No. 127258

IN THE

SUPREME COURT OF ILLINOIS

THE COUNTY OF McHENRY and JOSEPH TIRIO, in his Official Capacity as the McHenry County Clerk,	)	On Appeal from the Appellate Court of Illinois, Second District, No. 2-20-0478
Petitioners-Appellants,	)	There on Appeal from the 22nd Judicial Circuit Court,
v.	)	McHenry County, Illinois, No. 2020 CH 248
McHENRY TOWNSHIP,	)	
Defendant-Appellee.	)	The Honorable Kevin G. Costello, Judge Presiding

BRIEF OF APPELLANTS

COUNTY OF MCHENRY and JOSEPH TIRIO, MCHENRY COUNTY CLERK

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ORAL ARGUMENT REQUESTED

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NATURE OF THE CASE

This case involves the elected McHenry County Clerk Joseph Tirio's (Tirio) authority to effect compliance with statutory requirements governing inclusion of a proposition on the general election ballot to dissolve McHenry Township (the "Township") which originated from a McHenry Township Board of Trustees resolution. The Illinois Constitution, the Illinois Townships Code and the Illinois Election Code, combined, provide the authority for and the specific procedures to approve dissolution of a township government via a ballot referenda question resolution approved by a township governing body. In the instant case, the ballot proposition to dissolve the Township certified to Tirio by the McHenry Township Clerk, initially, had two disqualifying flaws: 1) it did not comply with the statutory standard for wording of the question and 2) it violated the statutory timing requirement that this type of proposition may not to appear on the ballot more than once in any 23-month period.

Tirio timely notified the Township of both these defects. The deadline for certifying the general election ballot content had not yet tolled so the McHenry Township Board of Trustees was able to revise the wording of its question and resubmit it prior to the deadline. However, because the proposition still did not meet the 23-month timing restriction, Tirio notified

the McHenry Township Clerk who advised the McHenry Township Board of Trustees, pursuant to a statutory provision, that the question would not appear on the November 2020 General Election ballot. The Township pursued a Mandamus action which was dismissed by the 22nd Judicial Circuit Court; the Appellate Court reversed the Circuit Court, finding that Tirio exceeded his authority when excluding the referendum proposition from the ballot, but did not address whether the two referenda questions were the same; and this Appeal ensued.

ISSUES PRESENTED FOR REVIEW

1. Whether the Appellate Court erred when it ruled that Tirio exceeded his

authority when he determined that a referendum question emanating from the Township governing body did not comply with Section 28-7 of the of the Illinois Election Code. Section 28-7 prohibits the placement of a referendum question to dissolve a township where the same referendum question was on the ballot less than 23 months previously, which this question was just eight (8) months previously. Tirio, therefore, did not place the referendum proposition on the November 2020 General Election ballot.

2. Whether, in the absence of a ruling by the Appellate Court, the wording of the Township's most recent proposed referendum question, which merely changed the effective date of the Township dissolution from the previous referendum question, which was on

the March 2020 Primary Election ballot, still rendered the question the same. If the questions are the same, the proposition at issue in the instant case did not comply with Section 28-7 of the Illinois Election Code and was, therefore, not qualified to be placed on the November 2020 General Election ballot.

STATEMENT OF JURISDICTION

The Appellate Court issued its order on April 15, 2021. No petition for rehearing was filed. Petitioner filed a timely petition for leave to appeal to the Illinois Supreme Court which was allowed on September 29, 2021. The Court has jurisdiction over this matter pursuant to Illinois Supreme Court Rule 315.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. "Townships may be consolidated or merged, and one or more townships may

be dissolved or divided, when approved by referendum in each township affected." Ill. Const. 1970 art. VII § 5.

2. "Units of local government means counties, municipalities, townships, special districts and units, designated as units of local government by law...but does not include school districts." Ill. Const. 1970 art. VII § 1.

3. "Proposals for actions which are authorized by this Article or by law and

which require approval by referendum may be initiated and submitted to the electors by resolution of the governing board of a unit of local government or by petition of electors in the manner provided by law." Ill. Const. 1970 art. VII § 11.

4. "By resolution, the board of trustees of any township located in McHenry

may submit a proposition to dissolve the township to the electors of that township at the election next following in accordance with the general election law. The ballot shall be as provided for in Section 24-30." 60 ILCS 1/24-15.

5. "The proposed date of dissolution shall be at least 90 days after the date of

the election at which the referendum is to be voted upon." 60 ILCS 1/24-20.

6. "Subject to the requirements of Section 16-7 of the Election Code [10 ILCS

5/16-7], the referendum ... shall be in substantially the following form on the ballot:

Shall the (dissolving township), together with any road districts wholly within the boundaries of (dissolving township), be dissolved on (date

YES

of dissolution) with all of the township and road district property, assets, NO personnel, obligations and liabilities being transferred to McHenry County?" 60 ILCS 1/24-30.

7. "The initiation and submission of all public questions to be voted on by the Electors of the State or of any political subdivision or district or precinct or combination of precincts shall be subject to the provisions of this Article." 10 ILCS 5/28-1.

8. "Whenever ... an election authority or the State Board of Elections is in receipt of ... a certification for the submission of a public question at an election at which the public question may not be placed on the ballot ... such officer or board shall give notice of such prohibition by registered mail as follows: ... (b) in the case of a certificate from a local election authority to such election authority who shall thereupon give notice as provided in subparagraph (a) [in the case of a petition] or notify the governing board which adopted the initiating resolution or ordinance..." 10 ILCS 5/28-5.

9. "In any case in which Article VII ... of the Constitution authorizes any action to be taken by or with respect to any unit of local government, as defined in Section 1 of Article VII of the Constitution by or subject to approval by

referendum, any such public question shall be initiated in accordance with this Section ... Referenda provided for in this Section may not be held more than once in any 23-month period on the same proposition." 10 ILCS 5/28-7.

10. "Election authority means a county clerk." 10 ILCS 5/1-3(8).

11. "[T]he county clerks, in their respective counties shall have charge of the

printing of ballots for all elections, including referenda." 10 ILCS 5/16-5.

STATEMENT OF FACTS

Defendant, Joseph Tirio ("Tirio") is the duly elected McHenry County Clerk who serves as the election authority of the county. C6. Defendant, County of McHenry, is a unit of government situated within McHenry County, Illinois. C6.

Plaintiff, McHenry Township ("Township"), is a local unit of government located in McHenry County, Illinois. C6.

On June 12, 2020, the Township's Board of Trustees approved, by resolution, a referendum proposition and submitted it to Tirio to be placed on the November 2020 General Election ballot. The referendum would have asked the voters if the Township and the road districts wholly within the Township should be dissolved, effective February 8, 2021. C28. The specific language of the proposition was as follows:

"Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on February

> 8, 2021, with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County? All funds of the dissolved township and dissolved road district shall be used solely on behalf of the residents of the geographic area within the boundaries of the dissolved township. Proceeds from the sale of park land, cemetery land, buildings or facilities after transfer to the county must be utilized for the sole benefit of the geographic area of the dissolved township. The McHenry County Board shall not extend a property tax levy that is greater than 90% of the property tax levy extended by the dissolved township or road district for the duties taken on by McHenry County." C29-30.

Tirio's June 30, 2020, response letter to the Township explained that the question was prohibited from appearing on the November 2020 General Election ballot for two reasons: (1) the wording of the question did not meet the substantial form requirement specified in Section 24-25 of the Townships Code (60 ILCS 1/24-25); and (2) the same proposition to dissolve McHenry Township had already appeared on the March 2020 Primary Election ballot, which would be about eight (8) months prior to the November 2020 General Election and would violate the 23-month time restriction in Section 28-7 of the Election Code. 10 ILCS 5/28-7. C30.

The referendum question previously submitted by petition of the electors of the Township for consideration on the March 2020 Primary Election ballot was as follows:

> "Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on June 21, 2020, with all of the township and road district property, assets, personnel, obligations and liabilities being transferred to McHenry County?" C10.

On July 6, 2020, the Township re-submitted to Tirio an amended version of the original proposed referendum to dissolve the Township which was worded as follows:

> "Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on February 8, 2021, with all of the township and road district property, assets, personnel, obligations and liabilities being transferred to McHenry County?" C30.

Tirio responded to this second submission on July 7, 2020, explaining that, despite the amended resolution that did render the question in compliance with the Townships Code Section 24-30 wording requirement (60 ILCS 1/24-30), the question could still not be placed on the November 2020 General Election ballot due to the 23-month timing restriction provided in Section 28-7 of the Election Code for these types of propositions. 10 ILCS

5/28-7. C9-10. This response from Tirio to the local election official and the subsequent notice to the Township Board of Trustees were pursuant to the authority granted by and the notice requirements provided in Section 28-5 of the Election Code. 10 ILCS 5/28-5. C9.

The Township filed its Complaint for Writ of Mandamus and Mandatory Injunctive Relief on July 24, 2020, asking the Circuit Court to require Tirio to print its proposed referendum question on the November 2020 General Election ballot. C6. After a lengthy hearing, the Circuit Court granted Tirio's Motion to Dismiss the Complaint for Writ of Mandamus and Mandatory Injunctive Relief with prejudice on August 24, 2020. C66. Township filed its appeal on August 24, 2020. C77-78. The Illinois Appellate Court filed its Opinion on April 15, 2021, reversing the Circuit Court's dismissal of the Township's Mandamus Complaint, finding that Tirio lacked authority to reject the Township's proposition, but not reaching the issue whether the Township's two propositions were the same.

STANDARD OF REVIEW

The standard of review on the first issue presented, whether Tirio had the authority to prohibit the Township's referendum proposition from being placed on the November 2020 General Election ballot, is *de novo*. The court has stated that, "[w]e interpret the Election Code, like all statutes, in a way that gives meaning to all of the language in the statute..." and "...determining compliance with the Election Code is a question of law, which

a reviewing court reviews *de novo*." *Zack v. Ott,* 381 Ill.App.3d 545, 549, 886 N.E.2d 487 (2nd Dist. 2008).

The second issue presented, whether or not the Township's two referenda questions are the same, was not addressed by the Appellate Court. A decision on this issue would have determined the second referendum question's compliance with the statute's timing restriction and dictated whether or not it would have been included on the November 2020 General Election ballot. Whether or not the two proposition questions are the same is a question of fact. Questions of fact are reviewed deferentially and would be disturbed only if they are against the manifest weight of the evidence. *Ramirez v. Chicago Board of Election Commissioners,* 440 Ill.Dec. 170, 174, 151 N.E.3d 206 (1st Dist. 2020).

ARGUMENT

The Illinois Constitution, the Illinois Townships Code ("Townships Code") and the Illinois Election Code (Election Code"), together, address this two-part issue. Tirio asserts that the Appellate Court misapplied the statutes and the case law, resulting in an incorrect and incomplete decision.

A. The Appellate Court ignored Tirio's statutory authority and duty to effect compliance regarding a local governmental unit governing body's proposed ballot referendum question, pursuant to Illinois Townships Code and Election Code dictates.

Initially, Article VII of the Illinois Constitution authorizes local elected official selection methods and government structures to be established and/or

changed by referenda of the applicable group of voters. Ill. Const., art. VII, §§ 1, 2, 3, 4, 5 and 11(a). Section 1 includes townships in the definition of units of local government. Ill. Const., art. VII, § 1. Section 5 specifically provides that, "[t]ownships may be consolidated or merged, and one or more townships may be dissolved or divided when approved by referendum in each township affected." Ill. Const., art. VII, § 5. Section 11(a) provides that, "[p]roposals for actions which are authorized by this Article or by law and which require approval by referendum may be submitted to the electors by resolution of the governing board of a local unit of government or by petition of electors in the manner provided by law." Ill. Const. 1970 art. VII § 11(a). Various sections of the Townships Code and the Election Code then detail the specific referenda procedures and requirements.

Section 24-15 of the Townships Code authorizes the board of trustees of any township located in McHenry County, Illinois, to submit a proposition to dissolve the township to the electors at the next election "*in accordance with the general election law.*" (Emphasis added.) 60 ILCS 1/24-15. Section 24-30 of the Townships Code requires that the question to dissolve a township be stated in substantially the form as provided in the statute. 60 ILCS 1/24-30. There is also a condition that a township dissolution may not go into effect until at least 90 (ninety) days after the election at which the proposition is approved by the voters. 60 ILCS 1/24-20.

Section 28-1 of the Election Code states that, "[t]he initiation and submission of all public questions to be voted upon by the electors of the State or of any political subdivision or district or precinct or combination of precincts shall be subject to the provisions of this Article." 10 ILCS 5/28-1. The Article further states that referenda propositions authorized by Article VII of the Illinois Constitution may not be placed on the ballot more than once in any 23-month period. 10 ILCS 5/28-7. Further, Section 28-5 of the Illinois Election Code states that,

> "[w]henever....an election authority or the State Board of Elections is in receipt of ...a certification for the submission of a public question at an election at which the public question may not be placed on the ballot...such officer or board shall give notice of such prohibition by registered mail as follows:...(b) in the case of a certificate from a local election authority [McHenry Township Clerk] to such election authority [McHenry County Clerk Tirio], who shall thereupon give notice as provided in subparagraph (a) [in the case of a petition], or notify the governing board which adopted the initiating resolution or ordinance..." 10 ILCS 5/28-5.

The Election Code also states that, "[e]lection authority means a county clerk..." (10 ILCS 5/1-3(8); and, "...the county clerks, in their respective counties, shall have charge of the printing of ballots for all elections, including referenda." 10 ILCS 5/16-5.

In this case Tirio, as the election authority, reviewed the question certified to him by the McHenry Township Clerk and determined that the wording was not in compliance with statutory requirements and also did not meet the 23-month timing restriction as the same question had appeared on the March 2020 Primary Election ballot just three (3) months previously and, if allowed, would appear on the November 2020 General Election ballot a total of only eight (8) months after the 2020 Primary Election. Tirio properly notified, by registered mail, the local election official, the McHenry Township Clerk who, subsequently, advised the Township Board of Trustees members of the decision. In concert with his responsibility to print a proper ballot, Tirio did not place the prohibited question on the November 2020 General Election ballot. The 22nd Judicial Circuit Court, in a lengthy and detailed written decision (C, 66-79), concluded that the proposed question was the same that had appeared on the March 2020 Primary Election ballot (and defeated); that it was, thus, prohibited from appearing on the November 2020 General Election ballot; and that Tirio, as election authority, was authorized by statute to implement these actions.

The Appellate Court erroneously relied on both inapplicable statute and

case law to opine that Tirio does not have the authority to look beyond the "four corners" of the resolution submitted to him to complete his analysis of the resolution question's eligibility to appear on the November 2020 General

Election ballot nor to implement the results of his analysis. The Election Code statutes (10 ILCS 5/10-8) and the case law (*People ex rel. Giese v. Dillon,* 266 Ill.272 (1914) and *North v. Hinkle,* 295 Ill.App.3d 84 (2nd Dist. 1998)) cited by Township all involved restrictions and conditions related to submission of referenda question via voter-signed *petitions* – not resolutions originating from the governing body of a governmental unit. The cases and the statute cited by Township provide for and explain the factor of apparent conformity and the nominating petition objection and hearing process—neither of which applies to the instant case of a governing body resolution to propose a referendum question for the ballot. Both are also easily distinguishable from the instant case circumstances.

Integral to this case is Tirio's (as the county clerk and election authority)

authority to review a resolution submitted by a township's governing body to dissolve the township and then implement the results of that statutory review. The Appellate Court erred when it reversed the Circuit Court's finding that Township was not entitled to mandamus relief.

Article VII of the Illinois Constitution authorizes local (including townships) elected official selection methods and government structure to be established and/or changed by referenda of the applicable group of voters. Ill. Const., art. VII, §§ 1, 2, 3, 4, 5 and 11(a). The Townships Code and the Election Code then detail the specific referenda procedures and requirements.

Section 24-15 of the Townships Code authorizes the board of trustees of any township located in McHenry County to submit a proposition to dissolve the township to the electors at the next election "*in accordance with the general election law.*" (Emphasis added.) 60 ILCS 1/24-15. This confirms that the referenda provision in the Townships Code must be read together with the Election Code to effect these dissolution referenda questions. Section 24-30 of the Townships Code requires that the question be stated in substantially the form as provided in the statute. 60 ILCS 1/24-30.

In addition, Section 5/28-1 of the Election Code states that,

"[t]he initiation and submission of all public questions to be voted upon by the

> Electors of the State or of any political subdivision or district or precinct or combination of precincts shall be subject to the provisions of this Article." 10 ILCS 5/28-1.

This Article further states that referenda propositions authorized by Article VII of the Illinois Constitution may not be placed on the ballot more than once in any 23-month period. 10 ILCS 5/28-7.

The Appellate Court asserts that Tirio exceeded his authority as McHenry County Clerk when he looked beyond the face of the propositions and determined they were the same; and, for that reason, erroneously excluded the proposition from being placed on the November 2020 General Election Ballot. C10-11. The Election Code states that, "[e]lection authority

means a county clerk…" (10 ILCS 5/1-3(8); and, "…the county clerks, in their respective counties, shall have charge of the printing of the ballots for all elections, including referenda." 10 ILCS 5/16-5.

Referenda questions may be placed on a ballot by either voter-signed petitions (10 ILCS 5/28-2(a)) or resolutions or ordinances of governing boards of political subdivisions (10 ILCS 5/28-2(c)). *Petitions* that generate referenda ballot placement are subject to the same objection petition and hearing procedures that apply to candidate nominating petitions. (Emphasis added.) 10 ILCS 5/28-4. These same objection petition and hearing procedures, however, do not apply to proposed governing board resolutions or ordinances to place referenda questions on the ballot. Instead, the Election Code provides specific authority and a procedure for the election authority to address possible issues with ballot placement resolutions or ordinances that are not subject to the above described statutory objection procedures. Section 28-5 of the Illinois Election Code states that,

> "[w]henever … an election authority or the State Board of Elections is in receipt of … a certification for the submission of a public question at an election at which the public question may not be placed on the ballot … such officer or board shall give notice of such prohibition by registered mail as follows: … (b) in the case of a certificate from a local election authority, to such election authority, who shall thereupon give notice as provided in subparagraph (a) [in the case of a petition], or

notify the governing board which adopted the initiating resolution or ordinance..."

10 ILCS 5/28-5.

The Appellate Court ignores this specific statutory authority for a county clerk to determine and advise local officials that a referendum question is prohibited.

As stated previously, Section 28-7 provides that any referenda authorized by Article VII of the Illinois Constitution, "...may not be held more than once in any 23-month period on the same proposition..." 10 ILCS 5/28-7. The issue of whether to dissolve McHenry Township was a highly contested and publicized topic prior to the March 2020 Primary Election (whereupon the question was contained on the ballot) and was certainly known to Tirio due to his statutory duties for that March 2020 Primary Election.

Township's referenda question to dissolve McHenry Township is specifically authorized by Article VII of the Illinois Constitution (Ill. Const., art. VII, § 5) and is the same question to dissolve McHenry Township that appeared on the March 2020 Primary Election ballot. C8, 10. Tirio knew this based on his prior election duties. The only difference between the two questions is the effective date, which is an automatic outcome as the effective date is dictated by the statutory requirement that dissolution may not occur

less than 90 (ninety) days after the election at which it was voted on and approved. 60 ILCS 1/24-20.

The Appellate Court ignores the above described election authority's statutory duty to determine if or when certain propositions are prohibited from being placed on the ballot and the duty to advise local election officials of such prohibition. 10 ILCS 5/28-5. The Appellate Court asserts that Tirio's authority is to perform only a facial review to determine if Township's dissolution proposition meets the statutory content and timing requirements to be placed on the November 2020 Election ballot. C50-51.

The appellate court's reliance on the named statute section and case law is misplaced. The Appellate Court relies on Section 5/10-8 of the Election Code and two cases (*People ex rel. Gise v. Dillon,* 266 Ill. 272 (1914) and *North v. Hinkle,* 295 Ill.App.3d 84 (2nd Dist. 1998)), to support the contention that the statutory authority to determine apparent conformity of this *resolution-sponsored* ballot question allows only a facial review. The Appellate Court argues that Tirio's comparison of the newly proposed ballot referendum question with the previous question on the March 2020 Primary Election ballot to determine that they were the same question went beyond the restriction for only a facial review to determine whether there was apparent conformity. C50. As a result of this alleged, unsubstantiated authority, the Appellate Court states that Tirio was obligated to allow the referenda question to be on the November 2020 General Election ballot

despite the questions being identical except for the effective date and clearly violative of 10 ILCS 5/28-7.

Section 10-8 of the Illinois Election Code states that, "[c]ertificates of nomination and *nomination papers and petitions to submit public questions to a referenda* being filed as required and being in *apparent conformity* with the provisions of this act shall be deemed to be valid unless objection thereto is duly made in writing..." (Emphasis added.) 10 ILCS 5/10-8. While this statute section provides the ability to determine apparent conformity of *nomination papers* and *petitions* to submit public questions to a referendum, it makes no provision for addressing *governing body resolutions* to submit referenda questions. *Id. Dillon* involved a *petition with voter signatures* to place an anti-saloon referenda question on the ballot for which the town clerk investigated individuals' registration statuses to determine their eligibility to sign the petition. *Id.,* at 275-276. *North* involved *signed nominating petitions* to place municipal candidates on the ballot which were not in apparent conformity as the candidates failed to file their mandatory Statements of Candidacy. *Id.,* at 88-89. These are easily distinguished from the instant case which involves a governing board resolution to propose a ballot referenda question that is identical to a question that appeared on the Primary Election ballot just eight (8) months previously. Both the above Election Code section and the cited cases state that the "apparent conformity" standard applies to reviewing candidate nominations and public questions

originating from voter-signed petitions – but do not include governing body resolutions in this review provision.

Section 10-8 of the Election Code provides a specific objection process

to challenge the validity of ballot items proposed in *nomination papers* and *petitions to submit public questions.* (Emphasis added.) 10 ILCS 5/10-8. This objection petition and hearing process to challenge improper efforts to place referenda questions on the ballot applies to signed petitions but not to those propositions originating from governing board resolutions or ordinances such as in the instant case. This different treatment is reinforced by the statutory deadlines for referenda *petitions* versus referenda *resolutions.* Governing body resolutions to submit ballot propositions must be adopted 79 days prior to the election (10 ILCS 5/28-2) but signed petitions must be filed with the appropriate authority no less than 122 days prior to the election. 60 ILCS 1/24-20. The earlier deadline for signed petitions contemplates allowing ample time for the objection and hearing procedures, but the same time consideration is not afforded governing body resolutions. As a result, the only recourse to address these improper governing body ballot question attempts is the authority granted to the election authority by Section 28-5 of the Election Code. The election authority must, necessarily, assess submissions, determine validity and make proper notification to the appropriate local official. This notification then provides local government

units the opportunity to seek mandamus action exactly as was done in the instant case.

Just as the election authority reviews the statutes to determine that referenda meet the wording requirement, he/she also has the obligation to ascertain that they are not otherwise prohibited. 10 ILCS 5/28-5. In the instant case, where there is no statutory hearing procedure to consider objections to the inclusion of a governing body resolution question on the ballot, it is important that the election authority ensure the referenda questions are in proper form and allowed. Even if the election authority intended to seek judicial review to issue an order prohibiting or allowing ballot questions based on analysis of the statutory requirements, the election authority would not even know that such action was appropriate without first reviewing the appropriate information sources. This review could easily require consultation of items beyond the face of the resolution, such as the relevant statutes and official ballots from previous elections.

Section 28-5 clearly contemplates that decisions must be made relative to proposed ballot questions from governing bodies that might be prohibited from appearing on the ballot. Since the objection process applies only to candidate nominating *petitions* and *petitions* to place propositions on the ballot, some other mechanism must be present to ensure that a public question complies with the requirement of the Election Code, including Section 28-7. 10 ILCS 5/28-7. Because the county clerk has the statutory

duty to prepare the election ballots, including referenda (10 ILCS 5/16-5), an elected county clerk is the logical entity to perform any compliance determination. The statutes do not invest any other public official with the authority to perform such an analysis and make a determination. Nor do the statutes provide any other process to address this responsibility. Outside of an election authority's specific knowledge of a prior ballot question due to the duty to prepare ballots, the only other option to even determine public question conformity requires the ability to expand beyond just a facial examination of the ballot question. To limit consideration to just a facial examination renders compliance with the Election Code provisions in Sections 28-1, 28-5 and 28-7 meaningless requirements.

The Appellate Court ruled that the county clerk may only review within the four corners of the resolution proposition submitted; that Tirio's "ministerial" duties do not afford him the ability to look beyond those four corners. 2nd District Appellate Court Opinion, p. 21. The Appellate Court also ruled, "[w]e further note that when faced with a public question that he or she believes may not be placed on the ballot, a county clerk has the option of obtaining a judicial determination of the question." 2nd District Appellate Court Opinion, p. 22. But, respectfully, these two rulings by the Appellate Court put county clerks in an impossible position. If the clerk is not entitled to look beyond the four corners of the submission, on what basis could he or she even seek a judicial determination? The Clerk must either look at the

prior ballots to see if the submissions were the same, which the Appellate Court's decision forbids, or must rely on prior knowledge, which the Appellate Court also forbids.

For example, at the hearing for "judicial determination" that the Appellate Court suggests, the course of questions would be something like the following:

Q by Township Attorney: Mr. Tirio, did you look at the prior ballot to determine if this submission was the same as a previous referendum question?

A by Tirio: Yes.

Response by Township Attorney: Motion to Dismiss Your Honor. The Appellate Court has specifically forbidden that action. McHenry Township v. Tirio, No. 2-20-0478, 2nd District Appellate Court, April 2021.

Alternately, a different course of questions would be as follows:

Q by Township Attorney: Mr. Tirio, did you look at the prior ballot to determine if this submission was the same as a previous referendum question?

A by Tirio: No.

Q by Township Attorney: Then how could you possibly know it is the same question?

A by Tirio: I remember it and it is the same.

Township Attorney: Motion to Dismiss, Your Honor. The Appellate Court has also ruled that, "[f]rom the face of the July 2020 filings, Tirio could not have known that a proposition with identical wording (except for the dissolution date) was presented to the voters in March 2020.

Based on these prohibitions, therefore, on what grounds could the county clerk seek this judicial review and not violate the Appellate Court's ruling?

Township then makes the even less plausible argument that Section 28-7 could be enforced by a private citizen lawsuit requiring the question to be removed from the ballot. This places an extraordinary burden on private citizens to expend funds and commandeer litigation in the short time period allowed for final ballot preparation after the deadline to submit governing body referenda resolutions. Instead, and more logically, Section 28-5 requires the election official to notify the submitting governing board members the details of the ballot question rejection. It is the governing board that is better situated to more expeditiously instigate a judicial determination regarding ballot placement than an individual elector—especially when the county clerk meets the duty to inform the appropriate official.

B. The Appellate Court erred when it failed to affirm the Circuit Court's ruling that the two referenda questions are authorized by Article VII of the Illinois Constitution, are worded the same

and, therefore, may only appear on the ballot once in any 23-month period.

Township argues that, notwithstanding Tirio's lack of authority to exceed facial review of the referenda resolution, the two questions at issue are not the same so the later question is not prevented from being printed on the ballot within the 23-month period immediately following the March 2020 Primary Election ballot. C52-53. Township states that the different effective dates render the questions not the same. C53. Township further argues that, since the questions are not the same, the 23-month restriction in Section 28-7 of the Illinois Election Code (10 ILCS 5/28-7) on Illinois Constitution Article VII-authorized propositions reappearing on the ballot does not apply. C54.

Township points to case law that states where the statutory language is clear and unambiguous it will be given effect without resort to other aids for construction. *People ex rel. Baker v. Cowlin,* 154 Ill.2d 193 (1992). First, Township relies on the Miriam-Webster's Dictionary definition of the word "same" as "identical" to aver there is no ambiguity in the plain language of the statute and that the questions are not identical. C53. Second, it also relies on *Sadowski v. Tuckpointers Local 52 Health & Welfare Trust,* 281 F.Supp.3d 710 (N.D.Ill. 2017) to opine that "same" is analogous to "identical." However, *Cowlin* is not applicable to the instant case as it actually deals with uncertainty about which section of the code applied in determining an individual's criminal sentence. *Id.,* at 197. *Sadowski* also appears irrelevant

as it was reviewing an individual's subsequent claim for medical expense coverage to determine if it stemmed from the "same" original physical accident and, therefore, would be honored. *Id.,* at 716-717.

The effective date of dissolution is triggered by the clarifying statute that dissolution cannot occur before 90 (ninety) days after the election at which the proposition was voted on and approved. 60 ILCS 1/24-20. In the instant case, based on the statutory requirement, the effective date of the proposed dissolution proposition is necessarily different from the date in the question that appeared on the March 2020 Primary Election ballot and is the only difference between the two questions.

The Election Code clearly states that questions authorized by Article VII of the Illinois Constitution that propose changes to government structure and methods to select elected officials be restricted to ballot consideration by voters to only once in any 23-month period. 10 ILCS 5/28-7. To enable circumvention of the requirement that these substantive propositions be given a measured timetable for consideration, by inserting an inconsequential and necessarily changing detail in the question, renders the plain language of Section 28-7, meaningless. The courts have long presumed that, in enacting legislation, the legislature does not intend absurdity (*Better Government Association v. Officers of the Special Prosecutor,* 2019 IL 122949); and that exceptions, limitations or conditions that are inconsistent with the

legislative intent should not be considered. *Hendricks v. Board of Trustees of the Police Pension Fund of Galesburg,* 2015 IL App (3d) 140858.

Reliance on the county clerk's duty, as in the instant case, to assess permissibility of ballot placement and to notify the proper officials, as dictated in Section 28-5 of the Election Code, is the established mechanism to prevent untoward ballot results. 10 ILCS 5/28-5. Further, Township acknowledges Tirio's statutory authority to look beyond the four corners of the resolution to review the Election Code and to, then, enforce the wording requirement, pursuant to 60 ILCS 1/24-30. Township readily responded to this notice of noncompliance with the statutory wording requirement by, timely, resubmitting a revised version. (C8). To, then, dispute Tirio's authority to review a previous election ballot to ascertain noncompliance with and to enforce the 23-month restriction (C10-11), (pursuant to 10 ILCS 5/28-5 and 28-7), is inconsistent. It is, similarly, an error for the Court to weigh these two duties, relative to ballot compliance and preparation, inconsistently.

CONCLUSION

For all the reasons discussed herein, Appellants McHenry County Clerk Joseph Tirio and McHenry County respectfully request that this Court reverse the decision of the Appellate Court and affirm the decision of the Circuit Court that Clerk Tirio had the authority to conduct ballot review of the McHenry Township Board of Trustees dissolution referendum resolution

proposition and apply the statutory prohibition that the question not appear on the ballot. Appellants Tirio and McHenry County further request that this Court find that the Township's dissolution resolution proposition was the same question as one that appeared on the ballot just eight (8) months prior and was, therefore, prohibited from being on the ballot as it violated the statutory 23-month time restriction.

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief , excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

/s/Carla N. Wyckoff
Carla N. Wyckoff

No. 127258

IN THE
SUPREME COURT OF ILLINOIS

THE COUNTY OF McHENRY and JOSEPH TIRIO, in his Official Capacity as the McHenry County Clerk,

Petitioners-Appellees,

v.

McHENRY TOWNSHIP,

Defendants-Appellants.

NOTICE AND PROOF OF SERVICE

To: Robert T. Hanlon
Law Offices of Robert T. Hanlon and Associates, P.C.
131 E. Calhoun St.
Woodstock, Illinois 60098
robert@robhanlonlaw.com

I hereby certify that the foregoing Brief of Appellants County of McHenry and Joseph Tirio, McHenry County Clerk was electronically filed with the Clerk of the Illinois Supreme Court, on November 3, 2021, via the efileIL system through an approved electronic filing service provider and was served via email on counsel of record, Robert T. Hanon, at the email address listed above, prior to 4:30 p.m. on November 3, 2021.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

Date: November 3, 2021

/s/ Susan Rouse
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No. 127258

IN THE

SUPREME COURT OF ILLINOIS

THE COUNTY OF McHENRY and JOSEPH TIRIO, in his Official Capacity as the McHenry County Clerk,	)	On Appeal from the Appellate Court of Illinois, Second District, No. 2-20-0478
Petitioners-Appellants,	)	There on Appeal from the 22nd Judicial Circuit Court,
v.	)	McHenry County, Illinois, No. 2020 CH 248
McHENRY TOWNSHIP,	)	
Defendant-Appellee.	)	The Honorable Kevin G. Costello, Judge Presiding

RULE 342 APPENDIX

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OF THE APPENDIX

2021 IL App (2d) 200478
No. 2-20-0478
Opinion filed April 15, 2021

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

McHENRY TOWNSHIP,	)	Appeal from the Circuit Court
	)	of McHenry County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 20-CH-248
	)	
THE COUNTY OF McHENRY and JOSEPH	)	
TIRIO, in His Official Capacity as the	)	
McHenry County Clerk,	)	Honorable
	)	Kevin G. Costello,
Defendants-Appellees.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court, with opinion.
Justices Zenoff and Brennan concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, McHenry Township, sued defendants, the County of McHenry and Joseph Tirio, in his official capacity as the McHenry County Clerk, for a writ of *mandamus* or mandatory injunctive relief, seeking to place on the township's November 2020 general election ballot a referendum proposition, initiated by the township's board of trustees, to dissolve the township. Less than 23 months earlier, another dissolution proposition, which was initiated by township electors, had appeared on the township's March 2020 primary ballot. With the exception of the proposed dissolution date, both propositions were identically worded. The trial court granted defendants' motion to dismiss the township's complaint, with prejudice, finding that (1) Tirio had

the authority to determine whether the second proposition violated the general election law, even though he would have looked past the face of the filings to determine whether it conformed with the law and the only other enforcement option—a private citizen suit—was not viable because it would be costly and chaotic, and (2) the second proposition was the same as the first, even though the two propositions contained different (statutorily prescribed) dissolution dates and, thus, because the second proposition was submitted within 23 months of the first, it could not be placed on the ballot (10 ILCS 5/28-7 (West Supp. 2019)). The township appeals. We reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 In early 2020, the township's *electors* submitted the following referendum proposition, which was included on the township's March 2020 primary ballot:

> "Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on June 21, 2020[,] with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?
>
> Yes
>
> No"

The voters rejected the referendum proposition.

¶ 4 On June 12, 2020, the township's *board* approved a resolution to place the following referendum proposition on the November 2020 general election ballot:

> "Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on February 8, 2021[,] with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County? All funds of the dissolved township and dissolved road

> district shall be used solely on behalf of the residents of the geographic area with the boundaries of the dissolved township. Proceeds from the [s]ale of park land, cemetery land, buildings, or facilities after transfer to the county must be utilized for the sole benefit of the geographic area of the dissolved township. The McHenry County Board shall not extend a property tax levy that is greater than 90% of the property tax levy extended by the dissolved township or road district for the duties taken on by McHenry County—Yes—N[o]"

¶ 5 On June 29, 2020, the township submitted to Tirio's office a certification consisting of several documents, including: (1) proof of filing of a certification of the proposition to dissolve the township, (2) certification of resolution No. 1120068 concerning the resolution for a proposition to be placed on the ballot, and (3) a certification of ballot.

¶ 6 The following day, Tirio objected to the filings on the basis that (1) the proposition's language did not comply with the proper form to appear on the ballot, as set forth in section 24-30 of the Township Code (60 ILCS 1/24-30 (West Supp. 2019)) and (2) the proposition was the same referendum as that on the March 2020 ballot, in violation of the Election Code's prohibition of more than one referendum on "the same proposition" in any 23-month period (10 ILCS 5/28-7 (West Supp. 2019)).

¶ 7 On July 6, 2020, the township board approved the following revised proposition language:

> "Shall the McHenry Township together with any road districts wholly within the boundaries of McHenry Township, be dissolved on February 8, 2021[,] with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?
>
> Yes

No"

¶ 8 On July 6, 2020, the township delivered to Tirio the second certification, to be placed on the November 2020 ballot. The submitted documents included (1) proof of filing of a certification of the proposition to dissolve the township, (2) certificate of resolution No. 1120068 concerning the resolution for a proposition to be placed on the ballot, and (3) a certification of ballot.

¶ 9 Again, Tirio refused to place the referendum proposition on the November 2020 general election ballot. In a July 7, 2020, letter, Tirio explained that, although the revised language conformed to the statutory form for the ballot (see 60 ILCS 1/24-30(a) (West Supp. 2019)), pursuant to the Township Code and the Election Code (including section 28-5 of the Election Code (10 ILCS 5/28-5 (West 2018) (providing that, when "a local election official[1] *** is in receipt of *** a certification for the submission of a public question at an election at which the public question may not be placed on the ballot ***, such officer *** shall give notice of such prohibition")), the referendum proposition was prohibited because it did not comply with the Election Code's 23-month prohibition in that the same proposition to dissolve the township appeared on the March 2020 primary ballot, with the sole change being the dissolution effective date (7½ months later). In Tirio's opinion, "[o]therwise, an effective date change of even a single day would undermine the intent of and make Section [ ]28-7 completely ineffective."

¶ 10 A. Township's Suit

¶ 11 On July 24, 2020, the township sued defendants for a writ of *mandamus* or mandatory injunctive relief, seeking to have Tirio place the referendum proposition on the November 2020

[1] The clerk is the local election official of a county. See 10 ILCS 5/1-3(10) (West 2018) (a " '[l]ocal election official' " includes "the clerk or secretary of a unit of local government"). Counties and townships are units of local government. Ill. Const. 1970, art. VII, § 1.

general election ballot. It argued that Tirio lacked the power to decide issues of content for propositions and that, even if he had such power, the two propositions at issue were not the same, because they called for dissolution in different years. The township argued that Tirio exceeded his authority as county clerk when he looked past the face of the filings.

¶ 12 On August 5, 2020, defendants moved to dismiss the township's complaint (735 ILCS 5/2-619 (West 2018)), arguing that the two propositions were the same, with the only difference being the dissolution effective date, which is dictated by section 24-20(b) of the Township Code. See 60 ILCS 1/24-20(b) (West Supp. 2019) (requiring that the dissolution date be at least 90 days after the date of the election at which the referendum is to be voted). The different effective dates, defendants asserted, did not render the two propositions different questions. They further asserted that, because referendum propositions to restructure government entities are limited to ballot placement only once in a 23-month period, Tirio was required to prohibit the township's July 2020 proposition from being printed on the November 2020 general election ballot. Pursuant to section 28-5 of the Election Code, he notified the township clerk of this prohibition. Defendants also maintained that Tirio had the duty to print ballots and is charged with knowledge of past ballot content. See 10 ILCS 5/16-5 (West 2018). As such, his determination that both propositions were identical required no investigation. Defendants also asserted that, here, there is no statutory provision for *voters* to object to the inclusion of the proposition and, thus, it is critical that the *county clerk* ensure that the proposition is in the proper form and allowed.

¶ 13 The township took the position that Tirio lacked the power to decide issues of content for propositions and that, even if he had such power, the two propositions were not the same.

¶ 14 B. Trial Court's Order

¶ 15 On August 24, 2020, the trial court granted defendants' motion and dismissed the township's complaint, with prejudice. The court found that the referendum proposition, on its face, conformed with statutory requirements and that Tirio would have looked outside the four corners of the filings to determine any alleged infirmities. However, the court noted that section 28-5 of the Election Code states that the local election official or authority, such as Tirio, is charged with notifying the entity that submitted the public question when it may *not* be placed on the ballot. The trial court determined that section 28-5 "clearly contemplates a determination by someone as to whether the public question violates any section of the Election Code, including [section] 28-7." The court queried, "if the local election official or authority is not charged with rendering that determination, who is? The logical answer is the same election official or authority. No provision in the Election Code suggests any other public official would have the standing or authority to do so." Strict enforcement of the position that the clerk's determination is limited to a facial examination of the document, the court further determined, "leads to an absurd result" and would never result in a determination by that official that the proposed question violates section 28-7. The court noted that sections 28-1 (10 ILCS 5/28-1 (West 2018)) and 28-5 make clear that public questions must comply with all provisions of the Election Code, including section 28-7. Preventing the election official from making a determination that a public question violates section 28-7 "would allow public questions violative of the Election Code to be placed on the ballot, clearly contrary to the provisions of Section 28-1."

¶ 16 The trial court distinguished case law upon which the township relied for the proposition that the clerk cannot look beyond the face of the filings. The court noted that the case law involved petitions, not a resolution such as here, and did not consider section 28-5 of the Election Code.

¶ 17 The trial court observed that section 28-4 provides an objection mechanism for referendums initiated by petitions *but not by resolution*. See *id.* § 28-4. Here, because the proposition was initiated by resolution, there is no mechanism in the Election Code whereby the public can object. "Thus, if the election official is not the gatekeeper, there is no gatekeeper and submitted public questions violative of Section 28-7 would be required to be placed on the ballot in clear contradiction to the intent of Sections 28-5 and 28-1 of the Election Code." The court noted that enforcement of section 28-7 would be "impractical, if not impossible."

¶ 18 Next, the trial court rejected the township's argument that section 28-7 could be enforced through a lawsuit brought by a private citizen (via a writ of *mandamus* or mandatory injunction) to remove the question from the ballot:

> "Putting aside the practical burdens of such a lawsuit (*i.e.*[,] cost to the litigants, the significantly compromised time period for resolution)[,] such judicial 'kicking the can down the road' would violate the purpose of Section 28-5, which requires determination of all submitted public questions as to their conformity with the Election Code *before* their placement on the ballot. The mechanisms of that Section, specifically the requirement that the election official provide notice of a rejected question to the submitting party, allows that party to do exactly what was done here: file a lawsuit contesting that rejection so that a court can review same and determine whether the question should be placed on the ballot, all in a timely fashion. Tirio rubberstamping a submitted public question he believes to be violative of the Election Code on the assumption that a private citizen will bring a lawsuit to enforce the provisions of the Election Code after Tirio had placed the matter on the ballot would be shirking his duties under the Election Code. Furthermore, it would promote chaos. If such a post[-]ballot printing challenge was brought and successful, Tirio would

> then have to print all new ballots and destroy the old ones—a potentially monumental and no doubt costly endeavor. The Court is disinclined to facilitate such an absurd scenario." (Emphasis added.)

¶ 19 The trial court rejected the township's argument that, even if Tirio had the discretion to determine that the referendum proposition violated section 28-7 of the Election Code, his decision was erroneous and an abuse of discretion because the proposition is not the same question that appeared on the March 2020 ballot. The court noted that the effective date is governed by statute (section 24-20 of the Township Code) and that, thus, by its very nature, the effective date for a proposed dissolution of a township will be different each time it is placed on the ballot. The court also noted that the statute does not require that an effective date be specified and instructs that referenda be in "substantially" the form appearing in the statute. Thus, the trial court concluded, the effective date was superfluous. In contrast, the court noted, section 24-20 requires a *petition* for referendum to include the effective dissolution date on the petition. The court found that the two propositions at issue were "the same." "The effective date is governed by statute and is not a question the public can vote on." A contrary reading of the statute, the court noted, would render section 28-7 unenforceable as to township dissolution referenda, "a result clearly contrary to both the Township [Code] and the Election Code." The court determined that the legislative intent of section 28-7 was "not to burden the public with the same referendum proposition every election cycle." It found that Tirio had the authority to reject the referendum proposition, which the township submitted pursuant to resolution, and that his determination that the proposition violated section 28-7 was correct. It dismissed the township's complaint, with prejudice. The township appeals.

¶ 20 II. ANALYSIS

¶ 21 The township argues that the trial court erred in dismissing its complaint. For the following reasons, we agree.

¶ 22 A. Mootness

¶ 23 We first consider whether the issue before us is moot, given that the November 2020 election has passed and that it is impossible to grant the relief—placement of the proposition on that ballot—that the township sought. The township argues that the public interest exception to the mootness doctrine applies to allow us to resolve the otherwise moot issue of placement of the proposition on the November 2020 ballot. It contends that the substantial public interest here relates to the powers of a county clerk in determining for himself or herself whether the voters could consider a ballot proposition. Defendants do not address mootness in their brief.

¶ 24 "An appeal is moot if no controversy exists or if events have occurred which foreclose the reviewing court from granting effectual relief to the complaining party." *In re Shelby R.*, 2013 IL 114994, ¶ 15. Although courts generally do not decide moot questions, there are several exceptions to this rule. *Id.*

> "One exception to the mootness doctrine allows a court to resolve an otherwise moot issue if the issue involves a substantial public interest. *** The criteria for application of the public interest exception are: (1) the public nature of the question, (2) the desirability of an authoritative determination for the purpose of guiding public officers, and (3) the likelihood that the question will recur. *In re A Minor*, 127 Ill. 2d 247, 257 (1989); *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 622 (1952). A clear showing of each criterion is required to bring a case within the public interest exception. See *Kohan v. Rimland School for Autistic Children*, 102 Ill. App. 3d 524, 527 (1981)." *Wisnasky-Bettorf v. Pierce*, 2012 IL 111253, ¶ 12.

¶ 25 The public interest exception applies where the court action is warranted due to the magnitude or immediacy of the interests at issue. *Shelby R.*, 2013 IL 114994, ¶ 16. The exception is narrowly construed. *Id.*

¶ 26 Turning to the first criterion—the public nature of the question—a question of election law is, "inherently, *** a matter of public concern." *Goodman v. Ward*, 241 Ill. 2d 398, 404-05 (2011); see also *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 208 (2008). This criterion is met here. We agree with the township that the question at issue here—whether a county clerk has the authority to determine whether the 23-month limit in section 28-7 of the Election Code applies when the only difference between two public questions is the dissolution date prescribed in article 24 of the Township Code—is a matter of public concern.

¶ 27 We also conclude that an authoritative determination of the issue is desirable for future guidance of public officers. Issues of first impression may be reviewed under the public interest exception. *Shelby R.*, 2013 IL 114994, ¶ 20. As the township notes, the question here relates to the application of the Election Code to a relatively new statute—article 24 of the Township Code (see Pub. Act 101-230 (eff. Aug. 9, 2019) (adding 60 ILCS 1/art. 24))—that allows for the consolidation of townships in the county. We believe that a ruling by this court will aid local election officials and lower courts in deciding the nature of a county clerk's duties under section 28-5 of the Election Code and township dissolution issues in McHenry County, thereby, "avoiding *** uncertainty in the electoral process." *Goodman*, 241 Ill. 2d at 405 (holding that exception applied to determine whether candidate seeking circuit judge office in a judicial subcircuit must be a resident of that subcircuit at the time he or she submitted a petition for nomination to the office; court ruling would aid election officials and lower courts in promptly deciding disputes, thereby avoiding uncertainty in elections by resolving eligibility questions before voters cast

ballots); see also *Wisnasky-Bettorf*, 2012 IL 111253, ¶ 13 (applying exception in case concerning the filling of vacancies in the nomination of a public office and noting that issues were "long-standing and have not been addressed by courts or the legislature"); *Bonaguro v. County Officers Electoral Board*, 158 Ill. 2d 391, 395-96 (1994) (applying exception to review whether constitution barred a political party from filling a vacancy in nomination for judicial office by party resolution; noting that issues concerning the subject "are long-standing and have not been addressed by courts or the legislature"). Finally, we agree with the township that this question is likely to recur. The fact that there were two attempts to dissolve the township within one year of the enactment of article 24 of the Township Code is evidence of this likelihood. Thus, we choose to decide the substantive issues in this appeal.

¶ 28 B. Dismissal of Township's Complaint

¶ 29 When ruling on a motion to dismiss under section 2-619 of the Code of Civil Procedure, a court must accept all well-pleaded facts in the complaint as true and draw all reasonable inferences from those facts in favor of the nonmoving party. *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶ 24. As a result, a motion to dismiss pursuant to section 2-619 should not be granted unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery. *Snyder v. Heidelberger*, 2011 IL 111052, ¶ 8. We review *de novo* a dismissal pursuant to section 2-619. *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004).

¶ 30 In addition, we review *de novo* questions of statutory construction. *Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390, 395 (2008). "The cardinal rule of statutory interpretation is to ascertain and give effect to the intent of the legislature." *Krautsack v. Anderson*, 223 Ill. 2d 541, 552 (2006). The language of the statute is the best indication of the legislature's intent and therefore must be given its plain and ordinary meaning. *Id.* at 553. If the language is unambiguous,

the statute must be given effect without the use of other aids of construction. *Id.* We cannot "depart from the plain language of the statute by reading into it exceptions, limitations, or conditions not expressed by the legislature." *Id.* at 567-68. A court should not consider words and phrases in isolation but instead should interpret each word and phrase in light of the statute as a whole. *Id.* at 553. "Each word, clause and sentence of a statute must be given reasonable meaning, if possible, and should not be rendered superfluous." *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 26. We interpret statutes with the presumption that the legislature did not intend to create "absurd, inconvenient, or unjust results." *In re Application of the County Treasurer & ex officio County Collector*, 2013 IL App (1st) 130103, ¶ 9.

¶ 31 In its complaint, the township sought a writ of *mandamus* to have Tirio place the July 2020 referendum proposition on the November 2020 ballot. Where a public official has failed or refused to comply with requirements imposed by statute, the court may compel the official to comply by means of a writ of *mandamus*, provided the requirements for the writ have been satisfied. *Noyola v. Board of Education of the City of Chicago*, 179 Ill. 2d 121, 132 (1997). An extraordinary remedy, *mandamus* enforces the performance of a public officer's official nondiscretionary duties as a matter of right. *Rodriguez v. Illinois Prisoner Review Board*, 376 Ill. App. 3d 429, 433 (2007). For *mandamus* to issue, a plaintiff must establish material facts that demonstrate (1) an unequivocal right to the requested relief, (2) an unequivocal duty on the defendant to act, and (3) the defendant's unequivocal authority to comply with an order granting *mandamus* relief. *Id.* at 433-34. *Mandamus* cannot be used, however, to compel a public official to perform an act that requires the exercise of his or her discretion. See, *e.g.*, *McFatridge v. Madigan*, 2013 IL 113676, ¶ 17 ("A writ of *mandamus* is appropriate when used to compel compliance with mandatory legal standards but not when the act in question involves the exercise of a public officer's discretion.").

¶ 32 1. Constitutional and Statutory Framework

¶ 33 The Illinois Constitution states that the legislature "shall provide by law for the formation of townships in any county when approved by countywide referendum. Townships may be *** dissolved *** when approved by referendum in each township affected." Ill. Const. 1970, art. VII, § 5. Article 24 of the Township Code, enacted in 2019, addresses the dissolution of townships in McHenry County, and the legislative intent of the article is to "further the intent of Section 5 of Article VII of the Illinois Constitution." Pub. Act 101-230 (eff. Aug. 9, 2019) (adding 60 ILCS 1/art. 24). Further, the public act provides that

> "[t]ransferring the powers and duties of one or more dissolved McHenry County townships into the county, as the supervising unit of local government within which the township or townships are situated, will reduce the overall number of local governmental units within our State. This reduction is declared to be a strong goal of Illinois public policy." *Id.*

¶ 34 Section 24-15 of the Township Code states that *the board of trustees* of any McHenry County township may, by *resolution*, "submit a proposition to dissolve the township to the electors of that township at the election next following in accordance with the general election law.[2] The ballot shall be as provided for in Section 24-30." 60 ILCS 1/24-15 (West Supp. 2019).

¶ 35 Section 24-30(a), in turn, states that, "[s]ubject to the requirements of Section 16-7 of the Election Code, the referendum described in Section 24-25[3] shall be in substantially the following form on the ballot:

---

[2] The Election Code is "the general election law" of Illinois. 10 ILCS 5/1-1 (West 2018).

[3]Section 24-25 addresses *petitions*, not *resolutions*, and provides that "[a] petition that meets the requirements of Section 24-20 shall be placed on the ballot in the form provided for in Section 24-30 at the election next following." 60 ILCS 1/24-25 (West Supp. 2019).

> Shall the (dissolving township), together with any road districts wholly within the boundaries of (dissolving township), be dissolved on (date of dissolution) with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?
>
> YES
>
> NO" *Id.* § 24-30(a).

¶ 36 Thus, as it relates to *resolutions* by a township's board of trustees, article 24 provides merely that (1) a board may submit to the electors a resolution to dissolve a township pursuant to the Election Code and (2) the ballot must meet section 24-30's requirements, which, in turn, state that, subject to the requirements of section 16-7 of the Election Code, the referendum shall be in the prescribed form. Here, the township's board approved a resolution to dissolve the township and, after revising the language, submitted to Tirio a proposition that conformed to section 24-30(a)'s form. Section 16-7 of the Election Code states, in relevant part, that,

> "[w]henever a public question is to be submitted to be voted upon and has been *initiated and certified in accordance with Article 28 of this Code*, the election authorities[4] to whom the question is certified *shall print* the question on the ballot for the proper election, and *shall cause it to be submitted in the proper precincts* to those electors entitled by reason of their residency to vote on such question." (Emphases added.) 10 ILCS 5/16-7 (West 2018).

The county clerk is in charge of printing all ballots, including referenda, and furnishing them to the judges of election. *Id.* § 16-5.

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[4] An " '[e]lection authority' means a county clerk or a Board of Election Commissioners." 10 ILCS 5/1-3(8) (West 2018).

¶ 37 The relevant provisions in article 28 of the Election Code that address the initiation and certification of public questions are as follows. Section 28-7 of the Election Code addresses constitutionally required referenda involving units of local government. It provides that, "*[e]xcept as provided in Article 24 of the Township Code*," in cases where article VII of the Constitution "authorizes any action to be taken [(*e.g.*, dissolution of a township)] by or with respect to any unit of local government, as defined in Section 1 of Article VII of the Constitution [*e.g.*, a township], by or subject to approval by referendum, any such public question shall be initiated in accordance with this Section." 10 ILCS 5/28-7 (West Supp. 2019); see also Ill. Const. 1970, art. VII, § 1. The question "may be initiated by the governing body of the unit of local government by resolution or *** petition ***, requesting the submission of the proposal for such action to the voters of the governmental unit at a regular election." 10 ILCS 5/28-7 (West Supp. 2019). Section 28-7 "is intended to provide a method of submission to referendum in all cases of proposals for actions which are authorized by Article VII of the Constitution by or subject to approval by referendum and *supersedes any conflicting statutory provisions except those contained in *** Article 24 of the Township Code*." (Emphasis added.) *Id.* (As noted above, as to resolutions, article 24 provides merely that a board may submit a resolution to dissolve a township pursuant to the Election Code, that the ballot must substantially be in the prescribed form, and that the ballot is subject to section 16-7 of the Election Code, which, in turn, states that, when the public question has been initiated and certified pursuant to article 28 of the Election Code, the election authority to whom it is certified must print the question on the ballot and shall cause it to be submitted to the precincts.) Finally, as relevant here, section 28-7 provides that "[r]eferenda provided for in this Section may not be held more than once in any 23-month period *on the same proposition*." (Emphasis added.) *Id.*

¶ 38 Section 28-5 states that, no "less than 68 days before a regularly scheduled election, each local election official *shall certify* the public questions to be submitted to the voters of or within his [or her] political subdivision at that election which have been initiated by *** action of the governing board of his [or her] political subdivision." (Emphasis added.) 10 ILCS 5/28-5 (West 2018). As relevant here, the certification includes the form of the public question, the date on which it was adopted by a resolution or ordinance by a governing body, and a certified copy of any political subdivision resolution or ordinance requiring the submission of the public question. *Id.* "Local election officials and circuit court clerks," in turn, "*shall make their certifications*, as required by this Section, to each election authority having jurisdiction over any of the territory of the respective political subdivision in which the public question is to be submitted to referendum." (Emphasis added.) *Id.* As is also relevant here, section 28-5 also provides that, when "a local election official *** is in receipt of *** a certification for the submission of a public question at an election at which the public question may *not* be placed on the ballot ***, such officer *** *shall give notice of such prohibition*" by, "in the case of a certificate from a local election authority, to such local election authority, who shall thereupon *** notify the governing board which adopted the initiating resolution or ordinance." (Emphases added.) *Id.*

¶ 39 Finally, the Election Code contains a mechanism for objections to *petitions* to submit public questions to a referendum (see *id.* § 10-8), but it contains no such mechanism for objections to *resolutions or ordinances* initiating a public question.

¶ 40 2. Tirio's Powers

¶ 41 The township maintains that this case is analogous to *People ex rel. Giese v. Dillon*, 266 Ill. 272 (1914), where residents submitted petitions to have the town clerk put on the ballot the question whether the town should become "anti-saloon territory". The town clerk refused to do so,

because he determined that the signatures on the petition were neither of legal voters nor given in person and because the sworn statements were neither signed by town residents nor sworn to. The residents sought a writ of *mandamus* to compel the clerk to place the question on the ballot. The supreme court affirmed the grant of *mandamus* relief, holding that, where the petition on its face appears to comply with statutory requirements, the clerk may not look beyond the face of the petition to determine whether it complies; he or she must submit the question to the voters. *Id.* at 275-76. The court noted that the validity (as contrasted with the number) of signatures and the authority of officers cannot be examined from the face of the complaint, the petition was in apparent conformity with the law, and the clerk was obligated to submit the question to the voters. *Id.* The supreme court noted that the town clerk was a ministerial officer with no discretionary power and that his duty was to examine the face of the petition to determine if it complied with statutory requirements. *Id.*

¶ 42 The township also points to a subsequent case that illustrates the application of *Dillon*. In *North v. Hinkle*, 295 Ill. App. 3d 84 (1998), the plaintiffs had filed nominating papers, seeking to have their names placed on the ballot in a municipal election, but they failed to include a statement of candidacy, as required by section 10-5 of the Election Code (10 ILCS 5/10-15 (West 1996) (addressing consolidated and nonpartisan elections and certification of candidates; providing that a "local election official with whom certificates of nomination or nominating petitions have been filed shall certify *** the names of all candidates entitled to be printed on the ballot")). The city clerk refused to certify their names for the ballot, and the plaintiffs sought a writ of *mandamus* to compel her to certify their names. The reviewing court affirmed the denial of their request, noting that the plaintiffs had conceded that their nominating papers were not in "apparent conformity" with the election law, as required by section 10-8 of the Election Code (*id.* § 10-8), and it noted

that whether the nominating papers included statements of candidacy can be determined from the face of the papers themselves and that the clerk was "empowered to make that ministerial determination." *North*, 295 Ill. App. 3d at 88-89. See also *Haymore v. Orr*, 385 Ill. App. 3d 915, 917-19 (2008) (finding *Dillon* controlling and reversing grant of *mandamus*; holding that village clerk had authority to withdraw certification of a binding referendum question for lack of sufficient signatures to put the question on the ballot; election law provided that questions were to be placed on ballot if they were in "apparent conformity" with the law (10 ILCS 5/10-8 (West 2004) (addressing objections to nomination papers, public question *petitions*, and certain constitutional amendments), and, because the petition was facially deficient for lack of sufficient signatures, the clerk had authority to withdraw her previous certification of question for the ballot).

¶ 43 Here, the township argues that Tirio, like the clerk in *Dillon*, impermissibly looked beyond the face of the filings. In both cases, the decision concerning a facial conformity was based on an extrinsic fact: in *Dillon*, it was the actual residency status of the signatories to the petition, and, here, it was the March 2020 ballot question. The township argues that defendants have failed to cite any authority that Tirio must/can look beyond the face of the filings. The township also asserts that the proposition here arose pursuant to article 24 of the Township Code, not the constitution, and that, therefore, "the 23-month rule is not appropriate to be ruled upon." As to the absence of a statutory provision allowing voters to object to ballot placement of a public question arising from a resolution, the township contends that voters have remedies; specifically, they (1) always have the opportunity to vote on the measure at the ballot box, (2) always have the right to vote out of office those who advance propositions not to their liking, and (3) possess the ability to create a new township or road district if one was dissolved against their liking. Finally, the township asserts

that our legal system does not provide for voter intervention at every stage of the legislative process; voters have input at the ballot box.

¶ 44 Defendants respond that Tirio is in charge of printing the ballots for all elections and, therefore, is charged with knowledge of the content of previous ballots, including referendum propositions, and cannot ignore the direct knowledge inuring from his duty to print ballots. To determine that the two propositions at issue here are the same did not, they assert, require investigation beyond facial review of the propositions. Defendants further argue that, even if imputed knowledge is not sufficient, there is statutory authority for a county clerk to determine and advise local officials that a referendum question is prohibited. They note that such questions may be placed on the ballot by either signed petitions or resolutions/ordinances of local governing boards of political subdivisions. See 10 ILCS 5/28-2(a), (c) (West 2018) (providing that petitions must be filed not less than 92 days before the election and that resolutions/ordinances be adopted not less than 79 days before a regular election); but see 60 ILCS 1/24-20(a) (West Supp. 2019) (referenda petitions to dissolve a McHenry township must be filed no less than 122 days prior to the election). *Petitions* that generate referenda ballot placement are subject to the same objection procedures that apply to candidate nominating petitions (see *id.* § 28-4), however, these same objection procedures do not apply to *resolutions or ordinances* to place referendum propositions on the ballot. Instead, section 28-5 of the Election Code provides the *clerk* with the ability to determine if and when certain propositions are prohibited from ballot placement and sets forth the duty to advise local election officials of such prohibition.

¶ 45 Defendants take issue with the case law upon which the township relies. They note that *Dillon* involved a petition, with citizens' signatures, to place an anti-saloon referendum question on the ballot and that the town clerk had investigated registration status to determine individuals'

eligibility to sign the petition. *North*, they note, involved signed nominating petitions to place on the ballot municipal candidates who were not in apparent conformity because they failed to file their statements of candidacy. Neither case involved, as here, a governing board resolution to propose a ballot referendum proposition. Furthermore, defendants note, section 10-8 of the Election Code, which the township's case law addresses, concerns the ability to determine apparent conformity of *nomination papers and petitions* to submit public questions, not governing body *resolutions* to submit referendum propositions. Finally, they point out that the different treatment of referenda petitions and referenda resolutions extends to the statutory deadlines that apply. Resolutions must be adopted 79 days prior to the election, whereas signed petitions in McHenry County must be filed no less than 122 days prior to the election (60 ILCS 1/24-20(a) (West Supp. 2019)). The earlier deadline for signed petitions, they contend, allows ample time for potential objection/hearing procedures, but this same opportunity is *not* made available for governing body resolutions. Thus, defendants argue, the only recourse for a governing body's improper ballot-question attempts is section 28-5 of the Election Code, under which the election authority assesses submissions, determines their validity, and notifies local officials. Here, where there is no statutory provision for voters to object to the inclusion of the public question on the ballot, it is important, they assert, that the election authority ensure that the referenda question is in the proper form and allowed.

¶ 46 We conclude that the trial court erred in dismissing the township's complaint. Tirio's determination that the township's July 2020 proposition was prohibited because it was identical to one submitted less than 23 months earlier (in violation of section 28-7 of the Election Code) necessarily required him to look beyond the face of the township's July 2020 filings. *Dillon* is clear that a ministerial officer such as Tirio may not look beyond the face of the filings to determine

whether the proposition complies with the law. *Dillon*, 266 Ill. at 275-76. From the face of the July 2020 filings, Tirio could not have known that a proposition with identical wording (except for the dissolution date) was presented to the voters in March 2020.

¶ 47 This case does not present a scenario such as that, for example, in *Haymore*, where the court held that the clerk had the power to withdraw a certification, because the petition was facially deficient for lack of a sufficient number of signatures. *Haymore*, 385 Ill. App. 3d at 917-19. Nor is it like *Hinkle*, where the court affirmed the denial of *mandamus* relief, because whether candidate nominating papers included a statement of candidacy could be determined from the face of the filings and the clerk had the power to make such a ministerial determination. *Hinkle*, 295 Ill. App. 3d at 88-89. Counting signatures and ascertaining whether required documents were filed are clearly ministerial tasks within the scope of a clerk's duties. Determining whether a proposition had previously appeared on a township ballot within a statutorily prescribed timeframe, which necessarily requires looking beyond the four corners of the filings, is not a ministerial task, as it constitutes an assessment of the content of the filings.

¶ 48 We reject defendants' argument that Tirio, who is in charge of printing ballots (10 ILCS 5/16-7 (West 2018)), was charged with knowledge of the content of prior ballots. He was not charged with knowledge of prior township ballots. Again, this inquiry would have required an investigation on his part that necessarily required looking beyond the face of the filings. Stated differently, Tirio would necessarily have evaluated the content of the township's proposition, an exercise beyond his ministerial powers. His obligation to send notice to public officials of public questions that may not be placed on the ballot does not, in our view, obligate him to evaluate the content of the proposition. Such an act extends beyond his ministerial powers. We cannot infer from the legislature's grant of power to Tirio to print the ballots anything more than that narrow

ministerial task. Had the legislature intended that a county clerk may use his or her knowledge of past ballots to ascertain whether a question submitted for the next election runs afoul of section 28-7's 23-month prohibition, we believe that it would have made such power clear. In the absence of such clarity, we believe that we cannot depart from *Dillon* or read into the statute authority that is not there. Further, we believe that our holding is consistent with the legislature's express policy goal of reducing the number of local governmental units in this State. Pub. Act 101-230 (eff. Aug. 9, 2019).

¶ 49 The trial court noted that a holding in the township's favor would result in the scenario where the only remedy for violations of section 28-7 would be a private citizen suit for *mandamus* or mandatory injunction, which would promote chaos. We are sympathetic to such concerns and are aware of the financial impact such suits could have on governmental units potentially resulting in the reprinting of ballots. However, we cannot ignore that Tirio is a ministerial officer. We further note that, when faced with a public question that he or she believes may not be placed on the ballot, a county clerk has the option of obtaining a judicial determination of the question. Thus, a citizen suit is not the only available enforcement option.

¶ 50 In summary, the trial court erred in dismissing the township's complaint. Having determined that Tirio lacked the authority to reject the township's proposition on the basis that it did not comply with section 28-7's 23-month prohibition, we need not reach the issue whether the two propositions were the same.

¶ 51 III. CONCLUSION

¶ 52 For the reasons stated, the judgment of the circuit court of McHenry County is reversed, and the cause is remanded for further proceedings.

¶ 53 Reversed and remanded.

No. 2-20-0478

Cite as:	*McHenry Township v. County of McHenry*, 2021 IL App (2d) 200478
Decision Under Review:	Appeal from the Circuit Court of McHenry County, No. 20-CH-248; the Hon. Kevin G. Costello, Judge, presiding.
Attorneys for Appellant:	Robert T. Hanlon, of Law Offices of Robert T. Hanlon & Associates, P.C., of Woodstock for appellant.
Attorneys for Appellee:	Patrick D. Kenneally, State's Attorney, of Woodstock (Norman D. Vinton and Carla N. Wyckoff, Assistant State's Attorneys, of counsel), for appellees.

IN THE CIRCUIT COURT OF THE 22nd JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

McHENRY TOWNSHIP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 20 CH 248
	)	
COUNTY OF McHENRY and JOSEPH J. TIRIO, NOT INDIVIDUALLY, BUT IN HIS OFFICIAL CAPACITY AS THE McHENRY COUNTY CLERK,	)	
	)	
Defendants.	)	

MEMORANDUM DECISION AND ORDER

This cause came to be heard on August 21, 2020 for hearing on Defendant, Joseph Tirio's ("Tirio") "Motion to Dismiss Petition for Mandamus Pursuant to 735 ILCS 5/2-619.5[1]" ("Motion to Dismiss") filed (with supporting memorandum) on August 5, 2020.

Pursuant to an expedited briefing schedule, Plaintiff, McHenry County Township, ("McHenry Township") filed its response to the Motion to Dismiss on August 19, 2020 and Tirio filed his reply in support of the Motion to Dismiss on August 20, 2020.

The Court has reviewed and considered all of the parties' briefs related to the Motion to Dismiss, the oral arguments of counsel related to the Motion to Dismiss, the court file, and all applicable statutes and case law.

BACKGROUND

On July 24, 2020, Tirio filed a Complaint for Writ of Mandamus seeking a court order

[1] The reference to 5/2-619.5 in the title of the Motion to Dismiss appears to be a misnomer as that subparagraph refers to statute of limitations defenses, which do not appear applicable here.

compelling Tirio, the county clerk and local election official, to place on the ballot for the upcoming November election a referendum question as to whether McHenry Township should be dissolved.

Although the referendum question had been approved by resolution of the McHenry Township Board, Tirio refused to certify and place it on the ballot, advising McHenry Township that it violated the Illinois Election Code because the same proposition was on the March, 2020 election ballot, less than 23 months earlier (Section 28-7 of the Election Code provides that the same referenda may not be considered more than once in a 23 month period).

McHenry Township contends in its Complaint that Tirio did not have the discretion to refuse to certify and place the question on the ballot and seeks a court order compelling him to do so.

ANALYSIS

Pursuant to 735 ILCS 5/2-619, Tirio raises affirmative matter which he alleges defeats McHenry Township's claim for mandamus; namely, its alleged violation of Section 28-7 of the Illinois Election Code (10 ILCS 5/28-7) by submitting the same referendum proposal within a 23 month period.

Before the Court can consider the issue of the legal correctness of Tirio's determination that the referendum proposal violated the Election Code, it must determine whether Tirio had the discretion to make that decision.

McHenry Township contends that Tirio's position is a ministerial one and that he exceeded his authority by refusing to certify the proposal, specifically, by looking past the four corners of the referendum proposal itself and making a determination that it violates Section 28-7 of the Election Code.

In support of its position, McHenry Township cities to an Illinois Supreme Court case from 1914, **People ex rel. Giese v. Dillon**, 266 Ill. 272. There, the town clerk refused to place a referendum question on the ballot, finding issues with petitioners' signatures. Ultimately, the Illinois Supreme Court determined that the clerk exceeded his authority because his review went beyond a facial review of the document. The **Dillon** Court held that if a petition on its face appears to comply with the applicable statute, the clerk cannot look outside the petition to determine whether in fact it complies. The clerk has no discretionary power in such situations to refuse to place the question on the ballot. **Ibid**, p. 276.

Dillon is of limited value given its age, however, subsequent courts including the first district in **Haymore v. Orr**, 385 Ill.App.3d 915 (2008) and the second district (whose decisions are binding on this Court) in **North v. Hinkle**, 295 Ill.App.3d 84 (1998), adopted the **Dillon** court's reasoning, the **North** court stating: "despite its octogenarian distinction, the analysis set forth in **Dillon** remains sensible and relevant." **Ibid**, p. 87.

In **North**, plaintiffs were candidates for municipal positions that sought a writ of mandamus because the city clerk refused to place their names on the ballot. The clerk refused because their nominating papers did not include a statement of candidacy, as required, and as such were not in apparent conformity with the Election Code. The appellate court in **North** upheld the trial court's dismissal of the writ of mandamus finding that the lack of apparent conformity with the Election Code was a ministerial determination that could "be answered by a facial examination of the papers themselves". **Ibid**, p. 88.

Haymore involved the de-certification of a referendum petition by the village clerk because the clerk determined that the petition did not contain the requisite number of signatures. The **Haymore** court reversed the trial court's issuance of a writ of mandamus because the clerk could make a determination as to whether the petition was in apparent conformity with the Election

Code solely by examining the face of the petition, specifically, by counting the number of signatures on it to see if it had the requisite amount. Conversely, in **Dillon,** the court found the petition was in apparent conformity and the clerk exceeded his authority because the validity (as contrasted to number) of signatures could not be determined solely by examining the face of the petition.

Here, Tirio does not suggest any facial non-conformities with the Township or Election Code on the face of the proposed question.[2] The question is submitted in the form required by the Township Code and its proposed effective date if adopted meets the requirements of the Township Code as well. Rather, Tirio reaches the conclusion that the proposed question violates Section 5/28-7 of the Election Code because the same referendum question was placed on the ballot less than 23 months ago.

A facial examination of the proposed question as submitted by the McHenry Township would not reveal the alleged defect Tirio suggests renders it non-certifiable – the placement on a previous ballot less than 23 months earlier of purportedly the same referendum proposal. That defect, if it exists, would be revealed by a review of the referendum proposal in the March, 2020 election and comparison of the language in same to the present proposed question. As stated by the **Haymore** court, referencing **Dillon**, "[i]f the petition on its face appears to comply with the statutory requisites, the clerk may not look outside the petition to determine whether in fact it does not comply; he must submit the question to the voters." **Ibid**, 917.

Here, the referendum proposal submitted by McHenry Township on its face apparently conforms with the statutory requisites. The clerk would have to look outside the four corners of the proposed question to determine any alleged infirmities.

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[2] Tirio previously rejected an earlier version of the referendum question on the ground that it violated language dictates of the Township Code but that offending language was amended by McHenry Township to conform with the Township Code and Tirio since acknowledged that defect has been removed.

At oral argument, Tirio's counsel contended that Tirio would not have needed to look beyond the four corners of the proposed question to determine that it violated Section 28-7 because since he is statutorily charged with knowledge of what is on the ballot and with the March, 2020 election being so recent, he would not need to review any other document but could make that determination from memory. McHenry Township's counsel correctly pointed out at oral argument that such a claim is not supported by an affidavit from Mr. Tirio. Regardless, even if there was an evidentiary hearing[3] and Tirio testified that he determined the violation of Section 28-7 based solely on his memory versus a review of the earlier referendum, the Court considers that to be a distinction without a difference. Under either scenario, a comparison is made: one is the clerk comparing his memory of a previous document to the present one before him; the other is comparing the two documents physically. More significantly, as stated before, there is nothing in the language in the proposed referendum that shows (or even suggests) that it violates Section 28-7 of the Election Code. It states verbatim the question in the required form pursuant to the Township Code with a proposed effective date conforming to statutory requirements. It makes no reference to any earlier referendums of the same nature. Thus, one must look beyond the four corners of the proposed question to determine whether it violates Section 28-7.

Given the above, at first glance it would appear that Tirio exceeded his authority by determining that the proposed question violated Section 28-7 and refusing to place it on the ballot and so notifying McHenry Township. However, Tirio points to Section 28-5 of the Election Code as giving him authority to do so. The portion of that Section relevant to Tirio's argument is as follows:

> "Whenever a local election official, an election authority, or the State Board of Elections is in receipt of an initiating petition, or a certification for the submission

[3] Counsel for Tirio and the County of McHenry stipulated at oral argument (confirmed by written order) to waive the filing of an Answer or further hearing but rather stood on their current pleadings in the event the Court denied the Motion to Dismiss.

> of a public question at an election at which the **public question may not be placed on the ballot or submitted because of the limitations of Section 28-1, such officer or board shall give notice of such prohibition**, by registered mail, as follows..." 10 ILCS 5/28-5 (emphasis added)

Tirio contends the above language gives him discretion (even the duty) to determine whether the proposed question violates Section 28-7, relying further on the following first paragraph of Section 28-1:

> "The initiation and submission of all public questions to be voted upon by the electors of the State or of any political subdivision or district or precinct or combination of precincts shall be subject to the provisions of this Article." 10 ILCS 5/28-1.

Here, "this Article" refers to the Election Code. A section of the Election Code is 28-7, which provides that referenda may not be held more than once in any 23 month period on the same proposition. Thus, the proposed question is subject to the limitations of Section 28-7. Section 28-5 states that the local election official or authority (in this case Tirio) is charged with notifying the entity that submitted the public question that the public question may not be placed on the ballot because of limitations of Section 28-1. Thus, Section 28-5 clearly contemplates a determination by someone as to whether the public question violates any section of the Election Code, including 28-7. That begs the rhetorical question: if the local election official or authority is not charged with rendering that determination, who is? The logical answer is the same election official or authority. No provision in the Election Code suggests any other public official would have the standing or authority to do so.

If the election official (in this case Tirio) is charged with determining whether public questions such as the one submitted here is in conformity with the Election Code, including Section 28-7, the Court is forced to circle back to the argument that any such determination is limited to a facial examination of the document. However, strict enforcement of that position leads to an absurd result.

As explained above, a determination that a proposed question violates the 23 month provision in Section 28-7 cannot be accomplished by merely a facial examination of the proposed question. Thus, strict adherence to the facial examination doctrine by the election official could **never** result in a determination by that official that the proposed question violates Section 28-7. Sections 28-5 and 28-1 make it clear that public questions must comply with all provisions of the Election Code, including the 23 month rule in Section 28-7. Hamstringing the election official to the point where he or she cannot make a determination that a public question violates Section 28-7 because of court imposed limitations on the scope of the official's investigation would allow public questions violative of the Election Code to be placed on the ballot, clearly contrary to the provisions of Section 28-1.

Further, the genesis of the concept that an election official's determination of apparent conformity with the Election Code is limited to a facial examination of the question is factually distinguishable from the case here. **Dillon** involved a referendum initiated by petitions. Presently, the Election Code, through Section 28-4, provides an objection mechanism for referendums initiated by petitions but not by resolution, such as here. Thus, members of the public could have objected to the referendum based on matters such as genuineness of signatures if the proposed question had been initiated by petition. In such a scenario, the public could serve as gatekeeper and it would be understandable for a court to determine that the election official exceeded his authority by questioning the genuineness at signatures like in **Dillon**.

Here, because the public question was initiated by resolution rather than petition, there is no mechanism in the Election Code whereby the public can object. Thus, if the election official is not the gatekeeper, there is no gatekeeper and submitted public questions violative of Section 28-7 would be required to be placed on the ballot in clear contradiction to the intent of Sections 28-5 and 28-1 of the Election Code. That is what distinguishes the case here from not only **Dillon** but

North and **Haymore** as well. None of those cases considered the duties of the local election official under Section 28-5 to reject proposed questions violative of the Election Code.

Such a draconian interpretation of **Dillon** and Section 28-5 would render enforcement of Section 28-7 impractical, if not impossible. McHenry Township argues that if this Court was to order Tirio to place the question on the ballot, Section 28-7 could still be enforced through a lawsuit subsequently brought by a private citizen (i.e. for a writ of mandamus or mandatory injunction to remove the question from the ballot). Putting aside the practical burdens of such a lawsuit (i.e. cost to the litigants, the significantly compressed time period for resolution) such judicial "kicking the can down the road" would violate the purpose of Section 28-5, which requires determination of all submitted public questions as to their conformity with the Election Code before their placement on the ballot. The mechanisms of that Section, specifically the requirement that the election official provide notice of a rejected question to the submitting party, allows that party to do exactly what was done here: file a lawsuit contesting that rejection so that a court can review same and determine whether the question should be placed on the ballot, all in a timely fashion. Tirio rubberstamping a submitted public question he believes to be violative of the Election Code on the assumption that a private citizen will bring a lawsuit to enforce the provisions of the Election Code after Tirio had placed the matter on the ballot would be shirking his duties under the Election Code. Furthermore, it would promote chaos. If such a post ballot printing challenge was brought and successful, Tirio would then have to print all new ballots and destroy the old ones – a potentially monumental and no doubt costly endeavor. The Court is disinclined to facilitate such an absurd scenario.

McHenry Township makes a final alternative argument: even if Tirio had the discretion to determine that the proposed question violated Section 28-7, his decision was erroneous and an abuse of discretion because it is not the same referendum question. For the reasons set out below, the Court disagrees.

Section 28-7 is as follows:

"Except as provided in Article 24 of the Township Code, in any case in which Article VII or paragraph (a) of Section 5 of the Transition Schedule of the Constitution authorizes any action to be taken by or with respect to any unit of local government, as defined in Section 1 of Article VII of the Constitution, by or subject to approval by referendum, any such public question shall be initiated in accordance with this Section.

Any such public question may be initiated by the governing body of the unit of local government by resolution or by the filing with the clerk or secretary of the governmental unit of a petition signed by a number of qualified electors equal to or greater than at least 8% of the total votes cast for candidates for Governor in the preceding gubernatorial election, requesting the submission of the proposal for such action to the voters of the governmental unit at a regular election.

If the action to be taken requires a referendum involving 2 or more units of local government, the proposal shall be submitted to the voters of such governmental units by the election authorities with jurisdiction over the territory of the governmental units. Such multi-unit proposals may be initiated by appropriate resolutions by the respective governing bodies or by petitions of the voters of the several governmental units filed with the respective clerks or secretaries.

This Section is intended to provide a method of submission to referendum in all cases of proposals for actions which are authorized by Article VII of the Constitution by or subject to approval by referendum and supersedes any conflicting statutory provisions except those contained in Division 2-5 of the Counties Code or Article 24 of the Township Code.

Referenda provided for in this Section may not be held more than once in any 23-month period on the same proposition, provided that in any municipality a referendum to elect not to be a home rule unit may be held only once within any 47-month period."
10 ILCS 5/28-7

Here, McHenry Township acknowledges that the wording in the proposed question at issue is identical to the referendum question considered in the March, 2020 election, with the sole exception being the effective date of the proposed abolishment of the township. McHenry Township nevertheless argues that "difference" renders the 23 month rule inapplicable. For several reasons, the Court finds that argument specious.

First, Section 28-7 makes it clear that its limitations apply to all public questions in regard to any unit of local government. Undoubtedly, this is a public question affecting a unit of local government.

Second, the change in effective date McHenry Township relies on is governed by statute, specifically, Section 24-20 of the Township Code, which provides that "the proposed date of the dissolution shall be at least 90 days after the date of election at which the referendum is to be voted upon." **60 ILCS 1/24-20(b)**. Thus, by its very nature the effective date for a proposed dissolution of a township will be different each time it is placed on the ballot, whether that be eight months apart (as McHenry Township seeks to do) or at least 23 months apart as required under the Election Code.

In fact, it does not appear that the referendum question must include the effective date as part of the question. The Township Code in Section 24-30 states that the referendums for dissolution of townships "shall be in substantially the following form on the ballot:

> Shall the (dissolving township), together with any road districts wholly within the boundaries of (dissolving township), be dissolved on (date of dissolution) with all of the township and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?
>
> YES
>
> _____
>
> NO"

Section 24-30 does not have any effective date in its required form language. Thus, inclusion of the effective date in the ballot question appears to be superfluous.[4]

The superfluous nature of the change of the effective date from the referendum question in the March, 2020 election to the proposed question here is one example in a litany of ones that lead to the inescapable conclusion that the proposed referendum here is the same proposition

[4] Section 24-20 requires a **petition** for referendum to dissolve a township to include the date of dissolution on the **petition**.

submitted and voted upon in March, 2020. The form of the question is identical to the one voted upon in March, 2020. The proposition the public voted upon (and rejected) was whether McHenry Township should be abolished – not the effective date of that dissolution. The effective date is governed by statute and is not a question the public can vote on.

Most significantly, McHenry Township's theory that submitting the same substantive referendum question on abolishing the township but changing the effective date renders the 23 month rule in Section 28-7 inapplicable, would render Section 28-7 unenforceable, at least as to township dissolution referenda, a result clearly contrary to both the Township and Election Code.

60 ILCS 1/24-15 provides the statutory authority for dissolving townships in McHenry County. The section of the Township Code specifically states that any such resolutions must be "in accordance with the general election law." **60 ILCS 1/24-15**. Thus, the process is subject to Section 28-7 of the Election Code. That section of the Election Code requires that the same referendum proposition cannot be held more than once in a 23 month period. If merely changing the effective date of the dissolution (which would have to be different under statute each time the referendum is proposed) would render Section 28-7 inapplicable, there would never be a situation where it would be applicable – rendering it unenforceable – an absurd result. Courts have long assumed that in enacting legislation, the legislature does not intend absurdity. **Better Government Association v. Offices of the Special Prosecutor**, 2019 IL 122949, ¶23.

Here, the legislature's intent is clear: not to burden the public with the same referendum proposition every election cycle. The losing party must wait at least 23 months before submitting it again. McHenry Township is seeking to circumvent that statutory requirement and the Court will not countenance such a proposition.

For all of the above reasons, the Court finds that Tirio had the authority to reject the proposed referendum question submitted by McHenry Township pursuant to resolution and that

his determination that the proposed referendum violated Section 28-7 of the Election Code was correct. As such, McHenry Township is not entitled to injunctive or mandamus relief and its Complaint should be dismissed, with prejudice.

ORDER

IT IS HEREBY ORDERED:

Defendant Joseph J. Tirio's Motion to Dismiss is granted and Plaintiff McHenry Township's Complaint for Writ of Mandamus and Mandatory Injunctive Relief is dismissed with prejudice.

Entered: 8/24/20

KEVIN G. COSTELLO
JUDGE

** FILED ** Env: 10210427
McHenry County, Illinois
20CH000248
Date: 8/24/2020 3:54 PM
Katherine M. Keefe
Clerk of the Circuit Court

IN THE CIRCUIT COURT OF THE 22ND JUDICIAL CIRCUIT
McHENRY COUNTY, ILLINOIS

McHENRY TOWNSHIP, PLAINTIFF,	)	
V.	)	Case No. 20 CH 248
COUNTY OF MCHENRY AND JOSEPH J. TIRIO, NOT INDIVIDUALLY, BUT IN HIS OFFICIAL CAPACITY AS THE McHENRY COUNTY CLERK, Defendants.	)	

NOTICE OF APPEAL
(Dated 8/24/2020)

To: Carla N. Wyckoff, ASA, & Norman Vinton, ASA
McHenry County State's Attorney's Office
2200 N. Seminary Ave.
Woodstock, IL 60098
815-334-4146
cnwyckoff@mchenrycountyil.gov
ndvinton@mchenrycountyil.gov

Notice is hereby given that Plaintiffs, McHenry Township, appeal to the Illinois Court of Appeals, Second District, from the orders entered in this action as follows:

A) The Memorandum Decision and order of August 24, 2020, dismissing Plaintiffs Complaint with prejudice.

Dated: August 24, 2020

Respectfully submitted,

By: /s/ *Robert Hanlon*
One of the Attorneys for
McHenry Township

CERTIFICATE OF SERVICE

I, Robert T. Hanlon, an attorney, certify that on August 24, 2020, the foregoing document was served on all parties and attorneys of record in this action by electronic mail and by United States Mail.

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By: /s/ *Robert Hanlon*

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
SECOND JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE TWENTY-SECOND JUDICIAL CIRCUIT
MCHENRY COUNTY, ILLINOIS

MCHENRY TOWNSHIP
Plaintiff/Petitioner

Reviewing Court No: 2-20-0478
Circuit Court No: 2020CH000248
Trial Judge: KEVIN G COSTELLO

v.

COUNTY OF MCHENRY AND JOSEPH J TIRIO, NOT INDIVIDUALLY, BUT IN HIS OFFICAL CAPACITY AS MCHENRY COUNTY CLERK
Defendant/Respondent

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