STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
	) SS:	
COUNTY OF MONROE	)	CAUSE NUMBER: 53C08-2006-MI-000958

ANDREW GUENTHER, individually and in his capacity as appointed Republican 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 capacity as Mayor for the City of Bloomington,	)
and	)
CHRISTOPHER COCKERHAM, in his capacity as contested member of the Bloomington Plan Commission.	)
and	)
	)
NICK KAPPAS, in his capacity as contested former member of the Bloomington Plan Commission.	)
Respondents.	

PETITIONERS' RESPONSE TO RESPONDENTS' BRIEF

Petitioners, **ANDREW GUENTHER** ("*Guenther*") individually, and in his capacity as appointed member of the Bloomington Plan Commission, and **WILLIAM ELLIS** ("*Ellis*"), in his capacity as Chair of the Monroe County Republican Party, by

counsel *Carl Lamb & Associates*, *P.C.,* for their *Petitioners' Response to Respondents' Brief* state and show as follows:

I. **Petitioners have standing because they have claimed a personal distinct interest in the disputed Plan Commission seat that is beyond that of a taxpayer.**

Contrary to contentions contained in the *Respondents' Brief,* Petitioners do not lack standing. Petitioners have suffered injury because Ellis's appointment of Guenther was not recognized by the Plan Commission. Ellis had the authority under Indiana law to appoint Guenther to the vacant seat on the Plan Commission and Guenther's substantive rights have been impaired by the failure of Respondents to recognize and accept the appointment. Further, Petitioners have the substantive right to assert their claims because Mayor Hamilton didn't timely make appointment under Indiana Law.

Respondents cite *City of Gary,* in support of their assertion that Ellis and Guenther lack standing. *City of Gary v. Johnson,* 621 N.E. 2d 65,0 652 (Ind. Ct. App. 1993). *In City of Gary,* Thomas Johnson brought a writ of *quo warranto* action as a "private citizen and taxpayer" in an attempt to remove a Councilman from office and void City resolutions voted upon by said Councilman. The court of appeals reversed, concluding that Johnson did not have standing, relying heavily upon *Hovanec v. Diaz*, 272 Ind. 342, 397 N.E. 2d 1249, 1250 (1979), which held that "an individual must

demonstrate a personal interest distinct from that of the general public, which interest must be in right or title to the office." *Id.*

Next, in *City of Gary*, Thomas Johnson did not claim any similar interest in a vacant Councilman position, in *City of Gary*, Mr. Johnson simply claimed a right to bring his request for a writ of *quo warranto*, solely upon his status of being a "taxpayer and property-owning resident of the City of Gary." *City of Gary* at 652.

Petitioner Guenther's status is well beyond that of Mr. Johnson as it relates to the alleged relevant facts before this Court and Mr. Guenther's request for a writ of *quo warranto* and declaratory judgment.

In our case, unlike in *City of Gary,* Petitioner Guenther's personal interest is apparent since he alleges that he is the rightful appointee to the City of Bloomington Plan Commission, pursuant to Indiana Code, Section 36-1-8-10.

Guenther asserts that his authority for the appointment to the vacancy rests in the fact that both appointments of Respondent Cockerham and Kappas were void. No such claim was made by Mr. Johnson in *City of Gary. Id.*

To further support their claim Ellis and Guenther lack standing, Respondents cite *Hovanec v. Diaz*, a case where the appellant, Judge John Hovanec appealed the trial court's decision in a *Quo Warranto* proceeding that declared the office of Lake State City Judge vacant. *Hovanec* at 1249.

Appellee Jeffrey Diaz's criminal defense attorney in an unrelated habaes corpus hearing in Lake Superior Court discovered Judge Hovanec's change of residence and filed his own *Quo Warranto* action in Lake Circuit Court under Article VI § 6 of the Indiana Constitution. *Id.*

The Court of Appeals found that Jeffrey Diaz, lacked standing because Mr. Diaz only claimed an interest as a criminal defendant in the city court in question, and that he was a taxpayer, who could be found liable for "tortious acts of Hovanec as usurper of its city court." *Id* at 1250. Additionally, the Court of Appeals noted that Mr. Diaz lacked standing because "Judge Hovanec has acted as the *de facto* officer. 'All that is required to make officers *de facto* is that they are claiming the office and in possession of it, performing its duties and claiming under color of election.' *Rule, supra,* 207 Ind. At 552, 194 N.E. at 153." *Id.* Under no circumstances could Mr. Diaz show any interest in the office of Judge.

Unlike Mr. Diaz in *Hovanec*, here, Guenther has a legitimate and articulable basis for claiming an interest for a seat on the City of Bloomington Plan Commission. Ellis likewise has asserted facts giving rise to standing for a *quo warranto* request and, at the very minimum, his request for declaratory relief. Under no scenario could Defendant Diaz claim a right to the elected position of judge, and therefore his interest fell "short of that necessary to maintain a quo warranto proceeding." *Id* As such, the

Court should not rely upon *Hovanec* as dispositive on the issue of standing to the facts before this Court.

Moving on, Respondents cited *Ind. Civil Rights Comm'n v. Indianapolis Newspapers, Inc.* 716 N.E. 2d 943, 945 (Ind. 1999) in support of their argument alleging Petitioners do not have standing.

In *Ind. Civil Rights,* the Indiana Supreme Court found that a tenant Belzer who had been denied a residential tenancy based upon familial status discrimination had standing, not as a "subject" of familial discrimination, but, that his standing was based upon being an "aggrieved person under the Indiana Civil Rights Law." *Id* at 946.

The alleged facts of the *Amended Complaint* are sufficiently consistent with *Ind. Civil Rights Comm'n*, and do not support Respondents' argument that Ellis and Guenther lack standing.

The Indiana Supreme Court found that I.C. § 22-9.5-6-1(c) allows an "aggrieved person," like Belzer to file a complaint with the Indiana Civil Rights Commission. *Id.* The Indiana Supreme Court believed that Belzer had "sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy." The court cited *Pence v. State*, 652 N.E. 2d 486, 488 (Ind. 1995) for the idea that the party challenging the law must show "adequate injury or the immediate danger of sustaining some injury." *Id.*

Here, both Ellis and Guenther are clearly in risk of suffering immediate danger of some injury because if the Court does not invalidate the appointment of Cockerham to the Plan Commission, either through Declaratory Judgment or Writ of *Quo Warranto*, then Guenther will lose the rightful entitlement to the disputed seat on the City of Bloomington Plan Commission, and Ellis' will not be able to exercise his legitimate appointment powers as chair of the Monroe County Republican Party, and as conferred upon him by the legislature when the legislature added subpart (d) to the 2017 amendment of I.C. § 36-1-8-10. Both Petitioners have a sufficient stake in this controversy for the reasons alleged in the *Amended Complaint*.

Ellis and Guenther have a "present and substantial interest in the relief which is sought." *Cook v. City of Evansville* (1978), 178 Ind. App. 20, 381 N.E. 2d 493, 494.

Next, Respondents cited *Pence v. State,* 652 N.E. 2d 486, 487 (Ind. 1995). (Respondent's Brief at p. 6). In *Pence,* the Indiana Supreme Court accepted a petition for emergency transfer of appellants Michael R. Pence and the Indiana Policy Review Foundation, who were challenging the constitutionality of Public Law 4-1992, which amended sections of the Indiana Code to bring it into accord with the Americans with Disabilities Act and increased the amount the State was required to contribute to the General Assembly. The trial court had granted the appellee's motion for summary judgment. *Id.*

As the Indiana Supreme Court noted, "challenging the constitutional validity of a statute, casts a higher and more difficult burden upon the court and litigants. The merits of such constitutional claims are preceded in court by the threshold question of standing." *Id.* Respondents did not make any constitutional claims at prior to their Motion to Dismiss being adjudicated at the Court of Appeals.

Dispositive to the issue of standing in *Pence* was that the appellants alleged an interest only as citizens, and in the case of appellant Pence, who claimed an additional interest to challenge the constitutionality of the Public Law, as a taxpayer. *Id.*

Unlike *Pence*, neither Ellis or Guenther are challenging the constitutionality of a statute, which carries a higher burden for the Courts and litigant. Additionally, here both Ellis and Guenther have alleged articulable facts asserting an interest to challenge the seat vacancy that goes well beyond that of a taxpaying citizen as was the case for the appellants in *Pence*. As the Indiana Supreme Court explained in *Pence*, the status as solely a taxpayer or citizen, "rarely will be sufficient" for standing. *Id* at 488.

Petitioners Guenther and Ellis are "actual injured" parties, with articulable interests in the claims and relief sought in their *Amended Complaint* that are not "merely a general interest common to all members of the public" like was present in *Pence, City of Gary,* and *Hovanec*.

As explained in the dissent in *Pence,* the "openness of Indiana courts is a foundational policy objective expressly recognized in Article 1, Section 12 of the Indiana Constitution." *Id* at 489. Finding that Guenther and Ellis have standing, over the objection of the Respondents, will further this foundational policy and permit the Court resolve the issue of whether Petitioners are entitled to a writ of *Quo Warranto* and *Declaratory Judgment.* At the very least, the Guenther has standing to bring an action for *quo warranto* and declaratory judgment seeing on issues related to a seat on the City of Bloomington Plan Commission. *See Brenner v. Powers,* 584 N.E. 2d 569 (Ind. Ct App. 1992).

Guenther was the rightful appointee for the City of Bloomington Plan Commission seat vacancy. Additionally, under Indiana law, Ellis had the authority to appoint Guenther to the Plan Commission. As such, both Ellis and Guenther have a sufficient stake in the claims of this action whereby they have established standing, and therefore the Trial Court's order should be affirmed.

Next, Ellis and Guenther's right to seek declaratory relief is permitted under I.C. § 34-14-1-2, which states:

> "Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder." I.C. § 34-14-1-2 (1988).

Ellis and Guenther have standing to bring a declaratory action because their legal rights are derived from I.C. § 36-1-8-10, and Bloomington Municipal Ordinance Code ("BMC") 2.13.010. Ellis has a right to make appointments under I.C. § 36-1-8-10, as the Republican Party Chair, and Guenther was rightfully appointed to the Plan Commission which is derived from both Indiana statute and local ordinance.

Indiana Code §36-1-8-10 does require political affiliation into statutes governing commissions, such as the City of Bloomington's Plan Commission. Petitioner's interpretation and proposed application of the statute, does not lead to "irrational and disharmonizing results," as alleged by the Respondent's in their Brief.

I.C. 36-1-8-10 was amended specifically to restrict how one may declare a party affiliation. The amendment to I.C. 26-1-8-10 shows that the legislature clearly intended to limit the scope of political party affiliation by restricting the conditions upon which a person may be recognized as a member of a political party. (See I.C. 36-1-8-10 (b)[1]

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[1](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.

Furthermore, the Respondents' interpretation of I.C. 36-1-8-10, would lead to disharmonizing results because it would be impossible for a political party without an organized party chairman, or primary to certify a member, which in turn would make it impossible for that same political party to appoint a replacement member under the terms and conditions outline under I.C. 36-1-8-10.

Next, Petitioners dispute the contention at footnote one (1) at page ten (10) of their *Respondent's Brief,* that reads:

> "Section 36-1-8-10 contemplates, for the purposes of establishing party affiliation, that it is not sufficient to ascertain whether a person voted in a recent primary or is certified by a party chair. To be certified for a party that person would have to actively claim an affiliation with a party and either most recently voted in that party's primary or be certified by the party chair." (Respondent's Brief at page 10)

Party affiliation under I.C. 36-1-8-10 simply bases party affiliation on whether you have voted in the primary as that party or were certified by the party chair. Actively claiming affiliation with a party is not required under the statute. Active affiliation is only required at the time of the appointment.

Kappas did not have recognized political party affiliation and therefore his appointment to the City of Bloomington Plan Commission was void. I.C. § 36-1-8-10 has specific party affiliation requirements for appointments to a board like the City of

Bloomington Plan Commission that in this case were not complied with. To explain, pursuant to the relevant portions of I.C. § 36-1-8-10:

> "(a) As used in this section, "board" means an administration, an agency, an authority, a board, a bureau, ***a commission***, a committee, a council, a department, a division, an institution, an office, a service, or another 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, 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." (***emphasis added***)

Here, at the time that Kappas was appointed, party affiliation could not be established by Kappas' most recent primary election in which he voted, nor a claim to a party affiliation, nor a certification of membership by a county party chair, as required by the statute, therefore Kappas' appointment was void.

Ellis and Guenther's interpretation of the plain reading and meaning of the statute results in a different outcome that that proposed by Respondents, to wit, that after the 2017 amendments to I.C. 36-1-8-10, party affiliation is required to be appointed to the City of Bloomington Plan Commission.

The clear and mandatory language of I.C. 36-1-8-10 should be obeyed, since "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 (2012);*Robinson v. Monroe Cnty.,* 663 N.E. 2d 196 (1996).

Prior to Kappas holding the position on the Plan Commission, it was held by Republican Chris Smith. As such, it follows that Ellis, the Republican Party Chair, would have an articulable basis to assert the right to appoint Guenther to the Plan Commission based upon the 2017 amendments to I.C. § 36-1-8-10. At the time Ellis appointed Guenther to the Plan Commission, the amendments to I.C. 36-1-8-10 had already been established.

Next, even if Kappas was a valid appointment, Cockerham was not a statutorily permissible choice for appointee to the City of Bloomington Plan Commission. Cockerham's appointment should be declared void. Again, pursuant to I.C. § 36-1-8-10, in relevant portion reads:

> "(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.

(c) If a certification by a county chairman of a political party is required under subsection (b), the certification must be filed with the office of the circuit court clerk not later than the time the appointee's oath of office is filed with the clerk under I.C. 5-4-1. If the county chairman's certification is not filed with the circuit court clerk's office as required by this subsection, the appointment is void." I.C. §36-1-8-10

Cockerham voted as a Democrat in the most recent primary prior to being appointed, that being the primary of 2019. Cockerham's vote in the 2020 primary as a Republican, was not an official vote until after his appointment, therefore, the Court must look to Cockerham's vote in the primary election for 2019, at which time he voted Democrat. Upon information and belief, no certification as described under I.C. § 36-1-8-10 (b)-(c), has been filed with the Monroe County Clerk's office.

Next, Respondent asserts that this Court should consider I.C. § 36-8-3.5-6 as a basis to reject Ellis and Guenther's proposed interpretation of I.C. § 36-1-8-10 and I.C. § 36-7-4-207(a)(5) (Respondents' Brief at p. 11). The composition of the police merit board, and the context and language of the I.C. § 36-8-3.5-6, significantly differs from language of I.C. § 36-7-4-207(a)(5), and therefore should not be considered as a basis to reverse the Trial Court's decision. The Merit Commission for Police and Fire Board

is significantly different structurally compared to a Plan Commission and is therefore not as useful as Respondents assert when arguing Petitioner's interpretation of I.C. 36-1-8-10 would lead to irrational and disharmonizing results.

To explain, I.C. § 36-8-3.5-6 mandates that four (4) of the five (5) persons on a merit commission "must be of different political parties." Likewise, I.C. § 36-7-4-207(a)(5), as a practical matter, mandates political affiliation, just that no more than three (3) of the citizen members can be of the same political party, who presumptively, would mean they have to be affiliated with a political party, especially in light of the 2017 amendments to I.C. § 36-1-8-10. The use of the permissive "may" in the context of I.C. § 36-7-4-207(a)(5) does not require this Court to agree with Respondents' assertion that the legislature intended "not to mandate political affiliation for all members." The fact that I.C. § 36-7-4-207(a)(5) uses the word "may" versus "must" is not dispositive that the legislature did not intend to require party affiliation requirement.

The Merit Commission for Police and Fire Board is significantly different structurally compared to a Plan Commission and is therefore not as useful as Respondents assert when arguing Petitioners' interpretation of I.C. 36-1-8-10 would lead to irrational and disharmonizing results.

The choice of phrasing by the General Assembly in drafting I.C. § 36-8-3.5-6 was likely more a function of the fact that I.C. §36-8-3.5-6 governs a police merit board where there are just two (2) prospective appointees whose political party affiliations are at issue, as opposed to I.C. § 36-7-4-207(a)(5) where there are five (5) appointed positions at issue. If the General Assembly would have used the approach for I.C. § 36-7-4-207(a)(5), when drafting I.C. § 36-8-3.5-6 it would lead to an unnatural construction that would be unclear. Reading the Police Merit Board statute in conjunction with the statute governing Plan Commission is not necessary because of the significant differences in the construction of the two entities and the statute's governing the appointments of the two distinct entities.

Respondents' comparison of the two statutes fails, because there lacks a reasonable parallel between the Police Merit Statute and the statute for Plan Commission. If the General Assembly would have used the statutory construction approach of I.C. § 36-8-3.5-6 when drafting I.C. § 36-7-4-207(a)(5), then I.C. § 36-7-4-207(a)(5) would be unintelligible.

I.C. § 36-7-4-207(a)(5) was drafted prior to the 2017 amendments of I.C. § 36-1-8-10, and the legislative intent to require political party affiliation was clear after the 2017 amendments.

The interpretation of I.C. 36-1-8-10 proposed by the Petitioners would not, as Respondents argue, "lead to irrational and disharmonizing results. Petitioners' interpretation would contradict and render meaningless the plan language of no less than 17 statutes creating boards under Title 36 of the Indiana Cod…" (Respondents' Brief at p. 12). Petitioners' interpretation of the statute simply expresses the intent of the legislature when the 2017 amendments to I.C. 36-1-8-10 took effect, which clarified the statutory requirements for political affiliation in the context of boards like the Plan Commission.

Additionally, Petitioners' proposed interpretation and application of I.C. 36-1-8-10 would not lead to additional litigation for alleged violations of freedom of association guaranteed by the First Amendment of the United States Constitution. To the extent, Respondents failed to timely raise their constitutional argument regarding Petitioners' interpretation of I.C. 36-1-8-10 prior to their previous briefing at the Court of Appeals, the argument has been waived.

Waiver notwithstanding, Respondents' fear is too speculative in nature and given the limited number of persons who serve on these types of boards and commissions, it is unlikely a flood of litigation would result, and the trial court could limit its ruling to the facts before the Court in a way that would not unduly impair or undermine rights of freedom of association.

Next, the right of freedom of association under the First Amendment, is not absolute. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984). Ellis and Guenther's proposed interpretation of I.C. 36-1-8-10 will not unduly burden persons who want to participate in city government that do not have political party affiliation. Rights of persons without party affiliation to serve the public are already limited in other contexts, like the various Indiana County election boards where party affiliation is required.

Respondents cited *Anderson v. Celebrezze,* 460 U.S. 780 (1983), in their Respondents' Brief (Respondents' Brief at p. 15), to support their contention that Ellis and Guenther's interpretation of I.C. § 36-1-8-10 would impinge the freedom of association protections guaranteed by the First Amendment of the United State Constitution.

Anderson involved a dispute surrounding the state of Ohio's filing deadline for independent candidates for the office of the President of the United States. *Id* at 782-83.

The Supreme Court appraised

> " …the 'extent and nature' of the burdens Ohio has placed on the voters' freedom of choice and freedom of association, in an election of nationwide importance, unquestionably outweigh the State's minimal interest in imposing a March deadline." *Id* at 806.

In *Anderson,* Justice Stevens writing for the majority opinion of the Supreme Court held that Ohio's March filing deadline for independent candidates running for President, was not justified by the Ohio's "asserted interest in protecting political stability."

Although important for citizens for the City of Bloomington, whatever burden that I.C. § 36-1-8-10 places on independent candidates, pales in comparison to the election of the President of the United States, "an election of nationwide importance." Further, I.C. § 36-1-8-10 protects against fractioning of major political parties, an interest that in the context of an appointment to a Plan Commission, is more probative than in the context of a nationwide election for the President of the United States. Citizen involvement and participation in matters related to the City of Bloomington Plan Commission is not as robust as a nationwide election, especially a presidential election.

I.C. § 36-1-8-10 does not implicate any national interest, nor does it monopolize election campaigns, such as was the case in *Anderson. Anderson,* 460 US at 794-95.

Any political party affiliation requirements of I.C. § 36-1-8-10 do not unduly diminish the First Amendment's value of promoting debate on public issues that is

"uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964).

Any burden imposed by I.C. § 36-1-8-10 on individual citizens who have not affiliated with a political party is minimal, and Respondents have failed to show that the First Amendment would be implicated and impaired if this Court interprets I.C. § 36-1-8-10 as proposed by Ellis and Guenther. I.C. § 36-1-8-10 does not "unnecessarily burden the availability of political opportunity." *Clements v. Fashing,* 457 U.S. 957, 964 (1982) [internal quotations omitted].

In fact, only four (4) boards and commissions in the City of Bloomington have partisan balancing requirements that would be potentially affected by the Ellis and Guenther's proposed application of I.C. § 36-1-8-10, including, Plan Commission (I.C. § 36-7-4-207); Board of Park Commissioners (I.C. § 36-10-4-3), Bloomington Urban Enterprise Association (I.C. § 5-28-15), and the Public Transportation Corporation (I.C.§ 36-9-4-15).

Bloomington acknowledged that there are already statutes in Indiana that mandate political party affiliation, i.e., I.C. 36-8-3.5-6, the statute governing Merit Commissions for Police and Fire. (Respondent's Brief at p. 11).

The concern that requiring party affiliation requirements will lead to unnecessary First Amendment litigation is misplaced. A political party affiliation

requirement imposed by I.C. § 36-1-8-10, will not lead to "irrational and disharmonizing results" as several statutes already have political party affiliation requirements.

Granting the Petitioner, a writ of *Quo Warranto* will not require persons without political party affiliation to surrender their first amendment rights to participate in city government. Although not a government benefit, the opportunity to serve on a city Plan Commission does confer a benefit to the person serving on said commission.

Further, statutes that condition the availability of a government benefit upon political party affiliation have survived assertions, like those made by the Respondents, that said statutes attacks undermine the First Amendment freedoms. *Libertarian Party of Indiana et al., v. Packard,* 741 F. 2nd 981, 990-91 (7th Cir. 1984). In *Packard,* as it relates to the First Amendment Claim, the 7th Circuit Court of Appeals held, that "…Indiana's Personalized License Plate Act does not condition the availability of a government benefit on the surrender of first amendment rights." *Id* at 991. Requiring part affiliation for the Plan Commission does not unreasonably compel individuals with no party affiliation, to support a party with which they disagree.

Independent are not affiliated with any political party. I. C. § 3-5-2-26.6, Additionally, independent candidates have to comply with separate processes than their Republican, Democrat, and Libertarian counterparts. *See* I.C. § 3-8-6-4.

This court can grant the Petitioners relief without infringing upon an Indiana taxpayer's first amendment rights. *Buckley v. Valeo,* 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 659 (1976). Persons that are unaffiliated with any political party would still have a legitimate role in local government.

Moving on, Petitioners dispute the assertion at page eighteen (18) of the *Respondents' Brief* that "[t]here 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." (Respondents' Brief, at p. 18). In fact, Respondents cite to no case law that supports their proposed procedure (*mandamus action*) to follow when there is a vacant seat of a member without any alleged party affiliation under the addition of subpart (d) in 2017 to Indiana Code, Section 36-10-8-10.

Additionally, mandamus actions are not favored when there is another adequate remedy at law, in this case a *quo warranto* action. *State ex rel. Brown v. Circuit Court of Marion County,* 430 N.E. 2d 786, 787 (Ind. 1982); *State ex rel. Grile v. Hughes,* (1967) 249 Ind. 173, 231 N.E. 2d 138.

Following the procedure for what existed prior to the 2017 amendment of I.C. § 36-10-8-10, would be a reasonable process to follow, but for the 2017 amendment, which clearly divested the original appointing authority of the power to make the appointment of a vacancy when the appointing authority did not make the

appointment, as is the case here, within “90 days after the expiration date of the member’s term.”

Following Respondents’ proposed course of action under the alleged facts before the Court would result in inconsistent results with the clear language of the 2017 addition of subpart (d) to I.C. § 36-10-8-10.

Contrary to Respondents' arguments, it is nevertheless appropriate for this Court to resolve the issue of whether Ellis had the lawful authority to make the appointment to the Plan Commission at the expiration of Smith's term in 2016 despite that the amendments to I.C. 36-1-8-10 did not take effect until 2017.

The 2017 amendments to I.C. 36-1-8-10, applied to the facts before this Court have created a unique set of circumstances that require disposition by the Court, regardless of whether Ellis had the authority on April 4, 2016, after the expiration of Smith's term. Ellis never claimed to have authority retroactively to 2016 at the expiration of Smith's term. Rather, Petitioners assert that Hamilton's appointment of Kappas was void, and that said void appointment has necessitated resolution of who had the right to make the appointment. Any lack of authority Ellis had to make the appointment does not prevent the Court finding that Petitioners had standing to bring their claim for Quo Warranto. As explained hereinabove, the facts supporting standing

go beyond the issue of whether Ellis had a right to appoint at the conclusion of Smith's term in 2016.

The Court must deny the Respondents request at page twenty (20) of the *Respondents' Brief* that Petitioners' Amended Complaint be dismissed for lack of standing. The Court of Appeals already denied the Respondents Trial Rule 12(B)(6) request to dismiss the Petitioners' *Amended Complaint,* and the April 6, 2021, *Memorandum Decision* at page ten (10) states, "[c]learly, Petitioners have a personal stake in the outcome of the proceedings, and such is distinct from that of the general public." (See : 20A-MI-1900, at page 10).

The authority to appoint to the Plan Commission was lost when Mayor Hamilton didn't timely make the appointment. The authority transferred to Ellis. Guenther's appointment was not a legal nullity. Petitioners have standing.

II. The validity of Kappas' appointment needs to be resolved in spite of any alleged waiver issues.

Petitioners have not knowingly waived their right to challenge Kappas' appointment to the Plan Commission. Petitioners aren't retroactively challenging Kappas' appointment to the Plan Commission; they are simply requesting the Court to declare that Kappas appointment was invalid. As indicated above, the resolution over whether Kappas' appointment should be held to be void, is a necessary question that needs to be resolved for adjudication of the merits of this case.

No stipulated facts exist that clearly establish that Ellis had actual knowledge of the existence of a purported "duty to act in both making a legitimate appointment to the Plan Commission to replace Christopher Smith and challenging Kappas' occupancy of Smith's former seat." (Respondents' Brief at p. 23). No stipulated facts establish that at the time Smith's term expired that "Ellis clearly had actual knowledge of the existence of Indiana Code Section 36-1-8-10." (Respondents' Brief p. 23) No facts exist to suggest that Ellis intended to relinquish any rights he may have under I.C. 36-1-8-10, which waiver requires. *See Lafayette Car Wash, Inc. v. Boss,* 282 N.E. 2d 838 (Ind. 1972). It takes

To support their assertion that "Ellis voluntarily and intentionally relinquished his known right to appoint a replacement to Smith and challenge Kappas's holding of the seat on the Plan Commission," Respondents in their *Brief,* at page twenty-three (23), cited *Indiana State Highway Comm'n v. Pappas*, 169 Ind. App. 611, 349 N.E. 2d 808 (1976). In *Highway Comm'n,* s the Highway Commission had approached Pappas and offered him $12,600 for his property as part of condemnation process required for a highway construction project. *Id* at 810.

The facts here are clearly distinguishable from *Highway Comm'n,* where the Court of Appeals held that the Indiana State Highway Commission had "waived its right to evict Pappas every time is gave him another 30-day extension of permission to

stay on the premises." *Id* at 813-14. The context of the issue of waiver is entirely different.

Unlike Ellis, a political party chair requesting declaratory judgment rights to establish respective rights of the parties under a recently amended I.C. 36-1-8-10, the highway commission, was a political party, operating under clearly established processes for highway construction. In *Highway Comm'n,* the Commission "voluntarily and intentionally relinquished their eviction rights. Here, Respondents are asserting Ellis waived his ability to request the Court to declare an appointment to a Plan Commission invalid as part a request for a writ of *Quo Warranto*, all in the context of litigation surrounding a novel issue of whether or not political affiliation should be applied to boards such as the City of Bloomington, Plan Commission.

Ellis did not voluntarily relinquish a known right, with the intention to relinquish said right. *M.O. v. Indiana Dept. of Ins. Patient's Compensation Fund,* 968 N.E.2d 254, 261 (Ind. Ct. App. 2012). Ellis never claimed to have the power in 2016 to make the appointment, it was not until Mayor Hamilton made the improper appointment of Cockerham did the question of statutory interpretation arise.

Next, denying the Petitioners' relief based upon waiver, would unfairly prevent this matter being heard on the merits, and in the future could lead to additional

unnecessary litigation surrounding the proper application of I.C. 36-1-8-10. It's prudent for these issues to be resolved in this litigation.

The right of Ellis to appoint Guenther to the Plan Commission should exist regardless of any delay Petitioners had in asserting their rights in the disputed seat on the Plan Commission. The Court can find that Kappas' appointment was invalid without consideration of any delay in Petitioners' challenge of said appointment because the issue of the validity of the appointment needs to be resolved in order to dispose of the conflict surrounding the correct interpretation of I.C. 36-1-8-10. Any delay in asserting that Kappas's appointment should be declared void is excusable. The Court has the ability to resolve this issue favorably for Petitioner without prejudicing the Respondents or the City of Bloomington unfairly.

III. Laches does not inhibit the Petitioners' claims, any delay was excusable and did not establish Petitioners' acquiescence to Kappas' appointment.

The court's determination of whether laches should prevent the Court from entering judgment in favor of Petitioner is discretionary. *Sate ex rel. Harris v. Mutschler,* 115 N.E. 2d 26, 20 (Ind. 1953).

Respondent wrongly characterizes Petitioners' argument surrounding Kappas' invalid appointment to the Plan Commission in order to support their laches argument. Petitioners' request for a writ of Quo Warranto, can be issued regardless of whether the Petitioners' waited too long to assert Kappas' appointment was invalid. Regardless,

there does not appear to be any stipulated facts that confirm that Petitioners should have known the dynamics of the amendments to I.C. 36-1-8-10, and how this amendment would potentially trigger rights in July 2017, that if the Petitioners did not exercise prior to Kappas' term expired would be diminished or extinguished. The delay was excusable. No circumstances exist that would have it reasonable for the Petitioners to make legal inquiry as to how the amendments to I.C. 26-1-8-10 affected their substantive rights.

The facts in *State ex rel Hogue v. Slack,* 200 Ind. 241, 162 N.E. 670, 674 (1928), a case almost 100 years old, are distinguishable from the facts before the Court here. In *Hogue,* the Indiana Supreme Court held that 20 months was too long to assert a claim to a disputed office position. Here, Ellis made his appointment timely (only 106 days after the expiration of Kappas's term), shortly after the time had elapsed for Mayor Hamilton to make the appointment. Although laches has been used in cases involving *Quo Warrant*, the facts here are sufficiently different whereby the application of laches is wholly inappropriate because there lacked sufficient knowing acquiescence of the existing conditions-the invalid appointment of Kappas. *Chico Corp. v Delaware-Muncie Bd. of Zoning Appeals,* 466 N.E. 2d 472, 475 (Ind. Ct. App. 1984). It would have been unreasonable for Petitioners to have "challenged" the

validity of Kappas's appointment when he was appointed in 2016 as asserted by the Respondents, especially since the 2017 amendments had not taken effect.

Under the stipulated facts before this Court, it is well within the courts discretion to find that laches does not bar the Petitioners' claims for *Quo Warranto* and Declaratory Judgment. Petitioners' assertion that Kappas' appointment was invalid is secondary and separate to the Petitioner's claim for Quo Warranto. Ellis' right to appoint Ellis did not arise until after Mayor Hamilton failed to make a timely replacement appointment. Ellis timely appointed Guenther. Laches should not impair the Petitioners' claim for *Quo Warranto* under these circumstances.

Unlike *Hutter v. Weiss,* 132 Ind. App. 244, 259, 177 N.E. 2d 339, 346 (1961), which was cited by the Respondents in their Brief, Ellis's appointment of Guenther took place within weeks of his appointment powers being vested. In *Hutter,* the court found a delay of 20 months in bringing a *quo warranto* action was barred by laches).

Any prejudice to the City of Bloomington if the Petitioners succeed on their claims is outweighed by the harm to Petitioners claim if their *Amended Complaint* is dismissed. The trial court could fashion and issue a writ of *Quo Warranto* and Declaratory Judgment that would not prejudice the Respondents. For example, an Order of *Quo Warranto* could be issued while simultaneously finding Cockerham, and

for that matter, Kappas' actions while acting on the Plan Commission were to remain in effect. There is insufficient evidence of prejudice, beyond speculation.

Any issues the Respondents have with how the Court ultimately interprets 36-1-8-10 is a matter better suited for further legislative, not judicial action. The Respondents' concern, which they have expressed at page ten (10), paragraph nine (9) of the *Respondents' Proposed Legal Conclusions,* does not necessitate the court's discretionary use of laches. Any limitation imposed on Respondents by not being able to appoint citizens without party affiliation, to boards like the Plan Commission, would be a prejudice is unfounded.

Next, the Respondent's hands would not be tied if the Petitioner's interpretation of I.C. 36-1-8-10 is recognized, instead the Respondents and future persons in their position will have the clarity necessary when future appointment issues arise and will know how to properly apply I.C. 36-1-8-10. Any restrictions or limitations imposed on persons without political affiliation, will provide an impetus for those political independents to organize and lobby for changes to the statute.

Additionally, the Court could craft an order that would not create a "new avenue of litigation" by limiting the application of the Order to the parties of this cause. Respondents' fear of the "chaos, confusion and controversy," that would arise appears to be unsupported by the facts and law.

For those reasons, laches does not prevent this Court from ruling in favor of the Petitioners on their claims asserted in the *Amended Complaint*. Under the circumstances as explained herein, any delay in Petitioners' challenge of the validity of Kappas' appointment is excusable and the Court can resolve the statutory interpretation issues without any unfair prejudice to the Respondents.

IV. Guenther's membership on the Environmental Commission should not bar Ellis' appointment of Guenther to the Plan Commission.

Respondents' argument that Guenther was barred from being appointed to the Plan Commission is undermined by the fact that Kappas simultaneously served on the Plan Commission and the Environmental Commission.

No case law appears to exist interpreting a situation that we have here where both Kappas and Guenther appear to have been serving in two separate capacities. I.C. 36-7-40216(b)(2), states, in full, as follows:

> "(b) A citizen member *may* not hold:
>
> (1) an elected office (as defined in IC 3-5-2-17); or
>
> (2) any other appointed office in municipal, county, or state government.
>
> except for membership on the board of zoning appeals as required by section 902 of this chapter and, in the case of an area plan commission, membership on the body from which the member must be appointed under this series."

Next, Guenther position on the Environmental Commission is unpaid, and he has not received any financial benefit from his position on the Environmental Commission, and therefore his position on the Environmental Commission cannot be considered a "lucrative office" for the purposes of Article 2 section 9 of the Indiana Constitutions.

Also, when Guenther accepted his position on the Plan Commission, his position on the Environmental Commission would have automatically terminated if his appointment to the Plan Commission has been recognized over Cockerham's appointment. The reason Guenther remains on the Environmental Commission is because the City of Bloomington did not recognize Ellis' appointment of Guenther to the Plan Commission.

Respondents did not articulate or point to specific facts indicating how Guenther's enumerated duties on the Environmental Commission, governed by B.M.C. section 2.12.050, will in anyway prejudice his ability to serve the public, or undermine the impartiality of either of the Commission positions.

As such, Guenther and Ellis have standing to assert relief for Quo Warranto and for a judgment in their favor, consistent with Petitioners' correct interpretation of I.C. 36-1-8-10. Guenther should not be barred from appointment on the Plan Commission because of his membership on the Environmental Commission.

V. It is necessary to resolve whether or not Kappas appointment to the Plan Commission was valid, when determining whether or not the Petitioners are entitled to relief in *Quo Warranto* and for Declaratory Judgment.

The claims of Petitioner should not be barred by the doctrine of laches. They asserted their claims within a reasonable time, any delay is excusable, and the Respondents have not shown sufficient prejudice whereby the discretionary doctrine of laches should overcome the Petitioners' right to relief and for a warrant of *Quo Warranto.*

Petitioners respectfully disagree with Respondent's contention that Indiana law prohibits Petitioners' ability to seek both Declaratory relief and for a warranto of *Quo Warranto.*

Declaratory Judgments are discretionary with the trial court, but Trial Rule 57 does not preclude a judgment for declaratory relief where it is appropriate, like it is here, because the validity of Kappas's appointment is intertwined with the issues of *Quo Warranto* in the context of interpreting I.C. 36-1-8-10. *Volkswagenwerk, A.G v. Watson,* 390 N.E. 2d 1082 (1979). Resolving the validity of Kappas's appointment is serves a useful purpose despite of the relief allowed by a writ of *Quo Warranto*. Additionally, determining the validity of Kappas' appointment does lead to a more expeditious determination of this controversy. *See Ember v. Ember,* 720 N.E. 2d 436 (Ind. Ct. App. 1999). The determinative factor is whether a declaratory action will

result in a more economical determination of the controversy, and not, as Respondent asserts, whether or not another remedy is more effective or exists. The inquiry goes well beyond that.

Respondents' citation to *Madden v. Houck,* at page thirty-two (32) of their Brief ignores a critical distinction. In *Madden,* the Plaintiff only sought Declaratory relief and did not assert relief in *Quo Warranto* like the Petitioners did here. *Madden v. Houck,* 403 N.E. 2d 1133, 1134 (Ind. Ct. App. 3rd Dist. 1980). The present case is not "materially the same" as the Respondents allege. Petitioners' Amended Complaint will fully resolve the issue of whether Ellis' appointment of Guenther should be upheld.

Finally, the Court can reach the correct result without the necessity in engaging in "mental gymnastics." The approach proposed by Petitioners is reasonable. If Kappas's appointment was void *ab initio,* then it is logical to look to political affiliation of the previous validly held seat to determine which political party chair is entitled to the appointment to the vacant seat that that was not timely filled by Respondent Mayor Hamilton. Ellis had the right and interest to make the appointment to fill the disputed Plan Commission seat.

CONCLUSION

For these reasons the Petitioners request that the Court enter judgment in favor of the Petitioners and against the Respondents on all claims contained in the *Amended Complaint.*

Respectfully submitted,

/s/ Carl Paul Lamb

_____

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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 September 28, 2021:

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