NO. 08-0063
IN THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

Armando Castillo, Harry Kudesh, and Angelo Mavraganes, Petitioners-Appellants, v. Cook County Officers Electoral Board, and its members, David Orr, Chairman, by and through his designee Daniel P. Madden, Richard A. Devine, by and through his designee, Michael C. Prinzi and Dorothy Brown, by and through her designee Mary A. Melchor, David Orr, in his official capacity as Cook County Clerk, Board of Election Commissioners for the City of Chicago and Jay Paul Deratany, Respondents-Appellees.	Appeal from the Circuit Court of Cook County, Illinois No.: 2008 COEL 01 Hon. Alfred J. Paul, Judge Presiding On Judicial Review from Cook County Officers Electoral Board case # 07 COEB BR 01

BRIEF AND ARGUMENT OF APPELLEE JAY PAUL DERATANY

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APPELLEE JAY PAUL DERATANY'S BRIEF

Respondent-Appellee-Candidate (*hereinafter* "Candidate"), Jay Paul Deratany, by and through his attorney, Richard K. Means, hereby submits his Brief in response to Petitioners-Appellants-Objectors' (*hereinafter* "Objectors'") Brief on Appeal.

ISSUE PRESENTED FOR REVIEW

Whether the decision of the Electoral Board to overrule the allegations of the Objectors that the entire nomination papers had been rendered void and invalid as a result of a "pattern of fraud and false swearing" and "an utter disregard for the mandatory provisions of the Election Code" was against the manifest weight of the evidence and contrary to law.

STATEMENT OF FACTS

On November 13, 2007 the Objectors filed a Verified Objectors' Petition alleging that the Candidate's nomination papers for the office of Commissioner of the Board of Review of Cook County from the 2nd Board of Review Election District were legally insufficient in law and in fact for, *inter alia*, the failure to submit a sufficient number of valid signatures (3,858) as required by law in that numerous signatures were allegedly not signed by registered voters, were not signed by registered voters residing in the Board's 2nd District, were not "genuine" in that they did not reasonably match the voter registration signature for that person, and various other irregularities and deficiencies. **R. Vol. I. C 122-127.**

The allegations related to the Candidate's petition signatories not being registered voters, not residing within the district of candidacy, signatures not matching, *etc*. were sent for a registration records check at the offices of the Chicago Board of Election Commissioners and the Cook County Clerk. This process took approximately two weeks with representatives of the Objectors and the Candidate as participants and observers and resulted in a preliminary summary report showing that the Candidate had presented 955 signatures more than the minimum required with thousands of pages of work sheets, Board Exhibit #1, showing the specific rulings and grounds therefor. **R. Vol. I. C 122-127.** Both the Objectors and the Candidate filed "Rule 8" notices preserving their right to contravene hundreds of the specific records examination rulings. **R. Vol. I. C 186-203**

Long-experienced political operative Victor Santana testified to the summary of results of the Chicago Board and Cook County Clerk's records examinations in this case. Focusing on the paid circulators (which the Candidate has a constitutional right to hire),

Mr. Santana specifically testified as to the percentage of objections made and sustained, by circulator, prior to Rule 8 rehabilitation proceedings. Mr. Santana admitted that he made no distinction whatever between categories of objections made for innocent defects and those made for the kind of signature forgeries found in *Fortas*, *Huskey* and *Canter*. Mr. Santana specifically admitted that the sustained rulings about which he calculated percentages included:

1. Signatures that the voter was not registered at the address shown,
2. Signatures that the voter was registered but not within the district of candidacy,
3. Signatures that did not reasonably match the registration records because the registration signature was cursive in form and the writing on the petition was in block printing,
4. Signatures that did not reasonably match the registration records because the registration signature was written as long as 40 years prior to the petition signature, and
5. Signatures that were made by another family member (commonly known as "Mom and Pop signatures") presuming, erroneously, authority to sign for the other family member. **R. Vol. IV. Pp. 76-80**

The principal thrust of the Objection was the allegations that some of the Candidate's petition circulators claimed residence addresses at which they did not reside at the time they signed the petition circulator affidavits and that those petition circulators had engaged in a "pattern of fraud and false swearing" with an "utter contempt for the mandatory provisions of the Election Code", rendering all

signatures contained on their petition signature sheets void and invalid. **R. Vol. I. C 122-127.**

The Objectors presented several witnesses who were investigators and process servers who testified as to their inability to serve witness subpoenas authorized by the Electoral Board (without objection by the Candidate) on some of these petition circulators at the addresses that they had entered on their circulator affidavits some weeks or months earlier. **R. Vol. I. C 122-127, _____**. For the 3 circulators who Objectors served with subpoenas but were not compliant, the Candidate thoroughly supported the enforcement of the subpoenas. See, for example, **R. Vol. ? Transcript of December 13, p. 236.** The Objectors failed to take action in the Circuit Court to enforce the subpoenas.

Pursuant to subpoena, two of the Candidate's petition circulators, Craig Thompson and Tyrone Sims, testified as to how they were recruited, how they went about gathering petition signatures, how they turned in their work and how they were paid for their services. **R. Vol. ? Transcript of December 13, pp. 7-56, 60-81.** Mr. Sims testified that he received confusing instructions on what address he should enter as his residence address. **R. Vol. ? Transcript of December 13, pp. 65-70, R. Vol. V. Transcript of January 10, p. 24.** Respecting their testimony, the Electoral Board found:

> **Objector called two circulators as witnesses. One was Craig Paul Thompson, who circulated over 200+ sheets, for which he was paid $1.00 per signature, gave uncontradicted testimony that he would ask prospective signers if they were registered to vote in Cook County. He testified to a work schedule that included more than enough time to have allowed him to have collected the signatures on his sheets. He**

> **testified to a process of notarization that is well within the legal requirements. His sheets have 1,181 presumably valid signatures. The other witness was Tyrone Sims, who circulated 5 sheets. His testimony made it clear that he was not a careful circulator; he rarely, if ever, observed any formalities; he had no real interest in the circulation process and engaged in it as a way of getting permission to leave the premises at 2049 West Jarvis. Mr. Sims' sheets netted the Candidate 9 signatures, according to Objector. The testimony of these two witnesses did not show any systematic, fraud-driven behavior on the part of them individually or on the part of Candidate. R. Vol. I. C 126.**

The Electoral Board analyzed the Objectors' proof and found it so sorely wanting that it denied the objection at the close of the Objectors' case-in-chief for failure to make out a *prima facie* case. The Electoral Board's decision reads in pertinent part:

> **The lynchpin of Objector's case, the basis for all of his efforts, is the notion that a high percentage of signatures disallowed is indicative of "a pattern of fraud" as defined by the case law. As discussed above, we do not believe that the law has reached that point. Moreover, Objector's decision not to analyze the reason for signatures being disallowed is a great weakness in his approach. We do not see how an objection sustained because a signer is "out-of-district" can be seen as a sign of fraudulent motivation. The same may be said for a signer who turns up "not registered." Mere numbers without reasons are not apt to carry a burden of proof as weighty as fraud.**

On the record before us, we decline to adjust the registration record check numbers on the basis of Objector's proofs. We adopt the results of the records check as reported to us and delineated above as our findings herein. Since any possible success on the part of Objector as to the other particulars of the Objector's Petition would not change the outcome, we regard those as mooted. The Board overrules the objections herein. R. Vol. I. C 126.

On Judicial Review of the Electoral Board decision, the trial court held:

There is nothing in that (Electoral Board) decision that I find that is arbitrary, capricious, and against the manifest weight of the evidence. I think his decision is very well reasoned. (Chairman Madden) discusses all the issues that have been raised. Candidly, I compliment him. I think he did a great job. He covered all the bases, and I think what this case really gets down to is there a per se rule. I think as of this time there is not.

****

I think Mr. Madden got it right, there wasn't enough here, the lynchpin of the case is still statistical and numerical, there is a little bit more, but I don't think it's against the manifest weight of the evidence. R. Vol. V. Transcript of January 10, p. 83-84, 85.

STANDARD AND SCOPE OF REVIEW

This matter comes before this Court under judicial review pursuant to the Election Code. 10 ILCS 5/10-10.1. In sum, the standard and scope of judicial review is that, to the extent that an aggrieved party disputes the factual findings of an electoral board, those findings must be upheld unless they are contrary to the manifest weight of the evidence. *King v. Justice Party,* 284 Ill. App.3d 886, 888, 672 N.E.2d 900, 902 (1996).

As this Court stated in *King:*

> **The findings of fact of an electoral board are *prima facie* true and correct. *Wicker v. Town of Cicero Municipal Officers Electoral Board,* 247 Ill.App.3d 200, 187 Ill.Dec. 89, 17 N.E.2d 297 (1993). The function of a court on judicial review is to ascertain whether the findings and decision of the electoral board are against the manifest weight of the evidence. *Williams v. Butler,* lll.App.3d 532, 341 N.E.2d 394 (1976). A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. (Emphasis added) *Abrahamson v. Illinois Department of Professional Regulation,* 153 Ill.2d 76, 88, 180 lll.Dec. 34, 40 606 N.E.2d 1111, 1117 (1992). The fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently based upon the same evidence will not justify a reversal of the findings of an administrative agency. *(Emphasis added) Abrahamson,* 153 lll.2d at 89, 180 Ill.Dec. at 40, 06 N.E.2d at 1117.**

> **Determination as to the weight of evidence and the credibility of witnesses are uniquely within the province of the agency *(Hahn v. Police Pension Fund,* 138 ll1.App.3d 206, 92 Ill.Dec. 825, 485 N.E.2d 871 (1985)), and a court will not substitute its judgment for that of the agency on such matters *(Abrahamson,* 153 Ill.2d at 89, 180 ll1.Dec. at 40, 606 N.E.2d at 1118). Where the findings of the agency are supported by competent evidence in the record, its decision should be affirmed. *Commonwealth Edison v. Property Tax Appeal Board,* 102 Ill.2d 443, 82 Ill.Dec. 294, 468 N.E.2d 948 (1984).** *King,* 284 Ill.App.3d 886 at 888.

When considering an Electoral Board's findings of fact, this Court in *Wicker v. Town of Cicero Municipal Officers Electoral Board,* 247 lll.App.3d 200 (1st Dist., 1993) noted:

> **In reviewing the Board's findings of fact, we, like the trial court, *must accord the Board's finding significant deference. (Williams v. Butler* (1976), 35 lll.App.3d 532, 341 N.E.2d 394.) *The findings of the Board are prima facie true and there need only be "some competent" evidence in the record sufficient to support its findings*. (See *Williams*, 35 Ill.App.3d at 538, 341 N.E.2d at 399). Review of electoral board decisions are not intended to provide a *de novo* hearing, but instead, "merely to provide a remedy against arbitrary or unsupported decisions." *Williams,* 35 Ill.App.3d at 538, 341 N.E.2d at 398. (Emphasis added).** *Wicker,* 247 Ill.App.3d 200 at 203.

Recently this Court again decided a case turning on the standard of review for an electoral board. *Bergman v. Vachata*, 347 Ill.App.3d 339, 807 N.E.2d 558, 282 Ill.Dec. 934 (1st Dist., 2004). The Court particularly detailed what weight is to be given to the findings of fact made by the electoral board:

> **The findings of fact of an electoral board are *prima facie* true and correct. The function of a court on judicial review is to ascertain whether the findings and decision of the electoral board are against the manifest weight of the evidence. *A decision is against the manifest weight of the evidence only if the opposite conclusion is clearly evident.* The fact that an opposite conclusion is reasonable or that the reviewing court might have ruled differently based upon the same evidence will not justify a reversal of the findings of an administrative agency. Determinations as to the weight of the evidence and the credibility of witnesses are uniquely within the province of the agency, and a court will not substitute its judgment for that of the agency on such matters. Where the findings of the agency are supported by competent evidence in the record, its decision should be affirmed.** (***Citing*** *King v. Justice Party, Id.*) *Bergman* at 347, 348.

In *Bergman*, this Appellate Court refused to overturn any rulings on signature findings by the Electoral Board and found:

> **We may agree that the signatures do not match and speculate that the voter stated in his affidavit that the signature was his when it was, in fact, somebody else's signature. But the fact that an opposite**

conclusion is reasonable or that the reviewing court might have ruled differently based upon the same evidence will not justify a reversal. (Citing *King v. Justice Party, Id*) *Bergman* at 348.

In dealing with a mixed question of law and fact, *Cardona vs. Board of Election Commissioners of the City of Chicago,* 346 Ill.App.3d 342 (1st Dist., 2004), instructs:

Because this case involves an examination of the legal effect of a given set of facts whether the information contained in the Receipt filed by the Candidate complies with the requirements of the Election Code — the Board's determination is best considered a mixed question of fact and law. For mixed questions of fact and law, our Supreme Court has held that a clearly erroneous standard of review applies. See *City of Belvidere v. Illinois State Labor Relations Board,* 181 IlL2d 191, 205, 229 Ill.Dec. 522, 692 N.E.2d 295 (1998). Accordingly, we will not reverse the Board's decision unless it is clearly erroneous. *Belvidere,* 181 Ill.2d at 205, 229 Ill.Dec. 522, 692 N.E.2d 295. (Emphasis added) *Cardona,* 346 Ill.App.3d at 343.

Shortly after deciding *Belvidere,* the Illinois Supreme Court, decided *AFM Messenger Services, Inc. v. Department of Employment Security,* 198 Ill.2d 380 (2002), adopting the Federal Rule of Civil Procedure 52(a) (Fed.R.Civ.P. 52(a)) definition of clearly erroneous requiring a court of review to be "significantly deferential" to the underlying determination.

As discussed in *DuPage County Board of Review v. Department of Revenue,* 339 Ill.App.3d 230 (2nd Dist., 2003), the United States 7th and 9th Circuit Court of Appeals apply a colorful metaphor in determining whether a decision is clearly erroneous under this Federal Rule.

> **To be "clearly erroneous," a circuit court's finding must be 'more than just maybe or probably wrong; it must 'strike us as wrong with the force of a five-week old, unrefrigerated dead fish.'" *Fisher v. Roe*, 263 F.3d 906, 912 (9th Cir.200l), quoting *Parts & Electric Motors, Inc. vs. Sterling Electric, Inc., 886 F.2d 228, 233 (7th Cir.1988)***

Putting the point more delicately in *AFM Messenger*, however, our Supreme Court held:

> **[W]hen the decision of an administrative agency presents a mixed question of law and fact, the agency decision will be deemed "clearly erroneous" only where the reviewing court, on the entire record, is "left with the definite and firm conviction that a mistake has been committed." *United States Gypsum Co.,* 333 U.S. at 395, 68 S.Ct. at 542, 92 L.Ed. at 766.** *AFM Messenger Service, Inc.,* 198 Ill.2d 380 at 395.

Finally, in one of the most recent cases of judicial review of an electoral board decision to come from this Court, the single case most heavily relied upon by the Objectors here, the Court gave clear deference to the findings of the electoral board:

> **We review the Board's findings of fact deferentially, and we will reject those findings only if they conflict with the manifest weight of the evidence. *King v. Justice Party*, 284 Ill. App. 3d 886, 888 (1996). Credibility determinations particularly fall within the Board's purview. *King*, 284 Ill. App. 3d at 888. The Board's interpretations of statutes do not bind the courts. *King*, 284 Ill. App. 3d at 888. We look to administrative review cases for guidance on procedures for review under the Election Code (10 ILCS 5/10-10.1 (West 2004)). See *King*, 284 Ill. App. 3d at 888.** *Harmon v. Cicero*, 371 Ill. App. 3d 1111, 1115, 864 N.E.2d 996 (1st Dist., 2007)

ARGUMENT

I.

The Right of Access to the Ballot is a Substantial One Which May Not Lightly Be Denied.

This case involves the challenge to a candidacy for the office of Commissioner of the 2nd District on the Cook County Board of Review. A few introductory principles concerning ballot access are therefore appropriate. The Election Code provides that the candidate's nomination papers are deemed valid until proven otherwise. 10 ILCS 5/10-8.

The right to vote and the right to seek office are among the most cherished in this land. Thus, the United States Supreme Court has said, in connection with restrictions on access to the ballot generally:

> **Restrictions on access to the ballot burden two distinct and fundamental rights, the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast ballots effectively. [Citation.] * * * Access restrictions also implicate the right to vote because absent recourse to referendums, voters can assert their preferences only through candidates or parties or both. [Citation.] By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have**
>
> **often reiterated that voting is of the most fundamental significance under our constitutional structure. [Citations.]** *Illinois State Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 59 L.Ed.2d 230, 99 S.Ct. 983, 990 (1979)

Illinois courts have also observed in a variety of contexts that there is a dual import to ballot access. In *McGuire v. Nogaj,* 146 Ill. App. 3d 280, 285, 496 N.E.2d 1037 (1st Dist., 1986), the Appellate Court observed: "The right of a party or an individual to a place on a ballot is entitled to protection and is intertwined with the rights of the voters." (Quoting *Lubin v. Panish*, 415 U.S. 709, 716, 39 L.Ed.2d 702, 708, 94 S.Ct. 1314, 1320.) The *McGuire* court further noted that this state has a policy in "favor

of a candidate's eligibility" (146 Ill. App. 3d at 285), and the Illinois Supreme Court has observed that the right of access to the ballot is a substantial one which may not lightly be denied. *Welch v. Johnson,* 147 Ill. 2d 40, 588 N.E.2d 1119 (1992). It is with these basic principles that this Court must analyze the law and consider this case which seeks to deny a candidate access to the ballot.

II.

The Objectors Impermissibly Assert Facts Contrary to the Record and a Factual Theory Not Asserted at Either the Electoral Board or the Circuit Court

In their Appeal Brief at pages 6, 7, 15, and 16 Objectors repeatedly and disingenuously assert that the Electoral Board and the parties were not informed of the specific rulings and grounds for each ruling in the records examination and that this is why Objectors' witness Santana testified broadly as to the percentage of objections sustained and not about the grounds upon which they were sustained. This assertion was never made at the Electoral Board or at the Circuit Court and also amounts to a misrepresentation of the factual record. The Board did not certify the thousands of pages of records examination work sheets, Board Exhibit #1, showing the grounds as a part of the record on appeal because the Objectors never once made such a factual assertion.

The Board and the parties had the complete records examination rulings, Board Exhibit #1, at the time of the December 19 hearing and Objectors chose to prepare Santana's testimony only from summaries. **R. Vol. IV. Transcript of December 19, pp. 8-15.** The Candidate specifically argued that Santana's testimony was not probative because a substantial proportion of the sustained objections were from deficiencies which suggested no fraud whatever such as printed signatures, out of district, *etc*. but the Board

permitted the testimony. **R. Vol. IV. Transcript of December 19, pp. 15-17.** The Board's decision that the Objectors had not proved any pattern of fraud specifically criticized Santana's testimony stating "Objector's decision not to analyze the reason for signatures being disallowed is a great weakness in his approach" **(R. Vol. I. C 126)** clearly implying that the specific grounds of the records examination rulings were readily available.

In addition, the fact that both the Objectors and the Candidate filed specific motions or notices preserving the right to contravene records examination rulings of registration and signature matching shows that the parties were fully apprised of the grounds of the records examination rulings. **R. Vol. I. C 186-203.**

It is elementary that this Court can not consider a factual theory not presented below nor can it ignore facts clearly in the record in the face of a newly-minted factual denial.

III.

The Objectors Failed in their Burden to Prove their Case

The Objectors have rather clumsily constructed a "Straw Man" and then proceeded to demolish him, exclaiming with glee that they had shown the Candidate's petitions insufficient. The Electoral Board was not fooled and neither should be this Court.

This "Straw Man," this deceptive and sinister construct, were the paid circulators (which the Candidate has a constitutional right to hire) which this Candidate's late-blooming campaign hired to be supplement (and double) the petition signatures provided by the Candidate's volunteer organization. Thus, the Objectors took aim at some of the

Candidate's circulators who they knew to be transient, proceeded to look for those circulators in places where they knew they would not find them, repeatedly looked for these same people in the same unsuccessful ways expressing shock at their thoroughly predictable lack of success and then proclaimed the Objectors' own failures to show fraud on the part of some of the Candidate's circulators.

The Objectors filed their extensive allegations on November 13, 2007 related to circulator residence addresses sworn to mostly in October. Then, the Objectors, over the objections of the Candidate, presented evidence that they could not find the transient circulators at those same addresses in December. **R. Vol. II, Transcript of Proceedings, November 19, pp. 106-112; 120-129; R. Vol. III., Transcript of Proceedings, December 19, pp. 3-13.** Surely the Objectors were not surprised and neither was the Electoral Board.

The Objectors claim diligence in their pursuit of serving subpoenas on the circulators who gave the Jarvis and other addresses on the circulator affidavits and yet the Objectors did not attempt to seek records of who might have been present at those addresses at the relevant times even for a an *in camera* judicial inspection. While the Objectors darkly suggest some obstruction of justice, they have not used the ingenuity usual in even routine commercial cases. The Objectors did not seek to subpoena the door keepers, the door keepers' employers, *etc*. The Objectors were content to keep running into the same brick wall and then claim repeated injury for the injuries they knew would occur.

Objectors suggest that something is sinister and unusual about people at an address not having their name on a bell or a mail box or that the door keeper may be uncooperative. There is no law requiring names on bells or mailboxes, there is no law requiring door keepers to be responsive to servers of civil process. The Objectors have confronted problems no different than they would encounter with high-income condominium buildings along the Lakeshore and yet they bitterly complain and suggest that these circulators were engaging in criminal activity.

Most important, the Objectors suggest that the Candidate has purposely procured circulators who are not amenable to process and ***yet Objectors made no attempts whatever to introduce evidence to support that suggestion.*** Indeed, for the 3 circulators who Objectors served with subpoenas but were not compliant, the Candidate thoroughly supported the enforcement of the subpoenas. **R. Vol. ? Transcript of December 13, p. 236.** Since the Objectors apparently did not really want the non-complaint circulators' testimony (the Objectors just wanted to complain of non-compliance), ***the Objectors failed and refused to take steps to enforce the subpoenas.***

Before the Electoral Board, and before this Court, the Objectors concentrate their case on petition circulators who claimed the address of 2049 West Jarvis in Chicago as their residence on the day they swore to their petition circulator affidavit. Recognizing this focus, the Board's decision took pains to analyze what the Objectors proved, ***and did not prove***, on this subject:

> **Before turning to a full discussion of Objector's theory, it is useful to examine Objector's case against William Field, a circulator of 95 sheets, with 243 remaining presumably good signatures, which**

consists of two particulars. The first is that he consistently listed 2049 West Jarvis as his address (Obj. Pet., ¶27(r)(4)), and the second is that objections to 74.42% of his signatures were sustained. (Obj. Ex. 13) Unless the Board finds either of those two grounds alone is a basis for disallowing all of his signatures, or finds that the two in combination provide a sufficient basis or doing so – when either one alone is not – Field's 243 signatures cannot be disallowed. But Objector introduced no evidence as to the grounds on which the objections to Field's signatures were sustained. How many were disallowed as the signatures of non-registered individuals? How many were disallowed because the address associated with the signature was outside of the 2nd Board of Review District? Objector, whose numeric analyses are otherwise complete, elects not to offer such numbers. This is the case not only with Field, but with every other circulator. There is nothing improper about that and, if anything, it points out Objector's willingness to live or die by his underlying theory, that a large enough percentage of disallowed signatures is enough, by itself, to require the disqualification of the circulator's other, and otherwise good, signatures.

The Board has entertained a parallel legal theory in an earlier case this session, *Sorrell v. Brewer,* 07 COEB CC 01. In that case we rejected the idea that *Harmon v. Town of Cicero Municipal Officers*

Electoral Bd., **371 Ill.App.3d 1111 (1st Dist 2007) could be read as authority for a *per se* rule based on no more than percentage of disallowed signatures. As we read *Harmon,* we observed that**

> **The *Harmon* Board apparently heard evidence of a quality and quantity that is wholly missing in this case. There was live testimony from a circulator and at least one other witness, there were multiple affidavits from purported petition signers and counter-affidavits from other petition signers. The quality of proof available to the Board in *Harmon* was much more specific and useful than what was presented by Objector here.**

The same situation regarding supporting evidence is true here with Mr. Field. The only specific factual data regarding Field is his address on West Jarvis, and the inability of Objector to serve him with a subpoena there. This inability, according to the record herein, apparently has nothing to do with Field himself, and everything to do with the nature of the enterprise in charge of 2049 West Jarvis and the services it offers. (Unlike the other circulators who claimed West Jarvis as a residence, Field is not alleged to live or be registered to vote elsewhere.) We do not hold this circumstance against either party, and draw no inferences from it. But, based on the record before us, we cannot hold, in respect to Field, that 2049 West Jarvis cannot be a legitimate address for him as a circulator. This leaves us with no specific evidence as to the Field signatures beyond the raw

sustained/overruled numbers. We find ourselves in the same situation as in *Sorrell v. Brewer,* and think it useful to cite a part of our rational(e) therefrom:

> **Without any supporting evidence of circulator wrongdoing, Objector is left with his numerical analysis. Here, too, he seeks solace in *Harmon,* arguing that the statistical patterns he sees here are the same as those in that case. Objector overlooks the fact that the County as a whole is a place vastly different than Cicero, and the large number of signatures required for the office at hand, 5,517 is nearly ten times the number of signatures required in Cicero. This means that the undertaking of circulating a petition for county-wide office is a vastly larger and more difficult undertaking than running in a municipality. A County-wide petition is a vast net that attempts to grab as many signatures as possible, in an attempt to capture the requisite number. Objector argues that this is improper, that dredging up six bad signatures to get four good ones, as was done here, is *per se* evidence of either deliberate wrongdoing or a cavalier disregard of the strictures of the law. In either event, he maintains, the Candidate should be penalized by losing whatever proper signatures were collected. We do not believe that the present state of the law supports, let alone requires, such an outcome. *Harmon* found that the Cicero**

> **Electoral Board was justified in doing what it did based on the record before it. The Cicero Board made specific findings of a pattern of fraud and false swearing. We do not believe that the record before us in this case does, or would, support such a finding. Without it, Objector's argument must fail.**

For this case, we must acknowledge that we have a petition for one-third of the County, requiring 3,858 signatures, seven times the number in *Harmon.* Otherwise, however, we believe our rationale to be correct and applicable herein.

The Field signatures are important because of Objector's own final figures. In the portion of his Post-Trial Brief entitled "C. Summary of Signature Count," he posits an outcome wherein his case would reduce the Candidate's signature total by 1,046, overcoming the Candidate's 955 signature "lead" and reducing him to 91 fewer than the minimum. However, the chief element of his total is his fourth Item "Invalidity of remaining Jarvis signatures" to which he assigns a value of "-949," and keys to his Exhibit 55. An examination of Exhibit 55 shows that of the 949 signatures assigned to Jarvis, 243 are Mr. Field's signatures. Once we have determined not to strike Field's signatures, the value of the Jarvis item is reduces to "-706," and Objector cannot overcome Candidate; the total can only be reduced to 152 signatures above the minimum. R. Vol. I. C 124-126.

IV.

Objectors' True Quarrel is that the Candidate has Utilized his Recently Guaranteed Constitutional Rights

The Objectors' case really boils down to matters beyond this Court's control. They dispute the wisdom, correctness and the natural and probable consequences of two lines of Federal Court constitutional decisions: Specifically,

1. They dispute the wisdom, the propriety and the natural and probable consequences of no longer requiring candidate petition circulators to be registered voters in the district of candidacy but who are simply required to disclose their current address at the time of notarization; and
2. They dispute the wisdom, the propriety and the natural and probable consequences of the use of petition circulators being paid by the page or by the signature.

It is plain that, and indeed suggested by the evidence in this case, that if petition circulators no longer need be registered voters of the district of candidacy who are simply required to disclose their current address at the time of notarization, they will likely be more transient than the circulators were prior to the change in the law. Likewise, it is plain that, and indeed suggested by the evidence in this case, that if petition circulators can be paid by the page or by the signature, that they will likely be more transient and naturally present the problems encountered by the Objectors in finding them for service of process.

As Justice John Paul Stevens wrote for the unanimous United States Supreme Court in *Meyer v. Grant* [486 U.S. 414, 108 S.Ct. 1886 (1988)]:

> **The Colorado Supreme Court has itself recognized that the prohibition against the use of paid circulators has the inevitable effect of reducing the total quantum of speech on a public issue. When called upon to consider the constitutionality of the statute at issue here in another context in *Urevich* v. *Woodard*, 667 P.2d 760, 763 (1983), that court described the burden the statute imposes on First Amendment expression:**
>
> > **"As mentioned previously, statutes that limit the power of the people to initiate legislation are to be closely scrutinized and narrowly construed. That the statute in question acts as a limitation on ACORN's ability to circulate petitions cannot be doubted. We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay. As the dissent in *State* v. *Conifer Enterprises, Inc.*, 82 Wn.2d 94, [104,] 508 P.2d 149[, 155] (1973) (Rosellini, J., dissenting), observed:**
> >
> > **"`The securing of sufficient signatures to place an initiative measure on the ballot is no small undertaking. Unless the proponents of a measure can find a large**

> **number of volunteers, they must hire persons to solicit signatures or abandon the project. I think we can take judicial notice of the fact that the solicitation of signatures on petitions is work. It is time-consuming and it is tire-some — so much so that it seems that few but the young have the strength, the ardor and the stamina to engage in it, unless, of course, there is some remuneration.'"** *Meyer* at 423-424.

As Justice Ruth Bader Ginsburg wrote for the unanimous United States Supreme Court in *Buckley v. American Constitutional Law Foundation*, [525 U.S. 182 119 S. Ct. 636 (1999)]:

> **…as we stated in *Meyer*, "the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting." 486 U.S., at 427. Finally, absent evidence to the contrary, "we are not prepared to assume that a professional circulator — whose qualifications for similar future assignments may well depend on a reputation for competence and integrity — is any more likely to accept false signatures than a volunteer who is motivated entirely by an interest in having the proposition placed on the ballot." *Id.*, at 426**. *Buckley* at 203-204

Thus, the Objectors' grievances grow out of the state of the law that they wish to be otherwise. This Court can not and the Electoral Board and Circuit Court could not give them the relief they seek. The Objectors' ultimate suggestion that the natural and probable consequences of these two lines of federal cases constitutes a pattern of fraud is both absurd and seeks relief well beyond the authority of this Court.

V.

A Petition Circulator's Residence May Be a Temporary Address and May Change from Time to Time

The Objector's Brief relies in large measure on a nonsensical and circular argument by which they seek to define "residence" for the purpose of a circulator's affidavit by the same standards forbidden by the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 196, 119 S.Ct, 636, 644 (1999); *Tobin for Governor v. Illinois State Board of Elections*, 105 F. Supp.2d 882, 2000 US Dist. LEXIS 10983 at p. 5 (ND Ill. 2000) and*; Krislov v. Rendour*, 1999 US Dist LEXIS 22122, at p. 2 (N.D. Ill. 1999). The very point of these constitutional decisions is that the standards applicable to candidates, registered voters and petition signers can not be applicable to the messengers who carry the petitions between signers and those who eventually file them.

The Objectors extensively cite over a dozen cases nearly all of which deal with residency for the purposes of voter registration and candidacies which require voter registration. If the Court decisions holding unconstitutional the necessity of voter

registration for the purpose of petition circulation are to have any meaning, the address to be disclosed by these unregistered persons must necessarily be something other than that permanent home address to which the person may, from time to time, return and instead mean, the place that this person can be found on the day he discloses the address. While this may be inconvenient for the Objectors, the purpose of guaranteeing one person's civil liberties is not to effectuate the convenience of others.

In context, it appears that the 7th Circuit and Supreme Court was referring to "residence address" in its common meaning and not as a term of art under any particular state's body of law.

Black's Law Dictionary defines "residence" as "the place where one actually lives, as distinguished from a domicile." *Black's Law Dictionary*, Eighth Edition, p. 1335. It defines "domicile" as "the place at which a person has been physically present and that the person regards as home; a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere." *Id*. at 523.

Query then whether the cases cited by the Objectors defining residency for the purposes of candidacy, petition signing and voting are not describing a standard more alike to the common understanding of domicile? Indeed for Illinois law respecting candidates and voting residency, it is even more strict. See *Pope v. Board of Elections Commissioners of East St. Louis,* 370 Ill. 196, 18 N.E.2d 214, 216 (1938) and *Clark v. Quick,* 377 Ill. 424, 36 N.E.2d 563 (1941).

In the majority opinion in *Buckley*, Justice Ruth Bader Ginsburg contemplates that petition circulators may be transient and notes:

> **The State's dominant justification appears to be its strong interest in policing lawbreakers among petition circulators. Colorado seeks to ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders. See Brief for Petitioner 32. The interest in reaching law violators, however, is served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, the "address at which he or she resides, including the street name and number, the city or town, [and] the county." Colo. Rev. Stat. § 1-40-111(2) (1998); see *supra*, at 189, n. 7. This address attestation, we note, has an immediacy, and corresponding reliability, that a voter's registration may lack. The attestation is made at the time a petition section is submitted; a voter's registration may lack that currency.** 525 U.S. at 196.

Unites States District Judge Robert Gettleman referred to this same passage from *Buckley* in his similar and *Buckley*-implementing *Tobin* decision. 105 F. Supp.2d at _____.

Thus it is plain that, when *Buckley*, *Tobin* and the amended provisions of §7-10 of the Election Code (amended to conform to these constitutional rulings in Public Act 92-129 effective July 20, 2001) refer to the requirement of disclosing the circulator's residence address, that address must necessarily include ***the current and even temporary residence address*** – the place that person can be found – on the day of the execution of

the circulator's affidavit. Thus it is proper for a transient to disclose a temporary address and, as he moves about, to disclose as many different addresses on different days as his temporary residency may change.

What is plainly required is that the address be accurate on the date that it is stated and, under the circumstances, the stating of an address at which that person might be in the future ***would not meet the requirements***. There is evidence in this case that persons could not find circulators in this case at the stated address no less that five weeks after the notarizations. ***There is no evidence whatever that they were not at the stated location on the date of the notarizations.*** For this reason, there is nothing improper with the use of the 2049 West Jarvis address for those circulators who resided there at the time they passed petitions ***even if they were not there at a later time*** (which Objectors have not even attempted to prove).

V.

Objectors Erroneously Rely on the Facts and Not the Holding in *Harmon*

Objectors seize upon one of the most recent decisions of this Court on Election Code §10-8 ballot access objection proceedings [*Harmon v. Cicero*, 371 Ill. App. 3d 1111, 864 N.E.2d 996 (1st Dist., 2007)] to solve all of their imagined problems. Unfortunately for them, life is not that simple. In short, the Objectors are desperately casting about to find support for their pattern of fraud argument which they can not support with facts they proved on the record in this case and ***they read Harmon not for what it says, but for what they wish it to mean.***

Further, the Objectors apparently find delicious irony in their opportunity to take a case won at the electoral board and Appellate Court by Deratany's attorney in this case and use it against his current client.

When examined carefully, *Harmon* stands, not as a primer on pattern of fraud, but as a primer on judicial review deference to election board findings when the facts in the record support the board's findings and are not against the manifest weight of the evidence. This case is a classic example of the old maxim: "bad facts make bad law" and this Board should not confuse this Court's strong reaction to outrageous candidate behavior in an election board proceeding with the Court's actual holding.

The Objectors here compare what they allege to be the facts here to the facts recited by the Court in *Harmon* and conclude that the facts here are the same or even more egregious. Objectors conveniently forget that the candidates had an opportunity to defend themselves in *Harmon* and that even though the Cicero Electoral Board "threw the book at" *Harmon* holding signatures invalid for some rather broad and sweeping reasons, this Court did not rule nearly so broadly. The Court held:

> **The Board provided us with several distinct bases for its ruling, and the Board clarified which factual findings led to each basis for its ruling. We may affirm the Board's decision if the facts in the record suffice to support any one basis for the Board's decision. *Younge v. Board of Education of the City of Chicago*, 338 Ill. App. 3d 522, 530 (2003).** *Harmon,* 371 Ill. App. 3d at 1116.

This Court's decision in *Harmon* is capsulated in the Court's first paragraph in the Court's "analysis" of the case:

> **We review the Board's findings of fact deferentially, and we will reject those findings only if they conflict with the manifest weight of the evidence. *King v. Justice Party*, 284 Ill. App. 3d 886, 888 (1996). Credibility determinations particularly fall within the Board's purview. *King*, 284 Ill. App. 3d at 888. The Board's interpretations of statutes do not bind the courts. *King*, 284 Ill. App. 3d at 888. We look to administrative review cases for guidance on procedures for review under the Election Code (10 ILCS 5/10-10.1 (West 2004)). See *King*, 284 Ill. App. 3d at 888.** *Id at 1115.*

The *Harmon* Court then went on to discuss all of the other findings of the electoral board and found that each of those findings had a basis in the record and causing the Court to refuse to disturb the electoral board's decision. Indeed, reading between the lines, gives the distinct and unmistakable impression that this Court's detailed recitation of the facts before the electoral board in *Harmon* is rather damning with faint praise.

As an example of that faint praise, the *Harmon* court's final paragraph says in part: "(t)he affidavits of Moran's witnesses further bolster the Board's finding that Alanis lacked credibility and that all pages Alanis signed as circulator should not count toward each candidate's signature requirements. However, we find sufficient grounds for the Board's decision here apart from the affidavits at issue." *Harmon,* 371 Ill. App. 3d at 1117.

By contrast, the Candidate invites the Court to re-read the trilogy of cases which form the basis for pattern of fraud invalidation of circulator sheets in ballot access cases. *Fortas v. Dixon,* 122 Ill.App.3d 697, 462 N.E.2d 615, 78 Ill.Dec. 496 (1st Dist. 1984),

Huskey v. Municipal Officers Electoral Board for Village of Oak Lawn, 156 Ill.App.3d 201, 509 N.E.2d 555, 557, 108 Ill.Dec. 859 (1st Dist. 1987), *Canter v. Cook County Officers Electoral Board,* 170 Ill.App.3d 364, 523 N.E.2d 1299, 120 Ill.Dec. 388 (1st Dist. 1988). None of these cases are deference cases and explicitly show this Court's approval and development of the pattern of fraud theory.

The Objectors assert that this Appellate Court's holding in *Harmon* "reaffirms that the Appellate Court is growing increasingly intolerant of circulator misbehavior." A fair reading of *Harmon* contrasted to *Fortas*, *Huskey* and *Canter* instead shows that this Court will support an electoral board which responds to outrageous candidate behavior in a ballot access hearing corrupting and tainting a sequestered witness by "throwing the book" at the candidate when the manifest weight of the evidence is not to the contrary. *Harmon* stands for nothing more and nothing less.

VI.

Objectors Erroneously Apply the Pattern of Fraud Theory to the Facts in this Case

In *Fortas*, *Huskey* and *Canter*, circulators, on the stand, admitted to misbehavior. Here, two of the circulators (Craig Thompson and Tyrone Sims – the only circulators who testified) testified credibly, extensively and unequivocally that they properly performed their duties, intended to properly perform their duties, and, when they signed their circulator affidavits, believed that they had properly performed their duties. There is not one shred of evidence in the record to the contrary. While the Electoral Board characterized Mr. Sims as careless, the Board held "(t)he testimony of these two witnesses did not show any systematic, fraud-driven behavior on the part of them individually or on the part of (the) Candidate." **R. Vol. I. C 126.**

This same simplistic "meat axe," numerical "bright line" pattern of fraud theory was rejected by the Cook County Officers Electoral Board in a prior case this year. As the Respondent Electoral Board below noted in its decision in this case:

> **The Board has entertained a parallel legal theory in an earlier case this session, *Sorrell v. Brewer,* 07 COEB CC 01. In that case we rejected the idea that *Harmon v. Town of Cicero Municipal Officers Electoral Bd.,* 371 Ill.App.3d 1111 (1st Dist 2007) could be read as authority for a *per se* rule based on no more than percentage of disallowed signatures. As we read *Harmon,* we observed that**
>
> > **The *Harmon* Board apparently heard evidence of a quality and quantity that is wholly missing in this case. There was live testimony from a circulator and at least one other witness, there were multiple affidavits from purported petition signers and counter-affidavits from other petition signers. The quality of proof available to the Board in *Harmon* was much more specific and useful than what was presented by Objector here.**
> >
> > ***
> >
> > **Without any supporting evidence of circulator wrongdoing, Objector is left with his numerical analysis. Here, too, he seeks solace in *Harmon,* arguing that the statistical patterns he sees here are the same as those in that case. Objector overlooks the fact that the County as a whole is a place vastly different than Cicero, and the large number of signatures required for**

the office at hand, 5,517 is nearly ten times the number of signatures required in Cicero. This means that the undertaking of circulating a petition for county-wide office is a vastly larger and more difficult undertaking than running in a municipality. A County-wide petition is a vast net that attempts to grab as many signatures as possible, in an attempt to capture the requisite number. Objector argues that this is improper, that dredging up six bad signatures to get four good ones, as was done here, is *per se* evidence of either deliberate wrongdoing or a cavalier disregard of the strictures of the law. In either event, he maintains, the Candidate should be penalized by losing whatever proper signatures were collected. We do not believe that the present state of the law supports, let alone requires, such an outcome. *Harmon* found that the Cicero Electoral Board was justified in doing what it did based on the record before it. The Cicero Board made specific findings of a pattern of fraud and false swearing. We do not believe that the record before us in this case does, or would, support such a finding. Without it, Objector's argument must fail.

For this case, we must acknowledge that we have a petition for one-third of the County, requiring 3,858 signatures,

seven times the number in *Harmon.* Otherwise, however, we believe our rationale to be correct and applicable herein. R. Vol. I. C 123-125.

None of the above categories of petition defects have ever been considered by the Cook County Officers Electoral Board, the Chicago Board, or the Illinois courts to be a constituent of any pattern of fraud and yet this supposed evidence is central to the Objectors' pattern of fraud theory.

Additionally, Mr. Santana suggested that petitions which were not circulated door-to-door with a poll sheet of registered voters were prone to fraud. **R. Vol. IV. Transcript of December 19, pp. 66-68, 82.** While most political professionals might agree that petition circulation door-to-door with a poll sheet of registered voters may be the least error-prone method of petition circulation, the notion that petition circulation in a public place honestly believed to be frequented by registered voters of the district may be fraudulent is truly breath-taking. Candidate petition circulation in a public place is both traditional and well-accepted in Illinois though the right to engage in the practice may be restricted by private property rights. *See People v. DiGuida*, 152 Ill.2d 104, 604 N.E.2d 336 (1992)

When the United States Supreme Court in *Buckley v. American Constitutional Law Foundation,* [525 U.S. 182, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999)], and the United States Court of Appeals for the 7th Circuit in *Krislov v. Rednour* [97 F. Supp.2d 862 (N.D.Ill. 2000)] found unconstitutional the requirement that political petition circulators must be a registered voters in the district of candidacy, it was thoroughly predictable and expected that itinerant and transient paid petition circulators would become increasingly

common in ballot access cases. The two circulators who testified in this case (Thompson and Sims) testified as to the care that they took to produce valid signatures and their belief that they had. . **R. Vol. ? Transcript of December 13, pp. 7-56, 60-81.** The fact that this Candidate used some paid help in attempting ballot access is thoroughly irrelevant to any legitimate pattern of fraud theory. This Candidate is merely "playing by the rules" and utilizing his constitutional rights. He certainly can not be penalized because he utilized rights which others might not utilize.

VIII.

The Remedy of Denial of Ballot Access is Inappropriate Even if The Court Determines that Objectors Have Presented a Prima Facie Case. The Candidate is Entitled, on Remand, to Present his Defenses to Pattern of Fraud Allegations and to Contravene Preserved Objections to Records Examination Rulings

The Objectors' Appeal seeks reversal of the Respondent Cook County Officers Electoral Board's decision to dismiss the Objectors' Petition at the close of their case-in-chief for failure to make out a *prima facie* case. ***The Objectors ask this Court not to remand to afford the Candidate the opportunity to present his extensive defenses, but to summarily throw him off the ballot.*** While the Candidate is satisfied that the Electoral Board's and the Circuit Court's decisions below are correct, he in no way waives his right to present his extensive defenses which would show that he presented far more valid signatures than he was preliminarily accorded; well in excess of the minimum requirements for ballot access.

The Objectors wasted their time before the Electoral Board pursuing frivolous arguments respecting the residency of a few paid petition circulators who they knew to be transient, knew they couldn't easily find, and did not really want to find. Rather than proceeding to the merits of whether the Candidate had sufficient valid petition signatures, the Objectors got side-tracked and ended up getting dismissed at the close of their case-in-chief for failure to make out a *prima facie* case.

If the Court were to determine that this the Decision of the Electoral Board and that of the Circuit Court were materially flawed, a remand and further proceedings would be required. Specifically, the Candidate has not yet been afforded the opportunity to contravene or rehabilitate 66 specifically preserved lack of registration rulings and 373 specifically preserved signature rulings. **R. Vol. I. C 186-203**

In addition, even if the Court were to rule that the Objectors had presented sufficient evidence of circulator misconduct to shift the burden of going forward to the Candidate respecting the validity of those particular petition sheets, the Candidate still awaits, ***and is entitled under Due Process to***, the opportunity to present extensive evidence to demonstrate his submission of well in excess of the minimum of required valid petition signatures. Specifically, the Candidate will, ***and is entitled to***, submit evidence on how and why the paid circulators were selected, the care taken to instruct them on how to properly collect valid signatures and the financial penalties which paid circulators would suffer if they presented invalid signatures.

CONCLUSION

WHEREFORE, the Court should affirm the Circuit Court of Cook County and the Cook County Officers Electoral Board and hold that the Candidate's name shall appear on the ballot as a Democratic candidate for nomination for the office of Commissioner of the Cook County Board of Review for the 2nd District to be voted upon at the General Primary Election to occur on February 5, 2008.

Respectfully submitted,

Jay Paul Deratany

/s/

by and through his attorney

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January 17, 2008

NO. 08-0063
IN THE ILLINOIS APPELLATE COURT, FIRST JUDICIAL DISTRICT

Armando Castillo, Harry Kudesh, and Angelo Mavraganes, Petitioners-Appellants, v. Cook County Officers Electoral Board, and its members, David Orr, Chairman, by and through his designee Daniel P. Madden, Richard A. Devine, by and through his designee, Michael C. Prinzi and Dorothy Brown, by and through her designee Mary A. Melchor, David Orr, in his official capacity as Cook County Clerk, Board of Election Commissioners for the City of Chicago and Jay Paul Deratany, Respondents-Appellees.	Appeal from the Circuit Court of Cook County, Illinois No.: 2008 COEL 01 Hon. Alfred J. Paul, Judge Presiding On Judicial Review from Cook County Officers Electoral Board case # 07 COEB BR 01

NOTICE OF FILING AND PROOF OF SERVICE

To: Sarah W. Cunningham, Assistant State's Attorney, Attorney for the Respondent-Appellee Cook County officers
James M. Scanlon, Attorney For Chicago Board of Election Commissioners
Thomas A. Jaconetty, Attorney for Petitioners-Appellant-Objectors
Burton S. Odelson, Attorney for Petitioners-Appellant-Objectors
James P. Nally, Attorney for Petitioners-Appellant-Objectors

PLEASE TAKE NOTICE that, prior to 4:30 pm on January 17, 2008, I filed, by hand delivery to the Court the attached Respondent-Appellee-Candidate's Brief**,** a copy of each of which is hereby served upon you by email and hand delivery at such time.

/s/
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Rule 341 (c) Certification

I hereby certify that this brief conforms to the requirements of Rules 341 (a) and (b). The length of this brief is 37 pages.

/s/
Richard K. Means
Attorney For Respondent-Appellee-Candidate