ATTORNEY FOR APPELLANT

R. Patrick Magrath
Alcorn Sage Schwartz & Magrath, LLP
Madison, Indiana

ATTORNEY FOR APPELLEE

William Joseph Jenner
Jenner, Pattison & Sharpe
Madison, Indiana

IN THE
COURT OF APPEALS OF INDIANA

Robert J. Waller,
Appellant-Petitioner,

v.

City of Madison,
Appellee-Respondent.

February 3, 2022

Court of Appeals Case No. 21A-PL-928

Appeal from the Jefferson Circuit Court

The Honorable Donald J. Mote, Judge

Trial Court Cause No. 39C01-2102-PL-118

Weissmann, Judge.

[1] The Mayor of Madison revoked Robert Waller's appointments to both the City of Madison Plan Commission (Plan Commission) and the Board of Zoning Appeals (BZA) after a heated exchange at a meeting of the Madison Board of Public Works and Safety (Board of Public Works). Waller believes he was wrongfully removed from those positions, and he wants them back. The trial court denied his request for a preliminary injunction, and he now appeals. We find the trial court applied the wrong meaning of "for cause" in determining whether the mayor properly removed Waller from these two appointed boards. We also find the trial court misapplied the law related to Waller's free speech claims. We reverse and remand for further proceedings.[1]

Facts

[2] Waller was a member of several community boards and commissions in the City of Madison, including the Plan Commission, the BZA, and the Police Merit Commission, also known as the Police Merit Board.[2] The former mayor appointed Waller to the Plan Commission and the BZA. Police officers selected Waller to serve on the Police Merit Commission.

---

[1] Without cross appealing and for the first time on appeal, the City asserts that Waller may be disqualified from serving on multiple boards pursuant to the dual office-holding restriction in the Indiana Constitution. It is well settled that an argument presented for the first time on appeal is waived for purposes of appellate review. *Ind. Bureau of Motor Vehicles v. Gurtner*, 27 N.E.3d 306, 311 (Ind. Ct. App. 2015).

[2] The parties dispute the proper name for this body. For clarity's sake, we will refer to it as the Police Merit Commission.

[3] On December 21, 2020, the Board of Public Works conducted a public hearing during which it discussed the revision of the Madison Police Department's standard operating procedures (SOPs). The current Mayor, Bob Courtney (the Mayor), sits on this board. Waller appeared before the Board of Public Works, apparently on behalf of the Police Merit Commission, to "stop a vote" on revisions to the SOPs. App. Vol. II, p. 50. A "lengthy and argumentative" exchange ensued between Waller and the Mayor, in which they squabbled over the proper name for the Police Merit Commission and whether Waller had previous opportunities to comment on the revision of the SOPs. *Id.*

[4] About three weeks later, Waller received a letter from the Mayor rescinding Waller's appointments to the BZA and the Plan Commission. App. Vol. II, pp. 18-19. The letter stated, "I take no pleasure in this action [rescinding your appointments] but given the manner of your conduct at the Board of Public Works and Safety meeting dated December 21, 2020, you have left me no choice." *Id.* at 18. The letter listed the following six causes for removal:

- Combative nature of conduct which is unbecoming of a mayoral appointment.
- Making false allegations against the Mayor and the Chief of Police and the Mayor's appointments to the Board of Public Works and Safety and the Police Merit Board regarding their ability to evaluate recommendations independently and professionally to the police standard operating procedures.
- Condescending attitude toward the civilian formed Public Steering Committee, which comprised of nine members of the community, including two current members of the police department. Your statement

that they are disqualified due to "personal emotions" is unfounded. In fact, this group is racially diversified and bring (sic) a wealth of personal and professional experience to the process. Community safety greatly depends on community participation.

- False allegations that the Mayor possesses a "disdain" for the City of Madison Police Merit Board.

- Lack of involvement and interest in providing meaningful feedback to the process despite multiple opportunities. And,

- Loss of trust that you can competently and fairly carry out your duties to these boards.

Id.

[5] In response, Waller filed a complaint alleging his removal was unlawful. He then moved for a preliminary injunction to return him to both the Plan Commission and the BZA during the pendency of the lawsuit. In support of his request for injunctive relief, Waller cited Indiana's removal statutes and the free speech protections of the First Amendment of the United States Constitution and Article I, Section 9 of the Indiana Constitution. After the trial court denied Waller's request for an injunction, Waller appealed pursuant to Indiana Appellate Rule 14(A)(5), which permits, as a matter of right, the appeal of interlocutory orders denying preliminary injunctions.

Discussion and Decision

[6] Because a trial court's decision to grant or deny a preliminary injunction is discretionary, we review for an abuse of discretion. *State v. Econ. Freedom Fund*,

959 N.E.2d 794, 800 (Ind. 2011). "An abuse of discretion occurs when the trial court misinterprets the law." *Id.*

[7] To obtain a preliminary injunction below, Waller was required to show by a preponderance of evidence that:

1. his remedies at law are inadequate, meaning he will experience irreparable harm pending the resolution of the substantive action;
2. he is reasonably likely to be successful at trial;
3. his threatened injury (here, his continued removal) outweighs potential harm to the City were the injunction granted; and
4. the injunction does not disserve the public interest.

B&S of Fort Wayne, Inc. v. City of Fort Wayne, 159 N.E.3d 67, 73 (Ind. Ct. App. 2020) (citing *Econ. Freedom Fund*, 959 N.E.2d at 803). When a court determines that a party's actions are unlawful, "the public interest is so great that the injunction should issue regardless of whether the plaintiff has actually incurred irreparable harm or whether the plaintiff will suffer greater injury than the defendant." *Id.* (citing *Union Twp. Schs. v. State ex rel. Joyce*, 706 N.E.2d 183, 192 (Ind. Ct. App. 1998); *Short on Cash.net of New Castle, Inc. v. Dep't of Fin. Insts.*, 811 N.E.2d 819, 823 (Ind. Ct. App. 2004)).

[8] Waller argues that the trial court erred in denying his motion for a preliminary injunction because his removal was contrary to statute. He argues that the Mayor did not follow the procedure described in Indiana Code § 5-8-1-35

(2021) (Removal Statute).[3] He also argues that his removal was not "for cause" as required by Indiana Code §§ 36-7-4-218(f) and -906(f), the statutes outlining removal procedures for the Plan Commission and the BZA. Alternatively, he argues that his removal violated his free speech rights. We reverse and remand for further proceedings on both his claim that his removal was not "for cause" and his constitutional claim.

I. Statutory Claims

A. Removal Under the Removal Statute

[9] Waller claims that as an officer under *Chapo v. Jefferson Cty. Plan Comm'n*, 164 N.E.3d 131, 133-34 (Ind. Ct. App. 2021), *trans. denied*, he can only be removed pursuant to the Removal Statute, which outlines removal procedures for officers guilty of specific acts of misconduct.[4] Though this is one path to removal, it is not the only one.

[10] Indiana Code §§ 36-7-4-218(f) and -906(f) permit removal for more banal acts or omissions by empowering the "appointing authority" to remove members of the Plan Commission and the BZA "for cause." These procedures allow for broader discretion than the Removal Statute, which requires specific acts of

---

[3] This statute was amended by P.L. 169-2021 § 1, which took effect on July 1, 2021. We apply the version in effect at the time of Waller's removal.

[4] For example, to remove the Fiscal Officer of City of Gary, the county grand jury must deliver the accusation to the county prosecutor unless the prosecutor is the officer being accused. Ind. Code §§ 5-8-1-21; -23 *See, e.g.*, *Rand v. City of Gary*, 834 N.E.2d 721 (Ind. Ct. App. 2005). The prosecutor then initiates court proceedings. Ind. Code § 5-8-1-23; see *State v. Neff*, 117 N.E.3d 1263, 1265 (Ind. 2019).

misconduct. The broader discretion reflects the specific relationship between appointees to the Plan Commission and the BZA and their "appointing authority." As Waller's "appointing authority," the Mayor can follow Indiana Code §§ 36-7-4-218(f) and -906(f).

[11] Neither the Removal Statute nor Indiana Code §§ 36-7-4-218(f) and -906(f) claims to be the exclusive means for removal. *See Neff*, 117 N.E.3d at 1267 ("[O]ur Constitution provides ways to remove an official outside of an election in certain circumstances. One such way is through a judicial proceeding pursuant to the Removal Statute." (internal citations omitted)). The Mayor did not err by employing Indiana Code §§ 36-7-4-218(f) and -906(f) rather than the Removal Statute. The existence of one form of removal does not offend the existence of another; they are two paths to the same destination.

B. "For Cause" Removal Under Indiana Code §§ 36-7-4-218(f) and -906(f)

[12] Waller's case hinges on the meaning of "for cause." Indiana Code §§ 36-7-4-218(f) and -906(f), which govern the Plan Commission and the BZA, respectively, state: "The appointing authority may remove a member . . . for cause." But "for cause" is not defined anywhere in the relevant Title, nor have we had occasion to define the term previously in this context. Waller argues that these provisions prohibit a board or commission member's removal for anything except a "miscarriage of his obligations as a member." Appellant's Br., p. 17.

[13] The City argues that the provisions are not so narrow. Even if they were, the City maintains that the causes listed in the Mayor's letter reflected the Mayor's belief that Waller could no longer fulfill his duties. In applying the "for cause" standard below, the trial court determined "for cause" required something less than "good cause" and that the Mayor's reasons qualified. App. Vol. II, p. 66. The implication of the trial court's order is that any reason or justification proffered by the Mayor would have been sufficient to remove Waller.

[14] To resolve the meaning of "for cause" in Indiana Code §§ 36-7-4-218(f) and -906(f), we turn to our well-established rules of statutory interpretation.

> When interpreting a statute, our first task is to give its words their clear and plain meaning, while considering the structure of the statute as a whole. As we interpret the statute, we are mindful of both what it does say and what it does not say. To the extent there is an ambiguity, we determine and give effect to the intent of the legislature as best it can be ascertained. We may not add new words to a statute which are not the expressed intent of the legislature.

City of Lawrence Utils. Serv. Bd. v. Curry, 68 N.E.3d 581, 585 (Ind. 2017) (cleaned up).

[15] "For cause" expresses "a common standard governing the removal of a civil servant or an employee under contract." *For Cause*, *Black's Law Dictionary* (11th ed. 2019). Indiana has historically recognized two basic forms of employment: (1) employment for a definite or ascertainable term where, unless otherwise specified, the employment relationship can only end before the specified term

for cause or by mutual agreement; and (2) at-will employment, meaning an employee is "presumptively terminable at any time, with or without cause, by either party." *Orr v. Westminster Vill. N., Inc.*, 689 N.E.2d 712, 718 (Ind. 1997). In employment law, "good cause," "just cause," and plain old "cause" are often used interchangeably. *Cause*, *Black's Law Dictionary* (11th ed. 2019) (citing Mark A. Rothstein et al., *Employment Law* § 9.7, at 539 (1994)). Because appointees serve set terms, their appointments resemble employment for a definite term. *See* Ind. Code §§ 36-7-4-218(a), -906(a). It is therefore reasonable to conclude that the legislature intended local appointee removal "for cause" to mirror the meaning in employment law.

1. Three-Tier Municipal Removal Framework

[16] Despite its common usage, the meaning of "for cause" can be difficult to pin down. *See, e.g.*, 32 Am. Jur. Proof of Facts 3d 229 (originally published in 1995) ("[T]here is no generally accepted definition of 'good cause' in employment litigation."). Our review of the relevant statutes and case law reveals three tiers of removal for municipal appointees that aid in understanding how "for cause" removals work.

- *Tier One – At-Will Removal.* Appointees serve at the pleasure of some entity and may be removed for any reason or no reason at all.[5]

[5] For example, police merit commissioners serve "at the pleasure of the appointing or electing authority and may be removed at any time." Ind. Code § 36-8-3.5-7. City attorneys can be removable "at the pleasure" of an appointing authority, meaning they could be removed "without any offense being charged." *State, ex rel. Blair v. Wilson*, 142 Ind. 102, 41 N.E. 361, 362 (Ind. 1895). Likewise, utilities directors who serve at the

- *Tier Two – For Cause Removal.* Appointees can be removed after a finding of cause, or for cause.

- *Tier Three – Statutory Removal.* Appointees can be removed for specific causes specified by statute, with varying levels of discretion.[6]

[17] Tier Two lies somewhere in between removal at the pleasure of some authority and removal pursuant to specific causes specified by statute. Removal "for cause" cannot be within the removing entity's complete discretion, like Tier One removal, because removal "at the pleasure" is prescribed by statute. *City of Peru v. Util. Serv. Bd. of City of Peru*, 507 N.E.2d 988, 992 (Ind. Ct. App. 1987) ("When certain words are specified in a statute, then, by implication, other words not specified are excluded."). Moreover, we have consistently treated Tier One "at the pleasure" removal differently from Tier Two "for cause" removal, with "for cause" removal allowing for less latitude in removing an appointee. *See, e.g.*, *id.* at 990 (citing *Morrison v. McMahon*, 475 N.E.2d 1174 (Ind. Ct. App. 1985); *State ex rel. O'Donnell v. Flickinger*, 211 Ind. 361, 7 N.E.2d 192 (Ind. 1937)). On the other hand, "for cause" must allow greater discretion than the Tier Three statutes, which list specific grounds for removal. This is true

---

pleasure of the mayor "may be dismissed without cause by the mayor." (*Phillips v. City of Bloomington*, 869 N.E.2d 1281, 1283 (Ind. Ct. App. 2007).

[6] For example, housing authority commissioners are removable only for "inefficiency, neglect of duty, or misconduct in office," Ind. Code § 36-7-18-9; board of sanitary commissioners are removable only for "neglect of duty and incompetence," Ind. Code § 36-9-25-5; and economic development commissioners are removable for "neglect of duty, incompetency, inability to perform the commissioner's duties, or any other good cause. . . ." Ind. Code § 36-7-12-14.

even for statutes like the economic development commissioner removal statute, which lists "good cause" as one of many grounds for removal. As a rule of statutory construction, the meaning of a general term that follows specific terms is limited by the specific terms. *See Loparex, LLC v. MPI Release Techs., LLC*, 964 N.E.2d 806, 819 (applying the doctrine of *ejusdem generis*).

[18] Within Tier Two, we decline to adopt the trial court's distinction between "for cause" and "good cause" and its conclusion that "for cause" merely requires *some* reason for removal. App. Vol. II, p. 64. If *any* reason is acceptable cause, "for cause" removal becomes almost indistinguishable from removal "at the pleasure" of the appointing authority. And because "good cause" and "for cause" can be used interchangeably in the employment context, are not defined by statute, and are used similarly within the relevant Title, we interpret these phrases to mean the same thing here. *For Cause*, *Black's Law Dictionary* (11th ed. 2019) (citing Rothstein et al., *supra*, at 539); Ind. Code § 36-10-10-5 (directors of the CIVIC Center Building Authority may be removed "for good cause" after a civil trial without a jury); Ind. Code § 36-10-11-5 (trustees of the Gary Building Authority may be removed "for good cause" after a civil trial without a jury).

2. Construing "For Cause" within this Framework

[19] Few Indiana cases define "for cause" in the appointee removal context, but *State ex rel. Manning v. Mayne*, 68 Ind. 285, 1879 WL 5667 (Ind. 1879), is instructive. In that case, the board of directors of a prison ordered the prison's warden to fire his deputy and several guards. When the warden refused, the

board of directors attempted to remove him and appoint a new warden. The old warden refused to relinquish his post, so the new warden sued. The relevant statute specified that a warden may be removed only "for cause." *Manning*, 68 Ind. at 294. Our Supreme Court declined to adopt the new warden's position that "an alleged cause declared by [the board] to exist and be sufficient, whether such cause were true or false, valid or invalid, or just or unjust, would be final and conclusive, and the warden would be thereby bound, without remedy or redress." *Id.* at 295. Instead, the Court determined that:

> The cause must be one amounting to malfeasance in office, or showing that he has not, in some particular, faithfully and impartially discharged his duties as warden; and . . . the cause for removal must be founded on some matter or thing done, or omitted to be done, by the warden, in reference to which the law has given the directors the right and power to supervise, control and enforce the acts of the warden.

Id. In other words, "cause" must be something related to an appointee's ability to perform the post in question and not just any reason relied upon by the appointing authority. *Manning* undermines the trial court's interpretation of "for cause" as encompassing any reason proffered by the appointing authority.

[20] National compilations of municipal law mirror the *Manning* view. According to Corpus Juris Secundum, "for cause"

> means, essentially, such cause as is plainly sufficient under the law and sound public policy and has reference to a substantial cause touching upon qualifications appropriate to the office . . . . It also necessarily implies such degree of misconduct or

> culpability on the part of the officeholder as clearly implicates the public interest in precluding the holder's continuance in that particular office.

62 C.J.S. Municipal Corporations § 522.

[21] Nearby jurisdictions offer similar interpretations. A recent decision by the Kentucky Court of Appeals implies that "for cause" removal requires some "allegations of misconduct." *Schell v. Young*, No. 2020-CA-0282-MR, No. 2020-CA-0300-MR, slip op. at 21 (Ky. Ct. App. 2021). This decision cites an 1896 case holding that cause for removal "must be such as constitutes misfeasance or malfeasance in office, or that character of charge that renders the officer unfit for the position." *Todd v. Dunlap*, 36 S.W. 541, 542 (Ky. 1896). In Michigan, an appointee removable for cause holds their position "so long as the appointee is competent to discharge the duties of the office or efficient in the performance of them." *Rowell v. City of Battle Creek*, 135 N.W. 79, 82 (Mich. 1912). And a federal court interpreting Illinois removal provisions has similarly held:

> The words also mean that there must be a legal cause and not merely a cause which the Governmental authority in the exercise of unlimited discretion may deem sufficient. It does not mean removal by arbitrary or capricious action, but there must be some cause affecting and concerning the ability and fitness of the official to perform the duty imposed on him. The cause must be one in which the law and sound public policy will recognize as a cause for his no longer occupying the office.

Napolitano v. Ward, 317 F.Supp. 79, 81 (N.D. Ill. 1970).

[22] Using *Manning* as our guide, we conclude that an appointee removable "for cause" may be removed only for acts or omissions that diminish the appointee's ability or fitness to perform the duties of the appointment. Such cause must be sufficient under law and not merely any reason that the removing authority in the exercise of unlimited discretion may deem sufficient. Because this is not the standard applied by the trial court, we reverse and remand for further proceedings to determine whether Waller's conduct at the Board of Public Works meeting diminished his ability or fitness to perform his duties on the Plan Commission and the BZA. This analysis should include whether the Mayor's reasons for removal constituted the type of cause that the law recognizes as legitimate grounds for Waller to no longer occupy his board positions.

II. Constitutional Claims

[23] Waller next argues that his removal for speaking at the meeting of the Board of Public Works violated his rights under the First Amendment of the United States Constitution.[7] The First Amendment, as incorporated against the states

[7] Waller also asserts a violation under Article 1, Section 9 of the Indiana Constitution, which independently protects freedom of speech. *See State v. Katz*, No. 20S-CR-632, 2022 WL 152487, at *4 (Ind. Jan. 18, 2022). Beyond quoting the provision, however, he provides no legal argument supporting this claim. Though Article 1, Section 9 and the First Amendment both protect freedom of speech, analysis under these provisions is not identical. *See, e.g.*, *Price v. State*, 622 N.E.2d 954, 958 (Ind. 1993). Waller provides no separate Article 1, Section 9 analysis, impeding our consideration of the issue and waiving this argument for our review. *See Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) (citing Indiana Appellate Rule 46(A)(8)(a)).

by the Fourteenth Amendment, prohibits the City from "abridging the freedom of speech." U.S. Const. amend. I; *Love v. Rehfus*, 946 N.E.2d 1, 8 n.5 (Ind. 2011) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995)).

[24] The trial court rejected Waller's First Amendment claim for two reasons, both of which reflected legal errors. First, the trial court initially found that "the City did not interfere" with Waller's First Amendment rights because he was "afforded generous time during which he freely expressed himself" at the meeting of the Board of Public Works. App. Vol. II, p. 65. But the City can violate First Amendment rights without interrupting speech. For example, in First Amendment retaliation cases, the government has not interrupted speech, but punished it. *See, e.g.*, *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968) (finding a First Amendment violation where the government did not prevent publication of the plaintiff's letter to the editor but did punish plaintiff because of the letter's publication).

[25] Second, Waller asked the court to apply the test from *Pickering*, which balances public employees' First Amendment interests against the government's interest as an employer in operational effectiveness and efficiency.[8] The trial court

[8] *Pickering* is the first in a line of cases creating a framework for evaluating public employees' free speech claims. *See also Connick v. Myers*, 461 U.S. 138, 147 (1983) (requiring determination of whether the employee spoke as a citizen on a matter of public concern); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (creating a framework for public employee speech that encompasses *Connick* followed by analysis of

refused to apply this test because Waller was an unpaid appointee rather than a public employee. It erred, however, when it failed to apply an alternative First Amendment analysis in *Pickering*'s place.

[26] It is true that *Pickering*'s applicability to unpaid government appointees is an open question. *See, e.g.*, *Rash-Aldridge v. Ramirez*, 96 F.3d 117, 119-120 (5th Cir.1996) (applying analysis derived in part from *Pickering* test to councilmember's First Amendment challenge to her removal from appointed position on local planning board); *but see McKinley v. Kaplan*, 262 F.3d 1146, 1150 n.5 (11th Cir. 2001) (opting to apply *Pickering* analysis to removal of an unpaid appointee under limited facts of case, but noting "the author of this opinion is not entirely comfortable with and not sure that the law requires that we place unpaid political appointees on equal footing with traditional public employees."). But we need not resolve this dilemma. Waller asks the court to apply the test advanced in *Pickering*. The City asserts that *Pickering* is inapplicable because the City is not Waller's employer. Because the City's stance gives the government less discretion to regulate Waller's speech than it would have had Waller been a paid employee, we see no reason not to analyze

---

"whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.").

this case under the standard more deferential to the government as advocated by Waller.

[27] Because the court erred in its constitutional analysis, we reverse and remand for the court to apply the *Pickering* line of doctrine to determine whether Waller's free speech claims meet the requirements for issuance of a preliminary injunction. We make no decision regarding whether an unpaid appointee must be seen as a public employee for purposes of First Amendment analysis.

[28] In conclusion, we hold that the Removal Statute does not affect the outcome of this case. We reverse the trial court's finding that Waller's removal was "for cause" under Indiana Code §§ 36-7-4-218(f) and -906(f) and remand for the trial court to apply the proper definition of "for cause." We also reverse and remand for the trial court to apply *Pickering* in determining whether Waller's free speech claims entitle him to injunctive relief.

[29] Reversed and remanded for further proceedings.

Mathias, J., concurs.
Tavitas, J., dissents with a separate opinion.

IN THE
COURT OF APPEALS OF INDIANA

Robert J. Waller,
Appellant-Petitioner,

v.

City of Madison,
Appellee-Respondent.

Court of Appeals Case No.
21A-PL-928

Tavitas, Judge, dissenting.

[30] I respectfully dissent from the majority's opinion in this interlocutory appeal. The only issue here is whether the trial court properly denied Waller's motion for a preliminary injunction. Generally, to obtain a preliminary injunction, the moving party has the burden of showing by a preponderance of the evidence that:

> (1) the movant's remedies at law are inadequate, thus causing irreparable harm pending resolution of the substantive action; (2) the movant has at least a reasonable likelihood of success at trial by establishing a prima facie case; (3) threatened injury to the movant outweighs the potential harm to the nonmoving party

> resulting from the granting of an injunction; and (4) the public interest would not be disserved.

Apple Glen Crossing, LLC v. Trademark Retail, Inc., 784 N.E.2d 484, 487 (Ind. 2003). "If the movant fails to prove any of these requirements, the trial court's grant of an injunction is an abuse of discretion." *Id.* at 487-88. "A preliminary injunction is not a final judgment but rather 'an extraordinary equitable remedy' that should be granted 'in rare instances.'" *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011) (quoting *Gary Bd. of Zoning Appeals v. Eldridge*, 774 N.E.2d 579, 584 (Ind. Ct. App. 2002), *trans. denied*).

[31] Here, however, Waller makes no argument whatsoever regarding the required elements except for the reasonable likelihood of success element, and Waller presented no evidence to the trial court on those other elements. Waller appears to invoke the "per se" injunction standard, which applies "if the action to be enjoined clearly violates a statute, the public interest is so great that the injunction should issue regardless of whether a party establishes 'irreparable harm' or greater injury.'" *Econ. Freedom Fund*, 959 N.E.2d at 804. Under such a standard, Waller would only be required to demonstrate a reasonable likelihood of success on the merits. *See id*.

[32] Although Indiana Trial Rule 52 provides that the trial court shall "make special findings of fact without request . . . in granting or refusing preliminary injunctions," the trial court did not address the applicability of the per se standard or the other elements. The trial court addressed only the reasonable likelihood of success in its findings of fact and conclusions thereon. On appeal,

although Waller briefly cites to the per se standard, he fails to explain how the per se injunction standard applies here, and I would find that he waived the issue. Without the per se exception, Waller was required to present evidence on all four elements, which he failed to do. Thus, I would find that the trial court did not abuse its discretion by denying Waller's motion for a preliminary injunction.

[33] Moreover, we must keep in mind that we are reviewing only the denial of the motion for preliminary injunction. We are not, at this time, tasked with addressing the merits of Waller's petition for judicial review, despite Waller's efforts to have us do just that.

[34] Based upon the record before us, I would affirm the trial court's denial of the motion for preliminary injunction. For these reasons, I respectfully dissent.