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IN THE INDIANA SUPREME COURT
CAUSE NO. 23S-PL-371

DIEGO MORALES, in his official capacity as Indiana Secretary of State, the INDIANA ELECTION COMMISSION and AMANDA LOWERY, in her official capacity as Jackson County Republican Party Chair,	)	Appeal from the Marion Superior Court
Appellant (Defendants below),	)	Trial Court Cause No. 49D12-2309-PL-036487
v.	)	
JOHN RUST,	)	The Honorable Patrick J. Dietrick, Special Judge
Appellee (Plaintiff below).	)	

BRIEF OF APPELLEE

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STATEMENT OF SUPREME COURT JURISDICTION

Rust agrees with Appellants' Statement of Supreme Court Jurisdiction.

STATEMENT OF THE ISSUES

1. If the hypotheticals posed by State Defendants come to fruition, does Rust have standing pursuant to the Declaratory Judgment Act and *Holcomb v. Bray*?

2. Does I.C. § 3-8-2-7(a)(4) violate Rust's First and Fourteenth Amendment right to freely associate with the Republican party?

3. Is I.C. § 3-8-2-7(a)(4) void for vagueness just like a similar statute struck down as overly broad and vague in *Ray v. State Election Board*?

4. Does I.C. § 3-8-2-7(a)(4) violate the Seventeenth Amendment by taking the power to elect senators away from Hoosier voters?

5. Does I.C. § 3-8-2-7(a)(4) violate Article 1, Section 23 by treating Rust differently than other candidates based on characteristics that are not inherent?

6. Does I.C. § 3-8-2-7(a)(4) improperly amend our state constitution by increasing the age and residency requirements for candidates?

7. Whether Lowery's (and the State Defendant's) interpretation and application of I.C. § 3-8-2-7(a)(4) violates multiple canons of statutory construction.

STATEMENT OF THE CASE

Rust agrees with the Appellants' Statement of the Case except to add that the trial court also awarded him his costs and attorneys' fees in its December 7, 2023 order. (App. Vol. 2, p. 45.)

STATEMENT OF THE FACTS

The statute

Before it was declared unconstitutional and enjoined on December 7, 2023, Indiana code section 3-8-2-7(a)(4), effective January 1, 2022, provided that in order to run as a Republican candidate, Rust must file a CAN-2 form including a statement of his party affiliation, and such affiliation is established only if he meets one of two conditions:

> (A) The two (2) most recent primary elections in Indiana in which the candidate voted were primary elections held by the party with which the candidate claims affiliation. If the candidate cast a nonpartisan ballot at an election held at the most recent primary election in which the candidate voted, a certification by the county chairman under clause (B) is required. ("Option A")
>
> OR
>
> (B) The county chairman of:
> (i) the political party with which the candidate claims affiliation; and
> (ii) the county in which the candidate resides;
> certifies that the candidate is a member of the political party. ("Option B")

Indiana Code 3-8-2-7(a)(4), as amended by P.L. 193-2021, SEC 17, eff. 1/1/2022 and PL 109-2021, SEC. 8, eff. 1/1/2022.

The immediate prior version of the statute (effective from July 1, 2013- December 31, 2022) only required voting in one primary (or party chair approval). The original version of the statute (effective from 1986 through June 30, 2013) allowed for three ways to demonstrate party affiliation, including an option for voters who did not vote in any primaries to affiliate *by choice*: "The candidate has never voted in a primary election and claims a party affiliation." Ind. Code § 3-8-2-7(a)(4) (2013).

Impact of the 2022 statute on Hoosiers and prior litigation

While most Hoosiers identify as either a Republican or a Democrat, most Hoosiers do not vote in primaries. According to Pew Research, 79% of Hoosier adults identify as a Republican or Democrat,[1] but only 24% of registered Hoosiers voted in the 2020 primaries.[2] (App. Vol. II, p. 41.) As such, under the 2022 amendment to I.C. § 3-8-2-7(a)(4), the vast majority of Hoosiers (approximately 81%[3]), including Rust, became presumptively ineligible to run for office unless their party chair certifies them as a member of the party. (Id.)

In February 2022, eight candidates were removed from the ballot pursuant to the statute. (Id. at 38.) Even though many of those candidates testified that the statute violated their constitutional rights, the Indiana Election Commission insisted their recourse was through the courts.[4] (Id.) Two of those candidates brought suits after they were removed and sought a decision on the constitutionality of this statute. (Id.) However, our Court of Appeals declined to address the merits of their cases, citing mootness, as the May 2022 primary election passed by the time they were before the appellate court. (Id.) This Court

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[1] Pew Research Center. Party affiliation among adults in Indiana. Available at https://www.pewforum.org/religious-landscape-study/state/indiana/party-affiliation/, *last visited* January 9, 2024, 7:05 p.m.
[2] Indiana Secretary of State, Elections Division. Primary Election Turnout and Registration. Available at https://www.in.gov/sos/elections/voter-information/files/2020-Primary.pdf, *last visited* January 9, 2024, 6:59 p.m.
[3] This is a conservative (no pun intended) estimate because just because someone votes in one primary, does not mean they vote in two and for the same party. Also, Rust uses the higher 2020 voter turnout in this calculation. There was more turnout in 2020 than in 2018 or 2022. https://www.in.gov/sos/elections/voter-information/files/2018-Primary-Election_Turnout_and_Registration_20181129_120427PM.pdf; https://www.in.gov/sos/elections/voter-information/files/2022-PERT.pdf *last visited* January 9, 2024, 7:05 p.m.
[4] The February 18, 2022 challenge hearings can be viewed on the Secretary of State's YouTube page: https://youtu.be/yK3sqzBGTQ8. Review the hearing for Thomas Charles Bookwalter, beginning at the 3 hour, 1 minute mark, for example.

denied transfer in both cases. *See, Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641(Ind. Ct. App. 2023), *transfer denied*; *Bookwalter v. Indiana Election Comm'n*, 209 N.E.3d 438 (Ind. Ct. App. 2023), *transfer denied*. A panel of our Court of Appeals called a prior, less restrictive version of the same statute "not essential to a valid election." *Wyatt v. Wheeler*, 936 N.E.2d 232, 239-40 (Ind. Ct. App. 2010).

Rust's candidacy and suit

Rust is a farmer from Seymour, Indiana who is seeking to be on the Republican primary ballot for U.S. Senate in 2024. (App. Vol. II, p. 37, 39, 42.) He also seeks to cast his vote effectively. (Id. at 37.) Rust is a lifelong Republican and has donated over $10,000 to Republican candidates. (Id. at 37, 40.) Rust voted in the Republican primary in 2016, but did not vote in 2020 as that election was moved due to Covid-19. (Id. at 40.) Rust voted in Democratic primaries over 10 years ago and he testified during his deposition that each of those times was for family or friends from church. (Id. at 58-59, 223-224 and 230-231.) He further testified that even though his brother ran on the Democratic ticket, his brother is "very conservative." (Id. at 231.)

At the time of the 2020 Republican primary, the prior version of the statute only required that Rust vote in one Republican primary in order to have ballot access and thus, even without voting in 2020, Rust's 2016 vote made him eligible to run for office. (Id. 43.) However, thereafter, the statute was amended. (Id.)

Because Rust does not have the required voting record pursuant to Option A in the statute, on July 19, 2023, Rust met with Jackson County, Indiana Republican chair, Amanda Lowery, to request she provide written certification of Rust's membership in the Republican party pursuant to Option B. (Id. at 42.) During that meeting, Rust explained

why he wanted to run for office. (Id.) That is, he has major concerns about the current national Democratic leadership and seeks a return to traditional Republican values. (Id.) Rust further expressed his desire to bring a common sense "farmer" approach to the problems facing our country which he thought would appeal to working class Hoosiers who are fed up with inflation and various moral issues, among other things. (Id.)

Lowery expressed concerns about Rust having previously voted in Democratic primaries and Rust explained that those votes were for people he knew personally through church or for those who were pro agriculture. (Id.) He further explained that he has never contributed to a Democratic candidate financially, but did support Republican candidates financially, and he always votes for Republican candidates in the general elections. (Id. at 42, 52-53.)

Lowery told Rust she would not certify him or any Republican candidate that that did not vote in the two primaries pursuant to Option A in the statute, a position she reported to the IndyStar newspaper as well. (Id. at 42, 61.) Once Rust formally announced his candidacy, Lowery contacted Rust to tell him he was "wasting his money" and that there was "no way" she would ever certify him. (Id. at 43.)

Prior to the statute being enjoined, without certification, Rust would not be able to check either box on his CAN-2 form to demonstrate party affiliation pursuant to I.C. § 3-8-2-7, and his candidacy could and would be challenged. (Id. at 43.) Indeed, candidate Jim Banks' campaign team told IndyStar that someone from his team planned to file a challenge to have Rust not placed on the ballot for failing to comply with the statute. (Id. at 61.)

Rust filed suit seeking declaratory and injunctive relief. (Id. at 37-51.) He argued that the statute violates our federal and state constitutions in numerous respects, and further,

that Lowery violated the canons of statutory construction when applying the statute to him. (Id.) Defendants argued that the statute is constitutional, and that Lowery properly applied it. (Id. at 14-15.) Defendants filed a Motion to Dismiss Pursuant to T.R. 12(B)(1), alleging that this matter is not ripe for adjudication on the merits. (App. Vol. III, p. 200.)

After a hearing combined with a trial on the merits, the trial court denied Defendants' Motion to Dismiss, and found in favor of Rust. (App. Vol II, pp. 9-35.) In its order, the trial court noted what this Court aptly said long ago about the very purpose of all election law: ". . . The purpose of the law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement." *Lumm v. Simpson*, 207 Ind. 680, 683-84, 194 N.E. 341, 342 (1935) (Id. at 16-17.) With this purpose in mind, and after noting that primaries are state run and financed, the Court declared that the statute: 1) violates Rust's First and Fourteenth Amendment rights; 2) is vague and overly broad; 3) violates the Seventeenth Amendment by taking power away from the voters and giving it to the legislature and party chairs; 4) violates Rust's right to equal protection under Article 1, Section 23; and 5) serves as an improper amendment to Article 4, Section 7. It also declared Lowery's interpretation of the statute invalid and illegal because it violates the cannons of statutory construction. (Id. at 9-35.) Defendants appealed. Defendants further seek a stay order from this Court.

SUMMARY OF THE ARGUMENT

The trial court found that I.C. §3-8-7(a)(4), a statute that renders the vast majority of Hoosiers ineligible to run for office for the party of their choosing, violates Rust's state and federal constitutional rights. This Court should affirm. The trial court found at least five

distinct state and federal constitutional violations. This Court only needs to find one to affirm.

State Defendants and their aligned amicus try to throw everything they can at the wall as a justification for the statute, hoping that something sticks. But the arguments they make are not supported by the law or the record. Indeed, on appeal State Defendants are making many entirely new arguments, which are waived on appeal. Some of their arguments contradict previously made arguments and admissions.

With regard to Rust's First and Fourteenth Amendment rights, the State Defendants have not consistently, credibly, or cogently articulated the state interest. That alleged interest has shifted and continues to shift, but the only alleged state interests asserted prior to this appeal are the interests of the political parties not the State. There is no compelling or even legitimate interest when the State struggles to identify the interest. The statute is also not narrowly tailored as the record reflects undisputed evidence that the statute can never serve the alleged state goal of ensuring party membership and/or commitment or prevent party-raiding. Further, State Defendants admitted before the trial court that part of the statute would likely be struck down as unconstitutional if challenged by the party, an admission they pretend never happened and even contradict on appeal. They admit now that the other part of the statute burdens candidates and voters. The statute does not balance anyone's interests; rather it violates both the constitutional rights of the parties and the candidates/voters.

The statute is also unconstitutionally vague just like the statute struck down by our Court of Appeals in *Ray v. State Election Board*. That is, both statutes: fail to define party membership, improperly delegate policy matters in a way that creates arbitrary and

discriminatory enforcement, are not the least restrictive means of achieving the alleged state goal, and do not give citizens fair notice of how they may obtain ballot access.

The statute violates the Seventeenth Amendment as it takes power away from the people and gives it to the state legislature and/or party chairs. State Defendants argue that voters choose, but that is not true where, as here, the statute serves to give Hoosiers no choices on the ballot. State Defendants fail to meaningfully distinguish case law cited by Rust that held an incumbent disqualification act violated the Seventeenth Amendment. Here, the statute serves as an incumbent protection act, and is equally unconstitutional.

The statute violates Rust's Article 1, Section 23 right to equal protection because he is being treated differently based on when he runs for office and who his party chair is. Neither of these factors have anything to do with him; he is not inherently different (or less Republican) than those who ran prior to amendment of the statute or who have a more reasonable party chair. State Defendants admit that there are no inherent characteristics at issue here and further, have admitted that there's disparate treatment—with a different party chair Rust could obtain certification. As such, the statute does not meet the test for constitutionality set forth in *Collins v. Day*.

The statute improperly amends our state constitution by increasing the residency requirements from two to four years and age requirement from 21 to 22 without going through the proper constitutional amendment process. There's no reason a younger voter, or one who relocates to Indiana should be treated any differently than someone born in Indiana or who is older. And, if our framers intended to place these restrictions on candidates, they would have done so at the outset.

Finally, the trial court properly found that Lowery misapplied the statute to Rust as her application, which has been adopted by the State Defendants, violates multiple cannons of statutory construction: 1) it is not in accord with the purpose and spirit of the law; 2) it engrafts words onto the statute; 3) it renders a portion of the statute meaningless; and 4) it conflicts with I.C. §3-10-1-2, which states major political parties, such as the Republican Party, "shall hold a primary election under this chapter to select nominees to be voted for at the general election." This faulty interpretation is the result of an unconstitutional statute that is both vague and discriminatory, and such improper interpretation by party chairs and the Indiana Election Commission will continue if this statute is upheld.

ARGUMENT

I. Rust has standing pursuant to the Declaratory Judgment Act and *Holcomb v. Bray*.

The State Defendants previously tried and failed to get this case dismissed on procedural grounds by arguing that the matter was not ripe because Rust or Lowery could die, and because hypothetically, Rust might not meet all the requirements to appear on the ballot. (App. Vol. II, pp. 203-210.) The trial court properly denied the State's Motion to Dismiss. (*Id*. at p. 36.) Now the State Defendants repackage their ripeness argument as a standing one if, hypothetically, he does not meet other candidate requirements. In support of their argument, they ignore the nature of Rust's suit, misstate this Court's precedent, and ignore Rust's actual injuries.

Rust brought his suit for declaratory and injunctive relief as both a candidate and a voter. The Uniform Declaratory Judgment Act, as relevant here, allows a person "whose rights, status, or other legal relations are affected by a statute ... [to] have determined any

question of construction or validity arising under the ... statute" via declaratory judgment. I.C. § 34-14-1-2.

This Court has recently addressed standing with regard to a declaratory judgment action, holding that while "[a]n injury must be personal, direct, and one the plaintiff has suffered or is in imminent danger of suffering[,] [u]nder the DJA. . . plaintiffs can satisfy the injury requirement by showing their rights are implicated in such a way that they could suffer an injury." *Holcomb v. Bray*, 187 N.E.3d 1268, 1286–87 (Ind. 2022) (internal quotations and citations omitted). It further held: "under the DJA we need not find that an injury has occurred or is imminent." *Id*. at *1287.* Finally, it observed that standing is determined by looking at a lawsuit's allegations, not its outcome. Id. at 1286.

State Defendant's boldly argue that *Holcomb* stands for the proposition that "'[a] litigant has standing only if they have suffered a personal and direct injury or are in "imminent danger of suffering' one." (Appellant's Brief at 19.) But that is not at all what *Holcomb* states with regard to declaratory judgment actions as noted above. In *Holcomb*, the governor alleged that the bill at issue (while not put into action yet) infringed on his constitutional authority. *Id.* Similarly here, Rust alleges the statute at issue, I.C. § 3-8-2-7(a)(4), infringes on his constitutional rights. Just as Holcomb had standing whether the bill was put into action or not, so does Rust, whether or not he can appear on the ballot in May 2024.

Additionally, Rust has suffered injury as a candidate and a voter, even if he cannot appear on the upcoming ballot, as his state and federal constitutional rights were violated. (And, this Court looks at the allegations, not the outcome.) With the statute in place, they will continue to be violated even if he cannot run in the upcoming primary. That is, he is

still a voter seeking to cast his vote effectively and to do so, there needs to be choices on the ballot that align with his values. Also, any future candidacy of his would be impacted by the statute if it is in effect.

II. I.C. § 3-8-2-7(a)(4) violates Rust's First and Fourteenth Amendment Rights.

The U.S. Supreme Court has long held that the First Amendment's protection of free speech, assembly, and petition logically extends to include freedom of association, including freedom of political association and political expression. *See, e.g., Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973) (the First Amendment guarantees "freedom to associate with others for the common advancement of political beliefs and ideas;" a freedom that encompasses the right to associate with the political party of one's choice.)

It is also well-settled that "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment. . . ." *Anderson v. Celebrezze*, 460 U.S. 780, 787, (1983) (*quoting NAACP v. Alabama,* 357 U.S. 449, 460, (1958).) "[T]he right of individuals to associate for the advancement of political beliefs, and the rights of qualified voters, regardless of their political persuasion, to cast their votes effectively. . . rank among our most precious freedoms." *Id*. at 787 (internal quotations and citations omitted.) If ballot access restrictions treat similarly situated parties or candidates unequally, they may violate the Fourteenth Amendment right to equal protection of the laws. *See*, *Anderson*, 460 U.S. at 786 n.7 (1983); *Lubin v. Panish*, 415 U.S. 709, 713 (1974).

Additionally, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some

theoretical, correlative effect on voters." *Bullock v. Carter,* 405 U.S. 134, 143 (1972). Indeed, the exclusion of candidates not only burdens the candidates, but also "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787–88.

Our U.S. Supreme Court set forth a balancing test for assessing the constitutionality of ballot access restrictions. Courts must:

> 1. consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate;
> 2. identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule; and
> 3. determine the legitimacy and strength of each of those State interests; as well as the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 789.

When the burden on ballot access is severe, the statute will be subject to strict scrutiny and must be narrowly tailored and advance a compelling state interest. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). If it is "reasonable" and "nondiscriminatory," the statute will survive if the state can identify "important regulatory interests" to justify it. *Id.* Further, the U.S. Supreme Court has emphasized that "[h]owever slight [the] burden may appear. . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (*quoting Norman v. Reed*, 502 U.S. 279, 288-89 (1992)).

A. I.C. § 3-8-2-7 imposes a severe restriction on Hoosier candidates and voters alike, and there is no compelling, or even legitimate, state interest being served.

1. Strict scrutiny applies.

As a threshold matter, State Defendants misstate the applicable level of constitutional scrutiny relying on 7th circuit precedent in *Hero v. Lake County Election Bd.*, 43 F.4th 768 (7th Circuit 2022), instead of controlling U.S. Supreme Court precedent. Here, strict scrutiny applies. That is, if the challenged law[5] burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the state shows that it advances a compelling state interest and is narrowly tailored to serve that interest. *Eu v. San Francisco Cnty. Democratic Cent. Comm.,* 489 U.S. 214, 222 (1989) (internal quotations and citations omitted.)

2. The statute is a severe restriction on Rust's and all Hoosiers' rights to freely associate.

Applying the *Anderson/Burdick* framework to I.C. § 3-8-2-7(a)(4), the statute severely burdens Rust's ability to freely associate as it completely precludes Rust, who is a Republican, from running for U.S. Senate in Indiana as a Republican. And while one might expect, as Rust did, that his party chair would provide him with certification, this is not the case where as here, the party chair has decided the only path to candidacy is voting in two primaries under the statute.

State Defendants (and the State Republican Committee) assert that Rust has the right to run for office but not the right to run for Republican office, and similarly that his rights have not been violated because he seeks primary ballot access rather than general ballot

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[5] Hero was banned from the Republican party and said ban was the issue in that case, not any state law. *Hero*, 43 F.4th at 771.

access. But Rust is not just seeking to vindicate a right to get on the general ballot any way possible, he is seeking to vindicate his right to free association. That is, Rust seeks to freely associate with like-minded individuals in the party he has chosen to associate with and cast his vote effectively. Sure, the party leadership and his party chair may not like him and/or may prefer the candidate they endorsed pre-primary (in a rare and bold move.) But the party is comprised of all of its members, not just those in office or leadership positions. When there are limited to no choices on the ballot, Rust and other Hoosiers might as well be completely excluded from accessing the Republican ballot as a candidate or a voter.

Additionally, if the statute is only a minor restriction as the State Defendants argue, it is hard to explain why most Hoosiers are completely precluded from running in primaries because they cannot meet Option A's voting requirement, and certainly there's no guarantee of being able to obtain Option B as discussed herein.

Before the trial court, and in the *Bookwalter* and *Rainey* cases, no one disputed Rust's statistics about how many Hoosiers are made ineligible to run for office pursuant to the statute. While the Republican State Committee apparently takes issue with those statistics now, the numbers do not lie: only a small fraction of Hoosiers vote in primaries and for a candidate to avail themselves of Option A under the statute they must vote in not only one primary, but two. They must also vote for the same party, consecutively.

Moreover, no individual is able to maintain records of his or her own voter history; that is entirely within the control of county governments. Thus, the statute requires that candidates provide proof which he or she may not even be able to access. Voter registration records and voter histories were digitized after 2003. *See,* I.C. § 3-7-26.3. I.C. § 3-7-26.3-22 requires that a voter's primary voting records be kept for at least ten years. This means

anything older than that may be destroyed. Indeed, during the 2022 challenge hearings, there were candidates removed from the ballot because their voting records were faulty/unavailable. (See, e.g., the link in fn. 4 above and *Leonard v. Carver* (Cause 2022-17)). And, despite the Committee's assertion that Rust and the trial court are somehow "confused" about the required voting record, that is belied by the record. (Transcript at 31, ll. 15-19.)

It sounds "easy" or like a "low bar" to simply vote in two primaries, but in practice, it is not, as is evidenced by the numbers. Certainly, having less choices in primaries does not inspire Hoosiers to go vote, especially when candidates run unopposed and will win regardless of votes. In Indiana, often the primary election *is* the election. And neither the State Defendants nor the Republican State Committee have attempted to explain how voting in a Republican primary versus voting in a general election for a Republican makes you somehow more Republican such that only those who vote in primaries for the party can properly affiliate with the party. Nor have they explained how two Republican votes 40 years ago and no votes since equates with a Republican affiliation today. A statute that precludes most Hoosiers from running cannot be said to be a "minor" restriction.

3. The State cannot claim there's a compelling or even legitimate State interest when they cannot consistently and cogently identify the interest.

After identifying the degree of the asserted injury to Rust, the Court must then balance Rust's First and Fourteenth Amendment rights to freely associate with the Republican party against the "...precise interests put forward by the State." *Anderson*, 460 U.S. at 789. Here, there is no precision with regard to the State's asserted, alleged interests. Indeed, State Defendants have made various, ever-shifting, and contradictory arguments about the State interest. In the *Rainey* case, the alleged state interest was party commitment;

being a party member just was not enough. (Rainey had a Republican membership card and appeared on the county GOP website as a party sponsor.) (See App. at 23.) In *Bookwalter*, the state interest was party membership. (Id.) Then before the trial court in Rust, when confronted about the lack of consistency, the State Defendants argued that party membership and commitment are "two sides of the same coin." (Id.)

Now, before this Court, the alleged state interests include:

Party interests:

-preserving the viability and identifiability of political parties (Appellant's Motion to Expedite at 2);

- guarding against party-raiding (Id.)

-enhancing parties' electioneering and party building efforts (Id. at 6-7)

-preserving the party's right to choose who it associates with and who it excludes (Appellant's Br. at 29)

Election regulating interests:

-preventing "voter confusion" (Motion to Expedite at 1,4)

-regulating elections (Id. at 2),

-a litany of important State interests in regulating elections including: maintaining the orderly, fair, and honest operation of its elections. . . guarding against party raiding and "sore loser" candidacies; and avoiding voter confusion, ballot overcrowding, and the presence of frivolous candidates. (Appellant's Br. at 15)

-maintaining a stable political system (Id. at 22.)

It is hard to believe that this one statute is meant to serve so many varied interests, some of which are party interests and some of which are state interests. Interestingly, none of the interests are voter/candidate interests (despite the State Defendants' hollow claim that the statute somehow balances the interests of the party with those of the voters/candidates). In any case, the fact that State Defendants cannot consistently articulate the state interest contradicts their claim that the statute meets *any* level of

constitutional scrutiny. Indeed, State Defendants have done quite a bit of gymnastics in an effort to reconcile their differing state interest claims. The trial court found State Defendants' efforts in this regard to be "disingenuous and inconsistent." (App. Vol. II, p. 24.)

And State Defendants' alleged interests have changed and expanded even more now that the matter is before this Court. Before the lower courts, State Defendants asserted interests related exclusively to protecting the *political parties*. Now that the State Defendants lost at trial because the trial court found there is no legitimate *state* interest in protecting political parties from voters in a taxpayer funded election, State Defendants are asserting, for the first time, a "litany" of alleged election regulation interests, even going so far as to list "party-raiding" as a state interest after chiding Rust for even suggesting that the statute was perhaps amended in effort to combat party-raiding:

> Mr. Rust speculates that the Declaration Statute was amended to prevent "party-raiding." Mem. Supp. Prelim. Inj. at 9. But even Mr. Rust acknowledges, party-raiding is when organized blocs of voters switch from one party to another to manipulate the other party's primary.

(App. Vol. II at 155.)

That is, the State Defendants now claim they must protect an interest that they denied was at play before the trial court, as well as other interests never before mentioned in any of the three suits regarding this statute since it was amended. Amazingly, they ask that this Court find that these interests are compelling, or even legitimate, even though they were not worth mentioning or were denied as an interest previously. Not only does this strain credulity, but the State Defendants' newly asserted state interests are waived on appeal. *Franklin Bank & Trust Co. v. Mithoefer,* 563 N.E.2d 551, 553 (Ind. 1990) ("A party cannot

change its theory and on appeal argue an issue which was not properly presented to the trial court.")

In any case, the State cannot consistently identify or cogently explain *its* interest in the statute. The only interests it has asserted before lower courts are party interests, demonstrated by the Committee's brief which rehashes the same arguments made by counsel for the State Defendants at trial. Given these facts and circumstances, it cannot be said that the State has even a legitimate interest in the statute, let alone a compelling one.

B. The statute is also not narrowly tailored, or even tailored at all, as it can never achieve the alleged and ever-shifting State goals and State Defendants admit part of the statute would be struck down if challenged by the party itself.

Even assuming the *State* has an interest in the statute (rather than it just protecting the interests of the political party), the statute is not narrowly tailored and it can never achieve the State's claimed goal here. Rust has demonstrated with citation to authority and record evidence that the statute has not and cannot ensure commitment to or membership in the party or prevent party-raiding. That is, any Hoosier may vote in the primary of either party, if the majority of candidates that he or she intends to vote for in the next general election, are the candidates of that party. I.C. § 3-10-1-6. This requirement is practically unenforceable. There is no way to know what a voter intends. As such, voting is not indicia of party membership or loyalty.

Additionally, we learned during the 2022 election challenge hearings, candidates are able to, and have in fact, run for office for a party they have voted for in two primaries, even if they are openly not actual members of that party. That is, Thomasina Marsili, Owen County Democratic party chair, vehemently protested the Democratic candidacies of Adnan Dhahir and Peter Priest, who were both Republicans. (App. Vol. II, p. 106-130.)

They only ran as Democrats because they had the voting record to support it. (Id.) The Indiana Election Commission denied Marsili's challenge, and the candidates were allowed to be on the ballot. (Id.) This undercuts any argument that the statute can ensure party membership or party loyalty. It also undercuts any argument that the statute can stop party-raiding as a person who wants to run as a Republican or Democrat may do so by voting in our open primaries even if they are not actual party members.

California Democratic Party v. Jones, 530 U.S. 567, 578 (2000) also supports Rust's position that the primary voting does not stop party raiding as the U.S. Supreme Court noted that in one survey of California voters, 37 percent of Republicans and 20 percent of Democrats said they planned to vote in the other major party's primary. *Id.* The Court further noted that those figures are comparable to the results of studies in other states with blanket or open primaries. *Id.*

If the Indiana Legislature was truly concerned with "party-raiding," a closed primary system would be far more effective and less burdensome than I.C. § 3-8-2-7(a)(4), which bars the candidacies of most Hoosiers. Indeed, our case law acknowledges that a restriction on candidates based on party membership—even without regard for primary voting history—could better deter "party-raiding," without infringing on the rights of candidates and voters. *See Ray v. State Election Bd.*, 422 N.E.2d 714, 720 (Ind. Ct. App.), *decision clarified on denial of reh'g*, 425 N.E.2d 240 (Ind. Ct. App. 1981). ("[t]he decisive difference between California's...[durational party requirement upheld by the United States Supreme Court in *Storer v. Brown*, 415 U.S. 724, 736 (1974)]...and...[Indiana's law preventing 'cross-filing' based on party membership, which the *Ray* panel held to be unconstitutional]...is that...the

California Election Code provides a definite statutory means of determining party membership.")

Moreover, the "party-raiding" justification for I.C. § 3-8-2-7(a)(4) just does not work under the facts of this case. First, there is zero indication that Rust is attempting to raid the Republican party. Rust is a member of the party, and over the years, he has made significant financial contributions to various Republican candidates. His democratic votes were over ten years ago, and he has always voted for Republicans in the general election. State Defendants even acknowledged in prior briefing that the Jackson County Republican party would "welcome [Rust's] participation in the Republican party." (App. Vol. II, p. 5.)

Second, even assuming Rust was previously a Democratic over ten years ago (he was not), he is free to change his mind. Many current politicians were previously members of the other party. For example, Ronald Reagan was a Democrat before he became a Republican President. He famously declared: "I did not leave the Democratic party. The party left me." Changing parties is not party-raiding. Freedom of association requires that ballot access laws accommodate changes in party allegiance and political views. *See Ray*, 422 N.E.2d at 721 (questioning the constitutionality of a restriction on a voter's freedom of association if, after voting for party A in the 1980 general election, but having switched their allegiance, and having contributed both time and money to party B from December 1980 on, a voter was prohibited from voting in party B's primary two and one-half years later).

I.C. § 3-8-2-7(a) makes no allowance for changes in party allegiance. To access the ballot for either major party, Rust is locked into voting in that party's primaries for up to four years or more under the statute. He is not able to change his mind, make his voice heard on individual issues, or vote his conscience if doing so breaks party lines. This denies

him and the vast majority of Hoosiers the freedom of association and the ability to cast their votes effectively.

Try as State Defendants may to throw a litany of new state interests at the wall and hope that one sticks, they have not meaningfully elaborated on any of the newly alleged election regulation interests or explained how the statute works to further them. They cannot, and that is because it does not. For instance, State Defendants have not explained how Rust's appearance on the primary ballot (rather than the one candidate endorsed by the Republican party running unopposed) creates "voter confusion" or "ballot overcrowding." Rust hopes State Defendants are not suggesting Hoosier voters will be confused by actually having a choice on the ballot and that having two choices instead of just one is overcrowding. State Defendants also fail to explain how excluding members of the party from running for office (but welcoming them to contribute their time and money, creating classes of party membership) supports the goal of "party building." And, to the extent they are claiming that I.C. § 3-8-2-7(a)(4) is meant to prevent "sore loser" candidates, Indiana already has a statute preventing these. I.C. §3-8-1-5.5.

State Defendants baldly assert that the statute is narrowly tailored and balances interests but they fail to explain how this is so. For instance, in the face of evidence that the statute did not stop two Republican from running as Democratics, the State Defendants respond only that the statute does not have to be perfect. Given the opportunity to present evidence that it works to accomplish the state interest before the trial court, they failed to do so. They also wholly fail to explain why voting in one primary is not enough, so that two was necessary, and they fail to reconcile their narrow tailoring claim with the fact that a panel of our Court of Appeals has ruled that a prior, less restrictive version of the statute at

issue (Option A only required voting in one primary) was "not essential to a valid election." *Wyatt v. Wheeler*, 936 N.E.2d 232, 239-40 (Ind. Ct. App. 2010). If a less restrictive version of this statute is not essential to a valid election, it cannot be said that the present, more restrictive one is narrowly tailored, or tailored at all.

C. Controlling case law supports Rust's position.

1. Less restrictive statutes have been struck down or questioned.

The U.S. Supreme Court, in its cases dealing with ballot access, has never upheld a temporal restriction greater than one year, and even then, only in the context of closed-primary states. *See Rosario v. Rockefeller*, 410 U.S. 752, 762 (1973) (upholding law requiring party registration 8 and 11 months prior to primary); *Storer,* 415 U.S. at 736 (upholding 'anti-sore loser law' requiring that independent candidates have not been registered as a member of either party in previous year). In *Kusper v. Pontikes*, the U.S. Supreme Court struck down an Illinois statute that "locked" voters into their pre-existing party affiliation for a 23-month period following their vote in any primary. 414 U.S. at 51.[6] I.C. § 3-8-2-7(a)(4), restricts party members' ability to run for much longer. Citing *Kusper*, our own Court of Appeals questioned even a 30-month waiting period. *Ray v. State Election Bd.*, 422 N.E.2d at 721.

With I.C. § 3-8-2-7(a)(4), the legislature has imposed a temporal restriction that is far in excess of what the U.S. Supreme Court declared to be unconstitutional in *Kusper*, as it

[6] Even though *Kusper* involved voters not candidates, as noted above, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock,* 405 U.S. at 143.

restricts party members' ability to run for office *for as many as 48 months or more.*[7] Further, while our U.S. Supreme Court recognized that states could regulate elections in an effort to prevent "splintered" parties and "unrestrained factionalism" it also explained that it "did not suggest that a political party could invoke the powers of the State to assure monolithic control over its own members and supporters." *Anderson,* 460 U.S. at 803. That is what the State and aligned Amicus are arguing for— state sanctioned monolithic control by the party to control who runs for office.

Defendants attempt to distinguish *Kusper* because it involved voters who were completely precluded from pulling a ballot of their choosing, and here Rust is a candidate. However, as discussed above: "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock,* 405 U.S. at 143. Further, the exclusion of candidates not only burdens the candidates, but also "burdens voters' freedom of association, because an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens." *Anderson*, 460 U.S. at 787–88. And Rust brings his action as both a voter seeking to vote effectively *and* a candidate. When there are limited to no choices on the ballot, he might as well be completely excluded from accessing the Republican ballot.

[7] Primaries occur every 2 years. Hoosiers could vote more often, in municipal primary elections, if they live within city limits but not every Hoosier lives within these limits and that some Hoosiers will necessarily have more opportunities to vote in primaries creates yet another equal protection problem.

2. The Republican party should get to regulate its affairs as it sees fit, but this is not a State interest, and neither the State nor the party may violate constitutionally protected rights.

State Defendants have cited *Eu* in support of the proposition that political parties also have the freedom to associate under the First and Fourteenth Amendments. *Eu* involved county central committees for each major party bringing an action challenging state regulation of and interference in political parties' internal operations. *Eu*, 489 U.S. at 224. (citations omitted*.)* Here, it is Rust challenging the statute, instead of the party objecting to the statute. And *Eu* supports Rust's position. That is, *Eu* recognized that "[s]tates must act within limits imposed by the Constitution when regulating parties' internal processes," and the state has no interest in protecting the integrity of the party against the party itself. *Eu*, 489 U.S. at 215, 232; *See also Jones*, 530 U.S. at 567. That is, while the Republican party can regulate its affairs as it sees fit, it cannot do so in a way that denies Rust his constitutionally protected rights and there is no state interest in the party protecting the party from itself.

Defendants argue that political parties have the right to exclude/select candidates. They cite *Jones* for the proposition that the party can exclude Rust. But looking past some nice sounding one-liners that at first blush seem to support Defendants' position, the facts and outcome of *Jones* actually support Rust's position that the statute is unconstitutional. *Jones* involved a change in California law from a partisan primary to a "blanket" primary where "[a]ll persons entitled to vote, including those not affiliated with any political party, shall have the right to vote ... for any candidate regardless of the candidate's political affiliation." *Id*. at 570. Jones involved a political party's challenge to the statute making

this change and ultimately, the Court struck down blanket primaries because they violated a party's right to freely associate. *Id*. at 586.

Indiana's primary system allows for a blanket primary of sorts because here, and as such, the statute interferes with the rights of the parties. That is, on the one hand, the statute makes it so that Hoosiers who vote in two primaries can run for office no matter what the party itself thinks (and even against the party's wishes) and again, anyone can vote in any primary. Interestingly, State Defendants admitted that Option A in the statute would likely be struck down as unconstitutional if challenged by the party instead of Rust, and argued at trial that Option B alone, party chair certification, would be perfectly constitutional.[8] (Tr. 59-60; 66; App. Vol. II at 22.)

And on the other hand, if the party chair alone decides who can run, as the State Defendants acknowledge on appeal (in contradiction to their position at trial): "[voters] right to associate through ballot access may be burdened because it would be wholly at the whim of local party officials." (Appellant's Br. at 33.) Thus, it seems that depending on which portion of the statute is applied, the statute violates either the candidates' or the parties' rights to freely associate. The situation is even more of a mess when we take into account that at least some party chairs are taking the position that they will only certify if Option A is met. In any case, alternating which rights are violated is not balancing interests in a constitutional manner.

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[8] Neither State Defendants or the Republican State Committee make mention of this interesting position on appeal. Given that position, it would make more sense for the State Defendants and their aligned Amicus to join Rust in asking that this Court be the last word to affirm that the statute is unconstitutional.

D. *Hero v. Lake Cty. Election Board* does not apply here.

State Defendants rely heavily, if not exclusively, on the reasoning of the 7th Circuit in *Hero* to support their position that the statute is constitutional, but *Hero* does not apply here. Hero voted in primary elections as a Republican but was banned from the Republican party for ten years after he openly campaigned against Republican candidates, in violation of party rules applicable to party officials. *Hero*, 43 F.4th at 771. *Hero* does not involve interpretation of I.C. § 3-8-2-7 and, unlike Hero, Rust has not been banned from the Republican party. Indeed, State Defendants make much of the fact that should Lowery die or resign, he could then access the Republican ballot. (App. Vol. II at 143.) Further, State Defendants' acknowledge that the Jackson County Republican party would "welcome [Rust's] participation in the Republican party." (Id., quoting Rust's deposition at 86:19-22) Rust presently meets the definition of 'Republican in Good-Standing': a Republican who supports Republican nominees and who does not actively or openly support another candidate against a Republican nominee." Indiana GOP. Rules of The Indiana Republican State Committee, 5 (September 22, 2021). Thus, Defendants cannot credibly claim that the Republican party has somehow rejected Rust as a member. Also, I.C. § 3-8-2-7(a)(4) does more than just prevent a single person from running for office (as with the ban in *Hero*); it prevents the majority of Hoosiers from doing so.

E. Even if Rust is permitted to run as an independent or write-in candidate, a severe restriction of his right to freely associate would nonetheless exist.

State Defendants repeatedly claim that Rust (and the majority of Hoosiers who are presumptively ineligible to run for a major party pursuant to the statute) may just run as a Democrat, Libertarian, other third-party or write-in candidate. Problem solved, they claim. This is not a solution. This claim is akin to telling someone who has their right to freely

exercise their religion impinged to simply change religions. Despite Defendants' attempt to characterize Rust's suit as a suit seeking to get on the ballot any way possible, it is not. At issue are Rust's rights to freely associate and cast his vote effectively. As he testified in his deposition repeatedly, unequivocally, and emphatically, he is a Republican and he seeks to freely associate as one. (App. Vol. II, p. 178-180.) He is also a voter who is interested in having choices on the Republican ballot. When incumbents and other party insiders run unopposed there are no meaningful choices. Rust's tax dollars are collected to fund the primaries for the two main parties[9] and he should not be precluded from participating in a system he is forced to fund.

Case law is clear that third-party and write in candidacies do not constitute meaningful alternatives to access the primary ballot. *See Anderson*, 460 U.S. at 799 n.26 (a write-in candidacy "is not an adequate substitute for having the candidate's name appear on the printed ballot"); *Kusper*, 414 U.S. at 57 ("The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom [to associate]."); *Bullock*, 405 U.S. at 146-47 ("[W]e can hardly accept as reasonable an alternative that requires candidates and voters to abandon their party affiliations in order to avoid the [challenged] burdens."). And, the *Hero* case tells us that if Rust were to run as an independent or openly support another party as State Defendants and the Committee suggest he should, he would face getting banned from the Republican party like Hero did.

Finally, while political parties also have the right to freely associate, the party chair and other party insiders are not the only members of the party; the voters are ultimately the party, and their voices should be heard too. State Defendants and the Republican

[9] See, I.C. § 3-5-3-1 et seq.

committee have cited no authority for their repeated assertion that the rights of the party leadership somehow supersede the rights of the party members. Case law is clear that a political party's associational rights are for *all* party members. *See*, *Tashjian v. Republican Party,* 478 U.S. 208, 215 (1986). The Committee certainly did not confer with the majority of Republican members when drafting their brief and asserting their position.

In sum, Rust has demonstrated that the statute severely infringes on his ability to associate with the Republican party, and he has cited authority in support of his position that the statute violates the federal Constitution. For their part, the State Defendants have cited little, if any, authority justifying their position and they cannot consistently, credibly or cogently identify the alleged state interests. They admitted before the trial court that Option A is likely unconstitutional if challenged by the party and they admit in their appellate briefing that Option B burdens the rights of candidates. Surely, protecting incumbents and the politically connected is not a compelling government interest, or even legitimate government interest.

There statute is not tailored at all here where State Defendants cannot explain why the statute had to be amended to add a second primary under Option A, where our Court of Appeals called a prior version of the statute not essential to a valid election and where there is evidence the statute can never achieve the alleged state interests. If protecting the party from non-members was really the goal here, then a closed primary, for example, would be a less restrictive means of accomplishing it.

III. The statute is void for vagueness, just like the statute in *Ray v. State Election Board* was, as it is not clear what a party chair must certify: party membership or something more.

The void for vagueness doctrine as it relates to a civil election cases was discussed in *Ray*[10]*:* Vague laws offend the constitution in two ways: 1) they deny citizens fair notice; and 2) they "impermissibly delegate basic policy matters. . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . ." 422 N.E.2d at 721; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

In *Ray*, the court found that the legislature's failure to provide meaningful guidelines for determining party membership trapped potential candidates who did not receive fair warning about what it would take to be on the ballot, that the overbroad language in the statute infringed on Ray's fundamental right to freedom of association, and that the statute was not the least restrictive means of accomplishing the goal of preventing cross-filing. *Ray,* 422 N.E.2d at 722-723.

State Defendants argue that the statute here is not void for vagueness because it does not prohibit conduct. First, this is another argument that State Defendants failed to raise before the trial court; therefore it is waived. Second, it does prohibit conduct. Specifically, it prevents the majority of Hoosiers, who do not vote in any primary, let alone two and let alone two back-to-back for the same party, from running in primaries.

State Defendants further argue that the statute is "sufficiently clear so that an ordinary person exercising ordinary common sense can sufficiently comply with the

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[10] While most commonly discussed in the context of criminal ordinances, the void for vagueness doctrine also applies to ballot access restrictions. *Id.* at 721, 723.

statute." (citing *Neudecker v. Neudecker*, 556 N.E.2d 557, 562 (Ind. Ct. App. 1991), aff'd 577 N.E.2d 960 (Ind. 1991). This is not true.

Here like in *Ray*, there are no guidelines for determining party membership. It is not clear what "membership" or "certification" means. Rust argues that what needs to be certified is his present party membership alone, while Defendants argue that it is something more than membership that must be certified. And, in any case, Defendants' interpretation—that the party chair has full and unfettered discretion to disqualify party members from running in the primary—means that the statute does exactly what the statute struck down in *Ray* did. That is, it gives party chairs unlimited discretion over whether to certify 'Option B' candidates, with zero guidelines, which does not give citizens fair notice of how they may obtain ballot access via certification. Indeed, Rust was not given the list of certification factors considered by Lowery until after she denied him certification and only because he filed suit. Like the statute in *Ray*, I.C. § 3-8-2-7(a)(4) is certainly not the least restrictive means to ensure the state interest as it does not and cannot even achieve this interest in the first place, as discussed above.

State Defendants argue (for the first time) that the vague statute is just fine because it is not the state actors (the state and county election boards) who exercise judgment here; they just apply objective criteria while the party makes this decision. But this is not true. The county party chair is acting as a state actor in applying the state law, and it is the state that is "impermissibly delegat[ing] basic policy matters. . . for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. . . ." *Grayned*, 408 U.S. at 108. It is also the state actors (the Election Commission) that will make the ultimate decision on whether a candidate appears on the ballot and they can and

do have great discretion regarding whether a candidate was "certified" by the party chair or not.

The assertion that state actors simply apply objective standards is belied by the facts in *Wyatt* and the 2022 *Rainey* challenge hearing. In *Wyatt*, Republican candidate Sue Ellspermann checked that she was affiliated with the Republican primary as her last primary vote was Republican[11]. 936 N.E.2d at 236. Her candidacy was challenged because this was not the case; she had actually last voted in the Democratic primary. *Id*. The Indiana Election Commission then split on whether to accept her belatedly tendered certification from the party chair. *Id*.

In the *Rainey* case, at issue was whether the chair had, in fact, certified Rainey given that Rainey presented her Republican membership card and a signed note from the party leadership, including the chair. The Indiana Election Commission admitted it did not know what certification was. That is when addressing Rainey's evidence, a member of the Commission stated that she did not "know that a card is certification from the chair that says yes, we'll support you for running for office." *Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641(Ind. Ct. App. 2023) (Appellant's App. at 66.) And the Chair of the Commission stated: "I don't know how you get [certification], but the county chair has not granted you anything that says you're in good standing as Republican to run in a Republican primary. . ." (Id. at 56.) (Interestingly, the statute says nothing about good standing.) These two examples demonstrate that the Indiana Election Commission can and does exercise great discretion during the challenge hearings. Further, counsel for State Defendants argued before the trial court that the Election Commission could let Rust on the ballot even if he

[11] The one primary rule was in effect at the time.

did not comply with the statute. (Tr. 23-24.) Given that argument, State Defendants cannot now argue that the state actors have no discretion.

In any case, there is no meaningful difference between the vagueness issues identified in the statute at issue in *Ray* and those here. Accordingly, the statute here is void for vagueness just like the statute in *Ray.*

IV. I.C. § 3-8-2-7(a)(4) violates the Seventeenth Amendment as it improperly takes rights away from voters and gives them to the state legislature and party chairs.

The Seventeenth Amendment provides in relevant part:

> The Senate of the United States shall be composed of two Senators from each state, elected **by the people thereof**, for six years; and each Senator shall have one vote. The electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislatures.

(emphasis added). This amendment supersedes Article I, Section 3, Clauses 1 and 2 of the U.S. Constitution, under which senators were previously elected by state legislatures.

It seems the Indiana legislature has figured out a way to get around the Seventeenth Amendment, taking power to directly elect Senators away from most Hoosiers. That is, as discussed above, I.C. 3-8-2-7(a)(4) renders the vast majority of Hoosiers ineligible to run for office based on their voting record and gives a single party chair the ability to control who appears on the ballot at his or her whim. And, the lack of choices on the ballot leads to voter disenfranchisement and an inability to cast votes effectively.

In addressing the Hatch Act (a federal statute prohibiting federal employees from participating in political campaigns), Justice Hugo Black issued an apt dissent:

> Such drastic limitations on the right of all the people to express political opinions and take political action would be inconsistent with the First Amendment's guaranty of freedom of speech, press, assembly, and petition. And it would violate, or come dangerously close to violating, Article I and the Seventeenth Amendment of the Constitution, which protect the right of the people to vote for their Congressmen and their United States Senators and to have their votes counted.

United Pub. Workers of Am. (C.I.O.) v. Mitchell, 330 U.S. 75, 111, (1947) (Justice Black, dissenting). The Hatch Act impacts the rights of federal employees who cannot be involved in political campaigns; here the statute impacts *all Hoosiers* and their ability to access the ballot and vote for a candidate that best reflects their values. As such, I.C. 3-8-2-7(a)(4) goes much further than the Hatch Act in limiting the rights of the people to elect their Senators.

While there is not much Seventeenth Amendment jurisprudence, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) is instructive. There the U.S. Supreme Court addressed the constitutionality of an Arkansas constitutional amendment that limited the number of times a candidate could run for the same office. *Id*. at 830. In striking down the state-mandated term limits, the Supreme Court observed that the statute at issue was indirectly doing what the Constitution (the Seventeenth Amendment and the qualifications clause) prohibited by serving as a mechanism to disqualify certain incumbents from running for office. Here, the statute also indirectly violates the Seventeenth Amendment and protects incumbents and other political elites. The timing of the passages of the amendments to the statute (in 2021, when mistrust and anger with the government was arguably at an all-time high) (See App. Vol. II at 9-10)), the practical reality that the statute can never achieve the alleged goal(s) asserted by the State, and the fact that the State cannot even consistently articulate the state interest in the statute, all demonstrate that the statute was indeed intended to be an incumbent protection act.

State Defendants are critical of the trial court's reliance on *Thornton*, but make no effort to explain how that case law does not apply here besides to saying, without any citation to fact or authority, that this case is "far removed" from *Thornton*. Indeed, given the

chance, they did not even address Rust's Seventeenth Amendment claim at trial. In any case, just as the U.S. Supreme Court struck down an incumbent disqualification act in *Thornton*, this Court should strike down this incumbent protection act.

The State Defendants argue that "Hoosier voters nominate major party candidates for U.S. Senate in primary elections." (Appellant's Br. at 39.) This is not the case where as here, there is no nominating via primary election because often candidates run opposed. And to the extent State Defendants insist Hoosiers can just run for office as a third party or write-in candidate, most Hoosiers identify as a Republican or a Democrat. They should not have to check their affiliations at the door to get on the ballot another way, a way that almost guarantees they can never actually win an election. Additionally, a statute that makes most Hoosiers are ineligible to run for office goes drastically further than regulating the time, place and manner of an election. State actors and the party chairs they delegate power to choosing who can run is not merely "procedural" regulation as the State Defendants claim.

Defendants also argue that the statute does not add to the constitutional requirements to run for office, yet the Constitution does not even require that one be registered to vote in order to run for the U.S. Senate. (App. Vol. III, p. 226.) The statute does in fact add to the constitutional requirements though, as it provides that in order to ensure a candidate may automatically access the ballot as a Republican or Democrat, one must register and vote twice for the party. And, as Rust and other prior candidates have learned, certification is not a reliable or predictable way to access the ballot.

Finally, State Defendants wholly fail to explain how the statute does not take power away from the people and give it to the legislature and other party insiders or how the statute does not serve as an incumbent protection act.

V. I.C. § 3-8-2-7(a)(4) violates Rust's Article 1, section 23 right to equal protection.

Article 1, Section 23 of the Indiana Constitution provides: "[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens." In *Collins v. Day* our Supreme Court adopted a two-part standard for determining a statute's validity under this provision:

> First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

644 N.E.2d 72, 80 (Ind. 1994). Both prongs need to be met in order for the statute to be constitutional. *Id.* When analyzing an Article 1, Section 23 challenge, "it is the disparate classification alleged by the challenger, not other classifications, that warrants review." *Myers v. Crouse–Hinds Div. of Cooper Indus., Inc.,* 53 N.E.3d 1160, 1165, (Ind. 2016).

Rust raises an as applied challenge[12]; he is being treated differently than candidates who were able to be on the ballot prior to the July 2021 Amendments and differently than those candidates who have a more reasonable party chair that certifies based on party membership alone. These distinctions cannot justify the unequal treatment resulting from the statute.

[12] State Defendants seem to be arguing that Rust is raising a facial challenge in that they claim the statute applies to everyone equally.

Prior to the July 2021 Amendments to I.C. § 3-8-2-7(a)(4), the statute only required a candidate to vote in one primary in Indiana to obtain ballot access.[13] Thus, the July 2021 amendments doubled the length of time during which Hoosiers who have not voted in a primary are presumptively ineligible to run for office as a candidate for a major party—from two to four years.[14]

As discussed above, the State Defendants now allege the statute is meant to prevent "party-raiding," (i.e., to prevent Hoosiers from running as candidates for a party whose values they do not support.) But one need only observe how, over the last few years, the pejorative term "RINO," meaning "Republican in Name Only," has come into popular usage as a shorthand claim that Republican office holders' actions are contrary to what the speaker believes to be the 'core values' of the party. That is, being an incumbent or favored party member in no way means that these party members actually represent core party values. Accordingly, I.C. § 3-8-2-7(a)(4) functions as a mechanism for protecting the political establishment and party insiders. It encourages discrimination in favor of current politicians, because the party must weigh the future, speculative benefit of certifying the membership of would-be candidates who do not satisfy the two-primary rule, against the current and more determinable benefits that are likely to flow from protecting established, well-funded politicians, especially where the party, by withholding certification, can engineer a 'noncontested primary.' *See* I.C. § 3-10-1-5(a).

Additionally, any attempt to justify the disparate treatment under I.C. § 3-8-2-7(a)(4), must explain why party-raiding apparently became more of a threat in 2021. The

[13] Or that the county party chair to certify that the candidate is a member of the party.
[14] Absent special circumstances, primary elections are held every two years.

immediate prior version of the statute only required voting in one primary (effective from July 1, 2013- December 2022) and the original version of the statute allowed for voters who did not vote in any primaries to affiliate *by choice*.

Two things that are apparent include: 1) Hoosier voters are increasingly angry with the political class and want change; and 2) the July 2021 amendments enacting the two-primary rule were passed by the very folks who were most likely to be worried about challengers. Certainly, the motive to protect current politicians, and concentrate power in the party, does not justify the disparate treatment. There is nothing inherently different between a Republican in office that only had to satisfy the one primary rule and a candidate like Rust that voted in one Indiana primary but then the statute changed, and now he must vote in two.

Additionally, and as discussed in more detail in Section VII below, Lowery is interpreting and applying the statute to Rust in a way that violates multiple cannons of statutory construction. Lowery can and should certify Rust because he is a member of the Republican party, but she refuses to do so, claiming it is because he did not vote in two primaries. Those candidates who have a reasonable county party chair who will act in good faith, by providing their certification of party membership to members who request it are treated preferentially compared to candidates like Rust whose county party chair will not certify unless the first part of the statute is met (making the certification superfluous), or who will not certify for other reasons beyond what the statute requires. In this case, too, the *Collins* test is not met, as the unequal treatment is not based on any inherent characteristic *of the candidate*, but rather the conduct of a county party chair, and challengers (or lack thereof), that determines the fate of the candidate. *See, e.g., Paul Stieler Enterprises, Inc. v. City*

of Evansville, 2 N.E.3d 1269, 1278 (Ind. 2014) (no inherent difference between bars and restaurants and riverboat casinos with regard to a smoking ban) and *Myers,* 53 N.E.3d at 1166 (no inherent difference among plaintiffs based on whether the defendant mined and sold raw asbestos or defendant provided products containing asbestos).

State Defendants have admitted there is an equal protection problem under Article 1, Section 23 in their prior briefing and do so now: "Both Rust and the trial court have failed to identify any inherent characteristic that is the basis for any unequal treatment." (Appellant's Br. at 41.) Rust agrees. He is not sure why the State Defendants seem to think this somehow supports their argument though.

In order to find the statute constitutional, the first prong of *Collins v. Day* requires that if there is disparate treatment it "*must be reasonably related to inherent characteristics* which distinguish the unequally treated classes." 644 N.E.2d 72, 80 (Ind. 1994) (emphasis added.) Both prongs of the *Collins* test need to be met in order for the statute to be constitutional. Thus, in response to Rust's argument and evidence that there are no inherent characteristics at play here, it is the State Defendants that must show there are inherent characteristics to support their argument that the statute is constitutional. And they admit there are none.

State Defendants have also admitted disparate treatment. They argued before the trial court that should Lowery resign or die, another chair may certify Rust. This demonstrates that: 1) there is disparate treatment (Rust is being treated differently based on who the party chair is); and 2) that this treatment is not related to inherent characteristics. Because the statute fails the first prong of *Collins*, it is unconstitutional.

VI. I.C. § 3-8-2-7(a)(4) serves to improperly amend our state constitution without going through the proper constitutional amendment process.

Rust is not only a candidate, but a voter, and he seeks to have all willing and constitutionally eligible candidates on the ballot so that he may have meaningful choices and cast his vote effectively. Article 4, Section 7 of our State Constitution sets forth clearly the requirements to be a Senator or Representative:

> No person shall be a Senator or a Representative, who, at the time of his election, is not a citizen of the United States; nor any one who has not been for two years next preceding his election, an inhabitant of this State, and, for one year next preceding his election, an inhabitant of the district whence he may be chosen. Senators shall be at least twenty-five, and Representatives at least twenty-one years of age.

I.C. § 3-8-2-7(a)(4) adds extra requirements not found in the Indiana Constitution and is unconstitutional on its face. For instance, under our Constitution, a candidate needs to live in Indiana for two years preceding the election to be eligible. But I.C. § 3-8-2-7(a)(4) requires that the two primaries in which the candidate voted be in Indiana. This would require residency in the Indiana for four years. Further, according to the state constitution, a state representative may be only twenty-one years old. But with the voting age set at eighteen, some candidates would not have voted in two primaries until reaching the age of twenty-two. If our framers wanted to make the voting age higher or the residency requirement longer, then they would have. They did not. As such, I.C. § 3-8-2-7(a)(4) improperly changes the constitutional requirements to run for office without going through the proper constitutional amendment process. For this reason alone, the statute should be struck down.

Incredibly, State Defendants argue it is constitutionally sound that younger candidates and those who move from out of state are relegated to running as a third party or

write in candidate or they must rely on the whims of their party chair. This creates another equal protection issue. There's no constitutionally sound reason a younger voter, or one who relocates to Indiana should be treated any differently than someone born in Indiana or who is older. There is no constitutionally sound reason that some Hoosiers should have only one of the two affiliation options under the statute available to them. State Defendants also ignore the practical realities of running for office and the fact that most voters and candidates are affiliated with the Republican or Democratic party and are unwilling and unable to cast their affiliations aside just to get on the ballot any way they can. They also have the right to freely associate with the party of their choosing.

State Defendants argue that it is not true that the statute raises the age to be to eligible to run for office from 21 to 22 citing I.C.§ 3-7-13-1(1). However, while pursuant to I.C.§ 3-7-13-1(1), a 17-year-old *could* vote in a primary election *if* they will be 18 by the time of the general election, not every 17-year-old will be given that opportunity.[15] Here is an example:

[15] It is likely not well-known that those under the age of 18 can vote in primary elections, given the widespread knowledge that the age of voting in Indiana is 18.

Potential candidate	**Age candidate turns 18**	**May 2024 primary- can she vote?**	**May 2026 primary- can she vote?**	**May 2028- is she 21 so that she can run as required by state constitution?**	**May 2028 primary- has she voted in two primaries as required by the statute so that she can run?**
Mary	January 13, 2024	Yes	Yes	Yes	Yes
Alice	November 23, 2024	No, she will not be 18 by the general	Yes	Yes	No

As the above chart demonstrates, at least some 21-year-olds will not have had an opportunity to vote in two primaries, and as such the statute does effectively raise the age to run for office.

Finally, State Defendants argue for the first time on appeal that Rust does not have standing to bring a challenge under Article 4, Section 7. However, a standing challenge cannot be raised for the first time on appeal, and this Court should not decide standing *sua sponte*. *Everroad v. State*, 590 N.E.2d 567, 569 (Ind. 1992); *Certain Westfield Se. Area 1 Annexation Territory Landowners v. City of Westfield,* 977 N.E.2d 394, 398 (Ind. Ct. App. 2012). Further, Rust is injured by not being able to cast his vote effectively for lack of all constitutionally qualified candidates as choices on the ballot. State Defendants cite no case law in support of the proposition that he has to name a specific candidate precluded from the ballot whom he would vote for, and he was not given any opportunity to do so as this issue was not properly raised before the trial court. Also, there is an example of at least one

person who was not able to be on the Indiana primary ballot due to her residency and thus, the statute doubled her residency requirement from 2 years to 4. Rainey voted in two Republican primaries; one was in Indiana and the other in South Carolina.) *Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641, 643 (Ind. Ct. App.), *transfer denied*, 215 N.E.3d 341 (Ind. 2023) (Appellant's Brief at 7).

VII. Lowery's interpretation and application of I.C. § 3-8-2-7(a)(4) violates multiple canons of statutory construction.

As a threshold matter, Rust is not sure why the State is making arguments on behalf of Lowery. When given the opportunity to address the statutory construction issues raised (that are directed toward Lowery) by Rust at trial, Lowery declined to address these issues at all. And, the State did not brief this issue at all below, but joined Lowery's brief. To the extent the State is now taking up Lowery's defense now, Rust notes three things: 1) it is strange for the State to say that the *party* is the one making decisions about certification and state actors are not involved when the state is presently taking up the cause of the party in this appeal; 2) Lowery's interpretation would certainly be upheld by the state actors, i.e., the Indiana Election Commission during the challenge hearing as State Defendants admit and demonstrate in their briefing here; and 3) to the extent the State Defendants are now making new arguments never before made by them or Lowery, those arguments are waived.

The relevant portion of the statute provides that a county chair must certify: "that the candidate is a member of the political party." I.C. § 3-8-2-7(a)(4)(B). The goal of statutory construction is to determine, give effect to, and implement the intent of the Legislature. *City of Carmel v. Steele*, 865 N.E.2d 612, 618 (Ind. 2007). To effectuate legislative intent, we read the sections of an act together in order that no part is rendered meaningless. *Id.* Further, courts do not presume that the Legislature intended language used in a statute to be applied

illogically or to bring about an unjust or absurd result. *ESPN Inc. v. University of Notre Dame Police Dept.*, 62 N.E.3d 1192 (2016).

Additionally, when interpreting a statute, courts cannot engraft new words onto the statute. That is, courts will not read into the statute that which is not the expressed intent of the legislature" and "it is just as important to recognize what the statute does not say as to recognize what it does say." *Wilson v. State*, 189 N.E.3d 231, 233 (Ind. Ct. App. 2022) (internal quotations and citations omitted). Finally, statutes "are to be construed in connection and in harmony with existing law, and as part of a general and uniform system of jurisprudence." *Holmes v. Rev. Bd. of Indiana Emp. Sec. Div.*, 451 N.E.2d 83, 86 (Ind. Ct. App. 1983).

Lowery's interpretation and application of the statute (which has now been adopted by the State Defendants) violates all the above-cited statutory construction cannons and jurisprudence. First, the purpose of the statute, by its plain language, is to determine if a candidate is a *bona fide* member of the political party. That is, the county party chair is tasked only with certifying party *membership* alone, not suitability for office, not good standing in the party and not whether she supports the candidate. The statute does not provide for either the Commission or a county party chairman to make decisions about who should run. To interpret the statute otherwise is to both engraft words onto it and ignore its spirit and purpose.

Rust is not sure why State Defendants and the State Committee argue that the purpose of the statute is about "affiliation" not membership, given that the statute itself tasks the party chair to certify that the candidate is a "member of the political party." Further, these semantics are not helpful to State Defendants or the Committee. If one is a

member of the party, they are certainly affiliated with it. It does not follow however that you are a member of something just because you are affiliated with it. You could be, but not necessarily.[16] Thus, if all Rust had to prove was some affiliation with the party rather than membership, that would be a lesser showing, not a greater one as State Defendants and the Committee seem to be arguing.

Lowery's interpretation of I.C. § 3-8-2-7 also leads to a portion of the statute being rendered meaningless. I.C. § 3-8-2-7 provides two distinct ways to demonstrate party affiliation: A) by voting in that party's primaries for the last two primaries a person voted in (in Indiana); OR B) by obtaining written certification of party membership by the county party chair. I.C. § 3-8-2-7(a)(4). Here, Lowery told Rust and the media that she would not certify him because he does not have the requisite voting record. If county party chairs like Lowery are allowed to refuse to certify under B because they insist on option A, option B is rendered meaningless/useless.

I.C. § 3-8-2-7(a)(4) must be construed in harmony with other election laws such as I.C. § 3-10-1-2 which states that major political parties, such as the Republican Party,[17] "…shall hold a primary election…to select nominees to be voted for the general election." To construe I.C. § 3-8-2-7 to permit county party chairs to withhold "certification" in order to protect favored candidates from a primary challenge by candidates that are party

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[16] Member: one of the individuals composing a group; Affiliation: the state or relation of being closely associated or affiliated with a particular person, group, party, company, etc. See, Member Definition & Meaning - Merriam-Webster; Affiliation Definition & Meaning - Merriam-Webster

[17] "…whose nominees received at least 10% of the votes for Secretary of State in the last election…" *See* I.C. § 3-10-1-2.

members, violates the spirit and purpose of I.C. § 3-10-1-2's requirement that such parties *hold primaries* and allow their members to elect the party's nominee.

Because Lowery's interpretation of I.C. § 3-8-2-7 and application to Rust which has now been adopted by the State is not in accord with the purpose and spirit of the law, engrafts words onto the statute, renders a portion of the statute meaningless and conflicts with other election law, their interpretation and application of the statute is invalid and illegal. "To disfranchise voters because of a mere irregularity or a mistaken construction of the law by a party committee or election commissioner would defeat the very purpose of all election laws." *Curley v. Lake County Board of Elections and Registration*, 896 N.E.2d 24 (Ind. Ct. App. 2008). This faulty interpretation is the result of an unconstitutional statute that is both vague and discriminatory and such improper interpretation by party chairs and the Indiana Election Commission will continue if this statute is upheld. (See App. Vol. III, p. 239-242.)

CONCLUSION

This Court should affirm the trial court. In the interim, this Court should not grant the stay requested by Defendants.

WORD COUNT CERTIFICATION

I verify that this Brief of Appellee contains no more than 14,000 words.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 12, 2024, I electronically filed the foregoing with the Clerk of the Indiana Supreme Court, Court of Appeals, and Tax Court. using the Indiana E-Filing System.

I also certify that on January 12, 2024, the foregoing document was served upon the following via IEFS:

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