decision not to vote, plaintiff has cited no authority for that proposition. Indeed, the records of who has not voted at all are available for public inspection. Plaintiff has cited no authority which would imply that greater secrecy is constitutionally mandated in the choice not to vote in a specific race or in specific races.

Court cases from other jurisdictions are persuasive on the issues before this Court. In a Kentucky Supreme Court case, *Ford v. Carlisle County*, 361 S.W.2d 757 (Ky. 1962), the Court held that a machine that made an audible sound when a write-in vote was cast did not violate the voter's right to secrecy. The plaintiff argued that a person would know that a voter did not completely support his or her party if the sound was heard. The Court noted that a person would know that a voter had not voted straight-party if the voter spent a large amount of time in the voting booth. Despite the chance of disclosure, the Court was "not prepared to say that such a disclosure is a material violation of secrecy requirements." *Id.* at 760.

In a Florida federal district court case, *American Association of People with Disabilities v. Smith*, 227 F.Supp.2d 1276 (M.D. Florida 2002), the Court held that the certification of voting equipment that did not allow visually or manually impaired voters to vote without assistance did not violate the "direct and secret" voting clause in Florida's constitution. The Court found that Florida's constitutional protection of the secrecy of the ballot is directed toward the voter's right to not be influenced by others in his or her voting.

Id. at 1286. Florida law permitted a voter to request assistance from two election officials or any other person of his or her own choice. *Id.* at 1285. The Court found that “secrecy” could be construed to contemplate information known by a few or information not publicly known. *Id.* Under that construction, Florida’s voter-assistance procedures, which permitted a person to seek the aid of two election officials or any other person of their choice, did not violate Florida’s constitutional protection of the secrecy of the ballot. *Id.* at 1285–86. The Court noted that Florida had recently passed a new voting law requiring that before a voting system could be certified, it must have a procedure to alert a voter if the voter’s ballot contained an undervote. The law permitted audible signals to be used, as long as there are corresponding visual cues and information. The statute was not directly at issue, (nor was the audible signal provision specifically discussed), but the Court stated in dicta that it would not change the Court’s ruling on the constitutionality of Florida’s voter assistance procedures. *Id.* at 1287 n.11.

Here, similar to *Ford*, 361 S.W.2d 757, the challenged voting machine produces an audible beep to convey to the voter that an undervote or overvote is present on the voter’s ballot. That beep *may* convey a limited amount of information to persons within hearing range who also are privy to the implications of that beep. As in *Ford*, the information conveyed by this beep is speculative at best. It could mean an assortment of outcomes, such as the presence of an undervote, an overvote, or both. It does not convey the intention of the voter with respect to such undervote or overvote. As in *Smith*, 227 F. Supp.2d 1276, any information conveyed is likely to be limited to a very few individuals and not generally publicly known. Following the Courts’ logic in *Ford* and *Smith*, the operation of a voting machine that presents an audible notification to a voter that he or she has

marked his or her ballot with an undervote does not constitute a “severe” restriction on the right to vote and is unlikely to present a material violation of the secrecy protections of the Illinois Constitution of 1970.

c. Equal protection claim

Plaintiff also lacks a likelihood of success on his equal protection claim. Plaintiff contends that the provisions of the Election Code requiring notification of undervotes are unconstitutional because they pertain only to the elections of constitutional officers and not to votes for other offices. According to plaintiff, the equal protection clause of the Illinois Constitution of 1970 prohibits treating the different levels of elective office differently.

The guarantee of equal protection requires that the government treat similarly situated persons in a similar manner. *Jacobson v. Department of Public Aid*, 171 Ill.2d 314, 322 (1996). In the present case, plaintiff is not complaining that similarly situated persons were treated differently. Instead, plaintiff is claiming that different offices were treated differently on the ballot.⁴ The equal protection clause has no application to this situation.

As support for its equal protection argument, plaintiff cites *People ex rel. Barrett v. Barrett*, 31 Ill.2d 360 (1964), a case that does not discuss equal protection. Instead, the issue in *Barrett* was whether the use of voting machines for judicial retention votes violated a provision of the Illinois Constitution of 1870, which required the use of separate ballots for retention votes.

⁴While plaintiff attempts to plead that the law treats that those who vote for constitutional officers differently from those who vote for other officers, the assertion is simply saying that those who perform the acts covered by the statute are treated differently than those who do not. By definition, the groups are not similarly situated.

Even if the use of voter notification equipment as to the undervotes for some offices and not others constitutes classification of persons for equal protection purposes, the legislature is not prohibited from drawing such proper distinctions among different categories of people. *In re A.A.*, 181 Ill.2d 32, 37 (1998). In cases where fundamental rights are not involved and classifications are not drawn based upon race, national origin, gender, or legitimacy, legislation will be upheld, if there is a rational basis for the classifications. *Jacobson*, 171 Ill.2d at 322, 23. While legislation that implicates the right to vote is subject to strict scrutiny, legislation concerning time, place, and manner of voting are analyzed with a rational-basis test. *Orr v. Edgar*, 298 Ill.App.3d 432, 437-38 (1998)(legislative elimination of option of straight-party voting upheld as having a rational basis).

When a rational basis test is employed, the legislative classification is not subject to fact finding by the Court and may be upheld based upon speculation as to the legislative goal. *Allen v. Woodfield Chevrolet*, 332 Ill.App.3d 605, 611 (2002). Such speculation need not be supported by evidence or empirical data. *Id.* If there is any conceivable basis for the classification, it will be upheld. *Alamo Rent A Car, Inc. v. Ryan*, 268 Ill.App.3d 268, 273 (1994). As the party challenging the classification, it is plaintiff's burden "to negate every conceivable basis which supports it." *Id.*

"The equal protection clauses of the State and Federal Constitutions do not prohibit the legislature from pursuing a reform in 'one step at a time' or from applying a remedy to the one selected phase of a field while neglecting the others." *Wright v. Chicago Municipal Employees Credit Union*, 265 Ill.App.3d 1110, 1118 (1994). The legislature can consider degrees of evil and proceed one step at a time. *Alamo Rent A Car, Inc. v. Ryan*, 268

Ill.App.3d 268, 275 (1994).

The legislature could rationally consider that, as an initial step, the notification for undervotes and overvotes be tried out on elections for statewide constitutional offices. Problems could be assessed, including the degree to which notification and corrections of undervotes slow the voting process. The legislature could also determine that, until the system was completely assessed, the potential for disruption of voting caused by increasing time needed to vote was too great to try it out on all offices. Accordingly, the legislation has a rational basis and does not violate equal protection.

4. The Court may not grant plaintiff his requested relief because it constitutes the ultimate relief sought

“A trial court errs when it enters a permanent injunction after a hearing on a motion for a preliminary injunction or grants the ultimate relief sought.” *Petrzilka v. Gorscak*, 199 Ill.App.3d at 123 (citation omitted); *See also Grillo v. Sidney Wanzer & Sons, Inc.*, 26 Ill.App.3d 1007, 1011–12 (1975); *Knuppel v. Adams*, 12 Ill.App.3d 708, 711 (1973); *Levy v. Rosen*, 258 Ill.App. 262 (1930). “It is established that a temporary or preliminary injunction should not be granted where its effect would be to give all the relief that could be obtained after a final hearing on the merits of the dispute. The purpose of a preliminary injunction is not to finally decide the controverted facts or merits of a case. . . . [It] is merely provisional in nature and concludes no rights.” *PSL Realty Co. v. Granite Inv. Co.*, 42 Ill.App. 3d 697, 699–700 (1976) (citations omitted).

In the present motion, plaintiff is not asking this Court to preserve the status quo. Rather, plaintiff is asking this Court to disrupt the status quo as it relates to the 2010 primary. Plaintiff seeks, by its motion for preliminary injunction, to obtain the entire relief

requested in his complaint, *i.e.*, that the Board of Elections be required to decertify the challenged voting machine, thereby preventing its use in Champaign County and the State. A mere showing of a likelihood of success, which plaintiff has failed to establish here, would not be sufficient to support an order granting the ultimate relief at this stage of the proceedings. Such ultimate relief should not be granted without allowing the parties to present all necessary evidence and be fully heard. Accordingly, plaintiff's motion for temporary restraining order or preliminary injunction must be denied.

Wherefore, defendant respectfully requests that this honorable Court deny the injunctive sought by plaintiff.

Respectfully submitted,

ILLINOIS STATE BOARD OF ELECTIONS,

Defendant,

LISA MADIGAN, Attorney General
State of Illinois,

Attorney for Defendant.

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TERENCE J. CORRIGAN
Assistant Attorney General

CERTIFICATE OF SERVICE

Terence J. Corrigan, Assistant Attorney General, hereby certifies that he caused a copy of the foregoing Memorandum of Law in Opposition to Plaintiff's Motion for Temporary Restraining Order And/or Preliminary Injunction to be served upon:

John G. Fogarty, Jr.
Law Office of John Fogarty, Jr.
4043 N. Ravenswood, Suite 226
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by depositing a copy of same in a correctly addressed, prepaid envelope and depositing same in the United States Mail in Springfield, Illinois, on December 15, 2009.

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