IN THE INDIANA COURT OF APPEALS
CASE NO. _____

IN RE: ELECTION RECOUNT	)	
	)	
	)	
Senator Spencer R. Deery,	)	
	)	
Appellant/Respondent Below,	)	Appeal from the Indiana Recount Commission
	)	
	)	
v.	)	
	)	
Paula K. Copenhaver,	)	
	)	
Appellee/Petitioner Below,	)	
	)	
and	)	
	)	
Secretary of State Diego Morales,	)	
Paul Mullin, and	)	
Michael Claytor, as Members of	)	
The Indiana Recount Commission,	)	
	)	
Appellees.	)	
	)	

EMERGENCY VERIFIED MOTION TO TRANSFER JURISDICTION OF APPEAL OF RECOUNT TO THE INDIANA SUPREME COURT BEFORE CONSIDERATION BY THE INDIANA COURT OF APPEALS PURSUANT TO IND. APPELLATE RULE 56(A)

Comes now Appellant/Respondent State Senator Spencer R. Deery, by counsel, and respectfully requests that this Court accept an emergency transfer of this case regarding a recount from the Appellate Court. On this date, Senator Deery has also filed a Verified Emergency Motion to Stay the decision of the Indiana Recount Commission and preliminarily enjoin

finalization and dissemination of the ballot provision for the election of state senator for all of the precincts contained in Senate District 23.

BACKGROUND

1. On May 5, 2026, Indiana held the primary election to determine the Republican nominee for Indiana State Senate District 23. Incumbent State Senator Spencer R. Deery prevailed over challenger Paula Copenhaver by three votes.

2. On May 18, 2026, Ms. Copenhaver filed a petition with the Indiana Recount Commission ("Commission") asserting two causes. Ms. Copenhaver sought a manual recount of the ballots cast and secondarily asserted her claim to an election contest.[1]

3. Senate District 23 is comprised of portions of Tippecanoe and Montgomery Counties and all of Vermillion, Parke, Montgomery, Warren and Fountain Counties.

4. The physical recount of the ballots began June 16, 2026, and the last county was counted on June 25, 2026.

5. On August 10, 2026, the hearing on the recount was held. The Commission declined to accept 10 (ten) ballots that had been previously counted and accepted by the local county election boards. As a result, Ms.

[1] Senator Deery is seeking transfer only of the recount action. In its omnibus order of July 28, 2026, Commission ordered that the contest would be continued for further hearing at the final recount hearing on August 10, 2026. A hearing was never held on the contest action. Following the recount hearing on August 10, 2026, the Commission unanimously dismissed the contest without objection by counsel for Ms. Copenhaver.

Copenhaver lost two votes and Senator Deery lost eight votes. The instant appeal seeks review of the decision not to count six absentee ballots that were not counted for the same reason: the failure of election officials to affix the clerk's seal and signature to the back of the absentee ballot.

6. Commission Chair Diego Morales and member Paul Mullin each voted against counting the six absentee ballots. Member Michael Claytor dissented and would have counted those six absentee ballots.

7. Of the six challenged absentee ballots, two were from Montgomery County, two were from Warren County, and two were from Vermillion County

8. The Commission certified the election on August 10, 2026 determining the final vote to be:

Candidate Paul K. Copenhaver	6,332 votes
Candidate Spencer R. Deery	6,329 votes

9. A copy of the Certificate of Recount is attached hereto as Exhibit A and a copy of the findings of the State Board of Accounts which conducted the recount is attached hereto as Exhibit B.

JURISDICTION

10. Indiana Code § 3-12-10-18 provides "Any party to a final determination of the state recount commission concerning a nomination . . . to a state office . . . may appeal the final determination to the court of appeals for errors of law under the same terms, conditions, and standards that govern appeals in ordinary civil actions."

11. Indiana Appellate Rule 56(A) provides: “In rare cases, the Supreme Court may, upon verified motion of a party, accept jurisdiction over an appeal that would otherwise be within the jurisdiction of the Court of Appeals upon a showing that the appeal involves a substantial question of law of great public importance and that an emergency exists requiring a speedy determination.”

12. A substantial question of law of great public interest is involved. Because of the error of law by the Commission, an election has been overturned and the clear and undisputed intent of those voters to nominate Senator Deery has been disregarded, through no fault of their own.

13. Further, there is an emergency as time is short given that the clerks need to begin preparation of the ballots and mail-out ballots in advance of the general election on November 3, 2026, as is evidenced by the chronology presented *supra.*

DISCUSSION

THIS APPEAL INVOLVES A SUBSTANTIAL QUESTION OF LAW OF GREAT PUBLIC IMPORTANCE

14. The purpose of the Indiana election code “and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement [of voters].” *Brown v. Grzeskowiak*, 230 Ind. 110, 130, 101 N.E.2d 639, 647 (1951) (decided before the savings clause, discussed *supra,* was enacted in 1986) (citation omitted). *See also, Wyatt v. Wheeler,* 936 N.E.2d 232, 239 (Ind. Ct. App. 2010) ("The purpose of [election] law and the efforts of the court are to

secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disenfranchisement") (citation omitted).

15. Indiana Code § 3-11-4-19(a) requires that an absentee ballot must "bear the circuit court clerk's official seal and signature or facsimile signature on the back of the absentee ballot."[2] This is a mandatory requirement placed upon the clerk. The issue presented by this appeal is whether the clerk's failure to affix the seal/signature on an absentee ballot prohibits that ballot from being counted. Senator Deery maintains that it does not, as that requirement must be read in *pari materia* with I.C.§ 3-12-1-12 (c).

16. Indiana Code § 3-11-4-19(a)(1)-(2) requires that before mailing, two members of the absentee voter board or two members of the election board "place their initials in ink on the back of the ballot." In this instance, the six absentee ballots, that are the subject of this appeal, all bore the requisite initials. Indiana law treats differently absentee ballots that lack initials versus absentee ballots lacking a seal/signature.

17. Indiana Code § 3-12-1-13(b)(1)-(2) states that "[t]whole ballot may not be counted unless the ballot is endorsed with the initials." This provision expressly directs the Commission to not count absentee ballots lacking the initials even though the error was made by the clerk and not the voter.

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[2] If the clerk is running for any office other than a political party office, then IC §3-5-4-9 et seq. prohibits the clerk from affixing her name and/or signature to the ballot and only the seal is to be affixed.

However, the legislature did not enact any such similar provision for absentee ballots lacking the seal/signature.

18. Instead, the legislature enacted a savings clause intended to protect against clerk errors such as the omission of the seal/signature, while expressly stating that absentee ballots lacking initials cannot be counted in a recount. Indiana Code § 3-12-1-12(b) provides that "a ballot that has been marked and cast by a voter in compliance with this title but may otherwise not be counted solely as the result of the act or failure to act of an election officer may nevertheless be counted in a [recount] proceeding . . . unless evidence of fraud, tampering, or misconduct affecting the integrity of the ballot is presented by a party to the proceeding."[3]

19. This savings clause enacted what *Brown* expressly held, that "[i]n the absence of fraud, actual or suggested, statutes will be liberally construed to accomplish this purpose [of the free and fair casting and counting of ballots], so as to uphold the will of the voters and "prevent disenfranchisement." *Brown,* 230 Ind. at 130, 101 N.E.2d at 647.

20. "[U]nder the doctrine of *expressio unius est exclusio alterius*, '[w]hen certain items or words are specified or enumerated in a statute then, by implication, other items or words not so specified or enumerated are

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[3] Another saving provision is the authority granted county election officials to allow an absentee voter the opportunity to recast their ballot if notified by the county election that due to an error, the ballot would not be counted. *See,* IC § 3-11-2-16, IC § 3-11-10-26. Here, as the six ballots at issue were accepted and counted, the voters were not given the opportunity to recast their ballot.

excluded.'" *Haskins v. Fin. Builders Fed. Credit Union,* 278 N.E.3d 1255, 1258 (Ind. Ct. App. 2026) (citation omitted), *trans. denied* 2026 Ind. LEXIS 489 (Aug. 4, 2026) (where "legislature specifically enumerated a two-year statute of limitations on actions on a deposit account . . . [i]nvocation of the ten-year statute of limitations for certain actions on a deposit account is not so specified and, by implication, is excluded"). *See also, Brandmaier v. Metropolitan Dev. Comm'n*, 714 N.E.2d 179, 181 (Ind. Ct. App. 1999) ("one long-standing rule of statutory construction is that expressed in the principle *expressio unius est exclusio alterius*, which means that the enumeration of certain things in a statute necessarily implies the exclusion of all others"). Under this doctrine of statutory construction, the express exclusion of absentee ballots without initials from the savings clause means that absentee ballots lacking the seal/signature are not excluded yet this is exactly how the Commission applied the statute.

21. Further, I.C. § 3-11.5-4-13 identifies absentee ballots that are not to be counted and absentee ballots lacking the seal/signature do not fall within this prohibition. Such ballots, other than those lacking initials, would fall under the protection of the saving clause contained in I.C. § 3-12-1-12(b). Under the doctrine of *expressio unius est exclusio alterius,* this raises the issue of whether absentee ballots lacking the seal/signature can be excluded from the count under any circumstance.

22. In excluding absentee ballots lacking initials from the savings clause, I.C. § 3-12-1-13(b) states the ballots "may not be counted." Although

using the word “may”, this Court has interpreted the language to impose a mandatory duty of not counting such ballots. *Horseman v. Keller*, 841 N.E.2d 164, 171 (Ind. 20--) (an absentee ballot lacking initials “may not be recounted in situations where clerical error by an election officer rendered it invalid”).[4]

23. Like I.C. § 3-12-1-13(b), I.C. § 3-12-1-12(b) states that a ballot of any type “may nevertheless be counted.” The use of “may” in this manner also imposes an obligation to count a ballot that was marked and cast by a voter that otherwise may not be counted due solely to an election officer’s act or failure to act if there is no evidence of fraud, tampering, or misconduct. *See, Brown,* 230 Ind. at 128 (“In the absence of fraud, election statutes generally will be liberally construed to guarantee to the elector an opportunity to freely cast his ballot, to prevent his disfranchisement, and to uphold the will of the electorate”). Indiana Code § 3-12-1-13(c) states: “The act or failure to act by an election officer is not by itself evidence of fraud, tampering, or misconduct affecting the integrity of the ballot.”

24. Thus, in applying the savings clause, the Commission should have first determined 1) whether the ballot was properly cast by the voter; and 2) whether the problem with the ballot is due to an error of an election official; and 3) whether the challenger satisfied the heavy burden of showing evidence of fraud, tampering, or misconduct affecting the integrity of the ballot. If the answer to the first two questions is “yes” and as the Commission found no

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[4] The saving provision in I.C. 3-12-1-12(a) regarding errors by the clerk is intended to apply “to votes cast by any method.” *Horseman* dealt only with absentee ballots lacking initials.

evidence of fraud, tampering, or misconduct as no evidence of such was presented, the six ballots should not have been subtracted from Senator Deery's total votes received. Two members of the three-member Commission voted not to count the six ballots without providing any explanation.

25. If the two members of the Commission believed they had discretion to refuse to count these six otherwise legitimate and properly-cast absentee ballots, this raises an issue under the Indiana Constitution, Art. 2, Sec. 1 ("All elections shall be free and equal").[5] The use of the word "may" in I.C. § 3-12-1-12(b) ("may nevertheless be counted") does not grant the Commission unbridled discretion to reject the ballots lacking the seal/signature. Such unbridled discretionary power would be arbitrary and capricious. As even counsel for Ms. Copenhaver recognized, such discretion would be "standardless."

26. This appeal presents a substantial question of law of great public importance, as the error of the Commission overturned an election and disregarded the voice of the voters who have a fundamental right to vote in free and fair elections and to have their vote counted.

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[5] If this Court resolves this matter through statutory interpretation, the Court need not address the constitutional issues that are otherwise raised. *J.B. v. State*, 252 N.E.3d 910, 916 (Ind. 2025) ("statutes should be interpreted so as to avoid constitutional issues").

AN EMERGENCY EXISTS REQUIRING SPEEDY DETERMINATION

27. Here are the pertinent deadlines:

09/04/2026	60 days before the election, the clerk must estimate number of absentee ballots required. After the estimate, the county election board must begin the printing of absentee ballots. I.C. § 3-11-4-10; I.C. § 3-11-4-14
09/14/2026	Absentee ballots must be delivered by the printer to the circuit court clerk no later than 50 days before the election. I.C. § 3-11-4-15
09/19/2026	Absolute 45-day deadline to transmit absentee ballots to voters whose applications have already been approved, including military and overseas voters. I.C. § 3-11-4-18; Military and Overseas Voter Empowerment Act, 52 U.S.C. § 20302(a)(8)(A); Uniformed and Overseas Citizens Absentee Voting Act, 52 U.S.C. § 20302(a)(8)(A). However, the State can make application for a hardship waiver request when there is a delay due to a legal contest. It must be approved by a presidential designee. 52 U.S.C. § 20302(g)(2)(B)(ii).
10/6/2026	Early voting begins.
11/3/2026	General Election Day

28. Given the tight time constraints, an emergency exists as this appeal could not be completed in a timely manner.

CONCLUSION

Appellant Senator Spencer R. Deery respectfully requests that the Court accept transfer of this case and consider the following expedited briefing schedule:

A. Any party objecting to this transfer or proposed expedited schedule must respond within two days after the date of service. If a party does not object, that party is to file a notice with the Court stating such as soon as practicable;

B. Appellant shall reply within two days of receipt of the latest response from Appellees and shall notify the Court as soon as practicable if it does not intend to file a reply;

C. The Commission, through the Recount Director, shall prepare the official record of the proceedings and submit it to the Court when requested;

D. The brief of the Appellant shall be due within five days after the grant of transfer;

E. The brief(s) of the Appellees shall be due within five days after the date of service of the Appellant's Brief;

F. The reply brief of the Appellant shall be due within three days after the date of service of the Appellant's Brief.

Appellant has already ordered the transcripts and exhibits which have been delivered this date to all counsel of record in the recount proceedings.

WE HEREBY AFFIRM UNDER PENALTIES OF PERJURY THAT THE FOREGOING REPRESENTATIONS ARE TRUE TO THE BEST OF MY KNOWLEDGE.

/s/ Karen Celestino-Horseman

/s/ Samantha E. DeWester

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of August 2026, the foregoing was filed and served via the Indiana E-Filing System upon Indiana Attorney General Todd Rokita, Paul Mullin, Michael Claytor, Indiana Secretary of State Diego Morales, Matthew R. Kochevar, Kegan Prentice, and Evan Norris, William, William Bock, III, Ted W. Nolting, Sarah R. Pfister, and Mark Colucci the time of service being that when electronically served by the Indiana E-Filing System pursuant to App. R. 24(B). Additionally courtesy copies were sent via the E-Filing System to the clerks of the following counties:

Fountain County: Hon. Patty Smith, psmith@fountaincounty.in.gov

Montgomery County: Hon. Sondra Sixberry, sondra.sixberry@montgomerycounty.in.gov

Warren County: Hon. Debbie Hiatt, dhiatt@warrencounty.in.gov

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