

IN THE
INDIANA SUPREME COURT

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 Chair,
Appellants-Defendants,

v.

JOHN RUST,
Appellee-Plaintiff.

Appeal from the
Marion Superior Court,

No. 49D12-2309-PL-36487

The Honorable
Patrick J. Dietrick, Special Judge.

**CORRECTED BRIEF OF APPELLANTS
DIEGO MORALES AND THE INDIANA ELECTION COMMISSION**

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STATEMENT OF SUPREME COURT JURISDICTION

The Supreme Court has mandatory and exclusive jurisdiction over this appeal because the trial court entered a final judgment declaring Indiana Code section 3-8-2-7(a)(4) (the “Affiliation Statute”) unconstitutional. *See* Ind. Appellate Rule 4(A)(1)(b).

STATEMENT OF THE ISSUES

John Rust is an aspiring candidate for U.S. Senate in Indiana. The Affiliation Statute could prevent him from appearing on the May 2024 Republican Party primary ballot if he cannot establish sufficient affiliation with the Republican Party by either: (1) his primary voting record, or (2) certification from his county’s Republican Party Chair; and his candidacy is challenged under Indiana Code sections 3-8-1-2(d) before the Indiana Election Commission. The issues presented here are:

1. If Rust fails to file a declaration of candidacy or meet the other requirements for candidacy, should this case be dismissed for lack of standing?
2. Does the Affiliation Statute violate Rust’s associational rights under the First and Fourteenth Amendments to the United States Constitution?
3. Is the Affiliation Statute void for vagueness or overbreadth?
4. Does the Affiliation Statute violate the Seventeenth Amendment to the United States Constitution?

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5. Does the Affiliation Statute violate Rust’s Equal Protection Rights under Article 1, Section 23 of the Indiana Constitution?
6. Does the Affiliation Statute improperly amend the Indiana Constitution by delaying the time a person may run as a Republican?
7. Is the Affiliation Statute invalid for giving Chairperson Lowery discretion to refuse to certify Rust as a Republican for the primary election for U.S. Senate?

STATEMENT OF THE CASE

Nature of the Case

Defendants the Indiana Secretary of State and the Indiana Election Commission (together, the “State Appellants”), by counsel, appeal the trial court’s final order finding the Affiliation Statute unconstitutional and enjoining the State Appellants from enforcing it. Amanda Lowery, in her official capacity as Jackson County Republican Chair, also appeals the judgment of the trial court.

Course of Proceedings

On September 18, 2023, Rust filed a complaint for declaratory and injunctive relief (2 App. 37–63). The same day, he sought a preliminary injunction enjoining enforcement of the Affiliation Statute (2 App. 64–65). After the trial court set a hearing on Rust’s preliminary injunction motion, the State Appellants moved to consolidate the preliminary injunction hearing with a trial on the merits (2 App. 131–141). The State Appellants also moved to dismiss the case under Trial Rule

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12(B)(1) asserting the case was not ripe and Rust lacked standing (3 App. 200–212).

The trial court granted the State Appellants’ motion to consolidate (3 App. 199).

Co-Defendant Jackson County Republican Party Chairperson Amanda Lowery joined the State Appellants’ motion to dismiss (3 App. 213–14). The trial court held the consolidated hearing on November 1 (2 App. 7; Tr. 1–80).

Trial Court Disposition

On December 7, 2023, the trial court denied the State Appellants’ motion to dismiss and entered an order finding the Affiliation Statute unconstitutional and enjoining the State Appellants from enforcing it (2 App. 9–36).

Appellate Proceedings

On December 8, 2023, the State Appellants filed a notice of appeal (Docket). On December 12, the State Appellants filed a motion to expedite the appeal and stay the trial court’s ruling (Docket). On December 15, after response from Rust, this Court granted the State Appellants’ motion to expedite the appeal and held in abeyance the request for a stay (Docket). On December 18, Chairperson Lowery filed a notice of appeal (Docket).

STATEMENT OF FACTS

I. Declaration of Candidacy and the Affiliation Statute

Rust wants to be a Republican candidate for U.S. Senate in the May 7, 2024 Primary Election (2 App. 10). Would-be candidates for a major party’s primary must file a declaration of candidacy. I.C. § 3-8-2-7; *see also* CAN-2 Form (2 App. 55–

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56). For the May 2024 primary, this declaration of candidacy must be filed between January 10 and noon, Eastern Standard Time, February 9, 2024. *See* I.C. § 3-8-2-4 (a declaration must be filed not later than noon 88 days and not earlier than 118 days before the primary election).

On their declaration of candidacy for the primary, candidates must establish party affiliation by either: (1) verifying they meet the requisite primary voting history or (2) receiving a certification from the political party's county chairperson. Specifically, the Affiliation Statute says:

A statement of the candidate's party affiliation. For purposes of this subdivision, a candidate is considered to be affiliated with a political party only if any of the following applies:

(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.

(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.

The declaration of candidacy must inform candidates how party affiliation is determined under this subdivision and permit candidates to indicate on the declaration of candidacy which of clauses (A) or (B) applies to the candidate. If a candidate claims party affiliation under clause (B), the candidate must attach to the candidate's declaration of candidacy the written certification of the county chairman required by clause (B).

I.C. § 3-8-2-7(a)(4).¹

After a declaration of candidacy is filed and up until noon seven days after the deadline for filing a declaration (here, noon February 16, 2024), “a registered voter of the election district that a candidate seeks to represent or a major party’s county chairperson in which any part of the election district is located” may file a statement challenging the declaration and questioning the candidate’s eligibility to seek the nomination. I.C. § 3-8-1-2(d); *see also* I.C. § 3-8-2-14. Questions concerning the validity of a declaration of candidacy in a primary for U.S. Senate are filed with the Election Division of the Secretary of State’s Office and referred to the Election Commission. I.C. § 3-8-2-14(a). After receipt of a statement questioning a declaration of candidacy, the Election Commission must meet and determine the validity of the declaration no later than 68 days before the date of the primary election, or February 29, 2023. I.C. §§ 3-8-2-14, -18.

II. Rust’s Party Affiliation

The time for Rust to file a declaration of candidacy for the 2024 primary election has not yet commenced or concluded. But neither of the avenues in the Affiliation Statute are currently available to Rust. Rust cannot establish affiliation with the Republican party through his primary voting record, and the Jackson County Republican Party Chair has refused to certify him.

¹ The previous version of the Affiliation Statute required a candidate to vote in only the most recent party primary to establish affiliation. In 2021 (effective January 1, 2022), the legislature amended Subsection A to require the last two primaries the candidate voted in to have been for the party the candidate is seeking to represent. Pub. L. No. 193-2021.

A. Rust’s Primary Voting History

Rust cannot establish Republican affiliation through his voting record because the two most recent Indiana primary elections he voted in were the Republican Primary Election in 2016 and the Democratic Primary Election in 2012 (2 App. 57). Over Rust’s primary voting history, he has voted in the Democratic Party primary four times, the Republican Party primary twice, and has not voted in either primary ten times since 1992.

2022 Primary	Did not vote	2006 Primary	Democratic
2020 Primary	Did not vote	2004 Primary	Did not vote
2018 Primary	Did not vote	2002 Primary	Did not vote
2016 Primary	Republican	2000 Primary	Did not vote
2014 Primary	Did not vote	1998 Primary	Did not vote
2012 Primary	Democratic	1996 Primary	Republican
2010 Primary	Democratic	1994 Primary	Did not vote
2008 Primary	Democratic	1992 Primary	Did not vote

(2 App. 57–59).² Rust has not voted in the last three primary elections, including the 2022 primary election (2 App. 57). As a result, Rust does not qualify for the 2024 Republican Party primary ballot based on his Indiana primary voting history because he has not voted in the Republican Party primary in “the two most recent primary elections in Indiana in which [he] voted.” I.C. § 3-8-2-7(a)(4)(A).

B. Rust’s Attempts at Certification

Rust lives in Jackson County, and he met with the Jackson County Republican Party Chair Amanda Lowery on July 19, 2023, seeking certification

² There is no evidence whether Rust was eligible to vote in any additional municipal primaries.

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under the Affiliation Statute Subsection B (2 App. 42, 247–50; 3 App. 2). But Lowery did not agree to certify Rust (2 App. 42; 3 App. 2).

III. Rust’s Suit and the Trial Court’s Decision

On September 18, 2023, Rust filed a verified complaint for declaratory and injunctive relief challenging the constitutionality of the Affiliation Statute (2 App. 37–51). Rust named as defendants: Secretary of State Morales, the Election Commission, and Chairperson Amanda Lowery (2 App. 39). After briefing and a hearing, the trial court entered a final order finding the Affiliation Statute unconstitutional and enjoining its enforcement (2 App. 9–35). Specifically, the trial court found the Affiliation Statute: (1) violates Rust’s associational rights under the First and Fourteenth Amendments; (2) is void for vagueness; (3) violates the Seventeenth Amendment by taking the right to elect a senator away from the people; (4) violates Rust’s equal protection rights under Indiana’s Constitution; and (5) improperly amends Indiana’s constitutional requirements for who may be a state senator or representative (2 App. 17–29). Additionally, the trial court found that Chairperson Lowery’s application of the Affiliation Statute was invalid and illegal because it violated the canons of statutory interpretation (2 App. 29–32). Both the State Appellants and Chairperson Lowery have appealed.

SUMMARY OF THE ARGUMENT

The Affiliation Statute is constitutional because it effectively balances the associational rights of candidates and of political parties and furthers the State’s well-established interest in regulating elections. The trial court’s decision holding

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the Affiliation Statute unconstitutional is wrong for two main reasons. First, the trial court failed to acknowledge the significant difference between a candidate's right to access the *general* election ballot and any right a candidate might have to access a particular political party's *primary* election ballot. Any limitation on Rust's ballot access is minor because, regardless of the Affiliation Statute's effect on a party's primary election, Rust can still access the general election ballot through other means and be elected to office. The Affiliation Statute only limits Rust's ability to be included on a ballot used by a political party to choose the candidate *that party* wishes to put forward for the general election.

Second, the trial court failed to fully recognize the State's clear and compelling interests in regulating elections and preserving parties' associational rights to govern their own membership. The trial court incorrectly dismisses a political party's associational right to control its membership as an interest of the party and not a state interest. But "[t]he *state* has an interest in protecting a party's right to determine its own membership and limit its candidates to those party members." *Hero v. Lake County Election Board*, 42 F.4th 768, 776 (7th Cir. 2022) (emphasis added). In fact, both state and federal courts have readily recognized a litany of important State interests in regulating elections including: maintaining the orderly, fair, and honest operation of its elections; preserving the identifiability of parties and enhancing their electioneering and party-building efforts; guarding against party raiding and "sore loser" candidacies; and avoiding voter confusion, ballot overcrowding, and the presence of frivolous candidates. All

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of these interests justify any minor limitation placed on Rust's access to the ballot by the Affiliation Statute's requirement that Rust establish sufficient affiliation with a political party before appearing on its primary ballot.

As an initial matter, if Rust does not file a timely declaration of candidacy (between January 10 and noon, Eastern Standard Time, February 9, 2024) or meet the other qualifications to run (aside from establishing party affiliation), then there is no plausible risk of injury caused by the Affiliation Statute and this case should be dismissed because Rust has no standing. Even if Rust meets these requirements and this Court determines he has standing, his claims fail on the merits.

On the merits, the trial court's two overarching errors—ignoring the difference between the primary and general election and ignoring the State's well-established interests—led to its incorrect ruling on each of the six substantive legal issues presented here.

First, the trial court erroneously applied strict scrutiny to Rust's First and Fourteenth Amendment access to the ballot claims. Because the Affiliation Statute limits only Rust's potential access to the Republican Party's primary ballot and he can still access the general election ballot, any ballot restriction imposed by the statute is minor and strict scrutiny does not apply. Under the more lenient *Anderson/Burdick* standard, the Affiliation Statute's reasonable and nondiscriminatory regulation requiring candidates to show affiliation with the party for which they wish to seek a primary nomination is justified by the State's important interest in regulating elections. Yet, even if strict scrutiny applied, the

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Affiliation Statute is narrowly tailored to balance the competing associational rights of the candidates and the parties and furthers the State's compelling interests.

Second, the Affiliation Statute is not vague or overbroad because it does not prohibit conduct and establishes a clear, objective standard for state election officials that it is understandable to an ordinary person. A candidate establishes affiliation to appear in a party's primary election by either: (1) their primary voting history or (2) by attaching a certification of party membership from the county party chair. An ordinary person exercising common sense knows how they can comply with the Statute.

Third, Hoosier voters select Republican and Democratic nominees for U.S. Senate by voting in primary elections and elect Senators in the general election. The Affiliation does not change this and does not violate the Seventeenth Amendment.

Fourth, the Affiliation Statute does not violate the Privileges and Immunities Clause of the Indiana Constitution because it requires everyone running for a party's primary to meet the same criteria. Rust's past primary voting decisions do not constitute an inherent characteristic, and neither he nor the trial court has shown that any class of person receives preferential treatment under the Statute.

Fifth, the Affiliation does not amend the Indiana Constitution. The constitutional qualifications for state senators and representatives must be met at the time of the general election. The Affiliation Statute does not affect or alter

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those requirements. Moreover, Rust lacks standing to bring this claim since he wants to run in the primary for the U.S. Senate.

Sixth, the plain language of the Affiliation Statute gives Chairperson Lowery discretion to decide whether or not to certify a candidate as a member of the Republican Party. Despite the trial court's mistaken holding to the contrary, Chairperson Lowery's exercise of this discretion is consistent with the purpose of the Statute, does not engraft words onto the Statute, does not render any part of the Statute meaningless, and does not conflict with other statutes.

Ultimately, the trial court's incorrect judgment has the potential to fundamentally alter Indiana's primary election system. Without an affiliation requirement, a candidate can game the system to increase their chances at election regardless of whether they share any political beliefs or ideas with the party they seek to represent. In counties with traditionally less competitive general elections, candidates of all stripes could seek better chances on a primary ballot for a party with which they have no affiliation. Minor party candidates could run unincumbered in major party primaries. The major parties could seek to disrupt each other's primaries by encouraging candidates affiliated with them to crossover and dilute the other parties' candidate pool. These, or any other similar tactics that could be devised, would lead to voter confusion and disrupt the orderly operation of Indiana's elections. The Affiliation Statute is a reasonable regulation that balances the rights of voters, candidates, and parties and furthers the State's important

interest in regulating elections. This Court should reverse the trial court's order finding the Statute unconstitutional and enjoining its enforcement.

ARGUMENT

I. If Rust fails to file a declaration of candidacy or meet the other requirements for candidacy, he has no standing.

If Rust does not file a declaration of candidacy or fails to meet the other statutory requirements to appear on the primary ballot, this case should be dismissed for lack of standing. Candidates for the upcoming primary election may begin submitting their declaration of candidacy forms on January 10, 2024. *See* I.C. § 3-8-2-4. By the time argument is held in this case on February 12, 2024, the deadline for filing a declaration of candidacy in the 2024 primary election will have passed. Rust asserts without certification that he will be injured because he will not be able to demonstrate party affiliation on his declaration of candidacy under the Affiliation Statute and his candidacy will be challenged (2 App. 43). But if Rust chooses not to file a declaration or is unable to comply with the other statutory or constitutional requirements for candidacy for office, he is in no imminent danger of suffering injury from the Affiliation Statute. A litigant has standing only if they have suffered a personal and direct injury or are in “imminent danger of suffering” one. *Holcomb v. Bray*, 187 N.E.3d 1268, 1286 (Ind. 2022). Without a sufficient showing of injury, this Court cannot adjudicate the substantive issues of his claims. *Id.* And “[a]n actual controversy must exist at every phase of litigation.” *Hero*, 42 F.4th at 772 (citation omitted). In addition to requirements in Indiana Code section 3-8-2-7, to be a candidate in the primary for U.S. Senate Rust must file a petition

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signed by at least 4,500 Hoosier voters, including at least 500 voters from each of Indiana's congressional districts. I.C. § 3-8-2-8. Rust can only establish an imminent injury from the Affiliation Statute by filing a declaration of candidacy form and meeting all of the other requirements to become a candidate in the primary. If he does not, there is no risk of injury from the Affiliation Statute and Rust does not have standing, so the trial court's order should be vacated and this case should be dismissed for lack of standing.

II. The Affiliation Statute does not violate Rust's associational rights under the First and Fourteenth Amendments.

The trial court's analysis under the First and Fourteenth Amendments is wrong for two main reasons. First, the trial court failed to acknowledge the significant difference between a candidate's right to access the general election ballot and a candidate's less compelling right to access a political party's primary election ballot. Second, the trial court failed to fully recognize the overwhelming precedent showing the State's clear and compelling interests in regulating elections and preserving parties' associational rights to govern their own membership. This Court reviews the trial court's legal conclusions de novo. *McIlquham v. State*, 10 N.E.3d 506, 511 (Ind. 2014).

The Affiliation Statute does not burden Rust's First and Fourteenth Amendment rights because it applies only to the primary election and does not prevent Rust from running for U.S. Senate in the 2024 General Election. The Affiliation Statute only prevents him from appearing on the Republican primary ballot without first establishing sufficient affiliation with the Republican Party,

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assuming he files to run in the primary election and is successfully challenged before the Election Commission under Indiana Code section 3-8-1-2.³ The Affiliation Statute also gives him two reasonable ways to show his affiliation: either by voting in two Republican primaries for the last two Indiana primaries he participated in or by securing certification by the country party chairperson. This restriction on Rust's access to the ballot is minor and serves the State's compelling interest in regulating election, preserves the political parties' rights of association, and prevents voter confusion. The Affiliation Statute does not unconstitutionally violate Rust's access to the ballot or associational rights.

First and Fourteenth Amendment challenges to state election laws are reviewed under the balancing test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and *Burdick v. Takushi*, 504 U.S. 428 (1992). Under the *Anderson-Burdick* standard, the Court weighs “the character and magnitude of the asserted injury to the rights protected by First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against ‘the precise interests put forward by the State as justifications for the burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights.’” *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789). The Court will apply a heightened standard—requiring a narrowly tailored regulation advancing a compelling state interest—only when the regulation “subjects the voters’ rights to

³ In order for the Election Commission to make any determination on the validity of a declaration of candidacy it must be challenged under Indiana Code sections 3-8-1-2 and 3-8-2-14.

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‘severe’ restrictions.” *Id.* at 434 (citing *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

Otherwise, when the regulation “imposes only ‘reasonable, nondiscriminatory restrictions’ upon those rights, the State’s important regulatory interests are generally sufficient to justify the restrictions.” *Id.* (quoting *Anderson*, 460 U.S. at 788).

Despite clear precedent from the Seventh Circuit that the more lenient *Anderson/Burdick* standard applies in primary ballot access cases, the trial court incorrectly applied strict scrutiny to the Affiliation Statute. Because Rust has access to the general election ballot regardless of the Affiliation Statute, any restriction on his right of access to the ballot is minor, and the State only needs to show that the regulation is reasonable and nondiscriminatory. The Affiliation Statute easily meets this more lenient standard and is justified by the State’s important regulatory interests in maintaining a stable political system, preserving the identifiability of political parties, protecting parties’ associational rights, and preventing voter confusion. Even if strict scrutiny applied, the Affiliation Statute is narrowly tailored to advance the State’s compelling interests.

A. Because the Affiliation Statute limits only Rust’s access to the primary ballot, the restriction is minor and justified by the State’s well-established interest in regulating election.

The Affiliation Statute’s restriction limits only Rust ability to access the party’s *primary* ballot without sufficient affiliation with the political party not his right to access the general election ballot. This restriction is minor and triggers the more lenient level of *Anderson/Burdick* scrutiny. While ballot access laws can

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“place burdens on...the rights of individuals to associate for the advancement of political beliefs...[.]” even restrictions on access to the *general* election ballot do not necessarily impose severe restrictions triggering strict scrutiny. *See Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013) (quoting *William v. Rhoades*, 393 U.S. 23, 30 (1968)). In *Navarro*, where Illinois required candidates for state legislature to secure 500 to 1000 signatures to appear on the *general* election ballot, the Seventh Circuit found that the burden was not severe, the more lenient level of *Anderson/Burdick* scrutiny applied, and the restriction did not violate the potential candidates First and Fourteenth Amendment rights to access the ballot. *Id.* at 428–32. For “the mere fact that a State’s system ‘creates barriers ... tending to limit the field of candidates from which voters might choose ... does not itself compel close scrutiny.’” *Burdick*, 504 U.S. at 433 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

Any restriction on a candidate’s access to a party’s *primary* ballot is even less severe than the restriction on access to a general election ballot in *Navarro*. The U.S. Supreme Court has regularly applied the more lenient level of *Anderson/Burdick* scrutiny to election restrictions. *See, e.g., Burdick*, 504 U.S. at 434 (applying the more lenient level of scrutiny to Hawaii’s prohibition on write-in voting in primary and general elections); *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (applying the more lenient level of scrutiny to Oklahoma’s semi-closed primary system that allowed independent voters but prevented other parties’ members from voting in the Libertarian Party’s primary election). The Seventh

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Circuit followed this well-established precedent when it ruled that restrictions on a candidate's access to a primary ballot are minor because the regulation merely prevents the candidate's "first choice" of being affiliated with a particular party and does not prevent access to the general election ballot through other means. *Hero v. Lake County Election Board*, 42 F.4th 768, 776 (7th Cir. 2022).

In *Hero*, the Seventh Circuit upheld Joseph Hero's removal from the Indiana Republican Party primary ballot after he was banned from the party for ten years. Hero had been a member of the Indiana Republican Party for over 40 years, voted in every Republican primary for two decades, and held several leadership positions with the party. *Id.* at 770. After a local disagreement about the use of eminent domain, Hero supported a group of independent candidates for town council. *Id.* In response, the local Republican party stripped Hero of his ability to run to be reelected as precinct committeeman and delegate to the Republican State Convention, and the State Party Chair banned him from running for any office as a Republican for ten years. *Id.* at 770–71.

When Hero tried to run for the St. John Town Council, local party leadership challenged his candidacy. *Id.* at 771. The Lake County Election Board removed Hero from the Republican primary ballot. *Id.* The Seventh Circuit held the county election board did not violate Hero's constitutional rights because "[t]he decision to strike Hero's name from the [primary] ballot imposed only a minor restriction on his ballot access." *Id.* at 776. Hero could still run for office in the general election as an independent or write-in candidate. *Id.* (citing I.C. §§ 3-8-2-2.5(a), 3-8-6-3(a)). Hero

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could also still “tout his Republican virtues...and run on a platform identical to any political party.” *Id.* Further, “[t]he state has an interest in protecting a party’s right to determine its own membership and limit its candidates to those party members.” *Id.*

Likewise, here, Rust can still run for the U.S. Senate as a Libertarian, a minor party candidate, an independent, or write-in candidate under Indiana law. I.C. §§ 3-8-4-10(b); 3-8-6-3; 3-8-2-2.5(a). He could also seek to fill any ballot vacancy for the Democratic, Libertarian, or Republican parties because the Affiliation Statute does not apply to the statutory ballot vacancy procedures. I.C. § 3-13-1-20. The trial court found *Hero* inapplicable because the candidate there was internally banned by the Republican Party and did not challenge the Affiliation Statute (2 App. 32). But *Hero* asserted the same First and Fourteenth Amendment rights to access the Republican primary ballot that Rust asserts here. *See Hero*, 42 F.4th at 771. And the same restrictions that were found to be constitutionally “reasonable and nondiscriminatory” in *Hero* are constitutionally reasonable and nondiscriminatory here.

Hero highlights the important distinction between a right to access the ballot in a primary election and a right to access the ballot in a general election. When a candidate asserts a right to access a political party’s primary ballot, that right must be considered in light of the party’s countervailing right to limit its membership and to exclude people the party does not recognize from being its standard bearer. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 224

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(1989) (finding “a political party has a right to identify the people who constitute the association and to select a standard bearer who best represents the party’s ideologies and preferences” (internal quotations and citations omitted)); *see also California Democratic Party v. Jones*, 530 U.S. 567 (2000) (holding California’s “blanket” primary system violated the political parties’ associational rights). The trial court acknowledged that the political parties have this right to limit their membership and to be involved in the candidate-selection process, and correctly noted that the U.S. Supreme Court found, “These rights are circumscribed, however, when the State gives the party a role in the election process.” (2 App. 17 (quoting *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008))). But the trial court mistakenly assumed the State cannot assert an interest in protecting those rights of the parties. “The state has an interest in protecting a party’s right to determine its own membership and limit its candidates to those party members.” *Hero*, 42 F.4th at 776.

And both Indiana and federal courts have recognized a litany of other rights justifying reasonable restrictions on associational and ballot access rights. The U.S. Supreme Court has recognized that the States have important interests in regulating elections that includes “preserv[ing] [political] parties as viable and identifiable interest groups, enhance[ing] parties’ electioneering and party-building efforts, and guard[ing] against party raiding and ‘sore loser’ candidacies by spurned primary contenders.” *Clingman*, 544 U.S. at 594; *see also Herr v. State*, 212 N.E.3d 1261, 1267 (Ind. Ct. App. 2023). Further, the State has an “interest in having

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orderly, fair, and honest elections ‘rather than chaos,’” *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 834 (1995) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)), as well as avoiding “voter confusion, ballot overcrowding, or the presence of frivolous candidacies.” *Munro v. Socialist Worker Party*, 479 U.S. 189, 194–95 (1986). Requiring a candidate to prove affiliation to appear on the party’s primary directly serves the interest of preventing voter confusion by preserving party identifiability, avoiding ballot overcrowding and frivolous candidacies, and maintaining order, rather than chaos, in Indiana’s primary and general elections.

Well-established U.S. Supreme Court precedent in *Burdick*, *Clingman*, and *Navarro* applied the more lenient *Anderson/Burdick* scrutiny where the restriction on rights, even those of voters, was minor. And as in *Hero*, that more lenient level of scrutiny should apply here because the Affiliation Statute’s restriction of Rust’s access to the primary ballot is minor. This restriction—that Rust can appear on a party’s primary only after he has established sufficient affiliation with the party through his primary voting history of certification by the county party chair—is reasonable and nondiscriminatory and is justified by the State’s strong interest in regulating elections. The Affiliation Statute does not violate Rust’s rights under the First and Fourteenth Amendments.

B. Even if strict scrutiny is required, the Affiliation Statute is narrowly tailored to further the State’s compelling interests.

The Affiliation Statute easily satisfies the more lenient *Anderson/Burdick* standard, but even if this Court were to find that the burden on Rust’s right to access the ballot were severe and strict scrutiny were to apply, the Affiliation

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Statute is constitutional because it is narrowly tailored to achieve the State's compelling interests. While the state and federal courts have recognized the State's important interests in regulating elections, the trial court failed to do so. First the trial court stated, "There is no compelling or even rational government interest being served here." (2 App. 20). But over the following pages, the trial court acknowledged that the State has some interest in regulating elections and ensuring candidates garner a significant modicum of support before appearing on a ballot. (2 App. 21–22 (citing *Anderson*, 460 U.S. at 803 and *Jenness v. Fortson*, 403 U.S. 431, 442 (1971))). The trial court continued, "While these asserted state interests may be compelling, [the Affiliation Statute], when overlaid with the totality of Indiana's Ballot access statutory framework, is not narrowly tailored to achieve those interests." (2 App. 22). As discussed above, the U.S. Supreme Court, the Seventh Circuit, and the Indiana Court of Appeals have all held that the states have multiple important interests in regulating elections. And here, the Affiliation Statute is narrowly tailored to balance the rights of all involved and further those compelling state interests.

A regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989). The regulation does not need to be the least restrictive way of furthering the government's goal—it need not be a perfect fit—but it cannot substantially burden the asserted right more than necessary. *Id.* at 800. The Affiliation Statute effectively balances all the relevant

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rights and interests at play in primary elections and does not burden Rust's access to the ballot or the Republican Party's right to associate more than is necessary.

The primary voting history provision allows a candidate control over their right to access the primary ballot, while the certification provision allows the party appropriate discretion whether or not to certify an individual as a member of the party who does not meet the voting history requirement. A candidate controls their primary voting history and may establish their association with a particular party if the candidate's two most recent primary votes were in that party's primary. I.C. § 3-8-2-7(a)(4)(A). The candidate may do so without certification from the county party chairperson. *But cf. Hero*, 42 F.4th at 771. This primary voting history provision furthers Rust's access to the primary ballot. Indeed, Rust voted in the Republican primary in 2016 primary, but chose not to vote in the next three Republican primary elections held in 2018, 2020, or 2022 (2 App. 57). Rust thus had an unencumbered means of access to the Republican 2024 primary election ballot if he had voted in any of the last three Republican primary elections, but he chose not to do so.

On the other hand, the certification provision furthers the State's interest in preserving the party's right to choose who it associates with and who it excludes. When a candidate cannot establish association by their primary voting history, the county party chairperson has discretion to certify whether or not the person is a member of their party. I.C. § 3-8-2-7(a)(4)(B). Thus, the Party has a right to select candidates for the primary election who would not otherwise qualify. That the

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Republican Party has chosen to exercise its right not to select Rust does not infringe his rights. In this way, the Affiliation Statute promotes the State's compelling interest in regulated, orderly elections that would be achieved less effectively absent this regulation and does not substantially burden either Rust or the parties' rights.

The trial court first complains that the Affiliation Statute is not narrowly tailored enough because it restricts a candidate's ability to run in a party's primary for "48 months or more" (2 App. 20). This is not correct. First, a candidate may run in a primary without waiting any time at all if they establish affiliation with the party through certification by the county party chair. Second, because primaries elections are held three out of every four years, it will not require 48 months for most candidates to establish an adequate primary voting record for affiliation. Third, the case upon which the trial court relies, *Kusper v. Pontikes*, 414 U.S. 51 (1973), is easily distinguishable because it focuses on voter's rights and not candidate's rights. In *Kusper*, the U.S. Supreme Court struck down as unconstitutional an Illinois statute locking voters into their party affiliation for 23 months after they voted in that party's primary. *Id.* at 61. The Illinois statute prevented a voter from exercising the most basic of political associational rights—to choose for whom they will vote. *Id.* at 57–58. It "deprived her of *any* voice in choosing the party's candidate." *Id.* at 58 (emphasis added). And the only way for that voter to break the party "lock" created by the Illinois statute was "to forgo voting in any primary for a period of almost two years." *Id.* at 61. The Illinois statute's restriction of the voter's most basic right to vote is why the U.S. Supreme

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Court found it unconstitutional. *Id.* at 60–61; *but see Clingman*, 544 U.S. at 595–97 (upholding Oklahoma’s semi-closed primary system that allowed independent voters but prevented other parties’ members from voting in the Libertarian Party’s primary election). Unlike the statute in *Kusper*, the Affiliation Statute does not restrict any individual’s right to cast a vote.

And the U.S. Supreme Court in *Lopez Torres* explained that *Kusper* does not apply equally to candidate’s rights and voter’s rights to access a party’s primary. Instead, the Court upheld as constitutional New York’s system for selecting nominees for trial court by party delegates elected by party members. *Id.* at 206. The party members elected delegates, who in turn selected the party’s nominee for the general election at a nominating convention. *Id.* at 200. To become a candidate for delegate, an individual must submit a petition signed by 500 party members within the 37 days preceding the filing deadline. *Id.* The *Lopez Torres* Court observed that *Kusper* addressed the right to vote in a primary and not regulations on who could run in it. *Id.* at 204. The Court continued, “Moreover, even if we extended *Kusper* to cover not only the right to vote in the party primary by also the right to run, the requirements of the New York law... are entirely reasonable.” *Id.* For that reason, *Kusper*’s rejection of restrictions on voter affiliation does not apply to the candidate regulations here, but even if it was extended to cover the situation, the Affiliation Statute is reasonable and constitutional because it gives a candidate two avenues to establish party affiliation, one that is time contingent and one that is not.

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The trial court's other complaint is that it believes the Affiliation Statute does not work to guarantee a candidate's party membership (2 App. 21–24). But even statutes subject to strict scrutiny need not perfectly address the targeted concern; instead, they must simply be narrowly tailored to address the State's compelling interest. *Williams-Yulee v. Florida Bar*, 575 U.S. 433, 454 (2015). A Hoosier may vote in either party's primary if they self-certify to have voted for a majority of the party's nominees in the last general election or intend to vote for a majority of the party's nominees at the next general election. I.C. § 3-10-1-6. The trial court reasoned, however, that because there is no way to know a voter's intent this statute is unenforceable and "anyone can vote in any primary" in Indiana (2 App. 24). The trial court also points to two Indiana Election Commission hearings where candidates openly claiming to be Republicans were able to appear on the Democratic primary ballot based on their primary voting record (2 App. 21, 106–32). Further, the trial court stated that the State had not shown justification for the recent amendment to the Affiliation Statute, effective January 1, 2022, which changed the voting history requirement from one to two primary elections (2 App. 24). But the trial court's criticism misses the mark and ignores the balancing of rights that the Affiliation Statute strikes.

The recent amendment illustrates this balancing of rights well. Now, a candidate must demonstrate more affiliation with a party by showing that their two most recent primary votes were for the party they seek to represent. This is tailored to address the concern that a person with different ideology from a party

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may try to seek to appear on that party's ballot by voting in a single party primary. But as before, a candidate can forgo that primary voting history requirement by securing certification from the county party chair, at the chair's discretion. This balancing of rights does not substantially burden either the candidates right to access the ballot or the parties' right of association.

Alternatives in either direction would place additional burdens on either the candidates' or the parties' rights. If a candidate could only establish affiliation with a party subject to the county chair's complete discretion, then their right to associate through ballot access may be burdened because it would be wholly at the whim of local party officials. But if the trial court's order stands and there is no requirement for party affiliation before an individual appears on a party's primary ballot, then the parties' associational rights are certainly substantially burdened because there are no limiting criteria on who may run for the party's nomination for the general election. Moreover, the State has a strong interest in preserving the identifiability of parties, *Clingman*, 544 U.S. at 594, for voters are also harmed when no affiliation requirement exists. Voters cannot effectively exercise their right to association with others for the common advancement of shared political beliefs and ideas when the parties are not readily identifiable and when a candidate need not show any affiliation before appearing on the party's ballot.

Here, the State's well-established interest in the regulation and orderly operation of elections is undeniably important and compelling. Any restriction on Rust's access to the ballot are minor because he can still run in the general election.

Even if the burden on Rust's right to access the ballot was severe, the Affiliation Statute is narrowly tailored to balance all of the competing rights of candidates, parties, and voters and to further those compelling state interests. Under either *Anderson-Burdick* standard, the Affiliation Statute is constitutional.

III. The Affiliation Statute is not vague or overbroad.

The void-for-vagueness doctrine does not apply here because the Affiliation Statute does not prohibit conduct. Moreover, the Statute is not vague or overbroad because it is understandable to an ordinary person. The Affiliation Statute plainly and unambiguously provides that a candidate can show their affiliation with a party by having voted in that party's primary in the last two primary elections that the candidate participated in or by getting a certification from the county party chair.

The void-for-vagueness doctrine applies to statutes which prohibit certain conduct. *See Karlin v. Faust*, 188 F.3d 446, 459 (7th Cir. 1999). The Due Process Clause was not intended to create a cause of action anytime a person thinks a statute or regulation is not sufficiently understandable. Instead, it "requires only that the law give sufficient warning so that individuals may conduct themselves in a manner which avoids the forbidden conduct." *Chandley Enterprises, Inc. v. City of Evansville*, 563 N.E.2d 672, 675 (Ind. Ct. App. 1990).

The Affiliation Statute, however, does not prohibit conduct and is not enforced by civil or criminal penalties, so the void-for-vagueness doctrine does not even apply here. This Court has not affirmatively found that the void-for-vagueness

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doctrine applies in civil cases. *Johnson v. St. Vincent Hospital, Inc.*, 404 N.E.2d 585, 596 (Ind. 1980), overruled on other grounds by *In re Stephens*, 867, N.E.2d 148 (Ind. 2007); *see also Brunton v. Porter Memorial Hosp. Ambulance Service*, 647 N.E.2d 636, 640 (Ind. Ct. App. 1994) (concluding that in *Johnson* this Court “opined that this type of constitutional challenge [a void-for-vagueness challenge] was applicable only to penal statutes”); *but see Ray v. State Election Bd.*, 422 N.E.2d 714, 721 (Ind. Ct. App. 1981) (citing *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967) as “clearly show[ing] the ‘void for vagueness doctrine’ also applies to statutes...which do not impose criminal sanctions”). Assuming for the sake of argument that it does, the question is whether the statute is sufficiently clear so that an “ordinary person exercising ordinary common sense can sufficiently comply with the statute.” *Neudecker v. Neudecker*, 566 N.E.2d 557, 562 (Ind. Ct. App. 1991), *aff’d*, 577 N.E.2d 960 (Ind. 1991). The trial court failed to show that it is unclear to an ordinary person how to comply with the Affiliation Statute.

The Affiliation Statute clearly states what an aspiring candidate must do to declare candidacy for a party primary election. The Affiliation Statute is not vague because election officials have explicit, objective standards for whether a person is sufficiently affiliated with a party to appear on their primary ballot: either the candidate (1) has a recent primary voting record with the party, or (2) the candidate attaches a written certification of party membership from the county party chair to their declaration of candidacy. *See Grayned v. City of Rockford*, 408 U.S. 104, 108

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(1972) (finding that laws prevent arbitrary and discriminatory enforcement by providing explicit standards for those who apply them). Here, the statute is not vague or unclear to an ordinary person. Either a certification from the county party chair is attached to the declaration of candidacy or it is not. This is a simple and explicit standard for the state and county election officials tasked with applying the Affiliation Statute and for the courts who exercise judicial review over the decisions made by those election officials. Nor is the statute made vague by affording county party chairs discretion to issue a certification. The only requirement placed on candidates is that they attach the party chair's certification.

The trial court improperly relied on *Ray*, to find that the Affiliation Statute is vague. In *Ray*, our Court of Appeals found a statute prohibiting individuals from seeking placement on both Republican and Democratic Party ballots unconstitutional. 422 N.E.2d at 715.⁴ The Court held that the language prohibiting persons “belonging to any other party” from participating in a primary election was vague and the statute provided no guidance to its meaning. *Id.* The Court also found that the statute was overbroad because it prohibited a candidate from “associating with more than one political party” and was not the least restrictive means to prohibit cross-filing with both party primaries, the presumed purpose of the statute. *Id.* at 723. Unlike in *Ray*, the election officials here have an objective

⁴ The statute the Court of Appeals found was unconstitutional, Indiana Code section 3-1-9-6, was repealed in 1986.

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and clearly understood standard to determine whether a candidate has established sufficient affiliation with a party to appear on its primary ballot.

Another important factual distinction from *Ray* is that here it is the party, through county party chair certification, that decides party membership. In *Ray*, the State Election Board applied the language of the applicable statute to determine who belonged to which party. 422 N.E.2d at 715. In contrast, under the Affiliation Statute, the county party chair exercises discretion as to whether she will certify a candidate as a “member” of her party. The state or county election officials simply determine whether the county party chair has made that certification when applying the statute. This standard applied by the election officials is objective and easy to understand. It is not the election officials that are determining who is a “member” of the party, it is the county party chair. And leaving the party representative with this discretion is constitutional, even without a consistent standard, because “a political party has a right to identify the people who constitute the association.” *Eu*, 489 U.S. at 224. The Affiliation Statute leaves the determination of party membership where it should be, with the party. The state actors—the state and county election officials—are not called upon to exercise judgment about the adequacy of a candidate’s affiliation; instead, they simply judge whether the candidate meets either of two objective criteria. The Affiliation Statute is not vague.

Nor is the Affiliation Statute overbroad. It effectively balances the associational rights of both individuals and parties by giving each a concrete avenue

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to vindicate their rights. The overbreadth doctrine protects peoples' constitutional freedoms from falling "within the ambit of a statute written more broadly than needed to proscribe illegitimate and unprotected conduct." *Matheney v. State*, 688 N.E.2d 883, 905 (Ind. 1997). This analysis is comparable to that of narrow tailoring, and as shown above, any restriction Rust's associational rights is not broad but narrowly tailored to preserve the rights of all involved. Under the Affiliation Statute, Rust may choose to affiliate with the Republican Party, without interference from the county party chair, by voting in two Republican Party primaries. If, as here, he has chosen not to do so, he can still become a candidate in the Republican primary, but only if he is certified at the discretion of the county party chair. This regulation is not overly broad but is narrowly tailored to balance the rights of both Rust and the Republican Party. The Affiliation Statute is not unconstitutionally broad.

Ultimately, the void-for-vagueness doctrine does not apply because the Affiliation Statute does not prohibit conduct. But even if that doctrine were to apply, that standard applied by the state and county election officials is constitutional because it is objective, explicit, and easy to understand. Either a candidate meets the primary voting requirement or they do not; either a certification from the county party chair is attached or it is not. And these two distinct avenues to establish party affiliation are not overly broad but are narrowly tailored to balance the rights of Rust and the Republican Party.

IV. The Affiliation Statute does not violate the Seventeenth Amendment.

The Affiliation Statute does not violate the Seventeenth Amendment because Hoosier voters nominate major party candidates for U.S. Senate in primary elections and elect U.S. Senators in general elections; the Affiliation Statute does not change that. The Seventeenth Amendment provides that two senators from each state are “elected by the people thereof.” That amendment changed the original rule set down in the Constitution that senators be “chosen by the [state] Legislature.” U.S. Const. art. 1, §3. But it does not divest States of the power to set the “Times, Places, and Manner of holding Elections for Senators and Representatives,” U.S. Const. art. 1, § 4, much less speak to the conduct of primaries.

The trial court found that the statute “indirectly violates the 17th Amendment as it protects incumbents and other party insiders...” by excluding candidates like Rust from running (2 App. 27). It is worth mentioning again, the Affiliation Statute does not prevent Rust from running for U.S. Senator in the 2024 General Election. Rust has several other avenues available to run for Senate and try to be elected by the people of Indiana. The Affiliation Statute governs only the nomination of candidates for major political parties in their primary elections. It in no way deprives the people of the ability to elect their senators at a general election.

The trial court erroneously relies on the U.S. Supreme Court’s decision in *Thornton* for its contrary holding. In *Thornton*, the Court held that an Arkansas constitutional amendment that placed term limits on Senators and Representatives

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violated the Federal Constitution. 514 U.S. at 805-15. The Federal Constitution fixes qualifications for those offices, and states lack the authority to add qualifications. *Id.* But the Court found these fixed qualifications distinguishable from mere procedural requirements for access to ballots that do not violate the constitution. *Id.* at 834–35. The Court has recognized that procedural requirements serve the states’ interests in avoiding voter confusion, ballot overcrowding, or the presence of frivolous candidacies. *Id.* at 834; *see, e.g., Munro*, 479 U.S. at 198–99 (finding constitutional a statute requiring minor-party candidates to receive at least 1% of vote cast in primary election before being placed on the general election ballot); *American Party of Texas v. White*, 415 U.S. 767 (1974) (finding constitutional multiple preconditions for minor-party candidates to appear on the general election ballot); *Libertarian Party of Illinois v. Rednour*, 108 F.3d 768, 777 (7th Cir. 1997) (holding statute mandating candidates show minimum voter support to gain access to ballot sets merely procedural requirements that do not violate the constitution). So, the Seventeenth Amendment poses no barrier to states enacting requirements to govern the manner of elections.

This case is far removed from *Thornton*. The Affiliation Statute does not add minimum qualifications for the general election or to hold the office of Senator. It merely sets up a procedural requirement for access to a party’s primary ballot. The Affiliation Statute does not block any candidate from the general election ballot because of their affiliation or lack of affiliation with a political party. And the Affiliation Statute does not prevent Hoosier voters from electing U.S. Senators to

represent them. The Affiliation Statute does not violate the Seventeenth Amendment.

V. The Affiliation Statute does not violate Rust’s equal protection rights under Article 1, Section 23.

The Affiliation Statute does not violate state equal protection because it requires everyone who wants to run in a party’s primary election to meet the same criteria. The privileges and immunities clause of the Indiana Constitution, Article 1, Section 23, states, “The 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.” This Court has adopted a two-part test to determine whether disparate treatment by the legislature violates the privileges and immunities clause in Article 1, Section 23. *Whistle Stop Inn, Inc. v. City of Indianapolis*, 51 N.E.3d 195, 198 (Ind. 2016) (internal citations omitted). First, the disparate treatment provided by the statute “must be reasonably related to inherent characteristics which distinguish the unequally treated classes.” *Id.* Second, the preferential treatment afforded under the law “must be uniformly applicable and equally available to all persons similarly situated.” *Id.*

The Affiliation Statute does not violate the state constitution because it imposes the same requirements on anyone seeking to declare candidacy in a party’s primary. There are no disparate classes or preferential treatment under the Affiliation Statute. Both Rust and the trial court have failed to identify any inherent characteristic that is the basis for any unequal treatment. Rust chose not to vote in the last three primary elections. Before that he chose to vote in twice as

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many Democratic Party primaries than Republican Party primaries. These decisions by Rust do not create any “inherent” characteristic for Rust that is recognizable under the Privileges and Immunities Clause. This Court has found that the meaning of “inherent” is reflected in its Article 1, Section 23 decisions. *Id.* at 200 (citing *Collins v. Day*, 644 N.E.2d 72, 81 (Ind. 1994) (recognizing the distinctive nature of farm work); *Gambill v. State*, 675 N.E.2d 668, 677 (Ind. 1996) (recognizing the presence of mental illness as an inherent characteristic); *Horseman v. Keller*, 841 N.E.2d 164, 172 (Ind. 2006) (recognizing not being present at the Election Day polling site was inherent to being an absentee voter)). A person’s ability to choose which party to associate with in a primary election, or the choice not to vote at all, is the opposite of an inherent characteristic. Rust cannot allege disparate treatment based on those decisions or their consequences.

The trial court incorrectly concluded that Rust is being treated differently than those who were able to be on the primary ballot before the 2021 amendment and those candidates that receive a certification from the county party chair (2 App. 27–28). First, the Affiliation Statute does not violate equal protection by treating Rust differently than those who were placed on the primary ballot under the prior version of the statute. An incumbent who was able to declare their candidacy for a prior election under the prior version of the Affiliation Statute is not similarly situated to Rust. Rust cannot claim an equal protection violation because he is being treated differently from individuals who ran in past elections. Any candidates

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seeking placement on the 2024 primary ballot must comply with the Affiliation Statute as it is presently in effect.

Further, there is no equal protection violation as to those individuals who are certified by a county party chair. A county party chair under the Affiliation Statute is not taking a “state action” for purposes of the Privileges and Immunities Clause. State action occurs when: (1) the “claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in government authority;” and (2) the party charged with the deprivation could be described as “in all fairness as a state actor.” *Osmulski v. Becze*, 638 N.E.2d 828, 833 (Ind. Ct. App. 1994) (citing *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 618–22 (1991)).

When deciding whether or not to certify an individual as a member of their party, a county party chair is exercising the party’s right of association and not government authority. Additionally, the county party chair is a party actor and cannot in all fairness be considered a state actor.

Ultimately, Rust has failed to show that any class of persons receives preferential treatment. The Affiliation Statute applies to all individuals who want to declare their candidacy for a major party’s primary election. The Statute does not violate the Privileges and Immunities clause of the Indiana Constitution.

VI. The Affiliation Statute does not add to Indiana’s constitutional requirements to become a state senator.

The Affiliation Statute does not amend Article 4, Section 7 of the Indiana Constitution by adding to the age and residency requirements to be a State Senator or Representative. Because Rust is seeking to run for the U.S. Senate, not for the

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State Senate, this claim is raised as a voter, not as a candidate. (2 App. 37).

Initially, Rust does not have standing to raise this claim because he cannot show an injury or imminent risk of an injury. Rust is not proposing to run for State Senate, and he has not identified a new resident or 21-year-old Hoosier that is supposedly adversely affected by this Statute for whom he would like to vote and, as discussed in Part I above, who would otherwise be eligible to run for State office. Because he has not shown an injury, Rust cannot raise this claim, and this was not a ground upon which the trial court could declare the Statute unconstitutional.

Regardless, the Affiliation Statute does not raise the age to be a representative. Article 4, Section 7 sets out state senator and representative qualifications that must be met at the time of the general election. A state representative must be 21 years of age “at the time of his election.” Ind. Const. art. 4, § 7. The Affiliation Statute does not prevent or change that. Anyone at least 18 years old at the time of a general election may vote in both the primary and general election that year, I.C. § 3-7-13-1(1), and could vote in the two primary elections necessary to meet the Affiliation Statute’s voting requirement by the age of 21 because primary and general elections occur three out of every four years in Indiana. The trial court incorrectly found that satisfying this voting standard required four years, which the court concluded both raised the minimum age for a candidate to 22 and the minimum residency requirements from two to four years (Exhibit A, pp. 20–21). This is incorrect.

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While it is true that availability of primary voting opportunities may differ for individuals depending on the alignment of elections to the candidate's birthdate or residency in Indiana, this does not alter the core requirements to hold office or bar the candidate's access to the primary ballot. It takes at most three years to satisfy the primary voting requirement to appear on a primary election ballot depending on the year the potential candidate turns 18. And even candidates with only a partial voting record can seek certification from the local party chair to establish their actual party affiliation and eligibility for the primary. So the Affiliation Statute does not prohibit a 21-year-old Hoosier from appearing on the primary ballot. But even if the Statute prevented a newer resident or 21-year-old Hoosier from running in a party's primary, that individual could still appear as a candidate in the general election and be elected to the General Assembly. The Affiliation Statute does not rewrite the Indiana Constitution.

VII. A statute affording a county party chair discretion to certify party membership as a way to run in the party's primary is not rendered "invalid and illegal" by how the chair exercises that discretion.

The Affiliation Statute is not "invalid and illegal" because Chairperson Lowery refused to certify Rust in light of his voting history. The Affiliation Statute's plain language gives Chairperson Lowery the complete discretion to certify Rust as a member of the Republic Party or not. The trial court concluded that Lowery cannot be able to exercise this discretion in the way she has because it would: (1) not be consistent with the purpose of the law; (2) engraft words onto the

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Statute; (3) render portions of the Statute meaningless; and (4) conflict with Indiana Code section 3-10-1-2 (2 App. 29). Each of these conclusions is wrong.

Pure questions of law like statutory interpretation are reviewed *de novo*. *Nicoson v. State*, 938 N.E.2d 660, 663 (Ind. 2010). The purpose of statutory interpretation is to ascertain and give effect to the legislature's intent. *Id.* The statute itself is the best evidence of that intent. *Id.* When the meaning of a statute is plain on its face, no interpretation is required. *Day v. State*, 57 N.E.3d 809, 812 (Ind. 2016). When a candidate cannot establish party affiliation through their primary voting history, “a candidate is considered to be affiliated with a political party only if...[t]he county chairman of: the political party with which the candidate claims affiliation; and the county in which the candidate resides; certifies that the candidate is a member of the political party.” I.C. § 3-8-2-7(a)(4) (structure condensed). This plain language gives Chairperson Lowery discretion to decide whether or not to certify Rust.

Inasmuch as the trial court conclusion that Lowery's exercise of discretion violates the canons of statutory interpretation is distinct from its incorrect conclusion that the Affiliation Statute is overbroad, Lowery's exercise of discretion is not a ground to invalidate the Affiliation Statute. The canons of interpretation are not mandatory rules, but guides designed to help courts “determine the Legislature's intent as embodied in particular statutory language.” *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). A private individual's decision cannot violate the canons of interpretation. Here, Chairperson Lowery's decision

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not to certify Rust as a Republican, on any ground, cannot violate the canons of interpretation, and her exercise of discretion cannot provide a basis for the trial court to strike down the Affiliation Statute. But even if it were possible, Chairperson Lowery's exercise of discretion here does not violate any of the four canons of statutory interpretation identified by the trial court.

First, Chairperson Lowery's exercise of discretion is consistent with the purpose of the statute—to allow political parties to certify who is a member of its party for a primary election that will determine the party's candidate for the general election. The trial court held that the purpose of the Affiliation Statute is to “determine if a candidate is a *bona fide* member of the political party” (2 App. 30). This is not consistent with the language of the Statute. The Affiliation Statute provides candidates two ways to establish that they are “*affiliated* with a political party[.]” I.C. § 3-8-2-7(a)(4) (emphasis added). One of the ways to establish affiliation is if a county party chair, in their discretion, certifies the individual as a member of the political party. Thus, the purpose of the statute is to establish “affiliation” not membership or “bona fide membership.” The Affiliation Statute does not suffer from the same problems as the now-repealed statute in *Ray*, which the Court of Appeals found unconstitutionally vague and overbroad because it required election officials to attempt to determine who “belong[ed] to any other party.” 422 N.E.2d at 722–23. The Affiliation Statute removes decision about party membership from the state election officials and provides candidates with two concrete ways to establish their affiliation with a party: their primary voting record

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or a written certification of their party membership by the county party chair. The trial court misinterpreted the plain language of the Statute and the evident intent of the General Assembly.

Second, the trial court reasoned that allowing Lowery's to exercise her discretion would engraft language onto the statute allowing Lowery, and not the voters, to decide who can run in the general election. (2 App. 31). This is plainly incorrect. Voters in the primary election are choosing only who will be the party's candidate for U.S. Senate. They are not choosing the complete slate of candidates for the general election. Nor are they choosing the winner of the general election. Nothing about the Affiliation Statute changes that. Further, Chairperson Lowery does not have complete control over who can run in the primary. A candidate with a consistent, recent primary voting history has no need to receive certification from the county party chair. While a political party has a right to limit its membership as it wishes, *Lopez Torres*, 552 U.S. at 202, it is Hoosier voters that select who will represent their party on the general election ballot by voting in their party's primary. Allowing a county party chair to certify a potential candidate's membership in the party does not add language to the Affiliation Statute.

Third, the trial court also incorrectly concluded that Chairperson Lowery's interpretation renders a portion of the statute meaningless (2 App. 31). Chairperson Lowery may freely exercise her discretion, even if it means refusing to certify a person that does not meet the primary voting history requirement. One county party chair's exercise of discretion in this way does not render the

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certification provision meaningless. Any other county party chair could choose to exercise their discretion differently. And Rust's voting history is more than his last two primaries; Rust voted in Democratic Party primaries twice as many times as he voted in Republican Party primaries over his voting history (four compared to two) (2 App. 57–59). And Rust chose not to vote at all in the last three primary elections (2 App. 57). In fact, Rust has chosen not to vote at all in ten different primaries throughout his voting history. Rust's voting history is more than just the last two primaries he voted in. The Affiliation Statute does not compel Chairperson Lowery to certify Rust, and her decision not to certify him does not render any portion of this Statute meaningless.

Fourth, the Affiliation Statute does not conflict with Indiana Code section 3-10-1-2, which requires major parties to hold primaries to select nominees for the general election. The Affiliation Statute simply establishes procedures for demonstrating sufficient affiliation to the party to be amongst the pool of primary candidates vying to represent that party in the general election. This process to ensure the mutual association of parties and those who would represent them does not conflict with the primary election process any more than a party not submitting a candidate for a particular office. A party does not violate Indiana Code section 3-10-1-2 by not nominating candidates or holding a primary to select candidates for every office. Neither does the Affiliation Statute's procedures to qualify for a party's primary ballot conflict with Indiana Code section 3-10-1-2.

CONCLUSION

The Affiliation Statute advances the State’s strong interest in regulating election and reasonably balances the rights and interests of the voters, the candidates, and the parties without unconstitutionally burdening the exercise of First Amendment rights. The Affiliation Statute does not violate any provision of the Federal or State Constitutions. This Court should reverse the trial court’s order finding the Affiliation Statute unconstitutional and enjoining its enforcement. If this Court expects any delay in issuing an opinion following oral argument beyond the February 16, 2024, deadline to challenge a declaration of candidacy, this Court should grant the State Appellants’ stay.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I verify that this Brief of Appellee contains no more than 14,000 words, not including those portions excluded by Indiana Appellate Rule 44(C).

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CERTIFICATE OF SERVICE

I certify that on January 2, 2024, I electronically filed the foregoing document using the Indiana E-filing System. I also certify that on January 2, 2024, I served the foregoing document on the following contacts through E-Service using the IEFS:

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