

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

Mark Shelden, in his capacity as)	
Champaign County Clerk)	
)	
Plaintiff,)	
)	
v.)	Case No. 09-CH-432
)	
Illinois State Board of Elections)	
)	
Defendant.)	

**MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION FOR TEMPORARY
RESTRAINING ORDER/PRELIMINARY INJUNCTIVE RELIEF**

There is no more fundamental right than the right to vote and to cast a secret ballot. Indeed, the Illinois Constitution specifically safeguards the secrecy of the ballot, requiring that “The General Assembly by law shall . . . *insure secrecy of voting* and the integrity of the election process, and facilitate . . . voting by all qualified persons.” ILLINOIS CONSTITUTION, ART. III, SEC. 4. (EMPHASIS ADDED) The Illinois Election Code likewise requires that a voter’s ballot choices remain *absolutely* secret. For example, § 24B-16(a) of the Election Code, which applies to optical scan technology for counting ballots, mandates that no optical scan tabulation system shall be approved for use unless “it enables a voter *to vote in absolute secrecy.*” 10 ILCS 5/24B-16(a) (emphasis added).

However, the right of Champaign County voters to a secret ballot has been compromised by a recent change in the Election Code. With the passage of P. A. 95-699, all optical scan ballot tabulation machines used in the State of Illinois must produce an error message when a voter “undervotes,” that is, fails to cast a vote, for one or more of the races for statewide constitutional

office up for election.¹ Curiously, under this change in the law, no “undervotes” for any other office on the ballot will cause the ballot tabulation machine to produce an error message – only an undervote for one of the statewide constitutional offices.

In Champaign County, the newly-required error notification will take the form of a visual message on the screen of the tabulation machine accompanied by an audible beep, and will thereby compromise the secrecy of a voter’s choices vis-à-vis the statewide constitutional offices. This two-tiered system of voting will cause a myriad of problems, the most pressing of which is that the error message now mandated by law will violate a voter’s right to cast a secret ballot, especially with respect to sight-impaired voters. However, this change in the law also raises other serious questions about voter confusion, voter intimidation, the added time necessary for a voter to cast his or her ballot, and the ensuing delays in the polling places. Finally, by setting up a system where different procedures are utilized by voters depending on for whom they choose to vote, this change in the law raises serious equal protection concerns.

I. BACKGROUND

In August of 2007, the Illinois General Assembly passed P.A. 95-699, an omnibus elections bill. Among the many provisions in this legislation was a scant-debated item that mandates that vote tabulation systems in Illinois detect, and produce an error message, for undervotes -- but only for undervotes in races for a statewide constitutional office. Specifically, under 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). Voting machines are not to detect undervotes for any of the other races for federal or

¹ The statewide constitutional offices are the Offices of Governor, Lt. Governor, Attorney General, Secretary of State, Treasurer and Comptroller.

state offices, which include United States Senator, Representative in the United States Congress, members of the General Assembly, as well as all other countywide and local offices. In enacting this change in the Election Code, the General Assembly provided no rationale as to why an undervote should be considered a voter error, as opposed to the voter's choice. Just as importantly, the General Assembly provided no rationale as to why an undervote should be corrected for the statewide constitutional office races, but not for any other office on the ballot, nor for any ballot initiative. Surely, if detecting for an undervote in statewide races is important enough to warrant a change in the Election Code, it would surely be just as important to detect for all races and initiatives on the ballot.

Indeed, the entire premise that an undervote is a mistake is a faulty one. In fact, quite the opposite is true. Overwhelmingly, a voter's choice not to cast a vote in a particular race is a purposeful one. Personal experience tells us that this is true. Often, if a voter not familiar with any candidate for a particular office, he or she will not cast a vote for that office. An analysis of undervotes from the November 2006 election in Champaign County indicates that over 99.8% of undervotes for statewide constitutional officers are actually intentional choices of voters not to cast a vote in a particular race.²

Champaign County utilizes the Election Systems and Software M100 Precinct Tabulator ("the M100") as its optical scan tabulation system. The M100 is a machine into which a voter places his or her ballot after the voter has marked that ballot in the voting booth. The M100 then tabulates the voters' choices. Currently, in accordance with HAVA, the M100 provides error notification for overvotes, or when no votes at all can be detected for any of the races on a

² The Champaign County Clerk's Office reviewed undervotes for statewide constitutional offices on the ballot in the General Election in 2006, and found that no more than 13 of undervotes counted by the M100 in that election appeared to be unintentional.

ballot.³ The M100's error notification consists of an audible beep accompanied by a message that appears on a small screen on the face of the machine. The voter is then given the opportunity to either override the error message by pressing a button on the front of the machine, or to return to the voting booth in order to correct, or finish, his or her ballot. Thus, an observer is able to discern only whether a voter overvoted, or whether the voter cast a ballot with no readable markings at all.

With the change in the Election Code brought about by P.A. 95-699, however, an observer will have insight into how a voter voted *in a particular race*. Quite simply, because the M100's error notification consists of an audible beep and a visible error message (albeit on a small screen), under the new § 5/24B-16(e-5), the right of the voter to cast a secret ballot is necessarily impaired. Election judges, poll watchers, and anyone in the vicinity of the voter will have insight into a voter's choices with respect to the statewide constitutional offices. If the M100 beeps and produces an error message, an observer will know that a voter either overvoted, or, undervoted for one or more of the statewide constitutional offices. To anyone watching, this error message sends a clear and obvious signal of that voter's actions, and provides an opportunity for a judge, or other observer, to remind the voter to finish their ballot, whether the voter truly wants to or not. This prompt (whether of the official or improper variety) would not occur for any other office other than the statewide constitutional offices.

Perhaps more critically in terms of voter privacy, if a voter's ballot is processed by an optical scan vote tabulation machine, and an error message *does not appear, an observer will know that that voter cast a vote for each of the statewide constitutional offices on the ballot.*

³ The Help America Vote Act ("HAVA") was enacted by Congress in the wake of the 2000 General Election in part to remedy the problem of the "overvote," that is, when a voter casts more than one vote in a particular race. This problem typically occurred as a result of confusing ballot design. HAVA only directs that voting machines be programmed to notify voters when they overvote.

This situation likewise violates a voter's right to a secret ballot. Where there is only one candidate for a particular statewide constitutional office on the ballot, any observer would be able to discern exactly how a voter voted if no error message is generated for that voter. This, of course, would be an obvious breach of a voter's right to cast a private ballot.

This new undervote notification provision also presents a host of problems for the visually impaired. In Champaign County, the visually impaired use a device known as the Automark system to fill out their ballots in their voting booth. The Automark system provides the visually impaired with undervote notification as they proceed through their ballot, and then once again at a summary screen at the end of their voting process. These notifications occur privately, within the voting booth. There is no way for election judges or other voters to be aware of the fact that the voter has decided not to cast a vote for a particular race.

A visually impaired voter, though, will of necessity have to ask for assistance when they go to the M100 to insert their ballot. Moreover, because the change in the law will require additional undervote notification, if the visually impaired individual has undervoted, that person will have to tell the election judge that he or she has not voted a particular office, and to press the button on the M100 to override the error message. The visually impaired voter who wishes to undervote a statewide constitutional office will have the secrecy of his or her ballot *destroyed*.

The Defendant in this matter, the Illinois State Board of Elections ("SBE") is charged with the administration and certification of all voting machines and tabulation systems employed in the State. The SBE has approved the M100 under the scheme set forth by the newly-enacted § 24B-16(e-5), but, the SBE cannot possibly 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 . . .*"

There is no question that maintaining such a voting procedure that denies a voter the opportunity to vote in absolute secrecy will serve to deter individuals from voting, will necessarily have an improper effect on a voter's choices, and will offend the principle that each voter have the right and opportunity to cast his or her vote in a manner free from undue restraint.

The Supreme Court in *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992), ruled that voting in an environment free from intimidation is a fundamental right, and that the right to a secret ballot is part of ensuring that right. The *Burson* Court stated:

“In sum, an examination of the history of election regulation in this country reveals a persistent battle against two evils: voter intimidation and election fraud. After an unsuccessful experiment with an unofficial ballot system, all 50 States, together with numerous other Western democracies, settled on the same solution: a secret ballot secured in part by a restricted zone around the voting compartments.

* * *

Contrary to the dissent's contention, the link between ballot secrecy and some restricted zone surrounding the voting area is not merely timing – it is common sense. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State's compelling interest.

* * *

Successful voter intimidation and election fraud is successful precisely because it is difficult to detect. Because a government has such a compelling interest in securing the right to vote freely and effectively, the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud.”

Burson, 504 U.S. 191, 206-208.

The decision of *Nabors v. Manglona*, 829 F.2d 902 (9th Cir. 1987) provides a particularly apt commentary on the effects of the loss of ballot secrecy. There, the majority party in the Commonwealth of the Northern Mariana Islands instituted a system whereby voters were directed to mark their ballots with a unique predesignated code name, and an individual from the

majority party was able to review those ballots to ensure that the ballots were cast for the majority party. *Id.* at 904. Candidates of the minority party filed suit, claiming, among other things, that the ballot marking scheme violated statute, which stated that every voter “has the right to cast a secret ballot in private . . .” *Id.* Of the ballot-marking provision, the Ninth Circuit noted that “Knowledge by the individual voter that his ballot choices can be monitored by others interferes with his fundamental electoral rights, and in many cases would inevitably influence his choice of candidates.” *Id.* at 905.

Notably, no other state in the Union has passed a law to require undervote notification, much less only for certain offices. In New York, an administrative regulation calling for undervote notification was recently suspended by the New York State Board of Elections. The findings of the New York State Board of Elections with respect to 9 NYCRR 6209.2(a)(8), a regulation that required ballot machines to notify voters of all undervotes, are instructive to the case at bar. In October of 2009, the New York State Board of Elections moved to change that regulation to delete the undervote notification requirement, concluding that such an undervote provision will result in long lines at polling places and violates a voter’s constitutional and statutory right to cast a vote in private. In adopting an emergency rule to deal with the provision, the New York State Board of Elections reasoned that the undervote notification regulation ***would create serious violations of a voter’s constitutional and statutory right to privacy*** in casting his/her vote in that it would be obvious that the voter chose not to vote in all races upon the ballot. The regulation would also create delays in the voting process, as the system must communicate the fact of the undervote to the voter and the voter must deal with the initial rejection of the voter’s choice not to vote all races upon the ballot.

In an effort to ensure that ballot secrecy is not compromised in the 2010 General Primary Election and in elections to follow, Plaintiff asks this Court for emergency injunctive relief as set forth in the Verified Complaint. Most particularly, Plaintiff seeks an Order directing the Illinois State Board of Elections to withdraw its certification of the undervote notification provisions with respect to the M100 ballot tabulator, so that the secrecy of all ballots cast in the 2010 General Primary Election is preserved.

II. THE PLAINTIFF IS ENTITLED TO INJUNCTIVE RELIEF

The Plaintiff is entitled to the injunctive relief he seeks in his Verified Complaint. There are four elements which require proof in a cause of action for injunctive relief. They are: (1) a protectable right; (2) irreparable injury if relief is not granted; (3) the remedy at law is inadequate; and (4) a likelihood of success on the merits. *Murges v. Bowman*, 254 Ill.App.3d 1071, 1081, 194 Ill.Dec. 214, 221, 627 N.E.2d 330, 337 (1st Dist. 1993). Here, Plaintiff more than satisfies each of these elements.

A. Protectable Right

The Plaintiff has a protectable right in ensuring that the integrity of the election process, which necessarily includes the right to cast a secret ballot, is preserved. A citizen's right to vote is his or her most precious right. The Supreme Court has stated that the right to vote is the "preservative of all other rights." *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490 (1980). Further, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined." *Wesberry v. Sanders*, 376 U.S. 1, 17, 84 S. Ct. 526, 535 (1964).

A citizen's right to vote is jeopardized when ballot secrecy is compromised. The Illinois Constitution explicitly recognizes the importance of ballot secrecy, requiring in Article III that the General Assembly to "insure secrecy of voting". ILLINOIS CONSTITUTION, ART. III, SEC. 4. The Illinois Election Code further explicitly recognizes the right to ballot secrecy, requiring that voting machines must function in a manner voters affords citizens "an opportunity to vote in absolute secrecy." 10 ILCS 5/24-1.

As the officer responsible for ensuring that elections in Champaign County are conducted in accordance with the law, and within the bounds of the Constitution, the Plaintiff has a protectable right in ensuring that the secrecy of all votes cast in Champaign County is preserved. Moreover, as the public official whose office will be held responsible for the constitutional defects in this change in the Election Code, the Plaintiff has standing to urge the constitutionality of this legislation be tested. *People ex rel. Hopf v. Barger*, 30 Ill.App.3d 525, 332 N.E.2d 649 (2nd Dist. 1975). Accordingly, the Plaintiff, in his capacity as Champaign County Clerk, has sufficiently alleged a protectable right for the purpose of this petition for injunctive relief.

B. Irreparable Injury if Relief is Not Granted

The Plaintiff, as well as the citizens of Champaign County, will suffer irreparable injury if injunctive relief is not granted. An irreparable injury is one which either cannot be adequately compensated by monetary damages or cannot be measured by a pecuniary standard. *Diamond Savs. & Loan Co. v. Royal Glen Condominium Ass'n*, 173 Ill.App.3d 431, 435, 122 Ill.Dec. 113, 116, 526 N.E.2d 372, 375 (2d Dist. 1988).

It is self-evident that once a ballot's secrecy is compromised, it cannot be made secret again. A voter cannot be adequately compensated for the loss of his or her right to a secret ballot, as there is no way to put a price on such a loss of one's most precious right. As such, an

irreparable injury will have occurred. The rights of voters will be violated in the 2010 Primary Election because the 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 to be known to observers.

Moreover, given that it is Plaintiff's responsibility to administer Champaign County elections, including administration of voting machines in such a way that safeguards the secrecy of the ballots cast by the voters, and treats in a fair and equal manner the process for casting votes for all of the different offices on the ballot, the Plaintiff's office will suffer irreparable damage in the event this new § 24B-16(e-5) of the Election Code is followed.

C. The Remedy at Law is Inadequate

Neither the Plaintiff, nor the citizens of Champaign County, have an adequate remedy at law. If monetary damages are impossible to calculate, the remedy at law will be held to be inadequate. *See, Binder Plumbing & Heating, Inc. v. Plumbers & Pipefitters Local Union No. 99*, 253 Ill.App.3d 972, 625 N.E.2d 934 (4th Dist. 1993). It is impossible to calculate the monetary damage of compromising ballot secrecy. Further, the undermining of citizen confidence and disenfranchisement in the democratic process simply cannot be quantified into any monetary denomination.

D. Likelihood of Success on the Merits

Plaintiffs are likely to succeed on the merits of their claims. To show a likelihood of success on the merits, a party is not required to make out a case which would entitle him to relief on the merits. Rather, the party must raise a fair question as to the existence of the right claimed; he must lead the court to believe that he will be entitled to the relief prayed for if the proof should sustain his allegations; and he must make it appear advisable that the positions of the

parties stay as they are until the court has an opportunity to consider the merits of the case. *Abdulhafedh v. Secretary of State*, 161 Ill.App.3d 413, 514 N.E.2d 563 (2d Dist. 1987). Here, Plaintiff more than meets that requirement.

i. Count I - Violations of Secs. 24 and 24B of the Election Code

The facts, as set forth above and in the Verified Complaint, amply demonstrate a likelihood of success on the merits of Plaintiff's claims. It is undisputed that, if §24B-16(e-5) is implemented, and a voter chooses not to vote for every constitutional office, the optical scan voting tabulation machine will act as town crier, proclaiming that fact to any and all present, in violation of constitutional and statutory provisions guaranteeing ballot secrecy. The machine will announce – both audibly and visually – that the voter has not voted for a candidate for every constitutional office. The beep will sound and electronic message will display. Critically, all of this will occur outside the voting booth.

The privacy of the voting booth for all parts of the vote is critical to ensuring ballot secrecy. *George v. City of Charleston*, 516 S.E. 206 (S.C. 1999). Under §24B-16(e-5), following the audible beep and electronic announcement, a voter wishing to vote the ballot with his or her already-expressed preferences, will have to himself or herself publicly press a button on the voting machine to demand the machine accept the ballot as-is. This unnecessarily forces the voter to express some aspect of his or her voting choice outside the voting booth.

Where voters have difficulty determining where to push the button on the voting machine or how to respond to the error beep regarding their ballot, their ballot secrecy is further compromised. Under §24B-16(e-5), many voters will require assistance operating the machine that they have never seen or operated before. It will fall upon the election officials or other voters present to assist them. In addition to ballot secrecy problems, high levels of “assistance”

from officials, regardless of whether or not the voters actually want the assistance, can present issues of voter intimidation and undue persuasion. *Sims v. Atwell*, 556 S.W. 2d 929 (Ky. App. 1977); *O'Neal v. Simpson*, 350 So. 2d 998 (Miss. 1977). It is not far-fetched to anticipate election officials responding to voters' questioning of the reason for the "error message" with encouragement – whether inadvertent or not – to voters to make a selection for every constitutional office, thereby swaying voters' choices. Alternatively, if voters wish to avoid having to publicly get assistance with the voting machine, their only alternative is to make a selection for every constitutional office, even if they would not independently have been inclined to do so.

With regard to the visually impaired, §24B-16(e-5) will completely strip those voters of their ballot secrecy, after that privacy was finally, attained through the AutoMark system. Every visually-impaired voter who does not choose to vote for every statewide constitutional office will require assistance with the voting machine. Section 24B-16(e-5) is thereby a significant step backward for the rights of the visually-challenged. Where it is technologically and financially feasible to use voting machines that allow blind people to vote without third party assistance, they should be used. *American Ass'n of People with Disabilities v. Hood*, 310 F.Supp.2d 1226 (M.D. Fla., 2004). In Florida, such voting machines were not already certified, yet still the court found that because they were feasible, they must be procured. *Id.* In Champaign County, visually impaired voters have been able to vote unassisted on certified voting machines since the purchase of the AutoMark system. Section 24B-16(e-5) would necessarily take away that right from every visually impaired voter choosing not to make a selection for every state constitutional office.

Additionally, those voters who choose to vote for every constitutional office will also have their ballot secrecy compromised under §24B-16(e-5), in violation of their constitutional and statutory guarantees of ballot secrecy. It is undisputed that if a voter chooses to vote for every constitutional office and has his or her ballot by the same optical scan vote tabulation machine, no sound or visible error message will display, thus proclaiming the voter has voted for a candidate in every constitutional office, in violation of constitutional and statutory secret ballot guarantees. Where there is only one candidate for a statewide constitutional office, this would announce the voter's specific candidate choice, completely negating ballot secrecy, effectively regressing to the time when voters verbally announced their choices at the time of this country's founding. Given these facts, Plaintiff has raised a sufficient likelihood of success on the merits of his §§ 24 and 24B claims to justify the imposition of injunctive relief here.

ii. Count II, Violation of Article III, Section 4 of the Illinois Constitution

Voting is a fundamental right, and any legislative infringements upon that right are subject to strict scrutiny. *Tully v. Edgar*, 171 Ill.2d 297, 664 N.E.2d 43 (1996). Even *de minimis* violations of a fundamental right cannot be ignored. “There are no *de minimis* violations of the Constitution – no constitutional harms so slight that the courts are obliged to ignore them.” *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1 (2004).

To withstand strict scrutiny, a court must conclude that the means chosen by the legislature (1) were necessary to advance a compelling state interest, to reach a stated goal and (2) are narrowly tailored, using the least restrictive means. *Tully v. Edgar*, 171 Ill.2d 297, 664 N.E.2d 43 (1996); *Fumarolo v. Chicago Bd. Of Educ.*, 142 Ill.2d 54, 566 N.E.2d 1283 (1990). Here, §24B-16(e-5) fails on both counts.

There is neither legislative history, nor any pronouncement within the statute itself that the State has a compelling interest in coding ballots such that undervotes for statewide constitutional officers show up as an error message on a vote tabulation machine. In fact, nowhere is there even an assertion by the legislature of a compelling state interest that would even nominally justify their goal of avoiding undervotes for state constitutional offices.

At any rate, even if the State could show a compelling state interest is served by this amendment to the Election Code, by no means could this change in the law be considered to be the least restrictive. There are voting systems already in existence that *privately* alert a voter of an undervote – specifically in Champaign County, vision impaired voters have *already* been provided such private notice while using the Automark system. The legislature could have ordered that electronic voting systems provide private notice of undervotes; instead, the legislature passed §24B-16(e-5), ordering public notice – outside the voting booth – of undervotes for state constitutional offices, infringing on ballot secrecy. For vision impaired voters who already had notice of their undervotes and the corresponding opportunity to correct them if they had been unintentional, the only change from the legislature’s passage of §24B-16(e-5) was to infringe on their right to vote privately. Section 24B-16(e-5) is not the least restrictive means to achieve any valid interest.

Section 24B-16(e-5) infringes on ballot secrecy, thereby undermining the fundamental right to vote, and inviting voter intimidation, and is not merely a time, place, or manner restriction on the right to vote. Secrecy of voting is such an important aspect of the right to vote that the Illinois Constitution explicitly protects it. ILLINOIS CONSTITUTION, ART. III, SEC. 4. Indeed, the United States Supreme Court has explicitly recognized the importance of ballot secrecy to achieve the compelling state interest of preventing voter intimidation. *Burson v.*

Freeman, 504 U.S. 191, 112 S.Ct. 1846, 119 L.Ed.2d 5 (1992). The *Burson* Court recognized that “some restricted zone” around the voting location is necessary. *Id.* Section 24B-16(e-5) eliminates that zone regarding undervoting for statewide constitutional offices, thereby infringing on ballot secrecy, and the fundamental right to vote.

The issues presented by §24B-16(e-5) are quite different from those present in *Orr v. Edgar*, where the Illinois Appellate Court found that abolishing straight-ticket voting regulated only the manner of voting and so was subject only to a rational basis test. *Orr v. Edgar*, 698 N.E. 560, 298 Ill. App.3d 432 (1st Dist. 1998). Specifically, the court found that the regulation did not prohibit an elector from voting a straight-party ballot but that a voter remained free, as before, to cast all of his or her votes entirely for candidates of the same political party. *Id.* at 564. Section 24B-16(e-5) compromises ballot secrecy for all voters – those who choose to undervote for state constitutional officers, those who unintentionally undervote for state constitutional officers, and those who vote for every state constitutional office – and these voters cannot regain their ballot secrecy, once compromised. It is far more than a manner restriction, but affects the fundamental right of voting itself.

However, even if this court were to find that §24B-16(e-5) was subject to a rational basis test, §24B-16(e-5) would fail. To survive the rational basis test, legislation must (1) bear a reasonable relationship to a legitimate state interest and (2) not be arbitrary or discriminatory. *Boynton v. Kusper*, 112 Ill.2d 356, 494 N.E.2d 135 (1986). The Legislature failed to assert a legitimate state interest in enacting what has become § 24B-16(e-5), and indeed, there is no legitimate state interest. In fact, *it could not be more arbitrary* to single out state constitutional offices, while federal offices and less-than-statewide state offices, among others, were left alone. Certainly, if undervotes are not desirable at the top of the ticket (where they occur with much

less frequency), they are not desirable anywhere on the ticket. Moreover, the legislation does not address other ballot initiatives, such as proposed Constitutional amendments, local bond issues and the like. These are arguably the most impactful items that are on a ballot. In sum, §24B-16(e-5) cannot pass constitutional muster, under either a strict scrutiny test or a rational basis test. At any rate, the Plaintiff here has alleged a sufficient likelihood of success on the merits to justify the imposition of injunctive relief.

iii. Count III – Equal Protection

Implementation of §24B-16(e-5) of the Election Code will necessarily violate the constitutional guarantee of Illinois citizens to equal protection under the law, by setting forth a scheme that provides different procedures to cast votes for offices on the same ballot. Article I, Section 2 of the Illinois Constitution guarantees all individuals equal protection under law. In the 2010 General Primary Election, Champaign County’s registered voters will cast ballots for several federal, state, county and other local offices. Yet by requiring undervote notification only for statewide constitutional offices, and not for the various statewide federal offices, non-statewide state offices, or local offices, §24B-16(e-5) denies equal protection by establishing different voting procedures for different offices on the same ballot. “The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise.” *Bush v. Gore*, 531 U.S. 98 (2000).

Illinois courts have upheld disparate treatment of different candidate offices only where the Illinois constitution so mandated. *People ex rel. Barrett v. Barrett*, 201 N.E.2d 849, 31 Ill.2d 360 (Ill. 1964)(Because the Illinois constitution mandated a special judicial ballot, legislature could legislate to include judicial retention vote with regular ballot, even when using voting machines). That is not at issue here. The Illinois constitutional section at issue here is the

guarantee of equal protection; the legislature may not infringe upon this constitutional guarantee through its regulations of voting machines.

Additionally, although governmental bodies have wide discretion in determining election procedures and enacting ballot regulations, that discretion must yield to constitutional limitations. *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr 377 (Cal., 1975). In *Grubb*, the Court struck down a procedure of putting incumbents in the top ballot position, finding that a governmental body is not free to make up whatever classifications among candidates it wishes relating to the ballot. *Id.* The court held that to the greatest extent possible, the voting scheme must reflect “the free and pure expression of the voters’ choice of candidates...untainted by extraneous artificial advantages imposed by weighted features of the election process.” *Id.* at 388. Here, the constitutional guarantee of equal protection does not permit §24B-16(e-5) to grant special treatment to statewide constitutional candidates that it does not afford the remaining candidates – both higher and lower – on the ballot. Notably, this two-tiered scheme’s effects on voters who choose to vote for statewide constitutional officers as opposed to those who do not presents equal protection issues that must be remedied by the injunctive relief sought herein.

iv. Count IV – Declaratory Judgment

Given the facts as set forth in the Verified Complaint and the requisites of Sections 24 and 24B the Illinois Election Code, success is likely on the merits of a declaratory judgment action. In this case, the Plaintiff does have an actual controversy with the Defendant. The SBE’s certification of the M100 with undervote placed the Plaintiff in the position of being unable to adequately safeguard the secrecy of the ballots cast by Champaign County voters, although he is statutorily required to do so. Also, 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.

E. The Threat To The Integrity Of The Electoral System Outweighs Any Conceivable Harm In Granting The Injunction.

The threat to the integrity of the electoral system posed by the compromise of ballot secrecy and disparate treatment of different offices on the same ballot, as set forth above and in the Verified Complaint, outweighs any possible harm in granting the injunction. The remedies for which Plaintiff prays in his Verified Complaint cause no harm to the Defendant. Indeed, the relief would enable the Defendant to fulfill its own statutory duty to ensure ballot secrecy.

The real harm that could result in this case is if injunctive relief is not granted. Plaintiff has a statutory obligation to conduct elections in a way that safeguards ballot secrecy. Voters have both a state constitutional right and a statutory right to vote by secret ballot. Candidates have a state constitutional right to equal protection, and thus to equal treatment on the ballot. Simply put, the harm caused by not granting injunctive relief – compromising the constitutionally protected rights of ballot secrecy and equal protection – vastly outweighs any harm to Defendant in granting the injunction.

III. CONCLUSION

Once a ballot's secrecy is compromised, it cannot be recovered. By granting injunctive relief this court can protect the rights of voters in Champaign County in the upcoming 2010 General Primary Election. Both the right to vote by secret ballot and the right to equal protection are protectable rights. If this Court does not act by granting injunctive relief, the Plaintiff will suffer irreparable injury. These injuries simply cannot be quantified in any dollar amount. And given the facts and the clear requirements of both the Illinois Constitution and the Illinois Election Code, there is a likelihood of success on the merits of the case. Injunctive relief is an

appropriate remedy to protect the constitutional rights of ballot secrecy and equal protection. For these reasons, this court should grant injunctive relief in favor of the Plaintiff.

Respectfully submitted,

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