No. 23-

IN THE

Supreme Court of the United States

FRANK DIFRANCO

Petitioner,

v.

PATRICIA FALLON, COOK COUNTY CLERK CEDRIC GILES, AND THE ILLINOIS STATE BOARD OF ELECTIONS

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State Court has subject matter jurisdiction in a special statutory election contest proceeding when there is a statutorily unauthorized party before the Court and the mode of procedure prescribed by statute is not strictly pursued?

2. Whether statutory deadlines set by the state legislature for counting votes in Federal and State elections are mandatory or directory?

PARTIES TO THE PROCEEDING

The Petitioner is Frank DiFranco.

The Respondent is Patricia Fallon, Cook County Clerk Cedric Giles[1], and the Illinois State Board of Elections.

1. Karen A. Yarbrough, Cook County Clerk, passed away on April 7th, 2024. Yarborough was a Public Official who is a party to a proceeding in this Court in an official capacity. Cook County Deputy Clerk Cedric Giles has been appointed to her position as interim Clerk and automatically substituted pursuant to Rule 35.

STATEMENT OF RELATED PROCEEDINGS

DiFranco v. Yarbrough et al, No. 20-cv-07813, United States District Court, Northern District of Illinois. There is a stay on the Proceedings currently.

Frank R. DiFranco v. Patricia M. Fallon et al., No. 130187, Illinois Supreme Court, Judgment entered January 24, 2024; App. 1a.

Frank R. DiFranco v. Patricia M. Fallon et al., No. 1-22-0785, Illinois Appellate Court, First District, Judgement entered October 5, 2023; App. 2a-45a.

Frank R. DiFranco v. Patricia M. Fallon et al. No. 2020 COEL 000032, Cook County Circuit Court of Illinois, May 11, 2022; App. 46a-57a.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Frank DiFranco respectfully petitions for a writ of certiorari to review the judgment of the Illinois Supreme Court and related judgment of the Appellate Court.

OPINION BELOW

DiFranco v. Fallon, 226 N.E.3d 32 (Ill. 2024); App. 1a.

DiFranco v. Fallon, 2023 IL App (1st) 220785, 228 N.E.3d 410, appeal denied, 226 N.E.3d 32 (Ill. 2024); App. 2a-45a.

DiFranco v. Patricia M. Fallon et al. No. 2020 COEL 000032, Cook County Circuit Court of Illinois, May 11, 2022; App. 46a-57a.

JURISDICTION

The judgment or order sought to be reviewed was entered by the Illinois Supreme Court on January 24th, 2024. App. 1a. DiFranco's petition for a writ of certiorari is seeking review of an Illinois State Court judgment which implicates the Federal Elections Clause and other Constitutional matters. This judgment was subject to discretionary review by the Illinois Supreme Court which was the State Court of last resort in Illinois. Discretionary review was denied by the Illinois Supreme Court on January 24th, 2024. App. 1a. There was no order respecting rehearing. On Apr 11, 2024, Application (23A912) was granted by this Court extending the time to file this petition for a writ of certiorari until June 21, 2024. The

statutory provision believed to confer jurisdiction to review the judgment or order in question is 28 U.S. Code § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. I, § 4, provides "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators".

U.S. Const. amend. I, provides "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. XIV, § 1, provides "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

10 ILCS 5/18A-15(a) provides "The county clerk or board of election commissioners shall complete the validation and counting of provisional ballots within 14

calendar days of the day of the election. The county clerk or board of election commissioners shall have 7 calendar days from the completion of the validation and counting of provisional ballots to conduct its final canvass. The State Board of Elections shall complete within 31 calendar days of the election or sooner if all the returns are received, its final canvass of the vote for all public offices."

10 ILCS 5/23-21 provides "Upon the filing of such statement, summons shall issue against the person whose office is contested, and he may be served with process, or notified to appear, in the same manner as is provided in other civil cases."

STATEMENT

DiFranco's petition presents the legal question of whether a State Court's interpretation finding that compliance with statutory deadlines for counting ballots cast in a State/Federal election is directory, as opposed to mandatory, vests an unconstitutional discretion in those whose responsibility it is to call an election in conformity with legislative requirements enabling them to influence/determine the result or defeat the legislative intent by failing, whether by design or neglect, to conform strictly with the statutory deadline requirements. Thereby, violating U.S. Const. art. I, § 4, U.S. Const. amend. I, U.S. Const. amend. XIV, § 1. Additionally, this petition presents the question of whether Courts have subject matter jurisdiction when there is a statutorily prohibited party to special statutory proceedings.

Frank DiFranco and Patricia Fallon were candidates in the November 3, 2020, general election for the Office

of Circuit Court Judge for the 12th Judicial Subcircuit of Cook County Illinois. Karen A. Yarbrough was the local election authority by virtue of serving as the Cook County Clerk. DiFranco, an Attorney, was elected as the Republican Candidate for Circuit Court Judge for the "Hanlon Vacancy" in the 12th Judicial subcircuit in The General Election. Fallon had been an appointed Judge of Cook County and was listed on the General Election ballot as the opposing Democratic candidate for Circuit Court Judge of the 12th subcircuit for the Hanlon Vacancy.

Prior to being appointed to the position of Judge, Fallon was the executive of the Human Resources Department at the Recorder of Deeds office, and at the same time Yarborough was the Recorder of Deeds. Fallon was recommended and then appointed to a Judgeship position in Cook County, Illinois. Subsequently, Yarborough became the County Clerk when the office of the Recorder of Deeds merged with the office of the County Clerk in or about 2018. Many, if not most of the employees, counting and aiding in the election at issue were subordinates of Yarborough, and whose hiring and employment were supervised by Fallon while she was in charge of Human Resources at the Office of the County Clerk.

On the night of the November 3, 2020, election, and every night thereafter through the last day set by statute for counting votes, November 17, 2020, the vote totals posted by Yarborough on her government website indicated that DiFranco was the winner of the election. See 10 ILCS 5/18A-15(a); 10 ILCS 5/19-8. Indeed[1], "Dewey

1. https://www.chicagotribune.com/2020/10/31/dewey-defeats-truman-the-most-famous-wrong-call-in-electoral-history/

defeated Truman" again in 2020, except this time the Tribune made the correct call. The Chicago Tribune publicly declared DiFranco the winner of the election[2]. In fact, all the election results posted and published by the Cook County Clerk from November 3, 2020, through November 17, 2020, indicated that DiFranco was the winner of the election as well. However, on December 4, 2020, the State Board, proclaimed the results of the November 3, 2020, election in the 12th Subcircuit of the Cook County Judicial Circuit to be, in pertinent part: Patricia M. Fallon 82,976 and Frank R. DiFranco 82,474.

To achieve this result for Fallon and her Party, Yarborough instituted a policy of "Count every vote". As part of this policy Yarborough counted ballots beyond the statutory deadlines of November 17, 2020. See 10 ILCS 5/18A-15(a); 10 ILCS 5/19-8. For example, the day after the last day for counting votes, on November 18, 2020, the Cook County Clerk's staff added 1,202 votes for DiFranco, resulting in a cumulative total of 81,855 votes, and 2,030 votes for Fallon, resulting in a cumulative total of 82,198 votes. On November 19, 2020, the Cook County Clerk's staff added 344 votes for DiFranco, resulting in a cumulative total of 82,199 votes, and 504 votes for, Fallon, resulting in a cumulative total of 82,702 votes. On November 22, 2020, the Cook County Clerk's staff added 298 votes for DiFranco, resulting in a cumulative total of 82,497 votes, and 320 votes for Fallon, resulting in a cumulative total of 83,022 votes. On November 23, 2020, 23 votes for DiFranco, were subtracted, resulting in a cumulative total of 82,474 votes, and 46 votes for Fallon,

2. https://www.chicagotribune.com/2020/11/05/DiFranco-defeats-fallon-in-race-for-cook-county-judge-seat/

were subtracted, resulting in a cumulative total of 82,976 votes. The ballots counted after the last statutory deadline day to count ballots resulted in DiFranco, going from a lead of 485 votes on November 17, 2020, to deficit of 502 votes.

Thereafter, DiFranco filed an election contest in the Circuit Court of Cook County Illinois on December 31, 2020. See 10 ILCS 5/23-21. DiFranco's verified petition amounted to four claims: (1) ballots were counted past the statutory time limit, (2) the number of vote-by-mail (VBM) ballots counted exceeded the number of VBM ballots requested by 18,423 (3) another 3628 VBM ballots lacking the required return envelope were improperly counted, and (4) the Clerk prevented DiFranco from fully observing the discovery recount. In Illinois, the failure to comply with a mandatory provision [of the Election Code] renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots. *Schwallenstecker v. Rull*, 2012 IL App (4th) 120754, ¶ 16, 977 N.E.2d 322, 325. The Trial Court found that the counting of the ballots were technical violations of directory provisions and did not affect the validity of the affected ballots or the election. App. 6a-7a, 26a-27a. The Trial Court granted Yarborough and Fallon's renewed motion for summary judgment. DiFranco then filed a timely notice of appeal from the trial court's orders.

The Illinois Appellate Court then addressed its own jurisdiction and the jurisdiction of the circuit court. App. 21a. The Appellate Court found while an election contest would not afford DiFranco complete relief, a declaration that he was duly elected would be necessary for the ultimate remedy he seeks—removing Fallon and

assuming office. *Id*. For that reason, a favorable judgment would have a practical effect. *Id*. The Court found the matter to be justiciable and not moot. *Id*. The Appellate Court also discussed the directory nature of the statute setting the deadlines for counting ballots. App. 26a-27a. The Appellate Court affirmed the trial court in this matter. *Id.*

DiFranco then timely sought leave to appeal (PLA) to The Illinois Supreme Court from this order. DiFranco argued that the "Will of the People" cannot be determined through a law or by judicial order which vests the officials whose responsibility it is to call an election in conformity with legislative requirements with an unreasonable discretion which might enable them to influence the result, nor should it grant such officials the power to defeat the legislative intent by failing, whether by design or neglect, to conform strictly with the statutory requirements. App. 70a-72a. DiFranco argued the Trial Court's finding and the Appellate Court's discussion that the Provisions of 10 ILCS 5/19-8 and 10 ILCS 5/18A-15(a) are discretionary created such an unconstitutional discretion. Specifically, this decision allows the officials whose responsibility it is to call an election to keep counting ballots past the legislative deadline until his or her respective party wins. The extent of the discretion afforded to the Cook County Clerk by the Trial Court and discussed by the Appellate Court is the equivalent of affording the Clerk the legislative authority granted in the elections clause to the States, or for that matter, the judicial authority to determine the scope of the statutory directive provisions with no bright line guidance as required by the Constitution. This violates the Elections Clause, the 14th amendment, and the First Amendment. Moreover, 10 ILCS 5/19-8 and 10 ILCS 5/18A-15(a) cannot

be considered discretionary under principles of due process because it does not provide sufficient standards to guide the agency in the exercise of its functions.

DiFranco also argued that the will of the people cannot be distributed through a void order in his PLA. App. 68a-70a. "In the exercise of special statutory jurisdiction, if the mode of procedure prescribed by statute is not strictly pursued, no jurisdiction is conferred on the circuit court." *Fredman Bros. Furniture Co., Inc. v. Dep't of Revenue*, 486 N.E.2d 893, 895–96 (1985). An election contest involves the exercise of special statutory jurisdiction. 10 ILCS 5/23-21 provides "upon the filing of such statement, summons shall issue against the person whose office is contested, and he may be served with process, or notified to appear, in the same manner as is provided in other civil cases." This statute limits the Respondent in the matter to only the person whose office is contested. Simply put, it is a boxing match between two people prohibiting any other persons from fighting. Yarborough was not a statutorily authorized party before the Court and assisted Fallon in the proceeding against Frank. DiFranco also argued, "When a court exercises its authority, it must proceed within the confines of that law and has no authority to act except as that law provides. [Citation.] A court is not free to reject or expand its statutory authority despite the desirability or need for such action. [Citation.] Any action the trial court takes that is outside the statute's stricture is void." *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 103, 965 N.E.2d 1215, 1234. DiFranco, argued allowing Yarborough into the proceedings destroyed the jurisdiction of the Court. The Supreme Court of Illinois denied the PLA.

The federal questions in this matter were timely and properly raised and this Court has jurisdiction to review the judgment on a writ of certiorari. Although the highest state court was silent on these federal questions, the issue was properly presented. IL R S CT Rule 315 provides that a party seeking leave to appeal must file the petition for leave in the Supreme Court within 35 days after the entry of such judgment. The Illinois Appellate court entered judgment on October 5, 2023. DiFranco then timely filed his PLA on November 9, 2023. Hence, the issues were properly and timely presented to the Illinois Supreme Court. App. 59a-74a

Moreover, the question as to subject-matter jurisdiction is not subject to waiver and can be raised at any time. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434–35, 131 S. Ct. 1197, 1202, 179 L. Ed. 2d 159 (2011). This question was first raised in DiFranco's Petition for Leave to Appeal to the Illinois Supreme Court which was denied. However, the counting of votes matters were raised first in the Trial Court proceedings. App. 6a-7a, 26a-27a. The Trial Court found that the counting of the ballots were technical violations of directory provisions and did not affect the validity of the affected ballots or the election. App. 6a-7a, 26a-27a. The Appellate Court then discussed the directory nature of the statute setting the deadlines for counting ballots in their decision and affirmed the trial court on the issue of deadlines in this matter. App. 26a-27a. Petitioner also raised this deadline issue in his PLA to the Illinois Supreme Court which was denied.

As such, the Illinois Supreme Court had "a fair opportunity to address the federal questions that are sought to be presented here, the matter was presented

at the time and in the manner required by the state law, the state procedural requirements could not serve as an independent and adequate state-law ground for the state court's judgment, and the particular claim at issue here was presented with "fair precision and in due time".

REASONS FOR GRANTING THE PETITION

The Illinois Supreme Court and Illinois Appellate court decided an important question of federal law that has not been, but should be, settled by this Court, and/or has decided an important federal question in a way that conflicts with relevant decisions of this Court. Specifically, the Illinois Courts have decided that the Trial Court and the Appellate Court had subject matter jurisdiction in an election contest and that the orders were not void even though there is a statutorily unauthorized party before the Court. App. 21a. This conflicts with *Williamson v. Berry*, 49 U.S. 495, 496, 12 L. Ed. 1170 (1850) which held that when the legislature passes an act authorizing the court to act upon a certain matter, and it states precisely what it may do in the matter, the Court cannot not deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. Id.

The Court also decided an important federal question in a way that conflicts with a decision of another state court of last resort and a United States court of appeals. Specifically, the Courts decided that deadlines for counting ballots in an election are not essential and are directory, as opposed to mandatory. However, the 7th Circuit has determined that Deadlines are essential to election. *Common Cause Indiana v. Lawso*n, 977 F.3d 663, 664–65 (7th Cir. 2020). "Counting the votes, and announcing the

results, as soon as possible after the polls close serves a civic interest." *Id.* Additionally, the Supreme Court of Alaska has found that election "deadlines are mandatory, and therefore substantial compliance is not sufficient" *Guerin v. State*, 537 P.3d 770, 779 (Alaska 2023), reh'g granted in part (Nov. 6, 2023)

Moreover, in Illinois, the failure to comply with a mandatory provision [of the Election Code] renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots." *Schwallenstecker v. Rull*, 2012 IL App (4th) 120754, ¶ 16, 977 N.E.2d 322, 325. The Trial Court and the Appellate Court found that the late counting of the ballots were technical violations of directory provisions and did not affect the validity of the affected ballots or the election. App. 6a-7a, 26a-27a. The Illinois Supreme Court denied reviewing the matter. App. 1a. These interpretations of state law in a federal election case presents a federal issue. See *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70, 76–78, 121 S.Ct. 471, 148 L.Ed.2d 366 (2000). These interpretations of the Statutes are also unconstitutional. The law cannot vest officials, whose responsibility it is to call an election in conformity with legislative requirements, "with an unreasonable discretion which might enable them to influence result, nor should it grant such officials the power to defeat legislative intent by failing, whether by design or neglect, to conform strictly with statutory requirements." *Secco v. Chicago Transit Auth.*, 2 Ill. App. 2d 239, 119 N.E.2d 471 (1st Dist. 1954). Here, as explained earlier, the interpretation by the State Courts vests the Clerk with the power to determine the mode, manner, outcome, and methods of a Federal and State Election. At this time, DiFranco believes this unique issue has never been decided by the U.S. Supreme Court.

Moreover, the issues presented in this petition concern the process to determine, ascertain, and distribute the "Will of the People" through elections and election contests. These questions are not entirely case specific. They are legal issues whose resolution is of tremendous and understandable importance to millions of voters who are legally qualified to vote, the state and federal candidates running, the election officials counting ballots, and the judiciary hearing the contests across the country. These questions also concern important procedural matters such as subject-matter jurisdiction, statutory interpretation, procedures for counting ballots in elections, and procedure in election contests in nearly every election throughout the Country. This is not purely a local or private matter, never again to be repeated. In fact, it is the very essence of questions of such importance that should be decided by the United States Supreme Court.

The issues are also of first impression. At this time, DiFranco could not find a case that has generated an opinion by this Court discussing whether compliance with statutory deadlines for counting ballots in an election is directory or mandatory or can even be considered directory given the important nature of the rights involved in relation to the deadlines. Moreover, Counsel has found no case that has discussed whether a court has subject matter jurisdiction over a statutorily unauthorized respondent in an election contest.

There is also a need for the exercise of the United States Supreme Court's supervisory authority. The Appellate Court generated an opinion discussing questions of general importance concerning discretionary compliance in relation to statutory deadlines. This opinion

encourages election officials who have been delegated the duty of calling an election to choose to keep counting until their respective party wins and to disregard the legislature. This is a loophole that effectively allows the official to determine the outcome of a very close election as opposed to the "will of the people". This loophole must be closed to protect the integrity of elections. But even so, the order of the Appellate Court was void because Yarbrough was not a statutorily authorized party to the election contest. The opinion allows for a statutorily unauthorized party to participate in an election contest and the appeal proceedings. The opinion is authority which directs courts and litigants to incorrectly believe that the election official is a proper party, must be joined, and served. This also results in unnecessary legal expenses for the unauthorized party official which are paid by the State and Local government to the outside legal counsel with the sole benefit going to the candidate party whose election is being contested. These are very serious questions.

Also, avoiding this petition would allow the courts across the entire Country to fashion a directory unconstitutional remedy which would escape review and allow for officials to count ballots beyond the times set forth by the legislature to ensure their candidate or party wins. Hence, the intervention of the court is necessary, imperative, and the Court has jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted By:

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — DENIAL OF APPEAL OF THE SUPREME COURT OF ILLINOIS, FILED JANUARY 24, 2024

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January 24, 2024

In re: Frank R. DiFranco, petitioner, v. Patricia M. Fallon et al., etc., respondents. Leave to appeal, Appellate Court, First District. 130187

The Supreme Court today DENIED the Petition for Appeal as a Matter of Right or, in the alternative, Petition for Leave to Appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on 02/28/2024.

Neville, J., took no part.
Rochford, J., took no part.

Very truly yours,

/s/ Cynthia A. Grant
Clerk of the Supreme Court

APPENDIX B — OPINION OF THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FILED OCTOBER 5, 2023

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

2023 IL App (1st) 220785

No. 1-22-0785

Filed October 5, 2023

Fourth Division

FRANK R. DIFRANCO,

Petitioner-Appellant,

v.

PATRICIA M. FALLON, THE ILLINOIS STATE BOARD OF ELECTIONS, AND KAREN A. YARBROUGH, COOK COUNTY CLERK,

Respondents.

(Patricia M. Fallon and Karen A. Yarbrough, Cook County Clerk, Respondents-Appellees).

Appeal from the Circuit Court of Cook County.

No. 20 COEL 032

Honorable Patrick T. Stanton, Judge, presiding.

Appendix B

JUSTICE MARTIN delivered the judgment of the court, with opinion.

Presiding Justice Rochford and Justice Hoffman concurred in the judgment and opinion.

OPINION

Frank DiFranco appeals the circuit court's orders granting the respondents' motion for summary judgment and denying his motion for leave to file an amended petition in his election contest.

I. BACKGROUND

Following the November 3, 2020, general election, the Illinois State Board of Elections (ISBE) certified Patricia Fallon as elected to the Office of Circuit Court Judge for the 12th Judicial Subcircuit of Cook County to fill the vacancy created by the retirement of Judge Kay Hanlon. It was a close election. In the final canvass, Fallon received 82,976 votes and DiFranco, 82,474—a margin of 502 votes. In percentage terms, Fallon received 50.15% and DiFranco 49.85% of the vote.

ISBE certified Fallon as elected on December 4, 2020. She took the oath and assumed office on December 7, 2020, and continues to serve as an elected Cook County Circuit Court judge.

Having received votes within 5% of Fallon's total, DiFranco petitioned for a discovery recount in 52

precincts—approximately one-fourth of the subcircuit—under section 22-9.1 of the Election Code (10 ILCS 5/22-9.1 (West 2018)).[1] The discovery recount was conducted on December 22 and 23, 2020. Thereafter, DiFranco filed the present election contest on December 31, 2020, naming Fallon, ISBE, and Karen Yarbrough, the Cook County Clerk (Clerk), as respondents. The Clerk was the local election authority responsible for administering elections in suburban Cook County, including the 12th Judicial Subcircuit.

DiFranco's verified petition alleged "significant mistakes and fraud [were] committed in the casting and counting of ballots" and "had the legal votes been properly counted," he would have been elected Judge of the 12th subcircuit. DiFranco made no specific allegations of fraud. Instead, the specific allegations in his petition amounted to four claims: (1) ballots were counted past the statutory time limit, (2) the number of vote-by-mail (VBM) ballots counted exceeded the number of VBM ballots requested by 18,423, (3) another 3628 VBM ballots lacking the required return envelope were improperly counted, and (4) the Clerk prevented DiFranco from fully observing the discovery recount. DiFranco requested a complete recount of all ballots cast in the 12th subcircuit for the November 3, 2020, election, an order declaring him elected, and other just relief.

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1. Such a recount is conducted for the purpose of discovery only. The results cannot be used to change the results of the previously proclaimed canvass. Nor are the results binding in an election contest. 10 ILCS 5/22-9.1 (West 2018).

Appendix B

The 2020 general election was unique. As the COVID-19 pandemic was at its height, the Illinois General Assembly enacted emergency legislation to facilitate voting by mail. See Pub. Act 101-642 (eff. Jun. 16, 2020). Many voters chose to use that method to cast their ballots—71,103 in this race. Of those, over 62% voted for Fallon, while DiFranco won a comparable percentage of the votes cast in person on or before Election Day. Hence, DiFranco's election contest focused on ballots cast by mail.

DiFranco's missing envelopes claim relied on results he purported from the discovery recount. His petition set forth the number of VBM ballots counted and the number of VBM return envelopes his "watchers" reported that the Clerk produced for each of the 52 precincts included in the discovery recount. According to his tallies, of the 22,461 VBM ballots counted from those precincts, 3628 were missing a return envelope, or approximately 16%. DiFranco acknowledged that the ballots were separated from the return envelopes, making it impossible to identify which ballots lacked a corresponding return envelope. For the same reason, it was impossible to determine whether improperly counted votes were cast for Fallon or DiFranco. DiFranco proposed a proportionate reduction method to ascertain the effect of improperly counted votes. That is, since Fallon received 62.85% of the total VBM votes and DiFranco received 37.15%, the candidates' vote totals should be reduced by the same percentages applied to the 3628 improperly counted votes. In other words, subtract 62.85% of those ballots (2280) from Fallon's total and 37.15% from DiFranco's (1348). By his method, in the 52 precincts of the discovery recount alone, Fallon

would lose more votes than DiFranco by a margin that overcomes Fallon's certified 502-vote win. Thus, DiFranco asserted the discovery recount revealed a reasonable probability that a recount of all the subcircuit's precincts would change the result of the election.

The respondents moved to dismiss DiFranco's petition. They argued that (1) the statutory two-week deadline is directory, not mandatory, and the Clerk was otherwise required to count ballots received before that date (see *Pullen v. Mulligan*, 138 Ill. 2d 21, 46, 561 N.E.2d 585, 149 Ill. Dec. 215 (1990) ("Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots."), (2) the more VBM ballots counted than requested claim was not set forth with sufficiently specific allegations and relied on a directory provision, (3) the statutory requirement of a return envelope is directory, and (4) alleged improprieties in the discovery recount are irrelevant to whether a recount would likely change the result of the election. In addition, the respondents objected to DiFranco's proposed method for apportioning improperly counted votes. Instead of applying the percentage of VBM votes each candidate received, the respondents argued that any apportionment should use the percentage of total votes each candidate received—50.15% and 49.85%. They contended DiFranco could not overcome his 502-vote deficit even if he could show ballots were improperly counted.

In response, DiFranco explained that his allegations regarding the discovery recount were provided only for

background information and maintained that his other allegations were sufficient to state a cause of action. He likewise maintained that his apportionment method was appropriate.

The trial court dismissed the claim regarding ballots counted beyond the statutory time limit, finding that the limit was directory, not mandatory. However, the court found the statutory requirement for an application to request a VBM ballot (see 10 ILCS 5/19-2 (West 2018)) and the requirement to submit VBM ballots with the return envelope (see *id.*'s claims of 18,423 excess ballots and 3628 ballots without envelopes were sufficient to demonstrate a reasonable likelihood that a recount would change the outcome of the election. Thus, the court denied the motion to dismiss as to those claims. The court observed that Illinois law did not provide a "bright line rule" for apportioning illegal votes. Since DiFranco's proposed method was "technically and realistically plausible," the court accepted that method in its analysis, viewing the allegations in the light most favorable to the nonmoving party. The court interpreted DiFranco's explanation that his discovery recount allegations were "background information" as a concession that this claim was not an independent basis to contest the election.

The respondents filed a motion for summary judgment in August 2021.[2] To refute the claim that more VBM ballots were counted than requested, the motion attached

2. The Clerk filed a motion for summary judgment, which Fallon joined and adopted. For simplicity, we refer to the motion as the respondents' motion.

an affidavit from Edmund Michalowski, the Cook County Deputy Clerk for Elections. Michalowski attested that a voter would only receive a VBM ballot if requested and only VBM ballots returned by verified voters were counted. Regarding DiFranco's allegations of ballots counted without return envelopes, the respondents contended his claim was "factually incorrect and false." In support, the Clerk provided the court and DiFranco with hyperlinks and USB flash drives containing over 22,000 images of ballot return envelopes for the 52 precincts included in the discovery recount. The area for the voter's signature was redacted on each of the digital images. According to the respondents, this production of images demonstrated that only 117 return envelopes were missing, approximately 0.5%—far fewer than the 3628 claimed by DiFranco and too few to justify a recount since it could not alter the result.[3]

Before responding to the motion for summary judgment, the court allowed DiFranco to depose Michalowski.[4] Michalowski testified that the Clerk reviewed applications for VBM ballots to verify the requesting voter was registered to vote. Upon verification, a VBM ballot was mailed to each voter with a return envelope. Voters could return VBM ballots by mailing

3. The Clerk believed the "missing" return envelopes had in fact been returned by voters, but the Clerk had not yet located the envelopes by the time of its production of the images.

4. DiFranco attached a transcript of Michalowski's deposition testimony to a subsequent response to the respondents' motion for summary judgment.

their ballot through the post office or depositing their ballot in a drop box. He explained that after the Clerk received VBM ballots in envelopes, they were run through a machine that scanned the images of the envelopes and collected information. Then, the ballots were reviewed by a three-judge panel to compare signatures with voter signatures on file and otherwise verify the voter was qualified. Michalowski believed some ballots were rejected for nonmatching signatures, but he did not know how many. If not rejected, the envelopes were run through a second machine to collect information to record that the voter submitted a ballot in the election. That information would then be transmitted to the Clerk's data systems. Only after those processes were ballots separated from envelopes by hand and prepared for tabulation. Consistent with the answers to interrogatories he completed, Michalowski testified that zero VBM ballots were returned without a corresponding envelope and no such ballots were counted.

In December 2021, DiFranco filed both a brief opposing the motion for summary judgment and a motion for leave to file an amended petition. DiFranco asserted that "an error in the [Clerk's] redaction methodology" enabled him to review voter signatures on the ballot return envelopes. In a subsequent hearing, DiFranco's counsel explained that they found the redactions could be easily removed, making the signatures viewable. The proposed amended petition sought to add new allegations based on DiFranco's review of the envelope images. It alleged that (1) the Clerk modified the residency certification to be completed by the voter on each VBM

return envelope from the form prescribed in the Election Code, (2) 6350 ballot return envelopes had incomplete duration of residency certifications, (3) 25 ballot return envelopes had no signature, and (4) 1811 envelopes were signed by someone other than the voter or the signature was illegible.

In addition, DiFranco revised his claimed number of missing return envelopes from 3,628 to 455. That is, he now claimed there were only 455 fewer ballot return envelopes than VBM ballots counted. Nonetheless, the other irregularities DiFranco claimed to discover by reviewing the envelope images increased the number of ballots that he alleges should not have been counted to approximately 36% of the VBM ballots counted in the 52 precincts included in the discovery recount. Applying his proposed apportionment method to these figures, DiFranco would overcome his 502-vote deficit to Fallon by a greater margin than he claimed in his initial petition. For relief, DiFranco requested the court either order a recount and declare him elected or nullify the November 2020 election and order a special election for circuit judge for the 12th subcircuit.

DiFranco's brief opposing the respondents' motion for summary judgment echoed the new claims asserted in his proposed amended petition. He argued the number of additional irregularities he discovered by reviewing the envelope images demonstrated a reasonable likelihood that a recount would change the result of the election. In addition, he contended that the Clerk failed to provide an affidavit authenticating the return envelope images. To support the contention that 455 return envelopes were

missing, DiFranco attached an affidavit from Rezarta Melo, a paralegal who reviewed the images produced by the Clerk. Melo counted 22,006 envelopes—455 fewer than the 22,461 VBM ballots counted. DiFranco withdrew his claim that more VBM ballots were counted than requested.

The respondents replied that DiFranco's removal of the redactions to view voter signatures was "offensive and sanctionable." They considered voter signatures to be personal information that the Clerk had a duty to withhold from disclosure. Further, the respondents argued that since DiFranco alleged the signatures were viewable due to an error in the Clerk's redaction method, DiFranco understood the Clerk intended to redact the signatures and the transmission of viewable signatures was inadvertent. Thus, they claimed the Illinois Rules of Professional Conduct of 2010 obliged him to return the images and not review the signatures. See Ill. R. Prof'l Conduct (2010) R. 4.4(b) (eff. Jan. 1, 2016).

In addition, the respondents countered Melo's affidavit with an affidavit from Natalie Wilkins, an attorney employed by the firm representing Fallon. Wilkins asserted that Melo only counted the VBM envelope images in Portable Document Format (PDF) and failed to include 11 images from the original Agilis voting system and 259 Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) (52 U.S.C. §§ 20301-20311 (2018)) envelopes, which were produced in discovery. Including the Agilis and UOCAVA envelopes, the number of missing envelopes was 115, according to Wilkins.

The respondents also filed a brief opposing DiFranco's motion for leave to file an amended petition. They contended DiFranco was avoiding an impending summary judgment dismissing his petition. The amendment, they argued, abandoned his original allegations and added new claims. The respondents further argued the amendment was barred by the doctrine of *laches* [5] and DiFranco should be barred from amending his petition since his new claims were premised on his misconduct in removing the signature redactions.

DiFranco filed a surreply to the motion for summary judgment, contending that the Clerk lacked a legal basis to redact the signatures on the VBM envelopes to begin with. He further argued the signatures were a proper subject of discovery, entitling him to inspect them.

The court denied the respondents' motion for summary judgment on the basis that the motion lacked an affidavit to authenticate the return envelope images. The Clerk filed a motion to reconsider, along with a certification from James Nally, Legal Counsel for the Clerk, asserting that images of VBM return envelopes submitted in support of the motion for summary judgment are true and accurate copies of the envelopes the Clerk maintains as official

5. "*Laches* is an equitable defense asserted against a party who has knowingly slept upon his rights and acquiesced for a great length of time, [citation] and its existence depends on whether, under all circumstances of a particular case, a plaintiff is chargeable with want of due diligence in failing to institute proceedings before he did." (Internal quotation marks omitted.) *Tillman v. Pritzker*, 2021 IL 126387, ¶ 25, 451 Ill. Dec. 48, 183 N.E.3d 94.

public records. Fallon later joined the motion, and all parties agreed to treat the motion to reconsider as a renewed motion for summary judgment.

While the renewed motion for summary was pending, the court ruled on DiFranco's motion for leave to file an amended petition. In a written order entered February 3, 2022, the court analyzed DiFranco's motion, using the factors our supreme court set forth in *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 586 N.E.2d 1211, 166 Ill. Dec. 882 (1992)—referred to as the *Loyola* factors—for determining whether leave should be granted to file an amended complaint.

First, the court observed that DiFranco's proposed amendment would not cure any deficiencies in his original petition but would address his original petition's "ultimate deficiency identified by the [respondents'] motion for summary judgment"—whether there were enough challenged ballots to change the outcome of the election.

The respondents, however, would be prejudiced by allowing the amendment, the court found. The respondents had litigated the initial claims for over a year and would have to defend new claims.

In addition, the court found DiFranco's request was untimely. The court observed that DiFranco reviewed the same VBM return envelopes during the discovery recount when the defects underlying his new claims were observable. So, the new claims could have been included in his initial petition. The court rejected DiFranco's

contentions that the Clerk inhibited him from discovering the defects, either during the discovery recount or discovery during the pendency of his election contest.

DiFranco had earlier opportunities to seek to amend his petition, the court found, but failed to do so until after he filed a response to the respondents' motion for summary judgment. The court noted that delay is disfavored in an election contest and litigants are expected to act with "'[e]xtreme'" diligence in such cases, which DiFranco had failed to show. *Trump v. Biden*, 2020 WI 91, ¶ 11, 394 Wis. 2d 629, 951 N.W.2d 568 (quoting 29 C.J.S. *Elections* § 459 (Aug. 2023 Update)). Finally, upon weighing the *Loyola* factors, the court denied DiFranco's motion for leave to file an amended petition.

Aside from the *Loyola* factors, the court found the doctrine of *laches* barred DiFranco from amending his petition, at least for his claims regarding the Clerk's modification of the residency certification and voter failure to complete the number of years and months. The Clerk's modification was apparent before the election. Since DiFranco could have raised these issues before the election, the court reasoned, it would be unfair to invalidate votes for the thousands of voters who relied on the Clerk's preprinted certification to cast their ballots.

Additionally, the court found DiFranco's counsel's removal of the electronic redactions violated rules governing professional conduct and discovery. The court observed that DiFranco's attorneys knew the Clerk had intended to redact voter signatures to prevent them from being viewed. In an October 2021 status hearing,

counsel for DiFranco mentioned that signatures had been redacted and proposed conferring with the Clerk to submit an agreed protective order but failed to follow through with the suggestion. Nevertheless, the court took counsel's representation as his acknowledgement that the signatures were confidential. DiFranco never attempted to compel production of unredacted images. When DiFranco's attorneys discovered the redactions could be removed, "they knew what they were doing was contrary to what the Clerk intended when it provided the envelopes to the Court and counsel." The court reasoned that the Clerk's submission of the VBM envelope images without "foolproof" redactions was akin to an inadvertently sent document. So, upon DiFranco's attorneys' discovery that they could manipulate the redactions to view the signatures, Rule 4.4(b) of the Illinois Rules of Professional Conduct of 2010 was implicated. In the court's view, whether the signatures were required to be kept confidential was irrelevant. Instead, sanctions were appropriate if the party "acted willfully, in bad faith, and with fault in a way that abused the judicial process in collecting [the information]." *Xyngular v. Schenkel*, 890 F.3d 868, 874 (10th Cir. 2018). Since DiFranco, through his counsel, "decided for himself" to remove the redactions instead of raising the issue so the court could decide, the court determined sanctions were appropriate.

DiFranco filed a memorandum opposing the respondents' renewed motion for summary judgment. DiFranco attached a second affidavit from Melo to respond to Wilkins's affidavit. Melo revised her own count of missing envelopes to 439.

Appendix B

After hearing argument from the parties, the court took the motion for summary judgment under advisement. In a written order entered May 11, 2022, the court granted the respondents' motion and entered judgment in their favor. The court noted DiFranco's allegation that VBM ballots lacking a return envelope were improperly counted was the sole claim remaining. The court further noted that the relevant evidence consisted of (1) DiFranco's "watcher" affidavits, which, taken together, attest that the Clerk produced 3628 fewer envelopes than VBM ballots counted for the precincts included in the discovery recount, (2) the over 22,000 images of return envelopes the Clerk submitted, (3) competing affidavits from Melo and Wilkins regarding the number of return envelopes the Clerk had produced in discovery, and (4) Michalowski's deposition testimony.

First, the court addressed DiFranco's contention that the court could not consider the images of return envelopes. The court observed the hearsay rule was not applicable since the images were offered as evidence of their existence—proof they were not missing—not for the truth of any matter asserted on the envelopes. The court found the images were admissible as authenticated public records under Illinois Rule of Evidence 901 (eff. Sept. 17, 2019). The images were authenticated by (1) Nally's affidavit stating they were true and accurate copies of the originals maintained by the Clerk, (2) Michalowski's testimony describing how return envelopes were received, scanned, and saved, and (3) characteristics apparent from the images, including the title "Official Suburban Cook County Ballot Return Envelope," bar codes, date stamps, and printed names of voters. Other than contesting

whether Nally had compared the images to the originals, the court observed, DiFranco offered nothing to dispute their authenticity.

Next, the court observed the competing affidavits offered different figures as to how many envelopes had been produced: Watkins said all but 115; Melo said 439 were missing. Viewing the evidence in the light most favorable to the nonmoving party, the court used DiFranco's count of 439. That number equated to 1.954% of the 22,461 VBM ballots counted from the 52 precincts included in the discovery recount. Applying DiFranco's proposed method for projecting the likely results of a subcircuit-wide recount, the court calculated that a rate of 1.954% VBM ballots without an envelope leads to an expected 1398 missing envelopes for the entire subcircuit.

Then, the court noted that missing envelopes could not be tied to a corresponding VBM ballot. Thus, proportional allocation of disqualified VBM ballots was the only remedy. The court observed that DiFranco proposed a "novel" method for allocating disqualified votes. Instead of proportional reduction based on precinct results, DiFranco argued the voting tendency of all VBM voters was a better predictor of how a VBM ballot was cast. Applying DiFranco's method, however, the court calculated that DiFranco would only reduce the margin by 357 votes. That is, Fallon would lose 873 votes (62.85% of 1389) while DiFranco would lose 516 (37.15% of 1389).[6]

6. For these calculations, the court used the number 1389 instead of 1398—flipping 8 and 9. The error made no difference to the conclusion.

Thus, even using DiFranco's novel method, he would not overcome his 502-vote deficit.

Finally, the court added that its analysis excluded the possibility that the Clerk might prove VBM ballots were properly counted, despite the disparity in VBM ballots and envelopes produced. In addition, Fallon would be able to contest ballots in a recount, which may counteract his net gain from disqualified ballots. Thus, viewing the evidence in the light most favorable to DiFranco, the court concluded "there do not appear to be any likely circumstances in which a recount will alter the results of this election."

DiFranco filed a timely notice of appeal from the trial court's orders denying his motion for leave to file an amended petition and granting the respondents' motion for summary judgment.

II. ANALYSIS

A. Jurisdiction

This court is obliged to consider its own jurisdiction, even when no party raises the issue. *Daewoo Int'l v. Monteiro*, 2014 IL App (1st) 140573, ¶ 72, 387 Ill. Dec. 891, 23 N.E.3d 583. Likewise, we are obliged to take notice of matters that go to the jurisdiction of the circuit court in the case before us. *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 334, 770 N.E.2d 177, 264 Ill. Dec. 283 (2002). Apart from the power to review administrative actions as conferred by statute, a

circuit court's subject matter jurisdiction extends only to "'justiciable matters.'" *Id.* (quoting Ill. Const. 1970, art. VI, § 9). "[A] 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Id.* at 335. When a court cannot grant effectual relief to the complaining party, an action is considered moot. *In re Marriage of Eckersall*, 2015 IL 117922, ¶ 9, 390 Ill. Dec. 89, 28 N.E.3d 742.

Effectual relief does not exist when any judgment rendered would have no practical effect. 1A C.J.S. *Actions* § 75 (Sept. 2023 Update). Here, a court could determine whether DiFranco was elected, but a declaration that DiFranco was elected would not automatically put him in office. Fallon took the oath of office, assumed office, and continues to occupy the office formerly held by Hanlon. Two people cannot occupy a single judicial office, and the courts cannot create an additional judicial office. *McDunn v. Williams*, 156 Ill. 2d 288, 305-10, 620 N.E.2d 385, 189 Ill. Dec. 417 (1993). For DiFranco to take office, Fallon would have to be removed. Accordingly, effectual relief for DiFranco would mean both declaring him elected and removing Fallon.

Removal from public office requires more than a declaration that another candidate was elected to that office. The Election Code only provides for the court hearing a contest of an election for public office to declare a person elected. See 10 ILCS 5/23-26 (West 2018). It does not expressly provide for the removal of a candidate who

has assumed office. Courts have no inherent power to hear election contests and may only do so in the manner dictated by statute. *Pullen v. Mulligan*, 138 Ill. 2d 21, 32, 561 N.E.2d 585, 149 Ill. Dec. 215 (1990). Thus, it appears the Election Code does not give the circuit court authority to remove a person occupying public office through an election contest.

We note that the supreme court found effectual relief was available and the contestant ultimately prevailed in the judicial election contest involved in *McDunn v. Williams*. *McDunn*, 156 Ill. 2d at 330. In *McDunn*, however, the election contest was not moot due to the case's "unique facts." *Id.* at 325. Specifically, the trial court suppressed the results of the 1990 general election—effectively enjoining certification of Williams' election—and preserved the status quo. *Id.* Thus, Williams had not filled the judicial vacancy at issue. Rather, he occupied the position by appointment until the vacancy was filled. So, when the supreme court rendered its decision in favor of McDunn and ordered that she be installed, the court did not remove Williams from office. His appointment expired under its own terms. Thus, *McDunn* did not pose the question of removal of a sitting judge, as we face here. No court enjoined certification of Fallon's election or otherwise prevented her from taking office. The status quo was not preserved.

The historical method to remove a person who is illegally occupying a public office is to obtain a judgment of ouster through an action in *quo warranto*. *Goral v. Dart*, 2020 IL 125085, ¶ 79, 450 Ill. Dec. 384, 181 N.E.3d

736; see *Snowball v. People ex rel. Grupe*, 147 Ill. 260, 35 N.E. 538 (1893) (affirming judgment of ouster in *quo warranto* proceeding following successful election contest). Our supreme court contemplated that a *quo warranto* proceeding was the appropriate action to oust a trial court judge alleged to be unlawfully holding the office in *People ex rel. Jonas v. Schlaeger*, 381 Ill. 146, 156, 45 N.E.2d 30 (1942). The *Jonas* decision, however, predated our current state constitution. The Illinois Constitution of 1970 vests authority to remove a sitting judge in the Courts Commission. Ill. Const. 1970, art. VI, § 15(e)(1). It is unclear whether the Court's Commission's authority to remove a judge is exclusive.

Nevertheless, a judgment declaring a judicial election contestant duly elected would seem to be a prerequisite to pursue the removal of a sitting judge—either through a *quo warranto* proceeding or a complaint filed with the Judicial Inquiry Board—on the basis that the sitting judge was not duly elected. Thus, while an election contest would not afford DiFranco complete relief, a declaration that he was duly elected would be necessary for the ultimate remedy he seeks—removing Fallon and assuming office. For that reason, a favorable judgment would have a practical effect. Therefore, we find this matter is justiciable and not moot.

B. Leave to File an Amended Petition

We next address DiFranco's claim that the trial court abused its discretion in denying his motion for leave to file an amended petition. The general principle liberally

allowing for amendments before a final judgment is entered in civil cases applies in election contests. *In re Durkin*, 299 Ill. App. 3d 192, 203, 700 N.E.2d 1089, 233 Ill. Dec. 381 (1998). A party's right to amend a pleading, however, is not absolute. *Avila v. Chicago Transit Auth.*, 2021 IL App (1st) 190636, ¶ 56, 453 Ill. Dec. 162, 187 N.E.3d 136. The decision whether to grant leave to amend a pleading rests within the sound discretion of the circuit court. *Atlas v. Mayer Hoffman McCann, P.C.*, 2019 IL App (1st) 180939, ¶ 39, 436 Ill. Dec. 952, 143 N.E.3d 781. We will not reverse the circuit court's decision absent an abuse of discretion. *I.C.S. Illinois, Inc. v. Waste Management of Illinois, Inc.*, 403 Ill. App. 3d 211, 219, 931 N.E.2d 318, 341 Ill. Dec. 710 (2010).

When reviewing whether the circuit court abused its discretion, we consider the following *Loyola* factors: "'(1) whether the proposed amendment would cure the defective pleading; (2) whether other parties would sustain prejudice or surprise by virtue of the proposed amendment; (3) whether the proposed amendment is timely; and (4) whether previous opportunities to amend the pleading could be identified.'" *Hayes Mechanical, Inc. v. First Industrial, L.P.*, 351 Ill. App. 3d 1, 7, 812 N.E.2d 419, 285 Ill. Dec. 599 (2004) (quoting *Loyola Academy*, 146 Ill. 2d at 273). Our primary consideration, however, is whether amendment would further the ends of justice. *Id.* If so, denial of leave to amend is an abuse of discretion. *Atlas*, 2019 IL App (1st) 180939, ¶ 39.

As the circuit court observed here, the new allegations asserted in DiFranco's proposed amendment did not cure defects in his original claims but instead addressed the

deficiency identified in the respondents' then-pending motion for summary judgment. The court went on to explain that the proposed petition "identifie[d] several thousand more votes, which, if disallowed, may be sufficient to change the outcome of the election." Later, the court described the proposed amendment as a new set of claims.

Asserting new bases to contest an election, rather than curing defects in an initial election contest petition, makes a crucial difference. In general, when a proposed amendment seeks to add a new claim for relief based on different facts—instead of curing a defect in an original pleading—the first *Loyola* factor is not satisfied. See *United Conveyor Corp. v. Allstate Ins. Co.*, 2017 IL App (1st) 162314, ¶ 40, 419 Ill. Dec. 150, 92 N.E.3d 561 (finding amendment properly denied when the plaintiff's amended complaint added a new cause of action instead of curing a defective pleading). In election contests, courts have allowed amendments when the amendment maintains the same grounds previously stated but alleges more detail to support those grounds or the amendment otherwise corrects technical matters. 26 Am. Jur. 2d *Elections* § 414 (May 2023 Update). Such amendments relate back to the original petition. *Id.* But when the amendment contains allegations and grounds to contest the election that did not appear in the original pleading, courts have generally refused to allow amendment. *Id.*

Here, DiFranco asserts the allegations in his proposed amendment were not new claims but merely clarified his original claims since all his claims were premised on the same provisions of the Election Code. We disagree. The

Election Code requires a person desiring to contest an election to file a verified petition "setting forth *the points* on which [they] will contest the election." (Emphasis added.) 10 ILCS 5/23-20 (West 2018). DiFranco's original petition sets forth certain points on which he would contest the election, mainly improperly counted ballots based on the discrepancy between the number of VBM ballots counted and the number of VBM ballot return envelopes the Clerk produced. In his proposed amended petition, DiFranco did not cure any defect in the "points" he originally pled for contesting the election. Rather, DiFranco's proposed amended petition sought to assert new "points" on which he would contest the election—the Clerk's preprinted certification varying from the statutory form, incomplete voter residency certification, illegible signatures, and so on. None of those new allegations related to the number of VBM ballot return envelopes or any other point raised in DiFranco's original petition. These were entirely new factual bases for contesting the election. Since his proposed amended petition would not cure a defective pleading, DiFranco failed to demonstrate the first *Loyola* factor.

Moreover, we believe amendment to add new claims in an election contest after the 30-day period for filing such an action should be highly disfavored. See *id.* (providing that an election contestant must file within 30 days after the elected person is declared elected). Election contests are unlike the typical litigation brought before the courts. *Carey v. Elrod*, 49 Ill. 2d 464, 470, 275 N.E.2d 367 (1971). Such actions are intended to be disposed of promptly (*Waupoose v. Kusper*, 8 Ill. App. 3d 668, 671, 290 N.E.2d

903 (1972)) and the public has an interest in the stability and finality of election results (29 C.J.S. Elections § 467 (Aug. 2023 Update); see *Doelling v. Board of Education of Community School District No. 88*, 17 Ill. 2d 145, 146, 160 N.E.2d 801 (1959) ("In election contests there must be finality ***.")). "[E]lection contests are meant to afford a simple and speedy means of contesting elections to stated offices and to achieve a full and fair litigation of election disputes in an expeditious manner." 26 Am. Jur. 2d *Elections* § 384 (May 2023 Update). A losing candidate using an election contest to search for new grounds to overturn an election through protracted litigation when the initial bases of the contest lack merit, as DiFranco attempted here, undermines the stability and finality of the election result as well as the expedient disposition of the contest. See *Zahray v. Emricson*, 25 Ill. 2d 121, 124, 182 N.E.2d 756 (1962) ("the proceeding cannot be employed to allow a party, on mere suspicion, to have the ballots opened and subjected to scrutiny to find evidence upon which to make a tangible charge").

We further find that allowing amendment in this case would not further the ends of justice. An amendment does not further the ends of justice if it fails to state a viable cause of action. *Hayes Mechanical*, 351 Ill. App. 3d at 7. "[W]hen ruling on a motion to amend, the court may consider the ultimate efficacy of a claim as stated in a proposed amended pleading." *Id.* DiFranco's proposed amendment sought to contest the election on the grounds that (1) the Clerk's preprinted certification did not conform to the prescribed form provided in section 19-5 of the Election Code (10 ILCS 5/19-5 (West 2018)), (2) the years

and months spaces to state the voter's length of residency were not completed on 6350 envelopes, (3) 25 envelopes had no signature, and (4) 1811 envelopes were either signed by another member of the voter's household or the signature was illegible. These allegations fail to demonstrate a reasonable likelihood that a recount would change the result of the election.

Election authorities are to furnish voters voting by mail with envelopes bearing a printed certification "substantially" in the form set forth in section 19-5 (*id.*), stating, in relevant part, "I have lived at such address for .... months last past." For the 2020 general election, the Clerk furnished envelopes with a printed certification reading, in relevant part, "I certify that I have (or will have) lived at the following address for at least 30 days before Election Day. I have lived here for years and months." In substance, both versions convey that the voter meets the residency requirement to vote in the election district, which is 30 days preceding the election. See *id.* § 3-1. So, we find the Clerk's version is substantially in the form provided in section 19-5.

Apart from that, the Clerk's deviation does not invalidate the ballots. "Strict compliance with all applicable provisions in the Election Code is not necessary *** to sustain a particular ballot." *Calloway v. Chicago Bd. of Election Commissioners*, 2020 IL App (1st) 191603, ¶ 11, 440 Ill. Dec. 739, 155 N.E.3d 509. "Failure to comply with a mandatory provision renders the affected ballots void, whereas technical violations of directory provisions do not affect the validity of the affected ballots." *Id.* A provision of the Election Code is mandatory if the statute

"'expressly states that failure to act in the manner set out in the statute will void the ballot.'" *Id.* ¶ 18 (quoting *Pullen*, 138 Ill. 2d at 46). But if the provision simply prescribes the performance of certain acts in a specified manner without an express consequence in the event of noncompliance, the provision will generally be deemed directory. *Id.* we construe section 19-5 as directory. Accordingly, any claimed noncompliance with the statute cannot result in disqualification of the affected ballots.

We also observe that the Clerk's version was redundant since the number of years and months a voter resided at their address is irrelevant if they have lived there for 30 days before the election. With the preprinted certification already stating so, voters could reasonably consider it unnecessary to complete the number of years and months. Thus, "incomplete residency" on 6350 envelopes did not render those ballots illegal.

Additionally, DiFranco claims that 25 envelopes lacked a signature and 1811 envelopes were either "signed by a member of the household other than the named voter, included the handwritten notation 'REMAKE' or 'Deceased' on the return envelope, or had wholly illegible signatures." DiFranco groups the 1811 envelopes with these claimed defects as "other irregularities." We find DiFranco's allegations related to voter signatures are insufficient to establish that any of these 1836 ballots should have been disqualified.

The General Assembly enacted Public Act 101-642 (eff. Jun. 16, 2020) to temporarily amend the Election Code for the Conduct of the 2020 General Election. Public Act

101-642 provided that "any vote by mail ballot received by an election authority shall be presumed to meet the requirements of Articles 17, 18, and 19 and the voter shall be deemed otherwise qualified to cast a vote by mail ballot unless deemed invalid as provided in [section 2B-20]." *Id.* § 10 (adding 10 ILCS 5/2B-20(b)). The election authority was to submit received VBM ballots to panels of three election judges to compare signatures and verify that the voter was duly registered and had not already cast a ballot. *Id.* § 10 (adding 10 ILCS 5/2B-20(c)). A VBM ballot could only be rejected if all three judges voted to reject the ballot for any of five enumerated reasons: (1) that the signatures did not match, or the envelope was unsigned, (2) the ballot envelope was delivered opened, (3) the voter had already cast a ballot, (4) the voter voted in person on election day, or (5) the voter was not duly registered in the precinct. *Id.* If the ballot was rejected, the election authority was required to notify the voter. *Id.* § 10 (adding 10 ILCS 5/2B-20(d)). If the ballot was rejected based on the signature or lack thereof, the voter could submit a statement asserting that they cast the ballot. *Id.* Upon receipt of the voter's statement, the ballot was to be determined valid and counted. *Id.* Accordingly, a nonmatching signature on a return envelope did not disqualify a ballot *per se*. Rather, it was a basis only to reject a ballot preliminarily, subject to voter affirmation.

Although DiFranco's brief acknowledges these provisions of Public Act 101-642 governed the 2020 General Election, he fails to explain how the irregularities he claims should have disqualified the affected ballots. We presume that DiFranco means to argue that the

1836 ballot envelopes should have been rejected for nonmatching signatures or lack of a signature. However, the plain language of Public Act 101-642 assigned review of envelope signatures to the discretion of panels of elections judges, and the presumption of a match could only be overcome by the unanimous decision of all three. Since the election judges' decisions were discretionary acts, we find those decisions are not judicially reviewable.

"Where the legislature leaves a matter to executive discretion, *** the judiciary may not interfere with such discretion under normal circumstances without offending the principle of separation of powers." *Bigelow Group, Inc. v. Rickert*, 377 Ill. App. 3d 165, 173, 877 N.E.2d 1171, 315 Ill. Dec. 842 (2007). Thus, "discretionary acts of public officials carrying out their duties are not subject to review by the judiciary" unless the public official abuses their discretion "or if fraud, corruption, or gross injustice underlying the discretionary act is shown." *Illinois Federation of Teachers v. Board of Trustees*, 191 Ill. App. 3d 769, 773, 548 N.E.2d 64, 138 Ill. Dec. 834 (1989). "[A] court should concern itself with discretionary acts of the other branches of government only where such acts may violate the law or where the empowering legislative act calls for such judicial review." *Bigelow Group*, 377 Ill. App. 3d at 174.

Here, DiFranco's proposed amended petition makes no allegations to support that any fraud, corruption, or gross injustice was involved in the election judges' comparison of signatures. And judicial review for an abuse of their discretion is impractical. The Election Code and

Public Act 101-642 provide no criteria for determining whether signatures match. There is no standard to apply. See *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 498, 524 N.E.2d 561, 120 Ill. Dec. 531 (1988) (observing that whether a statute contains "standards, goals, or criteria by which a court may evaluate agency action" is a factor in determining the reviewability of an agency's action). Illegibility is not a basis to invalidate a signature, and virtually anything counts as a signature. See 80 C.J.S. *Signatures* § 9 (Aug. 2023 Update) ("An illegible signature will not affect the validity of an instrument."); Black's Law Dictionary 1387 (7th ed. 1999) (defining "signature" as "A person's name or mark written by that person or at the person's direction."). Any recount procedure would amount to substituting the reviewer's judgment for that of the election judges.[7] We do not believe the legislature intended for such a procedure to occur in a recount. Instead, the Election Code defers to the judgment of the election judges. Since the legislature gave no direction on how to compare signatures and assigned the determination to the election judges, we believe the legislature intended for their judgment to be final and not judicially reviewable. *Cf.* 10 ILCS 5/19-8(g-5) (West 2018) (expressly providing that election judges' determination as to the validity of contested vote by mail ballots is unreviewable). Accordingly, VBM ballots cannot be invalidated based on the election judges' discretionary decisions regarding the envelope signatures.

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7. Or the "judgment" of a computer. DiFranco's counsel suggested to the trial court that artificial intelligence (AI) software could be used for signature comparison.

In addition, DiFranco's allegations do not foreclose that ballots may have been initially rejected for the very reasons he points out but later properly counted if the voter submitted a statement that they cast the ballot. See Public Act 101-642 § 10 (eff. June 16, 2020) (adding 10 ILCS 5/2B-20(d)). Election judges are presumed to have performed their statutory duties. *McDunn*, 156 Ill. 2d at 318. Further, invalidating ballots in a recount based on the signature would deprive the voter of their right to affirm that they cast the ballot.

We further observe that the voter's signature on a VBM return envelope is just one among several overlapping measures in the Election Code aimed at ensuring that only votes of qualified electors are counted. To be sure, the fact that voters reside in the election district, among other things, is what qualifies them to vote—not whether they have certified so. At no point did DiFranco make allegations—or offer proof—to demonstrate that even a single ballot was counted that was not cast by a duly qualified voter.

Accordingly, we find DiFranco's proposed amended petition failed to allege facts demonstrating a reasonable likelihood that a recount would change the result of the election. To be sure, none of the irregularities he claimed are bases to categorically disqualify votes. When a proposed amendment fails to state a viable claim, courts need not proceed with further analysis of the *Loyola* factors. *Hayes Mechanical*, 351 Ill. App. 3d at 7. Since we find the amended petition legally insufficient, we conclude that the circuit court did not abuse its discretion

in denying leave to file an amended petition. Having resolved the issue on these grounds, we need not consider the parties' other contentions.

B. Summary Judgment

Next, we consider DiFranco's claim that the circuit court erred in granting the respondents' motion for summary judgment. "The purpose of summary judgment is not to try a question of fact, but to determine if one exists." *Robidoux v. Oliphant*, 201 Ill. 2d 324, 335, 775 N.E.2d 987, 266 Ill. Dec. 915 (2002). "Summary judgment is to be encouraged in the interest of prompt disposition of lawsuits, but as a drastic measure it should be allowed only when a moving party's right to it is clear and free from doubt." *Pyne v. Witmer*, 129 Ill. 2d 351, 358, 543 N.E.2d 1304, 135 Ill. Dec. 557 (1989). We review the circuit court's grant of summary judgment *de novo*. *First Am. Bank v. Poplar Creek, LLC*, 2020 IL App (1st) 192450, ¶ 20, 453 Ill. Dec. 811, 188 N.E.3d 780. "Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file, viewed in the light most favorable to the nonmoving party, reveal that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." *Jones v. Live Nation Entertainment, Inc.*, 2016 IL App (1st) 152923, ¶ 28, 407 Ill. Dec. 527, 63 N.E.3d 959.

A defendant moving for summary judgment bears the initial burden of proof. *Nedzvekas v. Fung*, 374 Ill. App. 3d 618, 624, 872 N.E.2d 431, 313 Ill. Dec. 448 (2007). The defendant meets their burden either by (1) affirmatively demonstrating that some element of the case must be

resolved in their favor or (2) establishing the plaintiff lacks sufficient evidence to prove an essential element of the cause of action. *Williams v. Covenant Medical Center*, 316 Ill. App. 3d 682, 688, 737 N.E.2d 662, 250 Ill. Dec. 40 (2000).

If a defendant satisfies the initial burden, the burden shifts to the plaintiff to present a factual basis that would arguably entitle that party to a favorable judgment. *Nedzvekas*, 374 Ill. App. 3d at 624. "While a plaintiff does not need to prove its entire case during summary judgment, it must present some evidentiary facts as support for its cause of action." *Nat'l Tractor Parts Inc. v. Caterpillar Logistics Inc.*, 2020 IL App (2d) 181056, ¶ 38, 446 Ill. Dec. 566, 171 N.E.3d 1. However, the plaintiff must present a *bona fide* factual issue. *Morrissey v. Arlington Park Racecourse, LLC*, 404 Ill. App. 3d 711, 724, 935 N.E.2d 644, 343 Ill. Dec. 636 (2010). Specifically, the plaintiff must either demonstrate that a genuine issue of material fact exists—that material facts are disputed—or that reasonable people could draw different inferences from the undisputed facts. *Ill. Ins. Guar. Fund v. Priority Transp.*, 2019 IL App (1st) 181454, ¶ 53, 438 Ill. Dec. 401, 146 N.E.3d 155. The plaintiff cannot rely on general conclusions of law or allegations in their pleading to raise a genuine issue of material fact. *Morrissey*, 404 Ill. App. 3d at 724; *800 S. Wells Commer. LLC v. Cadden*, 2018 IL App (1st) 162882, ¶ 26, 422 Ill. Dec. 511, 103 N.E.3d 875. Likewise, "[m]ere speculation, conjecture, or guess is insufficient to withstand summary judgment." *Sorce v. Naperville Jeep Eagle, Inc.*, 309 Ill. App. 3d 313, 328, 722 N.E.2d 227, 242 Ill. Dec. 738 (1999).

Appendix B

Among other arguments in his brief, DiFranco contends the trial court's order granting summary judgment "disregarded the allegations" of his petition and "ignored section 23-23.2 of the Election Code." That statute provides: "A court hearing an election contest pursuant to this Article or any other provision of the law shall grant a petition for a recount properly filed where, *based on the facts alleged in such petition*, there appears a reasonable likelihood the recount will change the results of the election." (Emphasis added.) 10 ILCS 5/23-23.2 (West 2018). DiFranco appears to argue he was entitled to a recount based on the allegations in his petition alone and the court should not have considered the evidence submitted in connection with the motion for summary judgment. Though not spelled out, DiFranco's argument implies that section 23-23.2 confines the court to consider only the petition's allegations, taken as true on their face, in deciding whether to order a recount. In other words, DiFranco would have us interpret section 23-23.2 to mean that a contestant need only make out a legally sufficient petition to ensure the petition cannot be challenged by a motion for summary judgment. We reject this interpretation.

The primary objective in construing a statute is to ascertain and give effect to the intention of the legislature. *Cothron v. White Castle System, Inc.*, 2023 IL 128004, ¶ 20. The best indicator of legislative intent is the statute's language itself, given its plain and ordinary meaning. *Id.* When the language is clear and unambiguous, we must apply the statute without resort to further aids of statutory construction. *Id.* In determining legislative intent, we may also consider the consequences that would result from

construing the statute one way or the other. In doing so, we presume that the legislature did not intend absurd, inconvenient, or unjust consequences. *Home Star Bank & Fin. Servs. v. Emergency Care & Health Organization, Ltd.*, 2014 IL 115526, ¶ 24, 379 Ill. Dec. 51, 6 N.E.3d 128.

The plain language of section 23-23.2 calls upon the circuit court to determine the reasonable likelihood that a recount would change an election result "based on the facts alleged in the petition." However, the statute does not identify a particular procedure for making this determination, and the phrase "based on the facts alleged in the petition" is arguably ambiguous. "A statute is ambiguous when it is capable of being understood by reasonably well-informed persons in two or more different senses." *Id.* A court's determination "based on the facts alleged in the petition" could either mean (1) the court merely determines whether the petition's factual allegations, taken as true, are sufficient or (2) the court determines whether the allegations are sufficient subject to any procedures the litigants invoke as would normally be available in civil ligation. In the former sense, the court would be limited to the four corners of the petition. But in the latter sense, the court could consider evidence offered by the litigants supporting or refuting the allegations, such as occurs when reviewing a motion for summary judgment. In either sense, the court's decision would be "based on the facts alleged in the petition."

When a statute contains ambiguous language, we may look to tools of interpretation, such as the doctrine of *in pari materia*, to ascertain the meaning of a provision. *People v. Taylor*, 221 Ill. 2d 157, 163, 850 N.E.2d 134,

302 Ill. Dec. 697 (2006). The doctrine of *in pari materia* directs us to consider two statutes on the same subject with reference to each other to give them harmonious effect. *Id.* at 161 n.1. Section 23-23 of the Election Code (10 ILCS 5/23-23 (West 2018)) provides that election contests "shall be tried in like manner as other civil cases." Applying the Statute on Statutes (5 ILCS 70/0.01 *et seq.* (West 2006)), this court has found that the Election Code's reference to "other civil cases" "incorporate[s] into election contest cases the provisions contained in the Civil Practice Law." *Peet v. Voots*, 386 Ill. App. 3d 404, 407, 896 N.E.2d 1127, 324 Ill. Dec. 908 (2008); see 5 ILCS 70/1.22 (West 2018) ("'Other civil cases' *** shall be deemed to refer to cases under the Civil Practice Law *** and the Supreme Court Rules ***."). The Civil Practice Law is contained in article II of the Code of Civil Procedure (735 ILCS 5/2-101 *et seq.* (West 2018)). *Peet*, 386 Ill. App. 3d at 407; see 735 ILCS 5/1-101 (West 2018). Article II includes a provision allowing litigants to move for summary judgment. 735 ILCS 5/2-1005 (West 2018). Therefore, to give harmonious effect to section 23-23 and section 23-23.2, we find that a petition may be challenged by a motion for summary judgment before a court determines whether to grant a recount.

Turning to DiFranco's other contentions, he complains that the respondents' motion "failed to identify a legal basis for summary judgment." We disagree. The legal basis was obvious, and the respondents' motion stated it explicitly—a recount would not likely result in a different election outcome. DiFranco's responses and the court's decision reveal the legal basis for the motion was not lost on them. We need not address this argument further.

DiFranco offers several arguments attacking whether VBM envelope images were proper evidence to support the respondents' motion. He alternatively contends that the VBM envelope images (1) were not properly submitted to the court as exhibits, (2) were not properly authenticated, and (3) were not admissible under the public records hearsay exception (Ill. R. Evid. 803(8) (eff. Jan. 25, 2023)).

As to submission, DiFranco notes that the envelope images were stored on a drive maintained by the law firm representing the Clerk and accessible by hyperlinks embedded in the electronic copies of certain documents filed in the case. DiFranco contends this method failed to introduce the envelope images into evidence since, as he posits, the Clerk of Courts Act (see 705 ILCS 105/16(6) (West 2018)) contemplates that the court clerk must be able to take custody of any filed documents and make them available for public access. We need not determine whether hyperlinks to items stored on a private drive is a proper method of introducing exhibits to support a motion. In addition to the hyperlinks, the record demonstrates that the Clerk also submitted the images via USB flash drive. The court clerk can take custody of such drives, and courts have long accepted exhibits submitted in this format. In our view, the hyperlinks were akin to a courtesy copy provided for convenience.

As to authentication, DiFranco alleges Nally's certification is deficient under Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) for failing to set forth the basis of his personal knowledge that the images were true and correct copies of the VBM return envelopes kept

by the Clerk. Indeed, Nally's certification fails to do so. DiFranco, however, did not raise this precise objection before the trial court. A party cannot attack the sufficiency of an affidavit for the first time on appeal. *Andrews v. AT World Props., LLC*, 2023 IL App (1st) 220950, ¶ 30. Below, DiFranco argued that Nally's certification was deficient since the Clerk's counsel stated in an email communication that Nally did not personally count the envelopes. That argument challenged the fact of whether Nally had sufficient personal knowledge to authenticate the images, not whether his certification was deficient on its face, as he argues on appeal.

Notwithstanding that issue, the record apart from Nally's certification was sufficient to authenticate the VBM envelope images. "[T]he bar for authentication of evidence is not particularly high." (Internal quotation marks omitted.) *People v. Watts*, 2022 IL App (4th) 210590, ¶ 82. "[T]he standard for authentication, and hence for admissibility, is one of reasonable likelihood" that the evidence is what it is purported to be. (Internal quotation marks omitted.) *People v. Reynolds*, 2021 IL App (1st) 181227, ¶ 57, 184 N.E.3d 344; see Ill. Evid R. 901(a) (eff. Sep. 17, 2019) ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). As the trial court noted, Michalowski testified in his deposition that the envelopes were scanned after being received. Additionally, the images themselves support their authenticity. The distinctive characteristics of an item taken in conjunction with the circumstances may

serve as evidence of authentication. Ill. Evid. R. 901(b)(4) (eff. Sep. 17, 2019). As the trial court noted, each image shows an election envelope in the same form bearing the title "Official Suburban Cook County Ballot Return Envelope" as well as bar codes, date stamps, and printed names of voters. The images also indicate the voter's precinct. Indeed, Melo's affidavit included a spreadsheet in which she tallied the number of envelope images by each of the 52 precincts in the discovery recount. Thus, the respondents demonstrated a reasonable probability that the images were authentic copies of the VBM return envelopes for the 52 precincts included in the discovery recount. DiFranco offered no evidence to refute their authenticity. We reject his contention that the Clerk's redactions negated their authenticity. "In general, most editing will not render evidence inadmissible but rather will go to the weight of that evidence." *People v. Taylor*, 2011 IL 110067, ¶ 44, 956 N.E.2d 431, 353 Ill. Dec. 569.

We also observe DiFranco's argument that the VBM envelope images do not meet the public records hearsay exception is irrelevant because they are not hearsay. Though the respondents cited the hearsay exception in their motion, the images were not offered for the truth of any matter asserted on the envelopes. The envelopes themselves were offered solely to demonstrate their existence.

We turn to consider the motion for summary judgment itself. Although our review is *de novo*, our consideration of the motion leads to the same reasoning and conclusion the trial court reached. By the time the motion was taken

under advisement, DiFranco's sole claim was that VBM ballots were improperly counted since the ballots were submitted without the required return envelope. Notably, DiFranco produced no direct evidence demonstrating this occurred. To be sure, the Clerk's answers to DiFranco's interrogatories and Michalowski's deposition testimony indicated that no VBM ballots without a return envelope were received by the Clerk or counted. Further, we presume that election officials complied with their statutory duties in the conduct of an election. *Pullen*, 138 Ill. 2d at 67. To rebut that presumption and the respondents' evidence, DiFranco relies on the inference that some VBM ballots lacking a return envelope were improperly counted since the number of VBM ballots included in the final canvass is greater than the number of VBM ballots the Clerk later produced in discovery. Viewing the evidence in the light most favorable to DiFranco as the nonmoving party, we must consider the discrepancy as evidence that some VBM ballots were improperly counted.

Evidence of some improperly counted ballots alone, however, is insufficient to prevail in an election contest: there must be enough to make a difference. *Goree v. LaVelle*, 169 Ill. App. 3d 696, 700, 523 N.E.2d 1078, 120 Ill. Dec. 167 (1988) ("The irregularities complained of after an election must be of such magnitude that, if proved, would show that but for the irregularities, the election result would have been different, or that, if the irregularities were proved, would impose a duty on a court to void the election."). Initially, DiFranco claimed 3628 VBM ballots were improperly counted in the precincts included in the discovery recount. The Clerk submitted evidence

that there were only 115 fewer envelopes than VBM ballots. Thus, DiFranco could not rely on the allegation of 3628 missing envelopes asserted in his petition to demonstrate a genuine issue of material fact and avoid summary judgment. *Triple R Development, LLC v. Golfview Apartments I, L.P.*, 2012 IL App (4th) 100956, ¶ 16, 965 N.E.2d 452, 358 Ill. Dec. 381 ("Once the movant produces evidence that, if uncontradicted, would entitle it to a directed verdict at trial, the burden of production shifts to the party opposing the motion. The nonmovant may not simply rely on his pleadings to raise issues of material fact."). DiFranco countered with Mezo's affidavit asserting that the accurate tally shows the discrepancy was 439. Like the trial court, viewing the evidence in the light most favorable to DiFranco leads us to use the number 439 in our analysis.

Fallon won by 502 votes, so disqualifying 439 improperly counted ballots could not possibly change the outcome of the election. However, this figure only represents the discrepancy of VBM ballots and envelopes in the precincts included in the discovery recount, not the entire 12th subcircuit. DiFranco's petition posited that the precincts included in the discovery recount are representative of the whole subcircuit, so the same percentage of ballots missing a return envelope could be expected for the entire subcircuit in a recount.

In *In re Contest of the Election for the Offices of Governor & Lieutenant Governor Held at the General Election on November 2, 1982*, 93 Ill. 2d 463, 490, 444 N.E.2d 170, 67 Ill. Dec. 131 (1983) (*In re Contest*), our

supreme court disapproved of using the results of a discovery recount to project changes in vote totals in other precincts when seeking a recount. Rather, the petitioner was required to make specific allegations regarding those precincts. *Id.* When *In re Contest* was decided, however, the common law required an election contest petition to clearly allege that a recount would in fact change the result. *Andrews v. Powell*, 365 Ill. App. 3d 513, 519, 848 N.E.2d 243, 302 Ill. Dec. 243 (2006). The legislature subsequently amended the Election Code to require only that the facts alleged demonstrate a "'reasonable likelihood'" that a recount would change the result. *Id.* (quoting 10 ILCS 5/23-23.2 (West 2004)).

After recognizing the pleading standard was made less strict since *In re Contest*, the Fourth District stated: "The law and practice that has developed concerning discovery recounts and recount petitions provides that the results of the discovery recount are to be mathematically extrapolated to interpret whether the facts discovered during the discovery stage are significant." *Id* at 521. The *Andrews* court cited *Cummings v. Marcin*, 16 Ill. App. 3d 18, 22, 305 N.E.2d 606 (1973) to support the proposition, but *Cummings* does not appear to do so. That case concerned a ballot proposition in a single precinct and did not involve a discovery recount. *Id.* Thus, there is little legal authority supporting the projection methodology in DiFranco's petition.

We also observe that DiFranco selected which precincts would be included in the discovery recount. They are not a random sample. A party seeking a discovery

recount generally selects the precincts they believe would yield the most favorable results. See *In re Contest*, 93 Ill. 2d at 491. So, a projection based on the discovery recount results for the entire 12th subcircuit could be biased by DiFranco's selection.

Nevertheless, in keeping with viewing the evidence in the light most favorable to DiFranco, we will project the same percentage of counted VBM ballots without envelopes for the whole subcircuit. As the trial court calculated, 439 is 1.954% of the 22,461 total VBM ballots counted in the 52 precincts of the discovery recount. Projection leads to an expected 1398 improperly counted ballots for the entire 12th subcircuit if a recount were conducted.

If irregular ballots are easily distinguishable and no fraud is involved, exclusion of the ballots from the total tally is a simple remedy. *Hileman v. McGinness*, 316 Ill. App. 3d 868, 870, 739 N.E.2d 81, 250 Ill. Dec. 620 (2000). Here, the ballots and envelopes were separated, making it impossible to determine which VBM ballots were improperly counted and for which candidate they were cast. Thus, exclusion is not a possible remedy. *Id.* When the number of invalid votes can be ascertained, but it cannot be determined for whom the votes were cast, the proper remedy is to apportion the votes among the candidates. *Qualkinbush v. Skubisz*, 357 Ill. App. 3d 594, 624, 826 N.E.2d 1181, 292 Ill. Dec. 745 (2004).

Illinois courts have apportioned illegal votes by the proportion that each candidate received in the precincts

where the illegal votes were cast. *In re Durkin*, 299 Ill. App. 3d at 200-01. DiFranco's petition, however, proposed apportioning the improperly counted ballots by the proportion of the VBM votes each candidate received across the entire 12th subcircuit. Presumably, he proposed this method since Fallon received over 60% of VBM ballots cast. Thus, a proportionate reduction using DiFranco's proposed method would be more advantageous to DiFranco than apportion based on results in each precinct. Indeed, in the precincts where he received more votes, his reduction would be greater than Fallon's and reduce his relative gain in the precincts where Fallon received more votes. So, DiFranco's proposed method would avoid his relative loss of votes in the precincts he won and ensure a relative gain—that Fallon's total would be reduced more than DiFranco's.

The trial court aptly described DiFranco's proposed method to apportion votes as novel. We need not determine whether DiFranco's proposed method is appropriate, however, since, even applying his method, DiFranco would not overcome his 502-vote deficit, as the trial court's calculations demonstrated.

DiFranco nonetheless argues the trial court applied an incorrect standard, requiring him to show a mathematical certainty that a recount would change the result of the election rather than a reasonable likelihood. We disagree. The analysis afforded DiFranco a view of the evidence in the light most favorable to him. We took the discrepancy of the number of VBM envelopes produced versus the number of VBM ballots counted as evidence that VBM

ballots without a return envelope were received and counted, despite the Clerk's assertion that did not occur at all. We took the number of missing VBM envelopes as 439 instead of 115. And we projected the same percentage of missing envelopes for the 52 discovery recount precincts to the remaining three-quarters of the 12th subcircuit, despite reasons that the discovery recount precincts may not be representative of the entire subcircuit. In addition, using DiFranco's proposed apportionment method not only viewed the *evidence* in the light most favorable to him, but also the *law*, as precedent would have called for apportioning votes by precinct results. Despite all those advantages, DiFranco fell short of the votes he needed to overcome Fallon's lead. In other words, even giving DiFranco every favorable assumption, he would not surpass Fallon's vote total. The necessary conclusion, then, is there is no reasonable likelihood that a recount would change the outcome of the election.

For these reasons, we find no genuine issue of material fact exists and the respondents are entitled to judgment as a matter of law.

III. CONCLUSION

Based on the foregoing, we affirm the judgment of the trial court.

Affirmed.

APPENDIX C — ORDER OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS COUNTY DEPARTMENT – COUNTY DIVISION, DATED MAY 11, 2022

CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – COUNTY DIVISION

No. 2020 COEL 000032

FRANK R. DIFRANCO,

Petitioner,

vs.

PATRICIA M. FALLON, THE ILLINOIS STATE BOARD OF ELECTIONS AND KAREN A. YARBROUGH, IN HER CAPACITY AS THE LOCAL ELECTION AUTHORITY AND AS THE COOK COUNTY CLERK,

Respondents.

ORDER

Petitioner Frank R. DiFranco ("DiFranco") lost by 502 votes to Patricia M. Fallon ("Fallon") in the November 2020 General Election for the Hanlon Vacancy in the 12th Judicial Sub circuit. With his Election Contest Petition, DiFranco set forth certain specific violations of the Election Code, which he alleges, if remedied in a recount, would change the results of the election. After a year and half of litigation, there now remains a single

basis for DiFranco's election challenge: whether Karen A. Yarbrough, the Cook County Clerk, in her capacity as the local election authority (the "Clerk"), counted 3,268 vote by mail ("VBM") ballots that were returned without a VBM envelope.[1] The Clerk has countered this assertion by filing a Motion for Summary Judgment and attaching to it over 22,000 images of VBM return envelopes for the precincts identified in the Petition. (Fallon joined and adopted the Clerk's Motion.) The Clerk claims that there are only 117 missing VBM envelopes, which is far less than is required to call the results of the election into question.

I. LEGAL STANDARD

The Court will order a recount "where there appears a reasonable likelihood the recount will change the results of the election." 10 ILCS 5/23-23.2; *see also, Andrews v. Powell,* 365 Ill. App. 3d 513, 518-19 (4th Dist. 2006) (Enactment of section 23.2 superseded earlier court decisions mandating that facts alleged in petition must show that the recount would in fact change the outcome of the election.) Summary judgment is proper if the "pleadings, depositions and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party" is entitled to judgment as a matter of law. 735 ILCS 5/2-1005. In deciding a motion for summary judgment, the Court reviews that facts in the light most favorable to the non-moving party. *Gillespie v. Edmier,* 2020 IL 125262, ¶ 9.

1. For a more detailed recounting of the procedural history of this matter, see the Court's February 3, 2022 Memorandum Opinion· and Order denying DiFranco leave to file an amended petition.

II. FACTS

The General Election was held on November 3, 2020 and the results were formally certified on December 4, 2020. Fallon won the Hanlon Vacancy by 502 votes over DiFranco. Following the certification, DiFranco requested and participated in a discovery recount of the election results in 52 precincts, during which they reviewed ballots and VBM return envelopes that were "readily available." (Michalowski Dep. 66:4-5). As a result of that review, DiFranco filed this Election Contest, asserting several grounds. Specifically, he alleged that there were more VBM ballots counted than there were VBM applications and VBM envelopes received.[2]

Respondents denied these allegations and subsequently the Clerk filed a Motion for Summary Judgment challenging both claims. In support of its Motion, the Clerk submitted a "thumb drive" purporting to contain scanned images of all ballot return envelopes (except 117) returned in the 52 precincts in the discovery recount identified in the Petition. The Clerk argued that the existence of these VBM return envelopes disproved DiFranco's claim that there were 3,268 missing VBM return envelopes.

On December 1, 2021, DiFranco filed his Memorandum in Opposition to the Clerk's Motion for Summary Judgment. In it, among other things, DiFranco asserted

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2. The Court granted in part and denied in part the Respondents' Motion to Dismiss on May 24, 2021. The Court dismissed all claims other than the claims relating to the missing VBM envelopes and VBM applications.

that the Court should not consider the VBM envelope images because the Clerk failed to properly certify them under the Illinois Supreme Court Rule 191 and the Illinois Supreme Court Rules of Evidence. On December 22, 2021, the Court denied the Clerk's Motion for Summary Judgment on the sole ground that she failed to properly certify or otherwise provide testimony supporting the admission in evidence of the scanned ballot return envelopes.[3]

On January 4, 2022, the Clerk filed a Motion to Reconsider the Court's denial of her Motion for Summary Judgment and attached to it an affidavit of James Nally, Legal Counsel for the Clerk, purporting to authenticate the VBM envelope images. On February 22, 2022, Fallon joined the Clerk's motion and the parties agreed to treat the Clerk's motion to reconsider as a renewed motion for summary judgment and briefing was ordered.

In connection with both the original motion and the renewed motion each of DiFranco and Fallon, submitted affidavits of their counsel's staff, which described the results of their review of the VBM images submitted by the Clerk. DiFranco's affiant asserted that she conducted "an envelope by envelope review of all of the ballot return envelopes produced by the Clerk." DiFranco's affiant stated that her review showed that the Clerk's submission contained only 22,006 VBM envelopes out of 22,461 VBM ballots cast. In other words, there were still 455 missing

3. DiFranco had previously informed the Court that he was abandoning his claim that the Clerk counted more VBM ballots for which there was no VBM application.

VBM envelopes, which would mean that there were a like number of improperly counted VBM ballots in the precincts subject to the discovery recount. (Affidavit of Rezarta Melo).

Fallon's counsel provided counter affidavits of their review of the VBM images filed by the Clerk. Her review found that the Clerk had provided 22,102 VBM return envelopes, 11 "Agilis" images and 259 UOCAVA "envelope and delivery images." From that review, Fallon (and the Clerk) concluded that there were only 115 missing VBM envelopes. (Supplement to the Affidavit of Natalie Wilkins). DiFranco disputed Wilkins' accounting with another affidavit, which explained that Wilkins had overcounted VBM return envelopes by including non-VBM envelope certifications in her count. DiFranco's supplemental affidavit concluded that even including some of the additional images identified by Wilkins there remain over 439 missing VBM return envelopes. (Supplemental Affidavit of Rezarta Melo).

In addition to these affidavits, DiFranco also relies upon the affidavits of his "watchers" who observed the discovery recount. Each of these "Watcher Affidavits" sets forth a description of the VBM review process and recounts the number of VBM envelopes they reviewed during the discovery recount. None of the Watcher Affidavits, however, addresses or is related to the VBM envelope images filed by the Clerk in support of her Motion.

In addition to the Watcher Affidavits, DiFranco relies upon the deposition of Edward Michalowski, the Deputy Clerk in charge of elections. Michalowski's testimony addressed the Clerk's procedures for the issuance, reviewing and counting of VBM ballots during the November 2020 general election.

III. ANALYSIS

The Clerk's renewed motion is based solely upon the existence of more than 22,000 VBM return envelopes for the 22,461 VBM ballots cast in the precincts identified in the discovery recount and the Petition. In support of her motion, the Clerk filed the Certification of James Nally, Legal Counsel for the Clerk. Nally certified "that the Official Suburban Cook County Ballot Return Envelopes attached as exhibits to Karen A. Yarbrough's Motion for Summary Judgment in case number 2020 COEL 032, DiFranco v. Fallon, are true and correct copies of the documents maintained as official public records by the Cook County Clerk." (Ex. B to the Clerk's Motion to Reconsider). DiFranco, who admittedly conducted a "deep-dive" (Trans., Dec. 16, 2021, 19:15) review of all of these VBM return envelopes, nonetheless argues that the Court should not consider them.

The decision to admit evidence lies within the discretion of the court. *Peach v. McGovern,* 2019 IL 123159 ¶ 25. Here, the Clerk has asserted that these VBM return envelopes fall within the public records exception of the hearsay rule under Illinois Supreme Court Rule 803(8). While the Court is confident that these records could be

admitted under this rule, it may not applicable here, as the individual records are not being offered for the truth asserted in such records. Instead, they are being offered to prove that the VBM envelopes are not "missing" as alleged by DiFranco.

Nonetheless, even if the Court were to consider VBM envelopes under Rule 803(8), the Clerk would still be required to authenticate them. Illinois Supreme Court Rule 901 provides that for certain records, including public records, the "requirement of authentication or identification as a condition to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Rule 901(7) provides that public records may be admitted under this standard. Here, the VBM return envelopes submitted by the Clerk meet this standard. First, they are authenticated by the certification of James Nally, Legal Counsel to the Clerk. He states that they are true and accurate copies of originals maintained by the Clerk. In addition, the testimony of Edward Michalowski, relied upon by DiFranco, further supports their admission. Michalowski's description of how VBM return envelopes were received, scanned, saved and reviewed further bolsters their reliability. Finally, the documents themselves support their authenticity. Each is an image of a form election envelope, bearing the title, "Official Suburban Cook County Ballot Return Envelope." In addition, they have "bar codes," date stamps and a printed names of the voters. Finally, except for questioning Nally's actual knowledge about these 22,000 images, having conducted discovery and a "deep dive" into the VBM envelopes, DiFranco has not raised any issues

which would call into question that the VBM envelope images indeed are what the Clerk asserts they are-true and accurate copies of VBM envelopes returned to the Clerk during the November 2020 general election.[4]

DiFranco correctly asserts that the Election Code requires that all VBM ballots be returned to the Clerk in a VBM envelope. 10 ILCS 19-6 and 19.8(g). He alleged in his Verified Petition that during the discovery recount and in response to this Motion that out of 22,461 VBM ballots cast, there were 3,628 VBM ballots for which the Clerk did not have a corresponding VBM return envelope. After the review of the images produced by the Clerk, and crediting DiFranco's count (rather than Fallon's), it appears that there are at most 439 missing VBM envelope out of a possible 22,461 VBM ballots cast in the precincts identified in the Petition. In other words, less than 2% of the VBM ballots cast (1.954%) in the selected precincts were possibly missing VBM return envelopes. (This calculation excludes the contested overseas returns that

4. DiFranco argues that the Court should not consider the "copies" of the VBM envelopes, because the physical VBM ballots and VBM return envelopes are the best evidence of the election results. While properly preserved original ballots are better evidence to determine an election result than *returns* or *tallys* that conflict with the ballot count, *Anderson v. Wierschem,* 373 Ill. 239, 241 (1940), that is not the issue here. Here, the electronically scanned VBM envelopes are copies of the physical ballot envelopes themselves (rather than a count return or tally). Mr. Nally certified the electronic copies as true and correct copies of the physical VBM envelopes maintained by the Cook County Clerk, and DiFranco has raised no credible argument challenging the electronic images as accurate representations of the physical VBM envelopes.

may have been validly counted but for which the Clerk did not provide sufficient evidentiary foundation.) In his response to the initial motion for summary judgment, DiFranco argued that the Court should apply the percentage of missing VBM envelopes found in these precincts (or "error rate") to the total number of VBM ballots cast, 71,103 (see Ex. B to DiFranco' s Response), to project the number Of VBM envelopes that would be missing if a recount of all VBM ballots was conducted. Utilizing DiFranco's proposed method would result in a projected 1,389.35 missing VBM envelopes that could possibly be disqualified. (71,103 x .1954 = 1,398.35). In other words, for the purposes of determining whether a recount would likely change the results of the election, the Court will assume that during the recount, there will be approximately 1,398 missing VBM return envelopes, and as a result, 1,398 disqualified VBM ballots.

As noted above, the parties agree that there is no way to tie a missing VBM envelope to a specific VBM ballot. In other words, if a recount resulted in the disqualification of VBM ballots, the Court will not be able to determine which ballot belonged to any particular voter who did not comply with the VBM return envelope requirements. In these circumstances, courts in Illinois have allocated the disqualified ballots based upon the election results by precinct, the underlying assumption being that disqualified votes from a specific precinct would be cast in a proportion similar to the results of the election in that precinct. *Hileman v. McGinness,* 316 Ill. App. 3d 868, 870 (collecting cases).

In this case, rather than seeking allocation of disqualified VBM ballots based upon the election results in each precinct, DiFranco urges the Court to allocate the disqualified ballots between the two candidates based upon the VBM results as a whole. In other words, DiFranco argues that the voting tendency of VBM voters as a group is a better predictor of how a disqualified VBM ballot was cast than using the results by precinct. For purposes of deciding this Motion, the Court will adopt DiFranco' s proposed allocation method and allocate the projected disqualified ballots based upon VBM results.[5]

According to the Official Canvass (attached as Exhibit B to DiFranco's Memo in Opposition to Summary Judgment), of the total 71,103 VBM ballots cast for the Hanlon Vacancy, Fallon received 44,691 VBM votes and DiFranco received 26,412 VBM votes. Expressed in percentages, Fallon received 62.85% and DiFranco received 37.15% of the VBM ballots cast. Allocating the projected 1,389.35 disqualified VBM ballots between Fallon and DiFranco according to these percentages, Fallon's total would be reduced by 873.21 votes and DiFranco's vote total would be reduced by 516.14 votes, resulting in a net gain of 357.07 votes for DiFranco, which is less than Fallon's margin of 502 votes.

5. At a status hearing on May 4, 2022, DiFranco' s counsel confirmed that the methodology ("math") the Court has set forth in this order was the method DiFranco was asserting should be utilized for determining the likelihood that a recount would change the outcome of the election.

In making these calculations, the Court is taking as true DiFranco's assertion that if a VBM envelope is missing that a corresponding ballot must be disqualified. In other words, the Court assumes DiFranco's premise that the Clerk would not be allowed to prove by other means that counting the VBM ballot was proper. In addition, the Court has assumed that the Clerk would not be able to tie a missing VBM envelope to a specific ballot and, therefore, that proportional reduction of votes between the candidates would be an appropriate remedy. Finally, the Court has not taken into account that in a recount, Fallon may contest additional ballots during the recount, which if successful, would presumably counter some of the gains DiFranco would realize.

Having reviewed these facts in the light most favorable to DiFranco, and applying the novel proportional allocation method he has requested, there do not appear to be any likely circumstances in which a recount will alter the results of this election.[6]

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6. There are two remaining motions pending. First, DiFranco asked the Court to reconsider its ruling that he should be barred from utilizing his review of voter signatures that were redacted on the VBM envelope images submitted by the Clerk in connection with the Motion for Summary Judgment. With the entry of this Order granting summary judgment, that request is moot. Nonetheless, the Court has reviewed the Motion and considered the arguments made therein. The Motion to reconsider is denied. Finally, the Clerk asked for an order compelling DiFranco to seal or redact voter signatures on certain VBM envelopes submitted as exhibits to DiFranco's response to the Renewed Motion for Summary Judgment. These signatures were not redacted by the Clerk when she submitted them to the Court and DiFranco. As

Appendix C

CONCLUSION

For the reasons set forth above, Respondents' Renewed Motion for Summary Judgment is granted. Judgment is entered in favor of Respondents Karen A. Yarbrough and Patricia M. Fallon and against Petitioner Frank R. DiFranco.

Dated: May 11, 2022

ENTERED:

/s/
Judge Patrick T. Stanton

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such, the Court declines to order their redaction by DiFranco. The Clerk's motion is denied.

APPENDIX D — PETITION FOR APPEAL AS A MATTER OF RIGHT OF THE SUPREME COURT OF ILLINOIS, FILED NOVEMBER 9, 2023

No. _____

IN THE
SUPREME COURT OF ILLINOIS

FRANK DIFRANCO,

Petitioner-Appellant,

V.

PATRICIA M. FALLON, THE ILLINOIS STATE BOARD OF ELECTIONS, AND KAREN A. YARBROUGH, COOK COUNTY CLERK,

Respondents-Appellees,

Appellate Court, First Judicial District, Case No. 1-22-0785

Circuit Court, Cook County, Illinois
First Judicial Circuit,
Case No. 20COEL032

Honorable Patrick T. Stanton,
Trial Judge Presiding.

Appendix D

PETITIONER FRANK DIFRANCO'S PETITION FOR APPEAL AS A MATTER OF RIGHT

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[TABLES INTENTIONALLY OMITTED]

PRAYER FOR LEAVE TO APPEAL

The Appeal is taken as a matter of right. In the alternative, Petitioner, Frank DiFranco, respectfully petitions this court for leave to appeal from the decision of the Appellate Court, 1st District.

JUDGMENT BELOW

The judgment was entered on October 5th, 2023. A Petition for rehearing was not filed.

POINTS RELIED UPON FOR REVIEW OF JUDGMENT OF THE APPELLATE COURT

This petition arises from an election contest to the November 3, 2020, general election for the Office of

Circuit Court Judge for the 12th Judicial Subcircuit of Cook County. Respondent Fallon received 82,976 votes and DiFranco, 82,474—a margin of 502 votes.

i. Questions Presented

This Petition presents the legal question of whether directory compliance with statutory deadlines for counting ballots cast in an election violates Ill. Const. art. I, § 2 (Due Process) and Ill. Const. art. 2, § 1 (Separation of Powers) because it unconstitutionally vests an unreasonable discretion in those whose responsibility it is to administer an election in conformity with legislative requirements, thus affording such person(s) the unique power to influence the result, or otherwise grants such persons the power to defeat the legislative intent by failing, whether by design or neglect, to conform strictly with the statutory requirements. Additionally, this petition presents the question of whether trial and Appellate courts have subject matter jurisdiction over a special statutory proceeding when there is a statutorily unauthorized party to the proceeding, and therefore, whether the orders issued by those courts in such a proceeding are void.

ii. General Importance of The Questions

The questions presented in this petition concern the electoral process and electoral contests. These questions are not entirely case specific. They are legal issues whose resolution is of tremendous and understandable importance to millions of Illinois residents who are legally qualified to vote, the candidates running, the election

officials counting the ballots, and the judiciary hearing the contests. These questions also concern important procedural matters such as subject-matter jurisdiction, procedures for counting ballots in elections, and the procedures for election contests in nearly every election in Illinois. This is not purely a local or private matter, never again to be repeated. In fact, it is the very essence of questions of such importance that should be decided by the Supreme Court.

The issues are of first impression. The Petitioner could not find a case that has generated an opinion discussing whether compliance with statutory deadlines for counting ballots in an election pursuant to 10 ILCS 5/19-8(g) is directory or mandatory. Moreover, petitioner found no case that has discussed whether a court has subject matter jurisdiction over a statutorily unauthorized respondent in an election contest.

It is also important to note that no party challenged the jurisdiction of the court, and the issue of jurisdiction arose sua sponte for the first time because of the action of the Appellate Court.

iii. The Need for The Exercise of The Supreme Court's Supervisory Authority

There is also a need for the exercise of the Supreme Court's supervisory authority in that the appellate process did not afford adequate relief to the Defendant. The Appellate Court generated an opinion discussing questions of general importance as to 10 ILCS 5/19-8

allowing discretionary compliance, citing to *Pullen v. Mulligan*, 138 Ill. 2d 21, 46 (1990). This opinion encourages election officials to keep counting Vote by Mail Ballots beyond the statutory time limit where the ascertained proportionate distribution of votes is then cutting in favor of a candidate preferred by that supervisory authority. The availability of such discretion effectively provides the supervising authority the capacity to determine the outcome of a very close election as they see fit.

In addition, the order of the Appellate Court was void because Respondent Yarbrough was not a statutorily authorized party to the election contest. The Appellate Court's opinion held that jurisdiction is proper for a statutorily unauthorized party to participate in an election contest and an appeal. The opinion is also legal authority which directs courts and litigants to join the election official as a proper party and for such party to participate.

The opinion results in unnecessary legal expenses being incurred by the unauthorized party official which are paid by the Government to the officials' outside legal counsel with the sole benefit of the litigation going to the Respondent Candidate. These are serious questions. Also, avoiding this petition would allow the courts to fashion an unconstitutional remedy which would escape review. Hence, the intervention of the court is necessary to prevent an inferior tribunal from acting beyond the scope of its authority, and to aid in the development of the law.

iv. Matter of Right Question

The appellate opinion also creates a question under ILCS Const. Art. 6, § 9. This issue has now arisen for the first time because of the action of the Appellate Court rendering an opinion discussing discretionary compliance while sua sponte determining that the court had jurisdiction.

ILCS Const. Art. 6, § 9 governs the jurisdiction of the courts. Hence, there is a question under ILCS Const. Art. 6, § 9 that arises for the first time at this point in the proceedings because of the action of the Appellate Court.

Further, there is also the question of whether discretionary compliance with 10 ILCS 5/19-8(g) violates the due process and separation of powers clauses of the Illinois State Constitution and the United States Constitution.

v. Procedurally Proper Questions

These questions are properly before this Honorable Court. The issues were not waived in the lower court proceedings and cannot be waived by Petitioner. Petitioner is raising the issue of lack of subject matter jurisdiction in response to the Appellate Court's opinion. "Lack of subject-matter jurisdiction is not subject to waiver and cannot be cured through the consent of the parties". *Vasquez Gonzalez v. Union Health Serv., Inc.*, 2018 IL 123025, 123 N.E.3d 1091. Petitioner also raised constitutional issues in relation to the directory nature

of the statute. A challenge as to constitutionality may be raised at any time. *In re M.I.*, 2013 IL 113776, 989 N.E.2d 173.

vi. Final Judgment

This is a final judgment. If the court finds that the votes which were counted beyond the deadline imposed by10 ILCS 5/19-8 are improper, then the exclusion of such votes would result in Petitioner winning the election, and therefore entitled to the entry of an order granting him permission to assume office.

Furthermore, if the orders entered by the Court are void, the matter must be remanded to the trial court for further proceedings consistent such order thereby striking from everything in the record flowing from such void orders.

In such event the court can afford DiFranco complete relief, through a declaration that he was duly elected, prohibiting Fallon from serving any further, and granting DiFranco the authorization to be administered the oath to assume office.

Accordingly, the issues presented by this Petition are questions of such importance that they merit review and should be decided by this Supreme Court.

STATEMENT OF FACTS

Petitioner DiFranco and Respondent Fallon were candidates in the November 3, 2020, general election for

the Office of Circuit Court Judge for the 12th Judicial Subcircuit of Cook County. Respondent Cook County Clerk Karen A. Yarbrough was the local election authority. (C 1005; C 1044). Fallon received 82,976 votes and Petitioner Frank DiFranco, 82,474—a margin of 502 votes. On November 14, 2020, the Cook County Clerk reported that there were no more uncounted provisional ballots remaining to be counted. (C 26) On November 15, 2020, the day after the deadline to count ballots, the Cook County Clerk reported that Petitioner, Frank R. DiFranco, had 80,653 votes, 485 more votes than the 80,168 reported for Respondent, Patricia M. Fallon. (C 26) The Cook County Clerk did not report any additional votes counted for either candidate on November 16 or November 17, 2020. (C 26)

After the last day to legally count ballots, and after reporting there were no additional ballots to be counted, the Cook County Clerk's staff continued counting additional votes that were cast beyond the statutory deadline. [C 416, C26] The day after the last day for counting votes, on November 18, 2020, the Cook County Clerk's staff added 1,202 votes for DiFranco, resulting in a cumulative total of 81,855 votes, and 2,030 votes for Fallon, resulting in a cumulative total of 82, 198 votes. (C 26-29) On November 19, 2020, the Cook County Clerk's staff added 344 votes for DiFranco, resulting in a cumulative total of 82,199 votes, and 504 votes for Fallon, resulting in a cumulative total of 82,707 votes. (C 26-29)

On November 22, 2020, the Cook County Clerk's staff added 298 votes for DiFranco, resulting in a cumulative total of 82,497 votes, and 320 votes for Fallon, resulting in

a cumulative total of 83,022 votes. (C 26-28) On November 23, 2020, 23 votes for DiFranco, were subtracted, resulting in a cumulative total of 82,474 votes, and 46 votes for Fallon, were subtracted, resulting in a cumulative total of 82,976 votes. (C 26-29) The ballots counted after the last day to count ballots resulted in Petitioner, Frank R. DiFranco, going from a lead of 485 votes on November 17, 2020, to a deficit of 502 votes on November 23, 2020. (C 26-29)

Thereafter, DiFranco filed a discovery recount and the present election contest on December 31, 2020, naming Fallon, ISBE, and Yarbrough, as respondents. DiFranco's verified petition amounted to four claims: (1) ballots were counted past the statutory time limit, (2) the number of vote-by-mail (VBM) ballots counted exceeded the number of VBM ballots requested by 18,423 (3) another 3,628 VBM ballots lacking the required return envelope were improperly counted, and (4) the Clerk prevented DiFranco from fully observing the discovery recount. [C 25-260] DiFranco requested a complete recount of all ballots cast in the 12th subcircuit for the November 3, 2020, election, an order declaring him elected, and other just relief. [C 25-260] On January 25th, 2021, Yarbrough filed her appearance in the matter. [C 298] On February 3rd, 2021, the Court entered orders in relation to DiFranco's motion to transfer. [C 303] On February 7th, 2021, Fallon filed her appearance in the matter. [C 314] On February 24th, 2021, The Trial Court ordered Fallon and Yarbrough answer or plead to DiFranco's petition. Fallon and Yarbrough filed a joint motion to dismiss. [C 357-374]. The trial court dismissed the claim regarding ballots counted beyond the

statutory time limit, finding that the limit was directory, not mandatory. [C 959-967] However, the court found the remainder of DiFranco's claims were sufficient to demonstrate a reasonable likelihood that a recount would change the outcome of the election. [C 959-967]

Yarbrough and Fallon each filed a Verified Answer that denied the allegations of the Verified Original Petition relating to the number of missing original VBM ballot return envelopes. [C 1044-86] Yarbrough then filed a motion for summary judgment in August 2021. [C 1274-79] Respondent Fallon then filed a motion to join and adopt Yarbrough's motion for summary judgment and did not file her own. [C 1327- 1332] The court denied the respondents' motion for summary judgment on the basis that the motion lacked an affidavit to authenticate the return envelope images. [C 2013] Respondent Yarbrough then filed a motion to reconsider. [C 2095-2102] Fallon later filed a motion to join and adopt the motion, and all parties agreed to treat the motion to reconsider as a renewed motion for summary judgment. [C 2132-C 2134] The court denied DiFranco's motion for leave to file an amended petition and subsequently granted the respondents' motion for summary judgment. DiFranco then filed a timely notice of appeal from the trial court's orders denying his motion for leave to file an amended petition and granting the respondents' motion for summary judgment.

The Appellate Court addressed its own jurisdiction and the jurisdiction of the Trial Court sua sponte. [App. Pg. 15-18] The Appellate Court found jurisdiction was present in both courts and while an election contest would

not afford DiFranco complete relief, a declaration that he was duly elected would be necessary for the ultimate remedy he seeks—removing Fallon and assuming office. [App. Pg. 15-18] For that reason, a favorable judgment would have a practical effect. The Court found the matter to be justiciable and not moot. [App. Pg. 15-18] The Appellate Court then affirmed the trial court and found that the trial court did not abuse its discretion in denying his motion for leave to file an amended petition or granting the motion for summary judgment. [App. Pg. 18-37]

ARGUMENT

i. Appeal As a Matter of Right: Jurisdiction

Pursuant to IL R S CT Rule 317 this appeal lies to the Supreme Court as a matter of right. Specifically, ILCS Const. Art. 6, § 9 governs the jurisdiction of the courts. The Appellate Court generated the opinion discussing the above-mentioned important matters and sua sponte found that it had jurisdiction. This decision, in itself, spontaneously raised the issue under ILCS Const. Art. 6, § 9. Moreover, this decision was incorrect.

The underlying election contest at issue cannot be determined on the basis of a void order. "This court has held that when a court is in the exercise of special statutory jurisdiction, that jurisdiction is limited to the language of the act conferring it, and the court has no powers from any other source." *Fredman Bros. Furniture Co., Inc. v. Dep't of Revenue*, 109 Ill. 2d 202, 210, 486 N.E.2d 893, 895–96 (1985). Courts have no inherent power to hear election

contests, but may do so only when authorized by statute, and then, in the manner dictated by statute. *Pullen v. Mulligan*, 138 Ill. 2d 21, 32, 561 N.E.2d 585, 589 (1990).

10 ILCS 5/23-21 provides "upon the filing of such statement, summons shall issue against the person whose office is contested, and he may be served with process, or notified to appear, in the same manner as is provided in other civil cases." This statute limits the proceedings to the Respondent and Petitioner. This statute controls the way the Election contest can be heard. Respondent Yarbrough was not a statutorily authorized party before the Court. The Court had no authority to consider and grant Respondent Yarbrough's motions. Yarbrough's filings in the record, including her motions for summary judgment, and the court's orders in relation to such filings are all nullities. Fallon's decision to join in Yarbrough's motions, and adopt them as her own, resulted in Fallon joining and adopting a legal nullity.

Moreover, the trial court lacked the power to render the judgments. "" When a court exercises its authority, it must proceed within the confines of that law and has no authority to act except as that law provides." [Citation Omitted] "A court is not free to reject or expand its statutory authority despite the desirability or need for such action." [Citation Omitted.] "Any action the trial court takes that is outside the statute's stricture is void."" *Cushing v. Greyhound Lines, Inc.*, 2012 IL App (1st) 100768, ¶ 103, 965 N.E.2d 1215, 1234. The Court was not statutorily authorized to hear the matter in the form that it did. This is true with respect to both Respondents.

As a consequence, the Trial Court's orders entered on February 3, 2021, and thereafter were void.

While it is true that the jurisdiction and the power of the Trial Court and the Appellate Court was not challenged by the parties, this is immaterial. The judgments were based on orders which were void ab initio because the only parties to the election contest are the Petitioner and Respondent whose office is being contested, in this case, Frank DiFranco and Patricia Fallon. Although a court may acquire subject matter jurisdiction, it may transcend the limits of that jurisdiction, as here, rendering any judgments it enters void. See *Flake v. Pretzel*, 381 Ill. 498, 505, 46 N.E.2d 375, 379 (1943). Accordingly, the Appellate Court's order was incorrect and void. The Trial Court's orders, including but not limited to, granting the motion for summary judgment, denying the amendment, denying the motion to amend, denying the change of venue are void.

ii. Appeal As a Matter of Right: Violation of Due Process

As explained earlier, Yarbrough counted ballots beyond the statutory deadline. 10 ILCS 5/19-8(g) of the Illinois Election Code requires all VBM ballots to be counted within 14 days of Election Day. See 10 ILCS 5/19-8(g) and 10 ILCS 5/18A-15(a). The fourteenth day after the November 3, 2020, election was November 17, 2020. On November 14, 2020, the Cook County Clerk, reported that there were no more uncounted provisional ballots remaining to be counted. On November 15, 2020, the Cook County Clerk reported that Petitioner, Frank

R. DiFranco, had 80,653 votes, 485 more votes that the 80,168 reported for Respondent, Patricia M. Fallon. The Cook County Clerk did not report any additional votes counted for either candidate on November 16 or November 17, 2020. After the last day to legally count ballots, and after reporting there were no additional ballots to be counted, the Cook County Clerk's staff continued counting additional votes that were cast beyond the statutory deadline. (C 26-29) The Appellate Court generated an opinion discussing these issues, determining that this statutory deadline to count VBM ballot was discretionary citing to the case law relied upon by the trial court.

However, the election contest cannot be determined through a law or by judicial order which vests the officials whose responsibility it is to call an election in conformity with legislative requirements with an unreasonable discretion which might enable them to influence the result, nor should it grant such officials the power to defeat the legislative intent by failing, whether by design or neglect, to conform strictly with the statutory requirements. *Secco v. Chicago Transit Auth.*, 2 Ill. App. 2d 239, 252, 119 N.E.2d 471, 478 (1st Dist. 1954) The Trial Court's finding and the Appellate Court's discussion that the Provisions of 10 ILCS 5/19-8(g) are discretionary create such an unreasonable discretion and must be reversed.

Specifically, it allows the officials whose responsibility it is to call an election to keep counting past the legislative deadline until his respective party wins, which is what happened in this election between DiFranco and Fallon. The extent of the discretion afforded to the Cook County

Clerk by the Trial Court, and as ratified by the Appellate Court, is the equivalent of affording the supervisory election authority the legislative authority, or for that matter, the judicial authority, to determine the scope of the statutory directive with no bright line guidance consistent with Constitutional concepts and accordingly, determine the election results. Both the Trial Court's decision and the Appellate opinion discussing the decision are incorrect.

Due process of law "requires that an act shall not be vague, indefinite or uncertain, and must provide sufficient standards to guide the administrative body in the exercise of its function." *Polyvend, Inc. v. Puckorius*, 77 Ill. 2d 287, 299, 395 N.E.2d 1376, 1381 (1979) 10 ILCS 5/19-8(g) cannot be considered discretionary and satisfy due process at the same time. Simply put to the extent that compliance with the directives imposed by 10 ILCS 5/19-8(g) (as well as other election statutes) is deemed the exclusive, discretionary choice of the official charged with enforcing its provisions, such interpretation provides such official with the opportunity to determine the final outcome of an election in the manner he or she chooses in violation of the law.

Accordingly, a finding that the supervising authority's exercise of unbridled discretion under 10 ILCS 5/19-8(g) is inconsistent with the concepts of Separation of Powers and Due Process of Law would result in the exclusion of the votes counted beyond the deadline. This would result in Frank DiFranco being the true winner of the election.

iii. Sound Judicial Discretion

Additionally, leave to appeal should also be allowed as a matter of sound judicial discretion, not only for the reasons stated above, but because the winner of an election contest cannot be ascertained through sacrifices of fundamental justice and judicial fiat. Yet, this is exactly what has occurred in this matter when the Appellate Court improperly affirmed the trial Court's order denying the Petitioner's motion to file an amended petition and the trial court granted the motion for summary judgment despite the overwhelming evidence indicating that the officer belonged to the Petitioner.

Regarding the motion for summary judgment and the first Loyola Academy factor, the trial court made a revealing, acknowledgement: "In his Amended Petition, [Petitioner] identifies several thousand, more votes, which, if disallowed, may be sufficient to change the outcome of the election." (C 2119). The trial court also acknowledged that there was a reasonable likelihood, given the information revealed in the Envelope Images, that the election results would be nullified or overturned. The trial court concluded that the proposed amendment would cure a deficiency in the original Complaint. (C 2119). Yet, the trial court would not allow an amendment and granted summary judgment. This is not how election contests are decided.

Moreover, regarding the second factor, the court improperly considered the prejudice to a statutorily unauthorized party. (C 2119). The trial court could not

find that Yarbrough was prejudiced because she was not a proper party in the first place. Nor could the Court find that Fallon suffered any prejudice because she simply joined and adopted whatever Yarbrough filed. Regarding the third Loyola Academy factor, the trial court did not include the fact the Petitioner moved to compel discovery, but the trial court failed to rule. The court subsumed the fourth Loyola Academy factor into the third. The trial court found that Petitioner had prior opportunities to amend the Complaint. This was in error and should be reversed.

CONCLUSION

Wherefore, Petitioner, Frank DiFranco, pursuant to Supreme Court Rule 317, respectfully petitions this Court as a matter of right or for leave to appeal from the decision of the Appellate Court, 1st District, entered October 5th, 2023.

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