No. 111773

IN THE
SUPREME COURT OF ILLINOIS

WALTER P. MAKSYM and THOMAS L. McMAHON, Respondents-Appellants, v. BOARD OF ELECTIONS COMMISSIONERS OF THE CITY OF CHICAGO, et al., Petitioners-Appellees.	On Petition for Leave to Appeal from the Appellate Court of Illinois for the First Judicial District, First Division Appellate Court No. 11-0033 There Heard on Appeal from the Circuit Court of Cook County, County Department, County Division, No. 2010 COEL 020 Honorable Mark J. Ballard, *Judge Presiding*.

EMERGENCY MOTION FOR A STAY PENDING APPEAL AND TO EXPEDITE CONSIDERATION OF PETITION FOR LEAVE TO APPEAL

NOW COMES Petitioner, RAHM EMANUEL ("Emanuel" or "the Candidate"), by and through his attorneys and pursuant to Supreme Court Rules 311, 301, 366(a)(5) and 368, respectfully moves this Honorable Court (i) to stay the Appellate Court's mandate, (ii) to direct the Chicago Board of Elections to keep the Candidate's name on the ballot for the February 22, 2011 election if it chooses to print ballots before the proceedings in this Court have been completed, and (iii) to expedite consideration of the Petition for Leave to Appeal that Emanuel

will file no later than tomorrow, January 25, 2011, so the Court may hear and decide this case as soon as possible.[1]

In support of his motion, Emanuel states as follows:

1. The Appellate Court's decision involves one of the most far-reaching election law rulings ever to be issued by an Illinois court, not only because of its implications for the current Chicago mayoral election but also for its unprecedented restriction on the ability of individuals to participate in every future municipal election in this State. On January 24, 2011, the First District Appellate Court, by a 2-1 vote, held that Rahm Emanuel did not satisfy the residency requirements to run for Mayor of the City of Chicago. The majority's order directs the Chicago Board of Elections to remove his name from the ballot for the February 22, 2011 municipal general election. For reasons that will be outlined in Emanuel's Petition for Leave to Appeal, the Appellate Court's decision that Emanuel abandoned his Chicago residence when he lived temporarily in Washington, D.C. while serving as the President's Chief of Staff is directly contrary to this Court's long-standing precedents. As the dissenting Justice stated, without mincing words, the majority below created a "completely new standard" that shows "a careless disregard for the law shortly before an election for the office of mayor in a major city." App. 41. Given the importance of the issue not only to Emanuel but also to the many Chicago voters who support his candidacy, Emanuel urges the Court to grant his Petition, to order expedited briefing and argument, and to take the steps necessary to preserve the status quo until a final decision is reached.

BACKGROUND

[1] Petitioner has submitted herewith a Supporting Record, which includes the decisions of the Board of Elections and the circuit court rejecting the challenges to Emanuel's candidacy in all respects, as well as the Appellate Court's opinion reversing the circuit court's decision.

2. The Illinois Municipal Code provides in relevant part that "[a] person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and has resided in the municipality at least one year next preceding the election or appointment . . . ." 65 ILCS 5/3.1-10-5(a). It is undisputed that Emanuel was a resident of the City of Chicago prior to January 2009, when he began serving as President Obama's Chief of Staff. One of the key issues in this case is whether he lost his Chicago residence when he (and later his family) lived temporarily in Washington while he was serving the President. While Emanuel and his family were in Washington, they rented out their house on Hermitage Avenue, entering into a one-year lease with the current tenants on September 1, 2009, which was subsequently extended to June 30, 2011. After extensive hearings, the Board of Elections found—and the Appellate Court did not dispute—that Emanuel never intended to abandon his Chicago residence.[2] The objectors in this case argued that, regardless of his intent, because Emanuel rented out his house, rather than allow it to stand vacant, he must be deemed to have abandoned his Chicago residency. The Appellate Court did not accept that argument, presumably recognizing that—as the circuit court held—the objectors' argument conflicts with clear precedent of this Court.[3] The Appellate Court majority held instead that (a) the residency standard for candidates is different from and more demanding than the residency standard for

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[2] The Board found as a fact that "[t]he preponderance of this evidence establishes that the Candidate never formed an intention to terminate his residence in Chicago; never formed an intention to establish his residence in Washington, D.C., or any place other than Chicago; and never formed an intention to change his residence." S.R. (Board Decision ¶ 67). It therefore concluded that Emanuel "in 2009 and 2010 did not abandon his status as a resident of Chicago, and so remained a resident of Chicago." S.R. (Board Decision ¶ 78(e)). The Circuit Court affirmed the Board's determination. S. R. (Trial Court Decision at 8-9.).

[3] S.R. ___ (Board Decision ¶ 72). *See Smith v. People of the State of Illinois ex rel. Frisbie*, 44 Ill. 16 (1867); *Carter v. Putnam*, 141 Ill. 133 (1892); *Welsh v. Shumway*, 232 Ill. 54 (1907); *Tuthill v. Rendleman*, 387 Ill. 321, 343 (1944); *Messman v. Newman Township High School* District, 379 Ill. 32 (1942).

voter eligibility; (b) that a candidate "must have actually resided within the municipality for one year prior to the election"; and (c) that Emanuel did not satisfy that standard. App. 20-21.

3. As the dissenting Justice below emphasized (App. 36), both the voter qualification statute and the candidate qualification statute incorporate the same standard: a voter must have "***resided in*** this State and in the election district 30 days next preceding and election therein" (10 ILCS 5/3-1); and a candidate must have "***resided in*** the municipality at least one year next preceding the election." The dissenting Justice correctly concluded: "Nothing in the text or context of these statutes distinguishes 'has resided in' as used to define a 'qualified elector' from 'has resided in' as used to define the length of time a candidate must have been resident in order to run for office. Moreover, if the legislature had intended the phrase 'has resided in' to mean *actually lived in,*' as the majority proposed, then the legislature surely would have chosen to use the more innocuous word *live* rather than the verb reside and the noun residence, which are charged with legal implications." App. 37-38 (emphasis in original). Moreover, as the dissenting Justice further noted, this Court's decision in *Smith v. People of the State of Illinois ex rel. Frisbie*, 44 Ill. 16 (1867), which addressed a residency requirement for judicial appointees and applied the voter residency test, "cannot be distinguished from the relevant issue the majority should have addressed here." Finally, the dissenting Justice recognized that "[w]ell-established precedent shows that courts have construed" the two "has resided in" phrases "consistently." App. 36 [(*citing Smith, supra*; *Delk Walsh Baumgartner*). Under that standard—the one that has been applied in determining a candidate's residency in every case prior to this one—Emanuel plainly qualifies, as the Board and circuit court found and the Appellate Court did not dispute.

4. The Appellate Court also rejected the Candidate's argument that the "federal service statute" in the Illinois Election Code safeguards his status as a Chicago resident by providing that "[n]o elector or spouse shall be deemed to have lost his or her residence in any precinct or election district in this State by reason of his or her absence on business of the United States, or of this State . . . ." 10 ILCS 5/3-2(a). The majority held that this statute applies only to residency determinations for voters and not for candidates—despite the fact that the Municipal Code itself predicates eligibility for office on voting eligibility and Illinois courts have long interpreted candidacy requirements by reference to the definition of "residence" used in the Election Code for voter registration.

5. The issues raised, the Appellate Court's cavalier dismissal of Supreme Court precedent, and the importance of the election in the life of the City and its people all combine to demonstrate why this Court should grant review of the Appellate Court decision. As the dissenting Justice stated, "[t]he majority's decision disenfranchises not just this particular candidate but every voter in Chicago who would consider voting for him. Well-settled law does not countenance such a result" and "the majority's decision certainly 'involves a question of such importance that it should be decided by the Supreme Court.'" App. 41 (quoting Illinois Supreme Court Rule 316). "An opinion of such wide-ranging import and not based on established law but, rather, on the whims of two judges, should not be allowed to stand." *Id.* at 42.

6. Given the time constraints posed by the coming election (early voting starts on January 31), Emanuel urges the Court to grant his Petition immediately and to set a briefing schedule under which the Candidate's opening brief would be due on January 26, objector-appellees' brief would be due on January 28, and the Candidate's reply would be due by January 31, with oral argument, if any, to follow at the Court's convenience.

7. In addition, the Candidate urges the Court to preserve the status quo by staying the Appellate Court's mandate and by directing the Board of Elections to keep the Candidate's name on the ballot pending a decision by this Court. The Appellate Court did not issue its mandate "forthwith" and therefore the mandate should be automatically stayed pursuant to Supreme Court Rule 368(b) while Emanuel seeks relief in this Court. However, the Chicago Board of Elections has indicated that it will soon be printing ballots for the mayoral election and that, absent an order from this Court, it intends to omit Emanuel's name from the ballot. Emanuel seeks entry of an immediate order requiring the Board, if it chooses to print the ballots while this Court considers Emanuel's Petition for Leave to Appeal, to put his name on the ballot, in accordance with the original ruling of the Board of Elections.

8. This result should be automatic, in light of Rule 368(b). However, to the extent that the Court applies the ordinary rules applicable to stays pending appeal, those rules also counsel in favor of granting a stay of the Appellate Court's order in order to preserve the status quo. As this Court explained in *Stacke v. Bates*, 138 Ill. 2d 295, 302 (1990), a stay pending appeal is "intended to preserve the status quo pending appeal and to preserve the fruits of a meritorious appeal where they might otherwise be lost." Here, absent a stay, the Candidate might well lose the "fruits of a meritorious appeal" if he is excluded from the ballots that are about to be printed.

8. The standard for obtaining a stay pending appeal is a familiar one—"the movant, although not required to show a probability of success on the merits, must, nonetheless, present a substantial case on the merits and show that the balance of the equitable factors weighs in favor of granting the stay." *Id.* at 309. All of these factors are met in this case. There is no doubt that the Candidate has presented at the very least a "substantial case on the merits." To reach that

conclusion, the Court need only consider the fact that the hearing officer, the Board of Elections, the circuit court and the dissenting justice in the Appellate Court all concluded that Emanuel clearly met the residency test. Furthermore, the balance of harms weighs heavily in favor of granting a stay. If the Candidate is not allowed on the ballot, he will suffer irreparable harm. So too will the voters who believe that Emanuel is the best candidate to serve as the next mayor of the City of Chicago. Over 90,000 voters signed his petitions, and current polls show him as the front-runner in the race.

9. On the other hand, no harm would result if Emanuel remains on the ballot while this Court considers the merits of his position. So long as a decision is made before the February 22 election, there is simply no downside to having him appear on the ballot. In the event of an affirmance, votes for Emanuel would simply not be counted—and voters would be advised of that fact, so the risk of disenfranchisement would be minimal. On the other hand, if the decision is reversed, as it must be, the election can proceed smoothly, without risking the disenfranchisement of any voter.

WHEREFORE, for the foregoing reasons, Candidate respectfully prays that the Court grant his motion to expedite consideration of his Petition for Leave to Appeal and the merits of his appeal, stay or recall the mandate, and order the Board of Elections to continue including Emanuel on any ballots that are printed while this case is pending.

Respectfully submitted,

Rahm Emanuel

By: _____
One of his Attorneys

Kevin M. Forde
Richard J. Prendergast

Michael J. Kasper
222 N. LaSalle, Suite 300

111 W. Washington St., Suite 1100
Chicago, IL 60602
312.641.1441
312.641.1288 (Fax)

Chicago, IL 60601
312.704.3292
312.368.4944 (Fax)

Michael K. Forde
Michael J. Gill
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
312.701.7128
312.706.8633 (Fax)

SUPREME COURT RULE 328 AFFIDAVIT

I, Michael J. Kasper, being duly sworn, depose and state the following:

1. I am over the age of 18, a United States citizen, and am one of the attorneys representing Petitioner-Appellee Rahm Emanuel in the instant appeal.

2. Pursuant to Supreme Court Rule 328, I certify that the matters contained in the foregoing Appendix to the Petition for Leave to Appeal are true and correct copies of matters contained in the Record of Proceedings before the Appellate Court and the Circuit Court of Cook County.

3. 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.

Michael J. Kasper — Date: 1/24/11

Michael J. Kasper
222 North LaSalle Street, Suite 300
Chicago, Illinois 60601
312 704 3292

No. _____

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WALTER P. MAKSYM and THOMAS L. McMAHON,	)	On Petition for Leave to Appeal from the Appellate
Respondents-Appellants,	)	Court of Illinois for the First Judicial District, First Division
v.	)	Appellate Court No. 11-0033
BOARD OF ELECTIONS COMMISSIONERS OF THE CITY OF CHICAGO, et al.,	)	There Heard on Appeal from the Circuit Court of Cook County,
Petitioners-Appellees.	)	County Department, County Division,
	)	No. 2010 COEL 020
	)	Honorable Mark J. Ballard,
	)	*Judge Presiding.*

NOTICE OF FILING

PLEASE TAKE NOTICE that on January 24, 2011, we filed **EMERGENCY MOTION FOR A STAY PENDING APPEAL AND TO EXPEDITE CONSIDERATION OF PETITION FOR LEAVE TO APPEAL**, a copy of which is attached and hereby served upon you.

Dated: January 24, 2010

By: _____

Kevin M. Forde
Richard J. Prendergast
111 W. Washington St., Suite 1100
Chicago, IL 60602
312.641.1441
312.641.1288 (Fax)

Michael K. Forde
Michael J. Gill
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
312.701.7128
312.706.8633 (Fax)

Michael J. Kasper
222 N. LaSalle, Suite 300
Chicago, IL 60601
312.704.3292
312.368.4944 (Fax)

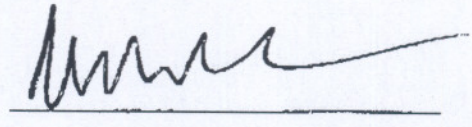
CERTIFICATE OF SERVICE

I, an attorney, hereby certify that I caused a true and correct copy of the forgoing **EMERGENCY MOTION FOR A STAY PENDING APPEAL AND TO EXPEDITE CONSIDERATION OF PETITION FOR LEAVE TO APPEAL** to be served via electronic mail and/or messenger delivery upon the following on January 24, 2011.

Burt S. Odelson
Matthew M. Welsh
Odelson and Sterk Ltd.
3318 S. 95th Street
Evergreen Park, IL 60805
Attorney No. 91071
E-Mail: attyburt@aol.com; mwelch@odelsonsterk.com

James P. Nally, P.C.
8 S. Michigan Avenue
Suite 3500
Chicago, IL 60603
Attorney No. 55164

Thomas A. Jaconetty
33 No. LaSalle Street
Suite 3300
Chicago, IL 60602
Attorney No. 11356



Mayer Brown LLP
Court Identification No. 43948