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Monroe Circuit Court 8
Monroe County, Indiana

STATE OF INDIANA	)	IN THE MONROE CIRCUIT COURT
	)SS:	
COUNTY OF MONROE	)	Case Number: 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' BRIEF

FACTUAL BACKGROUND

The City of Bloomington Plan Commission ("Plan Commission") is governed by Indiana Code Section 36-7-4-207 and Bloomington Municipal Code Chapter 2.13. The Plan Commission consists of ten members, five of whom are appointed by the Mayor. Ind. Code § 36-7-4-2017(a); B.M.C. § 2.13.010; Stipulations ¶8. Out of the five mayoral appointments, no more than three "may be of the same political party". *Id.*

Christopher Smith was a mayoral appointment to the Plan Commission and served from January 2, 2012, through January 5, 2016. Stipulations ¶12. During his term on the Plan Commission, Christopher Smith was affiliated with the Republican Party of Monroe County, Indiana. Stipulations ¶13. At the expiration of Christopher Smith's term on the Plan Commission, the Mayor appointed Nicholas Kappas to Smith's vacant seat. Stipulations ¶11. Nicholas Kappas was a member of the Plan Commission from February 10, 2016, through January 6, 2020. Stipulations ¶9. Kappas was one of the five mayoral appointees made pursuant to Bloomington Municipal Code, Section 2.13.010 Stipulations ¶10. During and before Kappas's appointment to the Plan Commission, Kappas was a political independent because he had not claimed a party affiliation, had not voted in a political party's primary election, and had not been certified as a member of a political party by a chairman of a party. Stipulations ¶¶ 14–16.

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. § 36-1-8-10(b).

Kappas served his full term on the Plan Commission, which expired on January 6, 2020. Stipulations ¶9. Kappas's appointment to the Plan Commission was not challenged prior to the instant litigation. Stipulations ¶35.

Nicholas Kappas's seat on the Plan Commission remained vacant from the expiration of his term on January 6, 2020, through April 16, 2020. Stipulations ¶17. After Kappas's term on the Plan Commission expired, three of the five mayor-appointed seats were held by Democrats, one of the five mayor-appointed seats was held by a Republican, and the seat held by Kappas was vacant. Stipulations ¶18.

On April 16, 2020—106 days after the expiration of Kappas's term and 1563 days after the expiration of Christopher Smith's term—Republican Party of Monroe County Indiana Chair William Ellis appointed Andrew Guenther to the vacant seat on the Plan Commission formerly held by Nicholas Kappas. Stipulations ¶19. William Ellis claimed authority to make the appointment pursuant to Indiana Code Section 36-1-8-10. Stipulations ¶19. On April 16, 2020, Guenther was affiliated with the Republican Party of Monroe County, Indiana. Stipulations ¶20. At the time Ellis appointed Guenther to the Plan Commission, Guenther was a member of the City of Bloomington Environmental Commission ("Environmental Commission"). Stipulations ¶33. Guenther was appointed to the Environmental Commission on September 19, 2018, by Mayor John Hamilton. Stipulations ¶31. Guenther remains an active and voting member of the Environmental Commission. Stipulations ¶32. On January 2, 2021, Guenther publicly resigned from the Republican Party. Stipulations ¶37.

The City rejected Ellis's appointment of Guenther to the Plan Commission. Stipulations ¶21. On May 7, 2020, Mayor Hamilton appointed Christopher Cockerham to the vacant seat on the City of Bloomington Plan Commission. Stipulations ¶22.

On May 7, 2020, Christopher Cockerham claimed affiliation with the Republican Party. Stipulations ¶23. In 2019, Cockerham voted in the Monroe County Democratic Party primary election. Stipulations ¶24. On May 7, 2020, Cockerham was not certified by the chair of the Monroe County Republican Party as a member of the Republican Party. Stipulations

¶27. However, prior to his appointment on May 7, 2020, Cockerham requested, received, completed, and submitted his ballot for the 2020 Republican Party primary election to the office of the Monroe County Circuit Court Clerk. Stipulations ¶25. In-person voting in the 2020 Indiana Primary had been scheduled to occur on May 5, 2020, but was delayed until June 2, 2020, due to the COVID-19 pandemic. Stipulations ¶26.

Mayor Hamilton reaffirmed his appointment of Cockerham to the Plan Commission on June 3, 2020. Stipulations ¶28. Cockerham first occupied the Plan Commission seat vacated by Kappas during the Plan Commission meeting on June 8, 2020, which was after the delayed 2020 primary election. Stipulations ¶¶26, 29. Ellis and Guenther objected to the appointment of Cockerham to the Plan Commission. Stipulations ¶30. Petitioners Ellis and Guenther ("Petitioners") initiated the current litigation on June 9, 2020. Docket.

SUMMARY OF ARGUMENTS

I. Petitioners Ellis and Guenther lack standing and have failed to state a claim upon which relief can be granted. 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. 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 results.

II. Even if Petitioners are found to have standing, their factual allegations demonstrate a knowing waiver of their rights under Indiana Code § 36-1-8-10. Petitioners knowingly failed to act on their purported duty to challenge and object to Kappas's allegedly invalid appointment for the entire 48 months of Kappas's term.

III. Even if Petitioners are found to have standing, their claims are barred by laches. Ellis failed to assert any claim against the alleged invalidity of Nicholas Kappas's seat for the entire duration of Kappas's occupancy of the Seat at Issue. Ellis, as chair of the Monroe County Republican Party, knowingly relinquished the Seat at Issue to be occupied by Kappas, a political independent. Ellis inexcusably failed to assert his purported known right from January 6, 2016, through April 16, 2020, the entirety of Kappas's term. Ellis's inexplicable change of mind only after the expiration of Kappas's term is a significant change in circumstance which has caused prejudice to Bloomington.

IV. Even if Petitioners are found to have standing, Guenther was barred from appointment to the Seat at Issue on the Plan Commission pursuant to Indiana Code Section 36-7-4-216(b)(2), which states a "citizen member may not hold . . . any other appointed office in municipal, county, or state government." Andrew Guenther was appointed to the Environmental Commission by Mayor Hamilton on September 19, 2018. On April 16, 2020, Guenther remained an appointed member of the Environmental Commission, and remains a member to date. Because Guenther held another appointed office in municipal government, he was ineligible to be appointed to the Plan Commission.

V. Indiana law prohibits Petitioners from seeking both declaratory judgment and an information in *quo warranto* in the same proceeding. The declaratory judgment statute was

intended to furnish an adequate and complete remedy where none before had existed. The long-established adequate and complete remedy for determining right to an office is an information in the nature of *quo warranto*. Petitioners request for declaratory judgment must be dismissed.

ARGUMENT

I. Petitioners Lack Standing to bring their claims.

Petitioners William Ellis and Andrew Guenther lack standing to bring their claims because Ellis did not have the authority under Indiana law to appoint a Republican to a seat that had been previously occupied by a political independent. Ellis and Guenther cannot create standing by reading a political party affiliation requirement into 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.

A. Governing Law

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.)

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)).

"[S]tatutes 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).

B. 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. § 36-1-8-10(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 36-1-8-10(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)(1). 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. *Id.* 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), 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 claims an affiliation with the Republican Party and either voted in the most recent 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.[1] *Id.* However, if the appointee does not claim an affiliation with the Republican Party, did not vote in the most recent Republican primary, and has not been certified as a Republican by the Party chair, 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 case 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.

i. 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

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[1] 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.

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. There is nothing in the plain language of the statute requiring 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. *See* I.C. § 36-8-3.5-6. 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 limiting the number of appointees from a single political party, but not expressly requiring party affiliation.[2] "Where possible, every word must be given effect

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[2] 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]
- Ind. Code § 36-8-9-3.1 Membership [Town Board of Metropolitan Police Commissioners]

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 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.

ii. 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

- Ind. Code § 36-8-10-3 Sheriff's 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

association guaranteed by the First Amendment to the United States Constitution.

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 violations 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, 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 plaintiff's 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 claim an affiliation with a political party, or whose chosen political affiliation 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.

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

i. 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).

ii. 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 propose, 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 graft a party affiliation mandate onto the statute where none previously existed, 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 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.

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

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 Christopher Smith's (Kappas's predecessor) term expiring on January 5, 2016. 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. Amended Complaint ¶37. 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. *See infra* sections II and III on waiver and laches.

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 36-1-8-10(d). That authority remained with the appointing authority, Mayor Hamilton, as it has under all versions of Indiana Code Sections 36-1-8-10 and 36-7-4-207 since 1988. 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. Petitioners do not have any interest that differs from that of the general public. 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). Petitioners lack standing to bring any of their claims and they must be dismissed.

II. If Petitioners have standing and the Court adopts their interpretation of Indiana Code Section 36-1-8-10, they have waived their claims in this case.

A. Governing Law

Waiver is the voluntary and intentional relinquishment of a known right, involving both knowledge of the existence of the right and the intention to relinquish it. *Lafayette Car Wash, Inc. v. Boes*, 282 N.E.2d 838 (Ind. 1972); *M.O. v. Indiana Dept. of Ins. Patient's Compensation Fund*, 968 N.E.2d 254, 261 (Ind. Ct. App. 2012); *In re Unsupervised Estate of Deiwert*, 879 N.E.2d 1126, 1129 (Ind. Ct. App. 2008); *Hastetter v. Fetter Properties, LLC*, 873 N.E.2d 679, 684 (Ind. Ct. App. 2007); *In re Estate of Highfill*, 839 N.E.2d 218, 222 (Ind. Ct. App. 2005). A waiver may consist of an election to forego some advantage that might otherwise have been insisted upon. *Lafayette Car Wash, Inc.*, 282 N.E.2d at 838; *Richardson v. State*, 456 N.E.2d 1063, 1066 (Ind. Ct. App. 1983); *Salem Community School Corp. v. Richman*, 406 N.E.2d 269, 274 (Ind. Ct. App. 1980). Waiver may be shown by either express or implied consent. *City of Crown Point v. Misty Woods Properties, LLC*, 864 N.E.2d 1069, 1079 (Ind. Ct. App. 2007). Waiver is an affirmative act and mere silence, acquiescence, or inactivity generally does not constitute a waiver unless there is a duty to speak or act. *Lavengood v. Lavengood*, 73 N.E.2d 685, 687–88 (Ind. 1947); *2444 Acquisitions, LLC v. Fish*, 84 N.E.3d 1211, 1217 (Ind. Ct. App. 2017); *City of Crown Point*, 864 N.E.2d at 1079. *Hastetter*, 873 N.E.2d at 684.

An individual may waive any right provided for that person's benefit by contract, by statute, or by the Constitution. *See, e.g.*, *New York v. Hill*, 528 U.S. 110, 114–15 (2000); *Brown v. State*, 37 N.E.2d 73, 77–78 (Ind. 1941); *Northern Ind. Steel Supply Co. v. Chrisman*, 204 N.E.2d 668, 674 (Ind. Ct. App. 1965). A waiver must be made by the person whose rights or

remedies are to be affected. *Matter of S.L.*, 599 N.E.2d 227, 229 (Ind. Ct. App. 1992). The right or privilege allegedly waived must have been in existence at the time of waiver. *American Nat. Bank & Trust Co. v. St. Joseph Valley Bank*, 391 N.E.2d 685, 688 (Ind. 1979); *Doan v. City of Fort Wayne*, 252 N.E.2d 415, 418 (Ind. 1969). A person who is in a position to assert a right or insist upon an advantage may waive such right by his words or conduct without reference to any act or conduct of any other party. *Lafayette Car Wash, Inc.*, 282 N.E.2d at 838 (quoting *Templer v. Muncie Lodge, I.O.O.F.*, 97 N.E. 546, 549 (Ind. Ct. App. 1912); *Indiana State Highway Comm'n v. Pappas*, 169 Ind. App. 611, 349 N.E.2d 808 (1976).

B. Petitioners knowingly waived their right to challenge Kappas's appointment to the City of Bloomington Plan Commission and to appoint Kappas's successor by failing to act upon their statutory duty for the entirety of Nicholas Kappas's term.

If the Court finds Petitioners have standing and adopts their interpretation of Indiana Code 36-1-8-10, then the Petitioners knowingly and intentionally waived any claims to make an appointment to the seat at issue on the Plan Commission by failing to act for the entirety of Kappas's term despite being aware of their statutory obligation to do so.

Christopher Smith, a Republican, served on the Plan Commission from January 2, 2012, through January 5, 2016. Stipulations ¶12. At the expiration of Christopher Smith's term on the Plan Commission, the Mayor appointed Kappas to Smith's vacant seat. Stipulations ¶11. Kappas was a member of the Plan Commission from February 10, 2016, through January 6, 2020. Stipulations ¶9. During and before Kappas's appointment to the Plan Commission, Kappas was a political independent. He did not claim a party affiliation, did not vote in a political party's primary election, and had not been certified as a member of a political party by a chairman of a political party. Stipulations ¶¶14–16. Kappas served his full term on the Plan Commission, which expired on January 6, 2020. Stipulations ¶9. Kappas's seat on the Plan Commission remained vacant from the expiration of his term on

January 6, 2020, through April 16, 2020. Stipulations ¶17. Then, on April 16, 2020—1,563 days after the expiration of Christopher Smith's term and after the entirety of Kappas's term—William Ellis appointed Andrew Guenther to the vacant seat formerly held by Kappas and Smith on the City of Bloomington Plan Commission claiming authority under Indiana Code 36-1-8-10. Stipulations ¶19.

Ellis argues he had an obligation to appoint a valid replacement to the Plan Commission seat held by Republican Chris Smith after his term expired on January 5, 2016. Stipulations ¶19; Amended Complaint ¶37. Ellis clearly had actual knowledge of the existence of Indiana Code Section 36-1-8-10. Section 36-1-8-10 requires that the county chair of the political party of the member whose term has expired shall make the appointment if the appointing authority fails to do so. Ind. Code § 36-1-8-10. Ellis therefore knew he had a duty to act in both making a legitimate appointment to the Plan Commission to replace Christopher Smith and challenging Kappas's occupancy of Smith's former seat. Amended Complaint ¶37. Ellis failed to act on his duty to make an appointment and challenge the validity of Kappas's appointment from at least July 1, 2017 (the effective date of Indiana Code Section 36-1-8-10(d)), through April 16, 2020. During that time, Kappas served his full appointed term, lacking any party affiliation for the entire duration.

Ellis, by electing to forego his known duty to act for the entirety of Kappas's term affirmatively consented to the seat on the Plan Commission no longer being held by a Republican. 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. *See Indiana State Highway Comm'n*, 349 N.E.2d at 813–14. Therefore Petitioners have waived their claims that Kappas's appointment is invalid, that the Plan Commission seat at issue should revert to a Republican seat, and that Ellis should be allowed to make an

appointment 1,563 days after the expiration of the term of the last Republican to hold the seat at issue on the Plan Commission.

III. Ellis and Guenther's more than four-year delay before challenging the legitimacy of Kappas's appointment to the Plan Commission bars their claim by laches.

Petitioners' more than four-year delay in challenging Kappas' appointment to the Plan Commission was inexcusable and is barred by laches. Laches in law means a culpable delay in suing. *Teamsters & Emps. Welfare Tr. of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 880 (7th Cir. 2002). The Indiana Supreme Court has found that laches may be asserted to both claims requesting declaratory relief and writs of *quo warranto*. *SMDfund, Inc. v. Fort Wayne-Allen Cty. Airport Auth.*, 831 N.E.2d 725, 729 (Ind. 2005) (suit requesting declaratory relief was barred by laches); *State ex rel. Hogue v. Slack*, 200 Ind. 241, 162 N.E. 670, 674 (1928) (holding that failure to assert *quo warranto* claim to office for 20 months was barred by laches). There are three elements of laches: (1) inexcusable delay in asserting a right; (2) an implied waiver arising from knowing acquiescence in existing conditions; and (3) a change in circumstances causing prejudice to the adverse party. *SMDfund, Inc.*, 831 N.E.2d at 729; *Metro. Dev. Comm'n of Marion Cty. v. Schroeder*, 727 N.E.2d 742, 749 (Ind. Ct. App. 2000) (citing *Simon v. City of Auburn, Ind., Bd. of Zoning Appeals*, 519 N.E.2d 205, 215 (Ind. Ct. App. 1988)). Laches is to be determined by the court in exercise of its sound discretion. *State ex rel. Harris v. Mutschler*, 115 N.E.2d 206, 209 (Ind. 1953).

Petitioners' delay in challenging the validity of Kappas's appointment was inexcusable, demonstrated their acquiescence to the validity of his appointment, and, if allowed to proceed, would prejudice the City. Petitioners assert that Kappas's appointment was "void *ab initio*" based on their interpretation of Indiana Code Section 36-1-8-10. Amended Complaint ¶30. Fundamental to Petitioners' claims is their assertion that the requirement

that no more than three of the mayoral appointments to the Plan Commission may be of the same political party means that at least two of the appointments *must* be members of the other major party. Amended Complaint ¶¶25–27. Petitioners have incorrectly argued that only parties recognized in the State as having their own ballot for the primary election may satisfy *any* party requirement found throughout Indiana code. Amended Complaint ¶¶24–31.

Despite believing Kappas's appointment was improper, the Petitioners did not challenge Kappas's appointment until after his term on the Plan Commission had expired. Stipulations ¶35. As a result, Petitioners cannot now be permitted to raise a belated claim as to the legitimacy of having a political independent fill one of the mayoral appointments that are reserved for any citizen that is not of the same party as the three other mayoral appointments. *See* Ind. Code § 36-7-4-207(a)(5).

A. Petitioners' delay in challenging Kappas's appointment was inexcusable.

Petitioners' more than four-year delay in challenging Kappas' appointment was inexcusable. Bloomington's mayor appointed Kappas to the Bloomington Plan Commission on February 10, 2016. Stipulations ¶¶9–10. Petitioners acknowledge that Kappas was not a Democrat and held no party affiliation during his term on the Plan Commission because he did not claim a party affiliation, did not vote in a primary election for a party with which he claimed such affiliation, and was not a certified member of a political party. Stipulations ¶¶14–16. By contrast, Kappas's predecessor, Christopher Smith, was a Republican and held the seat from January 2, 2012, through January 5, 2016. Stipulations ¶¶12–13.

Despite Petitioners' claim that Indiana Code Section 36-1-8-10 effectively requires party affiliation, they never challenged Kappas's appointment to the Plan Commission during Kappas's term Factual Stipulations ¶35. The Indiana Supreme Court has held that

challengers are charged with knowing the law and laches can bar claims for the neglect of failure to make an inquiry into a factual situation. *See SMDfund, Inc.*, 831 N.E.2d at 729 (citing *Simon*, 519 N.E.2d at 215 ("plaintiff is charged with knowledge of the law, so laches barred attack on zoning ordinance"); *Hutter v. Weiss*, 132 Ind. App. 244, 259, 177 N.E.2d 339, 346 (1961) ("[I]f circumstances should have put the plaintiff on inquiry and the plaintiff could have easily learned the truth the neglect of failure to make such inquiry will make the plaintiff guilty of laches just as if the facts were known to the plaintiff")). Even if Petitioners' claims hinged on the subsequent amendment to Section 10 of the statute, which it does not on its face, the amended statute went into effect on July 1, 2017, and Petitioners still would have had a delay of nearly three years before they brought suit. Ind. Code § 36-1-8-10 (West Supp. 2017); *cf*. Ind. Code § 36-1-8-10 (West 2016).[3]

Here, there is no dispute that Kappas was not affiliated with any party and began his term on the Plan Commission in 2016. Nothing in the Petitioners' claims regarding mandated party affiliation changed with the update to Indiana Code Section 36-1-8-10, as it still laid out requirements for party affiliation. Additionally, Petitioners either knew or should have known that Kappas was unaffiliated with any party—particularly with the Republican Party—and it could have easily been discovered with miniscule effort. *Hutter*, 177 N.E.2d at 346; *see also Teamsters & Emps. Welfare Tr. of Illinois v. Gorman Bros. Ready Mix*, 283 F.3d 877, 883 (7th Cir. 2002) ("[L]aches is predicated on careless rather than deliberate conduct by the plaintiff…"). As a result, Petitioners four-year delay in raising any claim related to Kappas's seat on the Plan Commission was inexcusable. *Id.*

B. The delay implied that Petitioners acquiesced to Kappas's qualifications and appointment.

[3] The statute was again updated in 2018 to simply update the language of the statute from "chairman" to "chair." *See* I.C. § 36-1-8-10 (West. Supp. 2018) (as amended by P.L. 86-2018, § 336 (Eff. March 15, 2018)).

The same factors that made Petitioners' delay inexcusable also point to their acquiescence. Similar to inexcusable delay, Petitioners lack of action given their ability to know that Kappas was unaffiliated with any political party during his term implies acquiescence to the existing conditions of his appointment. *Hutter*, 177 N.E.2d at 346. Petitioners are charged with knowing the law, and the Indiana Court of Appeals has found that a party acquiesces where circumstances indicated that the means of ascertaining the truth were readily available to the party had an inquiry been made. *Simon*, 519 N.E.2d 215 (holding that Plaintiffs' claim was barred by laches where they were charged with knowing the law and could have made sufficient inquiry for their claim, which indicated they knowingly acquiesced in the existing conditions) (citing *Chico Corp. v. Delaware-Muncie Bd. of Zoning Appeals*, 466 N.E.2d 472, 475 (Ind. Ct. App. 1984), *trans. denied*; *Hutter*, 177 N.E.2d at 346).

Likewise, *quo warranto* actions are barred by laches where it can be shown that the party bringing the action has acquiesced in the existing circumstances. *State ex rel. Hogue*, 162 N.E. at 674 (delay of 20 months in bringing *quo warranto* action showed laches); *State v. Gordon*, 87 Ind. 171, 174 (1882) ("[A]n information in the nature of a *quo warranto* will be refused when the right of the defendant has been acquiesced in for a length of time"); *State, ex rel. v. Bailey*, 19 Ind. 452 (1862) (filing of articles of association were sufficient to put the state on notice as to existing conditions, and the state lost its ability to raise claim by laches after delaying for eight years). The time to bring a claim as to the validity of Kappas's appointment began when he was appointed in 2016 or in July 2017 at the latest. *See SMDfund, Inc.*, 831 N.E.2d at 729 (holding that the time to bring a claim against an airport authority started with the formation of the authority). Petitioners' failure to bring any claim as to the validity of Kappas's appointment for the entire four-year duration of Kappas's term

demonstrates that Petitioners acquiesced in the appointment of the political independent to the seat. *See State ex rel. Hogue*, 162 N.E. at 674; *Gordon*, 87 Ind. at, 174.

C. Petitioners' claims prejudice the City.

If Petitioners prevailed on their claims, it would be prejudicial to the City. "Prejudice may be created if a party, with knowledge of the relevant facts, permits the passing of time to work a change of circumstances by the other party. *Angel v. Powelson*, 977 N.E.2d 434, 445 (Ind. Ct. App. 2012). Generally, the longer the petitioners' delay in filing a claim, the less prejudice that must be shown by the defending party on laches. *See, e.g., Smith v. Caterpillar, Inc.*, 338 F.3d 730, 733-34 (7th Cir. 2003) (holding that plaintiff's multi-year inexcusable delay mean that defendant did not need to "present a mountain of evidence establishing prejudice in order to succeed on its laches defense"). The City would clearly be prejudiced here because its executive would effectively lose his ability to appoint Cockerham to Kappas's seat, and the Mayor could not appoint any independent or other individual who may claim affiliation with a minor party to the two minority seats on the Plan Commission, or any similar seat.

Petitioners' failure to raise their claim of Kappas's invalidity until after Kappas's term expired effectively allowed the passage of time to change the circumstances, which prejudiced the City, Mayor Hamilton, and Cockerham. *Id.* Petitioners acquiesced in the seat no longer being held by a Republican, but instead by a political independent. That acquiescence lasted for the entirety of Kappas's term. Stipulations ¶35. Petitioners' acts were a clear indication that Bloomington's mayor was free to appoint anyone who was not a Democrat to Kappas's seat after Kappas's term expired. The City relied on that same validity to appoint Kappas, a political independent to replace Christopher Smith in 2016. Stipulations ¶¶9–16. It further relied upon the Petitioners' acquiescence in its appointment of Cockerham to replace Kappas,

because the City reasonably believed that Ellis had no authority to appoint the replacement for a seat that was not held by a Republican. But if Petitioners prevail, the City's hands would be tied in future appointments and cause it to deny participation in certain facets of local government based solely on someone's choice not affiliate with the two dominant political parties—even where the legislature has not explicitly imposed such a limitation.

The ramifications of Petitioner's claims, if successful, would also extend beyond Kappas's appointment to the Plan Commission. Any City appointment of a political independent, or any other party outside of the two dominant parties, would be called into question, and the lookback period could be extensive if the Court were to follow Petitioners' suggestion that the only valid appointments were held by the last individual who had a major party affiliation. Additionally, such a decision would cause both confusion and controversy as the City could have to defend its appointments and the appointee's decisions for an unknown period of time after an individual has served their term if a challenge is brought to the legitimacy of the appointment. *See Simon*, 519 N.E.2d at 215 (finding prejudice where the money was expended on a project and enforcement of claim would cause "chaos, confusion, and controversy" in application of zoning ordinance). In other words, this change in circumstances would open up a new avenue of litigation that had been properly closed to claimants that would otherwise have no valid claim.

The City has continually relied on the validity of Kappas's appointment to keep the business of its Plan Commission moving. Stipulations ¶¶9, 15; *SMDfund, Inc.*, 831 N.E.2d at 731 (finding prejudice where a public expenditure has been made or a public work undertaken) (citing *Penn Mut. Life Ins. Co. v. City of Austin*, 168 U.S. 685, 698, 18 S.Ct. 223 (1898)). The fear of future challenges is particularly well-founded as Petitioners have asserted in their filings to the Court that they believe that even a *de facto* officer's decisions

while holding office should or could be challenged in court.[4] Petitioners' Motion for Preliminary Injunction and Consolidation ¶8.

Petitioners' extensive delay in challenging the validity of Kappas's appointment was inexcusable, demonstrated their acquiescence to the validity of Kappas's appointment, and, if allowed to proceed, would cause significant prejudice to the City. Petitioners' claims are therefore barred by laches.

IV. If the Court adopts Petitioners' interpretation of Indiana Code Section 36-1-8-10, Andrew Guenther was barred from appointment to the seat at issue on the Plan Commission pursuant to Indiana Code Section 36-7-4-216(b)(2).

Even if the Court adopts Petitioners' interpretation of Indiana Code Section 36-1-8-10, Ellis failed to make a valid appointment to the Plan Commission because Guenther held another appointed office in municipal government as expressly prohibited by Indiana Code Section 36-7-4-216(b)(2). Indiana Code Section 36-7-4-216(b)(2) states:

> (b) A citizen member may not hold:
>
> . . .
>
> 2) any other appointed office in municipal, county, or state government.

At the time Ellis appointed Guenther to the Plan Commission, Guenther was a member of the Environmental Commission. Stipulations ¶33. Andrew Guenther was appointed to the Environmental Commission on September 19, 2018, by Mayor John Hamilton. Stipulations ¶31. Guenther remains an active and voting member of the Environmental Commission. Stipulations ¶32.

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[4] Petitioners' asserted belief is likely incorrect, but could nonetheless lead to future litigation. *See Ryder v. United States*, 515 U.S. 177, 180, 115 S.Ct. 2031, 132 L.Ed.2d 136 (1995) ("The *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient."); *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981) ("The authority of a *de facto* official cannot be collaterally attacked.").

The Environmental Commission is governed by Bloomington Municipal Code Section 2.12.050. The commission consists of twelve members, six appointed by the mayor and six appointed by the common council. B.M.C. § 2.12.050. The commission has 14 enumerated powers and duties, including retaining consultants, commissioning studies and developing plans for prevention of pollution, applying for and receiving grants, and advising many of the other City boards and commissions. *See* B.M.C. § 2.12.050(6).

Guenther already held an appointed office in municipal government when Ellis attempted to appoint him to the Plan Commission. Guenther never resigned his seat on the Environmental Commission, and he is still an active member. Stipulations ¶32. In holding and continuing to hold another appointed office in municipal government, Guenther was ineligible to be appointed to the Plan Commission by the clear language of Indiana Code Section 36-7-4-216(b)(2). Therefore, even if the Court adopts Petitioners' interpretation of Indiana Code Section 36-1-8-10, Guenther lacks standing because he does not have any right or title to the seat at issue on the Plan Commission. Because Ellis failed to make a valid appointment to the Plan Commission, Mayor Hamilton's appointment, and subsequent reaffirmation of his appointment, of Christopher Cockerham to the Plan Commission must stand.

V. Petitioners cannot substitute a claim for declaratory relief for a proper *quo warranto* action to overcome their inexcusable delay in challenging Kappas's appointment to the Plan Commission.

Indiana law prohibits Petitioners from seeking both declaratory judgment and an information in *quo warranto* in this case. The declaratory judgment statute "was intended to furnish an adequate and complete remedy *where none before had existed*." *Ember v. Ember*, 720 N.E.2d 436, 439 (Ind. Ct. App. 1999) (emphasis added). The propriety of declaratory relief must be judged in light of whether the issue at hand is more properly resolved in another

forum. *See Thompson v. Medical Licensing Bd.* 389 N.E.2d 43, 50 (Ind. Ct. App 1979). The long-established adequate and complete remedy for determining right to an office is an information in the nature of *quo warranto*. *See Madden v. Houck*, 403 N.E.2d 1133, 1135–36 (Ind. Ct. App. 1980)

In *Madden v. Houck*, the Indiana Court of Appeals held the trial court erred in denying defendant's motion to dismiss plaintiff's complaint for declaratory judgment. *Id.* The plaintiff in *Madden* sought a declaratory judgment to determine the defendant officeholder failed to meet the requirements to hold his office. *Id.* at 1135. The plaintiff requested the Court remove the defendant from office and install plaintiff to the office. The Court determined that the proper remedy was not declaratory relief but an action in *quo warranto* because declaratory relief would not fully resolve the matter:

> If, however, it decided that Madden was not a resident of LaGrange County, the controversy would be far from resolved. Such a declaration would not determine the proper person to hold office nor would it provide for the enforcement of the judgment.

Id. The Indiana Court of Appeals reversed the trial court and remanded with instructions to grant the defendant's motion to dismiss. The present case is materially the same as *Madden*. Petitioners' request for declaratory relief will not determine the proper person to hold office, nor would it provide for the enforcement of any judgment against Kappas since his term is already complete. *Id.*

Petitioners' claim for declaratory relief only became necessary because Ellis inexcusably failed to act on his statutory duty to challenge the validity Kappas's appointment to the Plan Commission for the entire duration of his term. Petitioners' claim for declaratory relief against Kappas appeared for the first time in Petitioners' Amended Complaint filed after Respondents' first 12(b)(6) motion. See Amended Complaint ¶¶9–13. The Amended Complaint also joined Kappas as a party to this litigation.

Petitioners engaged in significant mental gymnastics to create an argument giving Ellis a claim to appoint Guenther to the Plan Commission because Kappas, who served his full term, was unquestionably not a Republican. Petitioners must bootstrap a *quo warranto* action to a moot and legally improper declaratory judgment action[5] to attempt to meet the threshold requirement of standing. This situation is exactly why legal principles such as laches and waiver exist: to protect defendants from having to engage in these bizarre legal battles manifested by the Petitioners' own inexcusably lengthy inaction.

Furthermore, Ellis offers no explanation how, even if Kappas's holding the seat was void *ab initio*, the seat at issue would default back to a Republican seat for appointment purposes. Ellis's standing depends on this wholly unsupported logical leap. Certainly nothing in Indiana Code 36-1-8-10 or Indiana Code 36-7-4-207(a)(5) mandates the seat must default back to a Republican seat. This assumption also completely overlooks Ellis's waiver and acquiescence in the seat at issue on the Plan Commission not being held by a Republican for the entirety of Kappas's four-year term. Thus, even under Petitioners' incorrect proposed interpretation of the law, the seat at issue could have been occupied by any member of a political party that has a county party chair or conducts a political primary, not necessarily a Republican.

Kappas sat his full term and was unchallenged by Ellis, or anyone else, until the present litigation. Stipulations ¶35. The long established and proper remedy is an action in *quo warranto*. Petitioners cannot circumvent their inexcusable years-long delay in asserting

[5] Kappas's full term is complete, and he was undeniably the *de jure* office holder. Even if Ellis could challenge Kappas's appointment to the Plan Commission, the *de facto* officer doctrine confers validity upon acts performed by a person acting under the color of official title even if it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder*, 515 U.S. at 180; *Carty*, 421 N.E.2d at 1154. The case is no longer "live" and the parties lack a legally cognizable interest in the outcome of its resolution. *See Lake Cty. Bd. of Elections & Registration v. Copeland*, 880 N.E.2d 1288, 1291 (Ind. Ct. App. 2008).

their rights by trying to seek after-the-fact declaratory relief to challenge Kappas's holding of the seat. A timely action in *quo warranto* was the proper remedy. *Madden*, 403 N.E.2d at 1135. Petitioners failed for years to file the correct cause of action. The Court cannot permit this to proceed, and must dismiss Petitioners' claim for declaratory judgment and relief against Nicholas Kappas. Because the seat at issue most recently held by Kappas, and Kappas was unquestionably not a Republican, Ellis had no right or interest to make an appointment to fill the seat. Therefore all Petitioners' remaining claims must be dismissed because Petitioners lack the threshold requirement of standing. *See* Section I *supra*.

CONCLUSION

For the foregoing reasons, the Respondents request the Court enter judgment in favor of Respondents and against Petitioners on all claims in Petitioners' Amended Complaint.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2021, 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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