

App No. _____

In The
Supreme Court of the United States

FRANK DIFRANCO,

v. *Applicant,*

PATRICIA M. FALLON, THE
ILLINOIS STATE BOARD OF
ELECTIONS, and KAREN A.
YARBROUGH, Cook County Clerk,

Respondents.

**Application for an Extension of Time to File the Petition for a Writ of
Certiorari**

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To the Honorable Justice Amy Coney Barrett, as Circuit Justice for the United States Court of Appeals for the Seventh Circuit:

Appellee Karen A. Yarbrough, Cook County Clerk, recently passed away on April 7th, 2024. Yarbrough was a Public Official who is a party to a proceeding in this Court in an official capacity. At this time, no successor has been appointed or otherwise elected to her position. The Cook County Board of Commissioners must officially declare a vacancy. The Cook County Democratic Party has 60 days to appoint someone thereafter. Pursuant to this Court's Rules 13.5, 22, 30.2, 30.3, and 35 Applicant Frank DiFranco, respectfully requests that the time to file his petition for a writ of certiorari be extended for 59 days, up to and including Friday, June 21, 2024.

BACKGROUND

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 thereby 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 the Elections Clause, the 14th amendment Due Process Clause, and the First amendment. Additionally, the

petition presents the question of whether Courts have subject matter jurisdiction when there is a statutorily prohibited party to the 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 Yarbrough was the Recorder of Deeds. Fallon was recommended and then appointed to a Judgeship position in Cook County, Illinois. Subsequently, Yarbrough 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 Yarbrough, 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. Indeed¹, “Dewey defeated Truman” again in 2020, except this time the Tribune made the correct call. The Chicago Tribune publicly declared DiFranco the winner of the election². 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. 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

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

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

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, 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. 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. 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. DiFranco v. Fallon, 2023 IL App (1st) 220785, ¶ 38, 228 N.E.3d 410, 424, appeal denied, 226 N.E.3d 32 (Ill. 2024). 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 for the deadlines for counting ballots. *DiFranco v. Fallon*, 2023 IL App (1st) 220785, ¶ 53, 228 N.E.3d 410, 427, appeal denied. The Appellate Court affirmed the trial court in this matter. *Id.*

DiFranco then timely sought leave to appeal 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. The Trial Court's finding and the Appellate Court's discussion that the Provisions of 10 ILCS 5/19-8 are discretionary created such an unconstitutional discretion. Specifically, this allowed the officials whose responsibility it is to call an election to keep counting ballots past the legislative deadline until his 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 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 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*, 1st, 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. Yarborough was not a statutorily authorized party before the Court. Moreover, “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. The Illinois Supreme Court then denied DiFranco’s petition on January 24th, 2024. (Appendix A,B, C)

During the preparations of the DiFranco’s petition for cert, on April 7th, 2024, Appellee Yarborough passed away. Yarborough was a Public Official who is a party to a proceeding in this Court in an official capacity. At this time, no successor has been appointed or otherwise elected to her position.

JURISDICTION

The jurisdiction of this Court is based on 28 U.S. Code § 1257. 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 of Illinois on

January 24th, 2024. Appendix A, B, C. Absent an extension of time, the petition would be due on April 23, 2024.

The Supreme Court and 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, that the State Court had subject matter jurisdiction in an election contest and such Court's orders are not void when there is a statutorily unauthorized party before the Court. 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 deviate from the letter of the act, nor make an order partly founded upon its original jurisdiction, and partly upon the statute. See *Williamson v. Berry*, 49 U.S. 495, 496, 12 L. Ed. 1170 (1850).

The Court's also has decided an important federal question in a way that conflicts with 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. Lawson*, 977 F.3d 663, 664–65 (7th Cir. 2020). That Counting the votes, and announcing the results, as soon as possible after the polls close serves a civic interest. *Id.* Moreover, The

Supreme Court of Hawaii 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 counting of the ballots were technical violations of directory provisions and did not affect the validity of the affected ballots or the election. The Illinois Supreme Court denied reviewing the matter. This State Court interpretation 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). This interpretation of the Statute is 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 vests the Clerk with the power to determine the mode, manner, outcome, and methods of a Federal Election. At this time, while preparing the

Cert, Counsel for DiFranco believe 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’s counsel 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 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 effectively allows the official to determine the outcome of a very close election as opposed to the "will of the people". 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 an appeal. The opinion is authority which directs courts and litigants to incorrectly believe that the election official is a proper. This also results unnecessary legal expenses for the unauthorized party official which are paid by the County to the outside legal counsel with the sole provides benefit going to the candidate party whose election is being contested. These are 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, and the Court has jurisdiction.

Reasons For Granting an Extension of Time

This extension is justified and necessary to determine who the proper Appellee is before this court and which counsel will be representing the Appellee. Specifically, on April 7th, 2024, Appellee Yarborough passed away. Yarborough was a Public Official who is a party to a proceeding in this Court in an official capacity. At this time no successor has been appointed or otherwise elected to her position. Rule 35(c) seems to be self-executing in that it uses the term “automatically” but it also seems to require a condition precedent such as a successor. However, there is no successor in office to be automatically substituted as a party as required pursuant to Rule 35(c). At this time, it is not clear when and how a successor is going to be appointed and who will be the legally authorized representative of the deceased party which will appear and be substituted as a party or if such representative will even voluntarily become a party. Nor is it clear whom will be Counsel for the successor. DiFranco may be forced to seek an order requiring a new representative to become a party if a successor is not appointed by the Local/State Government. This is good cause for extending the time to file for DiFranco and for a proper successor to be determined.

CONCLUSION

Wherefore, for the foregoing reasons, the time to file Frank's petition for a writ of certiorari should be extended for 59 days, up to and including Friday, June 21, 2024.

Respectfully Submitted By:

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