Case Number 02-3924

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

American Civil Liberties Union of Ohio, Inc.,

Plaintiff-Appellant,

-vs-

Robert Taft, Governor of Ohio,

Defendant-Appellee

On Appeal from the United States District Court for the
Southern District of Ohio, Eastern Division
Case Number C2-02-0766 (Sargus, D.J.)

Merit Brief of Appellant the American Civil Liberties Union of Ohio

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

(This statement should be placed immediately preceding the table of contents in the brief of the party. See copy of 6th Cir. R. 26.1 on page 2 of this form.)

American Civil Liberties Union of Ohio (ACLU)

v.

Robert Taft, Governor of Ohio

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, ACLU
(Name of Party)

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? No

   If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? No

   If the answer is YES, list the identity of such corporation and the nature of the financial interest:

(Signature of Counsel)

2/24/03
(Date)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Oral argument is requested. The decision at issue impacts one of the core principles of democracy: the right to vote and participate in a representative government. Oral argument is necessary in order to address the specific legal and factual issues and to fully elucidate the constitutional question.

JURISDICTIONAL STATEMENT

The Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291. This case came before the District Court on the filing of a Complaint and Motion for Temporary Restraining Order and Preliminary Injunction on August 5, 2002. On August 19, 2002, the District Court entered an Order denying Appellant's Motion. (R. 8, Order, J.Apx. at 13) Appellant timely filed its notice of appeal on August 19, 2002. (R. 9, Notice of Appeal, J.Apx. at 169). The District Court issued its Opinion and Order in Case Number 02-00766, denying Appellant all relief, including declaratory relief, on August 26, 2002. Under the Federal Rules of Appellate Procedure, a notice of appeal from the final judgment of a district court must be filed within thirty (30) days of the entry of judgment. Fed.R.App.P 4(a)(1)(A). This case now is before this Court having been docketed as Case Number CA-02-3924.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The single issue presented in this case is whether Article I, Section 2, Clause 4 of the United States Constitution mandates that the governor of a state call a special election to fill a vacancy in the United States House of Representatives.

STATEMENT OF THE CASE

Appellant American Civil Liberties Union of Ohio filed the instant action on behalf of its members, who are electors and citizens in the Seventeenth Ohio

Congressional District, to challenge the refusal by Governor Robert Taft to hold a special election to fill the vacancy created by the expulsion of Rep. James Trafficant from the United States House of Representatives ("the House") on July 24, 2002. The Complaint and accompanying Motion asked for declaratory and preliminary and permanent injunctive relief, alleging, *inter alia*, that the Governor's action was in violation of the clear mandate of Article I, Section 2, Clause 4 of the United States Constitution.

Appellant filed a Complaint in the United States District Court for the Southern District of Ohio on August 5, 2002, seeking preliminary and permanent injunctive relief and a temporary restraining order that would require Governor Taft to fulfill his constitutional duty to call a special election and fill the congressional vacancy in the Seventeenth District. (R.1, J.Apx. at 5). On the same date, Appellant filed Motions for a Temporary Restraining Order and for a Preliminary Injunction and a Memorandum of Law in Support. (R.2, J.Apx. at 31). The district court immediately set a briefing schedule, and on August 19, 2002, held a hearing on the merits as to whether a permanent injunction should issue. (R. 10, Minutes, TRO and Preliminary injunction Hearing, J.Apx. at 172). The court denied Appellant's motion from the bench, (R. 8, Order, J.Apx. at 13), and filed a written Order on August 26, 2002. (R. 12, J.Apx. at 14). Appellant filed a timely notice of appeal to this Court on August 19, 2002. (R. 9, J. Apx. at 169).

Subsequent to the filing of the Notice of Appeal, Appellant filed a Motion for an Emergency Mandatory Preliminary & Permanent Injunction Pending Appeal, which this Court denied on September 5, 2002. (R. 14, Order, J.Apx. at 245).

STATEMENT OF THE FACTS

The Seventeenth Ohio Congressional District, as presently constituted, includes all of Mahoning and Columbiana counties, and parts of Trumbull County, Ohio. (R. 2, Plaintiff's Motion for Preliminary Injunction and TRO, Exhibit 1, Map of Ohio Congressional Districts, J. Apx. at 46.) Approximately 570,900 people live in the Seventeenth District. Prior to July 24, 2002, the citizens of the Seventeenth were represented in the House by James Traficant, Jr. On April 11, 2002, Mr. Traficant was convicted in federal court on ten counts of racketeering, bribery and fraud. As a result of his conviction, and a related ethics inquiry, he was expelled from the House on July 24, 2002.[1] Since that date, the Seventeenth District has been unrepresented in the House. (R. 2, Plaintiff's Motion, Exhibit B, House Resolution 495, J. Apx. at 48).

Following Mr. Traficant's expulsion, Governor Taft stated that he did not intend to call a special election to fill the vacancy created by the expulsion of Mr. Traficant. He stated this position publicly and officially, by means of an official

[1] He was subsequently sentenced to eight years in prison on July 31, 2002, and is currently serving in the Allenwood Correctional Facility in White Deer, Pa.

news release issued July 25, 2002. (R. 2, Plaintiff's Motion for Preliminary Injunction and TRO, Exhibit C, "Taft Statement on 17th Congressional District," J. Apx. at 57). This decision was publicly attributed by Governor Taft both to a fear of "voter confusion" and what he characterized as the unreasonably high cost of conducting such an election.[2] (Id., J.Apx. at 57).

Since Mr. Traficant's expulsion, the electors and citizens of the Seventeenth District have been – and continue to be - without a Representative in the House. Tim Ryan, elected to Congress on behalf of the "new" Seventeenth District in the general election held on November 5, 2002, will not take office until January 2003. In the meantime, the House has continued to debate and conduct the people's business. Since the target adjournment date of October 3, 2002, relied upon by the district court in support of its Order denying relief, (R. 12, Order at 13, J.Apx. at 26), Congress has had 28 votes, including the decision to authorize War Powers to the President to take action in Iraq, and authorization of funding for the Department of Defense. Jim VandeHei, Juliet Eilperin, *Congress Passes Iraq Resolution*, WASH. POST, October 11, 2002, at A1; Dan Morgan, *House Passes*

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[2] The idea of "voter confusion" comes presumably from the fact that the Seventeenth District has been redrawn as a result of the 2000 census, and when the general election was held on November 5, 2002, a representative was elected for a new Seventeenth District encompassing Mahoning, Trumbull, Portage and Summit counties.

New Stopgap Funding Bill, WASH. POST, October 11, 2002, at A20. The electors of the Seventeenth District had no voice in these decisions.

Congress returned to session on November 12, 2002, and has since voted to authorize the Homeland Security Act, John Mintz and Mike Allen, *House Passes Homeland Security Bill*, WASH. POST, November 14, 2002, at A1, and will consider several other pieces of legislation before the end of the year. Helen Dewar, *Lame Ducks Return With Bush Directive*, WASH. POST, November 12, 2002, at A4. The electors of the Seventeenth District will have no voice in any of these important decisions as the people's business is conducted in the House.

SUMMARY OF THE ARGUMENT

> The meaning of representative government is, that the whole people, or some numerous portion of them, exercise through deputies periodically elected by themselves the ultimate controlling power, which, in every constitution, must reside somewhere. This ultimate power they must possess in all its completeness. They must be masters, whenever they please, of all the operations of government.
>
> -John Stewart Mill, On Representative Government (1859)

Plaintiff American Civil Liberties Union of Ohio ("ACLU of Ohio") is a non-profit membership organization, dedicated to the preservation of rights and liberties established and protected under the Constitutions and Laws of the United States and the State of Ohio.

The ACLU of Ohio brought this case on behalf of its members who are electors and citizens living in the Seventeenth Ohio Congressional District, in order to enforce the right most basic to our constitutional system of government: the right of the people to vote for representatives to give voice to their will in the Congress.

Governor Robert Taft refused to provide the people of the Seventeenth District with an opportunity to elect a Representative to fill the balance of the term of office left when the United States House of Representatives expelled former Representative James A. Traficant, Jr. He has done this despite the clear and contrary mandate of the United States Constitution, which **requires** the governor to call a special election to fill any vacant congressional seat. The district court's decision, if allowed to stand, will provide authority for a governor of this state to deny the people of a congressional district their right to participate in representative government whenever the mechanics of holding an election threaten to prove inconvenient. Indeed, Governor Taft again chose the course of inaction in refusing to fill the vacancy created in the Third Ohio Congressional District when Congressman Tony Hall was appointed Ambassador to the United Nations Food Agencies. Franceen Shaugnessy, *House Vacancies Create Void for Constituents,* DAYTON DAILY News, October 6, 2002, B3. The Governor's unconstitutional action with respect to the Seventeenth District has denied more than a half million

people their sovereign rights of franchise and their voice in our representative government. Appellant asks this Court to reverse the district court's denial of declaratory relief.[3]

ARGUMENT

I. The Mandatory Language of Article I, Section 2, Clause 4 of the United States Constitution is Plain and Mandatory, Requires That a Special Election be Held, and Affords the Governor No Discretion With Respect to Whether or not to Hold Such an Election.

With respect to Congressional representation, the United States Constitution provides:

> When vacancies happen in the Representation from any State, the Executive Authority thereof **shall** issue writs of Election to fill such Vacancies.

U.S.CONST. ART. I , SEC 2, CL. 4 (WEST 2002)(emphasis added).

It is a basic canon of construction that words should be interpreted in accordance with their plain and ordinary meaning unless a clear legislative

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[3] The fact that the general election has already taken place does not moot the issue at bar as to declaratory relief. The same situation can occur again, and indeed **has** occurred again (in the Third Ohio Congressional District) since the district court ruled on August 19, 2002. And the district court's holding will operate as authority to allow Mr. Taft and any future governor to deny the people of a congressional district their right to the franchise and representation. Thus, it is capable of repetition and yet permanently evading review, and therefore is not moot. *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969). *See, also, Jackson v. Ogilvie*, 426 F.2d 1333 (7th Cir. 1970).

intention militates against it. *United States v. Apfelbaum*, 445 U.S. 115 (1980).[4] The language of the Constitution on this point is both clear and mandatory: the Governor has no choice but to call a special election to fill vacant seats in the House. Article I, Section 2, Clause 4, which orders that such an election **shall** be had, accordingly gives the people of the Seventeenth District the right to congressional representation, notwithstanding the fact that their erstwhile representative was expelled from the House.

To deprive the people of that right, even temporarily, "violates the vital principle of government that those who are bound by laws, ought to have a voice in making them. . . . Under every view of the subject, it seems indispensable that the Mass of Citizens should not be without a voice, in making the laws which they are to obey . . . ." THE COMPLETE MADISON at 38, 40 (Saul K. Padover, ed.)(1953). By refusing to follow the unambiguous mandate of the Constitution, Governor Taft has deprived the people of the Seventeenth District of one of the most basic rights upon which this country was founded – the sovereign right of franchise that allows them to participate in a representative government.

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[4] This Court has also held: "It is a well settled canon of statutory construction that when interpreting statutes, '[t]he language of the statute is the starting point for interpretation, and it should also be the ending point if the plain meaning of that language is clear." *United States v. Boucha,* 236 F.3d 768, 774 (6th Cir. 200 1)(quoting *United States v. Choice,* 201 F.3d 837, 840 (6th Cir. 2000).

In reaching its decision, the district court analyzed three cases and concluded that "a governor has substantial discretion as to the timing of a special election. Further, if the unexpired term is of exceedingly short duration, the governor has some discretion to forego a special election." (R 12, Order, at 13, J.Apx. at 26). These cases fail to provide any support for the district court's decision; indeed, to the contrary, they show that the governor's constitutional duty under Article I, Section 2, Clause 4 is mandatory. Each is discussed in turn below.

Only one federal case has ever directly presented the question central to the case at bar. In *Jackson v. Ogilvie,* 426 F.2d 1333 (7th Cir. 1970), *cert. denied*, 400 U.S. 833 (1970), the Seventh Circuit held that a mandatory injunction should issue, requiring the governor of Illinois to issue a writ of election to fill a congressional vacancy.[5]

In *Jackson*, an Illinois statute required that 162 days pass between the call for the election and the election itself. This delay led the governor to conclude that such an election was not economically practical, since only eleven months would be left between the earliest possible election date and the end of the term in

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[5] Before examining *Jackson,* it is well to consider that the paucity of cases in this area reflects the rarity with which such cases have been litigated. The parties could find only four cases that touched upon the question now at bar, and only one, *Jackson,* in which a governor had been sued to compel compliance with the Constitution. The mandate of Article I, Section 2, Clause 4 is so plain that it has almost never been disobeyed.

question. *Id.* at 1334-35. The district court found the duration of the unserved term too small to implicate either Due Process or Equal Protection, and dismissed the complaint for a perceived want of jurisdiction. *Id.* at 1335.

The Seventh Circuit reversed and held that, time constraints notwithstanding, under Article I, Section 2, Clause 4, the governor's duty to hold such elections "continued even though delay might eventually render calling of a special election of so little use that duty would no longer be enforceable." *Id.* at 1337.

Here it is significant to note a very important similarity between this case and *Jackson*. Both parties in this case agreed that a special election **could** be held the same day as the general election in early November, in two distinct senses. Appellant agreed that it would **be constitutionally sufficient** to do so, (R.10, Minutes, TRO and Preliminary Injunction Hearing, at Page 7 Line 16, J.Apx. at 178), and Governor Taft agreed that, at the time of the hearing on August 19, 2002, it was still physically possible to hold an election on that date. (R. 10, Transcript, Page 24 Line 23, J.Apx. at 195).

In *Jackson*, the Seventh Circuit found that the length of the new representative's term – which by the time the appellate decision was issued amounted to only four months - was irrelevant in the face of the mandatory duty which the Constitution placed on the governor. Faced with the same putative term

of service as is at issue in the case at bar, the Seventh Circuit held that the governor was constitutionally required to issue a writ of election:

> We note that a general election will be held November 3, 1970, and that a Representative will then be elected for the term beginning January 3, 1971. We are not aware of any reason why a special election could not be held the same day for a Representative to fill the vacancy for the balance of the term which began January 3, 1969. . . . ***We are not prepared to say as a matter of law that representation from the time the results of the November 3 (1970) election will be determined to January 3, 1971 is de minimis.***

Id at 1337 (emphasis added). The Seventh Circuit premised its holding on the conclusion that Article I, Section 2, Clause 4 "is mandatory according to the ordinary meaning of its terms. We find no persuasive reason for reading it in a directory sense." *Id.* at 1336. This reflects that "the people's right to chosen representation is not limited to exercise at a biennial election, but is a continuing right which is not to be defeated by death of a representative once chosen, or other cause of vacancy." Thus, "in performing the duty established in Article I, Section 2. Clause 4, the [governor] does not have discretion to decide against filling the vacancy." *Id.* at 1337. The duty in this case is the same as in *Jackson.*

The district court nonetheless held that Governor Taft had sufficient discretion with respect to the timing of a special election to decide not to issue the writ at all. The court narrowly construed *Jackson* to hold that, "Article I, Section 2, of the Constitution requires a governor to hold a special election in a case

involving a sixteen month remaining term of office." (R. 12, Order, at 12, J.Apx. at 25). The court's reading of *Jackson* was simply wrong. First, because of the special requirements of the Illinois election law, the actual period of time existing in the unexpired term was eleven months. Second, the Seventh Circuit's decision of May 6, 1970, required the governor to hold a special election on November 3, 1970, the same day as the general election, to fill a term that would expire on January 3, 1971. This is the same vacancy period at issue in the case at bar. There was no discussion by the *Jackson* court of whether Congress would or would not be in holdover session after the election. This was immaterial because "the issue at the heart of the [case] was whether the constitutional provision that when vacancies happen the Executive Authority of the state 'shall issue Writs of Election to fill such Vacancies' is mandatory." *Jackson* at 1336. The Seventh Circuit resoundingly held that it was.

Two other cases cited by the district court in support of its holding are *Mason v. Casey,* 1991 WL 185243 (E.D.Pa. Sept. 18, 1991), and an obscure Rhode Island decision, *In re Representation Vacancy,* 9 A. 222 (Rhode Island 1887).[6]

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[6] The district court made no mention of the contrary holding in *State ex rel. Armstrong v. Davey,* 130 Ohio St. 160 (1935), in which the Ohio Supreme Court opined that under Article I, Section 2, Clause 4, a governor has discretion with respect to the timing of a special election to fill a House vacancy, but not with respect to the question of whether to call it at all. It was briefed below.

Mason v. Casey is inapposite, and was misread by the court below to stand for the proposition that a governor should not be compelled to issue a writ for a special election. (R. 12, Opinion, at 12, J.Apx. at 25). In fact, *Mason* involved the question of **when** the election was to be held, and not **whether.** At issue was whether under Pennsylvania law, the governor was required to call a special election to fill a House vacancy within 60 days, or could wait until the next regularly scheduled general election, a delay of five months. As characterized by the Eastern District of Pennsylvania, "the issue [was] whether the **delay** is unconstitutional," and not whether the governor was free to dispense with the election entirely. *Id.* at *2.[7]

In re Representation Vacancy, 9 A. 222 (Rhode Island 1887), was issued by the Rhode Island Supreme Court to answer the certified question of whether, under a particular factual situation, the state legislature or the governor had the duty to order a new election to fill a congressional vacancy. In that case, the House Committee on Elections declared that a congressional representative, elected to the 49th Congress in November 1884, had not received a majority of the vote. Congress accordingly declared his seat vacant on January 25, 1887.

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[7] The district court also read *Mason* to involve a congressional term that was close to being expired (R. 10, Transcript, at Page 51 Line 17, J.Apx. at 222). That was a material error. In fact, the vacancy in *Mason* occurred in September 1991, near the end of the first session of the congress. A full year in the second session, which convened in January 1992, remained on the unexpired term. *Id.* at *1.

Rhode Island law required that when a congressional election failed to produce a winner with a majority, the general assembly would order a new election. The Rhode Island Supreme Court narrowed the certified issue before it thus: "the only question is whether a vacancy which exists by reason of a failure to elect is . . . a vacancy which has *happened* in the representation, since the word 'happen' may be thought to import a vacancy occurring in the course of the representation after it has been filled." *Id.* at 223.

The court ruled on February 9, 1887, that the provisions of Article I, Section 2, Clause 4 were controlling, in that a vacancy had "happened," and that the governor should be the one to issue a writ of election.

The district court cited this case (which is neither controlling nor persuasive authority in this Court) as support for the proposition that the Defendant had the discretion to issue the writ, or not, as he should choose. A careful reading of the opinion shows that the circumstances at issue in the Rhode Island case made the accomplishment of an election physically impossible. The dictum cited by the court, "we think it is for your Excellency to decide whether, considering how soon the Forty-Ninth Congress will terminate, it is your duty to exercise it," refers to the fact that the decision was issued on February 9, 1887 and the 49th Congress adjourned on March 4, 1887. Thus, the governor in that case would have had just

three weeks to call an election, tabulate the results, and seat a representative, a feat that even in 1887 was most likely impossible, and wholly inapposite to the **five month** window that was at issue here, which already included a scheduled general election. To the extent that case could be read to find that the governor has discretion not to call an election, it was wrongly decided.

It is clear from the district court's analysis of these three cases that it conflated the question of timing, or **when** to call an election, with the constitutional mandate, or **whether** to call an election. These two concepts are absolutely distinct. The distinction is critical. A governor can put off a special election as long as he deems it necessary, based on the myriad circumstances he must consider, as in the *Mason* case. But, he must ultimately call one. This is the teaching of *Jackson*. The governor has no discretion to determine **whether** a special election will take place, and as long as it is physically possible for a special election to be held, the governor must issue a writ of election. The district court erred in holding otherwise.

A. The District Court Improperly Relied Upon the Reasoning of Persuasive Authority Dealing with Special Senatorial Elections Under the Seventeenth Amendment.

In its Opinion, the district court noted that numerous legitimate considerations could influence the Governor as to whether to hold a special

election. The court deemed these concerns to be of some constitutional moment and noted that they were distinct from those surrounding the expense of holding an election. (R. 12 at 14-15, J.Apx. at 27-28). In doing so, the court repeatedly referred to the concerns raised in *Valenti v. Rockefeller,* 292 F.Supp. 851 (W.D..N.Y. 1969), which dealt with the conduct of a special election to fill the Senate vacancy left by the assassination of Sen. Robert F. Kennedy. (R.10, Transcript, at 15, 32, 44, and reasoning at 54-55, J. Apx. at 186, 202, 215, 225-26*)*. But for several reasons, not least among them the profound differences between Senate and House representation noted by the court itself (R. 12, Order, at 8, J. Apx. at 21), *Valenti* is inapposite.

Senate and House vacancies implicate different concerns, a fact recognized by the *Valenti* court. Thus, *Valenti's* central issue did not involve the mandate of Article I, Section 2, Clause 4 and the question of **whether** a governor must call a special election to fill a House vacancy, but rather involved the governor's **appointment** powers under the Seventeenth Amendment. Thus, *Valenti* focused on the question of **when** the governor must call a special election to fill a Senate vacancy after having appointed a person to fill that seat until an election is held. The court in *Valenti* discussed at length the differences between the two constitutional provisions:

> [A]ssuming that special elections are required by Art. I, §2, there are important factors which vitiate the relevance of the House vacancy

> provision to our problem. That provision, unlike the Seventeenth Amendment, does not authorize temporary appointments. The framers of the Amendment might logically have concluded that prompt elections were less essential for vacancies occurring in the Senate than the House since a State will be represented in the Senate by the Governor's temporary appointee until an election is held. Furthermore, the State almost always will be represented by its other elected Senator during the existence of any vacancy, while in contrast a vacancy in the House of Representatives leaves the affected district's residents completely without representation in the House until an election.

Valenti, 292 F.Supp. at 863.

The *Valenti* court also discussed the difference in the logistics of special elections for the House and the Senate:

> An important practical consideration also distinguishes the instance of a House vacancy from one occurring in the Senate. It is much easier for both the state government and the political parties to organize and conduct a special election in a single House district than to conduct one covering a populous state such as New York. In New York, problems of administering an election, financing a campaign, and familiarizing the electorate with the candidate are multiplied roughly 41 times in a statewide election as opposed to an election held in one of the state's House districts. This fact supports the decision of the legislature not to hold special elections to fill Senate vacancies. . . . It also provides another logical explanation for the apparent intent of the drafters of the Seventeenth Amendment to place decisions concerning the conduct of vacancy elections largely in the hands of the various state legislatures; what might be a perfectly feasible procedure in a small state like Delaware might prove unworkable in a populous state like New York.

Valenti at 863. Thus, those *Valenti* factors that the district court relied on to determine that a special election, and the primary in particular, would undermine

the integrity of the electoral process are not, according to *Valenti*, appropriate considerations in a special election for the House.

To the extent that the district court relied on *Valenti* for the proposition that the governor has the discretion to call only a well-attended, well-conducted election (or barring that, none at all), it failed to recognize these critical distinctions. Moreover, *Valenti* involved not the question at bar — **whether** to call a special election — but only the question of **when** the election should be conducted. *Id.* at 854. The district court conflated these two questions throughout its holding with clearly erroneous results.

B. While the District Court Characterized the Harm to Appellant's rights Purely Speculative, the Facts have not Borne Out This Conclusion, and Appellant's Have Been Denied Their Right to Congressional Representation for Five Months

In its opinion, the district court noted:

> Plaintiff's position overlooks the fact that, as of this date, the House is officially scheduled to adjourn on October 3, 2002. . . . While the House may extend such date of final adjournment, and the President could conceivably call a special session of Congress, neither of such potentialities have occurred. Finally, given the discretion exercisable by the Governor, the Court finds no abuse of authority.

(R. 12, Opinion, at 13, J. Apx. at 26). Here, the court speculated that no harm would befall Appellant because it was possible that Congress would not be in session during the period between November 5th and the swearing in of the 108th

Congress on January 3, 2003.[8] As noted above, the court's speculation was erroneous. Congress was in session two weeks after the target adjournment day and did not finally adjourn for the elections until October 18, 2002. Congress came back on November 12, 2002, and has since voted on numerous important pieces of legislation. In addition to the Homeland Security Office vote, the House recently passed legislation regarding terrorism insurance and blocked a revision to bankruptcy laws. Edward Walsh, *House Passes Terrorism Insurance Bill*, WASH. POST, November 15, 2002, at A1. The House voted on an extension of unemployment benefits for laid-off workers. *Id.* The voters of the Seventeenth District had no vote in any of these measures because the district court balanced the harm and found the injury to Appellant's rights purely speculative. Yet this has not been borne out by the facts. They have been without a vote in Congress since July 24, 2002. The harm done to voters is irreversible. They have been denied representation in Congress and participation in the electoral process.

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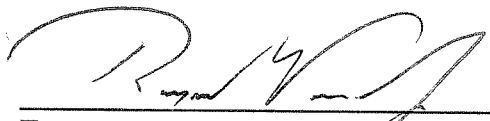
[8] During the first ten years of the Republic, Congress met far less frequently than it has in modern times. Indeed, it was not unusual for Congress meet for no more than 90 days at a time. *See, e.g.* Session Dates of Congress, available on the web site of the Office of the Clerk of the U.S. House of Representatives at http://clerk.house.gov/histHigh/Congressional_History/Session_Dates/sessionsAll.php. For example, the 5th Congress met from May 15, 1797 until July 10, 1797. Given these short session dates, the Founders were likely aware that a vacancy might happen during a time when the House was not meeting. Yet they still

CONCLUSION

For the foregoing reasons, Appellant, on behalf of its members who are citizens and electors within the seventeenth Congressional District, respectfully requests that the Court declare unconstitutional the Governor's failure to call a special election and reverse the contrary decision of the district court.

Respectfully submitted,



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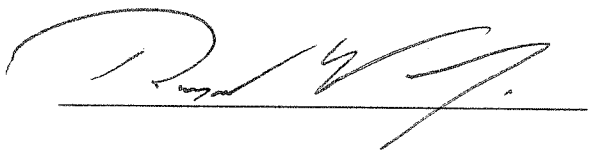
included the mandate requiring governors to call special elections in the body of the Constitution.

Statement of Compliance with FRAP 32(a)(7)(B)(iii)

Undersigned counsel hereby certifies that this Proof Brief complies with the type and word volume restrictions of **FRAP 32(a)(7)(B)**(iii). This Brief was composed in Microsoft Word 2000, and a word count performed, excluding formalities but including footnotes, indicates a volume of 4,601 words, including this page.



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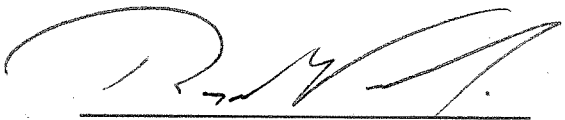

Raymond V. Vasvari

DESIGNATION OF CONTENTS FOR JOINT APPENDIX

RECORD	DATE	DESCRIPTION
NA	08-0523-02	Civil Docket Sheet
1	08/05/02	Complaint
2	08/05/02	Motion for Preliminary Injunction and TRO and Exhibits Thereto
5	08/13/02	Defendant's Response
6	08/13/02	Order (Taking judicial notice of document entitled "Session of Congress)
7	08/15/02	Plaintiff's Reply
8	08/19/02	Order (Denying motion for Preliminary Injunction and TRO)
9	08/19/02	Notice of Appeal
10	08/19/02	Civil Minutes
12	08/26/02	Order
14	09/05/02	Order of Sixth Circuit (denying Motion for Preliminary and Permanent Injunction Pending Appeal)

United States District Court, E.D. Pennsylvania.
Mary **MASON** and Roland Delaney, Plaintiffs,
v.
Robert P. **CASEY** as Governor of the Commonwealth of Pennsylvania and Robert N. Grant as Acting Secretary of the Commonwealth of Pennsylvania, Defendants.
Civ.A. No. 91-5728.
Sept. 18, 1991.

MEMORANDUM

ROBERT F. KELLY, District Judge.
*1 Plaintiffs, Mary Mason and Rowland Delaney, are both registered voters and taxpayers of the Second Congressional District of Pennsylvania located in the City of Philadelphia.
They have brought this action against the Governor of the State of Pennsylvania and Robert N. Grant, the Acting Secretary of the Commonwealth of Pennsylvania, seeking injunctive and other relief, more specifically requesting that we declare 25 Pa.Stat.Ann. § 2777 unconstitutional as applied to this case and requesting that we order a special election to be held for United States Representative in the Second Congressional District on November 5, 1991.
A hearing was scheduled for September 16, 1991 at which time the plaintiffs moved to consolidate the hearing with the trial on the merits under Fed.R.Civ.P. 65(a)(2). This motion was granted by the court without objection from the defense.
Plaintiffs presented their testimony and rested. The defendants moved for a directed verdict under Fed.R.Civ.P. 50(a). Both sides argued this motion and submitted memoranda. Plaintiffs requested the opportunity to submit a reply memorandum not later than the morning of September 17, 1991 which was granted. I took the motion for directed verdict under advisement and set Thursday, September 19, 1991 as the date for the defendants to present testimony if the motion for directed verdict was denied.
This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. 1331. Venue is properly laid in this district pursuant to 28 U.S.C. 1391 in that a substantial part of the events giving rise to this claim occurred in the Eastern District of Pennsylvania.

FINDINGS OF FACT

From the record and the testimony produced at the hearing on September 16, 1991, we make the following findings of fact:
1. A place has been reserved on the ballot for the election scheduled November 5, 1991 in the event that there is a court order requiring the vacancy for the Congressional seat for the Second Congressional District to be filled on that date. 09/16/91 14:55:42-14-56-31.
2. It is difficult to obtain polling places in the Second Congressional District for regularly scheduled elections and it would be even more difficult to secure such polling places for a special election. 09/16/91 14:57:00214:59:48.
3. If a special election were to be held during the winter time, it would be even more difficult to obtain suitable polling places. 9/16/91 15:59:54- 15:04:25.
4. The cost of the special election would be from five hundred twenty-five thousand dollars ($525,000) to six hundred thousand dollars ($600,000). 09/16/91 15:07:33-15:0745.
5. If a special election were ordered, the Board of Commissioners would be able to find polling places to accommodate the voters but it would be more difficult than in a regularly scheduled election. 09/16/91 15:14:4215:15:29.
6. The next regularly scheduled election will be the primary to be held April 28, 1992.

DISCUSSION

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William Gray resigned his position as United States Representative of the Second Congressional District of Philadelphia on September 11, 1991. Section 2777 [FN1] of Pennsylvania's Election Law prescribes procedures for filling unanticipated vacancies occurring in Congress. 25 P.S. § 2777. Section 2777 provides for a special election to fill vacancies occurring during a session of Congress or at a time when members are expected to meet and directs the Governor, within ten days of the vacancy, to issue a writ of election fixing the date and time of the special election at least 60 days after issuance of the writ. *Id.*

*2 Plaintiffs claim that, under the unique circumstances of this case, the State's failure to hold the election on November 5, 1991 will result in a deprivation of their fundamental right to **vote** and be represented in violation of the First Amendment, the Equal Protection clause of the Fourteenth Amendment, 42 U.S.C. § 1983, and the Voting Rights Acts, 42 U.S.C. § 1971, § 1973, *et seq.* Plaintiffs have shown that the delay caused by the Pennsylvania Election Code will result in convenience and expense. Specifically, plaintiffs have shown that a November 5, 1991 election has certain benefits, such as less cost, better voter turnout, and certain logistical advantages. Further, it is undeniable that a delay will mean a longer period of time in which voters from the Second Congressional District remain unrepresented. However, the issue is whether the delay is unconstitutional, and I find that it is not.

Plaintiffs claim of infringement of a fundamental right is based upon when the election should take place, and that determination is clearly within the wide discretion of the Pennsylvania Legislature and Governor Casey. In *Trinsey v. Commonwealth of Pennsylvania, et al.*, Nos. 91-1490 and 91-1491, *slip op.* (3rd Cir.1991), the Third Circuit recently had an opportunity to survey this area of the law and they emphasized that the Constitution gives states "wide discretion" in filling vacancies. *Id.* at 20-26 (citing, *inter alia, Rodriguez v. Popular Democratic Party,* 457 U.S. 1 (1982); *United States v. Classic,* 313 U.S. 299 (1941); *Valenti v. Rockefeller,* 292 F.Supp. 851 (S.D.N.Y.1968), *aff'd,* 393 U.S. 404 (1969)); *see also Jackson v. Ogilvie,* 426 F.2d 1333, 1338 (7th Cir.1970) (in scheduling a special election to fill a vacancy in the United States House of Representatives, a Governor has discretion "to cause the special election to coincide with or to avoid being held on the same day as another election"); Article I, § 4 of the Constitution of the United States ("The Time, Places and Manner of holding elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof"). It is clear that many factors must be considered in deciding the issue of when an election for a vacancy should take place, and these factors are peculiarly within the discretion of the state. Pursuant to 25 P.S. § 2777, November 5, 1991 is not a viable date for the election, and this decision is constitutional as long as the resulting delay serves a legitimate purpose. *See Trinsey, supra,* at 28 (citing *Rodriguez,* 457 U.S. at 12).

Defendants argue that the purpose of the 60 day requirement between the Governor's issuance of a writ and the election is to allow time to educate the voters as to the issues and the candidates and to allow candidates time to make their candidacy known prior to the election. This is certainly a legitimate purpose and I find no constitutional violation.

*3 Plaintiffs also argue that the possible delay in filling the vacancy operates as an infringement of their fundamental right to be represented in Congress. States have a compelling interest in safeguarding the sanctity of the democratic process and the Constitution has given the states the power to decide how to fill vacancies by balancing the competing interests of speed and an informed electorate in picking the date for an election to fill a vacancy. I found no constitutional violation of the state process in this case and for these reasons I have entered the Order dismissing the plaintiffs' case.

ORDER

AND NOW, this 17th day of September, 1991, the defendants having moved for a directed verdict at the close of the plaintiffs' testimony and after considering all of the plaintiffs' evidence, the relief requested by the plaintiffs is hereby DENIED. Judgment is hereby entered in favor of defendants, Robert P. Casey as Governor of the Commonwealth of Pennsylvania and Robert N. Grant as Acting Secretary of the Commonwealth of Pennsylvania, and against the plaintiffs, Mary Mason and Roland Delaney.

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FN1. Section 2777 provides as follows:

> Whenever a vacancy shall occur or exist in the office of Representative in Congress from this State during a session of Congress, or whenever such vacancy shall occur or exist at a time when the members of Congress shall be required to meet at any time previous to the next general election, the Governor shall issue, within ten days after the happening of said vacancy, or after the calling of an extraordinary session of Congress during the existence of said vacancy, a writ of election to the proper county board or boards of election and to the Secretary of the Commonwealth, for a special election to fill said vacancy, which election shall be held on a date named in said writ, which shall not be less than sixty (60) days after the issue of said writ. In all other cases no such special election to fill said vacancy shall be held. The Governor may fix, in such writ of election, the date of the next ensuing primary or municipal election as the date for holding any such special election.

E.D.Pa.,1991.
Mason v. **Casey**
1991 WL 185243, 1991 WL 185243 (E.D.Pa.)
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