

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 21-2793

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|-----------------------------|--|
| JOSEPH HERO, |) |
| |) Appeal from the United States District Court |
| Plaintiff / Appellant, |) for the Northern District of Indiana |
| |) |
| v. |) Cause No. 2:19-cv-00319-DRL |
| |) |
| LAKE COUNTY ELECTION BOARD, |) The Honorable Damon R. Leichty, Judge |
| |) |
| Defendant / Appellee. |) |

BRIEF AND SHORT APPENDIX OF APPELLANT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2793Short Caption: Joseph Hero v. Lake County Election Board

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):
Joseph Hero

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:
ACLU of Indiana (Gavin M. Rose, Stevie J. Pactor)

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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N/A

Attorney's Signature: /s/ Gavin M. Rose

Date: October 4, 2021

Attorney's Printed Name: Gavin M. Rose

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d).

Yes

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JURISDICTIONAL STATEMENT

The district court had original jurisdiction of this case pursuant to 28 U.S.C. § 1331. Federal-question jurisdiction was premised on alleged violations of the First and Fourteenth Amendments of the United States Constitution.

This Court has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291. The final judgment from which this appeal is taken dismissed this case for lack of jurisdiction, thereby resolving all claims, and was entered on September 21, 2021. No motion for a new trial or alteration of the judgment or any other motion that would have tolled the time to appeal was filed. The notice of appeal was filed on September 30, 2021. This is not an appeal from the decision of a magistrate judge.

STATEMENT OF THE ISSUES

The U.S. Supreme Court has reiterated the self-evident: that the very purpose of primary elections is to resolve intraparty squabbles. Nonetheless, when Joseph Hero—a lifelong Republican—supported an independent candidate for local office, the State Chairman of the Indiana Republican Party responded by writing a letter that purports to ban him from seeking any elected office as a Republican for the next decade. This letter was not based on a determination that Mr. Hero does not meet the requirements to run as a Republican, which he assuredly does. And when Mr. Hero submitted his declaration of candidacy in the 2019 Republican primary, the Lake County Election Board unanimously voted to exclude him from the primary ballot, solely on the basis of the

“ten-year ban” letter, which endures through 2026. He was therefore prohibited from running as a member of the Republican Party for the St. John Town Council. It is undisputed that he intends to run for office as a member of the Republican Party in the future and will be prohibited from doing so by the Lake County Election Board.

The district court did not reach the merits of Mr. Hero’s claim, as presented on cross-motions for summary judgment, because it concluded that this matter was not justiciable.

The issues presented for review are:

1. Whether the district court erred in concluding that this case presented no live “case or controversy” for adjudication, given the undisputed facts that (a) Mr. Hero intends to run as a Republican for local office at the earliest opportunity, (b) the “ten-year ban letter” that formed the basis of the Board’s determination lasts through 2026, and (c) the Board has adopted the firm and formal position that Mr. Hero may not run for office as a Republican, and given that an overwhelming abundance of case law from the U.S. Supreme Court, this Court, and other courts has found disputes such as this one to be justiciable.

2. Should this Court determine to reach the merits of this dispute, whether the Lake County Election Board’s imposition of a complete ballot-access prohibition on Mr. Hero violates the First and Fourteenth Amendments to the United States Constitution, given that the Board can articulate no legitimate interest forwarded by its prohibition.

STATEMENT OF THE CASE¹

I. Joseph Hero and his membership in and support for the Republican Party

Joseph Hero is an attorney and an adult resident of the Town of St. John—located in Lake County, Indiana—and has been a member of the Republican Party for more than forty years. (Dkt. 29-1 at 1). Since at least the mid-1980s, he has voted as a Republican in every primary election that has been conducted in Indiana, including the most recent primary election in 2020. (*Id.*). He intends to vote as a Republican in every primary election conducted in the future as well. (*Id.*).

Over the past several decades, Mr. Hero has held numerous elected and appointed positions within the Republican Party. In the early 1980s, he was appointed by the Lake County Republican Chairman to serve as a Republican Precinct Committeeman in St. John. (*Id.*). He was subsequently elected (by the voters at the Republican primary election) to retain this position on several occasions, and he served consistently in this position until 2016. (*Id.*). In this capacity, he assisted in identifying and recruiting qualified Republican candidates to seek public office in St. John; he also assisted in supporting Republican candidates who appeared on the ballot, mobilizing voters to support these candidates, and organizing the local Republican Party. (*Id.* at 1-2). On several occasions over the years, Mr. Hero also ran and was elected (by the voters at the

¹ All citations to the record are made to the page numbers assigned by the district court's electronic filing system rather than to any internal pagination. The short appendix attached to this brief is designated as "App."

Republican primary election) to serve as a delegate to the Republican State Convention. (Dkt. 29-1 at 2). As a delegate, he was afforded voting privileges at the Party's state convention and, among other things, assisted in approving the Party's platform and nominee for Indiana Attorney General. (*Id.*). Mr. Hero was also appointed by the Chairman of the Lake County Republican Party to serve as the Chairman of the Town of St. John Republican Party, a position that he held for at least twenty years. (*Id.*).

In addition to these positions, Mr. Hero also ran to be elected the Chairman of the Lake County Republican Party, although he narrowly lost the election. (*Id.*). He has also run as a Republican candidate to serve as Lake County Prosecutor and to serve as a state representative. (*Id.*). He secured the Republican nomination for both positions, although he was defeated in the general election on each occasion. (*Id.*).

When deciding which candidate or candidates he supports, Mr. Hero chooses to support (and to cast a ballot for) the candidate that he believes will best represent his community. (*Id.* at 2-3). Nonetheless, where candidates for partisan office are concerned, throughout his life he has most often chosen to support the candidate (or one of the candidates) representing the Republican Party insofar as that party's platform best aligns with his own beliefs. (*Id.* at 3).

II. The issuance of the "ten-year ban letter"

In 2015 a hotly debated eminent-domain issue arose in the Town of St. John ("the Town"). (*Id.*). The St. John Town Council—a five-member body that was (and remains)

exclusively Republican—voted to assert the Town’s eminent-domain authority to seize several private residences in order to construct a commercial development. (Dkt. 29-2 at 3). Numerous local residents spanning many party affiliations, including Mr. Hero, believed strongly that the Town should not assert its eminent-domain authority in this manner, particularly given that many of the affected residents were lower-income persons who had lived in the area for decades. (*Id.*). These residents also believed both that the Town was under-compensating many persons whose property was seized and that the Town was exercising its eminent-domain authority in a manner that was not sufficiently open and transparent. (*Id.*). A local political action committee (called the St. John Homeowners’ PAC) was formed to support the election of two independent candidates for local office who were running against incumbent officials who supported the eminent-domain action. (*Id.*). Among other things, this political action committee printed and distributed yard signs advocating for the election of the independent challengers and calling for voters to “fire” two Republican officials who were supportive of the exercise of eminent domain. (*Id.* at 3-4).

Given his opposition to the seizure of private property for commercial development and his belief that officials of the Town were not acting in a transparent or ethical fashion, Mr. Hero was vocally supportive of the St. John Homeowners’ PAC and the two independent challengers running for office. (*Id.* at 4). Among other things, he offered legal advice to the political action committee and assisted in the distribution and

posting of yard signs supportive of the independent candidates. (Dkt. 29-1 at 4). However, his support for these independent candidates did not change the fact that Mr. Hero considers himself to be a Republican, supports the vast majority of Republican positions and candidates, and openly identifies himself as a member of the Republican Party. (*Id.*). In fact, he did not consider the eminent-domain issue to be a partisan issue at all, and he is not aware of any official stance of the local, state, or national Republican Party that his advocacy contravened. (*Id.*). At least one of the independent candidates he supported previously identified as a member of the Republican Party and continued to hold beliefs consistent with the Republican Party. (*Id.*). Aside from this one local election, Mr. Hero does not recall a single instance in forty years where he has advocated the defeat of a Republican candidate for office. (*Id.*).

The following year, in 2016, Mr. Hero ran for election to retain his position as St. John Precinct Committeeman, and also ran to again serve as a delegate to the Republican State Convention. (*Id.*). He won both positions at the Republican primary election in May 2016. (*Id.*) Because these are internal party positions, they are elected only during the primary. (*Id.*). However, after his election, and notwithstanding the fact that no challenge had been filed to his candidacy, officials within the Republican Party determined that, given his support for the two independent candidates during the 2015 general election, he was ineligible to serve in either of these capacities,. (*Id.* at 4-5). He

was therefore not permitted to serve as St. John Precinct Committeeman or as delegate to the Republican State Convention. (Dkt. 29-4 at 5).

Shortly thereafter, in November 2016, Mr. Hero received a letter from the State Chairman of the Indiana Republican Party. (*Id.*). This letter provided, in pertinent part, as follows:

On June 6, 2016, you were found by the Lake County Republican Committee to not have been in good standing in the Republican Party and not compliant with Republican Rule 2-3 because you openly supported two independent candidates in the November, 2015 general election; therefore, you were not eligible for election for the office of St. John Precinct Ten Committeeman at the May 3, 2016 Primary Election.

Also on June 6, 2016, a special three-member hearing board appointed by the Lake County Republican Chairman found that you had committed gross misconduct that adversely affected the Republican Party organization, as that phrase is set forth within Republican Rule 3-23(3), by continuing to openly support and represent the St. John Homeowners PAC which is adverse to the principles and Rules of the Indiana Republican State Central Committee.

On June 8, 2016, the Chairman of the Committee on Credentials to the State Convention convened a hearing on a sworn challenge[] to your credentials as delegate to our State Convention based upon the same conduct complained of in the complaints presented before the two Lake County panels on June 6, 2016. The Committee on Credentials unanimously found by clear and convincing evidence pursuant to Rule 9-19 that you were not in good standing in the Party on May 3, 2016, and, consequently, could not serve in the Office of State Convention Delegate.

... It is for this reason and after reviewing the Orders entered by all three panels and the seriousness of your conduct that I am issuing you a ten (10) year ban from the Indiana Republican Party. This ban by definition means you are not a Republican in good standing and thus bars you from seeking an elected office within the State of Indiana as a Republican candidate during the next ten (10) years.

(Dkt. 29-1 at 5, 10-11 [emphasis in original]). In purporting to ban Mr. Hero from seeking office as a Republican, the State Chairman was not acting pursuant to any established Party rules: although Party rules require that an individual “not actively or openly support another candidate against a Republican nominee” in order to serve in certain internal leadership position—such as Precinct Committeeman (Dkt. 29-3 at 12), County Chairman (*id.* at 16-17), or State Convention Delegate (*id.* at 34)—these rules impose no similar requirement for an individual to seek local office as a Republican. (*See also* Dkt. 29-2 at 200:23 through 201:1 [“{O}ur GOP rules don’t cover a situation other than in a party position; precinct committeeman, state delegate.”]).² In fact, the rules explicitly provide that “[i]f there is a conflict between these Rules and a statute, the statute prevails.” (*Id.* at 3).

III. Indiana’s ballot-access laws

An individual wishing to run for local office in Indiana may gain access to the ballot in one of three ways. First, if he desires to be nominated at the primary election as

² The rules require that, in order to serve in specified internal party positions, an individual must be a “Qualified Primary Republican.” (*See, e.g.*, Dkt. 29-3 at 12 [Rule 3-3: Precinct Committeeman]; *id.* at 16-17 [Rule 4-11: County Chairman]; *id.* at 34 [Rule 7-8: State Convention Delegate]). This term is defined as “a voter who cast a Republican Party ballot at the most recent primary election in Indiana which the voter voted, and who is a Republican in Good-Standing.” (*Id.* at 5 [Rule 1-24]). A “Republican in Good-Standing” is, in turn, defined as “a Republican who supports Republican nominees and who does not actively or openly support another candidate against a Republican nominee.” (*Id.* at 5 [Rule 1-25]). (The version of the GOP Rules that appears in the record is dated March 11, 2019. [*Id.* at 1].

a candidate of a major political party—defined as a party “whose nominee received at least ten percent (10%) of the total vote cast for secretary of state at the last election”—he may file a “declaration of candidacy” with his county election board. *See* Ind. Code §§ 3-8-2-1(a), 2, 6. In this declaration, he must certify, *inter alia*, his name, his residential address, his precinct and township, that he is requesting that his name be placed on the ballot for the office he is seeking, and that he complies with all requirements under Indiana law to seek that office. Ind. Code § 3-8-2-7(a). Prior to January 1, 2022, the law required that an individual must also certify, under oath, the following:

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

(A) The most recent primary election in Indiana in which the candidate voted was a primary election held by the party with which the candidate claims affiliation.

(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.

Ind. Code § 3-8-2-7(a)(4).³ A “declaration of candidacy” must be filed “not later than noon

³ This provision was subsequently amended, to become effective January 1, 2022, and as amended, it mandates that party affiliation is determined by the last *two* Indiana primary elections in which an individual voted: they must have been primaries held by the party with which an individual claims affiliation. *See* Ind. Code § 3-8-2-7(a)(4)(A). This amendment has no

eighty-eight (88) days and not earlier than one hundred eighteen days before the primary election.” Ind. Code § 3-8-2-4(a).

Second, if an individual wishes to run as an independent candidate—defined as a candidate “who states that the candidate . . . is not affiliated with any political party,” Ind. Code § 3-5-2-26.6—he may be nominated by a petition signed by registered voters. Ind. Code §§ 3-8-6-1, 2. The required petition must be signed “by the number of voters equal to two percent (2%) of the total vote cast at the last election for secretary of state in the election district that the candidate seeks to represent.” Ind. Code § 3-8-6-3(a); *see also* Ind. Code §§ 3-8-6-6-8. This petition must be submitted to the county voter registration office during the period beginning 118 days before the primary election and ending at noon on June 30th before the election. Ind. Code § 3-8-6-10(a), (b).⁴

And third, an individual may appear as a write-in candidate in a general, municipal, or school board election by filing a “declaration of intent to be a write-in candidate” in the same manner as an individual running for nomination as a major-party candidate files a “declaration of candidacy.” *See* Ind. Code § 3-8-2-2.5(a). An individual “may not be a write-in candidate in a contest for nomination or for election to a political

impact on Mr. Hero’s claim, as he satisfied, and continues to satisfy, the provision even as amended.

⁴ An individual may also be nominated by petition as the candidate of a political party “not qualified to nominate candidates in a primary or by convention.” Ind. Code §§ 3-8-6-1, 2. As Mr. Hero is not affiliated with any political party other than the Republican Party, this possibility is not discussed further.

party office.” Ind. Code § 3-8-2-2.5(e). Among other things, a “declaration of intent to be a write-in candidate” must include “[t]he candidate’s party affiliation or a statement that the candidate is an independent candidate.” Ind. Code § 3-8-2-2.5(b)(4). A write-in candidate, however, may not claim affiliation with a major political party or any other political party “whose nominee received at least two percent (2%) of the total vote cast for secretary of state at the last election.” *Id.* (referencing Ind. Code § 3-8-4-1). A “declaration of intent to be a write-in candidate” must be filed during the period beginning 118 days before the primary election and ending at noon on July 3rd before the election. Ind. Code § 3-8-2-4(b).

IV. Mr. Hero’s attempt to run as a candidate for local office in 2019

In early 2019, Mr. Hero filed a “declaration of candidacy” to run as a member of the Republican Party for an at-large seat on the St. John Town Council. (Dkt. 29-1 at 6). At the time, he met all requirements imposed by Indiana law, including the requirement that the most recent primary election in Indiana in which he voted was a primary election held by the Republican Party—as noted, he has consistently and uniformly voted in Republican primary elections throughout his adult life. (Dkt. 29-1 at 1, 6). After filing this declaration of candidacy, however, Mr. Hero was informed that two persons—the Chairman of the Lake County Republican Party and a member of the Lake County Council—had submitted formal challenges to his candidacy. (*Id.*). According to these challenges, because of the ten-year ban letter issued by the Indiana Republican Party

Chairman, he was prohibited from running for elected office as a Republican in the upcoming primary election. (Dkt. 29-1 at 6, 13, 15).

The Lake County Election Board held a hearing on the challenges to Mr. Hero's candidacy on February 26, 2019. (*Id.* at 6). During this hearing, Mr. Hero maintained that the challenges to his candidacy were without merit insofar as he met the requirements established by Indiana law for him to run as a Republican in the primary election. (*Id.* at 6-7). He also presented an opinion from an attorney for the Indiana Election Division supportive of his position, as well as a print-out establishing that he had voted in every Republican primary since at least the mid-1980s (*Id.* at 7, 17-18). In response, the persons challenging Mr. Hero's candidacy conceded that he met the qualifications for affiliation with the Republican Party established by Indiana Code § 3-8-2-7(a)(4) and acknowledged that his removal from the ballot was not mandated by any rule of the Indiana Republican Party. (Dkt. 29-2 at 176-77). Nonetheless, they contended that Mr. Hero could not run for office as a Republican based on "an actual order from the party chairman in Indiana." (*Id.* at 177, 199). In so doing, they expressly disavowed the notion that they were "raising any freedom of association argument." (*Id.* at 204).

At the conclusion of that hearing, the Board unanimously sustained the challenges to Mr. Hero's candidacy and ordered his removal from the Republican primary ballot. (Dkt. 26-1 at 7; Dkt. 29-2 at 214).

V. Mr. Hero's intention to run for elected office in the future

Mr. Hero desires to run as a Republican candidate for the St. John Town Council or another local office at the earliest opportunity, which is in 2023 for the St. John Town Council. (Dkt. 29-1 at 7). Given the ban letter issued in 2016, and in light of the position taken by the Board, he is aware that the Board will again prohibit his placement on the ballot. (*Id.*).

This position of the Board, taken together with Indiana's statutory election provisions, has the effect of banning Mr. Hero altogether from the ballot for town council (or for any other partisan position). (*Id.* at 7-8). He cannot state that he is not affiliated with any political party, as he continues to be affiliated with the Republican Party and to vote in Republican primary elections. (*Id.*). And he certainly cannot state that he is affiliated with a political party *other* than the Republican Party, including minor parties, for he exclusively affiliates with the Republican Party. (*Id.* at 8). Notwithstanding the letter that he received from the State Chairman of the Indiana Republican Party in 2016, he considers himself to be a Republican, continues to assist in recruiting individuals to run for elected office as Republicans, affiliates exclusively with the Republican Party, and has voted in Republican primaries and for Republican candidates for four decades. (*Id.* at 8). He also meets the requirements of Ind. Code § 3-8-2-7(a)(4)(A), as amended, in that the last two Indiana primaries in which he voted were held by the Republican Party. (*Id.*) When he runs for office in the future, he intends to do so as a Republican. (*Id.*).

VI. Procedural history

Mr. Hero filed the complaint that forms the basis for this suit on August 26, 2019. (Dkt. 1). In it, Mr. Hero alleged that his removal from the ballot constituted an impermissible restriction on his ballot access, in violation of the First and Fourteenth Amendments to the United States Constitution, and he sought declaratory and injunctive relief. (Dkt. 1 at 1-2).

Mr. Hero filed his motion for summary judgment (Dkt. 29) and supporting brief (Dkt. 30) on February 9, 2021, and the Board filed its cross-motion and memorandum the following day, (Dkts. 31-32). Mr. Hero argued that application of the sliding-scale analysis, as required by the Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), results in the conclusion that his removal from the ballot was without justification and violates the Constitution. (Dkt. 30 at 13-24). In its motion for summary judgment, the Board contended that it was entitled to summary judgment on the merits. (Dkt. 32).

On September 21, 2021, the district court issued its Opinion and Order (“Order”). (Dkt. 50 [App. 2-9]). In its Order, the district court concluded that it lacked jurisdiction over this matter, in that Mr. Hero did not demonstrate standing to bring an action. (Dkt. 50 at 4-8 [App. 5-9]). It concluded that Mr. Hero had not established that he was suffering an injury that was “certainly impending,” but rather that any possible injury was based upon a “speculative chain of possibilities” or “several contingencies” that rendered any

harm too attenuated to satisfy the requirements of standing. (Dkt. 50 at 6 [App. 9]). Therefore, concluded the court, Mr. Hero did not meet the injury-in-fact requirement of Article III. (*Id.*)

Having concluded that it lacked jurisdiction to hear the case, the district court could not, and did not, reach the merits. It therefore entered a judgment of dismissal. (Dkt. 50 at 8 [App. 9]; Dkt. 51 [App. 1]). This appeal ensued.

SUMMARY OF THE ARGUMENT

The district court erred when it concluded that this case was not justiciable. Longstanding precedent establishes that, in circumstances such as these, a would-be candidate who suffered injurious conduct in a prior election may seek injunctive relief as to a future election. Viewed as a question of standing, under the Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), Mr. Hero has shown that he suffered a past injury due to the application of an unconstitutional policy—his removal from the ballot due to the Board's determination that it must enforce the Indiana Republican Party Chairman's "ten-year ban letter"—and he will suffer that same injury again in the future, due to the application of that policy. That is sufficient to establish that he is suffering the present, adverse effects of an injury in fact.

Viewed either alternatively or additionally as a question of mootness, a long line of case law also makes clear that his claim is justiciable. Although the 2019 election cycle is complete, the harm Mr. Hero suffered is capable of repetition, yet evading review. Mr.

Hero's claim is currently justiciable.

Should this Court determine that this matter is justiciable, Mr. Hero requests that this Court proceed to decide the merits. Under the sliding-scale approach articulated in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), no matter what level of scrutiny applies to Mr. Hero's claim, he has demonstrated that the Board's actions cannot be justified by any legitimate interest.

The only interests articulated by the Board depend on the same faulty and anti-democratic premise: that the Board was required to enforce, in contravention of state law, the desire of party leadership that Mr. Hero be deemed ineligible to run in the Republican primary. The Board simply does not have any interest in such enforcement: not only does case law reject any such purported interest, but the consequences to our democracy of the system necessarily advocated by the Board are severe. As such, the U.S. Supreme Court has repeatedly reiterated that the proper forum for resolving intraparty feuds is the primary election itself. While a party's associational rights no doubt entitle it to have a say in the primary process through which nominees are selected, these rights are not so broad that they extend to party leadership's selection of particular nominees.

Mr. Hero's First and Fourteenth Amendment rights were violated, and he is entitled to summary judgment.

STANDARD OF REVIEW

This matter has been appealed from a jurisdictional dismissal. When jurisdiction is not challenged on factual grounds, this Court reviews *de novo* a district court's dismissal. *Bria Health Servs., LLC v. Eagleson*, 950 F.3d 378, 381 (7th Cir. 2020). It "accept[s] as true all material allegations of the complaint, drawing all reasonable inferences therefrom in the plaintiff's favor," and "the plaintiff bears the burden of establishing standing." *Id.* at 381-82.

Should this Court decide to consider and address the merits, its analysis would be *de novo*. See, e.g., *Morgan Guar. Tr. Co. of New York v. Martin*, 466 F.2d 593, 600 (7th Cir. 1972). "The question on a motion for summary judgment is whether the moving party has shown there is 'no genuine dispute as to any material fact,' and is entitled to summary judgment as a matter of law." *Golla v. Office of Chief Judge of Cook Cnty.*, 875 F.3d 404, 407 (7th Cir. 2017) (quoting Fed. R. Civ. P. 56(a)). When a case is decided on cross-motions for summary judgment this Court will "constru[e] all facts and draw[] all reasonable inferences in favor of the party against whom the motion under consideration was filed." *Hess v. Board of Trustees of S. Ill. Univ.*, 839 F.3d 668, 673 (7th Cir. 2016) (citations omitted).

ARGUMENT

I. Mr. Hero's claim for injunctive relief was and is justiciable

A. Justiciability under Article III of the United States Constitution

Article III of the Constitution constrains the power of federal courts to deciding only “[c]ases” and “[c]ontroversies.” U.S. Const. Art. III, § 2. The Supreme Court has “long understood that constitutional phrase to require that a case embody a genuine, live dispute between adverse parties, thereby preventing the federal courts from issuing advisory opinions.” *Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

A plaintiff must establish three elements in order to satisfy a court of a matter's justiciability: (1) that the plaintiff has suffered “an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical”; (2) the existence of “a causal connection between the injury and the conduct complained of”—or in other words, that the injury is “fairly...traceable to the challenged action of the defendant”; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal quotations, citations, and alterations omitted). And even if these requirements exist at the outset of litigation, a case may become non-justiciable if it is rendered moot: that is, if “the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.” *Eichwedel v. Curry*, 700 F.3d 275, 278 (7th Cir. 2012) (citations omitted).

B. Mr. Hero's claim is justiciable, as he has shown that he is suffering an injury-in-fact that is redressible by a favorable order from this Court

The district court concluded that Mr. Hero failed to establish that he was suffering an injury that was sufficiently imminent—as opposed to merely conjectural or hypothetical—to create a live controversy. (Dkt. 50 at 6-8 [App. 7-9]). It therefore dismissed this matter for lack of jurisdiction. (Dkt. 50 at 8 [App. 9]). While the district court's analysis was phrased in terms of standing, it appears that in the ballot-access context, the issue is more often framed in terms of mootness. Regardless of the particular doctrine applied, the inquiry is the same: is the plaintiff suffering a real and imminent threat of injury, likely to be redressible by the injunctive relief he seeks? The answer here, unequivocally, is yes.

As noted by the district court, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), the Supreme Court has made clear that “past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse effects.” (Dkt. 50 at 5-6 [App. 6-7].) However, the Supreme Court's discussion in *Lyons*, as confirmed by a wealth of subsequent cases, makes clear that this is precisely the type of case in which the plaintiff has shown the “continuing adverse effects” that give rise to a justiciable claim.

In *Lyons*, after being subjected to a traffic stop for a minor infraction, the plaintiff was rendered unconscious after being held in chokehold by an officer of the Los Angeles Police Department. *Lyons*, 461 U.S. at 97-98. He filed a lawsuit seeking, *inter alia*,

injunctive relief barring the police department from utilizing such chokeholds except in narrowly circumscribed instances. *Id.* at 99-100. The plaintiff argued that because chokeholds were so routinely inappropriately used by police officers, he was likely to experience a repetition of the same injurious conduct in a future traffic stop. *Id.* The Supreme Court concluded that in order to establish that he was likely to suffer the same injury in the future, and thereby show a continuing or threatened injury, the plaintiff would have had to allege both that he would be subject to another traffic stop, and that the governmental conduct was so uniform—or so mandated by policy—that the same actions would occur in a future stop. *Id.* at 105-06. The plaintiff, said the Court, had not so alleged, and therefore had not established the existence of a present case or controversy.

But of course, *Lyons* makes clear then, that where a plaintiff does allege that he has suffered a past injury due to the application of an unconstitutional policy, and where that policy will be applied to him in the future, he is suffering the type of “present adverse effects” that constitute injury in fact. *Lyons*, 461 U.S. at 105-06.

In the ballot-access context, the same issue often arises as a question of mootness. *See, e.g., Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020); *Acevedo v. Cook County Officers Electoral Board*, 925 F.3d 944, 947-48 (7th Cir. 2019). In those cases, a plaintiff generally alleges unlawful governmental conduct during a past election, often involving the application of an allegedly offending policy or statute, and requests injunctive relief. Because such cases

are usually impossible to fully litigate within a single election cycle, the question presented is whether an injunctive relief claim remains live for resolution as to a future election after the subject election has passed. And the case law in this context, unsurprisingly, echoes the analysis applied in *Lyons*, though under the so-called “capable of repetition, yet evading review” exception to the mootness doctrine. Under this reasoning, an injunctive claim remains justiciable as to future elections where “there is a reasonable expectation that the same complaining party will be subject to the same action again.” *Gill*, 962 F.3d at 363 n.3 (internal citation omitted).

The facts here establish that whether viewed as a question of injury-in-fact or mootness, Mr. Hero has established that he will again be subjected to the complained-of unlawful conduct: he intends to run for office as a Republican in the next available primary election, and when he does so, he will be removed from the ballot. Therefore, his claim is justiciable.

1. Mr. Hero intends to run in the future as a Republican

While the district court characterized Mr. Hero’s future plans to run for office as “some day intentions” that were insufficient to confer jurisdiction, (Dkt. 50 at 7 [App. 8]), precedent of the Supreme Court and this Court establish that this is not so. *See, e.g., Honig v. Doe*, 484 U.S. 305, 320 (1988) (explaining that while the Supreme Court has “generally...been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury,” where the

plaintiff has shown that the conduct will indeed be repeated, he has demonstrated that his claim is justiciable); *Gill*, 962 F.3d at 363 n.3 (finding sufficient the plaintiff's expression of future "intent to run for office"); *Acevedo*, 925 F.3d at 947-48 (finding sufficient the plaintiff's "intention to run for office in Cook County again"); *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) (finding that plaintiff was reasonably likely to be subjected again to the same action where he "articulated an interest in pursuing the Democratic Party's nomination for other elective offices").

Mr. Hero has attested that he intends to run as a Republican candidate at the earliest opportunity, which is in 2023 for the St. John Town Council. (Dkt. 29-1 at 7). He meets the requirements of Ind. Code § 3-8-2-7(a)(4)(A), as amended, to do so, in that the last two Indiana primaries in which he voted were held by the Republican Party. (Dkt. 29-1 at 6). He meets all other statutory requirements for candidacy. (*See generally* Dkt. 29-1). Mr. Hero has articulated under oath that he plans to run again as a Republican in the next available election, and that will again place him—exactly as it did before—in front of the Board to determine the propriety of his candidacy. This is all the showing that is required to demonstrate that he will again seek to run as a Republican.⁵

⁵ If this were not enough, Mr. Hero's attestation is bolstered by the fact that he has, on many occasions over the past several decades, run for elected positions as a Republican in Lake County. (*See* Dkt. 29-1 at 1-2).

2. Mr. Hero will again be removed from the ballot by the Board

It is undisputed that the sole reason for Mr. Hero's removal from the ballot was the Board's determination that it must give effect to the "10-year ban letter." (*See* Dkts. 29-2 at 176-77, 199, 204, 214; 26-1 at 7). It is also undisputed that the letter purports to prohibit Mr. Hero from seeking an elected office within the State of Indiana as a Republican candidate for a period ten years, presumably through November 22, 2026. (Dkt. 29-1 at 5, 10-11).

Unlike in *Lyons*, there is a virtual certainty that when Mr. Hero submits his declaration of candidacy, the Board will again unlawfully remove him from the ballot. The Board is statutorily charged with conducting all elections and administering all election laws within the County, as well as preparing and distributing ballots. Ind. Code § 3-6-5-14(a). It has the statutory responsibility to determine if candidates may be placed on the ballot, and it has taken the position that, at least until 2026, Mr. Hero cannot be a Republican candidate, as allowing Mr. Hero to remain on the ballot would amount to the Board providing inaccurate information to voters, which it may not do. (Dkt. 37 at 19; Ind. Code § 3-8-1-2(b), (h)).

To put it plainly, under the Board's assessment, it must view Mr. Hero as no more a Republican today than he was when he was removed from the ballot. It is therefore

clear that Mr. Hero will be subjected to the same allegedly unconstitutional conduct by the Board during the next Republican primary election.⁶

Although the district court relied largely on *Tobin for Governor v. Illinois Board of Elections*, 268 F.3d 517 (7th Cir. 2001), to reach its conclusion that that this matter was not justiciable, the facts of *Tobin* render it an inapposite comparator here. The *Tobin* plaintiffs, by the time of this Court's review, did not raise a claim for prospective injunctive relief at all. *Id.* at 520. And they did not raise any challenge to a continuing policy or generally applicable statute. *Id.* Rather, they sought a declaratory judgment as to an election board's one-time, discrete procedural error in striking specific signatures from a petition to gain access to the ballot. *Id.* at 528. Therefore, the plaintiffs' claim involved only a "one-time decision," rather than a policy or course of action "that [would] continue to operate past the [already completed] election." *Id.* at 529. For all of the reasons described above, these circumstances are far afield from Mr. Hero's.

⁶ The Board may also exercise its authority under another provision of Ind. Code § 3-8-1-2, as it did when it removed Mr. Hero from the ballot, if it acts upon a challenge filed by a registered voter. *See* Ind. Code § 3-8-1-2(d). As described above, it need not wait for such a challenge, but in any event, such a challenge would appear to be a foregone conclusion in this case. The Board dedicates much of its briefing in the district court to underscoring the strenuousness of the Republican Party's objection to Mr. Hero's attempted affiliation with it. Indeed the challenges to Mr. Hero's candidacy were not filed by "casual" Republican voters or rank and file members of the Republican Party, but by local Republican leaders: Daniel Dernulc, on whose affidavit the Board now relies to support its actions, and who is the Chairman of the Lake County Republican Central Committee (Dkt. 38-4 at 1-3), and Chris Jorgensen, a member of the Lake County Council, (Dkt. 29-1 at 6).

Whether considered as an issue of injury-in-fact or of mootness, Mr. Hero has shown that he intends to run for office in the future as a Republican, and when he does so, the Board will remove him from the ballot. That is, there is “a sufficient likelihood that he will again be wronged in a similar way.” *Lyons*, 461 U.S. at 111.

3. Capable of repetition, yet evading review

Under the “capable of repetition, yet evading review” exception to the mootness doctrine, in addition to establishing a reasonable likelihood that he will again be subject to the same offending conduct, a plaintiff must also show that he cannot fully litigate his claim prior to its expiration or the cessation of the allegedly unlawful activity. *See, e.g., Gill*, 962 F.3d at 363 n.3. Ballot-access claims frequently satisfy this requirement, as it is often impossible to litigate such a claim in a single election cycle. *See, e.g., id; Acevedo*, 925 F.3d at 947-48. Under Indiana law, a candidate may not file his declaration of candidacy earlier than 118 days before the primary election. Ind. Code § 3-8-2-4(a). Needless to say, 118 days—which is certainly an overestimate of the amount of time actually available, as Mr. Hero must wait for Board action before mounting a challenge to that action—is an insufficient length of time within which to fully litigate a case in federal court. Mr. Hero’s claim is capable of repetition, yet evading review.

4. Conclusion

Under longstanding precedent of the U.S. Supreme Court and this Court, Mr. Hero’s claim is justiciable. *See Storer v. Brown*, 415 U.S. 724, 737 n. 8 (1974) (“The...election

is long over...but this case is not moot, since the issues properly presented, and their effects on independent candidacies, will persist as the...statutes are applied in future elections.”); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973) (case was justiciable although past election was complete); *see also Lee v. Keith*, 463 F.3d 763, 767 (7th Cir. 2006) (case was not moot even where candidate abandoned his bid for elected office prior to the election, and where that election had already been decided); *Nader v. Keith*, 385 F.3d 729, 735 (7th Cir. 2004) (stating that there would be “no question” as to a candidate possessing standing to contest candidacy provisions for a future election, even in advance of attempting compliance with statutory requirements); *Libertarian Party of Illinois v. Redhour*, 108 F.3d 768, 772 (7th Cir. 1997) (considering ballot access issue despite passing of election year).

He requests that this Court reverse the contrary conclusion of the district court.

II. Mr. Hero is entitled to summary judgment because, under any level of scrutiny, the Board’s prohibition of Mr. Hero’s candidacy is not justifiable to advance any legitimate interest

A. This Court should reach the merits of Mr. Hero’s claim

Ordinarily, the grant of summary judgment should be decided in the first instance by the district court. *Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 998 (7th Cir. 2003).

However, this Court

may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, *and may remand the cause and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had *as may be just under the*

circumstances. ...While it would seldom be appropriate for an appellate court to direct the entry of summary judgment, since such a determination is in most instances best left to the discretion of the trial judge, we believe this section makes it clear that we have the power to do so when it would be just under the circumstances.

Morgan, 466 F.2d at 600 (internal quotations and citations omitted) (emphasis in original).

In considering whether a directed grant of summary judgment may be just under the circumstances, courts consider factors such as whether the issues presented were fully briefed below, the complexity of the factual issues presented, and the use of judicial resources. *Id.*

Here, the factual issues presented are simple and undisputed, and the only issue to be resolved is a question of law, which the parties fully briefed at the district court. And here, as described above, the timeliness of resolution is material: Mr. Hero desires to run for office in a party primary that will be held in May 2023. The question of whether he can run needs to be finally resolved long before that date, so as to afford certainty to the electoral process. A consideration of the merits in this matter, therefore, would be appropriate, based upon the full briefing and record evidence provided below.

B. The constitutionality of the Board's restriction must be assessed under the sliding-scale approach of *Burdick v. Takushi* and *Anderson v. Celebrezze*

"Far from recognizing candidacy as a 'fundamental right,'" the U.S. Supreme Court has held "that the existence of barriers to a candidate's access to the ballot 'does not of itself compel close scrutiny.'" *Clements v. Fashing*, 457 U.S. 957, 963 (1982) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)). Nonetheless, restrictions on ballot access "place

burdens on the right 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.” *Navarro v. Neal*, 716 F.3d 425, 430 (7th Cir. 2013) (internal quotation, citation, and alteration omitted). Thus, while ballot-access rights “are not absolute,” they still “rank among our most precious freedoms.” *Id* at 430 (internal quotation and citation omitted).

The Supreme Court in *Burdick v. Takushi*, 504 U.S. 428 (1992), and *Anderson v. Celebrezze*, 460 U.S. 780 (1983), therefore developed a sliding-scale approach through which the constitutionality of a restriction on ballot access is to be assessed. Under this “flexible standard,” *see Burdick*, 504 U.S. at 434, courts must engage in a “two-step inquiry”:

First, [they] determine whether the law imposes severe or reasonable and nondiscriminatory restrictions on candidates’ and voters’ constitutional rights so that [they] can ensure application of the appropriate level of scrutiny. Second, [they] must determine whether the state interest offered in support of the law is sufficiently weighty under the appropriate level of scrutiny. For severe restrictions on voters’ rights, the challenged statute must be narrowly tailored to advance a compelling state interest. For statutes that impose only reasonable, nondiscriminatory restrictions, the state’s important regulatory interests are generally sufficient.

Navarro, 716 F.3d at 430 (internal quotations and citations omitted); *see also Burdick*, 504 U.S. at 434 (requiring courts to “weigh ‘the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate’ against the ‘precise interests put forward by the State as justification for the

burden imposed by its rule,’ taking into consideration ‘the extent to which those interests make it necessary to burden the plaintiff’s rights’”) (quoting *Anderson*, 460 U.S. at 788-89). Regardless, “[h]owever slight [a] 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) (plurality) (internal quotation and citation omitted).

C. The Board has imposed a severe restriction on Mr. Hero’s access to the ballot

Despite the Board’s contentions in the court below that Mr. Hero’s disputes are only with the Republican Party, there is no denying, of course, that it is the Board itself that has restricted Mr. Hero’s access to the ballot: it has deemed him ineligible to run for local office as a Republican, and it ordered that his name be removed from the ballot. This constraint on Mr. Hero’s ballot-access rights constitutes a “severe restriction” under *Burdick* and its progeny, and that restriction is not appropriately tailored to advance any governmental interest, let alone a compelling one.

It should, of course, require no citation to demonstrate that a complete prohibition on an individual’s access to the ballot represents a “severe restriction” within the meaning of *Burdick* and its progeny. Clearly it does: both the Supreme Court and the Seventh Circuit have applied strict scrutiny to ballot-access requirements even under circumstances where access to the ballot was technically achievable. *See, e.g., Norman v. Reed*, 502 U.S. 279, 288-95 (1992) (signature requirement for members of a new party to

obtain ballot access and restriction on use of party name); *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 524-25 (7th Cir. 2017) (requirement that petition of minor party candidate list a “full slate” of candidates for all offices in the political subdivision in which he or she wishes to compete); *see also, e.g., Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000) (holding, at the pleadings stage, that requirements that a petition for ballot access be notarized and that it be filed within seven days may constitute “severe restrictions” under *Burdick*).

Under Indiana law, the prohibition on Mr. Hero’s appearance as a Republican candidate serves to *completely* prevent him from running for local office—not just as a prohibition on access to the primary ballot. After all, as noted, in order to seek election as an independent candidate, Mr. Hero cannot be “affiliated with any political party.” Ind. Code § 3-5-2-26.6. Similarly, in order to seek election as a write-in candidate he may not claim affiliation with a major political party such as the Republican Party. Ind. Code § 3-8-2-2.5(b)(4). Simply put, no alternative mechanism for accessing even the general-election ballot is available to Mr. Hero.

At the district court, the Board disputed this fact, incorrectly asserting that Mr. Hero may claim party independence, or membership in another party, now that the Indiana Republican Party has taken the position that he cannot seek office as a Republican. (Dkt. 32 at 13; Dkt. 37 at 5-6, 10, 18; Dkt. 42 at 6). But he cannot—either as a matter of fact or as allowed by Indiana law. Under Indiana law, Mr. Hero still affiliates with the Republican Party, and not even the State Chairman has purported to remove

Mr. Hero's "affiliation"; clearly he could not do so: eligibility to vote in the primary election requires only that Mr. Hero have supported a majority of the Party's candidates at the last general election, which he has done. *See* Ind. Code § 3-10-1-6. After all, running for partisan office is not the only manner (or even the principal manner) in which an individual "affiliates" with a political party. To the contrary, persons demonstrate party affiliation by supporting a party's candidates and platform and, just as importantly, by participating as a voter in the primary election. With the exception of his support for two independent candidates for local office in 2016, for four decades Mr. Hero has consistently supported Republican candidates, has held several appointed and elected positions as a Republican, and has voted in Republican primary elections. He is not an unaffiliated independent under Indiana law, and he may not gain access to the ballot by stating (under oath) that he is.⁷

Even were Indiana law capable of an interpretation that would permit Mr. Hero to seek local office as an independent or write-in candidate at the general election—and

⁷ The Sixth Circuit's decision in *Jolivette v. Husted*, 694 F.3d 760 (6th Cir. 2012), is instructive. In that case, a candidate who was determined ineligible to run as a Republican after failing to demonstrate a sufficient modicum of support within the party, as required by state law, disavowed his affiliation with the Republican Party and sought instead to run as an independent. *Id.* at 763-64. When his candidacy was subsequently challenged, he was determined ineligible to run as an independent given that he remained affiliated with the Republican Party: he had a demonstrated history of voting in Republican primary elections, he had previously served as an elected official of the Republican Party, and he had sought to run as a Republican in that very election cycle. *Id.* at 764-65. The court upheld the requirement that a would-be independent candidate refrain from affiliating with a political party. *Id.* at 767-70.

it is not—the refusal to allow him to run in the Republican primary still imposes a “severe restriction” on his ballot-access rights. This is so for two independent reasons.

First, the Supreme Court’s case law places beyond dispute the fact that associational and voting rights extend to voters in primary elections. Indeed, the Supreme Court has recognized that “the right to vote”—the corollary of a candidate’s ballot-access rights—“is ‘heavily burdened’ if that vote may be cast only for one of two candidates in a primary election at a time when other candidates are clamoring for a place on the ballot.” *Lubin v. Panish*, 415 U.S. 709, 716 (1974).

Thus, in *New York State Board of Elections v. Lopez Torres*, 552 U.S. 196 (2008), the Court’s analysis makes clear that the possibility of a primary candidate’s access to the general-election ballot plays no role in a challenge to primary procedures. There, the Court was confronted with a challenge to the manner in which partisan trial court judges in New York were nominated: under state law, uncommitted delegates were selected at a primary election, and those delegates chose the party’s nominees at conventions conducted by each party. *See* 552 U.S. at 200-01. Given the overwhelming influence of party leadership at these nominating conventions, several candidates who failed to secure their party’s nomination (and voters that supported those candidates) challenged this process as depriving them “of their rights to gain access to the ballot and to associate in choosing their party’s candidate.” *Id.* at 201.

Even though New York's election law (like Indiana's) allowed independent and third-party candidates to appear on the general-election ballot if they demonstrated a sufficient modicum of support, the possibility that a candidate defeated during the primary election process might nonetheless seek election as an independent candidate played no role in the Court's decision. *See id.* at 202-07; *see also id.* at 207 ("[I]t is hard to understand how the competitiveness of the general election has anything to do with respondents' associational rights in the party's selection process. It makes no difference to the person who associates with a party and seeks its nomination whether the party is a contender in the general election, an underdog, or the favorite."). Although the Court ultimately held that the plaintiffs' constitutional rights were not violated, its analysis makes clear that the proper focal point of analysis is the primary ballot, and not the general election ballot.

And second, even were Mr. Hero permitted to run as an independent or write-in candidate, a severe restriction would nonetheless exist, as neither of those options constitute meaningful alternatives to access to the primary ballot. *See Anderson*, 460 U.S. at 799 n.26 (a write-in candidacy "is not an adequate substitute for having the candidate's name appear on the printed ballot"); *Kusper*, 414 U.S. at 57 ("The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom [to associate]."); *Bullock*, 405 U.S. at 146-47 ("[W]e can hardly accept as reasonable an

alternative that requires candidates and voters to abandon their party affiliations in order to avoid the [challenged] burdens.”).

As such, Mr. Hero’s removal from the ballot can only be classified as a “severe” restriction on access to the ballot under *Burdick*, and therefore subject to the highest level of scrutiny.

D. The restriction on Mr. Hero’s ballot-access rights is not justified by any governmental interest, and therefore the Board’s actions fail any level of scrutiny

Because the Board has imposed a severe restriction on Mr. Hero’s ballot-access rights, it must demonstrate that its actions are “narrowly tailored to advance a compelling state interest.” *Navarro*, 716 F.3d at 430. However, because no valid interest whatsoever exists in the Board’s restriction—let alone a compelling one—the Board cannot satisfy even the most deferential scrutiny under *Burdick*.

The Board has indicated that its interest in removing Mr. Hero from the ballot lies in protecting or otherwise vindicating the associational rights of the Republican Party. (Dkt. 32 at 10). But the Board’s assertion that it had a valid interest in protecting the associational rights of the Republican Party is premised on its erroneous conclusion that Mr. Hero was not, and is not, a Republican—a conclusion based solely on the fact that the Chairman of the Indiana Republican Party said so. (*See, e.g.*, Dkt. 37 at 19 [stating that

because Mr. Hero is not a Republican, “it was not proper for the Election Board to allow his name to be placed on the ballot with Republican affiliation affixed thereto”)).⁸

But as described at length above, party membership in Indiana is determined not by the say-so of party leadership, but instead by an individual’s primary voting history. *See* Ind. Code § 3-8-2-7(a)(4).⁹ At no point has the Board contended that this provision of Indiana law unconstitutionally infringes on political parties’ associational rights, and that should be the end of this case. Indeed, given the clear mandates of Indiana law, the Republican Party’s associational rights were simply not implicated by Mr. Hero’s declaration of candidacy, and were never in front of the Board. Instead the Board’s actions can only be considered an implementation of the preference of Party leadership

⁸ The Election Board also alludes to interests in “ballot integrity,” “political stability,” “[i]ntegrity,” “fairness,” avoiding “voter confusion,” and ballot “accuracy.” (Dkt. 32 at 10). As discussed below, it does not meaningfully elaborate on any of these supposed interests, and it appears that, if anything, they are derivative of its interest in respecting the associational rights of the Indiana Republican Party. If Mr. Hero is qualified to run for office as a Republican—and he is—there is nothing confusing or discordant about identifying him as such.

⁹ The formal Rules of the Indiana Republican State Committee are entirely consistent with this—not surprisingly, as the Rules specify that “[i]f there is a conflict between these Rules and a statute, the statute prevails.” (Dkt. 29-3 at 3). They do not impose any limitations on an individual’s primary candidacy for local office beyond those established by Indiana law. To be sure, as described above, the rules provide that eligibility for certain internal party positions, and it was on this basis that Mr. Hero was deemed ineligible in 2016 for the positions of Precinct Committeeman and State Convention Delegate, (Dkt. 29-1 at 5, 10-11), actions that are not challenged in this case. But a political party’s right to set qualifications for its own leadership positions is a far cry removed from suggesting that party leadership may, in conflict with both state law and internal party rules, unilaterally determine that a candidate must be stricken from a ballot.

to exclude Mr. Hero as a candidate, regardless of Indiana law. But that clearly does not represent a permissible governmental interest. *See, e.g., Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989) (“A primary is not hostile to intraparty feuds; rather, it is an ideal forum in which to resolve them.”).

Mr. Hero *is* a Republican. While there is no doubt that he is not favored by the leadership of the Indiana Republican Party, the very purpose of the primary process is to resolve such a dispute. That is how democracy works. *See, e.g., California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (states may constitutionally compel the nomination of candidates through primary elections in order “to assure that intraparty competition is resolved in a democratic fashion”). Here, however, the Board has taken the position that *it* may resolve such an internal dispute and that *it* may disqualify a candidate—not because he fails to meet the eligibility requirements of Indiana law, but because party leaders would rather not see him elected. If accepted, its arguments would eviscerate the primary process.

The Board’s reliance in the court below on *Lopez Torres* is misplaced, as that case only serves to underscore both Mr. Hero’s argument and the democratic principles underlying it. While the Board relied below on the *Lopez Torres* Court’s observation that “[a] political party has a First Amendment right to limit its membership as it wishes” (Dkt. 32 at 10), it ignored the Court’s very next sentence: this right is “circumscribed...when the State gives the party a role in the election process.” 552 U.S.

at 202-03. When that is the case, “the State acquires a legitimate governmental interest in ensuring the fairness of the party’s nominating process” such that it is “‘too plain for argument’ that a State may prescribe party use of primaries...to select nominees who appear on the general-election ballot.” *Id.* at 203.

While the Court in *Lopez Torres* upheld the constitutionality of the convention process employed in New York to select judicial nominees, it did so explicitly because the plaintiffs complained not of the process itself “but of the voters’ (and their elected delegates’) preference for the choices of the party leadership.” *Id.* at 205. The Supreme Court strongly implied that New York’s convention system for nominating judges would not pass muster were the electoral outcome pre-ordained not by the operation of political forces but by the imposition of government-imposed restrictions. *Id.* This case presents precisely the unconstitutional circumstances anticipated by the Court in that case.

To be sure, states may not compel political parties either to open the primary process to non-members or to limit the process to members. *See Jones*, 530 U.S. at 572-73 (blanket primary); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214-15 (1986) (closed primary); *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 121-22 (1981) (open primary). But, of course, such a restriction is not at issue here: rather, at issue is the straightforward requirement that when a state adopts the primary-election process for selecting nominees to appear on the general-election ballot, any associational right of a political party “to limit its membership as it wishes” or to employ an

undemocratic “candidate-selection process” yields to the “governmental interest in ensuring the fairness of the party’s nominating process.” *Lopez Torres*, 552 U.S. at 202-03. The associational interests recognized in *Jones*, *Tashjian*, and *La Follette* apply only to allow parties to select the *process* by which their nominees are selected but have never been extended so far as to allow party leadership to actually determine which candidates may seek nomination in the first instance.

At no point does the Board even purport to address the consequences to our democracy of a system where party leadership is given the ability to select for itself which nominees, qualified under state law, will appear on the ballot and to imperiously strike all other potential candidates. Take, for instance, *Gonzales v. Madigan*, 990 F.3d 561 (7th Cir. 2021), in which the Chairman of the Illinois Democratic Party and Speaker of the Illinois House of Representatives was sued for allegedly encouraging “sham” candidates to run in the primary election in order to split the opposition vote. Although this Court held the allegations insufficient to state a constitutional claim, the alleged efforts to split the opposition vote would hardly have been necessary if the party chairman simply could have declared his opponent ineligible to run in the primary election.

Or take *Mulholland v. Marion County Election Board*, 746 F.3d 811 (7th Cir. 2014), in which this Court described the major political parties’ “long tradition of ‘slating’ their preferred candidates in primary elections” in Marion County. *Id.* at 813. The First Amendment challenge mounted by an un-slated candidate (that is, a candidate not

preferred by party leadership) to Indiana’s “anti-slating statute”—which made it a crime “to distribute a list endorsing multiple political candidates during a primary election” without their consent, *see id.* (describing Ind. Code § 3-14-1-2(a))—surely would not have come to fruition if leadership could simply decree that its preferred candidates were the only persons qualified to seek nomination at the primary election. The point is that, while a party’s associational rights no doubt entitle it to have a say in the primary *process* through which nominees are selected (*see, e.g.,* Dkt. 30 at 21), these rights are not so broad that they extend to party leadership’s selection of particular *nominees*.

The anti-democratic notion that the Board was allowed to cede, in contravention of state law, to the desire of party leadership that Mr. Hero be deemed ineligible to run in the Republican primary finds no support in case law, and the Board’s exclusion of Mr. Hero from the ballot cannot be justified by the party’s associational rights. By doing so, the Board has taken it upon itself to resolve this “intraparty feud” on behalf of the voters. No governmental interest justifies this infringement on Mr. Hero’s ballot-access rights, and under any level of scrutiny the Election Board’s actions are unconstitutional.

CONCLUSION

For the reasons described herein, Mr. Hero requests that this Court reverse the judgment of the district court and remand with instructions that summary judgment be entered in Mr. Hero’s favor.

/s/ Stevie J. Pactor

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CERTIFICATE OF WORD COUNT

I hereby certify that this brief complies with the type-volume limitation of Circuit Rule 32(c) insofar as it contains 10,703 words, excluding the parts of the brief exempted by Appellate Rule 32(a)(7)(B)(iii).

/s/ Stevie J. Pactor
Stevie J. Pactor
Attorney at Law

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of November, 2021, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. Service will be made on all ECF-registered counsel by operation of the Court's electronic system.

/s/ Stevie J. Pactor
Stevie J. Pactor
Attorney at Law

UNITED STATES DISTRICT COURT
for the
Northern District of Indiana

JOSEPH HERO

Plaintiff

v.

Civil Action No. 2:19-cv-319

LAKE COUNTY ELECTION BOARD

Defendant

JUDGMENT IN A CIVIL ACTION

The court has ordered that (*check one*):

☐ the plaintiff _____
recover from the defendant _____ the amount of _____
dollars \$_____, which includes prejudgment interest at the rate of _____% plus post-
Judgment interest at the rate of _____% along with costs.

☐ the plaintiff recover nothing, the action is dismissed on the merits, and the defendant _____
recover costs from the plaintiff _____.

☒ Other: This case is DISMISSED.

This action was (*check one*):

☐ tried to a jury with Judge _____ presiding, and the jury has
rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was
reached.

☒ decided by Judge Damon R. Leichty.

DATE: 9/21/2021

GARY T. BELL, CLERK OF COURT

by s/ B. Scheumann
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

JOSEPH HERO,

Plaintiff,

v.

LAKE COUNTY ELECTION BOARD,

Defendant.

CAUSE NO. 2:19-cv-319 DRL

OPINION & ORDER

A longstanding Republican, Joseph Hero for years voted in the Republican primary elections and ran for office as a Republican candidate until 2015 when he supported two independent candidates for local office in St. John, Indiana. A year later, the Indiana Republican Party barred his membership for a decade—which, according to the party’s state chairperson, made him ineligible for elected office as a Republican in Indiana.

In 2019, Mr. Hero tried to run in the Republican primary for town council in St. John. The Lake County Election Board removed him from the ballot because of the ten-year ban. He says the board violated his First and Fourteenth Amendment rights. Today, he seeks a declaratory judgment and permanent injunction to allow his future candidacy, but not damages. He says he hopes to run (likely in 2023) for office as a Republican but fears the board will once more disallow his candidacy. Both sides filed summary judgment motions. The court dismisses the case for want of standing.

BACKGROUND

The relevant facts aren’t in dispute. Mr. Hero resides in St. John, Indiana. He has been a member of the Republican Party for more than forty years and has voted as a Republican in every primary election since the 1980s. So devoted to the Republican Party, he has held many party positions, including serving as an elected delegate to the Republican State Convention numerous times, precinct

committeeman in St. John for over 30 years, and town chairman for the St. John Republican Party for approximately 25 years. He ran for certain offices as a Republican but lost in the general elections.

In 2015, a debate ensued over St. John's use of eminent domain to take several private residences for commercial development. Certain residents formed a local political action committee to support two independent candidates who shared the concern that the exercise of eminent domain authority was disproportionately affecting lower-income homeowners and undercompensating them for their property. Mr. Hero helped the political action committee and two independent candidates. He gave legal advice, put up yard signs, and vocally supported their candidacy. Never before in forty years had he supported another party's candidate against a Republican candidate.

The next year, Mr. Hero sought to be reelected as St. John Republican Precinct Committeeman and to serve as a delegate to the Republican State Convention. He won both in May 2016. In a letter sent by the Indiana Republican Party Chairman, Mr. Hero was notified he was not in good standing because he committed "gross misconduct" and broke party rules by supporting the two independent candidates and the related political action committee. He was deemed ineligible to serve as precinct committeeman or party delegate. The Republican Party imposed a ten-year ban on seeking office.

In the 2018 and 2020 elections, Mr. Hero continued to vote in the Republican primary. In 2019, he filed a "declaration of candidacy" to run for a seat on the St. John Town Council as a Republican. He complied with the statutory requirements under Indiana law to declare his candidacy, including the requirement that he vote for the political party he was claiming affiliation with in the most recent primary election.

The party chairman and a council member in Lake County filed formal challenges to Mr. Hero's candidacy. The Lake County Election Board held a hearing. Mr. Hero demonstrated that he met all requirements under Indiana law. He provided a letter in support from an attorney for the

Indiana Election Division.¹ In response, everyone seemed to concede that Mr. Hero met the statutory requirements to run for office. The board nonetheless recognized the state party chairman's ten-year ban as authoritative. The board voted to remove him from the ballot.

Mr. Hero brought this action under 42 U.S.C. § 1983 alleging a deprivation of his First and Fourteenth Amendment rights. He seeks a declaratory judgment and permanent injunction that would permit him to seek election as a member of the Republican Party at some point in the future, provided he once more meets the requirements of Indiana Code § 3-8-2-7.

STANDARD

Summary judgment is warranted when “the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The non-moving party must present the court with evidence on which a reasonable jury could rely to find in his favor. *Beardsall v. CVS Pharmacy, Inc.*, 953 F.3d 969, 972 (7th Cir. 2020). The court must construe all facts in the light most favorable to the non-moving party, view all reasonable inferences in that party's favor, *Bellaver v. Quanex Corp.*, 200 F.3d 485, 491-92 (7th Cir. 2000), and avoid “the temptation to decide which party's version of the facts is more likely true,” *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003); *see also Joll v. Valparaiso Comty. Schs.*, 953 F.3d 923, 924 (7th Cir. 2020). With crossmotions for summary judgment, each party receives the benefit of all reasonable inferences drawn from the record when considering the opposing party's motion. *Tegtmeier v. Midwest Operating Engineers Pension Trust Fund*, 390 F.3d 1040, 1045 (7th Cir. 2004).

In performing its review, the court “is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe.” *Waldridge v. Am. Hoechst Corp.*, 24 F.3d 918, 920 (7th Cir. 1994). Nor is the court “obliged to research and construct legal arguments for parties.” *Nelson v. Napolitano*, 657 F.3d 586, 590 (7th Cir. 2011). Instead, the “court has one task and one task only: to

¹ The defense moves to strike this letter as hearsay, but not the fact a letter was sent.

decide, based on the evidence of record, whether there is any material dispute of fact that requires a trial.” *Id.* The court must grant summary judgment when no such genuine factual issue—a triable issue—exists under the law. *Luster v. Ill. Dept. of Corrs.*, 652 F.3d 726, 731 (7th Cir. 2011).

DISCUSSION

First Amendment rights to vote, to associate in parties to advance certain beliefs, and to access the ballot “rank among our most precious freedoms.” *Williams v. Rhodes*, 393 U.S. 23, 30 (1968). Few rights are more fundamental to the Framers’ vision of a healthy and functioning constitutional democracy. Political parties may self-define and regulate membership to be sure, *see N.Y State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008), but primary elections should not be “hostile to intraparty feuds” as they are an “ideal forum in which to resolve them,” *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 227 (1989). A primary election’s purpose is “to assure that intraparty competition is resolved in a democratic fashion.” *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (citing *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974)).

The First Amendment enshrines “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”—something that isn’t served when election campaigns are “monopolized by the existing political parties,” *Anderson v. Celebrezze*, 460 U.S. 780, 794 (1983) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)), or unilaterally by existing political party leaders. The board’s decision here seemed to exalt political party preference over the will of Indiana’s General Assembly—a legislative decision that must be considered reverently when free and fair elections and other precious freedoms prove at stake.

But before considering the motions, the court must ensure its jurisdiction. *See Common Cause Ind. v. Lamson*, 937 F.3d 944, 949 (7th Cir. 2019); *Simic v. City of Chicago*, 851 F.3d 734, 738 (7th Cir. 2017); *see, e.g., Lowrey v. Tilden*, 948 F.3d 759, 760 (7th Cir. 2020) (court must “take[] jurisdictional issues seriously” and analyze each new filing as a “jurisdictional hawk”). The United States Constitution

confines the federal judiciary’s power to “Cases” and “Controversies.” U.S. Const. art. III § 2. For a case or controversy to exist, a plaintiff must have standing—an injury, fairly traceable to the defendant’s conduct, that the court’s decision will likely redress. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 797 (2021); *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). The injury must be concrete and particularized, and actual or imminent rather than conjectural or hypothetical. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

In the context of the Declaratory Judgment Act, these same standing principles find their home. District courts “*may* declare the rights and other legal relations of any interested party seeking such declaration.” 28 U.S.C. § 2201(a) (emphasis added). “By the Declaratory Judgment Act, Congress sought to place a remedial arrow in the district court’s quiver; it created an opportunity, rather than a duty, to grant a new form of relief to qualifying litigants.” *Wilton v. Seven Falls Co.*, 515 U.S. 277, 288 (1995). The phrase “case of actual controversy” within the Declaratory Judgment Act refers to the types of cases or controversies that are justiciable under Article III of the Constitution. *See MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Disputes must be “definite and concrete, touching the legal relations of parties having adverse legal interests,” and they must be “real and substantial” and “admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.” *MedImmune*, 549 U.S. at 127 (quoting *Aetna Life*, 300 U.S. at 240-41). “Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.” *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

Mr. Hero says he was injured because of what he believes was a violation of his First and Fourteenth Amendment constitutional rights by the election board, but “[p]ast exposure to illegal

conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983) (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). He doesn’t seek any damages for what happened before. He seeks injunctive relief, not compensatory damages, in the event that he seeks election, qualifies by statute, and the election board (however then constituted by its board members in the future) decides to do the same thing it did in 2019. The alleged injury isn’t particularized, real, or immediate. “[T]hreatened injury must be certainly impending to constitute injury in fact,” and “[a]llegations of possible future injury” aren’t sufficient. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990).

The 2019 election has been held and decided. There are no “continuing, present adverse effects” of the past illegal conduct, and no substantial and present controversy given the eye toward the next primary election—at least none that Mr. Hero demonstrates with evidence to meet the injury requirement of constitutional standing. *See Lyons*, 461 U.S. at 102. His speculation that he may suffer the same injury at some time in the future is insufficient to establish standing. *See id.* at 105. He relies on a “speculative chain of possibilities,” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 414 (2013), or “several contingencies,” *Tobin for Governor v. Ill Bd. of Elections*, 268 F.3d 517, 528 (7th Cir. 2001).

In *Tobin*, for instance, this circuit agreed a candidate could not demonstrate constitutional standing—a “realistic threat” of future harm—because “several contingencies” would have to occur first: the candidate would need to decide to run for office, the candidate would need to collect over 25,000 sufficient signatures, the election board would have to make the same decision, and the election board would have to make the same procedural mistake. *Id.* at 527-28. A similar list of contingencies must occur in Mr. Hero’s case for any future harm to occur: he must run for office, he must vote in the most recent primary election, he must meet all other statutory requirements, his candidacy must

be challenged, and the election board must once again vote to remove him from the ballot.² The election board has changed since Mr. Hero's hearing in 2019 and may change once again before Mr. Hero files his declaration of candidacy. The court can only speculate whether future compositions of the election board will similarly decide that a political party decision is more authoritative than Indiana law, as duly enacted by the Legislature.

"[S]ome day intentions—without any description of concrete plans" or "specification of when the some day will be"—don't constitute actual or imminent injury. *Lujan*, 504 U.S. at 564. Distinguishable from "some day intentions" are "conditional statements" of intent to engage in conduct solely but for the ongoing illegal conduct. *See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-84 (2000) (individuals who had previously used the river conditionally said they would use the river for recreation but for the illegal pollution); *Scherr v. Marriot, Int'l* 703 F.3d 1069, 1074-75 (7th Cir. 2013) (plaintiff alleging future harm of an ADA violation established an injury-in-fact because she previously had been injured by the hotel's violation and said she would use the hotel but for the alleged ADA violation).

Mr. Hero might like to characterize his intention to run in 2023 as a "conditional statement" and more than a "some day intention" but that is too attenuated today. Per Indiana law, primary candidates must wait until 118 days before the primary election to declare their candidacy. *See* Ind. Code § 3-8-2-4. It seems then he cannot legally file a declaration of candidacy for St. John Town Council until approximately January 2023. Quite contrary to those who would use the river or hotel the next day if permitted, Mr. Hero is not currently suffering from any "continuing, present adverse effects" of his past injury or facing imminent future harm. Indeed, he has many avenues for relief in the future: he could return promptly to this court to obtain a preliminary injunction should the election

² The relevant portion of the Indiana Code was amended effective January 1, 2022 to require an individual to vote for the political party they seek to claim affiliation during the two most recent primary elections. *See* Ind. Code § 3-8-2-7.

board disallow his candidacy at the expense of Indiana law and his constitutional rights, *see* Fed. R. Civ. P. 65; *see also Christian Legal Society v. Walker*, 453 F.3d 853, 859 (7th Cir. 2011) (violation of constitutional right is irreparable injury), or he could seek prompt judicial review of the election board's decision by the Lake County Superior Court, *see* Ind. Code § 3-6-5-34. He is not without a remedy in the future, but he lacks standing today.

CONCLUSION

Because this federal court cannot proceed without jurisdiction, the court DISMISSES this case for want of jurisdiction, DECLINES a declaratory judgment, and DENIES AS MOOT the summary judgment motions and the motion to strike [ECF 29, 31, 39]. This order terminates the case.

SO ORDERED.

September 21, 2021

s/ Damon R. Leighty
Judge, United States District Court

CIRCUIT RULE 30(D) CERTIFICATION

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rule 30(a) and (b) are included within this appendix.

s/ Stevie J. Pactor

Stevie J. Pactor

Attorney at Law