STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 12
	) SS:	
COUNTY OF MARION	)	CAUSE NO.: 49D12-2309-PL-036487

JOHN RUST,

Plaintiff,

v.

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,

Defendants.

FINDINGS OF FACT, CONCLUSIONS THEREON, AND JUDGMENT/ORDER ON THE PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

The following facts are drawn from the parties' papers, the evidence submitted in advance of the injunction hearing, and from the representations made during oral argument. These facts are largely undisputed by the parties.

A. INTRODUCTION

On August 18, 2020, amid unprecedented and generational civil, political and economic turmoil, the Governor of Indiana delivered a charge[1] to his citizens wherein he committed that the state of Indiana would lead by example and take steps to shape the change necessary to remove barriers to access and opportunity for all Hoosiers. *See* www.in.gov/equity/the-governors-charge. Specifically, the Governor declared that "over our country's long history, inequity and exclusion have actually been engrained in many of

[1] Merriam-Webster defines "charge" as "to command, instruct or exhort with authority."

our institutions, systems and structures – often unknowingly. And while we've made progress, we haven't rooted it out fast enough." *Id*.

On April 29, 2021, *only eight months after that address*, the Indiana Legislature enacted an amendment to Indiana Code § 3-8-2-7(a)(4), part of Indiana's ballot access election law, that effectively bars and excludes the candidacies of approximately 81% of Indiana citizens. *See Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction*, pp. 4, 11, fn. 2, 3 and 4. This case challenges the constitutionality of that statute under both the United States Constitution and the Indiana Constitution.

When the immense power of the state is turned toward and upon its citizens in such a way that it imperils a sacred and cherished right of those same citizens, the state's actions must be for an articulated compelling and pressing reason, and it must be exercised in the most transparent and least restrictive and least intrusive ways possible. The 2021 amendment to I.C. § 3-8-2-7(a)(4) fails in this regard. It unduly burdens Hoosiers' long-recognized right to freely associate with the political party of one's choosing and to cast one's vote effectively. For the reasons set forth herein, Plaintiff John Rust's Motion for an Injunction is **GRANTED**.

B. THE PARTIES

John Rust ("Rust") is an Indiana citizen from Seymour, Jackson County, Indiana, who seeks to be on the Republican primary ballot for U.S. Senate in 2024. Diego Morales ("Morales") is the Secretary of State of Indiana and is Indiana's chief election official responsible for administering and enforcing the Indiana Election Code, including the statutory provisions challenged in this case. The Indiana Election Commission ("IEC") is responsible for holding hearings regarding candidate challenges and deciding whether a

candidate will be able to have access to the primary ballot. Amanda Lowery ("Lowery") is the chair of the Jackson County Republican Party who, by virtue of I.C. § 3-8-2-7(a)(4)(B) is statutorily empowered to certify candidates who are members of the Republican party.

C. PROCEDURAL HISTORY

This case was before the court on the filing by Plaintiff Rust of his Verified Complaint for Declaratory and Injunctive Relief and his contemporaneous Motion for Preliminary Injunction, both filed on September 18, 2023. On October 17, 2023, State Defendants Morales and the IEC, filed their Response in Opposition to Plaintiff's Motion for Preliminary Injunction, as did Defendant Lowery. On October 17, 2023, Morales and the IEC filed their unopposed T.R. 65(A)(2) Motion to Consolidate the November 1, 2023 hearing on the Plaintiff's Preliminary Injunction with a trial on the merits, which the court granted by Order dated October 18, 2023. Rust filed his Reply in Support of His Motion for Preliminary Injunction on October 24, 2023. There were no objections to the evidence offered and designated as exhibits by all the parties. The court heard arguments on all pending matters on November 1, 2023. Michelle C. Harter appeared for Plaintiff Rust. James Bopp, Jr. appeared for State Defendants Morales and the IEC. Paul O. Mullin, E. Ryan Shouse and William D. Young appeared for Lowery. The court took all motions and matters under advisement.

D. INDIANA'S BALLOT ACCESS FRAMEWORK GENERALLY

According to the IEC public website[2], to seek nomination in the May 2024 primary election, a candidate must belong to the Democratic or Republican Party. The candidate meets this requirement if 1) the party ballot that the voter requested in the two (2) most

[2] www.in.gov/sos/elections/files/2024-Candidate-Guide.FINAL.pdf

recent primary elections in Indiana in which the candidate voted was the ballot of that party[3], or 2) the candidate files a certification from their county chair affirming their membership in that political party. The declaration of candidacy for primary nomination (CAN-2) requires the candidate to affirm their party affiliation and attach the certification, if required. This is known as the "Affiliation Requirement". Democratic or Republican candidates seeking nomination in the 2024 primary election for U.S. Senator or Governor must also collect at least 500 signatures of registered voters in each of Indiana's nine Congressional districts for a minimum amount totaling 4,500 statewide. The petition signatures are first reviewed and certified by county voter registration officials. Certified petitions are then filed with the Indiana Election Division before or at the same time as the declaration of candidacy, Form CAN-2 for U.S. Senator. This is known as the "Petitioning Requirement."

Rust challenges the Affiliation Requirement.[4]

E. THE CHALLENGED STATUTE

Effective January 1, 2022, pursuant to I.C. § 3-8-2-7(a)(4), 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

[3] As described before, prior to January 1, 2022, Indiana law required only one (1) most recent requested primary ballot to document party affiliation, and, before that, a simple affirmation appears to have sufficed to document party affiliation. Notably absent in this case, from either the State Defendants or Lowery, was any explanation or rational as to why the 2021 amendment to I.C. §3-8-2-7(4)(A) that went from (1) most recent primary to two (2) most recent primaries, effective January 1, 2022, was necessary or desirable.

[4] It appears that most of the caselaw addressing candidate/voter challenges to a state ballot access framework involve petitioning requirements. That is not what is at issue in this case. Moreover, apart from *Ray* (discussed *infra*), the court was not directed to, and was unable to locate, any Indiana Court of Appeals or Indiana Supreme Court cases where the constitutionality of Indiana's ballot access framework was addressed.

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.

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.

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.

F. RUST'S EFFORTS TO BECOME A REPUBLICAN PRIMARY CANDIDATE

Rust does not have the required voting record under Option A of the recently amended affiliation statute. Rust voted in the Republican primary in 2016 but did not vote in 2020 as that election was moved due to Covid-19. 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. *See* Rust Depo. pp. 58-59, 65-66; *See also* Exhibit C to Plaintiff's Complaint- (Rust's voting record).

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 chairperson Lowery to request she provide written certification of Rust's membership in the Republican party pursuant to Option B. Lowery told Rust she would not certify him because of his voting record, a position she reported to the IndyStar newspaper as well. *See* Exhibit D to Plaintiff's Verified Complaint- (August 22, 2023 IndyStar article.) Lowery also informed IndyStar that she would not sign off on any candidate that did not vote in the two primaries pursuant to Option A in the statute. Once Rust formally announced his candidacy, Lowery

contacted him to tell him he was "wasting his money" and that there was "no way" she would ever certify him. *See* Plaintiff's Complaint, para. 27.

Rust argues that he is Republican and 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. *See* Plaintiff's Complaint, Ex. A – (donations made by Rust as posted on the Federal Election Commission website.) Lowery argues that Rust is a Democrat and has offered her Affidavit listing factors she alleges she considered when declining to certify Rust as a Republican. Essentially, she takes issue with his prior voting in Democratic primaries and the fact that she is not aware of him volunteering for the Jackson County Republican party or making local financial contributions to the Republican party. *See* Lowery's Opposition to Motion for Preliminary Injunction, Ex. 2. These factors were not presented to Rust prior to Lowery declining to certify him. Lowery's list of factors does not include Rust's current positions on the issues or his donations to non-local Republican candidates.

Without certification, Rust will 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 will be challenged. Indeed, Rust's would-be opponent's campaign team has told IndyStar that someone from his team will file a challenge to have Rust not placed on the ballot for failing to comply with I.C. § 3-8-2-7. *See* Plaintiff's Complaint, Ex. D.

Rust filed a Verified Complaint for Declaratory and Injunctive Relief as well as a Motion for Preliminary Injunction. He argues that the statute violates the federal and state constitutions in numerous respects, and further that Lowery has violated the canons of

statutory construction when applying the statute to him. Defendants argue that the statute is constitutional, and that Lowery properly applied it.

G. THIS MATTER IS RIPE FOR ADJUDICATION

The court, as a threshold matter, finds that this matter is ripe for adjudication. Recently, in *Holcomb v. Bray*, the Indiana Supreme Court addressed ripeness:

> [T]here must exist not merely a theoretical question or controversy but a real or actual controversy, or at least the ripening seeds of such a controversy." *Id.* In other words, the issues in a case must be based on actual facts rather than abstract possibilities, and there must be an adequately developed record upon which we can decide those issues.

187 N.E.3d 1268, 1287 (Ind. 2022).

In *Holcomb*, the governor challenged the constitutionality of a statute that would allow the legislature to call itself into session. The legislature argued the matter was not ripe because the legislature had not acted or threatened to act pursuant to the statute yet. The Indiana Supreme Court found that Holcomb did not need to wait for the future for it to address the constitutionality of the law. It found specifically that:

> [t]he dispute here is far from theoretical, and the parties have sufficiently developed a record upon which we can decide the constitutionality of [the statute] and [i]t is thus unnecessary to wait for the Legislative Council to call an emergency session or a law to be passed during that session. Neither occurrence would add anything to the record to help us address [the statute's] constitutionality.

Id. at 1287-88. The same is true in this case. There is no reason to wait until Rust is actually removed from the ballot at a challenge hearing to address the constitutionality of the statute; there are at least ripening seeds here now. And, the State Defendants have admitted in their Motion to Consolidate that the record is fully developed and all that remains to be decided are legal issues. *See* State Defendants' Memorandum in Support of

Motion to Consolidate, p. 4: "because this case turns on purely legal issues, concerns no issues of facts, and further discovery is unnecessary, consolidation is proper." Waiting for Rust to be removed from the ballot adds nothing to the record to help this court address the constitutional issues here.

Defendants argue that Rust's claims are not ripe because Lowery could resign, die or have a change of heart, which could allow for him to be certified. They also claim that Rust could be precluded from the ballot due to other ways besides the statute or that Rust himself could die prior to the election. The Court does not find these arguments to be persuasive in light of *Holcomb* and the facts in the record. The narrow issues in this case are a matter of great public importance, the issues presented are susceptible to recurring, and the record is sufficiently developed.

H. THE PURPOSE OF ELECTION LAWS IS TO PROTECT THE WILL OF THE VOTER AND PREVENT DISENFRANCHISEMENT

Before turning to the constitutionality of the statute, it is helpful to recognize what the Indiana Supreme Court aptly stated long ago about the very purpose of all election laws:

> the purpose of all election laws is to secure a free and honest expression of the voter's will. Statutes controlling the activities of political parties, party conventions, and primaries, and providing for the manner in which the names of candidates may be put upon the ballots, have for their only purpose the orderly submission of the names of candidates for office to the electors to the end that the electors may know who are candidates and have a free opportunity to vote for their choice, and that the ballots may not be incumbered by the names of those who have no substantial support. . .
> **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) (emphasis added).[5] Or, as another Hoosier raised lawyer was once heard to remark: "Elections belong to the people. It's their decision." Six Months at The White House with Abraham Lincoln: The Story of a Picture by F. B. Carpenter (Francis Bicknell Carpenter), Ch. 68, p. 275. It is with this purpose in mind that the court renders its decision.

I. I.C. § 3-8-2-7(A)(4) VIOLATES RUST'S FIRST AND FOURTEENTH AMENDMENT RIGHTS

Before analyzing Rust's constitutional claims regarding I.C. § 3-8-2-7(a)(4), the court is compelled to address a preliminary issue. At oral argument and in its opposition briefing, counsel for Morales and the IEC asserted the interest of the Indiana Republican Party[6] in protecting that political party's right of association and its interest in avoiding party splintering or voter confusion. These interests are legitimate, and the U.S. Supreme Court has held that "[a] political party has a First Amendment right to limit its membership as it wishes, and to choose a candidate-selection process that will in its view produce the nominee who best represents it's political platform." *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008). "These rights are circumscribed, however, when the State gives the party a role in the election process." *Id.*; *see also Utah Republican Party v. Cox*, 885 F.3d 1219 (10th Cir. 2018); *cert. denied Utah Republican Party v. Cox*, 2019 LEXIS 1660

[5] The principles articulated by the Indiana Supreme Court in 1935 find support in the writings of one of the Founders of our Constitutional Republic. In 1776, John Adams, writing to his friend George Wythe, stated: "In a large society, inhabiting an extensive country, it is impossible that the whole shall assemble, to make laws: The first necessary step then, is, to depute power from the many, to a few of the most wise and good. But by what rules shall you chuse your Representatives? . . . The principal difficulty lies, and the greatest care should be employed in constituting this Representative Assembly. ***It should be in miniature, an exact portrait of the people at large. It should think, feel, reason, and act like them. . . . Great care should be taken to effect this, and to prevent unfair, partial, and corrupt elections***." John Adams, Thoughts on Government; Applicable to the State of the American Colonies (1776) (emphasis supplied)

[6] The Indiana Republican Party did not intervene in this case.

(U.S., Mar. 4, 2019). "The distinction between wholly internal aspects of party administration on one hand and participation in state run and state financed elections[7] on the other is at the heart of this case." *Cox*, 885 F.3d at 1229. Therefore, it is the State's asserted interests, not the interests of the Indiana Republican party, which must be served by the limitations and restrictions imposed by I.C. § 3-8-2-7(a)(4) on Rust's First Amendment rights of political association.

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

[7] It is undisputed that the May 2024 Indiana U.S. Senate primary election is state run and state financed by tax dollars.

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.

The 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.* The 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).

There is no compelling or even rational government interest being served here. The State Defendants have alleged that the statute is a means to ensure party membership and/or commitment to the party. However, the statute has not ensured and cannot ensure membership in or commitment to the party. That is, any Hoosier may vote in the primary of either party, if the majority of candidates that they intend 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.

Niether is the statute tailored to meet the State's interest. 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 v. Brown*, 415 U.S. 724, 736 (1974) (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*, 414 U.S. 51 (1973), 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. I.C. § 3-8-2-7(a)(4), restricts party members' ability to run for 48 months or more. Citing *Kusper*, the Indiana Court of Appeals questioned even a 30-month waiting period. *Ray v. State Election Bd.*, 422 N.E.2d 714, 721 (Ind. Ct. App.), *decision clarified on denial of reh'g*, 425 N.E.2d 240 (Ind. Ct. App. 1981).

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

ability to run for office for 48 months or more. Further, while the U.S. Supreme Court recognized a state interest in regulating 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.

Without objection, specific evidence was put into the record of this case documenting the failure of the statute to achieve the purported state interest. During the 2022 election challenge hearings, Owen County Democratic party chair Thomasina Marsili filed challenges to the candidacies of Adnan Dhahir and Peter Priest because these two candidates were only running as Democrats because they had the voting record to support it, not because they were actually Democrats. Despite evidence that the candidates were openly claiming to be Republican, the challenges to their candidates were not upheld and they were allowed to be on the ballot anyway. *See* Plaintiff's Memorandum in Support of Preliminary Injunction, Ex. E - February 18, 2022 hearing transcripts excerpts for *Marsili v. Dhahir* (Cause 2022-26) and *Marsili v. Priest* (Cause 2022-27). This evidence undercuts any argument that the statute can ensure party membership or party loyalty. This cited evidence demonstrates that, in prior hearings before the Indiana Election Commission there were candidates who were not members of the Democratic party, by their own admission, but got to run as Democrats solely based on their voting record, to the dismay of their party chair. *See* Plaintiff's Memorandum in Support of Preliminary Injunction, Ex. E. Defendants did not address this in their briefing at all. Indeed, that outcome is compelling proof that the statute does not work to serve the alleged state goal. That is, to the extent that Defendants argue the statute somehow helps parties weed out unwanted candidates,

pursuant to I.C. § 3-8-2-7(a)(4), candidates who satisfy Option A (voting in two Indiana Republican primaries) are qualified to run in the primary, regardless of whether the party supports (or endorses) their candidacy. Candidates may run even if their party chair vehemently opposes it and when they admit they are not party members. Counsel for the State Defendants even admitted at the hearing that Option A under I.C. § 3-8-2-7(a)(4) would likely be struck down as unconstitutional if it were challenged by the political parties instead of Rust. As such, the statute cannot be said to be tailored to meet the asserted state interest.

Additionally, to the extent that the State Defendants argue that Rust's proposed relief threatens the state's interest in ensuring that a candidate garner a "modicum of support" before being placed on the primary ballot, that argument is unavailing. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.") While these asserted state interests may be compelling, I.C. § 3-8-2-7(a)(4), when overlaid with the totality of Indiana's ballot access statutory framework, is not narrowly tailored to achieve those interests. That is, if Rust is unable to timely complete the Petitioning Requirements (i.e., collect at least 500 signatures of registered voters in each of Indiana's nine Congressional district for a minimum amount totaling 4,500 statewide), that will be evidence of an inability to garner a modicum of support within the party. I.C. § 3-8-2-7(a)(4) does nothing to achieve this asserted state interest. I.C. § 3-8-2-7(a)(4) is therefore

not narrowly tailored to achieve the State's interest in ensuring candidates have a sufficient modicum of support before being placed on the primary ballot.

As set forth above, the court must 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 v. Celebrezze*, 460 U.S. 780, 789 (1983). Defendants have also asserted that the state interest here is "protecting a political party's right to determine its own membership and limit its candidates to those members." *See* State Defendant's Opposition, p. 13. In response to Rust pointing out that the State cannot consistently articulate its alleged interest, as in the *Rainey*[8] case it alleged one thing, party commitment, and in *Bookwalter*[9] another, party membership, the Defendants then pivoted to argue that those two things were "two sides of the same coin." *See* State Defendants' Opposition, p. 14. But that is not so. Membership in the party and commitment to the party are two separate things, as the State asserted in *Rainey*. That is, the State asserted "party commitment" was the alleged state interest in *Rainey* because there was no dispute she was a member of the Republican party as she had a party membership card, appeared on the Republican GOP website as a sponsor, and was told she could run for other Republican offices, just not the one of her choosing.[10] Because the State could not claim she was not a member of the party, it argued party membership alone was "not enough."[11] In *Bookwalter*, the State took a different tack in the absence of such clear indicia of party membership as

[8] *Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641(Ind. Ct. App. 2023), *transfer denied*, 2023 WL 5310878 (Ind. Aug. 10, 2023)
[9] *Bookwalter v. Indiana Election Comm'n*, 209 N.E.3d 438 (Ind. Ct. App. 2023), *transfer denied*, 2023 WL 5614405 (Ind. Aug. 24, 2023).
[10] *Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641, 643 (Ind. Ct. App. 2023) (Appellant's Br. 10.)
[11] *Rainey v. Indiana Election Comm'n*, 208 N.E.3d 641, 643 (Ind. Ct. App. 2023) (Appellee's Br. 22: "It simply is not enough that a candidate for a primary election is a member of a political party.")

was present in *Rainey*. For State Defendants to now argue that membership and commitment are the same is disingenuous and inconsistent with their prior arguments. In any case, it is not apparent how the State has any interest in protecting political parties, let alone a compelling one. Defendants do not even try to argue this is a compelling interest. Further, even assuming this is somehow a state interest (rather than the interest of a political party), the statute is not narrowly tailored; it can never achieve the State's claimed goal here. Indiana is essentially an open primary state. That is, any Hoosier may vote in the primary of either party, if the majority of candidates that they intend to vote for in the next general election, are the candidates of that party. I.C. § 3-10-1-6. This requirement is, however, unenforceable. There is no way to know what a voter intends or to ensure that a person voting in a particular party is actually a member of the party let alone committed to it. Thus, it is not clear how voting in two Republican (or Democratic) primaries shows membership in the party when *anyone can vote in any primary*—or why voting in one primary (versus two) was not good enough to show commitment to the party. And, in order to demonstrate any tailoring here, the Defendants were required to explain why one primary was not good enough to show party membership or commitment. This the Defendants have not, and cannot, do. The Defendants have failed to articulate a compelling state interest and cannot show that the statute is narrowly tailored, or even reasonably related, to the asserted interests. I.C. § 3-8-2-7(a)(4) violates Rust's right to freely associate with the Republican party and cast his vote effectively.

J. *RAY V. STATE ELECTION BOARD* STRUCK DOWN A SIMILAR STATUTE FOR BEING VAGUE AND OVERLY BROAD

The void for vagueness doctrine as it relates to ballot access election cases was discussed in detail in *Ray v. State Election Board,*422 N.E.2d 714 (Ind.Ct.App. 1981). 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. . . ." *Ray*, 422 N.E.2d at 721; *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

In *Ray*, the Indiana Court of Appeals 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.

In this case, as 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. In any case, Defendants' interpretation that the party chair has full and unfettered discretion to disqualify party members from running in the primary, actually means that I.C. § 3-8-2-7(a)(4) does precisely 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 as to 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.

While the Defendants baldly claimed that Rust's reliance on *Ray* was "misplaced," they failed to distinguish the facts presented here from those presented in *Ray*. To reiterate, the Indiana Court of Appeals in *Ray* struck down a statute where the term "party membership" was unclear, in part because "Indiana's election laws do not contain a [ ] provision for recording or determining party membership at the time of registration." *Ray*, 422 N.E.2d at 720. Indiana election laws still do not. And like in *Ray*, it is not clear what party membership (for purposes of certification) means here. That it, it is not clear if it means just party membership pursuant to the plain language of the statute, as Rust argues, or something more as the Defendants' argue. The vagueness and overbreadth problems that the *Ray* court found are, likewise, equally present in this case.

K. 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.

While there is not much Seventeenth Amendment jurisprudence, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) is instructive. *Thornton* addressed the constitutionality of an Arkansas constitutional amendment that limited the number of times a candidate can run for the same office. *Id*. at 830. In striking down the state-mandated term limits, the U.S. Supreme Court observed that the statute at issue was indirectly doing what the Constitution (the 17th 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 17th Amendment as it protects incumbents and other party insiders, and disqualifies candidates like Rust, who are constitutionally qualified to run but precluded due to the statute. Just as the statute in *Thornton* was struck down for taking decision making away from voters by disqualifying incumbents, I.C. § 3-8-2-7(a)(4) must be struck down for similarly taking away decision making from Hoosier voters.

L. 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* the Indiana 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*. Courts presume that the statute is constitutional, and the challenger has the burden of proving otherwise. *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 argues that he is being treated differently than candidates who were able to be on the ballot prior to the July 2021 Amendments (who had to vote in only one primary) and differently than those candidates who have a party chair that certifies based on party

membership alone. These distinctions cannot justify the unequal treatment resulting from the statute.

Defendants did not address this argument during the hearing, but they have admitted there is an equal protection problem under Article 1, Section 23 in their briefing: "So, even if there was disparate treatment based upon the reasonableness of a county party chair, that disparate treatment would simply not be related to an inherent characteristic of the potential candidate in question." *See* State Defendants' Response in Opposition, p. 18. This, paired with Defendants' argument that should Lowery resign, another chair may certify Rust, 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 I.C. § 3-8-2-7(a)(4) fails the first prong of *Collins*, it does not pass constitutional muster.

M. I.C. § 3-8-2-7(A)(4) SERVES TO IMPROPERLY AMEND THE INDIANA STATE CONSTITUTION WITHOUT GOING THROUGH THE PROPER CONSTITUTIONAL AMENDMENT PROCESS

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. 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 double the residency requirement to

four years. Further, according to the state constitution, a state representative may be twenty-one years old. But with the voting age set at eighteen, most candidates would not have voted in two primaries until reaching the age of twenty-two.

While the Defendants offer that younger candidates and those who move from out of state can simply run as an independent or write-in candidate, giving these candidates less than all of the options to run for office violates their rights to freely associate and to equal protection. If our framers wanted to make the voting age higher or the residency requirement longer, than they would have. They did not. I.C. § 3-8-2-7(a)(4) changes the constitutional requirements to run for office without going through the proper constitutional amendment process.

N. LOWERY'S APPLICATION OF THE STATUTE VIOLATES THE CANNONS OF STATUTORY INTERPRETATION.

Rust argues that I.C. § 3-8-2-7(a)(4) violates the canons of statutory construction because: 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." Defendants have not squarely addressed these arguments, except to argue that Lowery has unfettered discretion to certify, or not.

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).

Here, as discussed above, the parties do not agree about what it is that the party chair needs to certify, present party membership as Rust argues, or something more, as Defendants argue. Looking at the plain language of the statute and construing the statute in accord with the overall purpose and goal of election laws, to prevent disenfranchisement, the court agrees with Rust. "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 Cnty. Bd. of Elections & Registration*, 896 N.E.2d 24, 39 (Ind. Ct. App. 2008), *quoting Lumm,* 207 Ind. at 684; 194 N.E. at 342.

Lowery's interpretation and application of I.C. § 3-8-2-7(a)(4) 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 he or she supports the candidate. The statute does not provide for either the IEC 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.

Further, Lowery's interpretation of I.C. § 3-8-2-7 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.

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,[12] "…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 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, as applied to Rust, is not in accord with the purpose and spirit of the law, engrafts words onto the statute, renders a portion of

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

the statute meaningless and conflicts with other election law, Lowery's interpretation and application of the statute is invalid and illegal.

O. THE STATE DEFENDANTS' RELIANCE ON *HERO V. LAKE CTY. ELECTION BD.* IS MISPLACED

In its briefing and at oral argument the State Defendants relied heavily on *Hero v. Lake Cty. Election Board.*, 42 F.4th 768 (7th Cir. 2022), for the proposition that I.C. § 3-8-2-7(a)(4) is reasonable and non-discriminatory since Rust may potentially run as Libertarian, a minor party candidate, an independent or a write-in candidate. *See* State Defendants' Response in Opposition, p. 12. At oral argument State Defendants' counsel even alluded to *Hero* being "on all fours" with this case. The court does not agree.

First, *Hero* is factually and procedurally distinguishable from this case. *Hero* involved an individual who had voted in primary elections as a Republican but was internally 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. Importantly, *Hero* did not involve a challenge to, or the interpretation of, I.C. § 3-8-2-7. That is, Hero's inability to appear on a ballot was entirely the call of the Republican party and did not involve disqualification due to a statute. Also, unlike *Hero*, Rust in this case has not been banned from the Republican party. Indeed, the State Defendants make much of the fact that should Lowery die or resign, Rust could then access the Republican ballot. *See* State Defendants' Response in Opposition, p. 2. Further, the State Defendants acknowledge that the Jackson County Republican party would "welcome [Rust's] participation in the Republican party." Id., *quoting* Rust depo., p. 86, lines 19-22. Thus, Defendants cannot credibly claim that the Republican party has rejected Rust as a member. Also, I.C. § 3-8-2-7 does more than just preventing a single person for running for office, as

with the internal party ban in *Hero*. The challenged statute in this case prevents the majority of Hoosiers from running for office. Being barred for candidacy by your own party's internal rules for being an "unwanted person" or a person "not in good standing" is wholly distinguishable from this case where the state, by way of an enacted statute, effectively bars approximately 81% of citizens from candidacy. Finally, to the extent that the State Defendants read *Hero* as standing for a bright line rule that where there are available alternative routes to access the ballot[13] there can never be an unconstitutional burden on a candidate's right of free association, that idea was raised and rejected by at least one federal district court. *See Garbett v. Herbert*, 458 F.Supp. 1328, 1341(D. Utah 2020) (the availability of alternative routes to access the ballot does not preclude finding that a candidate's rights have been severely burdened; left open is the possibility that there could be scenarios in which a ballot qualification statute could be unconstitutional notwithstanding an additional constitutional alternative). *Hero* does not provide the State Defendants the safe harbor they seek.

P. DECLARATORY AND INJUNCTIVE RELIEF IS APPROPRIATE

Indiana's Declaratory Judgment Act, I.C. § 34-14-1-1 *et seq*. allows trial courts to declare the rights of parties and to express an opinion on a question of law. For the reasons discussed herein, the court finds that I.C. § 3-8-2-7(a)(4) violates Rust's federal and state constitutional rights. It further finds that Lowery's interpretation of the statute is contrary to law.

[13] The court does not agree that requiring a Republican otherwise in good standing with his party to run as an Independent, minor party candidate or write-in candidate is a true alternative.

When determining whether an injunction is an appropriate remedy, the court must consider four factors: (1) whether the plaintiff has succeeded on the merits; (2) whether plaintiff's remedies at law are adequate; (3) whether the threatened injury to the plaintiff outweighs the threatened harm a grant of relief would occasion upon the defendant; and (4) whether the public interest would be disserved by granting relief. *Drees Co. v. Thompson*, 868 N.E.2d 32, 41 (Ind. Ct. App. 2007) (citations omitted).

However, as the Indiana Court of Appeals has held, where the action to be enjoined is unlawful, the unlawful act constitutes *per se* "irreparable harm." *Short On Cash.Net of New Castle, Inc. v. Dep't of Fin. Institutions*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004). Should the court find that the nonmovant has committed an unlawful act, Indiana law deems the public interest in stopping the activity so great that "the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant." *Id.* at 823. In other words, where a court finds that denying a preliminary injunction would permit the nonmovant to continue committing unlawful conduct, the court need not consider the remaining preliminary injunction factors outside of the merits, and instead must issue the relief sought by the movant. Here, because the court finds that I. C. § 3-8-2-7(a)(4) is unconstitutional, it must be enjoined.

JUDGMENT/ORDER

This Court having reviewed the parties' briefing and having heard oral argument on the same, now rules and orders as follows:

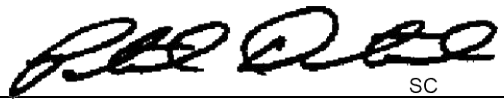
1. I. C. § 3-8-2-7(a)(4) is unconstitutional, and therefore the Defendants are enjoined from enforcing it.

2. Defendants shall pay Plaintiff's reasonable attorney's fees and costs pursuant to the Declaratory Judgment Act, I.C. § 34-14-1-10, in an amount to be determined by the court upon the submission of an attorney fee affidavit by counsel for Plaintiff.

3. There is no just reason for delay, and the court expressly directs the entry of judgment in favor of the Plaintiff and against the Defendants.

All of which is ORDERED, ADJUDGED AND DECREED AT THIS 7th DAY OF DECEMBER, 2023.

Dated: December 7, 2023



Patrick J. Dietrick
Judge, Marion County Superior Court 12

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