IN THE

Indiana Supreme Court

ROSS GRAHAM THOMAS, Appellant, v. JOSEPH FOYST, Appellee.	Court of Appeals Case No. 24A-MI-00251 Trial Court Case No. 03C01-2309-MI-4658 The Honorable Loretta H. Rush, Chief Justice of Indiana.

BRIEF OF THE ATTORNEY GENERAL OF INDIANA AS *AMICUS CURIAE*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

INTERESTS OF AMICUS CURIAE 6

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. Thomas Lacks Standing 8

II. The Bartholomew County Republican Party could lawfully renominate Foyst under Ind. Code § 3-13-1-7(b) despite a purported timing defect in the previous notice of caucus 11

III. Appellee's renomination was appropriate whether or not his initial candidacy was void and of no effect 14

IV. The Court of Appeals erred in granting the extraordinary remedy of nullifying the voters' will and declaring Foyst's opponent the winner of the 2023 general election 16

CONCLUSION 20

WORD COUNT CERTIFICATE 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

CASES

A.A. v. Eskenazi Health/Midtown CMHC,
97 N.E.3d 606 (Ind. 2018) 13

Brown v. Grzeskowiak,
101 N.E.2d 639 (1951) 13

Burke v. Bennett,
907 N.E.2d 529 (Ind. 2009) 19

Carr v. Boone,
9 N.E. 110 (1886) 14

Carroll v. Green,
47 N.E. 223 (Ind. 1897) 19

Cave v. Conrad,
24 N.E.2d 1010 (Ind. 1940), and (2) 7, 18, 20

City of Gary v. Nicholson,
190 N.E.3d 349 (Ind. 2022) 6, 9, 10

Fields v. Nicholson,
150 N.E. 53 (Ind. 1926) 17

State ex rel. Harry v. Ice,
191 N.E. 155 (Ind. 1934) 16

Higgins v. Hale,
476 N.E.2d 95 (Ind. 1985) .... *passim*

Hoosier Contractors, LLC v. Gardner,
212 N.E.3d 1234 (Ind. 2023) 8

Horner v. Curry,
125 N.E.3d 584 (Ind. 2019) 6, 9, 10, 11

Jacobson v. Fla. Sec'y of State,
974 F.3d 1236 (11th Cir. 2020) 11

Lance v. Coffman,
549 U.S. 437 (2007) 11

CASES [CONT'D]

Members of Med. Licensing Bd. of Ind. v. Planned Parenthood,
211 N.E.3d 957 (Ind. 2023), *reh'g denied* 11

Morales v. Rust,
228 N.E.3d 1025 (Ind. 2024) 7, 12

New England Coal. on Nuclear Pollution v. NRC,
727 F.2d 1127 (D.C. Cir. 1984)........ 14

Ortiz-Santiago v. Barr,
924 F.3d 956 (7th Cir. 2019) 14

Oviatt v. Behme,
147 N.E.2d 897 (1958) 8, 16, 17, 20

Pabey v. Pastrick,
816 N.E.2d 1138 (Ind. 2004) 11

Pence v. State,
652 N.E.2d 486 (Ind. 1995) 9

Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.,
182 N.E.3d 212 (Ind. 2022) 8

State v. Ross,
84 N.E. 150 (Ind. 1908) 16

Suggs v. State,
51 N.E.3d 1190 (Ind. 2016) 15

White v. Ind. Democratic Party ex rel. Parker,
963 N.E.2d 481 (Ind. 2012) 18, 19, 20

CONSTITUTIONAL PROVISIONS AND STATUTES

Ind. Const. art. 2, § 1 .... 7, 16

Ind. Const. art. IV, §§ 19, 29 9

Ind. Code § 3-8-1-1........ 13

Ind. Code § 3-8-1-5........ 19

Ind. Code § 3-8-1-27........ 19

CONSTITUTIONAL PROVISIONS AND STATUTES [CONT'D]

Ind. Code § 3-8-2-1 .... 11, 13

Ind. Code § 3-12-8-2 18

Ind. Code § 3-12-8-2(1) 19

Ind. Code § 3-12-8-17 18

Ind. Code § 3-13-1-1 13

Ind. Code § 3-13-1-6 12

Ind. Code § 3-13-1-7 12

Ind. Code § 3-13-1-7(a) 12

Ind. Code § 3-13-1-7(b) 12, 14, 15

Ind. Code § 3-13-1-9(b) 14

Ind. Code § 3-13-1-16.5 15

Ind. Code § 3-13-2-1 15

Ind. Code § 3-13-2-1(a)(7) 12

Indiana Code Title 3, Article 8 17

OTHER AUTHORITIES

Candidate, Oxford English Dictionary,
https://www.oed.com/search/dictionary/
?scope=Entries&q=candidate 15

INTERESTS OF AMICUS CURIAE

The Indiana Attorney General files this brief in response to this Court's December 19, 2024, order inviting amicus curiae briefing.

SUMMARY OF ARGUMENT

This case is about the constitutional allocation of power—the power of the People to choose their representatives, the power of those representatives to choose policies, and the power of the judicial branch to set those choices aside.

The threshold question concerns the proper limits on the judicial role. As this Court has recognized, the doctrine of standing limits the power of the courts within "the boundaries contemplated by our distribution-of-powers doctrine." *Horner v. Curry*, 125 N.E.3d 584, 595 (Ind. 2019). Appellant Thomas, a local Democrat Party official, has not claimed that the alleged violation of the timing rules governing the nomination of local political candidates injured him in any particularized, personal way; instead, he appears to claim "public standing" to vindicate the generalized interest—shared by all Hoosiers alike—in seeing the election laws obeyed. But if "any person, without a showing of harm, [may] enforce a public right or duty, what limits are there? If all government action is subject to judicial review, what purpose does the political process serve? What role does the franchise play?" *Id.* (footnote omitted). Wary of these implications, this Court has insisted that even public standing "at a minimum . . . requires some type of injury." *City of Gary v. Nicholson*, 190 N.E.3d 349, 352 (Ind. 2022). Thomas alleges none, so he cannot invoke the courts' jurisdiction.

If the Court does reach the merits, it should make clear that political parties retain the power to renominate a candidate whose previous nomination has been invalidated on procedural grounds. The legislature designed the statutory provisions governing candidate selection to robustly protect the People's constitutional right to associate together in political parties and then "select[] a standard bearer who best represents the party's ideologies and preferences." *Morales v. Rust*, 228 N.E.3d 1025, 1035 (Ind. 2024). Nothing in the election statutes dictates that a purported procedural error in a party's initial selection acts to forever bar the party from renominating the same candidate; to the contrary, the election code painstakingly creates multiple paths for a party to cure harmless errors and select the candidate of its choice at various points leading up to the election. The result is the same even if Appellee's initial candidacy is labeled "void and of no effect." (App. Br. 13).

Finally, this case also presents a pressing question about the propriety of the extraordinary remedy imposed by the Court of Appeals: *setting aside* the 2023 election result and declaring *the losing candidate the winner* by judicial fiat. That nuclear remedy is only appropriate in the most extreme cases, and to safeguard the constitutional guarantee that "all elections shall be free and equal," Ind. Const. art. 2, § 1, this Court has insisted that election results may be set aside only if two stringent requirements are met: (1) the legislature declared "by express terms" that the rule alleged to have been violated is "essential to the validity of an election," *Cave v. Conrad*, 24 N.E.2d 1010, 1012 (Ind. 1940), and (2) the violation of that rule was "brought home so closely and so clearly to the knowledge or notice of the elector" that

anyone who votes for the candidate anyway "has no right to complain of the loss of his franchise, the exercise of which he has wantonly misapplied." *Oviatt v. Behme*, 147 N.E.2d 897, 900 (1958). The Court of Appeals did not analyze whether these conditions were met, and Thomas did not even allege it. The judgment nullifying the election results for District 6 thus cannot stand.

ARGUMENT

I. Thomas Lacks Standing

Although Indiana's constitution "lacks the 'case or controversy' requirement found in Article III of the United States Constitution, our separation-of-powers clause, Ind. Const. art. 3, § 1, fulfills a similar function." *Hoosier Contractors, LLC v. Gardner*, 212 N.E.3d 1234, 1238 (Ind. 2023) (cleaned up). To show standing, a party ordinarily "needs to satisfy three requirements: (1) it must have a personal (rather than general) interest in the outcome; (2) it must have suffered or be in immediate danger of suffering an injury; and (3) the injury must be a direct result of the [challenged conduct]." *Solarize Ind., Inc. v. S. Ind. Gas & Elec. Co.*, 182 N.E.3d 212, 218–19 (Ind. 2022). Thomas has made no attempt to show that he satisfies these requirements, and the courts below made no claim that he did.

Instead, the Court of Appeals apparently concluded that Thomas has standing based on the "public standing" doctrine, citing the 1985 decision *Higgins v. Hale*, 476 N.E.2d 95 (Ind. 1985). Taking an expansive approach to standing, *Higgins* held that a suit seeking "to ensure that the election process is administered in a manner consistent with the laws of this State" involves "enforcement of a public rather than a private right," and that in such a case "the usual standards for establishing

standing need not be met" and "the plaintiff need not have a special interest in the matter nor be a public official." *Id.* at 101. Under that approach, virtually any Hoosier could bring a suit to enforce election laws.

But more recent cases have "signaled a more cautious approach to standing, finding it insufficient for a plaintiff to possess merely a general interest common to all members of the public.". *Horner*, 125 N.E.3d at 592 (cleaned up). *Pence v. State*, 652 N.E.2d 486 (Ind. 1995), is "[e]mblematic of this paradigm shift." *Horner*, 125 N.E.3d at 592. There, the Court held that Mike Pence, then the President of the Indiana Policy Review Foundation, did not have standing to enforce the state Constitution's single-topic rule and restrictions on legislative pay raises, *see* Ind. Const. art. IV, §§ 19, 29, reasoning that Pence had "failed to demonstrate any interest beyond that of the general public," *Pence*, 652 N.E.2d at 488. While Justice Dickson argued in dissent that jurisdiction existed under "Indiana's public standing doctrine," *id.* at 489 (Dickson, J., dissenting), the Court concluded otherwise, explaining that the mere invalidity of "a particular statute … is almost never a sufficient rationale for judicial intervention; the party challenging the law must show adequate injury or the immediate danger of sustaining some injury," *id.* at 488.

This Court then reaffirmed its approach in *City of Gary v. Nicholson*, 190 N.E.3d 349 (Ind. 2022). There, the Court held that an uninjured party could not challenge a municipality's "welcoming city" ordinance: "Although our public-standing doctrine is unsettled in Indiana, at a minimum it requires some type of injury." *Id.* at

352. This Court's cases thus unequivocally require that a plaintiff allege a personal injury.

There are sound reasons for this approach to public standing. Standing "limits the judiciary to resolving concrete disputes between private litigants while leaving questions of public policy to the legislature and the executive." *Horner*, 125 N.E.3d at 589. That limitation "is central to separation of powers," since when the courts confer "standing on citizens having no particularized injury and whose only interest in the case is their shared, common interest with other citizens in the execution of the law . . . we invade the executive's peculiar power, conferred by the People, to execute or enforce the law." *Id.* at 612, 614 (Slaughter, J., concurring) (citation omitted).

As *Nicholson* makes clear, Thomas lacks standing, because he has completely failed to articulate "some type of injury." 190 N.E.3d at 352. Thomas's only allegations related to standing are that he is a registered voter in Bartholomew County and the "County Chairman of the Bartholomew County Democratic Party." Am. Compl. ¶ 2 (Oct. 4, 2024). Thomas's status as a voter does not mean he has suffered any injury. He does not claim that he faces any "difficulty in voting for [his] preferred candidate" or that the alleged legal violation in any way "dilutes" the effectiveness of his vote, and as the federal courts have repeatedly and persuasively held, the mere fact that a voter's preferred candidate did not prevail is not a cognizable injury: "A candidate's electoral loss does not, by itself, injure those who voted for the candidate. Voters have no judicially enforceable interest in the *outcome* of an election. Instead, they have an interest in their ability to vote and in their vote being given the same weight as any

other." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1246 (11th Cir. 2020) (citation omitted); *see id.* at 1246–47 (collecting cases); *cf. Lance v. Coffman*, 549 U.S. 437, 441–42 (2007).

Nor does Thomas's status as a Democratic Party official in Bartholomew County mean he has suffered any injury. Yes, local officials like Thomas may "be governed by this decision" when they fill other vacancies in the future. *Higgins*, 476 N.E.2d at 102. But absent any allegation that some concrete uncertainty over the vacancy-filling process inflicts an "imminent, direct, personal injury," *Members of Med. Licensing Bd. of Ind. v. Planned Parenthood*, 211 N.E.3d 957, 961 (Ind. 2023), *reh'g denied*, 214 N.E.3d 957 (Ind. 2023), the abstract desire for a judicial pronouncement on the workings of Indiana election law presents calls for precisely the type of "academic debate or mere abstract speculation" that standing prevents the courts from undertaking, *Horner* 125 N.E.3d at 589.

II. The Bartholomew County Republican Party could lawfully renominate Foyst under Ind. Code § 3-13-1-7(b) despite a purported timing defect in the previous notice of caucus

If the Court does reach the merits of Thomas's challenge, it should reject the necessary premise of his argument: that if a candidate's nomination is voided on procedural grounds, his party is forever barred from renominating that candidate for the same office in that election.

"[T]his Court has long held that statutes providing for contesting elections should be liberally construed in order that the will of the people in the choice of public officers may not be defeated by any merely formal or technical objections." *Pabey v. Pastrick*, 816 N.E.2d 1138, 1148 (Ind. 2004) (cleaned up). Moreover, constitutional

principles of free association "consecrate[] a special place for the processes by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Morales*, 228 N.E.3d at 1035 (cleaned up).

To secure these principles, the Indiana Code provides at least three opportunities for a major party to select its candidate in a local election like the one at issue in this case. First, the candidate may be selected through the primary process. *See* Ind. Code § 3-8-2-1 *et seq*. Second, if a party does not choose its candidate in the primary election, it may fill this "early candidate vacancy" up to thirty days before the general election by a caucus or by action of the party's county committee. *See id.* § 3-13-1-6. Generally, the vacancy must be filled by July 3 following the primary election, but in certain circumstances the code allows the early vacancy to be filled up to thirty days before the general election. *Id.* § 3-13-1-7. Third, if the vacancy arises "after the thirty-first day before" the general election, the party may still fill this "late candidate vacancy" in certain circumstances so long as it acts "not later than 6 a.m. on election day." *Id.* § 3-13-2-1(a)(7).

Here, the Bartholomew County Republican Party selected Appellee Foyst to fill the vacancy for District 6 of the Columbus City Council, under the Article 13, Chapter 1 provisions governing early candidate vacancies, twice: *first*, through a caucus that took place on July 1, before "noon July 3 after the primary election," *id.* § 3-13-1-7(a); and *second*, after that attempt was invalidated based on an alleged timing defect in the notice of caucus, through another caucus that took place on August 29, "before the thirtieth day before [the] general … election," *id.* § 3-13-1-7(b).

Nothing in Indiana's election laws barred the party from selecting the same candidate twice in this way.

As indicated, the provisions of the Indiana Code governing candidate selection are lengthy, detailed, and precise. *See generally id.* § 3-8-2-1 *et seq.*; *id.* § 3-13-1-1 *et seq*. The code also sets forth detailed requirements governing the qualifications political candidates. *See generally id.* § 3-8-1-1 *et seq.* Yet Thomas has identified no provision barring a party from renominating a candidate whose initial nomination has been invalidated based on a procedural defect. Where "certain items or words are specified or enumerated in a statute," then the "courts may not engraft additional or new words." *A.A. v. Eskenazi Health/Midtown CMHC*, 97 N.E.3d 606, 614 (Ind. 2018).

Thomas's argument that such a rule should nonetheless be implied appears to run as follows: if the county clerk illegally accepts an untimely nomination notwithstanding the missed deadline, the opposing candidate's party will be forced to bring a challenge to the candidacy, and if the challenge succeeds the party can then renominate the same candidate at a later date under Section 3-13-1-7(b), effectively circumventing the initial deadline. There are multiple problems with this argument. First, it mistakenly presupposes that election officials will deliberately act contrary to the law. But "[p]ublic officials are presumed to do their duty and this presumption extends to election officials." *Brown v. Grzeskowiak*, 101 N.E.2d 639, 655 (1951).

Moreover, allowing renomination in these circumstances does not undermine the purpose of the statutory deadlines. The timing defect in this case was the

Bartholomew County Republican Party's alleged failure to provide notice of its July 1, 2023, caucus at least ten days before the meeting. *See* Ind. Code § 3-13-1-9(b). Such notice ensures that all members of the party who wish to have a voice in the candidate selection process are given a fair opportunity to do so. Where such notice was initially not provided, it furthers—rather than undermines—the purpose of the deadlines in question to allow the party to renominate the candidate through a caucus that *does* follow adequate notice. Indeed, in other contexts where there is a defect in notice, courts routinely allow the same action to take place again so long as appropriate notice is provided the second time. *See Carr v. Boone,* 9 N.E. 110, 111 (1886) ("[W]e think there can be no doubt of the right of the court to order [second] notice to be given, where it is discovered that a notice previously given was not sufficient, provided there is no unreasonable delay, and no substantial rights are prejudiced."); *accord Ortiz-Santiago v. Barr*, 924 F.3d 956, 965 (7th Cir. 2019); *New England Coal. on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1131 (D.C. Cir. 1984). That was also the appropriate course here.

III. Appellee's renomination was appropriate whether or not his initial candidacy was void and of no effect

Because Appellee was properly renominated under Ind. Code § 3-13-1-7(b), it does not matter whether his initial candidacy is described as void and of no effect. The Court of Appeals' conclusion to the contrary is based on a misinterpretation of the scope of 7(b). That provision authorizes renomination upon "[t]he successful challenge of a candidate under section 16.5," *id.*, and because, the court reasoned, Appellee's "candidacy never existed in the eyes of the law," he was not "a candidate"

and the vacancy that resulted from the Election Board's initial action must fall outside 7(b). That reasoning, in turn, was based on dicta from this Court's decision in *Higgins*.

Higgins principally concerned the interpretation of election code provisions governing the filling of post-primary vacancies that have since been repealed; it concluded that the candidate in question, who had ultimately prevailed in the general election, had not been nominated within the deadlines set forth in those now-defunct provisions. The Court of Appeals seized upon dicta in *Higgins* describing the untimely nomination as "void and of no effect," *id.* at 100, but that passage does not define the term "candidate" in Section 3-13-1-7(b). Because the statute itself also does not define that term, the Court must "give effect to [its] plain and ordinary meaning." *Suggs v. State*, 51 N.E.3d 1190, 1193 (Ind. 2016). The plain meaning of the word "candidate" is "[o]ne who seeks or aspires to be elected or appointed to an office."[1] Appellee was a "candidate" under this ordinary meaning until the Election Board's August 18, 2024, action, and so that action triggered the possibility of renomination under 7(b). Indeed, neither Appellee nor the Court of Appeals has identified any basis for the Election Board's August 18 decision—or the challenge by Thomas that gave rise to it—other than Indiana Code § 3-13-1-16.5.[2]

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[1] *Candidate*, Oxford English Dictionary, https://www.oed.com/search/dictionary/?scope=Entries&q=candidate

[2] The legislature has since updated the provisions governing late ballot vacancies, clarifying that vacancies due to "death," "withdrawal," "disqualification," "court order," "successful challenge," or "judicial proceeding" may be filled with a replacement candidate "not later than 6 a.m. on election day." Ind. Code § 3-13-2-1.

IV. The Court of Appeals erred in granting the extraordinary remedy of nullifying the voters' will and declaring Foyst's opponent the winner of the 2023 general election

Finally, apart from the merits of Thomas's challenge, the extraordinary remedy entered by the Court of Appeals in this case was inappropriate.

"The purpose of [election] law and the efforts of the court are to secure to the elector an opportunity to freely and fairly cast his ballot, and to uphold the will of the electorate and prevent disfranchisement." *State ex rel. Harry v. Ice*, 191 N.E. 155, 157 (Ind. 1934). The Indiana Constitution solemnly declares that "all elections shall be free and equal," Ind. Const. art. 2, § 1, and it is thus "a serious matter under our system of government to deprive one of an office for which he has received the highest number of votes," for "fundamental idea in all republican forms of government" is "that no one can be declared elected and no measure can be declared carried, unless he or it receives a majority or a plurality of the legal votes cast in the election." *Oviatt*, 147 N.E.2d at 901 (citation omitted).

To safeguard these principles, this Court has long held that an election result may be invalidated only where the voters clearly possessed "knowledge or notice …, either actual or constructive," of the legal defect in the winner's candidacy "when they cast their votes." *State v. Ross*, 84 N.E. 150, 151 (Ind. 1908). Indeed, "[t]he existence of the fact which disqualifies, and of the law which makes that fact operate to disqualify, must be brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it." *Oviatt*, 147 N.E.2d at 900. "[I]n absence of proof that the voters willfully threw away their ballots on a candidate they knew could not lawfully be elected, the mere fact that the

one who received the largest vote was ineligible to be elected to the office or to hold it is not enough to give the candidate who received a less number the right to the office." *Fields v. Nicholson*, 150 N.E. 53, 55 (Ind. 1926).

This rule is a high bar to clear. For example, a candidate's attempts at bribery were insufficient to invalidate an election because the challengers failed to present sufficient "evidence . . . that those voters who cast their ballots for defendant did so with knowledge" of the alleged disqualification. *Id.* at 56. This Court has similarly rejected a challenge that the winning candidate was ineligible due to a recent constitutional amendment imposing term limits on the office, reasoning that "there was considerable uncertainty about the proviso in the constitutional amendment being properly ratified" and it thus "can very well be said that the voters … were justified in believing that appellant … was qualified as a candidate for re-election." *Oviatt*, 147 N.E.2d at 901.

There is no finding, or even allegation, that the alleged legal defect in Foyst's candidacy—that his second nomination was purportedly outside the scope of Ind. Code § 3-13-1-7(b) and thus untimely under Ind. Code § 3-13-1-7(a)—was "brought home so closely and so clearly to" Bartholomew County voters that their election of Foyst can only "indicate[] an attempt to waste" their votes, *Oviatt*, 147 N.E.2d at 900. Accordingly, the remedy entered below was clearly inappropriate as a matter of settled law.

The Court of Appeals' remedy also undermines Indiana's electoral system by inviting perverse gamesmanship. As this Court has explained, "the Code places a

burden on political campaigns to investigate and vet their opposition before the pre-election time limitations expire." *White v. Ind. Democratic Party ex rel. Parker*, 963 N.E.2d 481, 489 (Ind. 2012). For "the alternative" to this rule is "that a challenger might ignore a known (or knowable) disqualification challenge before the election, wait to see who won at the polls, and then seek to set aside the results of the democratic process. Such a result is inconsistent with free elections and respect for voters' expressed preferences." *Id.* Accordingly, the Court long ago held that while "the provisions for the nomination of candidates and the filing of the nomination papers are binding upon the officers for whose guidance they are intended," if election officers mistakenly act contrary to those provisions but the "the will of the majority of the electors is fairly expressed by the ballot," the result may not be set aside unless the Code "by express terms declare[s]" that the provisions in question are "essential to the validity of an election." *Cave*, 24 N.E.2d at 1012. Again, nothing in the timing rules governing the nomination of local candidates expressly declares that those rules are "[e]ssential to the validity" of the election, or that irregularities in the timing of the nomination "void the election." *Id.*

The State does not exclude the possibility that the extraordinary relief entered here could be appropriate in some extreme case; indeed, the Code provides that in certain *post*-election challenges, the election of a candidate who is plainly ineligible to hold the office may be set aside in rare cases. *See* Ind. Code § 3-12-8-17; *see also id.* § 3-12-8-2. But that statute did not authorize the relief entered below for at least three independent reasons. First, this provision of the Code only authorizes "a *post-*

election challenge to the winning candidate." *Burke v. Bennett*, 907 N.E.2d 529, 531 (Ind. 2009) (emphasis added). This challenge, by contrast, was brought *before* election day and is thus "governed by Title 3, Article 8 of the Indiana Code." *White*, 963 N.E.2d at 485. And the Article 8 provisions governing pre-election challenges do not contain any provision authorizing the drastic remedy of invalidating the election results. That is for good reason: the central goal of Article 8's *pre*-election provisions is to resolve any challenges *before* the People express their will at the ballot box.

Second, even if this challenge had been brought under Article 12, the post-election procedures do not allow challenges based on timing defects in the winning candidate's nomination. Article 12 does countenance a challenge that the winning candidate "was ineligible," Ind. Code § 3-12-8-2(1), but that basis does not apply here. As the Court has held, "the word 'ineligible'" in Section 3-12-8-2(1)'s predecessor is "synonymous with the word 'disqualified.' … The term 'eligible,' as applied to candidates for office, means capable of being chosen; the subject of selection or choice; also implying competency to hold the office if chosen." *Carroll v. Green*, 47 N.E. 223, 224 (Ind. 1897) (citations omitted). A candidate for the office of City Councilman, for instance, must have resided in the relevant district for at least six months, Ind. Code § 3-8-1-27, cannot be subject to the Hatch Act, and cannot have been convicted of certain felonies, *id.* § 3-8-1-5. Thomas's challenge here has nothing to do with these qualifications.

Finally, the statutory provision authorizing the courts to overturn an election result in rare circumstances "must be interpreted in light of the common law, as well

as the constitution of this state." *Oviatt*, 147 N.E.2d at 900. And as explained above, the constitutional protection of free elections demands that such a remedy may be ordered only where the alleged illegality (1) violated a provision declared in "express terms" to "be essential to the validity of an election," *Cave*, 24 N.E.2d at 1012, and (2) was "brought home so closely and so clearly to the knowledge or notice of the elector, as that to give his vote therewith indicates an intent to waste it," *White*, 963 N.E.2d at 486. Neither requirement is satisfied here.

This Court's decision in *Higgins*—the only authority of this Court cited by the Court of Appeals—is not to the contrary. As noted above, *Higgins* held a nomination untimely under now-repeated provisions of the election code. *Higgins*, 476 N.E.2d at 101–02. But nothing in *Higgins* suggests that the appropriate remedy for the violation at issue was to throw out the result of the then-completed election. To the contrary, *Higgins did not grant any such remedy*. *See id.* at 98, 102 (affirming trial court's judgment entered *before* the election took place). It therefore cannot support that drastic remedy here.

CONCLUSION

The Court should grant transfer and reverse the judgment of the Court of Appeals.

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WORD COUNT CERTIFICATE

As required by Indiana Appellate Rule 44, I verify that the foregoing document contains no more than 4200 words.

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CERTIFICATE OF SERVICE

I certify that on January 31, 2025, the foregoing document was electronically filed using the Indiana E-filing System ("IEFS"). I also certify that on January 31, 2025, the foregoing document was served upon the following persons using the IEFS:

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