

STATE OF INDIANA ) IN THE MONROE CIRCUIT COURT  
 ) SS:  
COUNTY OF MONROE ) CAUSE NO. 53C08-2006-MI-000958

ANDREW GUENTHER, individually )  
and in his capacity as appointed member of the )  
Bloomington Plan Commission, )

And )  
WILLIAM ELLIS, in his capacity as Chairman )  
of the Monroe County Indiana Republican Party, )

)  
Petitioners, )

)  
v. )

)  
CITY OF BLOOMINGTON, INDIANA, )  
And )

)  
JOHN HAMILTON, in his official capacity )  
as Mayor for the City of Bloomington, Indiana, )

And )  
CHRISTOPHER COCKERHAM, in his )  
capacity as contested member of the Bloomington )  
Plan Commission, )

And )  
NICHOLAS KAPPAS, in his capacity as )  
contested former member of the Bloomington )  
Plan Commission, )

)  
Respondents. )

**RESPONDENTS' MOTION TO CERTIFY ORDER FOR INTERLOCUTORY  
APPEAL AND TO STAY PROCEEDINGS PENDING CERTIFICATION,  
ACCEPTANCE, AND DISPOSITION OF APPEAL**

Respondents, by counsel, and pursuant to Indiana Appellate Rule 14(B)(1), respectfully request that this Court certify its August 14, 2020 Order so that Respondents may seek leave of the Court of Appeals to pursue an immediate interlocutory appeal. Respondents further request a stay of all proceedings in this Court while this case is pending certification, acceptance, and final disposition of an interlocutory appeal. In support of this Motion to Certify, Respondents state as follows:

1. Petitioners filed their *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* (“Amended Complaint”) against Respondents on July 6, 2020. Petitioners seek a determination former Plan Commission member Nicholas Kappas’ appointment was void ab initio under Indiana Code Section 36-1-8-10 (2018). Petitioners further seek to overturn the subsequent appointment of Respondent Christopher Cockerham in the seat that was formerly held by Kappas, and have the Court certify Petitioner William Ellis’ authority to appoint Andrew Guenther to the Plan Commission instead.

2. On July 10, 2020, Respondents filed *Respondents’ Second Motion to Dismiss* Petitioners’ Amended Complaint pursuant to Indiana Trial Rule 12(B)(6), because this Petitioners lacked standing to request declaratory relief and a writ of quo warranto against Respondents, and therefore Petitioners failed to raise cognizable claims upon which relief can be granted.

3. On August 14, 2020, the Court issued its *Order on Respondents’ Second Motion to Dismiss* (“Order”) in which it denied *Respondents’ Second Motion to Dismiss*. The Court’s Order lifts a stay on discovery and allows this case to proceed on the merits.

4. The Court’s Order does not dispose of all claims in this action and does not recite the express determinations required by Indiana Trial Rule 54(B) for a final appealable order. Therefore, pursuant to Trial Rule 54(B), the Court’s Order is not a final judgment and is interlocutory.

5. Appellate Rule 14(B) provides for permissive appeals from interlocutory orders “if the trial court certifies its order and the Court of Appeals accepts jurisdiction over the appeal.” Pursuant to Appellate Rule 14(B)(1), it is within this Court’s discretion to certify an interlocutory order to allow for an immediate appeal. Under Appellate Rule 14(B)(1)(c), grounds for granting leave to pursue an interlocutory appeal include:

- (i) The appellant will suffer substantial expense, damage or injury if the order is erroneous and the determination of the error is withheld until after judgment.
- (ii) The order involves a substantial question of law, the early determination of which will promote a more orderly disposition of the case.

Applying the foregoing provisions, this Court would be well within its discretion to certify its Order for immediate interlocutory appeal.

6. Pursuant to Appellate Rule 14(B)(1)(c)(i), Respondents will suffer substantial prejudice and damage if the Order is not certified for immediate interlocutory appeal. Respondents will be forced, at considerable expense of time and resources to the City of Bloomington and its taxpayers, to conduct potential lengthy discovery and defend against Petitioners’ claims. Such time-consuming and costly efforts could be avoided altogether if the appeal of Respondents’ Second Motion to Dismiss on the basis of standing is decided in Respondents’ favor.

7. Pursuant to Appellate Rule 14(B)(1)(c)(ii), the Order presents substantial questions of law, which have broad implications not just for the parties to this litigation, but for all citizens and municipalities in Indiana. Given the

significance of the Court's Order, which opens the door to retroactive challenges to municipal commission members, and extensive litigation involving competing statutory interpretation and prospective appointments to municipal boards and commissions, the threshold issue of standing should be addressed sooner rather than later. The parties would also benefit from additional interpretation from the Indiana appellate courts as to who has standing to bring this novel type of claim. The subsection of the statute upon which Petitioners rely, Indiana Code Section 36-1-8-10(d), was added in 2017, and has not yet been interpreted by the appellate courts for how it should be read in conjunction with other statutes regarding appointments to various boards and commissions, such as Indiana Code Section 36-7-4-207. These important legal questions can be decided by an appellate court as a matter of law on the existing record. The early determination of these substantial legal questions will promote a more orderly disposition of the case in that a successful appeal will negate—or at a minimum, significantly streamline—the disposition of Petitioners' claims on the merits

8. For the foregoing reasons, this Court can and should certify its Order for immediate interlocutory appeal so that the substantial legal questions can be resolved before the parties and this Court are put through the significant time and expense of litigating the substantive merits of Petitioners' claims.

9. For the same reasons this Court should certify its Order for immediate interlocutory appeal, this Court also should grant a stay of all proceedings in this

action in the interest of preserving party and judicial resources pending the outcome of an appeal.

WHEREFORE, Respondents respectfully move this Court to certify its August 14, 2020 Order so that Respondents may seek leave of the Court of Appeals to pursue an immediate interlocutory appeal; to stay all proceedings in this matter pending certification, acceptance, and final disposition of an interlocutory appeal should jurisdiction over the appeal be accepted by the Court of Appeals; and to order all other just and proper relief.

Respectfully Submitted,

/s/ Larry D. Allen

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**CERTIFICATE OF SERVICE**

I certify that on August 17, 2020, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS) and the forgoing document was served upon the following parties or their attorneys of record via IEFS:

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