

THE PARTIES

2. Bookwalter is a long-time member of, and donor to, the Republican Party, who embodies the Republican Party's professed values.¹

3. Bookwalter's mailing address is P.O. Box 43, Thorntown, Indiana, 46071.

4. Bookwalter is a resident of Boone County, Indiana, which is in Indiana's United States Congressional District 4.

5. Bookwalter desires to run as a Republican Candidate for the United States House of Representatives for District 4.

6. The name of the agency whose action is at issue is the Indiana Election Commission ("Commission").

7. The Commission's mailing address is 302 W. Washington St., Room E204, Indianapolis, Marion County Indiana 46204.

8. Gregory L. Irby ("Irby"), who is the Vice Chairman of the Republican Party for Hendricks County, Indiana, is a party to the agency action, as Irby filed a CAN-1 challenge to Bookwalter's candidacy.

9. Upon information and belief, Irby's mailing address is 117 Parkridge Dr. Danville, IN 46122.

10. Cody Eckert ("Eckert"), who is a Republican Councilman for the city of Greencastle Indiana, is a party to the agency action as he also filed a CAN-1 challenge to Bookwalter's candidacy.

¹ Compare The Republican National Committee, *Who We Are*, available at <https://gop.com/about-our-party/>, last visited March 4, 2022, 4:36 PM and Brad Cook, *Traditional Republican Values*, NH Business Review, June 21, 2019, available at <https://www.nhbr.com/traditional-republican-values/> last visited March 4, 2022, 4:37 PM with Exhibit A (letter and Affidavit of Bookwalter provided to County Party Chair, Debbie Ottinger "Ottinger.")

11. Upon information and belief, Eckert's mailing address is 905 Zinc Mill Terrace Dr., Apt. 10 Greencastle, IN 46135.

STANDING, JURISDICTION AND VENUE

12. Bookwalter has standing as Bookwalter was a party to the final agency action pursuant to IC § 4-21.5-5-3(a)(2), and Bookwalter is a person to whom the final agency action is specifically directed, pursuant to IC § 4-21.5-5-3(a)(1).

13. Bookwalter has exhausted administrative remedies and is filing this Petition within the prescribed time period- within thirty (30) days. The agency action occurred on February 18, 2022.

14. Venue is proper in Marion County as this is the principal office of the Indiana Election Commission is located. Bookwalter is seeking to be on the Republican primary ballot for the United States House of Representatives for District 4.

GENERAL ALLEGATIONS COMMON TO ALL COUNTS

15. Bookwalter has only voted in one primary in Indiana--the Republican primary in 2016.

16. Bookwalter did not vote in the Republican party primary in 2020 because the Republican nominees for President and US Congress were unopposed.

17. Pursuant to Indiana Code section 3-8-2-7(a)(4)(A), in order to run as a Republican candidate, Bookwalter must include a statement of his party affiliation and such affiliation is established only if he meets one of two conditions:

(A) The two (2) most recent primary elections in Indiana in which the candidate voted were primary elections held by the party with which the candidate claims affiliation. If the candidate cast a nonpartisan ballot at an election held at the most recent primary election in which the candidate voted, a certification by the county chairman under clause (B) is required.

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.

18. Thus, Indiana Code section 3-8-2-7(a)(4)(A) provides that the Chairman of the party in the County which a candidate resides needs to certify membership in the party, if the candidate did not vote in that party's primaries twice, with no intervening votes for another party.

19. Each candidate seeking to be on the ballot for a primary election in Indiana must complete a CAN-2 form.

20. The CAN-2 form asks candidates to choose option A or B from the statute noted above with regard to establishing their affiliation with the party.

21. Bookwalter completed and submitted his CAN-2 form but did not select either option.

22. A true and correct copy of Bookwalter's CAN-2 is attached hereto as Exhibit A.

23. Bookwalter has not had the opportunity to vote in another GOP Primary since I.C. 3-8-2-7 was amended in 2021.

24. As noted above, Bookwalter lives in Boone County.

25. In December 2021, Bookwalter had a conversation with Boone County, Indiana Republican chairman, Debbie Ottinger ("Ottinger"), in effort to comply with option B and obtain her written certification to attach to his CAN-2.

26. During that conversation, Ottinger stated she would not provide Bookwalter with written certification of his Party membership because Bookwalter did not satisfy the two-primary rule, but stated she would support him if he ran for town council, or another a local office selected by her.

27. Bookwalter desires to run for US Representative because the issues that drove him to run are predominately federal issues.

28. I.C. § 3-8-2-7 does not state that the Chairman needs to believe the candidate is a good one or support their candidacy in any way. It only provides that he or she certify the candidate is a member of the party.

29. After candidates submit their CAN-2 form and declare their intention to run for office, individuals may seek to challenge the eligibility of a candidate by filing a CAN-1 form.

30. Irby filed a CAN-1 form challenging Bookwalter's eligibility to run for the United States House of Representatives for District 4 as a Republican.

31. A true and correct copy of Irby's challenge is attached hereto as Exhibit B.

32. On his CAN-1, Irby states, "See attached – Did not vote in 2 Republican primaries. No *approval* from chair." *See id.* (emphasis added).

33. Irby attached an addendum to his CAN-1 which states:

Since registering to vote on August 6th of 2007, Mr. Bookwalter has failed to vote in two Republican primaries. Additionally, Mr. Bookwalter did not received (sic) certification from the Republican Party county chairman. Under the statutory requirement of Indiana Code 3-8-2-7, the candidate does not qualify for the primary ballot on May 3rd, 2022.

Id. 3.

34. Irby also attached a copy of Bookwalter’s primary voting record that is, on information and belief, drawn from a database maintained by the Republican Party, which describes Bookwalter as a “Weak Republican.” *Id.* 4.

35. Eckert also filed a CAN-1 form challenging Bookwalter’s eligibility to run for the United States House of Representatives for District 4 as a Republican.

36. A true and correct copy of Eckert’s challenge is attached hereto as Exhibit C.

37. Neither Irby, nor Eckert, in their challenges alleges that Bookwalter is not a Republican.

38. A hearing was held on February 18, 2022. The hearing can be viewed here,² beginning at the 3 hour and 1-minute mark): <https://youtu.be/yK3sqzBGTQ8>

39. At the outset of the hearing, the panel states that Irby and Eckert have agreed to consolidate their challenges, and calls Irby to speak on behalf of Irby and Eckert. *See Hearing Transcript*, Exhibit D, at 144-45.

40. Irby, on behalf of the challengers, states:

My name is Greg Irby, I-R-B-Y, and I’m a resident of the 4th Congressional District. I won’t take your time. Short and simple today. Indiana Code 3-8-2-7 requires that a candidate in the primary either meet one of two requirements, two previous elections in the primary or get a waiver from the party chair. It is my understanding and we have submitted evidence that neither has happened with Mr. Bookwalter, so I would respectfully request you uphold the challenge.

Id. 145

41. Thus, also in the hearing, Irby (on behalf of Eckert) merely challenges Bookwalter’s candidacy on the basis of his failure to strictly comply with the two-primary rule.

42. Irby then yielded the balance of his time to Bookwalter.

² On the YouTube channel of Indiana Secretary of State Holli Sullivan.

43. Bookwalter propounded his letter and Affidavit attached hereto as Exhibit E, attesting to his membership in, and loyalty to the values of the Republican Primary, and testified he had it notarized, emailed, and hand-delivered to Boone County GOP Chair, Debbie Ottinger (“Ottinger”) prior to requesting that she provide written certification of his membership in the Party.

44. Bookwalter testified, consistent with his Affidavit, that he has voted Republican in nearly every general election since 2000, that he joined the Army after President Bush requested that Americans volunteer for the War on Terror, and that he served two tours as a Green Beret, U.S. Army Special Forces medic in Afghanistan, earning a bronze star for distinguished service in combat. *See Hearing Transcript*, Exhibit D, at 147-48.

45. Bookwalter testified that he home-schools his three daughters and serves at his church, and that he has invested in his community by developing commercial real estate and opening a restaurant franchise, where he employs members of his district. *Id.*

46. Bookwalter testified, “There’s no question that I am a Republican.” *Id.* 148

47. The G.O.P. Chair³ acknowledged my conservative *bona fides*, encouraged me to seek a different office, and suggested I wait until 2024. She stated she would not provide the certification because I had not voted in two primaries. She also stated her support for the incumbent and questioned why I would want to primary him.” *Id.*

48. Bookwalter testified regarding the challengers, Irby and Eckert, that “Neither alleges that I am not a Republican.” *Id.*

³ Ottinger.

49. Further, that no one “...challenged my candidacy for Republican Party delegate, only my candidacy for U.S. Congress, please see the attached CAN-37,” which Bookwalter provided to the panel. *Id.*

50. In fact, Bookwalter remains on the Republican Primary ballot as a Boone County Republican Convention Delegate for Clinton, Harrison, Jackson, Jefferson, Marion, Perry, Sugar Creek, Washington, and Worth townships. *See May 3, 2022 Primary Election Candidates*, page 229, available on the Indiana Election Division website at: https://www.in.gov/sos/elections/files/Candidate_List_Abbreviated_20220221_123820PM.pdf, last visited March 5, 2022, 6:27 PM.

51. Bookwalter testified, “The Committee can, and should, construe this as an implied certification of my Party membership, as that is the only way you can construe IC 3-8-2-7 in a Constitutional manner. The only basis...[the challengers]... allege is that I did not comply strictly with IC 3-8-2-7.” *See Hearing Transcript*, Exhibit D, at 148-49.

52. Bookwalter argued that striking him from the ballot based on IC 3-8-2-7 would violate his rights under the First and Fourteenth Amendments of the United States Constitution, as set forth in *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983). *See id.* at 149-151.

53. Bookwalter told the panel, “If you interpret 3-8-2-7 strictly, as to bar my candidacy, you are implementing a four-plus year waiting period for candidates that are not primary voters.” *Id.* 150.

54. Bookwalter argued, citing *Anderson v. Celebrezze*, that this would amount to an “...unconstitutional system,” and result in a “...cycle of disenfranchisement” because,

“...when candidates run unopposed, there is no reason to vote in the primary,” and further noted that “...voters can only express their preferences through candidate.” *Id.* 151.

55. Bookwalter argued that IC 3-8-2-7 imposes an obligation of good faith on the part of County Party Chairs to provide certification to *bona fide* Party members, because “...the legislature can’t get around the Constitution by delegating an unconstitutional act.” *Id.* 152.

56. Bookwalter argued that striking him from the ballot based on IC 3-8-2-7 would amount to unequal treatment because the GOP County Chair for Madison County provided a certification for Evan McMullen to challenge incumbent Republican, Mike Gaskill, in Indiana’s Senate District 25. *Id.* 152.

57. Bookwalter argued that striking him from the ballot based on IC 3-8-2-7 created an issue of notice because prior to IC 3-8-2-7’s amendment in 2021, he was qualified to run based on his voting in the GOP primary in 2016, but he has had no opportunity to vote in a primary since 2021. *Id.* 152.

58. Bookwalter concluded his testimony by stating, “I’m here today to ask you not to violate the Constitution. There’s no question that I’m a Republican and that the County Chair should have signed my certification. Again, no one has filed any objection to my candidacy as a GOP delegate and I will be on the ballot this primary, as a delegate to the Republican Party.” *Id.* 153.

59. Irby made no objections to Bookwalter’s testimony. *Id.*, *passim*.

60. After Bookwalter concluded his testimony, the Panel asked Irby if he had any cross-examination. *Id.* 153.

61. Irby expressly waived examination of Bookwalter, stating “I have no questions.” *Id.*

62. One of the Commission’s members, Ms. Celestino-Horseman, noted that Irby and/or Eckert had submitted GOP documents stating that Bookwalter is a Republican. *Id.* 154-55.

63. Bookwalter argued that the Panel should construe Ottinger, Irby, and Eckert’s acknowledgement of his membership in the Republican Party, and their failure to challenge his candidacy as a GOP Delegate, as an implied certification of his membership in the Republican Party. *Id.* 156.

64. Chairman Okeson stated he felt that Bookwalter did not meet the threshold requirements for candidacy set forth in IC 3-8-2-7. *Id.*

65. In colloquy, Bookwalter again stated that Ottinger “...made it clear that she did not want me to primary Jim Baird,” and that the Panel should construe the lack of any challenge to his party membership, as an implied certification of his party membership, pursuant to IC 3-8-2-7(a)(4)(B)(ii). *Id.* 156.

66. Bookwalter stated he did not believe the Panel would vote to uphold a law that Unconstitutionally, discriminated against minority, or women voters, and thus they should not uphold 3-8-2-7 to bar his candidacy. *Id.* 156-57.

67. Chairman Okeson stated that if the legislature passed that law, he would not serve on the Commission. *Id.* 157.

68. Bookwalter replied, “exactly, so why would you do it for a case like this? ...now is the opportunity, sir.” *Id.*

69. Chairman Okeson stated he appreciated the argument Bookwalter was making but he did not "...have the foundation on which to agree," and made a motion to uphold the challenge. *Id.*

70. The panel voted unanimously to uphold the challenge and to instruct the Election Division to remove Bookwalter from the ballot. *Id.*

COUNT I - JUDICIAL REVIEW

71. Bookwalter incorporates the foregoing allegations as fully set forth herein.

72. Bookwalter is entitled to relief pursuant to I.C. § 4-21.5-5-14, because the Election Commission's action is:

- a. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- b. contrary to constitutional right, power, privilege, or immunity; and
- d. unsupported by substantial evidence.

73. The Commission failed to construe I.C. § 3-8-2-7 in harmony with Bookwalter's rights under the First and Fourteenth Amendment, including as set forth in *Anderson v. Celebrezze*.

74. 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). Further, to effectuate legislative intent, we read the sections of an act together in order that no part is rendered meaningless. *Id.*

75. The clear purpose of the statute by its plain language is to determine if a candidate is a *bone fide* member of the party to prevent candidates from claiming they are when that is not the case. The statute does not provide for either the Commission or a

County Party Chairman to make decisions about who should run. It merely provides for a determination of the candidate's party affiliation.

76. In this regard, I.C. § 3-8-2-7 must be construed in harmony with I.C. § 3-10-1-2 which states that major political parties, such as the Republican Party,⁴ "...shall hold a primary election...to select nominees to be voted for the general election."

77. In other words, to construe I.C. § 3-8-2-7 to permit County Party Chairs to withhold "certification" in order to protect incumbent candidates from a primary challenge by persons they admit are party members, thus allowing the incumbent to run unopposed, 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.

78. It is undisputed that Bookwalter is a member of the Republican Party.

79. Despite the undisputed evidence and testimony that Bookwalter is a member of the Republican Party, the Commission found against his candidacy and against statutory intent.

80. All of the evidence at the hearing and the Commission's own admissions show that the Petitioner is a member of the party. No contrary evidence was presented, let alone substantial evidence.

81. I.C. § 3-8-2-7 is vague and overbroad as applied to Bookwalter and other candidates.

82. I.C. § 3-8-2-7, as applied to Bookwalter, is an invalid *ex post facto* law, because no primaries have been held since I.C. § 3-8-2-7 was amended and became effective, months

⁴ "...whose nominees received at least 10% of the votes for Secretary of State in the last election..." See I.C. § 3-10-1-2.

later, implementing the two-primary rule and Bookwalter had no notice or opportunity to comply with this revision.

83. Removing Bookwalter from the ballot denies violates his constitutionally protected right to equal protection under the Fourteenth Amendment of the U.S. Constitution as well as Article 1, Section 23 of the Indiana Constitution.

WHEREFORE, Bookwalter prays the Court grant this petition, reverse the Election Commission's decision, restore his name to the ballot, and enter all relief just and proper in the premises.

COUNT II
ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF
FOR VIOLATION OF THE FIRST AMENDMENT RIGHT TO FREEDOM OF
ASSOCIATION

84. Bookwalter incorporates the foregoing allegations as fully set forth herein.

85. The First Amendment to the U.S. Constitution provides:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

86. The Supreme Court has long held that the First Amendment's protection of free speech, assembly and petition logically extend 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, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973) (the First and Fourteenth Amendments guarantee "freedom to associate with others for the common advancement of political beliefs and ideas, a freedom that encompasses (t)he right to associate with the political party of one's choice.")

87. Additionally, the ‘void for vagueness’ doctrine applies to ballot access restrictions. *Ray v. State Election Board*, 422 N.E.2d 714, 721 (Ind. Ct. App. 1981).

88. The void for vagueness doctrine can be summarized as follows:

...if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to Boards, policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. ...Where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms.

Id. (cleaned up.)

89. I.C. § 3-8-2-7(a)(4) is overbroad and void for vagueness because Indiana is an open-primary state, where party membership is not statutorily defined, as set forth in *Ray v. State Election Board*, 422 N.E.2d 714, 721 (Ind. Ct. App. 1981).

90. In addition, I.C. 3-8-27 impermissibly delegates to party chairs total discretion to decide who they certify without any guidelines or restrictions, and without regard for actual party membership.

91. Bookwalter has the right to associate freely with the political party of his choosing.

92. As Bookwalter testified in his hearing before the Commission, I.C. § 3-8-2-7(a)(4) imposes a four-plus year waiting period on non-primary voters who are nonetheless members of the Republican or Democratic party to run for office as a candidate for the party of their choice.

93. As such, I.C. § 3-8-2-7(a)(4) imposes a substantial burden on the rights of free association, ballot access, and voting rights.

94. I.C. § 3-8-2-7(a)(4) is not narrowly tailored to meet any legitimate policy objective.

95. As such, I.C. § 3-8-2-7(a)(4) is facially unconstitutional.

96. In *Kusper v. Pontikes*, 414 U.S. 51, 56, 57, 94 S.Ct. 303, 307, 38 L.Ed.2d 260 (1973), the United States Supreme Court struck down an Illinois statute that locked voters into their party affiliation for 23-months following their participation in a primary election as infringing on voters' rights under the First and Fourteenth Amendments, including the right of free political association.

97. Indiana Code section 3-8-2-7(a)(4)(A) as applied to Bookwalter encumbers his right to associate with the Republican party and express his association by appearing on the ballot as a Republican.

98. Because the agency action impacts whether Bookwalter will appear on the ballot less than two months from now and Bookwalter has invested considerable time, effort and resources into his campaign, time is of the essence and she will be irreparably harmed with no recourse if his name is not placed back on the ballot.

99. Given the facts in the record and the law, Bookwalter has a reasonable likelihood of success on the merits.

100. Bookwalter will be harmed more than his challengers, Eckert and Irby, or the Commission should he not appear on the ballot. It is not clear what legitimate harm, if any, Eckert or Irby and the Commission will suffer by Bookwalter being back on the ballot.

101. The community has an interest in having choices on the ballot. Accordingly, the community's interests will not be disserved by Bookwalter being back on the ballot.

WHEREFORE, Bookwalter prays the Court grant this petition, declare that Indiana Code section 3-8-2-7(a)(4)(A) is unconstitutional on its face, and as applied, reverse the Election Commission's decision, restore his name to the ballot, enjoin any agency action to remove his name, and enter all relief just and proper in the premises.

COUNT III
ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF
FOR VIOLATION OF THE FOURTEENTH AMENDMENT
AND ARTICLE 1, SECTION 23.

102. Bookwalter incorporates the foregoing allegations as fully set forth herein.

103. Section 1 of the Fourteenth Amendment provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

104. Article 1, Section 23 of the Indiana Constitution provides that, "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which upon the same terms, shall not equally belong to citizens."

105. Here, Bookwalter is being removed from the ballot ostensibly based on I.C. § 3-8-2-7(a)(4) when the challengers concede that Bookwalter is a member of the Republican Party, and thus presumptively entitled to certification of same by Ottinger, who gave no legitimate rationale for not providing Bookwalter with certification, other than relieving the Party of its obligation under I.C. § 3-10-1-2 to select its candidates by holding a primary.

106. Because the agency action impacts whether Bookwalter will appear on the ballot less than two months from now and Bookwalter has invested considerable time, effort

and resources into his campaign, time is of the essence and she will be irreparably harmed with no recourse if his name is not placed back on the ballot.

107. Given the facts in the record and the law, Bookwalter has a reasonable likelihood of success on the merits.

108. Bookwalter will be harmed more than his challengers, Eckert and Irby, or the Commission should he not appear on the ballot. It is not clear what legitimate harm, if any, Eckert or Irby and the Commission will suffer by Bookwalter being back on the ballot.

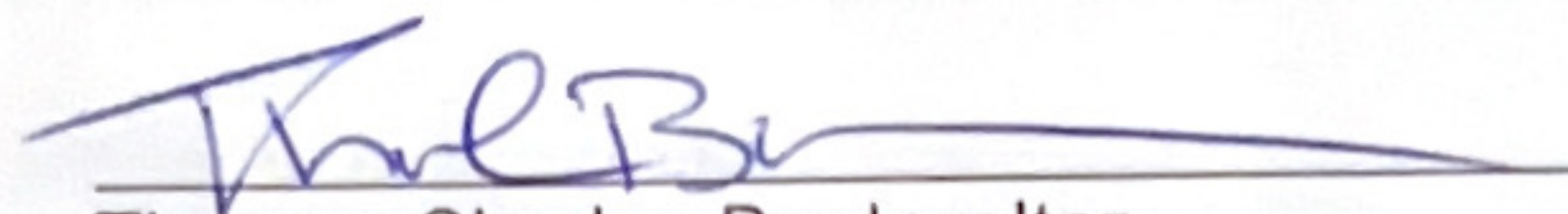
109. The community has an interest in having choices on the ballot. Accordingly, the community's interests will not be disserved by Bookwalter being back on the ballot.

110. Accordingly, for all the reasons listed above and others, removing Bookwalter from the ballot violates his federal and state constitutional rights.

WHEREFORE, Bookwalter prays the Court grant this petition, declare that Indiana Code section 3-8-2-7(a)(4)(A) is unconstitutional on its face, and as applied, reverse the Election Commission's decision, restore his name to the ballot, enjoin any agency action to remove his name, and enter all relief just and proper in the premises.

Verification

I, Thomas Charles Bookwalter, affirm under the penalties of perjury that the foregoing factual representations are true and accurate to the best of my knowledge and belief.


Thomas Charles Bookwalter

Respectfully submitted,

/s/ Michelle C. Harter

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Pro Hac Vice Admission pending

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