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IN THE
INDIANA COURT OF APPEALS
CASE NO. 20A-MI-1900

THE CITY OF BLOOMINGTON, INDIANA, et al.,	) Appeal from the Monroe Circuit Court,
Appellants-Respondents,	) Cause No. 53C08-2006-MI-000958,
v.	)
ANDREW GUENTHER, et al.,	)
Appellees-Petitioners.	) The Honorable Erik C. Allen, Special Judge.

BRIEF OF APPELLANTS-RESPONDENTS

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STATEMENT OF THE ISSUES

1. Whether Indiana Code Section 36-1-8-10 inserts a political party affiliation requirement into statutes governing local government boards, such as Indiana Code Section 36-7-4-207(a), which limit the number of appointees to a board who may be from a single political party but do not expressly require party affiliation for all members of a board?

2. Whether Petitioners lack any right or title to the office at issue in the Amended Complaint, and therefore lack standing to bring an information in *quo warranto*?

STATEMENT OF THE CASE

On June 9, 2020, Appellee-Petitioners Andrew Guenther and William Ellis ("Petitioners") filed a *Verified Complaint for Writ of Quo Warranto* against Appellant-Respondents City of Bloomington, John Hamilton, and Christopher Cockerham. On June 29, 2020, the named Respondents filed a motion to dismiss the *Verified Complaint for Writ of Quo Warranto* (Appellant's App. Vol. II p. 6).

On July 6, 2020, before the trial court took any action on the Respondents' June 29, 2020, motion to dismiss, Petitioners filed their *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Amended Complaint") (Appellant's App. Vol. II pp. 6, 10-35). The Amended Complaint named the original respondents and also added Nicholas Kappas as a respondent (City of Bloomington, John Hamilton, Christopher Cockerham, and Nicholas Kappas are hereinafter collectively referred to as "City of Bloomington") (Appellant's App. Vol. II p. 12).

On July 10, 2020, City of Bloomington filed *Respondents' Second Motion to Dismiss* as to Petitioners' Amended Complaint pursuant to Indiana Trial Rule 12(B)(6) (Appellant's App. Vol. II pp. 36-58). Petitioners filed a memorandum in opposition to Bloomington's *Second Motion to Dismiss* on August 4, 2020 (Appellant's App. Vol. II pp. 59-76). On August 5, 2020, the trial court held a hearing on City of Bloomington's motion to dismiss (Appellant's App. Vol. II p. 8).

On August 14, 2020, the Court issued its *Order on Respondents' Second Motion to Dismiss* ("Order") denying City of Bloomington's motion to dismiss (Appellant's App. Vol. II pp. 8, 77-78). City of Bloomington filed a motion to certify the trial court's order denying the City of Bloomington's motion to dismiss and to stay proceedings on August 17, 2020, and the trial court certified its order for interlocutory appeal and stayed the proceeding on September 14, 2020 (Appellant's App. Vol. II pp. 8, 79-81).

City of Bloomington submitted its *Motion to Accept Jurisdiction over Interlocutory Appeal Pursuant to Appellate Rule 14(B)* to this Court on October 19, 2020 (Appellant's App. Vol. II p. 82; Docket). Petitioners filed their opposition to City of Bloomington's motion on October 30, 2020 (Appellant's App. Vol. II p. 82; Docket). On November 13, 2020, the Indiana Court of Appeals accepted jurisdiction over the interlocutory appeal of the Order (Appellant's App. Vol. II pp. 82-83; Docket).

City of Bloomington filed a Notice of Appeal on November 25, 2020 (Appellant's App. Vol. II pp. 84-88). Petitioners filed a motion to shorten the briefing deadlines in accordance with Indiana Appellate Rule 14(G)(2) on December 4, 2020 (Docket). This Court granted Petitioner's motion on December 18, 2020, and ordered that

Bloomington's brief of appellant be due no later than 15 days from the service date of the Notice of Completion of Transcript (Docket).

The notice of completion of the clerk's record was filed on December 22, 2020 (Appellant's App. Vol. II pp. 89-90; Docket). On January 11, 2021, the notice of completion of the transcript was filed (Appellant's App. Vol. II pp. 91-92; Docket)

STATEMENT OF FACTS

The City of Bloomington Plan Commission ("Plan Commission") is governed by Indiana Code Section 36-7-4-207 and Bloomington Municipal Code Section 2.13.000 *et seq.* (Appellant's App. Vol. II p. 17). The Plan commission consists of nine members, five of whom are appointed by the Mayor. Ind. Code § 36-7-4-2017(a); B.M.C. § 2.13.010. Out of the five mayoral appointments, no more than three "may be of the same political party" (Appellant's App. Vol. II p.18). *Id.* Since 1988, Indiana Code Section 36-1-8-10 has defined what constitutes a political affiliation for appointees to all boards of a political subdivision in Indiana. Ind. Code § 36-1-8-10. To be affiliated with a political party, an individual had to have either (1) "voted in the most recent primary election held by the party with which the appointee claims affiliation" or (2) "be certified as a member of that party by the party's county chairman for the county in which the appointee resides." I.C. § 36-l-8-10(b).

On February 15, 2016, Bloomington's mayor appointed Nicholas Kappas to the Plan Commission (Appellant's App. Vol. II p.17). At that time, three of the members of the Plan Commission were Democrats. Kappas was appointed to the Plan Commission seat formerly held by Christopher Smith, a member of the Republican

Party. (Appellant's App. Vol. II pp. 19-21). Kappas was one of the five mayoral appointees made pursuant to Bloomington Municipal Code, Section 2.13.010 (Appellant's App. Vol. II p.17). At the time Kappas was appointed to the Plan Commission, Kappas was neither a Democrat nor a Republican as he had not voted in a primary election, claimed a party affiliation, or been certified as a member of a political party by a chairman of a party (Appellant's App. Vol. II p.18). During the term of his appointment, Kappas never voted in a political party's primary election, claimed a party affiliation, or sought certification by a party chair as a member of a political party (Appellant's App. Vol. II p.18).

In 2017, the legislature amended Indiana Code Section 36-1-8-10 to add the following:

> (d) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both of the following apply:
>
> > (1) The member may continue to serve on the board for ninety (90) days after the expiration date of the member's term.
> >
> > (2) The county chairman of the political party of the member whose term has expired shall make the appointment.

The definition of political affiliation for appointees remained unchanged from its codification in 1988 through the 2017 amendment. *See* I.C. § 36-l-8-10(b).

Kappas served his full term, which expired on December 31, 2019 (Appellant's App. Vol. II p.20). No appointment was made to replace Kappas within 90 days of December 31, 2019 (Appellant's App. Vol. II pp. 20-21). On April 16, 2020, 106 days after the expiration of Kappas's term, William Ellis, the Chair of the Republican

Party for Monroe County Indiana, attempted to appoint Andrew Guenther as a Republican to fill Kappas's seat (Appellant's App. Vol. II p. 21). At the time of Ellis's attempted appointment of Guenther, Guenther was serving on the City of Bloomington's Environmental Commission, a seat that he had held since September 18, 2018 (Appellant's App. Vol. II p. 24). Mayor John Hamilton announced the appointment of Christopher Cockerham to fill Kappas's seat on the Plan Commission on May 7, 2020 (Appellant's App. Vol. II p. 12).

SUMMARY OF ARGUMENTS

I. Standard of Review and Governing Law.

II. Indiana Code Section 36-1-8-10 only sets out the standards to apply to determine the party affiliation, or the lack thereof, of an appointee to a board or commission under limited circumstances and does not mandate party affiliation for all covered statutory boards. Petitioners' interpretation of Indiana Code Section 36-1-8-10 conflicts with the plain language of Indiana Code Section 36-7-4-207, and all other similar statutes, which do not expressly condition appointment upon a required party affiliation. Interpreting the statute in the manner Petitioners argue would lead to irrational and disharmonizing result and implicate the First Amendment freedom of association.

III. The legislative history of Indiana Code Section 36-1-8-10 provides historical guidance that the appointing authority retains its legal duty to make appointments to board and commission seats held by individuals without a

party affiliation, and can be required, through a mandamus action, to make said appointments.

IV. William Ellis did not have lawful authority to appoint Andrew Guenther to the City of Bloomington Plan Commission, and his appointment is a legal nullity. Neither Ellis nor Guenther has suffered any actual injury, and neither has any substantive right to enforce the claims that are being made in the litigation.

ARGUMENT

Petitioners William Ellis and Andrew Guenther lack standing to bring an information in *quo warranto* because Ellis did not have the authority under the law to appoint a Republican to a seat that had been previously occupied by a political independent. Nor can Ellis and Guenther conjure standing by adding a political party affiliation requirement to Indiana law which the legislature did not intend. Indiana Code Section 36-1-8-10 does not, and cannot, impose a political party affiliation requirement into statutes governing boards like the Plan Commission, which merely limit the members of any single political party but do not expressly require political party affiliation for all members.

I. Standard of Review and Governing Law

A. Standard of Review

The standard of review of a trial court's grant or denial of a motion to dismiss for failure to state a claim under Indiana Trial Rule 12(B)(6) is de novo. *Gordon v. Purdue Univ.,* 862 N.E.2d 1244, 1250—51 (Ind. Ct. App. 2007); *Sims v. Beamer,* 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). The appellate court does not defer to the trial

court's decision because deciding a motion to dismiss based upon failure to state a claim involves a pure question of law. *Id.* "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs of Northwest Indiana,* 845 N.E.2d 130, 134 (Ind. 2006). "Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *Id.*

In determining whether the facts alleged in the complaint are incapable of supporting relief, "the court must look only to the complaint and may not resort to any other evidence in the record." *Dawson v. Newman,* 845 N.E.2d 1076, 1080 (Ind. Ct. App. 2006), *trans. denied.* When ruling on a motion to dismiss under Indiana Trial Rule 12(B)(6), the court should consider all of the allegations in the complaint to be true and resolve all inferences in favor of the non-moving party. *Allen v. Clarian Health Partners, Inc.,* 980 N.E.2d 306, 308 (Ind. 2012); *State v. American Family Voices, Inc.,* 898 N.E.2d 293, 295-96 (Ind. 2008).

Where a party lacks standing to pursue a claim, dismissal under Trial Rule 12(B)(6) is appropriate. *In re Paternity of G.W.,* 983 N.E.2d 1193, 1196 (Ind. Ct. App. 2013); *Long v. Biomet, Inc.,* 901 N.E.2d 37, 40 (Ind. Ct. App. 2009); *R.J.S. v. Stockton,* 886 N.E.2d 611, 614 (Ind. Ct. App. 2008). Standing is defined in Indiana as having a "sufficient stake in an otherwise justiciable controversy." *Ind. Civil Rights Comm 'n*

v. Indianapolis Newspapers, Inc., 716 N.E.2d 943, 945 (Ind. 1999). The purpose of the standing requirement is to ensure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. *Pence v. State,* 652 N.E.2d 486, 487 (Ind. 1995). Standing is "a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case." *Id.* at 488; *see also Garau Germano, P.C. v. Robertson,* 133 N.E.3d 161, 170 (Ind. Ct. App. 2019), *reh'g denied* (Oct. 17, 2019), *trans. denied* (Ind. Feb. 13, 2020).

Indiana law expressly limits who has standing to bring an information in *quo warranto*:

> An information described in IC 34-17-1-1 may be filed:
>
> (1) by the prosecuting attorney in the circuit court, superior court, or probate court of the proper county, upon the prosecuting attorney's own relation, whenever the prosecuting attorney:
>
> (A) determines it to be the prosecuting attorney's duty to do so; or
>
> (B) is directed by the court or other competent authority; or
>
> (2) by any other person on the person's own relation, whenever the person claims an interest in the office, franchise, or corporation that is the subject of the information.

I.C. § 34-17-2-1.

Indiana law is well settled that "a private person may bring a *quo warranto* only if he claims an interest on his own relation or a special interest beyond that of a taxpayer." *City of Gary v. Johnson,* 621 N.E.2d 650, 652 (Ind. Ct. App. 1993); *See also Hovanec v. Diaz,* 272 Ind. 342, 343, 397 N.E.2d 1249, 1250 (1979) ("Although a private person may pursue a *quo warranto* action, he must demonstrate a personal interest distinct from that of the general public.)

B. Statutory Interpretation

When interpreting a statute, a court must give its words their plain meaning and consider the structure of the statute as a whole. *ESPN, Inc. v. Univ. of Notre Dame Police Dep't,* 62 N.E.3d 1192, 1195 (Ind. 2016). "In reviewing a statute, our foremost objective is to determine and effect legislative intent." *Spaulding v. Int'l Bakers Servs., Inc.,* 550 N.E.2d 307, 309 (Ind. 1990) (citing *Park 100 Dev. v. Indiana Dep't of State Revenue,* 429 N.E.2d 220, 222 (Ind. 1981)). "Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute." *Id.* "We examine and interpret a statute as a whole, giving words common and ordinary meaning "and not overemphasizing a strict literal or selective reading of individual words." *Id.* The Court "will not read into the statute that which is not the expressed intent of the legislature." *N.D.F. v. State,* 775 N.E.2d 1085, 1088 (Ind. 2002) (citing *Ind. Civil Rights Comm'n,* 716 N.E.2d at 946). "As such, it is just as important to recognize what the statute does not say as it is to recognize what it does say." *Id.* (citing *Clifft v. Ind. Dep't of State Revenue,* 660 N.E.2d 310, 316 (Ind. 1995)).

"[Sjtatutes concerning the same subject matter must be read together to harmonize and give effect to each." *Clippinger v. State,* 54 N.E.3d 986, 989 (Ind. 2016) (citing *Merritt v. State,* 829 N.E.2d 472, 475 (Ind. 2005)). "There is a presumption that the legislature in enacting a particular piece of legislation has in mind existing statutes on the same subject." *Schrenker v. Clifford,* 270 Ind. 525, 527, 387 N.E.2d 59, 60 (Ind. 1979). The Court must "avoid interpretations that depend on selective

reading of individual words that lead to irrational and disharmonizing results." *ESPN, Inc.,* 62 N.E.3d at 1195. Additionally, the Court must interpret a statute with the presumption that the legislature intended to comply with the Indiana and Federal Constitutions. *Boehm v. Town of St. John,* 675 N.E.2d 318, 321 (Ind. 1996); *Price v. State,* 622 N.E.2d 954, 963 (Ind. 1993); *Smith v. Indianapolis St. Ry. Co.,* 158 Ind. 425, 427-28, 63 N.E. 849, 850 (Ind. 1902).

II. Indiana Code Section 36-1-8-10 does not, and cannot, implant a party affiliation requirement into Indiana Code Section 36-7-4-207.

Indiana Code Section 36-1-8-10 only sets out the standards to apply to determine the party affiliation, or the lack thereof, of an appointee under limited circumstances and does not mandate party affiliation for all covered statutory boards. Petitioners incorrectly assume that Indiana Code Section 36-1-8-10 voids and prohibits all appointments of individuals who do not have a party affiliation, or whose affiliated party does not have a county party chair and does not conduct primaries, to boards which only require the membership of a board not to exceed a stated number of members from the same political party. Petitioners seek to read this language into Indiana Code Section 36-1-8-10, something the legislature has not seen fit to do since the codification of that statute in 1988, and over the course of numerous revisions and amendments to that section thereafter.

Indiana Code Section 36-1-8-10(b) states as follows:

> (b) Whenever a law or political subdivision's resolution requires that an appointment to a board be conditioned upon the political affiliation of the appointee, or that the membership of a board not exceed a stated number of members from the same political party, at the time of an appointment, one (1) of the following must apply to the appointee:

> (1) The most recent primary election in Indiana in which the appointee voted was a primary election held by the party with which the appointee claims affiliation.
>
> (2) If the appointee has never voted in a primary election in Indiana, the appointee is certified as a member of that party by the party's county chair for the county in which the appointee resides.

I.C. § 36-l-8-10(b). Subpart (b) covers two different types of board appointments, one which affirmatively requires party affiliation, and one which prohibits appointment of too many members of a single political party. *Id.* Despite covering two different types of boards, the language of Indiana Code Section 36-l-8-10(b) sets out a single standard which must be used for determining party affiliation, or lack thereof.

The first type of appointment covered by Section 36-1-8-10(b) affirmatively requires a political party affiliation. One such example is a police merit commission, which requires "two (2) persons, who must be of different political parties, appointed by the unit's executive." Ind. Code § 36-8-3.5-6(a)(l). If a merit board has one Republican member appointed by the executive, it requires that the next executive appointee be a member of another political party. If the appointee has not voted in a political party primary and has not been certified by a political party chair, then the appointee cannot be appointed to the commission, and such appointment would be void.

Under the second type of appointment, such as a plan commission, the appointee's party affiliation is determined pursuant to the same procedure; however, the ultimate application is different. I.C. § 36-7-4-207. For example, in a board

organized under Indiana Code Section 36-7-4-207(a)(5), which states that no more than three of five members may be from the same political party, if there are three Republicans on the board and a proposed additional appointee either voted in a Republican primary or has been certified by the county Republican Party chair as a Republican, then the appointee is a Republican and cannot be appointed to the board. *Id.* However, if neither of those is true, then the appointee is not a Republican, and the appointment would not result in a violation of the unambiguous test of the statute. I.C. § 36-7-4-207(a)(5). The Plan Commission seat at issue in this appeal is the second type of board appointment, made under Indiana Code Section 36-7-4-207(a)(5). Eligibility for service on a plan commission is not constrained by an affirmative party affiliation requirement.

A. Petitioners' Interpretation of Indiana Code Section 36-1-8-10 would lead to irrational and disharmonizing results.

Petitioners' interpretation of Indiana Code Section 36-1-8-10 would mandate party affiliation for any board that limits the number of members from a single political party. This interpretation conflicts with the plain language of Indiana Code Section 36-7-4-207, and all other similar statutes, which does not expressly condition appointment upon a required party affiliation. Interpreting the statute in the manner Petitioners argue would "lead to irrational and disharmonizing results," *ESPN, Inc.,* 62 N.E.3d at 1195.

The Indiana General Assembly has clearly manifested its ability to craft a statute mandating partisan affiliation for boards or commissions. For example, the statute governing Merit Commissions for Police and Fire states in relevant part:

> (a) A merit commission consisting of five (5) commissioners shall be established for each department of a unit having a merit system. The commissioners are:
>
> (1) two (2) persons, who *must be of different political parties,* appointed by the unit's executive;
>
> (2) one (1) person appointed by the unit's legislative body; and
>
> (3) two (2) persons, who *must be of different political parties,* elected by the active members of the department.

I.C. § 36-8-3.5-6 (emphasis added). The clear and unambiguous language of this statute requires that the two appointees of the executive and of the members of the department "must" be from a political party, and cannot be from the same political party.

In stark contrast, the General Assembly intentionally used different and distinct language when crafting Indiana Code Section 36-7-4-207(a)(5). That section provides for "[f]ive (5) citizen members, of whom no more than three (3) *may be of the same political party,* appointed by the city executive" to a plan commission. Ind. Code § 36-7-4-207(a)(5) (emphasis added). The decision to use the permissive "may" as opposed to the mandatory "must" shows that the intent was not to mandate a political affiliation for all members. Instead, the limitation is that the city executive "may" appoint up to a specified number from a single political party. The city executive may also choose not to appoint up to that specified number from a single political party. The plain language of the statute does not affirmatively require any appointee to have a political party affiliation.

If the General Assembly had wanted Indiana Code Section 36-7-4-207(a)(5) to require party affiliation for all appointees, it would have been drafted like the Police and Fire Merit Commissions referenced above. In contrast, Section 207 does not require any particular party affiliation—it allows for a member to be from one of any number of political parties or no party at all. There is a presumption that the Legislature chooses words intentionally, and that every word in a statute should be given meaning. *Spaulding*, 550 N.E.2d at 309. "It is just as important to recognize what the statute does not say as it is to recognize what it does say." *N.D.F.,* 775 N.E.2d at 1088. If the legislature had wanted Section 36-7-4-207(a)(5) to mandate political party affiliation, it clearly could have written it in a way that would do so.

If, as Petitioners claim, Indiana Code Section 36-1-8-10 mandates a party affiliation for boards like the Plan Commission under Section 36-7-4-207(a)(5), then it would lead to irrational and disharmonizing results. Petitioners' interpretation would contradict and render meaningless the plain language of no less than 17 statutes creating boards under Title 36 of the Indiana Code that limit the number of appointees from a single political party, but do not expressly require party affiliation.[1]

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[1] The relevant citations to these statutory boards and commissions are copied herein for ease of reference:

- Ind. Code § 36-7-4-208 Membership of [county plan] commission; county and metropolitan numbers
- Ind. Code § 36-7-4-214 Membership of [municipal plan] commission; additional members required for unincorporated jurisdictional area
- Ind. Code § 36-7-4-902 Board of zoning appeals; members; number; appointment
- Ind. Code § 36-7-13.5-3 Members [Shoreline Development]
- Ind. Code § 36-7-18-5 Commissioners; appointment [Housing Authorities]

"Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute." *Spaulding*, 550 N.E.2d at 309. Furthermore, implanting an affirmative party affiliation requirement into each of these 17 statutes would prevent the appointment of the many civic-minded individuals in Indiana who have not declared a party affiliation, and worse, invalidate the appointments of dedicated public servants in communities around the state, calling into question the important work they have performed for years on various boards and commissions. The Indiana General Assembly deliberately drafted these statutes so that numerous governing boards and commissions have a balance of viewpoints not defined entirely by political party affiliation. Petitioners' attempt to

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- **Ind. Code § 36-8-9-3.1** Membership [Town Board of Metropolitan Police Commissioners]
- **Ind. Code § 36-8-10-3** Sheriffs merit board
- **Ind. Code § 36-8-10-20.1** County sheriffs' standard vehicle marking and uniform commission; establishment; adoption of rules; limitation of authority
- **Ind. Code** § 36-9-4-13.5 Counties of more than 250,000 but less than 270,000; public transportation corporations; second largest city in county by population
- **Ind. Code** § 36-9-4-17 Directors; membership in political parties [Public Transportation Corporations]
- **Ind. Code** § **36-7-4-207** Membership of commission; numbers [Plan Commissions]
- **Ind. Code** § **36-9-25-3** Establishment of department; composition of board of commissioners; oaths, surety bonds and compensation of commissioners
- **Ind. Code** § **36-10-3-4** City, town, and county boards; membership; ex officio members; additional members
- **Ind. Code** § **36-10-4-3** Department of public parks; establishment; membership; compensation; oath
- **Ind. Code § 36-10-4-6.1** Extended districts in other counties; board of park commissioners; term; vacancy
- **Ind. Code § 36-10-8-4** Membership; terms; vacancies; removal; oath; reimbursement of expenses [Capital Improvement Boards]
- **Ind. Code** § 36-10-9-4 County board of managers; membership; terms; vacancies; oath of office; compensation

implant such a requirement would undermine the plain language of these statutes and lead to irrational and disharmonizing results. Their interpretation of Indiana Code Section 36-1-8-10 must therefore be rejected.

B. Interpreting Indiana Code Section 36-1-8-10 to mandate political party affiliation on boards and commissions such as the Plan Commission would lead to additional litigation for violations of the freedom of association guaranteed by the First Amendment to the United States Constitution.

Although not directly at issue on this interlocutory appeal, Indiana Code Section 36-1-8-10 must be interpreted with the presumption that the legislature intended to comply with the Indiana and Federal Constitutions. *Boehm* 675 N.E.2d at 321; *Price,* 622 N.E.2d at 963; *Smith,* 158 Ind. at 427—28, 63 N.E. at 850. Petitioners' interpretation of Indiana Code Section 36-1-8-10, if adopted, will open the door to additional litigation related to violation of the First Amendment freedom of association rights of individuals who choose not to have a party affiliation. This Court therefore should reject Petitioners' unreasonable interpretation.

In the United States, that there is "implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). In addition, "freedom of association . . . plainly presupposes a freedom not to associate." *Id.* at 623. "The right to associate with the political party of one's choice is an integral part of this basic freedom." *Kusper v. Pontikes,* 414 U.S. 51, 57 (1973). "Political belief and association constitute the core of those activities protected by the First Amendment."

Elrod v. Burns, 427 U.S. 347, 356 (1976); *see also Williams v. Rhodes,* 393 U.S. 23, 30 (1968) ("[T]he right of individuals to associate for the advancement of political beliefs . . . rank[s] among our most precious freedoms."). "A burden that falls unequally on independent candidates or on new or small political parties impinges, by its very nature, on associational choices protected by the First Amendment, and discriminates against those candidates and voters whose political preferences lie outside the existing political parties." *Anderson v. Celebrezze,* 460 U.S. 780, 793 (1983).

Like other First Amendment rights, the right to associate is not absolute. *Roberts*, 468 U.S. at 623. To determine whether a government-imposed restriction on associational freedoms violates the First Amendment, a court "must first consider the character and magnitude" of the infringement on protected interests. *Anderson*, 460 U.S. at 789. "It then must identify and evaluate the precise interests put forward by the State as justifications". *Roberts,* 468 U.S. at 623. Finally, the court must "determine the legitimacy and strength of each of those interests, [and] consider the extent to which those interests make it necessary to burden the plaintiffs rights." *Id.* A law that burdens the right to associate will be struck down if it "sweeps broader than necessary to advance" the state's asserted interests. *Norman v. Reed,* 502 U.S. 279, 290 (1992).

Petitioners' desired insertion of a party affiliation mandate into Indiana Code Section 36-1-8-10 "falls unequally," and exclusively, on Indiana citizens who have chosen not to affiliate with a political party, or whose chosen political party does not

hold primaries or have a county chair. *Anderson,* 460 U.S. at 789. Individual citizens like Kappas, who have a right to not affiliate with a political party, would be categorically denied from appointment to a vast swath of governing boards and commissions for no reason other than their lack of affiliation with an established political party. Petitioners' interpretation of the law would force individuals who are ready, willing, and able to serve their communities to go through a formality of affiliation with an established political party, or else be barred from participation. *See Storer v. Brown,* 415 U.S. 724, 746 (1974) (states cannot require an independent candidate to affiliate with a political party in order to appear on the ballot).

Furthermore, due to the nature of America's predominantly two-party system, it is highly unlikely that unaffiliated persons—who generally lack the vast financial and organizational resources of established political parties—would be able to secure a position in government through elections. The combined force of these two elements would effectively ban individuals exercising their right to not affiliate with a political party from all but a handful of small roles in governance. The "character and magnitude" of the infringement on the protected interest of associational rights would therefore be very high. *Anderson,* 460 U.S. at 789. Restrictions that "place[] a particular burden on an identifiable segment of . . . independent-minded voters" by precluding their participation in public life are "especially difficult for the State to justify." *Anderson,* 460 U.S. at 792—93. The State would therefore be hard-pressed to explain how any interest served by Petitioners' interpretation of Section 36-1-8-10

does not sweep more broadly than necessary to advance any such interest. *Norman*, 502 U.S. at 290.

We properly presume that the legislature complied with the Indiana and Federal Constitutions when it drafted Indiana Code Section 36-1-8-10. *Boehm* 675 N.E.2d at 321; *Price,* 622 N.E.2d at 963; *Smith,* 158 Ind. at 427-28, 63 N.E. at 850. Because Petitioners' proposed party affiliation mandate would potentially violate protected associational rights guaranteed under the First Amendment to the United States Constitution, this Court should refrain from adopting Petitioners' proposed interpretation.

III. Indiana Code Section 36-1-8-10 can be applied to boards such as the Plan Commission without mandating a party affiliation.

A. Legislative History of Indiana Code Section 36-1-8-10.

From the codification of Indiana Code Section 36-1-8-10 in 1988 through July 1, 2017, the appointing authority never lost any duty to make replacement appointments for any member of a board or commission where membership was limited to a stated number of members from a single political party. During all that time, the statute functioned properly. The appropriate procedural remedy against an appointing authority for an unfilled vacancy was to file a mandamus action. *See* Ind. Code. § 34-27-3-1; *see also Irmscher v. McCue,* 504 N.E.2d 1034, 1038 (Ind. Ct. App. 1987) (Mandamus action "has been interpreted as enabling a court to properly mandate public officials, boards and commissions to perform a clear, absolute and imperative duty imposed by law).

In its original form, Indiana Code Section 36-1-8-10 read as follows:

> (a) As used in this section, "Board" means an administration, agency, authority, board, bureau, commission, committee, council, department, division, institution, or other similarly designated body of a political subdivision.
> (b) Whenever a law or political subdivision's resolution requires that an appointment to a Board be conditioned upon the political affiliation of the appointee, or that the membership of a Board not exceed a stated number of members from the same political party, at the time of an appointment the appointee must:
>
> (1) Have voted in the most recent primary election held by the party with which the appointee claims affiliation; or
> (2) If the appointee did not vote in the most recent primary election held by the party with which the appointee claims affiliation, be certified as a member of that party by the party's county chairman for the county in which the appointee resides.

I.C. § 36-1-8-10 (1988).

This section was amended in 1996 to include language directing what must happen when a member's term expires and no appointment is made by the appointing authority. The additional language in subpart (c) stated:

> (c) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, the member may continue to serve on the board for only sixty (60) days after the expiration date of the member's term.

I.C. § 36-1-8-10 (1996).

The language added to the statute in subpart (c) existed from 1996 through July 1, 2017, when the statute was further amended with subpart (d) to read as follows:

> (d) Notwithstanding any other law, if the term of an appointed member of a board expires and the appointing authority does not make an appointment to fill the vacancy, both of the following apply:
>
> (1) The member may continue to serve on the board for ninety (90) days after the expiration date of the member's term.

> (2) The county chairman of the political party of the member whose term has expired shall make the appointment.

I.C. 36-1-8-10 (2017).

B. Properly applying and giving effect to both Indiana Code Section 36-1-8-10 and statutes similar to Indiana Code Section 36-7-4-207 does not result in procedural impossibilities.

Rewriting all statutes that do not require a political party affiliation, as the Petitioners' requested the trial court to do, would nullify the plain language of all of the other statutes that do not require such a definite affiliation. All of these statues can be read in harmony with each other without significantly altering the legislature's intent and the rights of all Indiana citizens. As is clear from the legislative history of Indiana Code Section 36-1-8-10, until July 1, 2017, the appointing authority never lost the duty to make appointments of any member, regardless of political party affiliation, even after a member's term had expired.

There is clear historical and statutory guidance for the proper procedure to follow under the current law when there is a vacant seat of a member without party affiliation. That procedure is not to read a party affiliation mandate into the statute, as Petitioners propose, but to follow the same procedure the statute operated under for the 31 years before the addition of subpart (d) in 2017: mandamus actions. For boards that shall not exceed a stated number of members from the same political party, when a vacant seat exists for a member lacking a party affiliation, the appointing authority retains its legal duty to make the appointment and can be required by a mandamus action to make said appointment in compliance with Indiana Code Section 36-1-8-10 and Indiana Code Section 36-7-4-207. *See, e.g., State*

ex rel. Rogers v. Davis, 230 Ind. 479, 485, 104 N.E.2d 382, 384 (Ind. 1952) (circuit court judge mandated to appoint a Democratic Party member to the local voter registration board). Petitioners' claims to the trial court of impossibility of application of Indiana Code Section 36-1-8-10 are contrary to the clear language and history of the statute, and are without merit.

"It is not a proper function of this court to ignore the clear language of a statute and, in effect, rewrite the statute in order to render it consistent with a particular view of sound public policy." *T.B. v. Indiana Dep't of Child Servs.,* 971 N.E.2d 104, 110 (Ind. Ct. App. 2012); *see also Robinson v. Monroe Cnty*., 663 N.E.2d 196, 198 (Ind. Ct. App. 1996) (concluding that a court cannot ignore unambiguous language of statute's exemption of particular class of individuals from abiding by certain safety requirement regardless of court's view as to the wisdom of the exemption). If Petitioners wish for Indiana Code Section 36-1-8-10 and all statutes such as Indiana Code Section 36-7-4-207 to be rewritten to affirmatively require potential appointees to be affiliated with a political party in order to be eligible for appointments to boards where membership shall not exceed a stated number of members from the same political party, then their appropriate remedy is through the General Assembly, and not through this Court. The courts are not the proper forum for Petitioners and the relief they seek under existing law.

C. Ellis did not have lawful authority to make an appointment at the expiration of Chris Smith's term in 2016, and Petitioners cannot claim standing based on such claim.

In their Amended Complaint, Petitioners claim in substantial part their standing arises from Ellis's obligation to make an appointment to the Plan Commission after Mayor Hamilton failed to make a valid appointment within 90 days of Chris Smith's (Kappas's predecessor) term expiring on January 5, 2016 (Appellant's App. Vol. II pp. 19-20). As is clear from the legislative history and date of enactment of subpart (d), Petitioners' argument is fatally flawed. Subpart (d) did not give the county chairman of the political party of the member whose term had expired any authority to make a board appointment until July 1, 2017. Ellis did not have any appointment authority on April 4, 2016, as he claims. Petitioners' claims of standing arising from any duty to make an appointment prior to July 1, 2017 must be disregarded.

Furthermore, the facts alleged in the Amended Complaint belie the sincerity and urgency of Petitioners' legal arguments. Petitioners claim that Ellis had an affirmative obligation to appoint a valid replacement to the Plan Commission seat held by Republican Chris Smith after his term expired on January 5, 2016. Ellis apparently felt such great urgency to fulfill his statutory obligation that he sat on his claimed duty to challenge the validity of Kappas's appointment from July 1, 2017 (the effective date of subpart (d)), through April 16, 2020. During that time, Kappas served his full appointed term, lacking any party affiliation for the entire duration.

IV. Petitioners lack standing and the Amended Complaint must be dismissed.

Because Kappas was lawfully appointed under Indiana Law, and was unquestionably not a Republican, Ellis, the Monroe County Republican Party Chair,

did not have lawful authority to appoint anyone to the City of Bloomington Plan Commission under Indiana Code, Section 36-l-8-10(d). That authority remained with the appointing authority, Mayor Hamilton, as it has under all versions of the Indiana Code Sections 36-1-8-10 and 36-7-4-207 since 1988. And because Ellis did not have lawful authority to appoint Guenther to the City of Bloomington Plan Commission, Guenther was not entitled to be appointed and his appointment is a legal nullity. Neither Ellis nor Guenther has suffered any actual injury, and neither has any substantive right to enforce the claims that are being made in the litigation. *See Pence*, 652 N.E.2d at 487; *Hovanec,* 397 N.E.2d at 1250 (affirming a grant of a motion to dismiss because the petitioner could not show that he had a right or title to the office, or an interest that differs from that of the general public).

The trial court erred in denying Bloomington's motion to dismiss, because Petitioners failed to allege any facts supporting a legitimate interest in the office at issue in their Amended Complaint. *See* I. C. § 34-17-2-1. Considering all of the allegations in the complaint to be true and resolving all inferences in favor of the non-moving party, the facts alleged in the Complaint are incapable of supporting relief as neither Ellis nor Guenther have legal standing to bring the claims in the Complaint.

CONCLUSION

For the foregoing reasons, Bloomington requests that this Court reverse the trial court, hold that Petitioners lack standing to file their action in *quo warranto,* and order the underlying cause of action dismissed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed using the Indiana E-Filing System (IEFS) and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS on January 21, 2021.

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