

IN THE INDIANA COURT OF APPEALS
CASE NO. 26A-EX-02271

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.)
)

APPELLANT’S REPLY IN SUPPORT OF
EMERGENCY VERIFIED MOTION TO TRANSFER
JURISDICTION AND MOTION TO STAY

Pursuant to the Court’s Order of August 18. 2026,
Appellant/Respondent State Senator Spencer Deery, by counsel, hereby
submits the following reply in support of the Appellant’s motion to transfer and
motion to stay:

DISCUSSION

Appellee/Petitioner Paula Copenhaver, does not dispute that the legal issues involved in Senator Deery’s appeal present a substantial question of law of great public importance.¹ Nor does she dispute that an emergency exists requiring a speedy determination. Instead, Copenhaver has chosen to rely on a single defense—that Deery’s appeal is moot because this Court cannot instruct the Indiana Recount Commission (“Commission”) to enter a certificate of election naming Senator Deery as the Republican candidate for SD23 as a deadline to do so has passed.

To the contrary, not only does the deadline not apply when a judicial appeal is taken but this Court has remedial authority to modify and/or extend statutory election deadlines. *Peterson v. Borst*, 786 N.E.2d 1086 (Ind. 2003) (*“We view the modification of [election] deadlines as a ministerial act, necessary to avoid frustrating legislative intent and to provide for the orderly administration of the 2003 election”* *Id.* (emphasis in original)). Further, this Court has demonstrated its commitment to speedy resolution in other substantial election law cases. *See, e.g., Morales v. Rust*, 228 N.E.2d 1025 (Ind. 2024) (expediting its reversal of the trial court’s contrary ruling and holding that a candidate for U.S. Senator was ineligible to be listed on the Republican Party’s primary

¹ The docket states that Attorney General Todd Rokita is appearing for Indiana Secretary of State Diego Morales but he has not appeared for Commission members Paul Mullin and Michael Claytor. The Commission has not filed an objection to either the motion to transfer or the motion to stay.

ballot); *Peterson v. Borst*, 786 N.E.2d at 1086 (drawing council districts map on an emergency basis).

The “deadline” argued by Copenhaver is not a final and absolute deadline. This Court has the power to determine that the six votes should be counted and to remand this matter to the Indiana Recount Commission (“Commission”) with instructions to enter a certificate of election naming Senator Deery as the Republican candidate for Senate District 23 in the 2026 general election. *See, T.W. v. St. Vincent’s Hosp. & Health Care Ctr., Inc.*, 121 N.E.3d 1039, 1042 (Ind. 2019) (a matter is not moot unless a court can no longer render effective relief).

I THE STATUTE WHICH COPENHAVER CLAIMS SETS AN IMMUTABLE DATE FOR THE CERTIFICATE OF ELECTION IS NOT AN ABSOLUTE DEADLINE

Copenhaver relies upon I.C. § 3-8-7-2, which establishes when the first date the Indiana Election Division (“IED”) must certify primary election results. Specifically, I.C. § 3-8-7-2 provides in part: “The election division shall, not later than noon seventy-four (74) days before the date of the general election, certify the primary election results canvassed and tabulated.” What Copenhaver fails to acknowledge is that this deadline is not ironclad and can be modified to account for both ordinary errors and errors of law. That a certificate of election is not inviolate is demonstrated by the statute which follows I.C. § 3-8-7-2.

I.C. § 3-8-7-3(a) authorizes the correction of errors that do not require a hearing, an evidentiary determination, judicial proceeding or adjudication. It provides in part:

- (a) Except as provided in subsection (b), an error in certification discovered before sixty (60) days before a general election shall be corrected by the public officials charged with the duties of certification.

I.C. § 3-8-7-3(a)-(b). In other words, if the certificate contains an ordinary error, the IED can make the necessary changes notwithstanding the initial certification deadline of 74 days before the election. But if there is an appellate review to determine whether the Commission committed an error of law, neither I.C. § 3-8-7-2 or -3(a) governs.

The error claimed by Senator Deery is one of law, and the means of correcting a certificate of election due to an error of law is expressly provided in I.C. § 3-12-10-18:

- (a) Any party to a final determination of the state recount commission concerning a nomination subject to IC 3-12-11 . . . may appeal the final determination to the court of appeals for errors of law . . .

- (b) If the court of appeals finds that a party has been substantially prejudiced by commission action that is:

- (1) . . . *otherwise not in accordance with law*;

* * * *

* * * [t]he court may remand the case to the commission for further proceedings and compel commission action that has been unreasonably delayed or unlawfully withheld.

If this Court determines the Commission erroneously applied the law, the Court must, pursuant to I.C. § 3-12-11-23, compel the Commission to change the certification, the IED “shall . . . correct the tabulation in accordance with

the certificate.” I.C. § 3-12-11-23(a)(2). Indiana Code § 3-12-11-24 provides: “The candidate shown by a corrected vote tabulation under section 23 [IC § 3-12-11-23] of this chapter to have received the highest number of votes for nomination or election to an office is entitled to a certificate of nomination, certificate of election, or commission for the office *even though one may have been issued upon a previous tabulation.*” (emphasis added).

The exception of judicially reviewed Commission decisions from deadlines regarding the certification of election is further buttressed by Indiana Code § 3-12-5-14, which expressly excepts recounts from the deadline:

(a) This section does not apply to the correction of an error under . . . IC § 3-12-11-23.

(b) The county election board or the election division shall correct an error in the certification of the vote for a candidate or on a public question if the error is discovered not later than the final date and hour for the filing of a recount or contest under this article.

Neither I.C. §§ 3-12-10-18, 3-12-11-23, nor 3-12-11-24 impose a deadline by which judicial review of an alleged error of law must be completed or the resulting recount correction implemented. That omission is particularly significant because if the General Assembly intended to enact a hard stop regarding appellate review errors of law by the Commission, it could certainly have done so as it has done in other parts of the Election Code dealing with judicial appeal.

For example, to challenge the eligibility of a candidate for state legislative office at the general election, a registered voter of the district must file an eligibility challenge with the IED no later than noon seventy-four days before

the general election. I.C. § 3-8-8-3. The statutory scheme then imposes an explicit finality provision: regardless of whether the challenge remains pending before the Election Commission or even on appeal, at noon sixty days before the general election the challenge is terminated, the candidate's name may not be removed or replaced on the ballot, and votes cast for that candidate must be canvassed, counted, and reported. I.C. § 3-8-8-7(a)(1) (“regardless of the status of a challenge before the commission or the court of appeals, at noon sixty (60) days before the general election the following apply . . . (1) The challenge is terminated”). No such express and immutable provision applies to the judicial review of a recount determination by the Commission that is alleged to be based upon an error of law. *Cf. Kite v. Curlin*, 139 N.E.3d 1113 (Ind. Ct. App. 2019) *trans. denied*) (where contest was granted after the general election, court ordered the certification of the candidate who received the second highest number of votes as required pursuant to I.C. 3-12-11-25(a)).

The overarching point is that certification of a candidate is subject to correction or modification under various scenarios outside the 74-day period, and that date is not an insuperable barrier to a court modifying it if the facts and law demand and due process so requires.

II I.C § 3-8-7-2 MUST BE CONSIDERED *IN PARI MATERIA* WITH OTHER PROVISIONS OF THE ELECTION CODE

This Court interprets ambiguous statutes relating to the same general subject *in pari materia* to produce a harmonious statutory scheme. *Sanders v. State*, 466 N.E.2d 424, 428 (Ind. 1984). “Where possible, every word must be

given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute.” *Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004) (citation omitted). Copenhaver’s proffered construction cannot be reconciled with other provisions of the Election Code as it would lead to the absurd and unconstitutional result of denying Deery his statutory and constitutional right to appeal and due process. For example, if I.C. § 3-8-7-2 is interpreted as establishing the hard and fast deadline for the certificate of election under all circumstances, as Copenhaver urges, it renders meaningless I.C. § 3-8-7-3, which provides for correction of ordinary errors until the sixtieth day before the election.

Unlike in recounts following a general election, there is no statutory deadline for the completion of a recount of a primary election by the Commission apart from the command in I.C. § 3-12-11-17(a) that the Commission “expeditiously complete the recount of all votes ordered recounted”. *Cf.* I.C. § 3-12-11-21(a) (“a recount or contest for general election to a legislative office shall be completed by the state recount commission not later than December 20 after the election”). Under Copenhaver’s strict interpretation of I.C. § 3-8-7-2, Deery’s right to appeal errors of law would be extinguished before such an appeal had a chance to be fairly and fully considered by an appellate court. For instance, if the Commission had issued the certificate of recount at 11:50 a.m., the IED would have certified the results by noon and Senator Deery would have been foreclosed from filing his appeal.

Indiana Code § 3-12-11-23 and § 3-12-11-24 would also be rendered meaningless. First, I.C. § 3-12-11-23 would be rendered subordinate to an earlier general certification deadline even though it contains the specific legislative command governing what happens after the recount. Also, I.C. § 3-12-11-24 provides for the issuance of a certificate of nomination following a recount “even though one may have been issued upon a previous tabulation.” Treating the earlier certification issued under I.C. § 3-8-7-2 as irrevocable makes these statutes impossible to reconcile.

III DECLARING DEERY’S APPEAL MOOT WOULD VIOLATE HIS INDIANA CONSTITUTIONAL RIGHTS

Copenhaver claims that the deadline provided in I.C. § 3-8-7-2 renders Deery’s appeal moot because he cannot “obtain [] effective relief because the statutory deadline for certifying candidates for the general election has passed, and he can no longer be certified as the Republican nominee in SD 23.” (Copenhaver Response, p. 9). As discussed *supra*, Copenhaver’s strict interpretation of I.C. § 3-8-7-2 is erroneous, not only as a matter of statutory construction, but because it would also infringe upon Senator Deery’s constitutional rights under Ind. Const. art. I, § 12, which ensures Hoosiers access to a remedy by due course of law:

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase; completely, and without denial; speedily, and without delay.

This Court has construed this provision of the Constitution to mean that the orders of an administrative body must be reviewable even without an express statutory right to an appeal. “[T]he inherent right to a review of an order of an administrative board or commission is not statutory, but a right under the Indiana Constitution”, so as to meet the requirements of due process and to ensure that the agency “has acted within the scope of its powers.” *Warren v. Indiana Telephone Co.* (1940), 217 Ind. 93, 26 N. E. 2d 399; *Joseph E. Seagram & Sons v. Board of Com'rs, etc.* (1943), 220 Ind. 604, 45 N. E. 2d 491.

Under exigent or emergency circumstances, this Court has undertaken even functions that are ordinarily legislative in nature. *See, Peterson v. Borst*, 786 N.E.2d 668 (Ind. 2003) (drawing new council districts, noting that the “Constitution grants this Court broad jurisdiction over judicial matters . . . we can exercise that jurisdiction, as authorized by the Indiana Constitution, in accordance with court rules”) (citing Ind. Const. art. 7, § 4). The *Peterson* Court, as a further fount of such authority, also noted that Ind. Appellate Rule 66(C), which grants the Court the authority to “order correction of a judgment or order; . . . make any relief granted subject to conditions; and (10) *grant any other appropriate relief.*” *Peterson*, 786 N.E.2d at 676 (Ind. 2003) (emphasis added).

This Court should reject Copenhaver’s invitation to abstain from deciding Deery’s appeal by transforming statutory deadlines, intended to facilitate an orderly election, into a mechanism for insulating the Commission’s alleged

errors of law from meaningful appellate review. Deery timely invoked the judicial review afforded by Indiana law, and the intervening progression of the election calendar should not extinguish that review before this Court can determine whether the Commission adjudicated the ballots in question in compliance with the law. Exercising this Court's authority to grant appropriate relief is necessary to guarantee Deery's constitutional right to a speedy review of the Commission's decision as promised by Ind. Const. art. 1, § 12. It will also avoid undermining Deery's constitutional right to a free and equal election as promised by Ind. Const art. 2, §1, as well as the constitutional rights of voters who supported him to have their valid votes counted.²

Election certification is not an immutable event that categorically forecloses correction, particularly when it comes at a cost of forfeiting constitutionally guaranteed rights. When a recount or contest -- or judicial review of a recount or contest -- establishes that the governing law requires a different result, Indiana law provides mechanisms by which the official election records must conform to the result required by law. *Peterson* confirms that statutory election deadlines likewise need not be applied in a manner that defeats meaningful judicial review and thereby frustrates, rather than advances, the Election Code's ultimate purpose of determining the lawful winners of elections and ensuring the proper administration of election law.

² The standing of a candidate to represent voters in a challenge to an election law is now firmly established under federal law. *Bost v. Illinois State Bd. Of Elections.*, 607 U.S. 71 (2026).

IV THE IED IS NOT REQUIRED TO BE A PARTY IN THIS APPEAL

Copenhaver claims that “Senator Deery has never sought to challenge, stay or set aside the IED’s certification of Paula Copenhaver as the SD 23 Republican nominee.” (Copenhaver Response, p. 13). There is no need to name the IED as a party because the Election Code prescribes its ministerial duties following receipt of the operative recount certificate. *See, I.C. § 3-12-11-23* (following receipt of operative recount certificate, IED shall correct the tabulation); *I.C. § 3-12-11-24* (upon corrected tabulation, candidate entitled to certificate of nomination). And even if this Court were to determine the IED is necessary to accord full and effective relief, the Court can order it to be made a party pursuant to Ind. Trial Rule 19(A)(2). Ind. Trial Rule 1 (“these rules govern the practice in all courts of the State of Indiana in all suits of a civil nature”).

Moreover, Deery seeks no relief from the IED, which has no discretion but to certify the results as the Commission is ordered by this Court to do. And the candidate shown in the corrected tabulation that received the highest number of votes “is entitled to a certificate of nomination” even though one was previously issued. *I.C. §. §3-12-11-23(a) and -24*. Moreover, “the burden of proving that joinder is necessary rests with the party asserting it.” *Ball State Univ. V. Irons*, 27 N.E.3d 717, 722-23 (Ind. 2015). Regardless, correction of a recount certificate is a ministerial function governed by *I.C. § 3-12-11-23*. Complete judicial relief can be afforded among the existing parties, and the implementation of relief follows by operation of law.

V COPENHAVER MISSTATES THE DEADLINE AS TO WHEN THE PRINTING OF BALLOTS MUST START

Copenhaver claims: “Via Deery’s [proposed briefing] schedule . . . briefing would not be completed until September 7, three days *after* the statutory deadline by which county election boards *must* begin printing absentee ballots.” (Copenhaver Response, p. 12) (citing I.C. §§ 3-11-4-10, -14) (emphasis in original). Once again, Copenhaver’s reliance upon these statutes is misplaced as they do not state a printing deadline.

Indiana Code § 3-11-4-10(1)-(2) provides:

Each circuit court clerk shall:

- (1) Not less than sixty (60) days before the date on which a general, primary, or municipal election is held; or
- (2) Not more than three (3) days after the date on which a special election is ordered;

estimate the number of absentee ballots that will be required in the county for the election.

Indiana Code § 3-11-4-14 states: “After completing the estimate required by section 10 [IC 3-11-4-10] of this chapter and receiving all certifications from the IED required under IC 3-8 or IC 3-10, the county election board shall immediately proceed to prepare and have printed the ballots.” This statute *does not* state that county election boards must begin printing ballots on September 4, 2026, the sixtieth day before the general election.

What these statutes do state is that after the county has estimated the number of absentee ballots it is going to need, and after receiving all required certifications from the IED, the county is to begin “to prepare and have printed

the ballots.”³ Accordingly, neither statute establishes September 4 as the date on which ballot printing must begin, and the asserted printing deadline does not support the denial of expedited review.

VI COPENHAVER’S LACHES DEFENSE IS WHOLLY WITHOUT MERIT, AS SENATOR DEERY PROMPTLY AND DILIGENTLY SOUGHT REVIEW

Copenhaver’s laches argument is similarly inapt. At no time did Senator Deery sleep on his rights or permit election deadlines to pass before seeking judicial relief. Indiana courts recognize that election disputes demand extraordinary diligence, and the equitable doctrine of laches exists precisely to prevent a litigant from withholding a known claim until delay prejudices the orderly administration of an election. See *Wyatt v. Wheeler*, 936 N.E.2d 232, 237–38 (Ind. Ct. App. 2010) (describing laches as requiring inexcusable delay, knowing acquiescence, and prejudice resulting from changed circumstances). Here, the opposite occurred.

Deery promptly challenged the Recount Commission’s decision through the appellate process provided by Indiana law and sought expedited judicial intervention before the approaching election administration deadlines could foreclose meaningful relief. There was no acquiescence, abandonment, or strategic delay. To the contrary, Deery has continuously pursued review of the Commission’s alleged errors of law.

³ The stay requested by Senator Deery would allow the clerks to complete the design of the ballots in all other ways except to identify the Republican candidate for the SD23 race. In that spot, the clerk can insert a placeholder so the rest of the ballot can be designed by the vendor.

CONCLUSION

Deery's appeal of the Commission's final determination in Copenhaver's recount involves a singular legal issue: Whether the Commission erred as a matter of law by removing six ballots from the certified tally that, on their face unambiguously expressed the voters' intent to select Senator Deery as the Republican senatorial nominee in SD23, solely because county election officials failed to affix the county clerk's seal/signature, even though the ballots contained the bipartisan initials required by I.C. 3-12-1-13(b), and there was no evidence of fraud, tampering, or misconduct affecting the integrity of the six ballots. A highly expedited briefing schedule can dispose of this issue, thereby ensuring a speedy resolution of Senator Deery's appeal as guaranteed by Ind. Const. art. 1, § 12.

Indiana has a history of commitment to free and fair elections, of making sure every vote is counted and ensuring that voters are heard. Voting is the bedrock upon which our country has been built. There are few substantial legal questions of greater public interest than those involving the fundamental right to vote and having that vote counted. Moreover, because of looming election deadlines, an emergency exists requiring speedy determination.

For all the foregoing reasons, Senator Deery respectfully requests that this matter be transferred to the Supreme Court on direct appeal pursuant to App. R 56(A), and that the execution of the Commission's determination be stayed pending the Supreme Court's final disposition of his appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th 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, Evan Norris, 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,
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Warren County: Hon. Debbie Hiatt, dhiatt@warrencounty.in.gov

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