IN THE
INDIANA SUPREME COURT

APPELLATE CASE NO. 21A-MI-2600

The City of Bloomington, et al., Appellants,	)	Appeal from the Monroe Circuit Court
V.	)	Cause No.: 53C08-2006-MI-958
Andrew Guenther, et al, Appellees.	)	The Honorable Erik Allen, Special Judge

PETITION FOR TRANSFER

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QUESTIONS PRESENTED ON TRANSFER

1. Whether an individual who claims no political party affiliation can be appointed by a city executive to a city plan commission when the statute prescribing the appointment process specifically requires that the appointee share membership in a political party.
2. Whether the Court of Appeals opinion incorrectly re-defined the meaning of holding an election by finding that an individual can vote in an election held by a political party before election day.

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BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

On July 6, 2020, Petitioners Andrew Guenther and William Ellis filed their *Amended Verified Complaint for Declaratory Judgment and Writ of Quo Warranto*. App. Appendix Vol. II, p. 23. The parties entered an *Agreed Factual Stipulations*, App. Appendix Vol. II, p. 49, a number of which facts the Court of Appeals recited in its opinion. Slip op. at 2-5.

From January 2, 2012 until January 5, 2016, one of the five mayor-appointed seats on the Commission was held by Christopher Smith, who was affiliated with the Monroe County Republican Party. App. Appendix Vol. II, pp. 49-53; slip op. at 2-5. Following Smith's term, Kappas was appointed to Smith's seat and served from February 10, 2016 until January 6, 2020. *Id.* Before and during Kappas' term on the Commission, Kappas did not vote in a primary election, nor did he claim a party affiliation, and nor was he certified as a member of a political party. *Id.* No challenge to Kappas' appointment was raised prior to this litigation. *Id.*

Following the end of Kappas' term on January 6, 2020, Kappas' seat on the Commission was vacant. *Id.* At that time, three Democrats held citizen member seats and one Republican held a citizen member seat. *Id.* On April 16, Chairman Ellis appointed Guenther, who was affiliated with the Republican Party, to the vacant seat, based on his authority pursuant to Indiana Code section 36-1-8-10. *Id.* Guenther voted in the Monroe County

Republican party primary election in 2019, the most recent primary election held prior to his appointment to the Commission. *Id.* The City rejected Guenther's appointment, and the Mayor appointed Chris Cockerham to Kappas' seat on May 7, 2020. *Id.* In 2019, Cockerham had voted in the Monroe County Democratic Party primary election. *Id.* In 2020, in-person voting for the Indiana primary election was set to occur on May 5, but was rescheduled to June 2 due to the COVID-19 pandemic. *Id.* Prior to his appointment to the Commission on May 7, 2020, Cockerham had requested, received, completed, and submitted his ballot for the 2020 Monroe County Republican Party primary election. *Id.*

As of May 7, 2020, Cockerham had not been certified by the Chairman as a member of the Republican Party. *Id.* The Mayor subsequently reaffirmed Cockerham's appointment on June 3, and Cockerham first took his seat at a Commission meeting on June 8. *Id.*

The trial court concluded that Kappas' appointment was void *ab initio*, and declared valid Guenther's appointment by Ellis, the Monroe County Republican Chair. Appealed Order at 7-9. The trial court also noted that Cockerham's appointment was invalid because Cockerham voted as a Democrat in the 2019 primary election, and the 2020 primary election was delayed due to Covid-19, so that election had not yet been held, though Cockerham had requested and submitted a Republican ballot. *Id.*

The Court of Appeals reversed, finding that the Bloomington Mayor's appointment of Kappas was valid because "[w]here a citizen member claims no party affiliation and therefore does not impact the political party affiliation limitation, section 36-1-8-10(b) is irrelevant." Slip op. at 16. It further reasoned that Cockerham's May 7, 2020 appointment was not infirm, because prior to his appointment, he had requested, received, completed, and submitted" a Republican ballot for the 2020 primary election, even though that election would not happen for nearly another month. *Id.* at 20-21.

ARGUMENT

When properly read in conjunction, Ind. Code § 36-1-8-10 and 36-7-4-207 require that the Court of Appeals decision be vacated, the trial court Order affirmed, Chris Cockerham removed as the Bloomington Plan Commission, and Andrew Guenther instituted in Cockerham's place. Legal conclusions and interpretations of statutes are reviewed *de novo*. *Gittings v. Deal*, 109 N.E.3d 963, 970 (Ind. 2018).

By its plain language, Ind. Code § 36-1-8-10 requires that any city executive appointee under § 36-7-4-207—here, the Bloomington Plan Commission—meet certain statutory criteria. As § 36-1-8-10 explicitly states, one of the following *must* apply:

(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.

By concluding that neither provision applied to Cockerham, and therefore his appointment was valid, the Court of Appeals took it upon itself to read out specific portions of code that the General Assembly thoughtfully proposed, considered, and enacted.

Secondly, the Court of Appeals re-defined the meaning of what it means to hold an election. If the Court of Appeals is right, then an election is considered "held" from the moment the first person casts and early vote or absentee ballot.

I. The plain language of Ind. Code § 36-1-8-10 means precisely what the statute says: In appointments that arise under § 36-7-4-207(a)(5), the appointee must satisfy either § 36-1-8-10(b)(1) or § 36-1-8-10(b)(2).

Because Kappas had neither voted "in the most recent primary election in Indiana … held by the party with which the appointee claims affiliation," and nor was Kappas "certified as a member of that party by the party's county chair for the county in which the appointee resides," Kappas' appointment to the Bloomington Plan Commission was not valid. Ind. Code § 36-1-8-10; *State v. Dugan*, 793 N.E.2d 1034, 1036 (Ind. 2003) (courts should apply the "plain and ordinary" meaning when a statute's language is clear and unambiguous).

The Court of Appeals erred by doing precisely what it accused the trial court of doing—applying one statute without regard for the other. Slip op. at 16. The Court of Appeals concluded that "[w]here a citizen member claims no party affiliation and therefore does not impact the political party affiliation limitation, section 36-1-8-10(b) is irrelevant." *Id*. But rather than harmonize the statutes, *Clippinger v. State*, 54 N.E.3d 986, 989 (Ind. 2016), such an interpretation *negates* the requirements under Ind. Code § 36-1-8-10(b). Ind. Appellate Rule 57(H)(4).

In support of its conclusion, the Court of Appeals considered § 3-6-4.1-2, the statute concerning appointees to the Indiana Election Commission. That comparison is misguided. For one, the Indiana Election Commission is not a "political subdivision" for purposes of § 36-1-8-10. And, more to the point, it is § 36-1-8-10(b) (rather than the same statute) that imposes the political party requirements sought by the Court of Appeals Opinion.

§ 36-1-8-10(b) does not say that "only in cases of when the appointee has a political party affiliation," (quite the opposite, as the sub-section starts "[w]henever . . . .") yet that is precisely the interpretation that the Court of Appeals decision reads into the statute. *Basileh v. Alghusain*, 912 N.e.2d 814, 821 (Ind. 2009) (statutes must be interpreted according to their "plain, ordinary, and usual sense."). The statute means exactly what it says: "*Whenever* a law or political subdivision's resolution requires . . . 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 . . . ." (emphasis added); *Dobeski v. State*, 64 N.E.3d 1257, 1259 (Ind. Ct. App. 2016) (explaining the primary goal "in interpreting a statute is to ascertain and give effect to the legislature's intent, and the best evidence of that intent is the statute itself.").

By its plain terms, § 36-7-4-207(a)(5) provides authority for the city executive to appoint five (5) members to the city plan commission. And of those five members, no more than three (3) may be members of the same political party. If that was the only statute that applied, then the Court of Appeals reasoning would be sound. But that is not the only applicable law.

When correctly harmonized, the two statutes read together mean that the city executive may appoint five (5) members who all must have some political party affiliation, and that not more than three (3) may be from the same political party. That is the interpretation implicit in the trial court's Order.

Crucially, this statute is broader than the Indiana Election Commission statute of § 3-6-4.1-2 cited by the Court of Appeals. § 36-1-8-10(b) only requires *some* political party affiliation, whereas an appointee to the Indiana Election Commission "must be a member of a major political party . . . ." That is to say, a member of the Libertarian Party, Green Party, or any other political party that satisfies the requirements of § 3-5-2-5.5 and § 3-7-28-6 is likely eligible for appointment under § 36-1-8-10.

Moreover, § 36-1-8-10 does not "exclude[ ] unaffiliated citizens from serving . . . ." Slip op. at 16. § 36-7-4-207 and Bloomington Code 2.13.010 both provide alternate avenues of participation for those not specifically affiliated with a political party. A political independent might win a seat on the city council; a political independent might be on the board of park commissioners; a political independent might be a member of the board of public works (or even a representative from the board); and the city civil engineer might be a political independent.[1]

Rather than harmonizing the statutes, the Court of Appeals decision instead improperly rewrites § 36-1-8-10 and § 36-7-4-207(a)(5). But, the power to legislate "is vested exclusively in the legislature under Article 4, Section 1 of the Indiana Constitution." *Paul Steiler Enters. v. City of Evansville*, 2 N.E.3d 1269, 1277 (Ind. 2014). Long-standing Indiana precedent upholds the foundational principle that

> courts cannot venture upon the dangerous path of judicial legislation to supply omissions or remedy defects in matters committed to a co-ordinate branch of the government. It is far better to wait for necessary corrections by those authorized to make them, or, in fact, for them to remain unmade, however desirable they may be, than for judicial tribunals to transcend the just limits of their constitutional powers.

Calvin v. State, 87 N.E.3d 474, 478 (Ind. 2017) (quoting *R.R. Comm'n of Ind. v. Grand Trunk W. R.R.,* 179 Ind. 255, 263-264, 100 N.E. 852, 855 (Ind. 1913)).

[1] Notably, Bloomington's ordinance includes a non-voting member from the Monroe County Plan Commission as well.

The Court of Appeals decision should be vacated, transfer granted, and the trial court's Order affirmed.

II. An election cannot be held before election day.

The Court of Appeals opinion incorrectly found that Cockerham voted in the 2020 Republican primary election, even though the Bloomington Mayor appointed Cockerham nearly a month before the 2020 primary election day of June 2, 2020. In doing so, the Court of Appeals focused too narrowly on a clause within § 36-1-8-10(b)(1) to the exclusion of the rest of the sub-section.

As a functional matter, Cockerham's appointment was not valid because Ellis' appointment of Guenther filled the spot that Cockerham's appointment purportedly filled. Nonetheless, because the Court of Appeals' opinion is a published decision, transfer is proper to clarify that the act of casting a ballot alone is insufficient to qualify under § 36-1-8-10(b)(1). Ind. Appellate Rule 57(H)(4).

The Court of Appeals opinion reasoned that the verb "held" in § 36-1-8-10(b)(1) explains only "*who* held the election, not *when* it occurred." Slip op. at 20. The verb "held," though, is the past tense version of the verb "hold." "Held." Mirriam-Webster, Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/held. Accessed July 3, 2022. That is to say, the statute contemplates a primary election held in the past. Cockerham may have voted, satisfying one portion of the sub-section,

but the election had not yet been held. Indeed, there is a reason why the terms "early voting" or "absentee voting" or "election day" are used. The Court of Appeals' determination of "voting" renders void such provisions as Ind. Code § 3-11.5-4-10 that, subject to a few exceptions, absentee ballots received after 6 P.M. on election day are invalid. *See also Ind. Code § 3-11.5-4-2* ("Through the last day before *the* election day . . . ."). Ind. Appellate Rule 57(H)(6). The term "election" refers to a specific day, not the entire process from the moment early voting begins through 6 P.M. on election day. *See Ind. Code § 3-7-13-3.*

Cockerham could not have been appointed on May 7, 2020 because no primary election had yet been "held."

CONCLUSION

Appellees respectfully request this Court vacate the Court of Appeals decision, grant transfer, and affirm the trial court's decision.

Respectfully submitted,

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WORD COUNT CERTIFICATE

I certify that I have performed a word count and this brief contains no more than 4,200 words.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition to Transfer was served by electronic filing through the IEFS upon Michael Rouker, Larry Allen, and Daniel Dixon on this 5th day of July, 2022.

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