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APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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ROBERT I. SHERMAN, CELESTE S.	)	Appeal from the Circuit Court of
SHERMAN, MARY F. DAY, ROBERT B.	)	Cook County, <b>No. 2011-COEL-66</b>
DINNERMAN, and RONALD P. MRAZ,	)	
	)	Trial Judge: Hon. Mark J. Ballard
Petitioners-Appellants,	)	
v.	)	Date of Notice of Appeal:
	)	September 22, 2011
INDIAN TRAILS PUBLIC LIBRARY	)	
DISTRICT, a body politic; GENE LOOFT,	)	Date of Final Order:
HENRY HACKNEY JR., WALLY	)	August 24, 2011
SALGANIK, DORIS WAGNER, LOUISE	)	
BARNETT, EARL SABES and PATRICIA	)	
MURRAY, as trustees of Indian Trails	)	
Public Library District; DAVID ORR, as	)	
Cook County Clerk; WILLARD R.	)	
HELANDER, as Lake County Clerk,	)	
	)	
Respondents-Appellees.	)	

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**BRIEF OF PETITIONERS-APPELLANTS,  
ROBERT I. SHERMAN, CELESTE S. SHERMAN,  
MARY F. DAY, ROBERT B. DINNERMAN and RONALD P. MRAZ**

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**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

This appeal addresses the right of Petitioners, as voters, to challenge the validity of a ballot referendum that was improperly and significantly influenced by Respondent, Indian Trails Public Library District<sup>1</sup> (herein referred to as the “District”) through the use of public funds to advocate for the passage of the referendum. The Petitioners seeks review and reversal of the circuit court’s dismissal of Petitioner’s verified complaint pursuant to 735 ILCS 5/2-615 for failure to state a cause of action upon which the referendum result could be declared null and void<sup>2</sup>.

The pleadings filed in the circuit court confirm that the parties agree that public funds cannot be used for political purposes – that is, a unit of government

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<sup>1</sup> The individual Trustees who comprised the Indian Trails Public Library District were originally named as Respondents, but they were dismissed by agreement of the parties and the court on June 9, 2011 (R.C30). The dismissal of the Trustees through the court’s June 9, 2011 order is not raised in this appeal. Respondents, David Orr and Willard Helander, County Clerks for Cook County and Lake County, respectively, were named as Respondents solely because they were the election authorities responsible for conducting and certifying the results of the April 5, 2011 referendum election to whom a declaratory order pertaining the election results would be directed (see Petitioners’ complaint, para. 5, R.C04, A02; para. 10, R.C05, A03).

<sup>2</sup> Although Petitioners’ complaint sought to “permanently restrain and enjoin Respondent, Library District and its Respondent trustees, from any further and additional illegal expenditures of public funds for partisan political and other private purposes,” the circuit court made no ruling or determination specifically upon this requested injunctive relief (R.C09, A07).

cannot use public funds to urge voters to support or oppose a specific candidate or a ballot proposition on an election ballot.

Where the parties disagree is on the Petitioners' right to a remedy to address the blatantly improper conduct of the District – the District argued, and the circuit court agreed, that there was no expressly stated, statutory remedy upon which the court could exercise its equitable powers to rectify the District's wrongful use of public funds to advocate a specific message intended to influence and alter the outcome of the election referendum at issue.

However, Petitioners, as voters within the Respondent, District's, geographic boundaries, filed their election contest complaint seeking injunctive relief premised in part upon their rights under the US and Illinois Constitutions, read *in pari materia* with the Election Code, and the circuit court's inherent authority to issue declaratory and injunctive relief.

Petitioners' complaint sets forth facts that specifically allege that the District used public funds for its own political activity, and did not timely report such political contributions and expenditures to the State Board of Elections.

The expenditures by the District are not merely negligent or harmless *de minimis* amounts, or simple carelessness of a staff employee using the District's copier for personal use or displaying a political sign on public property.

The expenditures at issue are those of the District, made intentionally and with its full knowledge acting through its Trustees, in excess of \$8,200 in public funds, specifically to advocate for the passage of a tax increase referendum<sup>3</sup>. The expenditures by the District – not expenditures ordinarily undertaken by a public library – are of such a magnitude, that they are alleged to have so corrupted and influenced the referendum vote, that it no longer represented the free, fair and untrammelled expression of the voters’ choice.

Petitioners have asserted in their complaint that the District improperly used public funds to pay for political consultants who provided a survey of voters and consulting services designed to produce favorable (“yes”) referendum votes, as well as to pay “for the printing and mailing of political literature, the posting of Internet Web pages and the creation and sending of emails to advocate for passage of an April 5, 2011 tax increase referendum” (*Complaint*, para. 14-15, R.C06-C09, A04-A07).

Petitioners’ complaint sought to prevent the District, a unit of government, from benefiting from its improper and secret use of public funds, and sought through their Complaint a declaration that the referendum is null and void in its

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<sup>3</sup> Since this matter was dismissed before discovery could be undertaken, limited information is available to Petitioners, as alleged in their complaint.

entirety, as well as an injunction to prevent any future attempts by the District to publicly self-fund its political agenda.

Petitioners respectfully assert that the circuit court prematurely and erroneously granted Respondent, District's, Section 2-615 motion to dismiss, without giving full weight and recognition to Petitioners' First and Fourteenth Amendment constitutional rights, and recognition of the circuit court's inherent authority to fashion an equitable remedy to address constitutional wrongs.

### **ISSUES PRESENTED FOR REVIEW**

Whether the circuit court erred when it dismissed Petitioners' complaint pursuant to 735 ILCS 5/2-615 for failure to state a cause of action upon which relief could be granted.

Whether Respondent, District, can reap the ill-begotten fruits of its use of public funds for partisan electioneering political activity in violation of the Illinois Constitution article VIII, §(1)(a) and the Illinois Election Code, 10 ILCS 5/9-25.1(b) which prohibit use of public funds for political activity, read together with the U.S. and Illinois Constitutions' First Amendment and Fourteenth Amendment protections that prohibit the dilution of individual votes.

Whether Petitioners stated a cause of action and were entitled to the remedy of voiding and nullifying the results of a referendum, where the Respondent, District, unconstitutionally advanced a "pro-referendum" political

message, paid for with public funds, and other political activity as defined by Illinois campaign finance disclosure laws, to manipulate, influence and skew the outcome of votes on a referendum.

Whether the Election Code should be construed *in pari materia* with (a) the well-recognized First and Fourteenth Amendment U.S. Constitutionally protected voting rights, and (b) the guidance provided by the Illinois Constitution, article I, §12 that: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation.”

Whether the Illinois Constitution and Election Code provide voters in a public body’s geographic district with a meaningful opportunity and basis upon which to seek equitable relief for a public body’s otherwise prohibited use of public funds for political activity, specifically targeted at influencing and supporting an election referendum, thus opposing and diluting opposing voters’ political speech and their respective votes.

## **JURISDICTION**

This appeal is brought pursuant to Illinois Supreme Court Rules 301 and 303, permitting an appeal from a circuit court final judgment order entered on August 24, 2011 (R.C97, C103; A60, A66), dismissing Petitioners’ verified complaint (R.C3; A01).

The Petitioners timely filed a notice of appeal on September 22, 2011, (R.C104; A69).

Jurisdiction is also premised upon the public interest doctrine. Specifically, this appeal addresses issues of law that are a matter of public interest based upon: (1) the public nature of the question; (2) the desirability of an authoritative determination for the purpose of guiding public officers; and (3) the likelihood that the question will recur. *Bonaguro v. County Officers Electoral Board*, 158 Ill.2d 391, 395, 634 N.E.2d 712 (1994) and *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 886 N.E.2d 1011 (Ill. 2008). As such, this appeal is not moot.

#### **STATUTES INVOLVED**

This appeal involves provisions of the Illinois and U.S. Constitutions, the Illinois Election Code, and the Illinois Code of Civil Procedure.

The U.S. and Illinois Constitutions guarantee due process and equal protection rights. The Illinois Constitution at article I, §2, provides as follows:

##### ***Section 2. Due Process and Equal Protection***

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

The due process and equal protection rights in the Illinois and U.S. Constitutions prohibit units of government from impermissibly burdening the exercise of citizens' political associational and voting rights, and prohibit

activities that impermissibly dilute individual votes. U.S. Const. amend. I and XIV, §1; Ill.Const. (1970), art. I, §2.

Article I, §12 of the Illinois Constitution offers guidance and support for the relief sought in Petitioners' complaint, and provides as follows:

***Section 12. Right to Remedy and Justice***

Every person *shall* find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He *shall* obtain justice by law, freely, completely, and promptly. (Emphases added.)

Ill.Const. (1970), art. 1, §12

The Illinois Constitution creates three separate branches of government, which are restricted in their powers through article II, §1 as follows:

***Article II, Section 1. Separation of Powers***

The legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another.

Pursuant to article III, §3 of the Illinois Constitution, “[a]ll elections shall be free and equal.” Ill.Const. (1970), art. III, §3.

Article VIII, §1 of the Illinois Constitution is relevant for its provisions regarding use of public funds, as follows:

***Section 1. General Provisions***

(a) Public funds, property or credit shall be used only for public purposes.

(b) The State, units of local government and school districts shall incur obligations for payment or make payments from public funds only as authorized by law or ordinance.

(c) Reports and records of the obligation, receipt and use of public funds of the State, units of local government and school districts are public records available for inspection by the public according to law.

Ill.Const. (1970), art. VIII, §1.

Pursuant to authority granted by the Illinois Constitution, the Illinois General Assembly has created the Illinois State Board of Elections, Ill.Const. (1970) art. III. §5, with duties defined in the Election Code, 10 ILCS 5/1A-1, et seq.

One of the duties of the State Board of Elections is to oversee enforcement of Article 9 of the Election Code, which governs political activity by non-governmental candidate and/or political action committees which receive more than \$3,000 in contributions, through specific campaign finance disclosure obligations. 10 ILCS 5/9-1, et seq.

Article 9 requires campaign committees to disclose to the electorate all campaign contributions and expenditures in support of or opposition to a candidate or a ballot referendum, so that voters may be informed of such campaign expenditures prior to casting their votes, and authorizes the imposition of civil penalties for violations. 10 ILCS 5/9-1, et seq.

Pursuant the Election Code §9-25.1, “[n]o public funds shall be used to urge any elector to vote for or against any candidate or proposition, or be

appropriated for political or campaign purposes to any candidate or political organization.” 10 ILCS 5/9-25.1(b).

Article 23 of the Election Code sets forth procedures to challenge ballot, voting, other election irregularities and results of an election, generally, 10 ILCS 5/23-1.1a, et seq., and the results of a question of public policy, 10 ILCS 5/23-24.

The Petitioners’ complaint, which sought declaratory and injunctive relief, is also governed by the Illinois Code of Civil Procedure, including 735 ILCS 5/2-701, et seq., which provides in pertinent part as follows:

*Sec. 2-701. Declaratory judgments.*

(a) No action or proceeding is open to objection on the ground that a merely declaratory judgment or order is sought thereby. The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any statute, municipal ordinance, or other governmental regulation, or of any deed, will, contract or other written instrument, and a declaration of the rights of the parties interested. The foregoing enumeration does not exclude other cases of actual controversy. The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding. In no event shall the court entertain any action or proceeding for a declaratory judgment or order involving any political question where the defendant is a State officer whose election is provided for by the Constitution; however, nothing herein shall prevent the court from entertaining any such action or proceeding for a declaratory judgment or order if such question also involves a constitutional convention or the construction of a statute involving a constitutional convention.

(b) Declarations of rights, as herein provided for, may be obtained by means of a pleading seeking that relief alone, or as incident to or part of a complaint, counterclaim or other pleading seeking other relief as well, and if a declaration of rights is the only relief asked, the case may be set for early hearing as in the case of a motion.

735 ILCS 5/2-701.

### STATEMENT OF FACTS

The procedural history and facts are not in dispute, and the sole issues presented for appeal are questions of law. Since this matter comes before this honorable Appellate Court for review of the circuit court's granting of Respondent, District's, motion to dismiss pursuant to 735 ILCS 5/2-615, the relevant facts are those asserted in (and admitted for purposes of the motion to dismiss), within Petitioners' verified complaint (R.C03, A01).

Petitioners, Robert I. Sherman, Celeste S. Sherman, Mary F. Day, Robert B. Dinnerman and Ronald P. Mraz (referred to as "Petitioners"), are duly qualified electors and registered voters within the Respondent, District's, geographic boundaries, who voted upon the referendum question at issue in this appeal at the April 5, 2011 election (Complaint, para. 1, 14 at R.C04, A02 and R.C06, A04).

Respondent, District, is a unit of Illinois government created for the purpose of providing public library services to persons and entities within its geographic boundaries (R.C04, A-02), including but not limited to the Petitioners.

There was a referendum placed upon the April 5, 2011 election ballot to be voted upon by Petitioners and other voters within the District's geographic boundaries (the "Referendum") (R.C05-C06, A07-A08; R.C34-C35, A19-A20). A "yes" vote on the Referendum would result in the increase of the extension limitation under the Property Tax Extension Limitation Law from 5% to 9.8% for 2011. *Id.* A "no" vote on the Referendum would still result in an increase of the extension limitation under the Property Tax Extension Limitation Law, but would be calculated as the lesser of 5% or the percentage increase in the Consumer Price Index over the prior levy year (or 1.438%). *Id.*

The District, duly acting through its Trustees, decided and voted to take steps to support and encourage passage of the Referendum. Specifically, the District received and/or expended the following public funds for the purpose of promoting and advocating for the passage of the referendum as stated in Petitioners' verified complaint at paragraph 15:

- (a) \$3,200 expenditure made on January 29, 2010 (par. 15.1);
- (b) \$3,000 expenditure made on May 19, 2010 (par. 15.3)
- (c) \$5,000 contribution from the Foundation For the Indian Trails Public Library District received on February 28, 2011 (par. 15.5);
- (d) \$3,389.89 contribution received from District's General Fund in March 2011 (par. 15.6);

- (e) \$2,055.11 expenditure made at various times in March-April 2011 (par. 15.7); and
- (f) the value of work provided by District staff employees who were paid wages with public funds (par. 15.8, 15.9 and 15.10).

(See *Petitioners' verified complaint*, R.C07 – R.C09, A04 – A07.)

In pleadings filed before the circuit court, all parties agreed that public funds were not to be expended for political purposes. Specifically, Respondent, District, acknowledged that it “does not dispute that public funds cannot be used to urge persons to vote in a particular way” (R.C72).

Due to the political activity funded and undertaken by the District in support of passage of the Referendum, the Referendum received 147 more “yes” votes than “no” votes (3.6% of the votes cast), and was certified and deemed to have passed by the respective county clerks (see *Petitioners' verified complaint*, generally, and para. 12-13 at R.C06, A04).

Petitioners have alleged in their verified complaint, taken as true for purposes of the Respondent, District's, motion to dismiss, that the ultimate result of the Referendum passage was specifically *“because of the mistakes made and the frauds and other prohibited and illegal acts committed in the conduct of the April 5, 2011 Library District referendum election that said election was so corrupted that it failed to obtain and determine a free, fair and untrammelled expression of the voters' choice”* (R.C06, A04) (emphasis in original).

Petitioners' complaint requested a declaration by the court that, because of the violations of Petitioners' and other voters' rights and the numerous violations of the U.S. and Illinois Constitutions, and Illinois laws, the Referendum election results be declared null and void and of no effect (R.C09, A07).

Additionally, Petitioners' complaint sought to "permanently restrain and enjoin the Respondent Library District and its Respondent trustees from any further and additional illegal expenditures of public funds for partisan political and other private purposes" (R.C09, A07).

The Respondent, District, filed a Section 2-615 motion to dismiss (R.C34, A19), to which Petitioners' filed their response (R.C49, A30), and Respondent filed its reply brief (R.C65, A43). The circuit court heard argument and entered an order on July 29, 2011 granting the District's motion to dismiss (R.79, A53).

Petitioners then filed their motion for reconsideration (R.C81, C87, A54), to which the District filed its response brief (R.C93, A57). No reply brief was filed. On August 24, 2011 the circuit court issued its memorandum opinion and order which denied Petitioners' motion for reconsideration and affirmed the dismissal of Petitioner's complaint pursuant to 735 ILCS 5/2-615; however, there was no ruling on Petitioners' request for injunctive relief to prevent future expenditures of public funds by the District (R.C97, C103, A60, A66). Petitioners timely filed their notice of appeal (R.C104, A69).

## STANDARD OF REVIEW

The issues presented in this appeal raise purely questions of law, which are reviewed *de novo*. *Cinkus v. Stickney Municipal Officers Electoral Board*, 228 Ill.2d 200, 886 N.E.2d 1011 (2008).

“When ruling on a motion to dismiss, the circuit court must interpret all pleadings and supporting documents in the light most favorable to the non-moving party. The court should grant the motion if the plaintiff can prove no set of facts that would support a cause of action. On appeal, review is *de novo*.” *Rodriguez v. Sheriff’s Merit Commission*, 843 N.E.2d 379, 218 Ill.2d 342 (2006), citing *In re Chicago Flood Litigation*, 176 Ill.2d 179, 189, 680 N.E.2d 265 (1997).

A motion to dismiss under section 2-615 challenges only the legal sufficiency of the complaint and all well-pleaded facts and reasonable inferences therefrom, are taken as true; furthermore, the allegations in the complaint are to be construed in a light most favorable to the plaintiff. *Jackson v. South Holland Dodge, Inc.*, 197 Ill.2d 39, 755 N.E.2d 462 (2001). See also, *Horwitz v. Sonnenschein Nath and Rosenthal LLP*, 399 Ill.App.3d 965, 972-973, 926 N.E.2d 934, 940-941 (First Dist., 2010) quoting *Tedrick*, 235 Ill.2d 155 at 161, 920 N.E.2d 220 (2009).

Whether a statute, or actions taken by a unit of government, are unconstitutional is a question of law subject to *de novo* review. *Lebron v. Gottlieb*

*Memorial Hospital*, 237 Ill.2d 217, 930 N.E.2d 895 (2010), citing *People v. Johnson*, 225 Ill.2d 573, 584, 870 N.E.2d 415 (2007).

## ARGUMENT

THE DISTRICT'S ILLEGAL AND UNCONSTITUTIONAL USE OF PUBLIC FUNDS TO SUPPORT PASSAGE OF THE APRIL 5, 2011 TAX EXTENSION REFERENDUM, AND ACTIVE OPPOSITION TO PETITIONERS' VIEWPOINT, SO TAINTED AND CORRUPTED THE REFERENDUM THAT ITS RESULTS CANNOT BE ALLOWED TO STAND BECAUSE IT FAILED TO OBTAIN AND DETERMINE A FREE, FAIR AND UNTRAMMELED EXPRESSION OF THE VOTERS' CHOICE.

**A. Constitutional implications of the District's political activities to support the Referendum through use of public funds.**

The District's use of public funds for political purposes has violated Petitioners' First and Fourteenth amendment rights to vote and associate for the common expression of political ideas, and the U.S. and Illinois Constitutions, read *in pari materia* with the Election Code, empowered the circuit court with the equitable authority to right those Constitutional wrongs.

Each voter's right to cast an equally weighted vote is a fundamental right at the core of our democracy. The Illinois Supreme Court explained the sanctity of our individual right to vote as follows:

The essence of the democratic voting right is that it is equally and separately vested in each member of the electorate. The right to vote is not a common right of the public, such as the beneficial interest in property held in public trust, or the assurance that public funds will be expended lawfully. Rather, the voting right is by

definition capable of being exercised individually by each voter; indeed, this is its genius. The right to be represented is intertwined with the right to vote and is likewise personal to each voter.

*Kluk v. Lang*, 125 Ill.2d 306, 317, 531 N.E.2d 790, 795 (1988).

The right to vote and the right of voters to associate for political purposes are two of the more fundamental rights present under our Constitution. *Munro v. Socialist Workers Party*, 479 U.S. 189, 193, 107 S.Ct. 533, 536 (1986). See also, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 117 S.Ct. 1364 (1997) and *Norman v. Reed*, 502 U.S. 279, 112 S.Ct. 698 (1992).

The District, agrees with Petitioners on the fundamental constitutional rights at issue, though disagree factually, when Respondents wrote:

What is constitutionally required in an election is that each voter has the right and opportunity to cast his or her vote without any restraint and that his or her vote has the same influence as the vote of any other voter. *Goree v. LaVelle*, 169 Ill. App.3d 696, 699, 120 Ill. Dec. 167, 169, 523 N.E.2d 1078, 1080 (1st Dist. 1988). ***Infringements of voting rights found to have risen to this constitutional level include*** dilution of votes by reasons of malapportioned voting districts or weighted voting systems, purposeful or systematic discrimination against voters of a certain class or political affiliation, ***and other "willful conduct which undermines the organic process*** by which candidates are elected" (emphasis added). *Hennings v. Grafton*, 523 F.2d 861, 864 (7<sup>th</sup> Cir. 1975). Petitioners allege none of these grounds.

See Respondent, District's, motion to dismiss at page 8 (R.C41, A26).

Petitioners assert that indeed, the conduct of the District falls squarely within the prohibited conduct – including “willful conduct which undermines the organic [election] process” – and therefore warrants entry of an order declaring that the Referendum results are null and void.

In addressing the use of public funds in the context of publicly funded elections, the U.S. Supreme Court very succinctly summarized First Amendment concerns that arise, as follows:

The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom — the “unfettered interchange of ideas” — not whatever the State may view as fair.

*Arizona Free Enterprise Club’s Freedom Club PAC vs. Bennett*, 564 U.S. \_\_\_, 131 S.Ct. 2806 (2011), citing *Buckley v. Valeo*, 424 U.S. 1,14, 96 S.Ct. 612 (1976).

The District has not only expended public funds for political activity, but then exacerbated its initial transgression by then specifying the content and message of that political speech – that is, the District expressed support for the Referendum and advocated for approval of the Referendum – to the detriment of Petitioners and all others who opposed and voted “no” to the Referendum.

The review of the constitutionality of laws is applicable to the review of the District’s actions before this honorable Appellate Court whether such conduct originates from a law, or is taken without authorization in law. The analysis

would be the same, since both laws and actions of government trigger the same constitutional safeguards.

Although it is self-evident that political content restrictions violate the First Amendment, the Federal Court of Appeals for the First Circuit explained the dangers of permitting a unit of government to favor viewpoints or ideas at the expense of others as follows:

The general principle is that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804, 104 S.Ct. 2118 (1984); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510 (1995) (viewpoint discrimination occurs when speech is regulated where "the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."). The viewpoint discrimination doctrine has been thought by one commentator to have two ultimate constitutional justifications: (1) fear of "impermissible reasons for governmental action," and (2) fear of the "skewing effects on the system of free expression." See Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. Chi. Legal F. 25, 26-27.

*McGuire v. Reilly*, 386 F. 3d 45, 62 (1<sup>st</sup> Cir. 2004). In addition to public-funding violations, the District violated the First Amendment by favoring a greater tax increase viewpoint (i.e. support for the Referendum), which skewed "the system of free expression." *Id.*

It is undisputed for purposes of this appeal, that the District used public funds to actively promote and advocate for passage of the Referendum, as

asserted in Petitioners' complaint. By implication then, the District also actively, and unconstitutionally, opposed the Petitioners' viewpoint on the Referendum, and did not provide an any forum or funding for Petitioners' differing viewpoint.

Petitioners and the District, have undertaken an exhaustive analysis of election contest precedent, in which courts have previously invalidated election results pursuant to Article 23 of the Election Code. 10 ILCS 5/Article 23.

For sake of brevity, Petitioners reference and incorporate their response to Respondent, District's, motion to dismiss, filed on July 14, 2011 (R.C49, A30), and highlight the decisions, *Ury v. Santee*, 303 F.Supp. 119 (N.D. Ill. 1969), *Smith v. Cherry*, 489 F.2d 1098 (7<sup>th</sup> Cir. 1973), *Hester v. Kamykowski*, 13 Ill.2d 481 (1958).

While the Illinois Constitution and Article 23 of the Election Code clearly grant courts the authority to resolve contests over election results, where election validity is at issue, the US and Illinois Constitutions permits equitable relief. The guiding principals in article I, §12 compel such a result, such that every person shall have a remedy for "all injuries and wrongs." Ill.Const. (1970) art. I, §12.

The U.S. Supreme also opined that "[t]he Constitution requires that access to the electorate be real, not 'merely theoretical.'" (emphasis added) *American Party of Texas v. White*, 415 U.S. 767, 783, 94 S.Ct. 1296, 1307 (1974), citing *Jenness v. Fortson*, 403 U.S. 431, 439, 91 S.Ct. 1970, 1974 (1971). A theoretical recourse, through the State Board of Elections premised upon campaign

disclosure violations, would not address Petitioners' constitutional grievances nor the validity of the tainted Referendum, particularly where the District has violated Petitioners' constitutional rights. A nominal fine is no deterrent to blatantly unconstitutional political activity, particularly since such a fine would be paid from the proceeds of the crime (and public funds).

Where there are "errors that are so pervasive as to undermine the integrity of the vote," as distinguished from garden-variety election irregularities, such errors may rise to the level which warrants invalidation of an election. *Andrews v. Powell*, 365 Ill.App.3d 513, 522-523, 848 N.E.2d 243, 252 (2006). Petitioners' complaint alleges such violations, which are deemed admitted for purposes of the issues on appeal, and warrant invalidation of the Referendum results.

The District's political activities that promoted and advocated for passage of the Referendum, improperly and unconstitutionally undermined and diluted Petitioners' protected voting and associational rights at the core of our democracy. The District should not be permitted to benefit from its actions.

Respondent, District's, decision to take sides and actively promote and advocate for the passage of the Referendum improperly violated Petitioners' First and Fourteenth Amendment U.S. Constitutional rights to such a degree that it rendered the results of the referendum meaningless. The U.S. and Illinois Constitutions alongside Articles 9 and 23 of the Election Code, compel and

empower the circuit court to exercise its equitable powers. Petitioners have stated a cause of action and are entitled to a remedy, as are other aggrieved parties asserting violations of their fundamental constitutional rights. Respectfully, Petitioner request reversal of the circuit court's order dismissing their complaint.

**B. Unconstitutional Use of Public Funds.**

Petitioners' complaint sought to contest the *validity* of the Referendum election, but not specifically the *results* of the election, based upon the illegal and unconstitutional use of public funds by the District to support and promote passage of the Referendum by the electorate.

The Illinois Supreme Court has previously enjoined the use of public funds for partisan advertising purposes intended to induce voters to act favorably upon a bond issue submitted at an election. *Elsenau v. City of Chicago*, 334 Ill. 78, 81 (1929). The Supreme Court expressly stated that the expenditure of funds for "[t]he conduct of a campaign, before an election, for the purpose of exerting influence upon the voters is not the exercise of an authorized municipal function and hence is not a corporate purpose of the municipality." *Id.* at 81-82.

Similarly the Illinois Election Code has codified these public policy goals into the Election Interference Act, mandating that "[n]o public funds shall be used to urge any elector to vote for or against any candidate or proposition, or be appropriated for political or campaign purposes to any candidate or political

organization.” 10 ILCS 5/9-25.1(b). This prohibition was also confirmed by the Illinois Attorney General in 1975, premised upon the provisions of article VIII, §1(a) of the Illinois Constitution. See *1975 Ill. Atty. Gen. Op S-960* at page 3.

Contrary to the Illinois Constitution and the Election Code, the District essentially created a secret “public funding” system for the Referendum election, and then was the sole and exclusive beneficiary of this “public funding” system when it funded its own campaign to promote, support, and induce “yes” votes on the Referendum. Such “public funding” was *not* available to Petitioners, or other voters, who opposed the passage of the Referendum, and kept secret from Petitioners by not being disclosed until after the election, and a complaint filed.

The Petitioners’ First Amendment rights were impermissibly burdened through the District’s use of such public funds to finance political speech that counteracted and thus diminished the effectiveness of Petitioners’ own speech. See e.g., *Davis v. Federal Election Comm’n*, 554 U.S. 724, 736 128 S.Ct. 2759 (2008). That is, the District’s self-funding of its political activity, with public funds, would have forced Petitioners to expend greater amounts of their own private funds, in order to have their viewpoint reach and be heard by the same number of voters lobbied by the District in support the Referendum. Petitioners should never be so encumbered or burdened in exercising their First Amendment rights.

Exacerbating this situation, the District has improperly apportioned and used some of the public funds contributed by Petitioners themselves (through payment of taxes), for speech that directly opposed Petitioners' viewpoint. That is, the District has essentially used Petitioners' own funds to impermissibly advocate for a passage of the Referendum, which Petitioners opposed.

Similarly, as in the constitutional analysis of statutes providing public funding for elections, a unit of government *may not* designate, or specifically restrict, or define the *content* of publicly funded speech. See e.g., *Arizona Free Enterprise Club's Freedom Club PAC vs. Bennett*, 564 U.S. \_\_\_, 131 S.Ct. 2806 (2011).

Nonetheless, the District, a unit of government, not only self-funded its political activity to obtain passage of the Referendum, but its Trustees and/or political consultants improperly designated a partisan, pro-Referendum content of speech, in violation of the First Amendment.

The District's actions indicate that it has lost focus of its purpose and mission as a branch of local government that serves the needs of the community on a representative basis. By using public funds to self-fund a political advocacy campaign, the District crossed over, suppressed and trampled upon Petitioners' and all other voters' First Amendment rights to associate together, to advance ideas, and to meaningfully and equally cast their votes.

The political activity of the District burdened Petitioners' First Amendment rights, just as a law would have accomplished the same result. Accordingly, the District's campaign activities incidental to the Referendum election cannot be allowed to stand, just as a provision of law "cannot stand unless it is 'justified by a compelling state interest.'" *Davis v. Federal Election Comm'n*, 554 U.S. at 740 (quoting *Massachusetts Citizens for Life*, 479 U.S., at 256, 107 S.Ct. 616). No compelling state interest has been, or could be, advanced.

Nonetheless, it is of no avail for the District to claim to have a compelling state interest in "leveling the playing field... or leveling electoral opportunities" to justify undue burdens on political speech. See *e.g.*, *Citizens United v. Federal Election Comm'n*, 558 U.S. 50, 130 S.Ct. 876, 904–905 (2010).

The Court in *Arizona Free Enterprise* explained these grave dangers as follows:

"Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election," *Davis*, *supra*, at 742, 128 S.Ct. 2759—a dangerous enterprise and one that cannot justify burdening protected speech.

*Arizona Free Enterprise Club's Freedom Club PAC vs. Bennett*, 564 U.S. \_\_\_, 131 S.Ct. 2806, 2826 (2011).

Just as restrictions on campaign finance have been held to be a substantial burden on the exercise of the First Amendment right to use personal funds for campaign speech, similarly the District's expenditure of public funds imposes a substantial burden on the Petitioners' exercise of their First Amendment rights.

In its reply brief in support of its motion to dismiss, the District cited to *Wirtz v. Quinn*, 2011 IL 111903 (July 11, 2011), for the proposition that the District's expenditure of funds was not shown to be for a "private purpose" and therefore, was an acceptable use of public funds (R.C72-C73). However, the Illinois Supreme Court's decision in *Wirtz v. Quinn* is neither applicable to the facts presented to this court, nor resolves this appeal, which involves the use of public funds for (partisan) political activity, akin to a publicly funded election.

The Plaintiffs in *Wirtz v. Quinn*, 2011 IL 111903 (July 11, 2011), challenged the constitutionality of four public acts on various bases, one of which was an alleged violation of the public funds clause in article VIII, §1(a) of the Illinois Constitution. The issues before this court are distinguishable from those addressed by court in *Wirtz v Quinn*, both factually and legally.

Petitioners are not seeking a declaration that a statute is unconstitutional, as was the case in *Wirtz v. Quinn* – but rather, seek a declaration that the District's expenditure of public funds for political activity was unconstitutional activity. Petitioners are not arguing the public expenditure versus private expenditure

distinction that was addressed in *Wirtz v Quinn*. Rather, in the matter before this honorable Appellate Court the District undertook political activity, and used public funds for political purposes. The District's conduct is far worse than use of public funds for private purposes, since it infringes upon Petitioner's First Amendment rights, and also constitutes action by a unit of government and expenditure of public funds expressly prohibited by the Election Code, 10 ILCS 5/9-25.1(b) and by article VIII, §1(a) of the Illinois Constitution.

**C. Separation of Powers.**

The Illinois Constitution created three branches of government at article II, §1 which provides "[t]he legislative, executive and judicial branches are separate. No branch shall exercise powers properly belonging to another." Ill.Const. (1970) art. II, §1.

In discussing the separation of powers provisions of the Illinois Constitution, Justice Clark in a dissenting opinion noted that "[l]egislation which allows such usurpation of judicial authority, without a possibility for judicial review, violates the doctrine of separation of powers." *DeLuna v. St. Elizabeth's Hospital*, 147 Ill.2d 57, 81, 588 N.E.2d 1139, 1149 (1992) (Clark, J. dissenting), citing *People v. Bainter*, 126 Ill.2d 292, 303, 533 N.E.2d 1066 (1989).

The Petitioners are not seeking the invalidation of a statute premised upon the separation of powers provisions of the Illinois Constitution, but rather,

seeking to reconcile, and find a construction of the Election Code and the Constitution, which provides a logical and constitutional result.

Starting with the presumption that legislation is constitutional, and that the legislature did not intend an unconstitutional result, the circuit court's dismissal of Petitioners' complaint effectively violates the separation of powers clause of the Illinois Constitution. That is, the legislature has prevented judicial review. This approach is also inconsistent with the policy guidance of the Illinois Constitution at article I, §12 which states that "every person shall find a certain remedy in the laws for all injuries and wrongs." Ill.Const. (1970), art. I, §12.

On the contrary, Petitioners are seeking a construction which reconciles their constitutional rights and existing laws, including the Election Code. The construction of relevant provisions of the Election Code as argued by the District and adopted by the circuit court, ignores Petitioners' constitutional rights and would violate the separation of powers doctrine, through a construction which precludes and denies Petitioners their right to seek judicial review. Respectfully, Petitioners request that this honorable Appellate Court recognize the judicial branch's inherent authority to provide equitable relief for violations of constitutional rights, and reverse the circuit court's order.

**D. Constitution and Public Trust Doctrine Compel Reversal of the Circuit Court's Dismissal of Petitioners' Complaint.**

The Illinois Constitution authorizes and empowers circuit courts to have original jurisdiction of all justiciable matters and review of administrative actions, except those matters in which the Supreme Court has original jurisdiction. Ill.Const. (1970) art. VI, §9.

Furthermore, the guiding provisions of article I, §12, confirm the intent of the people of the State of Illinois, that “[e]very person shall find a certain remedy in the laws for all injuries and wrongs.” Ill.Const. (1970), art. I, §12. It is a fundamental tenet of statutory construction that provisions of the Constitution and laws of the State related to the same subject should be read *in pari materia*, to yield an operative and harmonious result. *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill.2d 200, 217, 886 N.E.2d 1011, 1022 (2008).

Although at one time a plaintiff not proceeding under specific statutory authority was restricted from suing to enjoin misuse of property held in public trust without showing special damage not suffered by the public at large, that doctrine was abrogated in *Paepcke v. Public Building Comm'n* (1970), 46 Ill.2d 330, 263 N.E.2d 11. *Kluk v. Lang*, 125 Ill.2d 306, 316, 531 N.E.2d 790, 794 (1988).

In *Paepcke*, the Illinois Supreme Court stated:

“If the ‘public trust’ doctrine is to have any meaning or vitality at all, the members of the public, at least taxpayers who

are the beneficiaries of that trust, must have the right and standing to enforce it. To tell them that they must wait upon governmental action is often an effectual denial of the right for all time.” (*Paepcke*, 46 Ill.2d at 341, 263 N.E.2d 11.)

*Kluk v. Lang*, 125 Ill.2d 306, 316, 531 N.E.2d 790, 794 (1988).

Similar to the public trust doctrine, the matter before this honorable Appellate Court raises issues that are at the core of our democracy, including fundamental Constitutional rights, the sanctity of voting, and the integrity of the election process. To allow and permit the District to benefit from the Referendum results borne of its illegal and unconstitutional acts, would condone flagrant and unequivocal violations of the restrictions contained in the U.S. and Illinois Constitutions and Election Code prohibiting the use of public funds for political purposes, and would open the door to future transgressions (and likely expansions) of public self-funding of political activity by not only the District, but any other governmental entity. A line must be drawn, and the constitutional rights of Petitioners enforced.

The Respondent, District, argued before the circuit court that Petitioners could cite to no prior decisions for support of their position. Although Petitioners concede that there is no prior decision directly on point, this is likely because no governmental entity was so bold, or misguided, as to create an exclusive self-funding scheme to advance a specific political message in support of a ballot

referendum using public funds. There are, however, volumes of prior decisions that invalidated elections results, and/or fashioned an equitable remedy where constitutional rights were violated.

To tell Petitioners that they have no specific recourse or remedy in law, and that they must wait upon some unspecified governmental action is tantamount to a denial of their Constitutional rights, for all time. Such a result would yield neither justice, nor accountability, nor democracy, but only serve to encourage further abuses of public funds. In a representative democracy, all branches of government serve the public's best interest, and are accountable to voters. To allow the District to use public funds for political purposes, and to determine the content and viewpoint of political speech, not only violates Petitioners' constitutional rights, but would create a campaign finance double standard by exempting governmental entities from regulation or accountability.

Just as the judicial branch was empowered to recognize the standing of taxpayers to enforce the public trust doctrine, so to would the judicial branch be empowered to recognize standing of voters to enforce and defend their U.S. and Illinois Constitutional rights as voters. As the Illinois Constitution admonishes, "every person shall find a certain remedy in the laws for all injuries and wrongs." Respectfully, Petitioners request this honorable Appellate Court reverse the circuit court's dismissal of their complaint, and allow them to seek a remedy.

## CONCLUSION

WHEREFORE, the Petitioners-Appellants, Petitioners, Robert I. Sherman, Celeste S. Sherman, Mary F. Day, Robert B. Dinnerman and Ronald P. Mraz, through counsel, respectfully request that this honorable Appellate Court reverse the circuit court's order dismissing their complaint and remand this matter to the Circuit Court of Cook County for further proceedings on the merits of Petitioners' complaint consistent with this honorable Appellate Court's decision, and any other relief in favor of the Petitioners that this honorable Appellate Court deems just and appropriate.

Respectfully submitted:

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Mary F. Day, Robert B. Dinnerman  
and Ronald P. Mraz, Petitioners-Appellants*

By: \_\_\_\_\_  
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APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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CERTIFICATE OF COMPLIANCE

The undersigned, an attorney, certifies that, to the best of his ability, this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief is 31 pages, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a).

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APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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**NOTICE OF FILING and CERTIFICATE OF SERVICE**  
**FOR APPELLANTS' BRIEF ON APPEAL**  
**and SEPARATE APPENDIX**

To: See attached Service List.

**PLEASE TAKE NOTICE** that on January 6, 2012, I filed with the Clerk of the First District Appellate Court, Chicago, Illinois, nine copies of the *Appellants' Brief on Appeal* and *Appellants' Separate Appendix*, copies of which are attached hereto and served upon counsel of record.

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**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that he served three copies of the Appellants' Brief on Appeal and Appellants' Separate Appendix upon the counsel of record shown above by placing copies of same into properly addressed, postage prepaid envelopes and depositing into a US Postal Service mail receptacle in Chicago, Illinois on January 6, 2012.

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Andrew Finko

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APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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*Robert I. Sherman, et al., vs. Indian Trails Library District, et al.*  
*Cook County Circuit Court No. 2011-COEL-66*

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APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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APPENDIX  
TO THE APPELLANTS' BRIEF ON APPEAL

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