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IN THE
INDIANA SUPREME COURT

Case No. 23S-PL-371

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

AMICUS BRIEF OF COMMON CAUSE INDIANA AND LEAGUE OF WOMAN VOTERS OF INDIANA IN SUPPORT OF AFFIRMANCE

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I. STATEMENT OF INTEREST

Common Cause Indiana ("CCIN") is a non-partisan voluntary organization with approximately 11,000 members in Indiana whose core missions and goals include increasing voter turnout in Indiana by ending hyper-partisan gerrymandering and lobbying and litigating against other laws and policies that deny Hoosier voters meaningful electoral choices and/or impose unnecessary obstacles to voting and access to the ballot. CCIN will explain why federal election law jurisprudence under the First and Fourteenth Amendments to the Constitution of the United States requires this Court to affirm the trial court's ruling in favor of Appellee John Rust declaring that Ind. Code § 3-8-2-7(a)(4) (the "Affiliation Statute")[1] is unconstitutional both on its face and as applied to Rust to deny him access to the May 7, 2024, Republican party primary ballot and any opportunity to demonstrate his support in the electorate through the Petition Statute.

[1] CCIN understands that Rust's challenge is limited to the Affiliation Statute, and that he does not challenge I. C. § 3-8-2-8 (a) (the "Petition Statute"), which requires that a declaration of candidacy for the office of United States Senator be accompanied by at least four thousand five hundred (4,500) voters of the state, including five hundred (500) voters from each congressional district. To serve the State's interest in avoiding a cluttered ballot, a state can "impose reasonable restrictions on access, as by requiring …that a would-be candidate demonstrate significant support" by submitting nominating petitions. *Protect Marriage Illinois v. Orr,* 463 F.3d 604, 607-08 (7th Cir. 2006). However, Rust has standing to challenge the Affiliation Statute without collecting any signatures for his nomination petitions. *Nader v. Keith,* 385 F.3d 729, 736 (7th Cir. 2004) (a candidate may seek relief from a ballot access restriction "in advance of the submission or even collection of any petitions").

League of Women Voters of Indiana ("LWVIN") is a nonpartisan, nonprofit civic organization that encourages active participation in government, works to increase understanding of major public policy issues and influences public policy through education and advocacy. The LWVIN has 22 local Leagues within the state and coordinating 1,800 members and supporters across the state. The LWVIN works within the state to build citizen participation in redistricting, voting rights, elections, and all parts of the democratic process, and enables Hoosier voters to seek positive solutions to public policy issues through education, advocacy, lobbying, and conflict resolution.

II. SUMMARY OF ARGUMENT

High voter turnout is a measure of civic participation which reflects a healthy and vibrant democracy. Indiana suffers from abysmal voter turnout, particularly in primary elections, which due to gerrymandering and other anti-competitive laws are often the determinant of who will prevail in the general election. Indiana's low turnout rates in State-run primary elections reflect a lack of electoral competition. The "Affiliation Statute" at issue in this case is a device used by political party officials to eliminate or stifle competition in primary elections, as the Jackson County Republican Chair did in denying Appellee John Rust access to her political party's primary ballot as a candidate for United States Senator. The trial court properly ruled that the Affiliation Statute as applied in this instance

violates various articles of the Indiana Constitution and the First and Fourteenth Amendments to the United States Constitution.

The right to vote for the candidates of one's choice is the very essence of our democracy. A law that operates to deny voters meaningful choices heavily burdens the fundamental right to vote. And while the State has a legitimate interest in preventing ballot "clutter" and require would-be candidates to demonstrate a modicum of electoral support, by refusing to certify his membership in the Republican party Rust was denied the opportunity to demonstrate his electoral potency through the state's petition requirement, which requires a candidate seeking state-wide office such as the United States Senate to secure 500 valid signatures of registered voters in each of Indiana's nine (9) congressional districts.

As a result of a 2021 amendment, the Affiliation Statute now requires a would-be candidate to have voted in his party's last two (up from one) primary elections or be subject to a "certification" process requiring the political party chair of his home county to certify his "membership" as a condition to being included on the primary ballot. Indiana law contains no requirement that a citizen declare his or her party affiliation upon registration.

State-sponsored and financed primary elections are an integral part of Indiana's election machinery such that constitutional safeguards, like the freedom of association, come into play. A statute that operates to arbitrarily or

discriminatorily deny access to the primary ballot of an otherwise constitutionally-qualified candidate, without providing a reasonable alternative means of access, cannot survive an equal protection challenge under either the Indiana or United States Constitutions.

Because it regulates access to the ballot, this Court should evaluate the Affiliation Statute under the test established by the U.S. Supreme Court in the *Anderson* and *Burdick* cases. That flexible test requires lower courts to consider the magnitude of the injury to a plaintiff's rights protected by the First and Fourteenth Amendments, and then to evaluate the *precise* interests the State asserts to justify that law, including whether those state interests make the burdens imposed by the challenged law *necessary.* A challenged law that imposes a "severe" burden, such as by denying an otherwise qualified candidate access to the ballot, must survive strict scrutiny, meaning the State must show it is narrowly tailored to serve a compelling state interest and is neither overinclusive nor underinclusive. The Affiliation Statute is neither narrowly tailored nor is the State's interest in excluding Rust from the primary ballot compelling.

The Affiliation Statute is particularly ill-suited to serve the State's interest to avoid cluttering the ballot with frivolous candidacies, particularly those candidates running state-wide who must also comply with Indiana's petition requirement. In the only reported decision construing its predecessor statute, our court of appeals

held that compliance with the affiliation requirement is not necessary to a valid election. Moreover, because it lacks any objective standards for determining "membership," the Affiliation Statute, as here, is subject to arbitrary enforcement by a single political party official in whom the statute vests unfettered discretion.

Hero v. Lake Co. Election Bd., relied upon by the State, is inapposite. *Hero* did not consider or decide the constitutionality of the single-primary predecessor of the Affiliation Statute. Instead, it upheld the purely internal decision of a political party to expel a candidate for local political office after he had qualified for ballot placement under the voting prong of the Affiliation Statute.

Neither running as an independent nor as a write-in candidate are reasonable alternatives for Rust. To run as an independent candidate, he would need to secure more than eight (8) times the number of signatures required by the Petition Statute to seek nomination to the office of United States Senator. Write-in candidates do not appear on the printed ballot and require the candidate to renounce his major party affiliation and thus forego his freedom protected by the First Amendment to associate with the political party of his choosing.

Finally, the trial court's ruling declaring the Affiliation Statute unconstitutional as applied to Rust does not severely burden the Republican party's freedom of association. The party's associational rights, which are not limited to party leadership, are not severely burdened when voters are given the choice of

voting for a candidate different from the one party leaders may prefer. Indeed, primary elections were part of a reform movement to end the absolute control of party bosses over candidate selection. A political party's associational rights are not severely burdened by a candidate not preferred by party leadership being able to access the primary ballot.

This Court should affirm the judgment of the trial court.

III. ARGUMENT

A. Indiana's election laws have contributed to low voter turnout, particularly in primary elections.

Indiana suffers from abysmally low voter participation rates. The single most anti-competitive election structure in Indiana is partisan gerrymandering. CCIN's parent organization, Common Cause, as part of the national CHARGE Coalition's Community Redistricting Report Card, gave Indiana a "D" for its most recent round of state legislative and Congressional redistricting in 2021, citing the hyper-partisan and rushed process that made meaningful citizen participation difficult, available at https://www.commoncause.org/democracy-wire/community-redistricting-report-card-5-key-takeaways/ A George Washington University professor recently found the maps used by the state from 2012 through 2022 to be more biased towards one party than 95% of the maps drawn nationwide over the past 50 years. "Independent analyses say Indiana redistricting will produce little competition," WFYI (10/5/21), available at

https://www.wfyi.org/news/articles/independent-analyses-say-indiana-redistricting-will-produce-little-competition The most recent legislative redistricting has resulted in maps with "historically extreme levels of partisan bias," which contributes to Indiana having some of the lowest voter participation rates in the country. "In Indiana, extreme gerrymandering and low voter turnout go hand in hand," The Center for Public Integrity (10/6/22), available at https://publicintegrity.org/politics/elections/who-counts/in-indiana-extreme-gerrymandering-and-low-voter-turnout-go-hand-in-hand/

Extreme partisan gerrymandering results in far too many non-competitive or one-candidate legislative races which fuels the perception that voting, particularly in primary elections, doesn't matter. In a vicious circle, this in makes it difficult for political parties to recruit quality and sufficiently well-financed candidates to run competitively for public office.

Eight (8) states, including Indiana, had turnout rates of below 50% when averaged between the last two national elections. Primary turnout rates in off-year elections are even lower. "States with low election turnout did little in 2023 to expand voter access," Zachary Roth (Stateline, 6/16/23), available at https://stateline.org/2023/06/16/states-with-low-election-turnout-did-little-in-2023-to-expand-voting-access/

Due to the combination of geographic self-sorting and partisan gerrymandering, the number of competitive seats for Congress and state legislatures nationwide has dramatically declined since the 1970s. As a result, primaries, when voter participation is typically lowest, are increasingly determinative of general election outcomes. Given primaries' outsized influence in our representative government and low turnout rates, public policy organizations and election scholars are in wide agreement that states should adopt laws and policies that increase rather than lessen the desire to participate in primary elections. "Nearly 80% of Eligible Voters Don't Participate in Primaries," Bipartisan Policy Center (6/16/23), available at https://bipartisanpolicy.org/press-release/voters-dont-participate-primaries/

Other Indiana election laws also contribute to its low voter turnout rates. For example, Indiana voters need to show a government-issued ID to cast a ballot that is assured of being counted, a requirement that disproportionately affects low-income voters. *Crawford v. Marion County Election Bd.,* 553 U.S. 181 (2008); I. C. § 3-11-8-25.1. Mail-in absentee voting is available only to voters who qualify under statutorily-prescribed categories, *Tully v. Okeson,* 78 F.4th 377 (7th Cir. 2023); I. C. § 3-11-10-24; and absentee ballots must either be hand-delivered or deposited in the mail, as Indiana does not provide drop boxes for voters to submit

absentee ballots in more convenient times and locations. *See* https://vote.indy.gov/absentee/

Indiana also lacks same-day registration and instead has the earliest registration deadline (twenty-nine (29) days prior to an election) in the nation. "Voter Registration Deadlines," National Conference of State Legislatures (updated 12/11/23), available at https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines Election law scholars Bernard Grofman and Craig Leonard Brians believe that permitting same-day registration improves voter turnout by up to 7%. "Election Day Registration's Effect on U.S. Voter Turnout," Social Science Quarterly, Vol. 32, No. 1 (March 2001), available at https://sites.socsci.uci.edu/~bgrofman/18%20Brians-Grofman-Election%20day%20registration's%20effect.pdf

Due to a 2021 amendment the Affiliation Statute now requires a would-be candidate to have voted in his party's last two primary elections (up from a single primary). It is another Indiana election law which, absent this Court's affirmance, will deprive voters of the opportunity for a meaningful choice of candidates in this year's Republican primary for United States Senate and thus further reduce public interest and participation in the upcoming primary election.

While the associational rights of political parties are important, political parties should not be allowed to stifle competition by denying qualified and non-

frivolous candidates access to the ballot, thereby denying primary voters electoral choices. The party primary "is not an exercise or warm-up for the general election but an integral part of the entire election process," which the State severely burdens when it denies voters electoral choices. *Common Cause IN v. Ind. Election Comm'n,* 800 F.3d 913, 918 (7th Cir. 2015).

The associational rights of political parties go beyond party leadership to the people through primary elections. Requiring constitutionally-qualified and non-frivolous candidates for the United States Senate, such as Mr. Rust, to win the favor of a single local political official in order even to have the opportunity to access the primary ballot through the petition process is antithetical to our democratic values and will inevitably lead to even greater voter cynicism and depressed turnout rates.

B. Though Indiana has a legitimate interest in regulating its primary elections, it may not do so in derogation of the constitutional rights of voters and candidates.

To be sure, as this Court has held, Indiana has a legitimate interest in seeing that ballots are not encumbered by the names of candidates who have no substantial support. *Lumm v. Simpson,* 207 Ind. 680, 683, 194 N.E. 341 (1935); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and

confusing to encumber the ballot with the names of frivolous candidates"); and *Bullock v. Carter,* 405 U.S. 134, 145 (1972) (recognizing a state's interest in regulating ballot access to protect against "frivolous or fraudulent candidacies"). At least for purposes of state-wide candidacies in Indiana, this interest is more than adequately served by the Petition Statute, I. C. § 3-8-2-8.

A state also has a legitimate interest in excluding from the ballot candidates who are constitutionally prohibited from assuming office. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 359 (1997) (excluding an ineligible candidate from the ballot does not severely burden that party's associational rights). Though Indiana has a major role to play in structuring its primary elections to ensure their integrity, states must act within the limits imposed by the United States Constitution. *Calif. Democratic Party v. Jones,* 530 U.S. 567, 573 (2000).

For at least the past 80 years the United States Supreme Court has recognized that primary elections conducted by and for the benefit of a political party are an integral part of a state's election machinery and thus subject to constitutional safeguards. *Smith v. Allwright,* 321 U.S. 649 (1944) (holding that art. I, section 4 of the United States Constitution authorized Congress to regulate primary as well as general elections and declaring Texas's whites-only Democratic Party primary unconstitutional); *United States v. Classic,* 313 U.S. 299, 324 (1941) (constitutional safeguards are brought into play when a political organization takes

on the attributes of government by holding primary elections.) This means states may not erect artificial, unnecessary, and unreasonable barriers that limit voters' choices in primary elections. *Bullock v. Carter*, *supra* (striking down state law imposing excessive filing fee that created barriers to candidates' ability to access the primary ballot and thus limited the field of candidates from which voters might choose).

Though as noted above states are allowed discretion to require would-be candidates to make a preliminary showing of substantial support to qualify for a place on the ballot, *Jenness v. Fortson,* 403 U.S. 431, 442 (1971), that discretion is not without limits. Ballot access laws "place burdens on….the rights of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes,* 393 U.S. 23, 40 (1968). Both this Court and the United States Supreme Court have observed that legislative bodies do not have *carte blanche* in regulating access to the primary ballot. Thus, a statute that arbitrarily or discriminatorily precludes an otherwise *bona fide* candidate from seeking nomination and election to public office, without providing any reasonable alternative means to ballot access, may not survive a challenge on equal protection grounds. *Murphy v. Schilling,* 271 Ind. 44, 47, 415 N.E.2d 314 (1979) (citing *Lubin v. Panish,* 415 U.S. 709, 718 (1974), and *Bullock v. Carter, supra* (striking down

candidate filing fee that excluded both legitimate as well as frivolous candidates); *see also Ray v. Indiana State Election Bd.,* 422 N.E.2d 714, 718 (Ind. Ct. App. 1981) (citing *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973) (declaring unconstitutional an Illinois statute that prohibited a person from voting in a political party's primary election if that person had voted in another party's primary within the preceding 23 months for infringing on the voter's First Amendment right to change political party affiliation).

The right to vote freely for the candidate of one's choice is the very "essence of a democratic society." *Reynolds v. Sims,* 377 U.S. 533, 535(1964). Because "voters can assert their preferences only through candidates or parties or both[,] . . . [t]he right to vote is 'heavily burdened' if their vote may be cast only for major-party candidates at a time when other parties or other candidates are 'clamoring for a place on the ballot.'" *Lubin v. Panish*, 415 U.S. at 716; *see also Lee v. Keith,* 463 F.3d 763, 767-68 (7th Cir. 2006) (laws that impose candidate eligibility requirements implicate basic constitutional rights); *Common Cause IN v. Ind. Election Comm'n,* 800 F.3d at 920-21 (when an election law reduces or forecloses the opportunity for electoral choice, it has "severely burdened the voter's ability to cast a meaningful and effective vote").

1. **Ballot access laws such as the Affiliation Statute are governed by the *Anderson/Burdick* test.**

Though all election-related burdens irrespective of severity were at one time evaluated under strict scrutiny, state election laws regulating access to the ballot are now subject to the test laid out in *Anderson v. Celebrezze, supra,* and *Burdick v. Takushi,* 504 U.S. 428, 434 (1992), which direct courts to…

> …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 [and then] identify and evaluate the *precise* interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it *necessary* to burden the plaintiff's rights.

Anderson, 460 U.S. at 789 (emphases added).[2] When a law regulating access to the ballot imposes a severe burden on candidates or voters, strict scrutiny of that law remains the appropriate standard of review. *Crawford v. Marion County Election Board,* 533 U.S. 181, 205 (2008) (if an election law imposes a "severe" burden, "[s]trict scrutiny is appropriate.") (Scalia, J., concurring).

To survive strict scrutiny a statute must be narrowly tailored to serve a compelling state interest. This means that even where the State has specifically identified an actual problem in need of solving, it must use the least restrictive means for addressing the government's interest. In other words, "if a less restrictive alternative would serve the governmental purpose, a legislature must use that

[2] Our court of appeals, *Herr v. State,* 212 N.E.3d 1261, 1265-66 (Ind. Ct. App. 2023), recently applied the flexible *Anderson/Burdick* test to an Indiana election law challenged on equal protection grounds.

alternative...Legitimate ends must be pursued by means that are neither seriously underinclusive nor seriously overinclusive." *State v. Katz,* 179 N.E.3d 431, 458-59 (Ind. 2022) (cleaned up); *see also Reed v. Town of Gilbert,* 576 U.S. 155 (2015) (same).

2. A law that excludes a qualified candidate from the ballot imposes a severe burden.

Federal courts have uniformly held that a law which operates to exclude from the ballot an otherwise qualified candidate imposes a severe burden. *Lee v. Keith,* 463 F.3d at 770-71 (exclusion from the ballot is a "severe" burden, rejecting clam that alternative means of qualifying for ballot access which themselves impose onerous access requirements can operate as a "constitutional safety valve"); *see also Gottlieb v. Lamont,* 2023 U.S. App. LEXIS 8542, *10 (2nd Cir. 2023) ("the hallmark of a severe burden is exclusion or virtual exclusion from the ballot," quoting *Schmitt v. LaRose,* 933 F.3d 628, 639 (6th Cir. 2019)), which either alone or in combination[3] with other ballot access requirements keeps a reasonably diligent candidate off the ballot; *see also Thompson v. DeWine,* 959 F.3d 804, 808 (6th Cir. 2020) (exclusion or virtual exclusion from the ballot is a severe burden, citing *Burdick,* at 434, and *Schmitt v. LaRose, supra*).

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[3] The Affiliation Statute should be evaluated in combination with Indiana's overall scheme of controlling ballot access, including the obligations imposed by the Petition Statute. *Luft v. Evers,* 963 F.3d 665, 675 (7th Cir. 2020) (electoral provisions cannot be assessed in isolation); *Lee v. Keith,* 463 F.3d at 769 (ballot access restrictions are to be evaluated together rather than individually to assess their combined effect on voters' and candidates' political association rights).

C. The State cannot meet its heavy burden to show the Affiliation Statute is narrowly drawn to advance a state interest of compelling importance.

A. Enforcement of the Affiliation Statute is not essential to a valid election.

An election statute that imposes a severe burden must be "narrowly drawn to advance a state interest of compelling importance." *Lee v. Keith,* 463 F.3d at 768 (quoting *Norman v. Reed,* 502 U.S. 279, 289 (1992)). For several reasons, Indiana is unable to meet its heavy burden of demonstrating a compelling interest in enforcement of the Affiliation Statute.

In the only reported case construing the single-primary precursor of the Affiliation Statute, our court of appeals explicitly held that its enforcement was unnecessary to the validity of an election. *Wyatt v. Wheeler,* 936 N.E.2d 232 (Ind. Ct. App. 2010). There, a candidate and later Lt. Governor Sue Ellspermann sought to have her name placed on the primary election ballot as a Republican candidate for the Indiana House of Representatives. Ellspermann had certified in her candidate declaration that she was affiliated with the Republican Party because she thought she had voted in the most recent Republican primary, which was all the predecessor statute required. As it turned out her memory was mistaken, as she had asked for a Democratic ballot in the then most recent (2008) primary election. Accordingly, she did not seek her county chair's certification of her party membership as would otherwise have been required.

After rejecting a claim of mootness, the appellate court affirmed the holding of the trial court that Ellspermann was nevertheless eligible to run as a Republican in its 2010 primary. In so holding the court, quoting *Lumm v. Simpson,* 207 Ind. at 684; and *State ex rel. Harry v. Ice,* 207 Ind. 65, 71, 191 N.E. 155, 157 (Ind. 1934) ("The purpose of [election] law [is to] …prevent disenfranchisement."), held that it would defeat that fundamental purpose of Indiana election law to disqualify Ellspermann based on her non-compliance with the single-primary requirement of predecessor statute.

When an election law such as the Affiliation Statute interferes with the marketplace by restricting a candidate a party may nominate, it hinders electoral choice and thus has severely burdened the voter's ability to cast a meaningful and effective vote. *Common Cause IN,* 800 F.3d at 921.If enforced to exclude Rust from the Republican primary ballot, his supporters are disenfranchised.

D. The Affiliation Statute is anything but narrowly tailored and is instead vague and thus susceptible to arbitrary and discriminatory enforcement.

The Affiliation Statute vests unfettered absolute discretion in county chairs to exclude a candidate for the United States Senate from the primary ballot who is unable to meet its now two-consecutive-primaries requirement. On its face the statute is remarkable for lacking standards for determining whether a candidate is a "member of the political party." I.C. § 3-8-2-7(a)(4)(B). It thus gives to political

party chairs the unbridled authority to exclude candidates from the primary ballot for any reason whatsoever and thereby is susceptible to arbitrary enforcement. To prevent arbitrary and discriminatory enforcement, laws must provide *explicit* standards for those who apply them and not impermissibly delegate to decisionmakers on an *ad hoc* and subjective basis, especially when a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms." *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). It is axiomatic that voting for a candidate of one's choice is a foundational right in our republic.

Our court of appeals has applied the "void for vagueness" doctrine both in the criminal law context and where an election law was at issue. The vagueness doctrine has special salience here because political parties in Indiana do not "provide any evidence of membership such as a membership card," *Ray v. State Election Bd.,* 422 N.E.2d 714, 721-22 (Ind. Ct. App. 1981), nor are citizens required to state a party preference at registration. *Herr v. State,* 212 N.E.3d 1261, 1264 n.1 (Ind. Ct. App. 2023) (observing that Indiana conducts what is more aptly described as a "semi-closed" primary, given that under Indiana's system political party membership in Indiana is so informal, amorphous, often transitory, and subjective). Thus, the Affiliation Statute's vagueness increases the likelihood of arbitrary and discriminatory enforcement by a county party official against a

person perceived to be insufficiently "loyal" or for other unstated reasons unacceptable for inclusion as a candidate on the party's primary ballot.[4]

The Affiliation Statute does not require the county party's chair to articulate any reasons for refusing to certify party "membership" and thus disqualify the potential candidate. As the record below shows, Rust considers himself a member of the Republican party and is willing to demonstrate his wide support among voters in his chosen political party through the petition requirement, which in the case of state-wide elections effectively serves the State's asserted interest in avoiding frivolous candidacies. As it is unconstitutionally vague and not narrowly tailored, the Affiliation Statute cannot survive strict scrutiny, or even a more forgiving level of intermediate scrutiny under which a regulation affecting speech or voting is constitutional only if it furthers a substantial governmental interest and limits expression to no more than is essential to that governmental interest. *Harlan v. Scholz,* 866 F.3d 754, 760 (7th Cir. 2017). The "precise interests" put forward by the State neither justify nor are served by the burdens placed on voters for office of the United States Senate by the Affiliation Statute, whose operation infringes on

[4] The certification option of the Affiliation Statute (as amended effective January 1, 2022) does not even come into play if a would-be candidate is able to demonstrate compliance with the two-most-recent-primaries requirement. As the Ellspermann example in *Wyatt, supra,* and the Hero example in *Here v. Lake Co. Election Bd.* demonstrate, voting in a party's primary election is anything but a reliable indicator of party "membership" or fealty.

Rust's and his supporters' basic constitutional freedoms of association and equal protection guaranteed by the First and Fourteenth Amendments.

E. *Hero v. Lake County Election Bd.* does not support the State's contentions.

The State relies heavily on *Hero v. Lake County Election Bd.,* 42 F.4th 768 (7th Cir. 2022). However, as the trial court noted it is inapposite. *Hero* involved a decision by Lake County Republican leadership to remove a candidate "unaffiliated with the party" from the Republican primary ballot *after* he had qualified under the single-primary requirement of the pre-2022 predecessor of the Affiliation Statute. Unlike Hero, Rust has not "unaffiliated" with the Republican party, he has never been expelled or disciplined for violating its rules, and his party chair Lowery said she'd "welcome his participation in the Republican party" but just not as a candidate. Rust is not a party pariah but at most is an "insurgent" who wishes to compete against his political party's preferred candidate.

Hero did not address the constitutionality of the Affiliation Statute's current two-primary requirement because Mr. Hero had already qualified for inclusion on the primary ballot by having voted in the last Republican primary. Because the decision to exclude him from the primary ballot dealt solely with wholly *internal* actions of a political party, *Hero* also did not address the questions of the Affiliation Statute's undeniable constitutional implications on voters' and candidates' associational rights.

There is a clear constitutional distinction between wholly *internal* aspects of party affiliation (as in *Hero)* and the *external* activities arising from participation in a state-run, state-financed primary election, which are necessarily subject to greater state involvement and scrutiny than are a political party's "wholly internal machinations." *Utah Republican Party (URP) v. Cox,* 885 F.3d 1219, 1229-30 (10th Cir. 2018) (citing *N.Y. Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 202-03 (2008)). *Hero* involved a political party's internal decision to expel a perceived party disloyalist. By contrast, this case involves the application of a vague, unnecessary, and overbroad law that party leadership has used to preclude Mr. Rust from appearing on the primary ballot solely because of his "insufficient" history of voting in Republican primaries.

The State and its amicus also claim *Hero* establishes an ironclad rule that the existence of any alternative means of accessing the ballot, such as running as an independent or a write-in candidate, defeats Rust's free association claims.[5] This cannot be correct.

Hero was not a ballot access case but one involving the wholly internal affairs of a political party. The court in *Hero* cited no authority for its *dicta*, 42

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[5] Neither of these is a reasonable or realistic alternative. Independent candidates must collect valid signatures of 2% of the total number of voters who voted in the most recent race for Indiana Secretary of State, 1,847,179, or a total of 36,944, more than eight (8) times the number of signatures (4,500) needed to run for the United States Senate as a major party candidate. Write-in candidates' names are not even printed on ballots, I. C. § 3-12-1-1.7, and a write-in candidate cannot declare and thus must renounce affiliation with a major political party, I. C. §3-8-2-2.5. *Common Cause IN,* 800 F. 3d at 915.

F.4th at 776, that the existence of *any* alternative means for accessing the ballot, no matter how onerous or unreasonable, undermined Hero's constitutional claims. At least one Seventh Circuit ballot access decision, citing a decision of the United States Supreme Court, has ruled that running as an independent is not a sufficient alternative to inclusion on the primary ballot of one of the established political parties, because political party and the independent candidate approaches to political activity are different and neither is an adequate substitute for the other. *Lee v. Keith,* 463 F.3d at 771 (citing *Storer v. Brown,* 415 U.S. 724, 745 (1974)); *see also Garbett v. Herbert,* 458 F.Supp.3d 1328, 1341 (D. Utah 2020) ("It seems unlikely that executive State action imposing additional burdens on candidates pursuing either available route created by the legislature can *never* rise to the level of a severe burden merely because the other avenue was theoretically available at one time.").

Neither running as an independent nor as a write-in candidate are reasonable or realistic alternatives for Rust. Independent candidates must collect valid signatures from 2% of the total number of voters who voted in the most recent race for Indiana Secretary of State, 1,847,179, or a total of 36,944, more than **eight (8) times** the number of signatures (4,500) needed to run for the United States Senate as a major party candidate. Write-in candidates' names are not even printed on ballots. I. C. 3-12-1-1.7. Requiring a candidate who seeks to run for United States

Senate as an independent to get 8 times the number of signatures required of party-affiliated candidates would have serious equal protection implications as infringing upon "the right of individuals to associate for the advancement of political beliefs." *Williams*, 393 U.S. at 30; *see also Green Party of Tennessee v. Hargett,* 791 F.3d 684, 695 (6th Cir. 2015) (a ballot access restriction that "imposes a greater burden on minor parties without a sufficient rationale…violates the Equal Protection Clause").

F. The trial court's opinion that the Affiliation Statute was unconstitutionally applied to Rust does not severely burden the Republican party's associational rights.

Though a political party like other voluntary private associations at its discretion may take measures to limit and control its membership, *see, e.g., Hero v. Lake County Election Bd., supra,* a political party's associational rights are circumscribed when, as here, the State gives it an integral role in its electoral process. In such a circumstance, the State acquires a legitimate governmental interest in insuring the fairness of the party's nominating process. *N.Y. State Bd. of Elections v. Lopez Torres,* 552 U.S. at 202-03. As the Tenth Circuit Court of Appeals recently stated in *Utah Republican Party v. Cox,* 885 F.3d at 1236: "we cannot close our eyes to the fact . . . that the practical influence of the choice of candidates at the primary may be so great as to affect profoundly the choice at the

general election . . . and may thus operate to deprive the voter of his constitutional right of choice" (quoting *Classic*, 313 U.S. at 319).

Contrary to the State's claims, the Republican party's associational rights are not severely burdened simply because trial court's decision may result in the will of the voters reflecting a different choice than would have been made by the Jackson County Republican party chair. A political party's associational rights and interests do not begin and end with party leadership. *Tashjian v. Republican Party,* 478 U.S. 208, 215 (1986) ("A major state political party necessarily includes individuals playing a broad spectrum of roles in the organization's activities.").

The United States Supreme Court has permitted states to administer primary elections, subject to state regulation, as a "necessary step in the choice of candidates for election." *Classic,* 313 U.S. at 319-20. Primaries themselves were part of a reform movement intended to democratize the electoral process by limiting the control of "party bosses" over candidate selection, opening candidate selection procedures to insurgents rather than the hand-picked candidates favored by party leadership. As the Supreme Court said in *Lopez Torres,* 552 U.S. at 205, "we have …permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries". Or as the Tenth Circuit put in *Cox,* 885 F.3d at 1234, a state law does not impose a severe burden on a political party "by potentially allowing the

nomination of a candidate with whom the URP leadership disagrees." *See also, Alaska Independence Party v. Alaska,* 545 F.3d 1173, 1179-80 (9th Cir. 2008) (rejecting notion that a political party's associational rights are severely burdened when a candidate is selected democratically by voters in a primary rather than by party leadership).

Thus, where (as here) the associational rights of a political party clash with the right of *bona fide* candidates to seek elective office and the rights of voters to cast a meaningful ballot, the voters' rights must ordinarily prevail, as the right to cast a meaningful ballot is the "very backbone of our constitutional scheme" which can be impaired if not protected at the primary level. *Cox,* 885 F.3d at 1236; *see also Common Cause Indiana v. Indiana Election Div.,* 800 F.3d 913 (7th Cir. 2015) (a statute which burdens the vote by removing all competition and electoral choice before the general election violates the First and Fourteenth Amendments); and *Libertarian Party of Ill. v. Ill State Bd. of Elections,* 164 F. Supp. 3d 1023, 1028 (N.D. Ill. 2016) (striking down on constitutional grounds the "full slate" requirement for minor parties as ill-suited to achieve the state's goals, not narrowly tailored, and not advancing a compelling state interest).

IV. CONCLUSION

While avoiding political instability, excessive factionalism, and ballot clutter are important state interests, the Affiliation Statute does little to nothing to further those interests, while at the same time infringing on the fundamental right of voters to cast a meaningful vote. The Affiliation Statute cannot survive any level of constitutional scrutiny. Accordingly, *amici* urge this Court to affirm the judgment of the trial court declaring that the Affiliation Statute unconstitutionally prevents Appellee Rust from accessing the Republican party's primary ballot in violation of his and supporters' associational rights guaranteed by the First and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 11, 2024, the foregoing document was filed using the Indiana E-filing System. I also hereby certify that on January 11, 2024, the foregoing was served, contemporaneously with this filing, via the IEFS, to the following attorneys of record:

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