

STATE OF ILLINOIS
 IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
 COUNTY OF CHAMPAIGN

FILED
7 NOV 20 2009

Linda S. Frank
 CLERK OF THE CIRCUIT COURT
 CHAMPAIGN COUNTY, ILLINOIS

Mark Shelden, in his capacity as
 Champaign County Clerk)
)
 Plaintiff,)
)
 v.)
)
 Illinois State Board of Elections)
)
 Defendant.)

Case No. 09 - CH - 432

COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF

Plaintiff Mark Shelden, in his capacity as Champaign County Clerk, hereby files this Complaint and requests injunctive relief against the Defendant, Illinois State Board of Elections, and in support thereof, avers as follows:

NATURE OF THE ACTION

1. This is an action to ensure a fair, open and honest process with respect to the upcoming February 2, 2010 General Primary Election (“2010 Primary Election”), which the Plaintiff will be administering in Champaign County. Plaintiff seeks to enforce voters’ rights under the Illinois Constitution and the Illinois Election Code to cast their ballots in secret in the 2010 Primary Election and in elections to follow.

2. The right of Champaign County voters to a secret ballot is and has been compromised by the passage of P.A. 95-699, codified at 10 ILCS 5/24B-16(e-5), which now mandates that optical scan ballot tabulation machines produce an error message when a voter fails to cast a vote for all of the statewide constitutional offices up for election on his or her ballot. Because such an error message will take the form of an audible beep, accompanied by a

message on a screen on the tabulation machine, the secrecy of a voter's choices is necessarily compromised.

3. There is no more fundamental right than the right to vote and to cast a secret ballot. Indeed, Article III, Section 4 of the Illinois Constitution specifically safeguards the secrecy of the ballot, requiring that "The General Assembly by law shall define permanent residence for voting purposes, *insure secrecy of voting* and the integrity of the election process, and facilitate registration and voting by all qualified persons." ILLINOIS CONSTITUTION, ART. III, SEC. 4. (EMPHASIS ADDED)

4. The Illinois Election Code further mandates that a voter have the ability to cast a vote in secret. Pursuant to § 24/1 of the Election Code, any voting machine that is used in connection with an election in Illinois must be certified such "that it affords each elector an opportunity *to vote in absolute secrecy . . .*" 10 ILCS 5/24-1 (emphasis added). This requirement is further echoed in § 24B-16(a), which mandates that no Precinct Tabulation Optical Scan Technology system shall be approved for use unless "it enables a voter *to vote in absolute secrecy.*" 10 ILCS 5/24B-16(a) (emphasis added).

5. The rights of voters will be violated in the 2010 Primary Election because, on information and belief, the Illinois State Board of Elections ("SBE") will certify and administer the election despite the existence of the voting scheme set forth in § 24B-16(e-5) that allows voters' ballot choices with respect to the statewide constitutional offices (Governor, Lt. Governor, Secretary of State, Attorney General, Treasurer and Comptroller) to be known to observers.

6. The requirements of the Illinois Election Code, including but not limited to the SBE's duties with respect to the administration of elections such that a voter's ballot may be cast

in secrecy, are intended to further the state's compelling interest in ensuring that elections are conducted in a fair, open and honest manner.

7. As set forth more fully herein, the administration of § 24B-16(e-5) will undermine the voters' right to cast their ballots in secret, and thereby undermine the electoral process in general.

8. Plaintiff brings this action to obtain injunctive and other relief necessary to ensure the upcoming 2010 Primary Election is fair, open and honest and to preserve the ability of Champaign County's electors to cast their ballots in a secret manner.

PARTIES

9. Plaintiff Sheldon brings this action in his official capacity as the Champaign County Clerk. The Champaign County Clerk is a County Officer under the Illinois Constitution and the Election Authority for Champaign County and, as such, is bound by oath and is statutorily charged with the administration of state laws affecting voting, voting procedures, and for assuring that elections in Champaign County are conducted fairly, openly, and in accordance with all applicable laws. The County Clerk's principal office is located in Urbana, Illinois.

10. Defendant SBE is established by the Illinois Constitution and specifically charged with the administration of the election laws in the state of Illinois. 10 ILCS 5/1A-1.

JURISDICTION AND VENUE

11. This Court has jurisdiction over the subject matter of this Complaint because the matters alleged herein are governed by Illinois Election Code, 10 ILCS 5/1 *et seq.*

12. Venue is proper in Champaign County because the matters alleged involve elections occurring in Champaign County, and the County Clerk is an official of Champaign County.

BACKGROUND

13. In the 2010 Primary Election, Champaign County's registered voters will cast ballots for several federal and state offices, including for the next United States Senator, Governor and other statewide state offices, Representative in the United States Congress, Representatives in the General Assembly, as well as countywide and other local offices.

14. Champaign County has purchased and uses Precinct Tabulation Optical Scan Technology as defined in Article 24B of the Election Code. 10 ILCS 5/24B-1 *et seq.* The system purchased by Champaign County is the Election Systems and Software M100 Precinct Tabulator ("the M100").

15. Currently, the M100 provides error notification when a voter casts a vote for more than the allowed number of candidates for a particular office, or when no votes at all can be detected on a ballot. The error notification consists of an audible beep and a message appearing on a small screen on the face of the M100.

16. In August of 2007, the legislature passed P.A. 95-699, an omnibus elections bill that mandated that voting systems produce an error message when a voter "undervotes" for statewide constitutional offices. An "undervote" occurs when a voter does not cast a vote for all of the offices on a ballot, whether or not that failure was actually intended by the voter.

17. As a result of this change in the law, all Precinct Tabulation Optical Scan Technology systems must "identify when a voter has not voted for all statewide constitutional offices . . ." 10 ILCS 5/24B-16(e-5).

18. Two elections have been conducted with the M100 in Champaign County in which statewide constitutional officers were on the ballot. An analysis of so-called "undervotes"

from the November 2006 election in Champaign County indicates that over 99.8% of undervotes are intentional choices of voters not to cast a vote in a particular race.

19. Now that optical scan tabulation systems must alert the voter, election judges, and anyone observing or listening, that a voter did not cast a vote in one or more of the statewide constitutional office races, that voter's right to a secret ballot is necessarily violated.

20. Moreover, if § 24B-16(e-5) is implemented, and a voter's ballot is processed by an optical scan vote tabulation machine, and an error message does not appear, a voter's right to a secret ballot is likewise violated. This would be particularly true where there is only one candidate for a statewide constitutional office.

21. The SBE has approved the M100 under the scheme set forth by the newly-enacted § 24B-16(e-5), but, the SBE will not and cannot ensure that it functions, as is required by 10 ILCS 5/24B-16, in a manner that gives each elector the right *to vote in absolute secrecy . . .*"

22. Such a voting procedure that denies a voter the opportunity to vote in absolute secrecy will serve to deter individuals from voting.

23. Such a voting procedure that denies a voter the opportunity to vote in absolute secrecy will necessarily have an improper effect on a voter's choices.

24. Such a voting procedure that treats votes cast, or not cast, for offices on the same ballot in a different manner offends the principle that each voter have the right and opportunity to cast his or her vote in a manner free from undue restraint.

CLAIMS FOR RELIEF

COUNT I INJUNCTIVE AND OTHER RELIEF SOUGHT FOR VIOLATION OF SECTIONS 24 AND 24B OF THE ILLINOIS ELECTION CODE

25. Paragraphs 1 through 24 are incorporated by reference as if fully set forth herein.

26. Sections 5/24-1 and 5/24B-16(a) of the Election Code explicitly provide that a voter's vote is to be cast in secrecy.

27. Implementation of Section 5/24B-16(e) of the Election Code, the statewide constitutional officer undervote provision, will necessarily violate the guarantee of secrecy provided by Sections 5/24-1 and 5/24B-16(a) of the Election Code.

28. Given the nature of a voter's right to secrecy, a voter, and the electoral process in general, will suffer irreparable injury if injunctive relief is not granted.

29. There is no adequate remedy at law for the impending violation of the right of voters in Champaign County to cast a secret ballot.

30. Plaintiff has alleged facts sufficient to demonstrate a fair likelihood of success on the merits.

WHEREFORE, for the reasons set forth above, Plaintiff prays that this Court grant the following relief:

- (a) Prohibit the County Clerk and all election officials acting in concert with him in Champaign County from utilizing the undervote notification technology of the M100 in the 2010 General Primary Election;
- (b) Order the State Board of Elections to withdraw their certification of the undervote notification of the M100 ballot tabulator;
- (c) Such other and further relief this Court deems just.

COUNT II

INJUNCTIVE RELIEF SOUGHT TO REMEDY VIOLATION OF ARTICLE III, SECTION 4 OF THE ILLINOIS CONSTITUTION

31. Paragraphs 1 through 24 of the Complaint are hereby incorporated by reference as though the same were fully set forth herein.

32. Article III, Section 4 of the Illinois Constitution protects the rights of individuals to cast their ballots in a manner that preserves the secrecy of the voters' choices.

33. Implementation of Section 5/24B-16(e) of the Election Code, the statewide constitutional officer undervote provision, will necessarily violate the guarantee of secrecy provided by Article III, Section 4 of the Illinois Constitution.

34. Given the nature of a voter's right to secrecy, a voter, and the electoral process in general, will suffer irreparable injury if injunctive relief is not granted.

35. There is no adequate remedy at law for the impending violation of the right of voters in Champaign County to cast a secret ballot.

36. Plaintiff has alleged facts sufficient to demonstrate a fair likelihood of success on the merits.

WHEREFORE, for the reasons set forth above, Plaintiff prays that this Court grant the following relief:

- (a) Prohibit the County Clerk and all election officials acting in concert with him in Champaign County from utilizing the undervote notification technology of the M100 in the 2010 General Primary Election;
- (b) Order the State Board of Elections to withdraw their certification of the undervote notification of the M100 ballot tabulator;
- (c) Such other and further relief this Court deems just.

COUNT III

VIOLATION OF PLAINTIFFS' RIGHTS TO EQUAL PROTECTION OF THE LAWS AND DUE PROCESS UNDER THE ILLINOIS CONSTITUTION

37. Paragraphs 1 through 24 of the Complaint are hereby incorporated by reference as though the same were fully set forth herein.

38. Article I, Section 2 of the Illinois Constitution guarantees all individuals equal protection under law.

39. Implementation of Section 5/24B-16(e) of the Election Code, the statewide constitutional officer undervote provision, will necessarily violate the guarantee of Illinois citizens to equal protection under the law, by compromising the secrecy of the vote, and by setting forth a scheme that provides different procedures to cast votes for offices on the same ballot.

WHEREFORE, for the reasons set forth above, Plaintiff prays that this Court grant the following relief:

- (a) Prohibit the County Clerk and all election officials acting in concert with him in Champaign County from utilizing the undervote notification technology of the M100 in the 2010 General Primary Election;
- (b) Order the State Board of Elections to withdraw their certification of the undervote notification of the M100 ballot tabulator;
- (c) Such other and further relief this Court deems just.

COUNT IV

DECLARATORY JUDGMENT

34. Paragraphs 1 through 24 of the Complaint are hereby incorporated by reference as though the same were fully set forth herein.

35. Plaintiff has a tangible legal interest in the proper administration of the election, including administration of voting machines in such a way that safeguards the secrecy of the ballots cast by the voters, and that treats in a fair and equal manner the process for casting votes for all of the different offices on the ballot.

36. By virtue of the County Clerk's Office being unable to adequately safeguard the secrecy of the ballots cast by Champaign County voters and because votes for statewide constitutional officers are treated in a different manner than those cast for every other office on the ballot, an actual controversy concerning the provisions of the Election Code exists that must be resolved pursuant to Section 2-701 of the Code of Civil Procedure.

WHEREFORE, for the reasons set forth above, Plaintiffs pray that this Court grant them declaratory judgment and other relief, and enter judgment as set forth more fully above.

Dated: November 20, 2009

Respectfully submitted,



Mark Shelden
Champaign County Clerk

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VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Date:

11/20/09

Mul Sheikh