STATE OF INDIANA	)	IN THE MARION SUPERIOR COURT 4
	) SS:	
COUNTY OF MARION	)	CAUSE NO. 49D04-2203-PL-008226

THOMAS CHARLES BOOKWALTER,	)
	)
Petitioner,	)
	)
v.	)
	)
INDIANA ELECTION COMMISSION; GREGORY L. IRBY, and CODY ECKERT,	)
	)
Respondents.	)

Order on Emergency Stay Pending Ruling on a Verified Petition for Judicial Review Complaint for Declaratory and Injunctive Relief

Comes now the Court after having conducted a remote hearing on March 25, 2022. The parties were present by counsel except for Defendants Gregory L. Irby and Cody Eckert. Those defendants were duly served with summons, but failed to appear. The Court left open the option that those parties would have the opportunity to appear later, if they chose to do so, to present arguments and state their positions as to the request for an emergency stay of the agency action. To date, no such request has been made. Time is of the essence so this order is entered without their participation.

The Court, having reviewed the filings submitted by the parties, having heard argument from Petitioner Charles Thomas Bookwalter ("Bookwalter") and Respondent Indiana Election Commission ("IEC"), and having been duly advised now issues the following order, to wit:

Findings of Fact

On January 10, 2022, Bookwalter filed a Form CAN-2 to declare his candidacy for U.S. Congressional Representative for District 4 as a Republican primary candidate. On the CAN-2 form, Bookwalter did not select either requirement listed for affiliation with the political party indicated. Gregory Irby, vice-chairman of the Hendricks County Republican Party, and Cody Eckert both filed challenges to Bookwalter's declaration of candidacy.

The Indiana Election Commission held a hearing on February 18, 2022, for all candidacy challenges filed for the May 3, 2022 primary election, including the challenge to Bookwalter's candidacy. At hearing, Bookwalter testified that he had not voted in the 2020 primary. He admitted that the Republican Party Chairperson for Boone County had declined to certify that he was a member of the Republican Party as required by law. The last primary election in Indiana, in which Bookwalter voted, was the 2016 Republican primary.

The Commission, by unanimous vote, upheld the challenge to Bookwalter's declaration of candidacy and directed the Indiana Election Division to not include him on the certified list of candidates sent to the county election boards and to indicate that his name not be printed on the ballot.

On March 14, 2022, Bookwalter filed a petition for judicial review, claiming that he was entitled to judicial review of the Commission's decision that upheld the challenge to his candidacy because the decision was (1) arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; and (3) unsupported by substantial evidence. Bookwalter also included a claim for declaratory and injunctive relief that sought an order declaring that

Indiana Code § 3-8-2-7 violated the Fourteenth Amendment of the U.S. Constitution and Article 1, Section 23 of the Indiana Constitution. The same day, Bookwalter filed a petition for an emergency stay of the Commission's decision.

Conclusions of Law

The Indiana Administrative Orders and Procedures Act provides the exclusive mechanism for obtaining a stay pending the resolution of a judicial review. The Court in a judicial review proceeding may issue an order staying the agency order pending a final determination if "the court finds that the petition for review and the petition for a stay order show a reasonable probability that the order or determination appealed from is invalid or illegal" and "a bond is filed that is conditioned upon the due prosecution of the proceeding for review and that the petitioner will pay all court costs and abide by the order of the agency if it is not set aside," the bond being for at least $500. Ind. Code § 4-21.5-5-9(a).

To establish this probability, a petitioner must overcome the deferential standard of review given to the agency that includes a set of presumptions which favor the validity of the agency action. The reviewing court may not try the case *de novo*. Ind. Code § 4-21.5-5-11. Rather, "the court is bound by the agency's findings of fact that are supported by the record." *Bennet v. Ind. Life & Health Ins. Guaranty Ass'n*, 688 N.E.2d 171, 176 (Ind. Ct. App. 1997).

An agency's decision is invalid if the petitioner "has been prejudiced by an agency action that is:

> (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (2) contrary to constitutional right, power, privilege, or immunity;

> (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (4) without observance of procedure required by law; or
> (5) unsupported by substantial evidence."

Ind. Code 4-21.5-5-14(d).

The U.S. Supreme Court explained in *New Motor Vehicle Bd. Of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) that "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." The stay that Petitioner Bookwalter has requested would preclude the effect of the validity of Indiana Code § 3-8-2-7; a statute enacted by the Indiana General Assembly.

Three and a half weeks elapsed before Bookwalter sought relief on his behalf. By doing so, Bookwalter effectively acceded to the printing and mailing of ballots without his name included as a candidate. March 14, 2022, was the statutory deadline for counties to receive delivery of printed absentee ballots. Ind. Code § 3-11-4-15. March 19, 2022, was the statutory deadline for counties to begin mailing absentee ballots to eligible voters who had applied. *Id.*; 52 U.S.C. § 20302(a)(8)(A). Ballots have already been mailed and some voters have returned their ballots and have designated their candidate choices.

A stay of an agency action may only maintain the status quo. *Medical Licensing Bd. of Indiana v. Provisor*, 678 N.E.2d 814 (Ind. Ct. App. 1997. That case held that a stay of an agency action pending judicial review preserves the status quo to avoid undue hardship. In *State ex rel. Indiana Alcoholic Beverage Comm'n v. Lake Superior Court Room Four Sitting at Gary*, 284 N.E.2d 746 (Ind. 1972), the Court held that the entrance of a stay pending judicial review exceeded court's jurisdiction by authorizing the continued

operation of a licensee even though the license period had expired. In that case, an expired permit was effectively renewed.

Bookwalter argued that the status quo should return to the period before his application for candidacy was required. He now asks the Court to mandate an act of the Commission that is discretionary. The requested relief is not available through a stay of an administrative action.

In *Scales v. Hospitality House of Bedford*, 593 N.E.2d 1283, 1285 (Ind. Ct. App. 1992), the Court held that "the essence of this statute" that is permitting a stay pending judicial review "is inaction"). Here, Bookwalter asks the Court to compel State election officials to do something, not just remain passive while he appeals the IEC decision. Specifically, Bookwalter requests that this Court "grant a stay of the agency determination" and "restore his name to the ballot." However, Bookwalter's name was not placed on the ballot. He declared his candidacy for the Republican nomination and two individuals challenged his candidacy. The Election Commission sustained that challenge. Consequently, his candidacy was never certified under Indiana Code § 3-8-2-17. He was not placed on the ballot because he did not meet the requirements under Indiana Code § 3-8-2-7.

Bookwalter did not dispute that he did not satisfy the statutory requirements set forth in Indiana Code § 3-8-2-7 for political party affiliation or that the Indiana Election Commission accurately applied the requirements specified in Indiana Code § 3-8-2-7. Bookwalter maintained that the statute is unconstitutional. This position, if sustained by Court, would invalidate the Commission's decision to uphold the challenge to his candidacy. The Court finds that Petitioner Bookwalter has not shown by a reasonable probability that the statute is unconstitutional.

The US Supreme Court did not recognize an unfettered right of a person to run for election. In *Storer v. Brow, 415 US 724, (1974)* the Court upheld a California statute forbidding a ballot position to an independent candidate if he or she voted in "the immediately preceding primary," or "had a registered affiliation with a qualified political party at any time within one year prior to the immediately preceding primary election." The Court recognized that, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, it to accompany the democratic processes." *Id.* at 726.

In *Rosario v. Rockefeller*, 410 U.S. 752 (1973), the Supreme Court reviewed New York's closed primary system which required a voter to enroll in the party of his choice at least thirty days before the general election in November to vote in the subsequent party primary. The Supreme Court found that the statute was constitutional because it did not prohibit voters from associating with the political party of their choice, but "merely imposed a legitimate time limitation on their enrollment." The Court in *Rosario* recognized the legitimate interest in inhibiting "party raiding," "whereby voters in sympathy with one party designate themselves as voters of another party to influence or determine the results of the other party's primary." *Id.* at 761;

In *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989) (citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214 (1986)), the Court found that it was "well settled" that "partisan political organizations enjoy freedom of association protected by the First and Fourteenth Amendment." … "a political party has a right to identify the people who constitute the association… and select a standard bearer who best represents the party's ideologies and preferences." *Id.* A political party has "discretion in how to organize itself, conduct its affairs, and select its leaders." *Id.* at 215.

"Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Id.* at 229.

Bookwalter relied on *Kusper v. Pontikes*, 414 U.S. 51, 53 (1973). Kusper concerned disenfranchisement of a voter, not whether a candidate has the right to run under the banner of a political party. In *Kusper*, the Court reviewed an Illinois statute that barred a voter from voting in the primary election of a political party if he or she had voted in the primary of any other party within the preceding 23 months. *Id.* at 52. The Court found that the prohibition of participation in any party activities for almost two years that included a prohibition on the right to vote if a voter wished to vote for a different party in a primary went too far and infringed on the right of a voter's free political association protected by the First and Fourteenth Amendments of the U.S. Constitution.

Bookwalter cited *Anderson v. Celebrezze*, 460 U.S. 780 (1983) as support that the Indiana requirement of having voted in two prior primary elections is unconstitutional. In *Anderson*, the Supreme Court reviewed an Ohio statute that required independent candidates to file their candidacy around five months before the major political parties would adopt their nominees for a general election. *Anderson*, 460 U.S. at 790–91. The Court found that the early filing deadline for independent candidates violated the right of association under the First and Fourteenth Amendments because the deadline unequally burdened all independent candidates and thus violated "associational choices protected by the First Amendment." *Id.* at 793.

Here, the Indiana statute does not prohibit association with a political party. It does allow a partisan political party to exercise its discretion to conduct its affairs. The Court finds that Bookwalter is unlikely to succeed in showing that this statute violates the First or Fourteenth Amendment of the US Constitution.

Bookwalter further asserted that Indiana Code § 3-8-2-7 is unconstitutionally vague and overbroad because the statute did not elucidate clear criteria for how a county political party chair determines party membership. The Due Process Clause "requires only that the law give sufficient warning so that individuals may conduct themselves in a manner which avoids the forbidden conduct." *Chandley Enterprises, Inc. v. City of Evansville*, 563 N.E.2d 672, 675 (Ind. Ct. App. 1990).

The Court finds that Bookwalter has not established that the void-for-vagueness doctrine applies here, because Indiana Code § 3-8-2-7 does not prohibit conduct. The question was whether the statute is sufficiently clear so that an "ordinary person exercising ordinary common sense can sufficiently comply with the statute." *Neudecker v. Neudecker*, 566 N.E.2d 557, 562 (Ind. Ct. App. 1991), *aff'd*, 577 N.E.2d 960 (Ind. 1991). This statute is sufficiently clear and understandable by ordinary citizens.

Bookwalter also relied on *Ray v. State Election Bd.*, 422 N.E.2d 714 (Ind. Ct. App. 1981), in support of his argument. *Ray* addressed a statute, that was no longer in effect, that stated that "that the name of no candidate belonging to any other party shall be printed or written [on a primary election ballot of any party]." 442 N.E.2d at 715. The IEC relied on the statute to find that an individual could not declare candidacy for both major political primaries. The Court held that the statute was vague because of the language "belonging to any other party." *Id.* The Court also found that the statute was unconstitutionally overbroad because it prohibited a candidate from "associating with more than one political party" and the language was not the least restrictive means to prohibit cross-filing with both political party primaries that was the issue at hand.

Indiana Code § 3-8-2-7 states what a candidate must do to declare candidacy for a political party. The challenge issue of "vagueness "raised here is based on the process by

which a county chair can certify that an aspirant is a member of a political party. The decision to make that determination is within the import of *Eu* and would allow such discretion notwithstanding unspecific criteria. Bookwalter is unlikely to succeed in a finding that disallows a party chair's discretion.

Petitioner Bookwalter has not met the burden for relief he requested in his Verified Petition for Emergency Stay. He has not shown a reasonable probability that the Indiana Election Commission's decision to uphold the challenge to his candidacy was invalid or illegal. Accordingly, the Court denies his Verified Petition for Emergency Stay Pending Judicial Review.

So, Ordered this 1st Day of April 2022

Cynthia J. Ayers Judge
Marion Superior Court Civil Division Room IV

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