IN THE
INDIANA COURT OF APPEALS
CASE NO. 21A-MI-02600

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

BRIEF OF APPELLANTS

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2. Whether Petitioners lack any right or title to the office at issue in the Amended Complaint, and therefore lack standing to file their Amended Complaint?

3. Whether Petitioners waived any claims to make an appointment to the seat at issue on the Plan Commission because Ellis failed to act for the entire four-year term of political independent Nicholas Kappas.

4. Whether Ellis's claim of right to appoint Guenther to the City of Bloomington Plan Commission ("Plan Commission") is barred by laches after Ellis failed to act for the entire four-year term of political independent Nicholas Kappas.

5. Whether Guenther was barred from appointment to the Plan Commission as a result of his continued service on Environmental Commission.

6. Whether Ellis and Guenther are barred from seeking both declaratory judgment and an information in *quo warranto* in this case.

STATEMENT OF THE CASE

On June 9, 2020, Appellees-Petitioners Andrew Guenther and William Ellis (collectively "Petitioners") filed a *Verified Complaint for Writ of Quo Warranto* against Appellants-Respondents City of Bloomington, John Hamilton, and Christopher

Cockerham challenging Hamilton's appointment of Cockerham to the Plan Commission and seeking to install Andrew Guenther in his place (Appellants' App. Vol. II pp. 4). On June 29, 2020, the named Respondents filed a motion to dismiss the *Verified Complaint for Writ of Quo Warranto* (Appellants' App. Vol. II p. 6).

On July 6, 2020, Petitioners filed an *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto* ("Amended Complaint") (Appellants' App. Vol. II pp. 6, 23–48). The Amended Complaint named the original respondents and also added Nicholas Kappas as a respondent (City of Bloomington, John Hamilton, Christopher Cockerham, and Nicholas Kappas are hereinafter collectively referred to as "City of Bloomington" or "Respondents") *Id.*

On July 10, 2020, City of Bloomington filed *Respondents' Second Motion to Dismiss* as to Petitioners' Amended Complaint pursuant to Indiana Trial Rule 12(B)(6) (Appellants' App. Vol. II p. 7). Petitioners filed a memorandum in opposition to City of Bloomington's *Second Motion to Dismiss* on August 4, 2020 (Appellants' App. Vol. II p. 7). On August 5, 2020, the trial court held a hearing on City of Bloomington's motion to dismiss (Appellants' App. Vol. II p. 8).

On August 14, 2020, the Court issued its *Order on Respondents' Second Motion to Dismiss* denying City of Bloomington's motion to dismiss (Appellants' App. Vol. II pp. 8, 86–87). City of Bloomington filed a Motion to Accept Jurisdiction over Interlocutory Appeal Pursuant to Appellate Rule 14(B) to the Indiana Court of Appeals on October 19, 2020 (Appellants' App. Vol. II p. 9). On November 13, 2020, the Indiana Court of Appeals accepted jurisdiction over the interlocutory appeal of

the Order. The Court of Appeals, in a memorandum decision, affirmed the trial court's denial of City of Bloomington's motion to dismiss, but left undecided the question of statutory interpretation related to Indiana Code Sections 36-1-8-10 and 36-7-4-207. *City of Bloomington v. Guenther*, 168 N.E.3d 1054 (Ind. Ct. App. 2021).

The parties submitted stipulated facts and proposed findings and conclusions of law along with supporting briefing to the trial court (Appellants' App. Vol. II pp. 49–139). On November 18, 2021, the trial court issued its *Findings of Fact, Conclusions and Judgment* in favor of the Petitioners (Appellants' App. Vol. II p. 14).

On November 23, 2021, City of Bloomington timely filed a notice of appeal and motion to stay enforcement of the trial court's judgment pending appeal (Appellants' App. Vol. II pp.13, 140–144). On December 2, 2021, the clerk filed the *Notice of Completion of Clerk's Record* and certified chronological case summary—no transcript was requested (Appellants' App. Vol. II p. 145). On December 13, 2021, the trial court granted Respondents' motion to stay enforcement of the November 18, 2021, judgment (Appellants' App. Vol. II p.147). Appellants-Respondents now file their *Brief of Appellants*.

STATEMENT OF FACTS

On April 16, 2020, Monroe County Republican Party Chair William Ellis attempted to appoint a Republican successor to a seat on the City of Bloomington Plan Commission ("Plan Commission") that had most recently been held by a political independent, Nicholas Kappas (Appellants' App. Vol. II pp. 50–51). Ellis claimed his authority was based in a new law, which had taken effect in the middle of Kappas'

term, that allowed a party chair to name a replacement to a seat held by someone of the same party if the regular appointing authority failed to act within 90 days (Appellants' App. Vol. II p. 42). *See* Ind. Code § 36-1-8-10(d).

The 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 (Appellants' App. Vol. II p. 41). Ind. Code § 36-7-4-2017(a); B.M.C. § 2.13.010. Out of the five mayoral appointments, no more than three "may be of the same political party." *Id.*

Christopher Smith was a mayoral appointment to the Plan Commission and served from January 2, 2012, through January 5, 2016 (Appellants' App. Vol. II p. 50). During his term on the Plan Commission, Christopher Smith was affiliated with the Republican Party of Monroe County, Indiana (Appellants' App. Vol. II p. 50). At the expiration of Christopher Smith's term on the Plan Commission, the Mayor appointed Nicholas Kappas to Smith's vacant seat (Appellants' App. Vol. II p. 50). Nicholas Kappas was a member of the Plan Commission from February 10, 2016, through January 6, 2020 (Appellants' App. Vol. II p. 50). Kappas was one of the five mayoral appointees made pursuant to Bloomington Municipal Code, Section 2.13.010 (Appellants' App. Vol. II p. 50). During and before Kappas's appointment to the Plan Commission, Kappas was a political independent because he had not claimed a party affiliation, 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. (Appellants' App. Vol. II pp. 50–51).

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 (Appellants' App. Vol. II p. 50). Kappas's appointment to the Plan Commission was not challenged prior to the instant litigation (Appellants' App. Vol. II p. 52).

Nicholas Kappas's seat on the Plan Commission remained vacant from the expiration of his term on January 6, 2020, through April 16, 2020 (Appellants' App. Vol. II p. 51). 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 (Appellants' App. Vol. II p. 51).

On April 16, 2020—106 days after the expiration of Kappas's term and 1,563 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 (Appellants' App. Vol. II p. 51). William Ellis claimed authority to make the appointment pursuant to Indiana Code Section 36-1-8-10 (Appellants' App. Vol. II p. 51). On April 16, 2020, Guenther was affiliated with the Republican Party of Monroe County, Indiana (Appellants' App. Vol. II p. 51). At the time Ellis appointed Guenther to the Plan Commission, Guenther was a member of the Environmental Commission (Appellants' App. Vol. II p. 51). Guenther was appointed to the Environmental Commission on September 19, 2018, by Mayor John Hamilton (Appellants' App. Vol. II p. 51). Guenther remained an active and voting member of the Environmental Commission during the pendency of this *quo warranto* action in the trial court (Appellants' App. Vol. II p. 52). On January 2, 2021, Guenther publicly resigned from the Republican Party (Appellants' App. Vol. II p. 53).

The City rejected Ellis's appointment of Guenther to the Plan Commission (Appellants' App. Vol. II p. 51). On May 7, 2020, Mayor Hamilton appointed Christopher Cockerham to the vacant seat on the City of Bloomington Plan Commission (Appellants' App. Vol. II p. 51).

On May 7, 2020, Christopher Cockerham claimed affiliation with the Republican Party (Appellants' App. Vol. II p. 51). In 2019, Cockerham voted in the Monroe County Democratic Party primary election (Appellants' App. Vol. II p. 51). On May 7, 2020, Cockerham was not certified by the chair of the Monroe County Republican Party as a member of the Republican Party (Appellants' App. Vol. II p. 51). 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 (Appellants' App. Vol. II p. 52). 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 (Appellants' App. Vol. II p. 52).

Mayor Hamilton reaffirmed his appointment of Cockerham to the Plan Commission on June 3, 2020 (Appellants' App. Vol. II p. 52). 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 (Appellants' App. Vol. II p. 52). Petitioners Ellis and Guenther initiated the current litigation on June 9, 2020 (Appellants' App. Vol. II pp. 2, 23).

On November 18, 2021, the trial court issued its *Findings of Fact, Conclusions and Judgment* (Appellants' App. Vol. II pp. 14–22). The trial court concluded and ordered as follows:

- The Plan Commission statute requires an affirmative party affiliation and the appointment of Nicholas Kappas, a political independent, was void *ab initio* (Appellants' App. Vol. II pp. 19–21).
- Christopher Cockerham was a "Democrat" for purposes of Indiana Code Section 36-1-8-10 and was ineligible for appointment because there were already three Democrats on the Plan Commission. Cockerham's appointment was therefore void *ab initio* (Appellants' App. Vol. II pp. 20–21).

- William Ellis, as chair of the Monroe County Indiana Republican Party, had authority to appoint Andrew Guenther to the Plan Commission on April 16, 2021, because the last legitimate seat holder was Christopher Smith, a Republican and whose term expired in 2016 (Appellants' App. Vol. II p. 20).
- Petitioners' years-long delay in filing *quo warranto* did not constitute a waiver of their claims or bar them by laches (Appellants' App. Vol. II p. 20).
- Petitioners could use both a declaratory judgment action and information in *quo warranto* to establish current legal right to the seat at issue on the Plan Commission (Appellants' App. Vol. II pp. 18–19).
- Andrew Guenther was entitled to the seat on the Plan Commission (Appellants' App. Vol. II p. 21).
- Christopher Cockerham was ordered to immediately vacate his seat on the Plan Commission and Petitioner Andrew Guenther was ordered to begin occupying the seat (Appellants' App. Vol. II p. 21).

SUMMARY OF ARGUMENTS

I. Petitioners Ellis and Guenther lack standing and have failed to state a claim upon which relief can be granted. 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. Neither Ellis nor Guenther has any substantive right to enforce the claims that are being made in the litigation.

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 and the trial court concluded would lead to irrational and disharmonizing results and violate the Freedom of Association Clause of the United States Constitution.

II. If Petitioners have standing, the facts 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 and make a valid appointment for the entire 48 months of Kappas's term.

III. Petitioners' 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 occurred only after the expiration of Kappas's term and significantly changed circumstances to Bloomington's prejudice.

IV. Even if Ellis could have appointed Guenther to the Plan Commission, Guenther was ineligible for the seat because Guenther was already a member of the Environmental Commission, and Indiana Code Section 36-7-4-216(b)(2) bars a Plan Commission appointment from holding "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 remained a member through the initiation of the litigation. 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*.

ARGUMENT

I. Petitioners William Ellis and Andrew Guenther lack standing to bring an information in *quo warranto* because Ellis did not have lawful authority to appoint a Republican to a seat that had been previously occupied by a political independent.

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. Standard of Review and Governing Law

Respondents argued that the Petitioners lacked standing to bring their claims and the Amended Complaint should have been dismissed pursuant to Rule 12(B)(6) of the Indiana Rules of Trial Procedure for failing to state a claim for relief (Appellants' App. Vol. II p. 60). The trial court concluded the Petitioners had standing and did not dismiss the case (Appellants' App. Vol. II p. 20–21).

The standard of review of a trial court's denial of a motion to dismiss for failure to state a claim under Indiana Trial Rule 12(B)(6) is de novo. *Gordon v. Purdue Univ.*, 862 N.E.2d 1244, 1250–51 (Ind. Ct. App. 2007); *Sims v. Beamer*, 757 N.E.2d 1021, 1024 (Ind. Ct. App. 2001). The appellate court does not defer to the trial court's decision because deciding a motion to dismiss based upon failure to state a claim involves a pure question of law. *Id.* "A motion to dismiss under Rule 12(B)(6) tests the legal sufficiency of a complaint: that is, whether the allegations in the complaint establish any set of circumstances under which a plaintiff would be entitled to relief." *Trail v. Boys & Girls Clubs of Northwest Indiana*, 845 N.E.2d 130, 134 (Ind. 2006). "Thus, while we do not test the sufficiency of the facts alleged with regards to their adequacy to provide recovery, we do test their sufficiency with regards to whether or not they have stated some factual scenario in which a legally actionable injury has occurred." *Id*.

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

Where a party lacks standing to pursue a claim, dismissal under Trial Rule 12(B)(6) is appropriate. *In re Paternity of G.W.*, 983 N.E.2d 1193, 1196 (Ind. Ct. App. 2013); *Long v. Biomet, Inc.*, 901 N.E.2d 37, 40 (Ind. Ct. App. 2009); *R.J.S. v. Stockton*, 886 N.E.2d 611, 614 (Ind. Ct. App. 2008). Standing is defined in Indiana as having a "sufficient stake in an otherwise justiciable controversy." *Ind. Civil Rights Comm'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 945 (Ind. 1999). The purpose of the standing requirement is to ensure that the party before the court has a substantive right to enforce the claim that is being made in the litigation. *Pence v. State*, 652 N.E.2d 486, 487 (Ind. 1995). Standing is "a significant restraint on the ability of Indiana courts to act, as it denies the courts any jurisdiction absent an actual injured party participating in the case." *Id.* at 488; *see also Garau Germano, P.C. v. Robertson*, 133 N.E.3d 161, 170 (Ind. Ct. App. 2019), *reh'g denied* (Oct. 17, 2019), *trans. denied* (Ind. Feb. 13, 2020).

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

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

I.C. § 34-17-2-1.

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

On appeal, this Court reviews the trial court's legal conclusions and interpretations of statutes de novo. *Gittings v. Deal*, 109 N.E.3d 963, 970 (Ind. 2018). 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 § 36-8-9-3.1 (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.

C. The trial court's interpretation of Indiana Code Section 36-1-8-10 leads to irrational and disharmonizing results.

The trial court's interpretation of Indiana Code Section 36-1-8-10 would mandate party affiliation for any board despite that board's controlling statute merely limiting the number of members from a single political party. This interpretation conflicts with the plain language of Indiana Code Section 36-7-4-207 and all other similar statutes which 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," *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:

[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.

> (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 similarly to 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]

[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]

"Where possible, every word must be given effect and meaning, and no part is to be held meaningless if it can be reconciled with the rest of the statute." *Spaulding*, 550 N.E.2d at 309.

Furthermore, implanting an affirmative party affiliation requirement into each of these 17 statutes would prevent the appointment of the many civic-minded individuals in Indiana who have not declared a party affiliation. Even more troubling, under this interpretation of these statutes, the authority to fill these suddenly vacant seats would not remain with the elected officials who had originally selected public servants to serve on boards and commissions, but would instead be transferred to unelected party chairmen who are not able to be held to account in any public election.

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

The Indiana General Assembly deliberately drafted these statutes so that numerous governing boards and commissions would 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.

D. 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.

E. The Trial Court's conclusion that Indiana Code 36-1-8-10 mandates political party affiliation at the time of appointment to boards and commissions such as the Plan Commission violates the freedom of association guaranteed by the First

Amendment to the United States Constitution and should not be adopted by this Court on appeal.

Indiana Code Section 36-1-8-10 must be interpreted with the presumption that the legislature intended to comply with the Indiana and Federal Constitutions. *Boehm* 675 N.E.2d at 321; *Price*, 622 N.E.2d at 963; *Smith*, 158 Ind. at 427–28, 63 N.E. at 850. "If a statute has two reasonable interpretations, one constitutional and the other not, we will choose the interpretation that will uphold the constitutionality of the statute." *Sims v. United States Fid. & Guar. Co.*, 782 N.E.2d 345, 349 (Ind. 2003) (citing *Boehm* 675 N.E.2d at 321). "We do not presume that the General Assembly violated the constitution unless the unambiguous language of the statute so mandates." *Id*. This Court should "nullify a statute on constitutional grounds only where such result is clearly rational and necessary." *Bd. of Comm'rs of the County of Howard v. Kokomo City Plan Comm'n*, 263 Ind. 282, 330 N.E.2d 92, 95 (Ind. 1975).

The trial court's interpretation of Indiana Code 36-1-8-10 should not be upheld on appeal because it violates the First Amendment freedom of association rights of individuals who choose not to have a party affiliation. 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' and the trial court's 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 at their time of appointment. Petitioners' and the Trial Court's 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 merely to get appointed, 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). Based upon the Petitioners' and trial court's interpretation of the law, the appointee could then disavow their affiliation after appointment and continue to serve (Appellants' App. Vol. II p. 20). The trial court concluded Guenther was still entitled to occupy the seat on the Plan Commission despite not claiming a political party affiliation after he renounced his affiliation with the Republican Party on January 2, 2021. *Id.*

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 bar individuals exercising their right to not affiliate with a political party from all but a handful of small roles in governance merely because they did not

affiliate with a political party at the time of their appointment. 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. Under the interpretation put forth by Petitioners and adopted by the trial court, the requirement to affiliate with an established political party only matters at the instant of appointment and at no moment thereafter. Such an interpretation is arbitrary and does nothing to advance the interest of ensuring balanced representation by members of differing political parties. It only forces affiliation as a superficial obstacle to participation in government which can be immediately disregarded thereafter. The State would be hard-pressed to explain how any purported interest served by the Petitioners' and trial court's interpretation of Indiana Code Section 36-1-8-10 does not sweep more broadly than necessary to advance such interest. *See Norman*, 502 U.S. at 290.

The Court must 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 the trial court's interpretation of Indiana Code 36-1-8-10 mandating affiliation with an established political party at the time of appointment violates protected associational rights guaranteed under the First Amendment to the United

States Constitution, this Court must reject the Petitioners' and trial court's interpretation.

F. 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 the Amended Complaint must be dismissed.

II. Even if Ellis and Guenther's interpretation of Indiana Code Section 36-1-8-10 is adopted by this Court, they waived their claims.

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 this Court finds Ellis and Guenther 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 because Ellis failed to act for the entirety of Kappas's term despite being aware of his statutory obligation to do so.

Christopher Smith, a Republican, served on the Plan Commission from January 2, 2012, through January 5, 2016 (Appellants' App. Vol. II p. 15). At the expiration of Christopher Smith's term on the Plan Commission, the Mayor appointed Kappas to Smith's vacant seat (Appellants' App. Vol. II p. 15). Kappas was a member of the Plan Commission from February 10, 2016, through January 6, 2020. (Appellants' App. Vol. II p. 15). 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. (Appellants' App. Vol. II p. 15). Kappas served his full term on the Plan Commission, which expired on January 6, 2020. (Appellants' App. Vol. II p. 15). Kappas's seat on the Plan Commission remained vacant from the expiration of his term on January 6, 2020, through April 16, 2020. (Appellants' App. Vol. II p. 15). 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. (Appellants' App. Vol. II p. 15).

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. Appellants' App. Vol. II pp. 15, 34). 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 (Appellants' App. Vol. II p. 34). 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.

This Court should therefore reverse the decision of the trial court and enter judgment in favor of the City of Bloomington as a result of Petitioners' waiver.

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 (Appellants' App. Vol. II p. 34). 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. (Appellants' App. Vol. II p. 31). 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 (Appellants' App. Vol. II p. 30 –32).

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 (Appellants' App. Vol. II p. 15). 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 (Appellants' App. Vol. II p. 15). 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 (Appellants' App. Vol. II p. 15). By contrast, Kappas's predecessor, Christopher Smith, was a Republican and held the seat from January 2, 2012, through January 5, 2016 (Appellants' App. Vol. II p. 15).

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 (Appellants' App. Vol. II p. 16). 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 or 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 determining 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

[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)).

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.

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 elected mayor would lose the authority to fill a Plan Commission seat to an unelected county chairperson. Furthermore the Mayor would be barred from appointing an independent or other individual who may claim affiliation with a minor

party to the citizen seats on the Plan Commission and other boards with similar requirements.

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. (Appellants' App. Vol. II p. 16). 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. (Appellants' App. Vol. II p. 15). 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 an established political party—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's appointment of a political independent, or any other party outside of an established political party, 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 (Appellants' App. Vol. II p. 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 trial court that they believe that even a *de facto* officer's decisions while holding office should or could be challenged in court.[4]

[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.").

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. Even if Petitioners had standing, their claims are barred by laches. This Court should therefore reverse the decision of the trial court and enter judgment in favor of the City of Bloomington.

IV. 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 this 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 continued to hold 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 (Appellants' App. Vol. II p. 16). Andrew Guenther was appointed to the Environmental Commission on September 19, 2018, by Mayor John Hamilton (Appellants' App. Vol. II p. 15). Guenther remained an active and voting member of the Environmental Commission through the pendency of this matter in the trial court (Appellants' App. Vol. II p. 16).

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 was still an active member at the time of the trial court's Judgment (Appellants' App. Vol. II p. 16). 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 of Christopher Cockerham to the Plan Commission must stand. This Court should therefore reverse the decision of the trial court and enter judgment in favor of the City of Bloomington.

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 the 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 during Kappas's term, 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 claimed 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 City of Bloomington's first 12(b)(6) motion(Appellants' App. Vol. II pp. 17–18). The Amended Complaint also joined Kappas as a party to this litigation.

Petitioners had 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 seek to 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 waiver and laches exist: to protect defendants from having to engage in

[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).

unnecessarily complex legal battles manifested by the Petitioners' own inexcusably-lengthy inaction.

Furthermore, neither the trial court's legal conclusions nor Petitioner's briefing provide an explanation or cite legal precedent as to why, if Kappas's holding the seat was void *ab initio*, the seat would default back to a Republican seat for appointment purposes. Ellis's standing depends on this 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 legal conclusion also 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 a member of any 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 (Appellants' App. Vol. II p. 16). The long established and proper remedy is an action in *quo warranto*. Petitioners cannot circumvent their inexcusable years-long delay in asserting 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. This Court cannot permit this to proceed, and must dismiss Petitioners' claim for declaratory judgment and relief against Nicholas Kappas. Because the seat at issue was 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, Respondents City of Bloomington, John Hamilton, Christopher Cockerham, and Nicholas Kappas request this Court reverse the trial court and enter favor in judgment of Respondents and against Petitioners William Ellis and Andrew Guenther on all claims in the Amended Complaint.

Respectfully Submitted,

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WORD COUNT CERTIFICATE

Pursuant to Indiana Rule of Appellate Procedure 44(F) and in reliance upon the word count of the word processing system used to prepare this brief, I verify that this brief contains no more than 14,000 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed using the Indiana E-Filing System (IEFS) and that the foregoing document was served upon the following person(s) using the service contact entered in the IEFS on January 3, 2022.

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