Illinois Official Reports

Appellate Court

McHenry Township Road District v. Pritzker, 2021 IL App (2d) 200636

Appellate Court Caption	THE McHENRY TOWNSHIP ROAD DISTRICT and THE NUNDA TOWNSHIP ROAD DISTRICT, Plaintiffs, v. JAY ROBERT PRITZKER, in His Official Capacity as Governor of the State of Illinois, and THE COUNTY OF McHENRY, Defendants (The Nunda Township Road District, Plaintiff-Appellant; Jay Robert Pritzker, in His Official Capacity as Governor of the State of Illinois, Defendant-Appellee; McHenry Township, Intervenor-Appellee).
District & No.	Second District No. 2-20-0636
Filed	November 16, 2021
Decision Under Review	Appeal from the Circuit Court of McHenry County, No. 19-MR-861; the Hon. Thomas A. Meyer, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	James G. Militello III and Andrew J. Mertzenich, of Prime Law Group, LLC, of Woodstock, for appellant. Kwame Raoul, Attorney General, of Chicago (Jane Elinor Notz, Solicitor General, and David E. Neumeister, Assistant Attorney General, of counsel), for appellee. No brief filed for other appellee.

Panel JUSTICE BRENNAN delivered the judgment of the court, with opinion.
Justices Zenoff and Birkett concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiff, the Nunda Township Road District (NTRD), sued defendant, Jay Robert Pritzker, in his official capacity as Governor of the State of Illinois (Governor), seeking a declaratory judgment that article 24 of the Township Code (60 ILCS 1/art. 24 (West 2020)), titled "Dissolution of Townships in McHenry County," violates the special legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 13). The trial court granted with prejudice the Governor's motion to dismiss the operative complaint on the basis that the case was moot and that the public interest exception to the mootness doctrine did not apply. For the reasons set forth below, we reverse and remand.

¶ 2 I. BACKGROUND

¶ 3 We recount the relevant portions of the constitutional and statutory framework and the trial court proceedings.

¶ 4 A. Constitutional and Statutory Framework

¶ 5 Article VII, section 5, of the Illinois Constitution, titled "Townships," provides:

> "The General Assembly shall provide by law for the formation of townships in any county when approved by county-wide referendum. Townships may be consolidated or merged, and one or more townships may be dissolved or divided, when approved by referendum in each township affected. All townships in a county may be dissolved when approved by a referendum in the total area in which township officers are elected." Ill. Const. 1970, art. VII, § 5.

¶ 6 Article 24, addressing the dissolution of townships in McHenry County, was signed into law on August 9, 2019. Pub. Act 101-230 (eff. Aug. 9, 2019) (adding 60 ILCS 1/art. 24). The legislation provides a mechanism by which a township in McHenry County may be dissolved through a referendum process initiated by either a resolution from a township board of trustees or a petition from township electors. See 60 ILCS 1/24-15 (West 2020) ("Dissolving a township in McHenry County"); *id.* § 24-20 ("Petition requirements; notice"). The referendum is approved when "a majority of those voting in the election from the dissolving township approve the referendum." *Id.* § 24-30(b). If the dissolution is approved, "[o]n or before the date of dissolution, all real and personal property, and any other assets, together with all personnel, contractual obligations, and liabilities of the dissolving township and road districts wholly within the boundaries of the dissolving township shall be transferred to McHenry County." *Id.* § 24-35(1).

¶ 7 The stated legislative intent of article 24 is as follows:

> "It is the intent of the General Assembly that this Act further the intent of Section 5 of Article VII of the Illinois Constitution, which states, in relevant part, that townships 'may be consolidated or merged, and one or more townships may be dissolved or

divided, when approved by referendum in each township affected.' Transferring 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." Pub. Act 101-230, § 1 (eff. Aug. 9, 2019) (adding 60 ILCS 1/art. 24).[1]

¶ 8 B. Trial Court Proceedings

¶ 9 A month after article 24 was enacted, on September 16, 2019, NTRD and the McHenry Township Road District (MTRD) filed their initial complaint against the County of McHenry (County). While titled a "Complaint for Declaratory Injunction," the relief sought in the initial complaint was a declaratory judgment that article 24 is unconstitutional special legislation. See Ill. Const. 1970, art. IV, § 13 ("The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination.").

¶ 10 The County moved to dismiss the complaint, pursuant to section 2-615 of the Code of Civil Procedure (735 ILCS 5/2-615 (West 2020)). The County argued that the claim was not justiciable because the complaint failed to allege that any of the statutory prerequisites to dissolution had occurred, *i.e.*, that a referendum to dissolve Nunda Township and McHenry Township had been passed by a majority of eligible voters, that such a referendum had been published or placed on the ballot, or that the township trustees or electors had even approved for placement on the ballot a referendum to dissolve the townships (see 60 ILCS 1/24-15, 24-20, 24-25, 24-30 (West 2020)). The County also argued that it was not a proper defendant because it was merely a passive recipient of plaintiffs' assets and obligations and, moreover, its receipt of the assets and obligations was dependent upon the passage of a referendum to dissolve Nunda Township or McHenry Township. In any event, the County argued that article 24 is constitutional.

¶ 11 Plaintiffs filed a response in opposition to the motion to dismiss and noted that they had provided the attorney general with notice of a claim of unconstitutionality, pursuant to Illinois Supreme Court Rule 19 (eff. Sept. 1, 2006), but that the attorney general had not indicated an intention to intervene at that point. Following briefing and argument, on December 24, 2019, the trial court granted the County's motion to dismiss with leave to replead, finding, *inter alia*, that plaintiffs failed to establish an actual controversy with the County and that the County was not a proper defendant.

¶ 12 1. First Amended Complaint

¶ 13 Plaintiffs filed their "First Amended Complaint For Declaratory Judgment" against both the County and the Governor on January 21, 2020, seeking a declaratory judgment that article 24 is unconstitutional special legislation. Plaintiffs alleged that there are townships and road districts outside McHenry County with higher tax rates than some of the townships and road districts in McHenry County and that the township and road district tax rates in McHenry are,

[1]We note that article 25 of the Township Code (60 ILCS 1/art. 25 (West 2020)) otherwise provides a different process for the "Discontinuance of Township Organization," applicable to every county in the state.

on average, not the highest in Illinois. Thus, plaintiffs alleged, article 24's single-county classification and application *only* to townships in McHenry County was not rationally related to any legitimate state interest and therefore violated the special legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 13).

¶ 14 Plaintiffs added allegations with respect to steps that had been taken to initiate the dissolution of Nunda Township and McHenry Township. Specifically, regarding Nunda Township, plaintiffs alleged that, "[o]n or about October 10, 2019, the Nunda Township Board, pursuant to section 24-15 of the Township Code, approved a referendum asking voters whether Nunda Township should be abolished." Regarding McHenry Township, plaintiffs alleged that, "[o]n or about September 27, 2019, a Petition for Submission of Public Question was filed, pursuant to Section 24-20 of the Township Code, with the McHenry Township Clerk, County of McHenry, and the McHenry County Clerk asking voters whether McHenry Township should be abolished." Moreover, on or about November 6, 2019, the McHenry County Clerk caused publication of a "Notice of Petition to Dissolve McHenry Township," which notified residents that a petition had been filed with McHenry Township and McHenry County, requesting a referendum to dissolve McHenry Township to be placed on the March 17, 2020, primary election ballot.

¶ 15 Plaintiffs further alleged that, on or about January 9, 2020, McHenry County published on its website a page titled "Referenda Filed with the McHenry County Clerk for March 17, 2020 General Primary Election" that set forth the propositions to dissolve Nunda Township and McHenry Township. The propositions provided, respectively:

> "Shall Nunda Township, together with any road districts wholly within the boundaries of Nunda Township, be dissolved on May 18, 2037 with all of the townships and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?
>
> Shall McHenry Township, together with any road districts wholly within the boundaries of McHenry Township, be dissolved on June 21, 2020 with all of the townships and road district property, assets, personnel, obligations, and liabilities being transferred to McHenry County?"

Plaintiffs alleged that the County had taken steps to prepare for the dissolution of Nunda Township and McHenry Township and the transfer of their assets.

¶ 16 2. County's Motion to Dismiss the First Amended Complaint

¶ 17 On January 23, 2020, the County filed a motion to dismiss the first amended complaint. The County again moved for dismissal pursuant to section 2-615 and reiterated its prior arguments in support of dismissal, including that the claims were not justiciable because there still was no allegation that a referendum to dissolve the townships had been voted on or passed. Following briefing and argument, on March 10, 2020, the trial court granted the County's motion to dismiss the first amended complaint, finding that the County was "not a proper party yet. They may become one, but as of right now, they are not." Pursuant to plaintiffs' counsel's request and reference to "wait[ing] to see what happens next week," the trial court continued the matter for a determination of whether the dismissal was with prejudice. The trial court entered a written order on March 10, 2020, stating that "McHenry County's motion to dismiss is granted" and that the case was continued to March 27, 2020, "for a determination whether to enter a final judgment dismissing the County and to set any further briefing schedule that

may be required." However, the record does not reflect that the parties appeared on March 27, 2020, or that any further action was requested or taken with respect to modifying the dismissal order.

¶ 18 3. March 17, 2020, Primary Election

¶ 19 A week after the trial court's ruling, at the March 17, 2020, primary election, neither the referendum to dissolve Nunda Township nor the referendum to dissolve McHenry Township was approved.

¶ 20 4. McHenry Township's Intervention

¶ 21 On April 9, 2020, McHenry Township filed a petition to intervene pursuant to section 2-408(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-408(a)(2) (West 2020)) on the ground that the representation of its interests was not adequate. McHenry Township stated that the action was advanced on behalf of MTRD by its "Township Attorney," despite the McHenry Township Board of Trustee's objection, and that no conflict waiver had been signed or authorized by the McHenry Township Board. McHenry Township also sought leave to file a motion to dismiss. A few months later, on July 31, 2020, the trial court granted McHenry Township leave to intervene and leave to file its motion to dismiss. In its motion, McHenry Township sought dismissal on grounds that (1) the first amended complaint sought to "undermine the power of the people to decide self-governance," (2) plaintiffs, as non-home-rule units, lacked the authority to challenge the ability of the people or the legislature to regulate a township's or road district's termination, (3) plaintiffs raised a nonjusticiable, hypothetical matter, (4) the claim amounted to a political question, improper for judicial review, (5) the declaratory judgment statute (735 ILCS 5/2-701 (West 2020)) did not confer jurisdiction or standing because plaintiffs failed to establish an interest in an "actual controversy," and (6) plaintiffs improperly named the Governor in violation of the declaratory judgment statute's prohibition on the court entertaining "any action or proceeding for a declaratory judgment or order involving any political question where the defendant is a State officer whose election is provided for by the Constitution" (see *id.* § 2-701(a)). The record does not reflect that McHenry Township's motion to dismiss was ever noticed for presentment, briefed, argued, or ruled upon.

¶ 22 5. MTRD's Voluntary Dismissal

¶ 23 On April 15, 2020, MTRD dismissed its suit with prejudice, pursuant to an agreed order. This left NTRD as the only plaintiff and the Governor as the only defendant.

¶ 24 6. Governor's Motion to Dismiss the First Amended Complaint

¶ 25 On August 28, 2020, the Governor moved to dismiss the first amended complaint as moot, pursuant to section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2020)). The Governor argued that, since the referendum did not pass in the March 2020 primary election, "no conflict can exist since none of [NTRD's] properties and powers will be transferred to McHenry County and [NTRD] will not be dissolved." The Governor argued that NTRD improperly sought an advisory opinion regarding the constitutionality of article 24 because it "seeks nothing more than the resolution of a question of law that is no longer

presented by the facts of the case, *i.e.*, the threat of dissolution and the transfer of assets no longer exists."

¶ 26 Alternatively, the Governor argued that, even if the claims were not moot, article 24 did not violate the special legislation clause. Citing the legislative intent set forth in article 24 and the legislative debate over article 24, the Governor characterized the legislation as rationally related to the legitimate state interest of reducing local property taxes by consolidating units of local government and reducing legal battles, costs, and investigations.

¶ 27 NTRD filed a response in opposition to the Governor's motion in which it "acknowledge[d] the general principle that a case is moot if no controversy exists" but sought application of the public interest exception to the mootness doctrine. NTRD argued that the case involved the Township Code, township and township road district dissolution, and general election law—all matters of a public nature. It also argued that a determination of the question was desirable for the future guidance of public officers. And finally, NTRD argued that the question of article 24's constitutionality was likely to recur and in fact had recurred, citing McHenry Township v. County of McHenry, No. 20 CH 000248 (Cir. Ct. McHenry County)—the case underlying our recent decision in *McHenry Township v. County of McHenry*, 2021 IL App (2d) 200478 (where we held that the McHenry County Clerk lacked the authority to reject a referendum proposition to dissolve McHenry Township for placement on the November 2020 general election ballot), *appeal allowed*, No. 127258 (Ill. Sept. 29, 2021). On the merits, NTRD maintained its argument that article 24 was unconstitutional special legislation.

¶ 28 In reply, the Governor argued that NTRD failed to establish "two of the three necessary criteria" for application of the public interest exception. Namely, the Governor argued, "while there is certainly public concern involved in deciding whether Article 24 of the Township Code is unconstitutional, the public concern extends only to a discrete group, *i.e.*, townships and road districts located within McHenry County." According to the Governor, NTRD's claim is "fact-specific" in that it "does not rely on resolution of a pure legal question, but it would instead involve review of facts and data specific to McHenry County to determine whether Article 24 is rationally related to a legitimate government interest." The Governor also argued that NTRD failed to establish that the question was likely to recur. The Governor maintained his position that article 24 was rationally related to a legitimate state interest.

¶ 29 On October 29, 2020, the trial court heard argument on the motion. At the inception of the proceeding, McHenry Township orally moved to adopt the Governor's motion to dismiss. During argument, the trial court acknowledged that the question of article 24's constitutionality could recur but under "a very different fact pattern," as "the voters have spoken as to what their preference is." The trial court concluded that the issue was moot and that NTRD failed to establish the applicability of the public interest exception. The trial court noted NTRD's counsel's "reference to two other matters that are present and pending" and found, "given that those are going to have the unique set of facts attached to each one of them, I think the more appropriate vehicle to test Article 24 is those cases rather than have those issues resolved here when they are not even parties."[2]

[2]The trial court did not specify the "cases" to which it referred. NTRD states in its brief that "the *case* pending at the time of hearing *were*" McHenry Township, No. 20 CH 000248. (Emphases added.) A review of the transcript reflects that NTRD's counsel requested that the trial court take judicial notice of a newspaper article that discusses "how Algonquin is now doing exactly the same thing and McHenry

¶ 30 In its written order, the trial court granted McHenry Township's oral motion to adopt the Governor's motion to dismiss. As to the motion to dismiss, the trial court's written order provided, "Defendant's Motion to Dismiss is granted as the Court finds that the case is moot and the public interest exception does not apply; Dismissed with Prejudice." The trial court also set forth in the written order its finding that there was no just reason for delaying the enforcement of or any appeal from the order. NTRD timely appealed from the October 29, 2020, order. We have jurisdiction pursuant to Illinois Supreme Court Rule 304(a) (eff. Mar. 8, 2016).

¶ 31 7. Scope of Review

¶ 32 Before commencing our analysis, we note that, in its opening brief, NTRD included an argument that the County was improperly dismissed because the County has a legal or beneficial interest in the outcome of the case. In a March 23, 2021, minute order, this court granted the County's motion to strike and dismiss this portion of the brief, stating, "By its terms, the March 10, 2020, dismissal as to the County was not final, and the October 29, 2020, dismissal as to appellee Pritzker, though final, did not finalize the dismissal as to the County." The order dismissing the County was without prejudice and thus not a final order. See *DeLuna v. St. Elizabeth's Hospital*, 147 Ill. 2d 57, 76 (1992) (orders of dismissal without prejudice are not final orders). We therefore have no jurisdiction to review the dismissal of the County. Accordingly, we review only the trial court's dismissal with prejudice as to the Governor.

¶ 33 II. ANALYSIS

¶ 34 An appeal is moot when no actual controversy exists or when events transpire that "make it impossible for the reviewing court to render effectual relief." *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, 2016 IL 118129, ¶ 10. Reviewing courts generally do not decide moot questions, render advisory opinions, or consider issues where the resolution of the issues will not affect the result. *Id.* "When a decision on the merits would not result in appropriate relief, such a decision would essentially be an advisory opinion." *Id.*

¶ 35 The Governor's position is that this case was rendered moot after the proposition to dissolve Nunda Township and its road districts failed to pass in the March 2020 primary election. According to the Governor, the relief sought by NTRD was "ultimately to avoid dissolution." When NTRD obtained that relief through the ballot box, the controversy between the parties over the constitutionality of article 24 was eliminated such that the trial court could no longer provide NTRD with any meaningful relief.

¶ 36 NTRD concedes "that the case is moot" but takes issue with the Governor's characterization "that [NTRD] received what it wanted by 'avoiding dissolution.' " According to NTRD, the possibility of dissolution persists. As such, NTRD maintains that the trial court should have considered the constitutionality of article 24 under the public interest exception to

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is also discussing the same issue." Counsel for McHenry Township objected on relevance and hearsay grounds. The trial court responded that it was neither taking judicial notice of the article nor considering it. Yet in its finding, the trial court specifically referenced "two other" pending matters; thus, it appears that the trial court did in fact consider the matters to which NTRD's counsel referred. Ultimately, however, as set forth *herein*, the question of the particular case or cases to which the trial court referred is not dispositive.

the mootness doctrine. Given the parties' agreement that the case is moot, we assume for the sake of analysis that such is the case, although we otherwise express no opinion on the mootness question, and we note that this opinion should not be read as support for the proposition that the mootness concession is correct as a matter of law. We proceed to address whether the public interest exception to the mootness doctrine applies. See *Cook v. Illinois State Board of Elections*, 2016 IL App (4th) 160160, ¶ 15 ("[W]e find this appeal is not moot. Moreover, even if it is moot, the appeal would be reviewable under the public interest exception to the mootness doctrine."); *Filliung v. Adams*, 387 Ill. App. 3d 40, 55-56 (2008) (holding that a claim was not moot and also that it fell within the public interest exception).

¶ 37 Given the trial court's holding that the case was moot and that the public interest exception did not apply, the trial court did not rule on the underlying issue of article 24's constitutionality. On appeal, the only issue raised is the applicability of the public interest exception to the mootness doctrine, and the only relief requested by NTRD is reversal of the trial court's dismissal order and remand for further proceedings. Accordingly, the sole issue we address is whether the trial court erred in its dismissal order in declining to apply the public interest exception. Whether an exception to the mootness doctrine applies is a case-by-case determination. *In re Alfred H.H.*, 233 Ill. 2d 345, 353-54 (2009). We review the issue *de novo*. See *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 488 (2008).

¶ 38 "The public interest exception to the mootness doctrine permits review of an otherwise moot question when the magnitude or immediacy of the interests involved warrants action by the court." *Commonwealth Edison*, 2016 IL 118129, ¶ 12. The exception applies when there is "an extraordinary degree of public interest and concern," and it is invoked rarely. *Id.* ¶ 13. The public interest exception is narrowly construed and requires a clear showing that (1) the question presented is of a public nature, (2) an authoritative determination of the question is desirable for the future guidance of public officers, and (3) the question is likely to recur. *Id.* ¶¶ 12-13. "If any one of the criteria is not established, the exception may not be invoked." *Id.* ¶ 13. We address each criterion in turn and hold that NTRD established that the public interest exception applies in this case.

¶ 39 A. Public Nature of Question Presented

¶ 40 We turn first to whether the question presented is of a public nature. The underlying question in this case is the constitutionality of article 24. The first amended complaint sought a declaratory judgment that article 24 violated the special legislation clause of the Illinois Constitution (Ill. Const. 1970, art. IV, § 13). "The issue of whether the legislature enacted legislation violating our constitution is a matter of public importance." *Koshinski v. Trame*, 2017 IL App (5th) 150398, ¶ 24 ("The issue of whether the legislature enacted this broad-sweeping legislation in a manner that violates our constitution is a matter of public importance." (citing *Johnson v. Edgar*, 176 Ill. 2d 499, 513 (1997))); see also *People v. Horsman*, 406 Ill. App. 3d 984, 986 (2011) ("[T]he issue involves statutory construction, which is of broad public interest and therefore of a public nature.").

¶ 41 The Governor contends that the involvement of a constitutional challenge does not automatically satisfy the public nature criterion (see *Eisenberg v. Industrial Comm'n*, 337 Ill. App. 3d 373, 380 (2003)) and that, here, NTRD's challenge to the constitutionality of article 24 "did not have a sufficiently broad application" statewide to warrant consideration under the public interest exception. An issue must be "of sufficient breadth, or ha[ve] a significant effect

on the public as a whole" to satisfy the public nature criterion. See *Felzak v. Hruby*, 226 Ill. 2d 382, 393 (2007) (declining to apply the public interest exception to consider a grandparent's attempt to require visitation with a grandchild who had reached the age of majority during the pendency of the appeal). The crux of the Governor's argument is that article 24's application is strictly limited to townships within McHenry County and thus has no impact beyond McHenry County. As such, the Governor argues, article 24's application does not affect the public as a whole, and the trial court properly refused to apply the public interest exception. NTRD responds that article 24 does in fact have statewide impact, as it provides McHenry County residents with a right not available to residents throughout the State.

¶ 42 Distilled to its essentials, the Governor's argument is that, because the legislation targets only McHenry County townships, it lacks sufficient breadth to have a significant effect on the public as a whole. To some extent, this argument implicates the very question raised in the underlying case, *i.e.*, whether article 24 is unconstitutional special legislation in the first place. While we do not decide today whether article 24 is unconstitutional legislation, we reject the Governor's argument that article 24's limited reach to McHenry County renders this constitutional issue insufficient to satisfy the public nature criterion in this case.

¶ 43 The Governor also likens the underlying challenge to article 24's constitutionality to a sufficiency-of-the-evidence challenge. According to the Governor, the question presented is dependent upon "the specific facts regarding the dissolution of Nunda Township and [NTRD] and consolidation of their particular interests with McHenry County" and any "future dissolution proceedings would depend on the unique facts and circumstances of the particular townships and other local governmental units involved."

¶ 44 Our supreme court has held that "case-specific inquires, such as sufficiency of the evidence, do not present the kinds of broad public issues required for review under the public interest exception." *In re Rita P.*, 2014 IL 115798, ¶ 36 (citing *Alfred H.H.*, 233 Ill. 2d at 356-57). For instance, in *Alfred H.H.*, the question presented—whether the evidence was sufficient to involuntarily commit the respondent to a mental health facility—did not satisfy the public nature criterion, given its lack of sufficient breadth or significant effect on the public as a whole. *Alfred H.H.*, 233 Ill. 2d at 356-57.

¶ 45 The question presented here—whether article 24 is unconstitutional special legislation—is not akin to a sufficiency-of-the-evidence challenge. Unlike the fact-specific inquiry involved in challenging the sufficiency of the evidence, the question of whether a statute violates the special legislation clause (Ill. Const. 1970, art. IV, § 13) is a question of law that asks broadly whether the statutory classification discriminates in favor of a select group and, if so, whether the classification is arbitrary. *Moline School District No. 40 Board of Education v. Quinn*, 2016 IL 119704, ¶¶ 15, 23. As framed by both parties in the trial court, it must ultimately be determined whether article 24 is rationally related to a legitimate state interest. A statute will be upheld " '[i]f any set of facts can be reasonably conceived that justify distinguishing the class to which the statute applies from the class to which the statute is inapplicable.' " *Id.* ¶ 24 (quoting *Big Sky Excavating, Inc. v. Illinois Bell Telephone Co.*, 217 Ill. 2d 221, 238 (2005)). The breadth of this issue is unlike a sufficiency-of-the-evidence challenge involving only the particular party before the court.

¶ 46 The Governor nevertheless cites several cases where the public interest exception was not satisfied for reasons he contends are analogous to sufficiency-of-the-evidence challenges. See *Commonwealth Edison*, 2016 IL 118129, ¶ 14; *Harry W. Kuhn, Inc. v. County of Du Page*, 203

Ill. App. 3d 677, 686 (1990); *Hamer v. Board of Education of Township High School District No. 113*, 140 Ill. App. 3d 308, 316-17 (1986). NTRD responds that these cases are distinguishable because "each one involves the actions of the government on private individuals and entities" and "did not affect the administration or changes to the actual State government." We agree that the cases are distinguishable, but for reasons more nuanced than those submitted by NTRD.

¶ 47 In *Commonwealth Edison*, the issue was whether the Illinois Commerce Commission had the authority to require the utility companies to negotiate energy procurement from the "FutureGen 2.0" power plant—a "clean coal" project in Illinois. *Commonwealth Edison*, 2016 IL 118129, ¶ 1. While on appeal to our supreme court, federal funding for the project was suspended, project developments were ceased, and the agreements at issue in the appeal were terminated. *Id.* In dismissing the appeal as moot, the court declined to apply the public interest exception, reasoning that, while "Illinois electric energy consumers have an interest in affordable utility rates," the "issue in this case uniquely applies only to a specific group of regulated entities for a specific project." *Id.* ¶ 14. "Because of the unique character of this project, any public nature of the question presented in this appeal ceased to exist with the termination of the FutureGen 2.0 project." *Id.*

¶ 48 In *Harry W. Kuhn, Inc.*, the court declined to apply the public interest exception to the issue of whether public officials should allow construction permits for temporary uses of land after the construction project at issue was completed. *Harry W. Kuhn, Inc.*, 203 Ill. App. 3d at 685-86. The court reasoned that the applicable statutory provision was "clearly worded" and "adequately construed some time ago" and that "[a]ny determination that we would make in the present case would not necessarily be of great import to future cases which will depend on their particular facts." *Id.* at 686.

¶ 49 Similarly, in *Hamer*, the court declined to apply the public interest exception to a student's constitutional challenges to a high school's grade reduction policy, where the student had graduated from the high school and was about to graduate from the college of her choice. *Hamer*, 140 Ill. App. 3d at 316-17. The court held that the public's interest in the grade reduction policy was simply not of sufficient magnitude to bring the case within the purview of the exception. *Id.*

¶ 50 Considered together, the rejection of the public interest exception in these cases rested upon the particularity of the question presented or the fact that a determination of the question was dependent on the specific facts of the case and would not be significant to or useful in future cases. In contrast, the question presented here was the constitutionality of article 24—a question of law that involves the interpretation of a statute that remains in effect and provides a mechanism to initiate the dissolution of a form of government in McHenry County. This question is a matter of public importance. See *Johnson*, 176 Ill. 2d at 513; *Koshinski*, 2017 IL App (5th) 150398, ¶ 20; *Horsman*, 406 Ill. App. 3d at 986.

¶ 51 In addition, the constitutionality of article 24 encompasses a question of election law, which is "inherently *** a matter of public concern" sufficient to invoke the public interest exception to prevent uncertainty in the electoral process. *Goodman v. Ward*, 241 Ill. 2d 398, 404-05 (2011); *McHenry Township*, 2021 IL App (2d) 200478, ¶ 26. The potential for uncertainty in the electoral process likewise informs the analysis here. Article 24 provides a mechanism by which a township in McHenry County may be dissolved through a referendum process initiated by either a resolution from a township board of trustees or a petition from

township electors. See 60 ILCS 1/24-15, 24-20 (West 2020). Once the referendum is approved by majority vote, on or before the date of dissolution, all property, assets, personnel, contractual obligations, and liabilities of the dissolving township and road districts wholly within the boundaries of the dissolving township "shall be transferred to McHenry County." *Id.* §§ 24-30(b), 24-35(1).[3] Accordingly, there remains a possibility that, before a challenge to the constitutionality of article 24 is resolved, a referendum to dissolve a township could be approved by majority vote and that the township's property, assets, personnel, contractual obligations, and liabilities could be transferred to the County. For these reasons, NTRD established that the question presented here amounts to a matter of public concern and is of sufficient magnitude to satisfy the public nature criterion.

¶ 52 B. Desirability of Authoritative Determination for Future Guidance of Public Officers

¶ 53 We next turn to the second criterion: whether an authoritative determination of the question presented is necessary for future guidance of public officers. The Governor argues that, given its recent enactment, the state of the law regarding article 24 is neither in disarray nor subject to conflicting precedents. However, the Governor did not contest this factor in the trial court and affirmatively argued that NTRD failed to establish only "two of the three necessary criteria" for application of the public interest exception—the public nature and likely-to-recur criteria. Accordingly, NTRD argues that this issue is waived. See *Fragakis v. Police & Fire Comm'n*, 303 Ill. App. 3d 141, 146 (1999) ("It is well established that as a general rule any issue not raised in the circuit court is waived."). The Governor responds that we may nevertheless consider the argument in affirming the trial court's dismissal, citing *BankUnited, National Ass'n v. Giusti*, 2020 IL App (2d) 190522, ¶ 14 ("We may affirm on any basis appearing in the record, regardless of whether the trial court relied on that basis or its reasoning was correct."). Alternatively, NTRD argues that issues of first impression may be reviewed under the public interest exception and that a determination of article 24's constitutionality would provide guidance to townships subject to article 24 and citizens and governing officials as to "their rights to fundamentally change their form of government based upon where they live in the State."

¶ 54 Given the Governor's affirmative concession of the second criterion and failure to argue the issue in the trial court, we agree that the argument is waived. See *People v. Blair*, 215 Ill. 2d 427, 444 n.2 (2005) (" '[w]aiver' " means the "voluntary relinquishment of a known right," while " 'forfeiture' " means "the failure to make the timely assertion of the right"). However, we address the argument in the interest of maintaining a sound and uniform body of precedent. See *Pinske v. Allstate Property & Casualty Insurance Co.*, 2015 IL App (1st) 150537, ¶ 19 ("[W]aiver and forfeiture rules serve as an admonition to litigants rather than a limitation upon the jurisdiction of the reviewing court, and courts of review may sometimes override considerations of waiver and forfeiture in order to achieve a just result and maintain a sound and uniform body of precedent.").

[3]We note that section 24-20(b) (addressing petitions by electors) provides that "[t]he 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(b) (West 2020).

¶ 55 The party seeking application of the public interest exception must establish the need to make an authoritative determination of the question for future guidance of public officers. *Commonwealth Edison*, 2016 IL 118129, ¶¶ 15-16. Cases are not reviewed " 'merely to set precedent or guide future litigation.' " *Id.* ¶ 15 (quoting *Berlin v. Sarah Bush Lincoln Health Center*, 179 Ill. 2d 1, 8 (1997)). In determining the need for an authoritative determination, the court looks to "whether the law is in disarray or conflicting precedent exists." *Id.* ¶ 16. When the question presented is an issue of first impression, no such disarray or conflict in the law exists. *Id.* However, "the absence of a conflict does not necessarily bar *** review." *In re Shelby R.*, 2013 IL 114994, ¶ 20. Rather, "[c]ase law demonstrates that even issues of first impression may be appropriate for review under this exception." *Id.*; accord *McHenry Township*, 2021 IL App (2d) 200478, ¶ 27 ("Issues of first impression may be reviewed under the public interest exception.").

¶ 56 For instance, in *McHenry Township*, we invoked the public interest exception to address an issue of first impression involving interpretation of article 24—whether a county clerk had the authority to determine if 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 2020)) applied when the only difference between the public questions on the two referenda was the dissolution date prescribed in article 24. *McHenry Township*, 2021 IL App (2d) 200478, ¶¶ 26-27. There, in accordance with article 24, the McHenry Township Board of Trustees had approved a resolution to place a referendum to dissolve McHenry Township on the November 2020 general election ballot, but the McHenry County Clerk refused to place the referendum on the ballot, given the referendum proposition to dissolve McHenry Township that the voters rejected at the March 2020 primary election (the same referendum and primary election result discussed *supra* ¶¶ 14-15). *McHenry Township*, 2021 IL App (2d) 200478, ¶¶ 3-9. The issue became moot when the November 2020 general election passed. *Id.* ¶ 23. In applying the public interest exception, we noted that the question presented "relates to the application of the Election Code to a relatively new statute—[article 24]—that allows for consolidation of townships in the county." *Id.* ¶ 27. We concluded 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 [the Election Code] and township dissolution issues in McHenry County, thereby, 'avoiding *** uncertainty in the electoral process.' " *Id.* (quoting *Goodman*, 241 Ill. 2d at 405).

¶ 57 The rationale set forth in *McHenry Township* applies equally to this case. A determination of the challenge to article 24's constitutionality would provide guidance to townships subject to article 24 and aid public officers in resolving township dissolution issues in McHenry County, avoiding uncertainty in the electoral process. Accordingly, the second criterion of the public interest test was satisfied.

¶ 58 C. Likelihood of Question to Recur

¶ 59 We turn to the final criterion—the likelihood that the question will recur. NTRD cites our holding in *McHenry Township* to support its argument that the question of article 24's constitutionality is likely to recur. In *McHenry Township*, we held that the question of the county clerk's authority to reject the referendum proposition was likely to recur, given the fact that there had been two attempts to dissolve McHenry Township within one year of article 24's enactment. *Id.* ¶ 27. We agree that, given the attempts at township dissolution set forth in the record, this same rationale applies here in determining that the question of article 24's

constitutionality is likely to recur. Indeed, the record demonstrates that there are 17 townships in McHenry County, any one of which faces the possibility of future dissolution pursuant to article 24 and could raise a challenge to the legislation.

¶ 60 The Governor, however, argues that the third criterion was not established because any likely recurrence would be under different factual circumstances, citing *Village of Palatine v. La Salle National Bank*, 112 Ill. App. 3d 885, 891-92 (1983). There, a challenge to the validity of a municipal flood plain ordinance became moot during the pendency of the appeal when the municipality's amendment to the ordinance resulted in excluding from the flood plain the construction project at issue. *Id.* at 891. In declining to apply the public interest exception, the court reasoned that, *inter alia*, any recurrence of the issue would involve application of the ordinance to property with different physical characteristics and proposed uses. *Id.* at 891-92. Given the question presented, there was no determination that could conclusively resolve the ordinance's validity in a manner that would guide future litigation or administrative action. *Id.* at 892.

¶ 61 *Village of Palatine* is inapposite. As discussed, any challenge to article 24 as violative of the special legislation clause involves the legal question of whether the statutory classification discriminates in favor of a select group and, if so, whether the classification is arbitrary. See *Moline School District*, 2016 IL 119704, ¶¶ 15, 23. That would be the same question presented in any future litigation challenging the constitutionality of article 24.

¶ 62 The Governor argues that the parties would be different in future litigation and that "[e]ach party, as the circuit court recognized, presents the 'unique set of facts' concerning each township that may face dissolution under Article 24." However, "[t]he public-interest exception considers potential recurrences to any person, not only the complaining party." *In re Christopher P.*, 2012 IL App (4th) 100902, ¶ 20 (citing *Holly v. Montes*, 231 Ill. 2d 153, 158 (2008) ("Unlike in the recurrence exception, the public interest exception considers potential recurrences to any entity, not only the complaining party.")). Indeed, the trial court appears to have conflated the likelihood-that-the-question-will-recur criterion of the public interest exception with the "capable of repetition yet avoiding review" exception, which requires a "reasonable expectation that 'the same complaining party would be subjected to the same action again.' " *Alfred H.H.*, 233 Ill. 2d at 358 (quoting *In re Barbara H.*, 183 Ill. 2d 482, 491 (1998)). Application of the public interest exception is warranted due to the magnitude or immediacy of the interests at issue (*Commonwealth Edison*, 2016 IL 118129, ¶ 12) and is not dependent on continuity in the identity of the complaining party (see *Holly*, 231 Ill. 2d at 158). Thus, we reject the Governor's argument and hold that NTRD established the likelihood that the question presented will recur.

¶ 63 III. CONCLUSION

¶ 64 For the reasons stated, NTRD established that application of the public interest exception is warranted in this case. Accordingly, the judgment of the circuit court of McHenry County is reversed, and the cause is remanded for further proceedings. See *Koshinski*, 2017 IL App (5th) 150398, ¶¶ 28-31 (reversing and remanding for further proceedings upon holding that the trial court erroneously declined to apply the public interest exception).

¶ 65 Reversed and remanded.