

No. 21-____

IN THE
Supreme Court of the United States

JOSEPH CHAPO, SHERRY CHAPO,
DEPUTY BIG SHOT LLC,

Petitioners,

v.

JEFFERSON COUNTY PLAN COMMISSION,

Respondent.

**On Petition for a Writ of Certiorari from the
Supreme Court of Indiana**

PETITION FOR A WRIT OF CERTIORARI

CHARLES E. MCFARLAND

Counsel of Record

338 Jackson Road

New Castle, KY 40050

(502) 845-2754

mcfarlandc@bellsouth.net

Counsel for Petitioners

August 25, 2021

QUESTION PRESENTED FOR REVIEW

The **question presented for review**, with its subsidiary questions is:

Whether the *de facto* officer doctrine can be applied to individuals claiming to hold a vacant office of a political subdivision made vacant by the General Assembly statute declaring the office vacant, if an appointed officer does not take the mandatory oath to uphold the United States Constitution, where an injunction is sought by the vacant offices to prohibit the use and operation of a shooting range in violation of the 2nd Amendment right to bear arms?

Subsidiary question 1 – Whether the Supreme Court has jurisdiction to review the decisions of Indiana State courts that apply the *de facto* officer doctrine, where the individuals claiming to hold vacant offices violate a protected constitutional right?;

Subsidiary question 2 – Whether the failure to take an oath to uphold the Constitution of the United States is a constitutional structural error, where the individuals claiming to hold vacant offices initiate a court action to prohibit the 2nd Amendment right of persons to use and operate a shooting range?; and

Subsidiary question 3 – Whether the *de facto* officer doctrine can be applied to individuals claiming to hold vacant offices, where the offices are vacant per Indiana law?

**PARTIES TO THE
PROCEEDING IN STATE COURT**

Plaintiff/Appellee – Jefferson County Plan Commission;
Defendant/Appellant – Joseph Chapo;
Defendant/Appellant – Sherry Chapo; and
Defendant Appellant – Deputy Big Shot LLC.

CORPORATE DISCLOSURE STATEMENT

The Petitioner Deputy Big Shot LLC¹ is organized under the State of Indiana as a Domestic Limited Liability Company and has no parent corporation and no publicly held company is a member of the LLC.

¹ The Registered name is Deputy Big Shot LLC in the Indiana Secretary of State records and its Articles of Incorporations. When the Amended Complaint was filed, however, the caption incorrectly listed it as Deputy Big Shot, LLC. The Caption in every court since then has used Deputy Big Shot, LLC, instead of its correct name, Deputy Bigshot LLC.

**PROCEEDINGS IN INDIANA CIRCUIT COURT
AND COURT OF APPEALS**

The Jefferson County Circuit Court Order on Defendant's Motion to Dismiss and Plaintiff's Citation for Contempt, *Jefferson County Plan Commission v. Joseph Chapo, Sherry Chapo, and Deputy Big Shot, LLC*, No. 39C01-1605-CT-380 (October 17, 2017), Appx. A, at beginning at Appx. 1a.

The Opinion of the Court of Appeals in the interlocutory appeal upholding the Circuit Court preliminary injunction is unpublished, *Joseph Chapo and Sherry Chapo v. Jefferson County Plan Commission*, 39A05-1612-CT-2840, 102 N.E.3d 354 (Ind. App. May 29, 2018).²

The Order of the Jefferson County Circuit Court denying the Rule 60(B)(6) is unpublished, *Jefferson County Plan Commission v. Joseph Chapo and Sherry Chapo*, Jefferson County Circuit Court, No. 39C01-1605-CT-380 (November 25, 2019), Appendix (hereinafter referred to as Appx.) B, beginning at Appx. 11a.

The Order of the Jefferson County Circuit Court denying Motion to Correct Error is unpublished, *Jefferson County Plan Commission v. Joseph Chapo and Sherry Chapo and Deputy Big Shot, LLC*, Jefferson County Circuit Court, No. 39C01-1605-CT-380 (April 17, 2020), Appx. C, at beginning at Appx. 14a.

² The question presented to the Supreme Court deals only with the question of applying the *de facto* officer doctrine to vacant offices, where actions of the individuals claiming to hold the vacant offices are repugnant to the Constitution and a trespass upon the 2nd Amendment right to bear arms, not merely a misapplication of the Indiana law making an office vacant. Accordingly, because the appellate decision was not directly involved with the question of *de facto* officer doctrine, it is not included in the Appendix.

Opinion of the Court of Appeal upholding Circuit Court decision to deny the Rule 60(B)(6) Motion for Relief from Void Judgment, *Joseph Chapo, Sherry Chapo and Deputy Big Shot, LLC v. Jefferson County Plan Commission*, 20A-CT-1197, 164 N.E.3d 131 (Ind. App. January 22, 2021), Appx. D, beginning at Appx. 28a.

Indiana Supreme Court denial of Petition to Transfer with no discussion is unpublished, *Joseph Chapo; Sherry Chapo; Deputy Big Shot, LLC v. Jefferson County Plan Commission*, 20A-CT-1197 (May 27, 2021), Appx. E, beginning at Appx. 36a.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW.....	i
PARTIES TO THE PROCEEDING IN STATE COURT.....	ii
CORPORATE DISCLOSURE STATEMENT.....	ii
PROCEEDINGS IN INDIANA CIRCUIT COURT AND COURT OF APPEALS	iii
TABLE OF AUTHORITIES.....	viii
STATEMENT OF SUPREME COURT JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1
STATEMENT OF THE CASE	2
A. Nature of the Case and Lack of Jurisdiction of Jefferson Circuit Court	2
B. Course of Proceedings in Indiana Courts	5
STATEMENT OF RELEVANT FACTS	6
REASONS FOR GRANTING A WRIT OF CERTIORARI.....	11
I. Introduction	11
II. Question for Review.....	14
A. Introduction.....	14
B. Supreme Court Has Jurisdiction to Review the Decisions of State Courts.	15

TABLE OF CONTENTS—Continued

	Page
C. The Failure to Take an Oath to Uphold the Constitution of the United States is a Structural Error	20
D. The <i>De Facto</i> Officer Doctrine Cannot Be Applied to Offices Made Vacant by Indiana Law.....	24
CONCLUSION	31
APPENDIX	
APPENDIX A: ORDER ON DEFENDANT’S MOTION TO DISMISS, AND PLAINTIFF’S CITATION FOR CONTEMPT, State of Indiana, Jefferson County Circuit Court (October 17, 2017)	1a
APPENDIX B: ORDER, State of Indiana, Jefferson County Circuit Court (November 25, 2019)	11a
APPENDIX C: ORDER, State of Indiana, Jefferson County Circuit Court (April 17, 2020)	14a
APPENDIX D: OPINION, Indiana Court of Appeal (January 22, 2021).....	28a
APPENDIX E: ORDER, Indiana Supreme Court (May 27, 2021)	36a

TABLE OF CONTENTS—Continued

	Page
APPENDIX F: RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	38a
Amendment II to the United States Constitution	38a
Amendment XIV Clause 1 to the United States Constitution.....	38a
IC § 5-4-1-1.....	39a
IC § 5-4-1-1.2.....	40a
Indiana Rules of Trial Procedure, Rule 60(B)	41a
Article I, Section 26, to the Indiana Constitution	44a
Article I, Section 32, to the Indiana Constitution	44a
Article 6, Section 9 to the Indiana Constitution	44a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Arizona v. Fulminante</i> , 499 U.S. 279 (1991).....	22
<i>Ayers v. Porter County Plan Commission</i> , 544 N.E.2d 213 (Ind.App. 1989).....	19
<i>Carty v. State</i> , 421 N.E.2d 1151 (Ind.App.1981).....	18, 27, 28
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	22
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011).....	<i>passim</i>
<i>Ezell v. City of Chicago</i> , 846 F. 3d 888 (7th Cir. 2017).....	18
<i>Fields v. State</i> , 91 N.E.3d 597 (Ind. Ct. App. 2017).....	21, 26, 27, 28
<i>Freytag v. Commissioner</i> , 501 U.S. 868 (1991).....	22
<i>Glidden Co. v. Zdanok</i> , 370 U.S. 530 (1962).....	18, 21
<i>Joseph Chapo and Sherry Chapo v. Jefferson County Plan Commission</i> , 39A05-1612-CT-2840,102 N.E.3d 354 (Ind. App. May 29, 2018).....	4, 19
<i>Joseph Chapo, Sherry Chapo and Deputy Big Shot, LLC v. Jefferson County Plan Commission</i> , 20A-CT-1197, 164 N.E.3d 131 (Ind. App. January 22, 2021).....	<i>passim</i>

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Joseph Chapo; Sherry Chapo; Deputy Big Shot, LLC v. Jefferson County Plan Commission</i> , 20A-CT-1197 (May 27, 2021).....	1, 2, 6
<i>McDonald v. City of Chicago, Illinois</i> , 561 U.S. 742, 130 S.Ct. 3020 (2010).....	22
<i>Morten v. City of Aurora</i> , 96 Ind. App. 203, 182 N.E. 259 (1932)	29
<i>Murray v. Conseco, Inc.</i> , 795 N.E.2d 454 (Ind. 2003).....	25
<i>Needham v. Suess</i> , 577 N.E.2d 965 (Ind.App. 4 Dist. 1991) ...	25
<i>Norton v. Shelby County</i> , 118 U.S. 425 (1886).....	16, 17, 18, 21
<i>Ryder v. United States</i> , 515 U.S. 177, 115 S.Ct. 2031 (1995).....	<i>passim</i>
<i>Sauer v. Board of Zoning Appeals</i> , 629 N.E.2d 893 (Ind.App. 1994)	19
<i>Scudder v. State</i> , 124 N.E.3d 638 (Ind.App. 2019)	25
<i>State ex rel. Schroeder v. Morris</i> , 199 Ind. 78, 155 N.E. 198 (Ind. 1927)	25
<i>United States v. Royer</i> , 268 U.S. 394 (1925).....	29, 30
<i>Weaver v. Massachusetts</i> , 137 S.Ct. 1899 (2017).....	22

TABLE OF AUTHORITIES—Continued

CONSTITUTION	Page(s)
U.S. Const. art. II, §2, cl. 2.....	21
U.S. Const. amend. II.....	<i>passim</i>
U.S. Const. amend. XIV	22, 23, 32
U.S. Const. amend. XIV, cl. 1.....	2, 22
Ind. Const. art. I, § 26	2, 23
Ind. Const. art. I, § 32	2, 23
Ind. Const. art. 6, § 9.....	2, 27, 30
Ind. Const. art. 15, § 2.....	26
STATUTES	
28 U.S.C. §1257(a).....	1, 12
IC §5-4-1-1	<i>passim</i>
IC §5-4-1-1(a).....	26
IC §5-4-1-1.2	2, 5, 28
IC §5-4-1-1.2(c)	<i>passim</i>
IC §5-4-1-1.2(d)	<i>passim</i>
Indiana Shooting Range Protection Act (1996), IC §§14-22-31.5-1--14-22-31.5-7	7, 9, 32
Ind. P.L.26-2000, SEC.32.....	28
RULES	
Fed. R. Civ. P. 12(b).....	9, 10
Fed. R. Civ. P. 12(b)(6)	10
Ind. Code of Jud. Cond. 2.2	23

TABLE OF AUTHORITIES—Continued

	Page(s)
Ind. R. App. P. 5	5
Ind. R. Trial P. 60(B).....	<i>passim</i>
Ind. R. Trial P. 60(B)(2).....	11
Ind. R. Trial P. 60(B)(6).....	5, 6, 10, 11
Ind. R. Trial P. 60(C).....	5
Sup. Ct. R. 10.....	12
Sup. Ct. R. 10(c).....	12, 16

PETITION FOR WRIT OF CERTIORARI

The Petitioners Joseph Chapo, Sherry Chapo and Deputy Big Shot LLC respectfully submit this Petition for a Writ of Certiorari to review the January 22, 2021 judgment of the Indiana Court of Appeals and the subsequent May 27, 2021 denial of their Petition for Transfer to the Supreme Court of Indiana.

STATEMENT OF SUPREME COURT JURISDICTION

The Supreme Court has jurisdiction pursuant to 28 U.S.C. §1257(a), which states in pertinent part,

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The Petitioners Joseph Chapo, Sherry Chapo and Deputy Big Shot LLC are respectfully petitioning for a Writ of Certiorari to review the judgment of the Indiana Court of Appeals opinion upholding Circuit Court decision denying the Rule 60(B) Motion, *Joseph Chapo, Sherry Chapo and Deputy Big Shot, LLC v. Jefferson County Plan Commission*, 20A-CT-1197, 164 N.E.3d 131 (Ind. App. January 22, 2021), Appx. D, beginning at Appx. 28a, and the subsequent denial of their Petition for Transfer to the Supreme Court of Indiana, *Joseph Chapo; Sherry Chapo; Deputy Big Shot*,

LLC v. Jefferson County Plan Commission, 20A-CT-1197 (May 27, 2021), Appx. E, beginning at Appx. 36a.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The relevant Constitutional and statutory material is set forth in Appx. F, beginning at Appx. 38a. They are as follows:

1. Amendment II to the United States Constitution, Appx. 38a;
2. Amendment XIV Clause 1 to the United States Constitution, Appx. 38a;
3. IC §5-4-1-1, Appx. 39a;
4. IC §5-4-1-1.2; Appx. 40a
5. Indiana Rules of Trial Procedure, Rule 60(B), Appx. 41a;
6. Article I, Section 26, to the Indiana Constitution, Appx. 44a;
7. Article I, Section 32, to the Indiana Constitution, Appx. 44a; and
8. Article 6, Section 9 to the Indiana Constitution, Appx. 44a.

STATEMENT OF THE CASE

A. Nature of the Case and Lack of Jurisdiction of Jefferson Circuit Court.

This case originated as a civil case brought by the Jefferson County Plan Commission (hereinafter referred to as JCPC) to seek an injunction against Defendants Joseph Chapo and Sherry Chapo to prohibit them from using and operating a shooting range on their prop-

erty. Deputy Big Shot LLC was subsequently added as a defendant in an Amended Complaint. The Jefferson County Court issued an Order on Defendants' Motion to Dismiss and Plaintiff's Citation for Contempt on October 17, 20017.

Despite the fact that the Jefferson County Zoning Ordinance (JCZO) did not have any provisions regarding shooting ranges, the Circuit Court found:

9. There is no evidence that the JCZO is an ordinance that was enacted with the explicit intent to target or restrict the Second Amendment rights of any individual or entity.

10. There is no evidence that the JCZO is an ordinance that has been applied to act as an explicit or de facto ban on shooting ranges in Jefferson County.

See Appx. 5a.

The main issue raised by the Chapos to the Circuit Court was there was no provision regarding shooting ranges in the JCZO, yet the Jefferson County Board of Zoning Appeals (JCBZA) made an *ad hoc* decision to include shooting ranges and the JCPC sought an injunction to prohibit the shooting ranges.

Without citing any shooting range provision in the JCZO, the Circuit Court specifically ordered the following:

The Chapos shall immediately cease and desist in the operation of a tactical and test firing shooting range at the Property, regardless of whether said operation is occurring in an individual capacity or by and through the operation of Big Shot, an entity under their exclusive ownership and control. The Chapos shall take all necessary steps to prevent any

other person or entity from operating a tactical and test firing shooting range at the Property, regardless of whether said operation is occurring in an individual capacity or by and through the operation of a business entity.

See October 17, 2017 Order, Appx. A, 10a.

Subsequent to the October 17, 2017, order and the May 29, 2018, opinion of the Court of Appeal upholding the preliminary injunction, it was discovered that the offices of the JCPC were vacant. A preliminary injunction was issued against the Defendants.¹ The Court of Appeals upheld the preliminary injunction, see Footnote 2, at page iii, above.

During the course of the proceedings the Defendants were informed by the Jefferson County Clerk there was no record of the individuals claiming to hold the JCPC offices had taken and deposited the oaths of office as required by IC §5-4-1-1.2(d). Consequently, the Jefferson County Circuit Court lacked jurisdiction because the offices of the JCPC, at the time of the filing of the Complaint and the subsequent Amended Complaint, were vacant as a matter of law per IC §5-4-1-1.2(d).

¹ The question presented to the Supreme Court deals only with the question of applying the *de facto* officer doctrine to vacant offices, where actions of the individuals claiming to hold the vacant offices are repugnant to the Constitution and a trespass upon the 2nd Amendment right to bear arms, not merely a misapplication of the Indiana law making an office vacant. Accordingly, because the appellate decision was not directly involved with the question of *de facto* officer doctrine, it is not included in the Appendix.

The Indiana Court of Appeals had jurisdiction to review a denial of a Rule 60(B) pursuant to Trial Rule 60(B). Trial Rule 60(C) declares a denial of a Rule 60(B) motion a final judgment, which allows it to be appealed as a final judgment. Indiana Appellate Rule 5 gave jurisdiction over the appeal of final judgments.

B. Course of Proceedings in Indiana Courts.

During the course of proceedings, the Defendants discovered that the alleged officers of the JCPC had violated IC §§5-4-1-1 and 5-4-1-1.2, by not taking an oath under §5-4-1-1, which required an “oath to support the Constitution of the United States and the Constitution of the State of Indiana, and that the officer or deputy will faithfully discharge the duties of such office.” §5-4-1-1.2(c) mandated the oath under §5-4-1-1 be taken by individuals appointed “to an office of a political subdivision” “not later than thirty (30) days after the beginning of the term of office.” §5-4-1-1.2(d) provided that if the individual “does not comply with subsection (c), the office becomes vacant.”

Upon the discovery that the individuals claiming to hold the JCPC offices had not taken the mandated oath of office, it became evident that as a matter of law the JCPC were vacant, because the individuals claiming to hold the JCPC offices did not comply with §5-4-1-1.2(c). The Defendants filed a Rule 60(B)(6) motion seeking relief from a void judgment due to the JCPC offices being vacant and not having standing to initiate a court action. The Rule 60(B) motion was denied (Appx. B, starting at Appx. 11a.) and the Motion to Correct Error was also denied (Appx. C, starting at Appx. 14a). The Defendants appealed per Trial Rule 60(C) and Indiana Appellate Rule 5.

The Court of Appeals upheld the Jefferson County Circuit Court decision to deny the Rule 60(B)(6) Motion (Appx. D, starting at Appx. 28a) and the Petition to Transfer to the Supreme Court of Indiana was denied (Appx. E, starting at Appx. 36a). The Defendants in the Indiana case now Petition the Supreme Court of the United States for a Writ of Certiorari.

STATEMENT OF RELEVANT FACTS

The Petitioners (Defendants in the state case) Joseph Chapo and Sherry Chapo are residents of Jefferson County, Indiana. The Chapos are the owners of the property at 10214 W. Deputy Pike Road, Deputy Indiana 47230. They have owned the property since 1991.

Shortly after they took possession of the property in 1991, the Chapos built and began to use and operate a shooting range. They continued to use and operate the shooting range since it was constructed. At the time of the initial construction there was no ordinance regulating shooting ranges, nor is there currently any ordinance regulating shooting ranges.

The case of *Ezell v. City of Chicago*, 651 F.3d 684, 708 (7th Cir. 2011) ruled that a ban on shooting ranges was “a serious encroachment on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.” The *Ezell* decision was decided on July 6, 2011.

Petitioner Deputy Big Shot LLC is a Limited Liability Company organized under the laws of Indiana on October 23, 2012. Deputy Big Shot began leasing the shooting range on 10214 W. Deputy Pike Road, Deputy Indiana 47230 on October 24, 2012.

On November 7, 2012, the Jefferson County Board of Zoning Appeals (JCBZA), without citing any ordinance regarding shooting ranges, denied a Conditional Use Application for the Chapos' shooting range solely because of noise. The denial was made by a majority of the JCBZA in spite of the ruling in *Ezell, supra*. The denial was also made even though Wilson, the Zoning Enforcement Officer, made it clear at the November 7, 2012 JCBZA hearing, "There is no ordinance on this [noise], we don't have any law on that." The denial was further made in violation of the Indiana Shooting Range Protection Act, which protected prior existing shooting ranges. Chairman Jacobson acknowledged the existence of the Chapos' shooting ranges.

After the Zoning Enforcement Officer issued an Order of Enforcement on April 6, 2016, Sherry Chapo responded on April 19, 2016 to the Order of Enforcement with a letter that informed the Zoning Enforcement Officer that "since 1991 the shooting range is an accessory use to our farm," and that Attorney Magrath, attorney for the JCPC, through an e-mail notified her that the JCPC was not able to locate any records regarding her Open Records request for a zoning ordinance provision regulating shooting ranges prior to 1996, when the Indiana Shooting Range Protection Act was passed, IC §§14-22-31.5-1 through 14-22-31.5-7.

Despite the known violation of the 2nd Amendment and the Indiana Shooting Range Protection Act, the individuals claiming to hold the offices of the JCPC, held a meeting on April 20, 2016 and voted to recommend litigation to the Jefferson County Board of Commissioners to prohibit the use and operation of the shooting range. None of the alleged members of the

JCPC had taken an oath to uphold the Constitution of the United States as required by IC §5-4-1-1.2(c).

The Jefferson County Board of Commissioners (JCBC) held a meeting on April 27, 2016 and did not act on the JCPC's recommendation for litigation. Without an approval from the JCBC and without having taken the required oath, the individuals claiming to hold the vacant offices of the JCPC caused the filing of a court action on May 25, 2016 to seek an injunction to prohibit the use and operation of a shooting range on Chapos' property. The Complaint was later amended to add Deputy Big Shot LLC.

A letter addressed to Sherry Chapo, dated February 25, 2019, from Jefferson County Clerk, Tabatha Eblen stated that no oaths of office were found in the Jefferson County Clerk's Office for any of the following individuals, Jeff Dagher, Lonnie Mason, Gene (Robert) Riedel, Norbert Schafer, Jerry Yancey, Dennis Bowyer, Virginia Franks, Warren Auxier, and Laura Boldery. These individuals claimed to hold the offices of the JCPC. The oath of office, pursuant to IC §5-4-1-1, also included an oath to uphold the Constitution of the United States Constitution and was mandated by §5-4-1-1.2(c), or the offices would be vacant per §5-4-1-1.2(d).

A second letter was addressed to Sherry Chapo, dated April 1, 2019, from Jefferson County Clerk, Tabatha Eblen stating that no oath of office for 2012 were found in the Jefferson County Clerk's Office for any of the following individuals, Robert Johnson, Virginia Franks, Jerry Yancy, Mike Shelton, and James Griffith. The oath of office, pursuant to §5-4-1-1, also included an oath to uphold the Constitution of the United States Constitution. These individuals claimed to hold the vacant offices of the JCBZA. A majority of

these individuals were the ones that voted to deny use of the shooting range in violation of the 2nd Amendment per *Ezell, supra*, and the Indiana Shooting Range Protection Act.

Through the discovery process, all of the individuals claiming to hold the offices of the JCPC admitted that they did not take an oath of office. All of the individuals claiming to hold the offices of the JCPC also admitted that they did not file an oath of office. Thus, they were all in violation of §5-4-1-1.2(c) and the JCPC offices were vacant pursuant to §5-4-1-1.2(d).

The Petitioners made a direct constitutional challenge to the authority of the alleged officers, when claiming to hold offices made vacant by Indiana law, to initiate an action to enjoin the 2nd Amendment core right to operate a shooting range,

The first time the Chapos raised the 2nd Amendment issue was on July 11, 2016, when they filed a Rule 12(b) Motion to Dismiss the original Complaint. It was then recommended by the senior judge for the Chapos to amend their motion and include an answer. The Chapos again raised the 2nd Amendment violation in their Amended Rule 12(b) Motion to Dismiss and Answer, which was filed on August 2, 2016. With Deputy Big Shot LLC now added as a defendant, the Petitioners again raised the 2nd Amendment, when they filed their Rule 12(b) Motion to Dismiss the Amended Complaint on February 1, 2017. In their conclusion of the section addressing the violation of the 2nd Amendment the Petitioners stated,

Thus, pursuant to both the *Ezell* cases, the attempt by the JCPC to enjoin the defendant from operating a shooting range is unconstitutional under the 2nd Amendment to the

United States Constitution. Because the Amended Complaint is attempting to violate the Defendants' 2nd Amendment right to bear arms, it fails to state a claim upon which the Court can grant relief. Accordingly, the Amended Complaint must be dismissed under Rule 12(B)(6).

The Rule 12(b) Motion to Dismiss was denied on October 17, 2017 in an order that did not address the 2nd Amendment issue raised in the Motion to Dismiss. The order specifically ordered the Chapos and Deputy Big Shot LLC to cease and desist "the operation of a tactical and test firing shooting range," either in an individual or an entity capacity. The Defendants were further ordered to "take all necessary steps to prevent any other person or entity from operating a tactical and test firing shooting range at the Property." See October 17, 2017 Order, Appx. A at Appx. 10a.

The 2nd Amendment issue was again referred to in the Rule 60(B)(6) Motion, which gave a reference the 2nd Amendment being raised in the concurrently filed Motion for Judgment on the Pleadings, which was filed the same day, April 19, 2019. The Motion for Judgment on the Pleadings was denied on November 25, 2019 without explanation. The reasons for the denial of the Motion for Judgment on the Pleadings were subsequently provided when the Circuit Court denied the Motion to Correct Error, Appx. C, beginning at Appx. 21a.

The direct challenge regarding the oath of office was made in the Rule 60(B)(6) Motion filed on April 19, 2019. The Petitioners specifically asserted the October 17, 2017 order, which explicitly prohibited them from operating a shooting range, was a void judgment because the JCPC had no standing due the JCPC

having vacant offices at the time the court action was filed. The Rule 60(B)(6) Motion was denied on November 25, 2019 without explanation. The reasons for the denial of the Rule 60(B)(6) Motion were subsequently provided when the Circuit Court denied the Motion to Correct Error, Appx. C. at Appx. 19a. The Circuit Court ruled the Rule 60(B)(6) Motion was not timely, because it rejected the Rule 60(B)(6), which was based on a void judgment, and improperly treated the motion as a Rule 60(B)(2), which is based on newly discovered evidence. The Circuit Court also incorrectly ruled that the direct challenge of the lack of oath was a collateral attack and improperly applied the *de facto* officer doctrine.

A summary judgment motion is before the Jefferson County Circuit Court pending the outcome of the appellate process for the Rule 60(B) Motion. Thus, neither a summary judgment, nor a trial, has addressed the facts of the case.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I. Introduction

Under existing Indiana law every officer of a political subdivision is mandated to take an oath of office, which includes an oath to uphold the Constitution of the United States, before entering into the office. not later than thirty (30) days after the beginning of the term of office, or the office becomes vacant. The 7th Circuit in *Ezell v. City of Chicago* ruled that prohibition of shooting ranges was a core right of the 2nd Amendment. Persons claiming to hold vacant offices initiated a court action to prohibit the Petitioner's shooting range in violation of the 2nd Amendment.

In addition to the jurisdiction requirements of the Supreme Court as stated above in 28 U.S.C. §1257(a), Petitioners Joseph Chapo, Sherry Chapo and Deputy Big Shot LLC (hereinafter referred to collectively as Petitioners). are also mindful of the criteria set forth in Supreme Court Rule 10 which are guides to determine whether the Court should review a decision of a state court. The criterium which is applicable in this case is Rule 10(c), which states:

a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court. A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

28 U.S.C. §1257(a) provides in pertinent part,

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

With these principles in mind, the Petitioners assert the actions of the individuals claiming to hold the vacant offices of the JCPC are repugnant to the Constitution and a trespass and infringement upon the Petitioners' 2nd Amendment right to bear arms, and are not merely a misapplication of the Indiana law making an office vacant. As detailed below, in light of Supreme Court decisions, the 2nd Amendment Right to bear arms, and the state courts' refusal to apply applicable law, structural constitutional error was committed. In upholding the ruling of the Jefferson County Circuit Court, the Indiana Court of Appeals opinion and Indiana Supreme Court's denial of the Petition for Transfer, the state courts failed to protect the Petitioners' 2nd Amendment right by ignoring the IRC §5-4-1-1.2(c) and (d), which declared local subdivision offices to be vacant when the individuals appointed to said offices failed to comply with taking the oath required under §5-4-1-1 within thirty days of the beginning of the term of office. The decisions of the Indiana courts departed from the normal and usual course of judicial proceedings by not conforming their decisions to the 2nd Amendment, the prevailing and relevant Supreme Court cases regarding the exception to the *de facto* officer doctrine, and Indiana law. The Petitioners also seek review of the important federal question of whether the *de facto* officer doctrine can be applied to vacant offices where the individual claiming to hold the vacant offices are making decisions directly abridging the Constitutional rights of citizens. This question of whether the *de facto* officer doctrine can be applied to vacant offices mandated by law has not yet been settled by this Court, especially where the claimed Constitutional rights are infringed.

II. Question for Review.

Whether the *de facto* officer doctrine can be applied to individuals claiming to hold a vacant office of a political subdivision made vacant by the General Assembly statute declaring the office vacant, if an appointed officer does not take the mandatory oath to uphold the United States Constitution, where an injunction is sought by the vacant offices to prohibit the use and operation of a shooting range in violation of the 2nd Amendment right to bear arms?

A. Introduction.

To reach an accurate response to the above question presented for review, three sub-questions must be answered. There are:

Subsidiary question 1 – Whether the Supreme Court has jurisdiction to review the decisions of Indiana State courts that apply the *de facto* officer doctrine, where the individuals claiming to hold vacant offices violate a protected constitutional right?;

Subsidiary question 2 – Whether the failure to take an oath to uphold the Constitution of the United States is a constitutional structural error, where the individuals claiming to hold vacant offices initiate a court action to prohibit the 2nd Amendment right of persons to use and operate a shooting range?; and

Subsidiary question 3 – Whether the *de facto* officer doctrine can be applied to individuals claiming to hold vacant offices, where the offices are vacant per Indiana law?

Because the responses to these three subsidiary questions are in the affirmative, it is clear that the response to the question presented must be negative, *i.e.*, the *de facto* officer doctrine cannot be applied to vacant offices that seek an injunction to prohibit a constitutionally protected 2nd Amendment right of the use and operation of a shooting range.

B. Supreme Court Has Jurisdiction to Review the Decisions of State Courts.

Subsidiary Question 1 – Whether the Supreme Court has jurisdiction to review the decisions of Indiana state courts that apply the *de facto* officer doctrine, where the individuals claiming to hold vacant offices violate a protected constitutional right?

The pivotal factor in the question presented for a Writ of Certiorari is the application of the *de facto* officer doctrine to individuals claiming to hold vacant offices and making decisions that directly and adversely affect the core 2nd Amendment right to maintain proficiency of firearms through the use and operation of a shooting range. The Indiana courts erroneously upheld the application of the *de facto* officer status to individuals who caused a court action to seek an injunction to prohibit the use and operation of a shooting range of the Petitioners. The injunction is a violation of the 2nd Amendment per *Ezell, supra*. In addition, the application of the *de facto* doctrine is in violation of the Indiana State law, which declares an office of a political subdivision vacant because the individual appointed to the office failed to take an oath of office, which included an oath to uphold the United States Constitution. Under these circumstances the question is, “Can the United States Supreme Court review decisions of the Indiana State courts, when the

Indiana Supreme Court denied the petition for Transfer from the Court of Appeal to the Supreme Court without comment?”

The Supreme Court has answered this question in the affirmative. *Norton v. Shelby County*, 118 U.S. 425, 439 (1886) addressed the application of the *de facto* officer doctrine in relation to the “eligibility and election or appointment of their officers.” The *Norton* court declined to review the state issue, because there was “no principle of the federal constitution, or of any federal law, is invaded, and no rule of general or commercial law is disregarded.” In reaching this decision the *Norton* Court recognized an exception to the refusal to review state court decisions by holding,

Upon the construction of the constitution and laws of a state, this court, as a general rule, follows the decisions of her highest court, ***unless they conflict with or impair the efficacy of some principle of the federal constitution, or of a federal statute, or a rule of commercial or general law.***

Thus, the Supreme Court in *Norton* has made it clear that it can entertain the review of a state court where the decision of the state court conflicts with, or impairs, “the efficacy of some principle of the federal constitution.” In this case it is the confliction, or impairment of the Petitioners’ 2nd Amendment core right to use and operate a shooting range.

The *Norton* exception has been formalized in the Supreme Court rule on its jurisdiction. Supreme Court Rule 10(c) states it may grant a Writ of Certiorari, when,

a state court or a United States court of appeals has decided an important question of

federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

The *Norton* decision was addressing the application of a *de facto* doctrine where the plaintiff in the state case was asserting the *de facto* officer status in the state court, *id.* at 435. While the *Norton* court did list the elements of the *de facto* officer doctrine, it declined to overturn the state court decision, because it did not involve a federal constitutional principle. See *Norton, supra*, 118 U.S. at 439, “In these cases no principle of the federal constitution, or of any federal law, is invaded, and no rule of general or commercial law is disregarded.” Petitioners, unlike the plaintiffs in *Norton*, are presenting a constitutional question, which involves a constitutional structural error as discussed below.

The Supreme Court in *Ryder v. United States*, 515 U.S. 177, 180 (1995) held that normally,

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.

The normal application of the *de facto* officer doctrine was rejected in the *Ryder* case. In rejecting the application of the *de facto* officer doctrine, the *Ryder* court, however, also held that the *de facto* officer doctrine is generally not applicable to a timely constitutional challenge, *Ryder*, 515 U.S. at 182-183,

We think that one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of

the question and whatever relief may be appropriate if a violation indeed occurred.

The case of *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) also declined to apply of the *de facto* officer doctrine by noting the prior cases addressing the *de facto* officer doctrine did not involve “basic constitutional protections designed in part for the benefit of litigants.” In other words, the *Glidden* court ruled that the *de facto* officer doctrine cannot be used to validate actions of individuals whose appointments were directly challenged because of constitutional issues.

Indiana law is consistent with these three Supreme Court cases. In *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind.App.1981) the court held, “The validity of a de facto officer’s acts may only be challenged directly against the individual who purports to hold the office.” The Petitioner did directly challenge the validity of the individuals claiming to hold the vacant offices of the JCPC. Furthermore, the direct challenge was made to protect their constitutional rights under the 2nd Amendment.

The exceptions recognized by *Norton*, *Ryder*, *Glidden* and *Carty* cases were not applied by the Indiana courts. When the Circuit Court denied the Motion to Correct Error at ¶6 in Appx. 26a, the Court stated,

The constitutional claims have previously been addressed in prior court hearings and orders. A set of zoning regulations that have the effect of limiting where a shooting range may be located do not run afoul of the protections on the Second Amendment. *Ezell I*, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Ezell II*, *Ezell v. City of Chicago*, 846 F. 3d 888 (71h Cir. 2017). No evidence that

the Jefferson County Zoning Ordinance as applied has the effect of severely restricting the rights of the citizens of Jefferson County in firearm use.

There are two obvious and critical errors in the foregoing statement by the Circuit Court. First, the constitutional claims raised were never addressed in any order by the Circuit Court, nor by Court of Appeals in the interlocutory appeal decided on May 29, 2018, see *Chapo v. Jefferson County Plan Commission*, 39A05-1612-CT-2840, 102 N.E.3d 354 (Ind. App. May 29, 2018).

Second, there is, and has been, no zoning regulation relating to shooting ranges. The denial of the shooting range by the JCBZA was an *ad hoc* decision forbidden by Indiana case law. See *Sauer v. Board of Zoning Appeals*, 629 N.E.2d 893, 897-898 (Ind.App. 1994), in which the court found that it is a derogation of the common law to restrict the free use of property. Such an ordinance must be strictly construed. The *Sauer* court also stated that it would “construe the ordinance to favor the free use of land and will not extend restrictions by implications.” At page 899 the *Sauer* court further stated, “A Zoning Board may not on an ad hoc basis impose a condition or requirement not contained in the zoning ordinance.” See also *Ayers v. Porter County Plan Commission*, 544 N.E.2d 213, 219 (Ind.App. 1989).

Accordingly, the holding by the Circuit Court that there was, “No evidence that the Jefferson County Zoning Ordinance as applied has the effect of severely restricting the rights of the citizens of Jefferson County in firearm use,” was categorically not supported by the record.

The bottom line is, the infringement and/or abridgment of the Petitioners' 2nd Amendment right to bear arms in the denial of the core right to the use of a shooting range were completely sidestepped by both the Circuit Court and the Court of Appeals.

Thus, in light of the foregoing, the response is clear to,

Subsidiary Question 1 – Whether the Supreme Court has jurisdiction to review the decisions of Indiana state courts that apply the *de facto* officer doctrine, where the individuals claiming to hold vacant offices violate a protected constitutional right?

When the actions of the alleged *de facto* officers seek to limit a constitutionally protect right, *i.e.*, the core right of the 2nd Amendment to maintain proficiency in the operation of firearms, the Supreme Court of the United States has jurisdiction to grant a Writ of Certiorari to review a state court decision violating that constitutional right.

C. The Failure to Take an Oath to Uphold the Constitution of the United States is a Structural Error.

Subsidiary Question 2 – Whether the failure to take an oath to uphold the Constitution of the United States is a constitutional structural error, where the individuals claiming to hold the vacant offices initiate a court action to enjoin the use and operation of a shooting range?

The Indiana Court of Appeals in Appx. D, at Appx. 32a to 33a, incorrectly agreed with the JCPC that its members qualified as *de facto* officers. The Court of

Appeals quoted the *de facto* officer doctrine as stated in *Ryder*, see the *Ryder* quote *supra*. The opinion then quoted *Fields v. State*, 91 N.E.3d 597, 600 (Ind. Ct. App. 2017), which also quoted *Ryder*,

This doctrine “springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite ***technical defects*** in title to office.” *Ryder*, 515 U.S. at 180-81, 115 S.Ct. 2031.

(Emphasis added)

The Indiana Court of Appeals opinion did not regard the exception used by the *Norton* court, or the *Ryder* court. The *Norton* court exception applied, when “the efficacy of some principle of the federal constitution” is present. The *Ryder* court exception held that the *de facto* officer doctrine is “not applicable to a timely constitutional challenge.” A third Supreme Court case, *Glidden Co.*, *supra*, 370 U.S. at 536, ruled that when “basic constitutional protections designed in part for the benefit of litigants,” are involved the *de facto* officer doctrine is not applicable. In other words, where there is a constitutional challenge and/or a constitutional infringement, the *de facto* officer doctrine is to be rejected.

In addressing the Appointments Clause in the United States Constitution at Article II, §2, clause 2, the *Ryder* court declared,

The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it “preserves

another aspect of the Constitution’s **structural integrity** by preventing the diffusion of the appointment power.” *Freytag v. Commissioner*, 501 U.S. 868, 878 (1991)

(Emphasis added)

The failure to preserve the “structural integrity” is otherwise known as a structural error. In *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017) the *Weaver* court held, “the defining feature of a structural error is that it “affect[s] the framework within which the trial proceeds,” rather than being “simply an error in the trial process itself,” citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). The court in *Fulminante*, 499 U.S. at 294 also equated “structural error” with “structural integrity,” when it strikes “at fundamental values of our society.”

The 2nd Amendment is a fundamental value of our society. The 2nd Amendment protects the citizens’ inalienable “right of the people to keep and bear Arms, shall not be infringed.” The 14th Amendment to the United States also protects the state citizens, see *Ezell, supra*, 651 F3d at 690, citing *McDonald v. City of Chicago, Illinois*, 561 U.S. 742, 750 and 791, 130 S.Ct. 3020 (2010) (at page 750 “we hold that the Second Amendment right is fully applicable to the States,” and at page 791 “We therefore hold that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment right recognized in *Heller*”). The cite for *Heller* is *District of Columbia v. Heller*, 554 U.S. 570 (2008).

The 14th Amendment, Clause 1 states,

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. ***No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;*** nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(Emphasis added)

Thus, the 14th Amendment protects the Petitioners from the Indiana State courts' violation of their 2nd Amendment right.

In addition, the Indiana Constitution's Bill of Rights, Article I, Section 32 also protects the Indiana citizen, *i.e.* "The people shall have a right to bear arms, for the defense of themselves and the State." The Indiana Bill of Rights further protects the rights of the citizen by stating at Section 26, "The operation of the laws shall never be suspended, except by the authority of the General Assembly." This means that the court cannot ignore the law in favor of a judicial decision.

It is a fundamental principle in Indiana that the law, as passed by the General Assembly, must be enforced. It cannot be ignored. This fundamental principle is contained in the Judicial Code of Conduct. Pursuant to Rule 2.2 a judge has a responsibility to uphold and apply the law. Indeed, Rule 2.2 specifically requires a judge to uphold and apply the law. By failing to apply the law, *i.e.*, IC §5-4-1-1.2(c) and (d), the judges of the Indiana courts not only violated their responsibility, but they also committed structural error.

Since the failure to apply IC §5-4-1-1.2(c) and (d) incorrectly permitted the courts, both the Jefferson

County Circuit Court and the Indiana Court of Appeals, to apply the *de facto* officer status to individuals who failed to take an oath to uphold the Constitution of the United States, the Petitioners were denied their protection of the 2nd Amendment right to operate a shooting range. The Indiana courts in effect suspended the operation of IC §5-4-1-1.2 (c) and (d), Thus, the failure of the individuals to take an oath to uphold the United States Constitution, when the offices they were claiming to hold were vacant, is not a technical defect, but a constitutional structural error.

Thus, based on the foregoing, the response is clear to,

Subsidiary question 2 – Whether the failure to take an oath to uphold the Constitution of the United States is a constitutional structural error, where the individuals claiming to hold vacant offices initiate a court action to prohibit the 2nd Amendment right of persons to use and operate a shooting range?

Where a constitutional right is infringed by the actions of individuals not taking an oath to the United States Constitution, a constitutional structural error is present.

D. The *De Facto* Officer Doctrine Cannot Be Applied to Offices Made Vacant by Indiana Law.

Subsidiary question 3 – Whether the *de facto* officer doctrine can be applied to individuals claiming to hold vacant offices, where the offices are vacant per Indiana law?

While the *de facto* officer doctrine is well established and is normally applicable where there is a technical defect in the appointment of an officer, it is not, however, applicable where there is a constitutional structural error. The *de facto* officer doctrine has never been used by any court to deny relief to a defendant facing the infringement of a constitutional right by an alleged plaintiff, which has vacant offices. And nothing in the principles or history of the *de facto* officer doctrine justify what the Jefferson County Circuit Court and the Indiana Court of Appeals did, *i.e.*, by-pass the law that made the offices of JCPC vacant.

The Indiana courts are unanimous in declaring that the courts are not above the law. See the following: *Needham v. Suess*, 577 N.E.2d 965, 968 (Ind.App. 4 Dist. 1991) (“As no court is above the law, and as all courts must enforce the law as it is written.”); *Scudder v. State*, 124 N.E.3d 638, ¶11 (Ind.App. 2019) (“The judicial function is to apply the law as enacted by the legislature.”); *Murray v. Conseco, Inc.*, 795 N.E.2d 454, 457 (Ind. 2003); and (“However, as the Court of Appeals pointed out, public policy is a matter for the General Assembly subject only to constitutional limitations on legislative authority. On this issue the General Assembly’s expression of its policy is quite clear.”).

There is a truism that says, “What Congress gives, it can take away.” This principle has long been recognized in Indiana. See *State ex rel. Schroeder v. Morris*, 199 Ind. 78, 87, 155 N.E. 198 (Ind. 1927),

The city, its officers, whether elective or appointive, of whatever grade, must take notice that the legislative authority, except as restrained by the Constitution, “is at all times

absolute with respect to all offices within its reach. It may at pleasure create or abolish them, or modify their duties.” It may also shorten or lengthen the term of any office created by it not longer than four years. Art. 15, § 2, Indiana Constitution.

The General Assembly of Indiana created the offices of the JCPC. Through the enactment of IC §5-4-1-1(a) it required all officers of a political subdivision to take an oath to uphold the Constitution of the United States.

Indiana courts have held that the failure of an officer to take the required oath under IC §5-4-1-1 is a “technical defect.” See *Fields v. State*, 91 N.E.3d 597, 600 (Ind. Ct. App. 2017). As support for its use of the term “technical defect” the *Fields* quoted Supreme Court case of *Ryder, supra*. *Fields* court stated at page 600,

This doctrine “springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office.” *Ryder*, 515 U.S. at 180-81, 115 S.Ct. 2031.

The *Fields* decision did not address the *Ryder* exception to the application of the *de facto* officer doctrine. That exception is cited above, where the *Ryder* court ruled that the *de facto* officer doctrine is not applicable when there is a timely constitutional challenge, *Ryder, supra*, 515 U.S. at 182-183. ***The Fields case also did not involve the office of a political subdivision. Nor did it involve a con-***

stitutional infringement or challenge. Thus, the *Fields* case did not address, or apply IC §5-4-1-1.2(c) and (d).

Through IC §5-4-1-1.2(c) and (d), the General Assembly mandated that all appointed officers of political subdivisions take an oath within thirty days of the beginning of the term of office, or the office became vacant. As a result of individuals appointed to the JCPC offices not taking the oath to uphold the Constitution of the United States within thirty days required by §5-4-1-1.2(c), the JCPC offices became vacant as a matter of law per §5-4-1-1.2(d). The Constitution of Indiana required that vacant office can only be filled by the appointing authority, see Indiana Constitution, Article 6, Section 9, which mandated that vacancies be filled pursuant to law (“Vacancies in county, township, and town offices, shall be filled in such manner as may be prescribed by law). None of the vacant JCPC offices were filled pursuant to the Indiana Constitution or Indiana law. As a result, the failure to apply IC §5-4-1-1.2(c) and (d) is a constitutional structural error as discussed in the previous section.

Furthermore, the court in *Fields, supra*, 91 N.E.3d at 598 in applying the “technical defect” language reached its conclusion by citing *Carty, supra*, for the elements of a *de facto* officer, *Fields, supra*, 91 N.E.3d at 600. But *Carty, supra*, 421 N.E.2d at 1154, specifically held “One who holds office under the color of an election or an appointment and discharges the purported duties of office in full view of the public ***without being an intruder or usurper***, is at least a *de facto* official.” (Emphasis added).

Here the individuals claiming to hold the vacant JCPC offices were not appointed to the offices after the vacancy. Thus, they were usurpers per *Carty*.

The *Carty* decision was made in 1981, just after IC §5-4-1-1.2 was enacted in 1980. The original §5-4-1-1.2 only covered “officers.” It was, however, amended by P.L.26-2000, SEC.32 by adding individuals “appointed.” Thus, the current version of §5-4-1-1.2 is applicable to appointed individuals and their offices are made vacant if they do not take the oath to uphold the Constitution as mandated by law. Thus, the individual claiming to hold the vacant offices of the JCPC are usurpers according to §5-4-1-1.2 and *Carty*.

Neither *Carty*, nor *Fields* addressed §5-4-1-1.2, because neither were dealing with vacant offices, nor were they dealing with officers of a political subdivision. Yet the Jefferson County Circuit, in its April 17, 2020 Order, instead of applying §5-4-1-1.2, which specifically addressed vacant offices and officers of a political subdivision, relied on both *Carty* and *Fields*. See Appx. 20a-21a. The same is true for the Court of Appeals Opinion, Appx.33a. In its January 22, 2021 opinion, it also relied on *Fields* and *Carty*. Contrary to the April 20th Order of the Circuit Court and the January 22nd Opinion of the Court of Appeals, *Carty* and §5-4-1-1.2 clearly establish individuals claiming to hold vacant offices are usurpers. Thus, they do not meet the qualifications of *de facto* officers.

Because there is a constitutional structural error due to the failure of the individuals to take an oath to the United States Constitution where there is a direct constitutional challenge and an infringement of a right guaranteed by the Constitution, the application of the *de facto* officer doctrine cannot be applied to the vacant JCPC offices. The *de facto* officer doctrine does

not fill the vacancies pursuant to the law. The *de facto* officer doctrine is not applicable. Thus, the individuals claiming to be officers of the vacant JCPC, with having not been appointed after the vacancy occurred are usurpers.

The Court of Appeals in its January 22, 2021 opinion actually agreed with the Petitioners that a usurper cannot be a *de facto* officer. See Appx. 34a,

The Chapos argue the JCPC members “were usurpers and not entitled to the status of de facto officers[.]” Appellant’s Reply Br. p. 9. ***To be sure, a usurper cannot be a de facto officer. Morten v. City of Aurora***, 96 Ind. App. 203, 182 N.E. 259, 262 (1932). ***But a usurper is “one who intrudes himself into an office which is vacant, or ousts the incumbent, without any color of title[.]”*** *Id.* (citation omitted). And here, the JCPC members were appointees with color of title, as explained above. They are not usurpers. (Emphasis added)

Unfortunately, The Court of Appeals in its January 22, 2021 opinion at Appx. 34a cited *United States v. Royer*, 268 U.S. 394, 397-398 (1925) to support its erroneous conclusion that the individuals claiming to be JCPC member were not usurpers. The Court of Appeals used *Royer* for authority to apply the *de facto* officer doctrine to a vacant office. *Royer* does not, however, support the Court of Appeals conclusion for two reasons. First, *Royer* was “ordered by competent authority to assume the rank of major,” *id.* at 396. In the Petitioners’ case there was no competent authority appointing the individuals claiming to the vacant JCPC office. Since the JCPC offices were vacant as a matter of law per §§5-4-1-1.2(c) and (d), the individu-

als claim to the offices had no color of title as did Royer. The only way they could have color of title to the offices was to be appointed to the vacant office as required by the Indiana Constitution. See Indiana Constitution, Article 6, Section 9 at Appx. 44a.

Second, the *Royer* court also did not involve a constitutional infringement. In the Petitioners' case the 2nd Amendment was abridged by the individuals claiming to hold vacant offices. Thus, the Court of Appeals reliance on *Royer* was misplaced.

While the individuals claiming the vacant JCPC offices were usurpers, they initiated a court action for an injunction against the Petitioners to prohibit them from operating a shooting range in violation of the 2nd Amendment, a constitutional error was committed and the *de facto* officer doctrine is not applicable to them.

The truism quoted above has equal application and force through the doctrine of separation of powers. A corollary to the maxim is, "What the General Assembly takes away, the court cannot give back." The General Assembly, which is the legislative authority of Indiana, unless restrained by the Constitution, "is at all times absolute with respect to all offices within its reach."

Here, the General Assembly, through IC §§5-4-1-1.2(c) and (d), mandated that officers of a political subdivision take an oath of uphold the Constitution of the United States, or the office would be vacant. Under the separation of powers doctrine, the General Assembly has the sole power to take away the ability to hold an office. The courts have no power to give the office back to the violator.

Thus, in light of the foregoing, the response to,

Subsidiary question 3 – Whether the *de facto* officer doctrine can be applied to individuals claiming to hold vacant offices, where the offices are vacant per Indiana law?

is also clear. Where an office of a political subdivision is made vacant by law, because of a failure to take an oath to uphold the Constitution of the United States and constitutional right is infringed by the actions of individuals not taking an oath, the vacancy cannot be filled by the *de facto* officer doctrine.

CONCLUSION

The Petitioners Joseph Chapo, Sherry Chapo and Deputy Big Shot LLC, have shown the three subsidiary questions have affirmative responses. They have shown that the Supreme Court has jurisdiction to grant a Writ of Certiorari to review a state court decision where a state court commits a constitutional error that limits the 2nd Amendment right to bear arms by prohibiting the operation of a shooting range.

The Petitioners have also shown where a constitutional right is infringed by the actions of individuals not taking an oath to the United States Constitution, a constitutional structural error is present.

Finally, the Petitioners have shown Indiana law mandates officers appointed to political subdivisions to take an oath to uphold the Constitution to the United States, or the offices become vacant. Where an office of a political subdivision is made vacant by law, because of a failure to take an oath to uphold the Constitution of the United States and a constitutional right is infringed by the actions of an individual not

taking an oath, the vacancy cannot be filled by the *de facto* officer doctrine.

Thus, *de facto* officer status cannot be applied to individuals claiming to hold a vacant office of a political subdivision made vacant by a General Assembly statute making the office vacant, if an appointed officer does not take the mandatory oath to uphold the United States Constitution. This is especially true where an injunction is sought by the political subdivision with vacant offices to prohibit the use and operation of a shooting range in violation of the 2nd Amendment right to bear arms.

Because this is a question that touches all citizens affected by decisions of individuals that claim to hold vacant offices and that directly and adversely affect constitutional rights of the citizen, the question is an important issue that has not been decided, but should be settled by this Court.

In addition, the General Assembly passed the Shooting Range Protection Act in 1996 to preserve existing shooting ranges. The General Assembly also passed IC §§5-4-1-1.2(c) and (d) to safeguard the Indiana citizens' constitutional rights. To allow a state court to by-pass these important and vital protections sets a dangerous and unparalleled precedent to other state courts and leaves citizens, whose federal constitutional rights have been violated, with no recourse to protect their 14th Amendment rights, except the Supreme Court of the United States.

Accordingly, the Petitioners respectfully request the Supreme Court to grant their Petition for a Writ of Certiorari for the question and its subsidiary questions presented.

Respectfully submitted,

CHARLES E. MCFARLAND

Counsel of Record

338 Jackson Road

New Castle, KY 40050

(502) 845-2754

mcfarlandc@bellsouth.net

Counsel for Petitioners

August 25, 2021

APPENDIX

1a

APPENDIX A

STATE OF INDIANA
IN THE JEFFERSON CIRCUIT COURT

Cause No: 39C01-1605-CT-380

JEFFERSON COUNTY PLAN COMMISSION,
Plaintiff,

vs.

JOSEPH CHAPO, SHERRY CHAPO, and
DEPUTY BIG SHOT, LLC

Defendants.

Special Judge Jeffrey Sharp

October 17, 2017

ORDER ON DEFENDANT'S MOTION TO
DISMISS, AND PLAINTIFF'S
CITATION FOR CONTEMPT

This case submitted for hearing on September 7, 2017, to the Jefferson Circuit Court, Special Judge Jeffery Sharp presiding, on the Defendants' Motion to Dismiss Amended Complaint Filed on February 1, 2017 and on the Plaintiff's Amended Citation for Contempt and Motion for Enforcement filed July 14, 2017. The Plaintiff Jefferson County Plan Commission (the JCPC) appeared by Commission President, Lonnie Mason, and by counsel, Patrick

Magrath the Defendants Joseph and Sherry Chapo (the Chapos) appeared in person and by counsel, Charles McFarland, and the Defendant Deputy Big Shot, LLC Shot) appeared by owners, Joseph and Sherry Chapo, and by counsel, Charles McFarland.

Procedural History Relevant to Current Issues

1. On May 25, 2016, the JCPC filed a complaint against the Chapos for enforcement of the Jefferson County Zoning Ordinance (JCZO).
2. On July 11, 2016, the Chapos filed a Motion to Dismiss.
3. On August 9, 2016, the JCPC filed a Motion for Preliminary Injunction.
4. On October 12, 2016, the case was submitted for hearing to the Jefferson Circuit Court, Judge Darrell Auxier presiding.
5. On November 17, 2016, Judge Auxier issued an Order Granting Preliminary Injunction.
6. On November 23, 2016, Judge Auxier issued an Order Vacating the Preliminary Injunction citing his intent to recuse himself.
7. On November 23, 2016, Judge Auxier issued an Order Recusing himself to avoid the appearance of impropriety.
8. On December 5, 2016, Special Judge Sharp issued an Order accepting appointment.
9. On December 12, 2016, the Chapos filed a Motion to Stay the vacated November 17, 2016, Order Granting Preliminary Injunction.

10. On December 14, 2016, the case was submitted for hearing to the Jefferson Circuit Court, Special Judge Jeffery Sharp presiding, on all pending issues.
11. On December 20, 2016, the JCPC filed an amended complaint against the Chapos and Big Shot for enforcement of the JCZO.
12. On January 4, 2017, the Court issued an Order on all pending issues wherein:
 - a. The Chapos' Motion to Dismiss was denied.
 - b. The JCPC's Motion for Preliminary Injunction was granted.
 - c. The Chapos' Motion for Stay was denied.
13. On January 24, 2017, the Court of Appeals issued an Order granting the Chapos' request to tender an Amended Notice of Appeal to include the January 4, 2017 Order and denying the Chapos' Motion for Stay.

Findings of Fact

1. The Chapos are the owners of certain real property located at 10214 W. Deputy Pike Road, Jefferson County, Deputy, Indiana ("the Property").
2. The Complaint and Amended Complaint filed by the JCPC concisely states the JCPC's standing to bring this action for enforcement, the JCPC,s claim that the Chapos and Big Shot are putting the Property to a use that requires a conditional use permit, the JCPC's claim that the Chapos and Big Shot have failed to obtain the required permit

prior to proceeding with the use, and the JCPC's request for an injunction and fines.

3. On September 17, 2012, Chapos filed an application for conditional use to include "in the future and Indoor/Outdoor tactical and test firing range to be marketed to professional marksmen, law enforcement and light military forces in the region under (Conditional Use under 4739 in Section 7.00 – official schedule of district regulations)."
4. On October 23, 2012, the Chapos registered a limited liability corporation in the State of Indiana under the name Deputy Big Shot, LLC ("Big Shot"). The Chapos are the sole owners and operators of Big Shot.
5. On April 16, 2016, the Chapos announced the "Grand Opening" of the Big Shot business including the disputed tactical and test firing/shooting range.
6. The Chapos, by affidavit and testimony, assert the disputed tactical and test firing/shooting range was in existence prior to 1996. The Court finds the Chapos' assertion not credible in light of the Chapos signed petition, registration of Big Shot, "Grand Opening" advertising and published material.
7. On November 7, 2012, the Chapos' application for a conditional use as to the future Indoor/Outdoor tactical and test firing range was denied.
8. Neither the Chapos nor Big Shot took any steps to appeal the BZA decision.

9. There is no evidence that the JCZO is an ordinance that was enacted with the explicit intent to target or restrict the Second Amendment rights of any individual or entity.
10. There is no evidence that the JCZO is an ordinance that has been applied to act as an explicit or de facto ban on shooting ranges in Jefferson County.
11. The Chapos received a copy of the January 4, 2017 Order, granting a preliminary injunction and denying the request for stay, within days of the Order's issuance.
12. The Court's January 4, 2017 Order contained the following language:
 - a. The Chapos, and/or any entity under their control, are preliminarily enjoined from operating a tactical and test firing range, and/or a shooting range, at the Property located at 10214 W. Deputy Pike Road, Deputy, Indiana.
13. The Chapos were aware of the existence and content of the Court's Order within days of the Order's issuance.
14. The Chapos received a copy of the January 24, 2017 Order of the Court of Appeals denying the request for stay, within days of the Order's issuance.
15. On January 8, 2017, four days after the Court's Order, the Chapos hosted a fee based "Target Discrimination Event" at the disputed tactical and test firing / shooting range

at the Property through their business, Big Shot.

16. On February 5, 2017, one month after the Court's Order and two weeks after the Court of Appeals Order, the Chapos hosted a fee based "Advanced Movement and Shooting Event" at the disputed tactical and test firing/shooting range at the Property through their business, Big Shot.
17. On June 17, 2017, the Chapos hosted a fee based "3 Gun Run" at the disputed tactical and test firing/shooting range at the Property through their business, Big Shot.
18. On July 4, 2017, the Chapos hosted a fee based "Machine Gun Shoot" at the disputed tactical and test firing shooting range at the Property through their business, Big Shot.
19. On July 29, 2017, the Chapos hosted a fee based "Three Gun Competition" at the disputed tactical and test firing/shooting range at the Property through their business, Big Shot.
20. Between January of 2017 and July of 2017, the Chapos continued to advertise by publication, by website and by Facebook fee based access to the disputed tactical and test firing/shooting range at the Property through their business, Big Shot.
21. In July of 2017, the Chapos posted an invitation to the community to attend the hearing scheduled in this matter that contained a cartoon caricature of a judge editing the

language of the Second Amendment with a marker labeled “Jefferson County.”

22. The Chapos admit that the disputed tactical and test firing/shooting range at the Property remains in operation and has not ceased operation since the issuance of the January 4, 2017 Order.
23. The Chapos assert that they were not able to understand the statement in imperative form contained in the January 4, 2017 Order that clearly and concisely prohibited “Chapos, and/or any entity under their control . . . from operating a tactical and test tiring range, and/or a shooting range, at the Property.” The Court finds this assertion not credible in light of the clarity of the Court’s Order and the content and manner of the testimony provided.
24. The Jefferson County Plan Commission has been required to expend \$400.00 in attorney fees in the filing and prosecution of their Amended Citation for Contempt and Motion to Enforce Preliminary Injunction.

Conclusions of Law

1. “Once an appeal has been perfected to the Court of Appeals or the Supreme Court, the trial court has no further jurisdiction to act upon the judgment appealed from until the appeal has been terminated.” *Hickman v. Irwin Union Bank (In Re Hickman)*, 811 N.E.2d 843 at 848 citing, *Schumacher v. Radiomaha*, 619 N.E.2d 271, 273 (Ind. 1993). “The rule does not promote form over substance; it facil-

itates the orderly presentation and disposition of appeals and prevents the confusing and awkward situation of having the trial and appellate courts simultaneously reviewing the correctness of the judgment.” *Id.* “However, we have recognized situations in which a trial court may retain jurisdiction over certain matters notwithstanding a pending appeal. Specifically, a trial court retains jurisdiction to perform such ministerial tasks as reassessing costs, correcting the record, or enforcing a judgment.” *Id.*

2. An injunction places a direct personal duty upon the defendant, and he or she is directly and personally responsible to the court for the accomplishment of the object of the order. *Hancz v. City of S. Bend*, 691 N.E.2d 1322, 1324 (Ind. Ct. App. 1998). Indirect contempt arises from conduct which does not occur in the presence of the court, including the failure of a party to obey a court order. *Mitchell v. Stevenson*, 677 N.E.2d 551, 558 (Ind. Ct. App. 1997). *Ind. Code Sec. 34-47-3-1* grants the Court the authority to find a Defendant guilty of indirect contempt for willful disobedience of any order lawfully issued by any court of record. *Ind. Code Sec. 34-47-3-6* provides the Court may punish the Defendant for indirect contempt by fine, imprisonment or both.
3. The Chapos are in contempt of this Court’s January 4, 2017 Order. The Court’s Order clearly and unequivocally prohibited “Chapos, and/or any entity under their control . . . from

operating a tactical and test firing range, and/or a shooting range, at the Property.” The Chapos received and reviewed said Order within days of its issuance. The Chapos also received and reviewed the Order from the Court of Appeals denying stay of enforcement of this Court’s Orders. Nonetheless, the Chapos have openly and notoriously continued to operate a tactical and test firing range, and/or shooting range, at the Property, which is owned exclusively by the Chapos, either individual or by and through Big Shot, an entity under the Chapos’ exclusive ownership and control. The Chapos have demonstrated willful disobedience of this Court’s Orders and disdain for the authority of this Court.

WHEREFORE, the Court now ORDERS, ADJUDGES AND DECREES as follows:

1. The Defendant’s Motion to Dismiss filed February 1, 2017 is DENIED.
2. The Plaintiff’s Citation for Contempt and Motion to Enforce filed July 14, 2017 is GRANTED.
3. The Defendants, Joseph and Sherry Chapo are found to be in CONTEMPT of this Court’s Orders. The Defendants, Joseph and Sherry Chapo, shall purge themselves of contempt by taking the following actions:
 - a. The Chapos shall make payment in the amount of \$400.00 to the JCPC within thirty (30) days of this Order.

10a

- b. The Chapos shall immediately cease and desist in the operation of a tactical and test firing/shooting range at the Property, regardless of whether said operation is occurring in an individual capacity or by and through the operation of Big Shot, an entity under their exclusive ownership and control. The Chapos shall take all necessary steps to prevent any other person or entity from operating a tactical and test firing / shooting range at the Property, regardless of whether said operation is occurring in an individual capacity or by and through the operation of a business entity.

SO ORDERED this 17 day of October, 2017.

/s/ Jeffrey Sharp
Honorable Jeffrey Sharp
Special Judge, Jefferson Circuit Court

Distribution to:

Jefferson Circuit Court Clerk

R. Patrick Magrath, Esquire
1 W. 6th Street
Madison, IN 47250

Charles E. McFarland, Esquire
338 Jackson Road
New Castle, KY 40050

John Vissing, Esquire
432 E. Court Avenue
PO Box 187
Jeffersonville, IN 47131

11a

APPENDIX B

STATE OF INDIANA
COUNTY OF JEFFERSON
IN THE JEFFERSON CIRCUIT COURT

Cause No. 39C01-1605-CT-0380

General Term: 2019

JEFFERSON COUNTY PLAN COMMISSION

Plaintiff

vs

JOSEPH CHAPO and SHERRY CHAPO

Defendants

Special Judge Sally A. McLaughlin

November 25, 2019

ORDER

This matter came for hearing on the 12th day of July, 2019. The Plaintiff was present by counsel, Patrick Magrath, and the Defendants were present by counsel, Charles McFarland.

This matter was filed on May 25, 2016, the initial Judge, Judge Auxier, entered an Order of Recusal and the Honorable Judge Jeff Sharp was appointed Special Judge who denied Defendants Motion to Dismiss in 2019. The Order on Motion to Dismiss was appealed and affirmed by the Court of Appeals on May 29, 2018.

Judge McLaughlin was appointed as Special Judge on November 27, 2018.

The issues presented at hearing included Defendants Motion for Relief from previously ordered Injunction, Motion to Vacate Jury Trial, and set for Bench Trial, and Plaintiffs Motion to Strike.

The Court orders and finds:

(1) Pursuant to Indiana Trial Rule 38(B) the Court finds the Defendants have not asserted a right to trial by jury within ten (10) days of the first responsive pleading and therefore the Court shall set this matter for bench Trial.

(2) The Court denies Defendants Motion to Dismiss finding that the issues presented were previously denied and the denial was affirmed by the Court of Appeals.

(3) The Court declines to issue sanctions to the Defendants as requested by the Plaintiffs.

(4) The court is declining to re-litigate the issuance of a temporary Restraining Order at this time and the current temporary order shall remain in full force and effect.

(5) The parties are scheduled for a conference of attorneys on **December 2, 2019, in Dearborn Superior Court II at 3:00 p.m.** The Court had previously set this matter for Bench Trial on December 6, 2019 however, the Court did not issue a written order. The Court shall review the trial date, deadlines for discovery, and Summary Judgment Motions at said review hearing.

So ORDERED this 25 day of November, 2019 at Lawrenceburg, Indiana.

13a

/s/ Sally A. McLaughlin
SALLY A. McLAUGHLIN, SPECIAL JUDGE
JEFFERSON CIRCUIT COURT

CC: Atty. P. Magrath Atty.

C. McFarland

Atty J. Vising

Atty G. Relford

14a

APPENDIX C

STATE OF INDIANA
COUNTY OF JEFFERSON
IN THE JEFFERSON CIRCUIT COURT

Cause No. 39C01-1605-CT-0380

General Term: 2020

JEFFERSON COUNTY PLAN COMMISSION

Plaintiff

vs

JOSEPH CHAPO AND SHERRY CHAPO AND
DEPUTY BIGSHOT, LLC.

Defendants

Special Judge Sally A. McLaughlin

April 17, 2020

ORDER

This matter came for hearing on the 12th day of February, 2020 on the Defendant's motion to correct error and to clarify the Court's order from November 25, 2019. The plaintiff was present by counsel, Mr. Magrath and the defendant was present by counsel, Mr. McFarland.

Defendants Motion to Clarify and
Motion to Correct Error

The relevant issues in the court's order of November 25, 2019 include: (1) paragraph 2 "The court denies defendant's motion to dismiss finding that the issues presented were previously denied and the denial was affirmed by the court of appeals"; and (2) paragraph 4 "the court is declining to re-litigate the issuance of a temporary restraining order . . . and the current temporary order shall remain in full force and effect."

The defendants filed timely motions subsequent to the November 25, 2019 order requesting the court to clarify the order and a motion to correct error. The defendants request the court to clarify whether the court ruled on defendants' motions for relief from judgment and for judgment on the pleadings. The motion to correct error addresses the defendants' position if the court clarifies the November 25, 2019 order is an order to deny the motion for judgment on the pleadings and the denial of the relief from judgment from the temporary injunction. The motion to correct error also addresses the issue of no findings of fact or conclusions of law in the November 25, 2019 order.

Relevant Case History

The Jefferson County Planning Commission (JCPC) filed a Complaint against the Chapos and later amended to include Deputy Big Shot, LLC, regarding a violation of a zoning ordinance involving a shooting/target range on Chapos' property.

On January 4, 2017, the court granted a preliminary injunction enjoining the Defendants from operating a shooting/target range on their property. The findings of fact included, in part:

(1) on September 17, 2012, Chapos filed an application for conditional use to include “in the future . . . a test firing range;”

(2) the Chapos are the sole owners of a limited liability corporation registered in the State of Indiana under the name of Deputy Big Shot, LLC;

(3) on November 7, 2012, the Chapos’ application for a conditional use as to the future indoor/outdoor tactical and test firing range was denied by the Jefferson County Board of Zoning Appeals (JCBZA);

The Chapos/Deputy Big Shot have regularly conducted a firing range on the property since April, 2016. The court also denied Defendant’s Motion to Dismiss based on failure to cite which provision of ordinance was violated; and found the granting of the injunction did not violate the Fifth Amendment, “taking cause”.

The defendants appealed the granting of the preliminary injunction. The Indiana Court of Appeals affirmed the trial court decision. On October 24, 2017, the court issued an order denying defendants’ second motion to dismiss and finding defendants in contempt for violation of the preliminary injunction. No motion to correct errors or appeal of the October 24, 2017 order occurred. The following is a partial review of the relevant chronological case summary:

- 05-25-2016 Complaint filed against Joseph Chapo and Sherry Chapo
- 07-11-2016 Motion to dismiss filed by Sherry Chapo, pro se
- 08-08-2016 Motion for preliminary injunction filed by plaintiff
- 10-12-2016 Hearing held on preliminary injunction

- 11-17-2016 Order issued by Judge Auxier
- 11-24-2016 Judge Auxier issues order nullifying previous order granting injunction/denying motion to dismiss and withdraws due to conflict
- 12-01-2016 Judge Sharp, Ripley Superior Court, appointed Special Judge
- 12-05-2016 Motion to join party, DEPUTY BIGSHOT, LLC filed by plaintiff
- 12-09-2016 Order granting joinder of party
- 12-14-2016 Hearing held on all pending motions
- 01-04-2017 Order denying defendant's motion to dismiss; granting plaintiffs motion for preliminary injunction enjoining the defendants from operating a tactical and test firing range, and/or a shooting range on their property; defendant's motion to stay is denied; defendant's motion for reconsideration of joinder is denied; the defendant's motion for reconsideration of expediated hearing is denied; and the defendant's motion to recuse is denied
- 01-24-2017 Court of appeals issued order granting defendant's request to tender amended notice of appeal and denying motion to stay proceedings
- 01-26-2017 Pro-se amended notice of appeal to include 1/4/2017 court order
- 02-01-2017 Motion to dismiss amended complaint filed by defendants
- 03-15-2017 Plaintiff's response to defendants' motion to dismiss filed

- 03-15-2017 Citation for contempt and motion to enforce preliminary injunction filed by plaintiff
- 05-19-2017 Motion for hearing on Rule 12B motion filed on behalf of defendant
- 07-13-2017 Hearing held with matter reset for 7/20/2017
- 07-14-2017 Plaintiffs amended response to defendants' motion to dismiss
- 07-18-2017 Plaintiffs amended citation for contempt filed
- 07-20-2017 Court had conflict with 7/20/2017 hearing date and resets for 9/7/2017
- 09-07-2017 Hearing held, counsel to present proposed orders within 21 days to Court
- 10-24-2017 Order on defendants' motion to dismiss and plaintiff's citation for contempt ordering the defendants' motion to dismiss filed February 1st, 2017 be denied, and granted the plaintiff's citation for contempt and motion to enforce
- 10-30-2017 Court issued order staying proceedings
- 05-29-2018 Court of Appeals issues order, appeal from trial court order dated November 17, 2016 and Special Judge's January 4, 2017 order, granting plaintiff's request for preliminary injunction affirmed
- 11-01-2018 Indiana Supreme Court denies transfer
- 11-06-2018 Plaintiffs request for permanent injunction
- 11-13-2018 Judge Sharp order to recuse

- 11-16-2018 Notice of appointment of Judge King
- 11-27-2018 Notice of non-acceptance by Judge King
- 11-27-2018 Notice of appointment of Judge McLaughlin
- 02-11-2019 Motion for judgment on the pleadings filed on behalf of defendants
- 04-19-2019 Motion for relief from judgment filed on behalf of defendants
- 07-12-2019 Hearing on pending motions
- 11-25-2019 Order from 7-12-2019 hearing
- 12-20-2019 Defendant's motion to correct error and motion to clarify
- 01-16-2020 Plaintiffs response to motion to correct error and motion to clarify
- 02-28-2020 Motion for summary judgment filed by defendants

Motion for Relief from Judgment

At hearing on July 12, 2019, counsel for defendants stated the defendants are seeking relief from the orders of January 4, 2017 and October 24, 2017. Both orders involved the preliminary injunction. The January 4, 2017 order issued a preliminary injunction which was affirmed by the Indiana Court of Appeals. The October, 2017 order found the defendants in contempt for violating the preliminary injunction. Both orders also denied defendants' motion to dismiss.

Trial Rule 60 B allows relief from judgment where newly discovered evidence could not have been discov-

ered in time for a motion to correct error or excusable neglect.

The defendants, by counsel, at the hearing, stated the relief requested was relief from the preliminary injunction. The defendants' position is that the motion is not a motion to reconsider the previous orders but instead a motion to "void" the previous preliminary injunction, as well as the entire litigation based on new evidence that the officers did not take an oath and thus their positions were void and unable to take action.

The motion is not timely. The action has been pending since 2016 and it was in 2012 that the JCBZA denied the Chapos' request. Although the defendants claim to not have learned this information until 2019, the information could have been known in exercise of due diligence. In *Steinbarger v. State*, 14 N.E. 2d 533 (Ind. 1938), the court found the appellant who sought relief from jury decision and judgment of conviction on the basis that the jury commissioners had not taken an oath to support the constitution could not prevail. *Id.* The court found that the oath was a matter of public record and as such available prior to trial, *Id.* The court found that the jury commissioners were de facto officers and their authority to act was not subject to collateral attack; and that the nature of the oath taken was public record and could have been known by the appellant prior to the start of trial. *Id.* There has not been adequate showing that in the instant case that this could not have been discovered earlier with due diligence.

In this matter, even if the officers were required to take an oath and failed to do so, the de facto officer doctrine applies. *Fields v. State*, 91 N.E.3d 597 (Ind. Ct. App. 2017) held that an arresting officer's failure to take an oath was a technical defect applying a three-

prong test from *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981).

According to Indiana law, all that is required to make an officer de facto is that (1) claim the office (2) be in possession of it, and (3) perform its duties under the color of election or appointment. *Id.*

The Defendants' motion is without merit. Any failure of either the 2012 JCBZA or 2016 JCPC to take and deposit the oath of office is a technical error that does not invalidate their official actions.

The court clarifies the Motion for Relief from Judgment is addressed in paragraph (2) of the November 25, 2019 order in which the court termed the preliminary injunction a temporary restraining order.

Motion for Judgment on the Pleadings

The defendants' motion for judgment on the pleadings included two new arguments attacking JCPC's qualification and attacking the citizen complaint that initiated the zoning violation.

The motion also included several issues already pleaded and denied by prior orders. These include the issue of required specificity in JCPC's complaint, collateral attack on the JCBZA due to denial of conditional use permit, and the constitutional attack on zoning restrictions applied to a tactical or test firing range.

A motion for judgment on the pleadings attacks only the legal sufficiency of the pleadings. *RQAW Corp. V. Dearborn County*, 83 N.E. 3d 745, 754 (Ind. Ct. App. 2017) "A judgment on the pleadings is proper only when there is no genuine issue of material fact and when the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations there-in." *Id.*

The Court must accept as true the well-pleaded material facts alleged. The moving party is deemed to have admitted well-pleaded facts in favor of the non-movant, and the Court is required to draw all reasonable inferences in favor of the non-movant. *Id.*

On May 29, 2018 the Indiana Court of Appeals expressly held the JCPA has provided a reasonable likelihood of success in the following passage: “In its amended complaint, the JCPC authorized under Indiana Code Section 36-7-4-1014 (2011) and the Jefferson County Zoning Ordinance section 11.50 (Title 28-8-23) to enforce the Jefferson County Zoning Ordinance by civil action. Here the Chapo’s filed an application for conditional use. The Chapo’s application...explicitly acknowledged the property was zoned for agricultural use. The JCBZA denied the Chapo’s request for the conditional use of the property as a tactical and test firing range. Nonetheless, they used the property as a tactical and test firing or shooting range in violation of the zoning ordinance. Consequently, the JCPC has provided a reasonable likelihood of success on the merits . . . *Chapo v. Jefferson Cty. Plan Comm.*in, 102 N.E. 3d 354 (Ind. Ct. App.) transfer denied, 113 N.E. 3d 627 (Ind. 2018).

The defendants have not demonstrated determinatively that the JCPC lacks standing. The defendants have not shown that there are no issues of fact as to whether the relief requested is in violation of Indiana statutes. The evidence the defendants claim supports their position requires a finding that the ordinance violation is for noise and that the shooting range has been in operation since 1991. Both are plead to the contrary in the amended complaint filed by the plaintiff in which the plaintiff alleges the defendants violated a zoning ordinance by establishing a shooting/

target range in an agriculture zoned property and were denied conditional use in 2012 when defendants first desired to operate the shooting/target range.

The Court finds the motion for judgment on the pleadings a partial repetition of prior motions to dismiss that were denied; and finds the new allegations attacking JCPC's qualifications; and alleging the citizen complaint that initiated the zoning violation investigation provides evidence that the citizen is the complainant and that the complaint is about "noise," not supported by the pleadings.

The Court clarifies the denial of the motion to dismiss as stated in the Courts order of November 25, 2019 was a denial of the motion of judgment on the pleadings filed by the defendant.

Special Findings

The Court finds neither party filed a request for special findings prior to the hearing. Trial Rule 52(A) provides in relevant part "upon its own motion, or the written request of any party filed with the Court prior to the admission of evidence, the Court in all actions tries upon the facts without a jury . . . shall find the facts specifically and state its conclusions thereon."

While findings of fact and conclusions of law are required in an initial order for an injunction, that would not apply where the injunction is previously ordered on a motion for relief from judgment.

Order of Clarification of November 25, 2019 Order

The Court clarifies the order of November 25, 2019 as follows:

Paragraph 2. The Court denies the defendant's motion for judgment on the pleadings as stated herein.

Paragraph 4. The Court declines to re-litigate the issuance of the preliminary injunction (restraining order) and denies motion for relief from judgment from the orders of January 4, 2017 and October 24, 2017.

Order on Motion to Correct Error

Findings of Fact

1. On September 17, 2012, Chapos filed an application for conditional use to include “in the future . . . a test firing range.”
2. The Chapos are the sole owners of a limited liability corporation registered in the State of Indiana.
3. On November 7, 2012, the Chapos’ application for a conditional use for a future indoor/outdoor tactical (firing/shooting) range was denied by the JCBZA.
4. The JCPC commenced this action in 2016, upon finding that a firing/shooting range was being operated on Chapos’ property.
5. On January 4, 2017 the Court ordered a preliminary injunction enjoining the Defendants from operating a firing/shooting range on their property and a motion denying defendants’ motion to dismiss.
6. On October 24, 2017, Court denied defendants’ motion to dismiss and finds defendant in contempt for violating preliminary injunction.
7. On May 29, 2018, the Indiana Court of Appeals affirmed the January 4, 2017 order and November 1, 2018 the Indiana Supreme Court denied transfer.

8. In April 2019, defendants have verification that officers of the 2016 JCPC and 2012 JCBZ may not have taken oaths of office and oaths are not on file.
9. On February 11, 2019, the defendants filed a motion for judgment on the pleadings.
10. On April 19, 2019, the defendants filed a motion for relief from judgment.
11. On July 12, 2019, a hearing was held.
12. On November 25, 2019, the Court issued order denying both motions.
13. On December 20, 2019, the Defendant filed a motion to correct error and motion to clarify.
14. On February 12, 2020, a hearing was held on the motion to clarify and motion to correct error.

Conclusions of Law

1. Trial Rule 60 B allows for relief from judgment where newly discovered evidence could not have been discovered in time for a motion to correct error or excusable neglect. The motion is not timely. Whether oaths of the JCPC and JCBZA had been taken and filed could have been known in the exercise of due diligence. *Steinbarger v. State*, 14 N.E.2d 533 (Ind. 1938).
2. Additionally, even if the officers have not taken or filed oaths pursuant to law, the de facto officer doctrine applies. *Fields v. State*, 91 N.E.3d 597 (Ind. Ct. App. 2017).
3. A motion for judgment on the pleadings attacks only the legal sufficiency of the pleadings. *RQAW Corp. v. Dearborn County*, 83 N.E.3d 745, 754 (Ind. Ct. App. 2017). A judgment on the plead-

ings is proper only when there is no genuine issue of material fact and when the facts shown by the pleadings clearly establish that the non-moving party cannot in any way succeed under the facts and allegations therein. *Id.*

4. The issue of the sufficiency of the complaint due to not citing to a specific provision of the Jefferson County Zoning Ordinance was previously litigated and rejected by the court in orders on January 4, 2017 and October 17, 2017.
5. The JCPC attorney is “an attorney representing the county” to “make an investigation of the alleged violation” and if the acts are sufficient to establish a “reasonable belief that a violation has occurred” to proceed with a complaint and prosecution. (Indiana Code Section 36-7-4-1013(a)) and thus has the standing to bring complaints to enforce zoning violations. The Jefferson County Zoning Ordinance Sec. 11.50 (Title 28-8-23) provides authority for the Jefferson County Plan Commission to bring an action to enforce the ordinance.
6. The constitutional claims have previously been addressed in prior court hearings and orders. A set of zoning regulations that have the effect of limiting where a shooting range may be located do not run afoul of the protections on the Second Amendment. *Ezell I*, *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011); *Ezell II*, *Ezell v. City of Chicago*, 846 F. 3d 888 (7th Cir. 2017). No evidence that the Jefferson County Zoning Ordinance as applied has the effect of severely restricting the rights of the citizens of Jefferson County in firearm use.

7. The order of January 4, 2017 found no Fifth Amendment taking violation. The restriction on the use of the property does not deprive the Chapos of the reasonable use or value of the property.
8. Whether the Defendants had a pre-existing target/shooting range in 1991 is an issue of fact and is not a fact adopted by the Plaintiff in the pleadings and is opposite to findings of fact in earlier court orders.
9. The action is brought by JCPC for a zoning violation and according to the pleadings is not a noise violation as Defendants claim (although the investigation into the zoning violation may have been initiated by a citizen complaint of noise.) The JCPC has standing to bring the complaint and is the real party in interest.
10. The allegations that the JCPC and JCBZA acted outside their authority is not supported by the pleadings or Indiana law.
11. The court finds no error in the Order to Deny Defendant's Motion for Relief from Judgment and to Deny Defendant's Motion on the Pleadings, as clarified herein. WHEREFORE, the **Court denies the motion to correct error.**

So ORDERED this 17 day of April, 2020 at Lawrenceburg, Indiana.

/s/ Sally A. McLaughlin
SALLY A. McLAUGHLIN, SPECIAL JUDGE
JEFFERSON CIRCUIT COURT

cc: P. Magrath
C. McFarland
J. Vissing

28a

APPENDIX D

IN THE COURT OF APPEALS OF INDIANA

Court of Appeals Case No. 20A-CT-1197

JOSEPH CHAPO, SHERRY CHAPO, and
DEPUTY BIG SHOT, LLC,

Appellants Defendants,

v.

JEFFERSON COUNTY PLAN COMMISSION,

Appellee-Plaintiff.

Appeal from the Jefferson Circuit Court
The Honorable Sally A. McLaughlin, Special Judge
Trial Court Cause No. 39C01-1605-CT-380

January 22, 2021

Attorneys for Appellant

Charles E. McFarland
New Castle, Kentucky

John R. Vissing
Jeffersonville, Indiana

Attorney for Appellee

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

Vaidik, Judge.

Case Summary

In 2016, the Jefferson County Planning Commission (“JCPC”) sued Joseph and Sherry Chapo and Deputy Bigshot, LLC (hereinafter “the Chapos”), alleging they were violating a zoning ordinance. The trial court granted a preliminary injunction against the Chapos and later found them in contempt for violating the preliminary injunction. Thereafter, the Chapos discovered the JCPC members had not taken an oath before assuming office and moved for relief from judgment based on Indiana Code section 5-4-1-1, which requires “officers” to take an oath to support the United States and Indiana Constitutions before entering office. The Chapos asserted the JCPC members were officers required by Section 5-4-1-1 to take an oath and their failure to do so made the office vacant, which in turn meant the JCPC lacked standing to sue, the preliminary injunction and contempt orders were void, and the case should be dismissed. The trial court denied the motion, and the Chapos appeal.

We affirm, concluding while the JCPC members are officers required to take an oath under Section 5-4-1-1, their failure to do so here did not invalidate the JCPC’s actions because the members acted as de facto officers.

Facts and Procedural History

In May 2016, the JCPC filed a complaint against the Chapos, alleging they were violating a zoning ordinance by maintaining a shooting range on their property. In January 2017, the trial court granted the JCPC’s request for a preliminary injunction against the Chapos. Later that month, the Chapos filed an interlocutory appeal of the preliminary injunction. In October, while the appeal was still pending, the trial

court found the Chapos in contempt for continuing to operate the shooting range despite the preliminary injunction. The trial-court proceedings were then stayed pending the outcome of the appeal. In May 2018, this Court affirmed the grant of the preliminary injunction, and in November the Indiana Supreme Court denied transfer. Proceedings began again in the trial court, with the Chapos moving for judgment on the pleadings in February 2019.

In April, while that motion was still pending, the Chapos discovered the JCPC members had not taken and filed oaths of office. The Chapos then moved for relief from judgment under Indiana Trial Rule 60(B)(6), arguing the JCPC members' failure to take and file oaths violated Section 5-4-1-1 and made the offices vacant under Indiana Code section 5-4-1-1.2, which meant the JCPC lacked standing to file the original suit, the trial court's January and October 2017 orders are void, and the entire case should be dismissed.¹ A hearing on all pending motions—including the motion for relief—was held in July 2019. In November, the trial court issued an order which, in part, denied the Chapos' motion for relief.

The Chapos now appeal.

Discussion and Decision

The Chapos argue the JCPC members' failure to take and file the required oath means the JCPC lacked standing to sue and therefore the trial court lacked authority to act, the January and October 2017 orders are void, and the case must be dismissed. Under Rule

¹ While the Chapos' Rule 60(B) motion requests relief only from the October 2017 order, at the hearing the Chapos clarified they were also requesting relief from the January 2017 order.

60(B)(6), the trial court may relieve a party from a judgment if “the judgment is void[.]” A Rule 60(B) motion alleging a judgment is void requires no discretion by the trial court because the judgment is void or valid and, thus, our review is de novo. *Koonce v. Finney*, 68 N.E.3d 1086, 1090 (Ind. Ct. App. 2017), *trans. denied*.

The Chapos first contend the oath required by Section 5-4-1-1 applies to members of the JCPC. We agree. Title 5 governs state and local administration, and Article 4 governs officers’ bonds and oaths. The statute provides, in relevant part:

(a) Except as provided in subsection (c)^[2], **every officer** and every deputy, before entering on the officer’s or deputy’s official duties, shall take an oath to support the Constitution of the United States and the Constitution of the State of Indiana, and that the officer or deputy will faithfully discharge the duties of such office.

Ind. Code § 5-4-1-1(a) (emphasis added). No definition of the term “officer” is included in the statute. When the legislature has not defined a word, we give the word its common and ordinary meaning. *Vanderburgh Cnty. Election Bd. v. Vanderburgh Cnty. Democratic Cent. Comm.*, 833 N.E.2d 508, 510 (Ind. Ct. App. 2005). Black’s Law Dictionary defines “officer” as one “who holds an office of trust, authority, or command.” *Black’s Law Dictionary* 1257 (10th ed. 2019). And “office” is defined as a “position of duty, trust, or authority, especially one conferred by a governmental authority for a

² The exception provided for in subsection (c) applies to “a deputy of a political subdivision.” Ind. Code § 5-4-1-1(c). As the JCPC members are not deputies, the exception is not relevant here.

public purpose.” *Id.* at 1254. This definition follows the few prior holdings on the statute. We have held law-enforcement officers are “officers” under Section 5-4-1-1 because they “hold positions of substantial public responsibility.” *State v. Oddi-Smith*, 878 N.E.2d 1245, 1248 (Ind. 2008); *see also Fields v. State*, 91 N.E.3d 597, 600 (Ind. Ct. App. 2017), *trans. denied*.

However, the JCPC argues this definition sweeps too “broadly” and we should apply the statute to only “officials recognized by Indiana’s Constitution and/or statute, and deputies appointed or hired by those elected officials.” Appellee’s Br. p. 24. However, we see no indication the legislature intended the term “officer” to be limited in this way. As such, we give the term its ordinary—albeit broad—meaning. And under that meaning, the JCPC members are officers. The JCPC is a plan commission established by Indiana law, *see* Ind. Code § 36-7-4-208, whose members “exercise planning and zoning powers” for the purpose of “improv[ing] the health, safety, convenience, and welfare of their citizens and to plan for the future development of their communities,” Ind. Code § 36-7-4-201. Therefore, members of the JCPC are officers under the statute—and required to take the oath because they hold positions of authority and exercise governmental powers to benefit the public.

Nonetheless, the JCPC contends their failure to take and file the required oath does not mean they lacked standing because “the JCPC members qualified as ‘de facto’ officers, thereby the JCPC’s decision to pursue injunctive relief was legally valid and not subject to collateral attack.” Appellee’s Br. p. 11. We agree. “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." *Ryder v. United States*, 515 U.S. 177, 180 (1995). "This doctrine springs from the fear of the chaos that would result from multiple and repetitious suits challenging every action taken by every official whose claim to office could be open to question, and seeks to protect the public by insuring the orderly functioning of the government despite technical defects in title to office." *Fields*, 91 N.E.3d at 600 (quotation omitted). In Indiana, all that is required to make an officer de facto is that they (1) claim the office, (2) be in possession of it, and (3) perform its duties under the color of election or appointment. *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). "The authority of a de facto official cannot be collaterally attacked." *Id.*

Failing to take the oath required by Section 5-4-1-1 is a "technical defect." *Fields*, 91 N.E.3d at 600. Therefore, to determine if the JCPC members acted as de facto officers, we apply the three-pronged *Carty* test whether the JCPC members (1) claimed the offices, (2) were in possession of the offices, and (3) performed the duties under color of title. The JCPC members each claimed the offices on the date of their appointment. *See* Appellee's App. Vol. IV pp. 178-83. They thereafter possessed the offices. Each performed the duties of a JCPC member by publicly attending meetings, voting on issues, and holding themselves out as members of the JCPC. *See* Appellee's App. Vol. III pp. 179, 198. And the JCPC members had color of title. "Color' legally means an appearance, semblance or an apparent right." *Hendrickson v. State*, 253 Ind. 396, 254 N.E.2d 311, 333 (1970). JCPC members are appointed under Indiana Code section 36-7-4-208. And notably, the Chapos make no argument the JCPC members here were not properly appointed. *See*

Appellant's Br. p. 26. As such, they had an apparent right to the offices. *See City of Terre Haute v. Bums*, 69 Ind. App. 7, 116 N.E. 604, 607 (1917) ("Where one is actually in possession of a public office, and discharging the duties thereof, the color of right which constitutes him a de facto officer may consist in an election or appointment . . ."). Accordingly, we conclude they were acting as de facto officers when the lawsuit against the Chapos was filed.

The Chapos argue the JCPC members "were usurpers and not entitled to the status of *de facto* officers[.]" Appellant's Reply Br. p. 9. To be sure, a usurper cannot be a de facto officer. *Morten v. City of Aurora*, 96 Ind. App. 203, 182 N.E. 259, 262 (1932). But a usurper is "one who intrudes himself into an office which is vacant, or ousts the incumbent, without any color of title[.]" *Id.* (citation omitted). And here, the JCPC members were appointees with color of title, as explained above. They are not usurpers.

The Chapos also assert the JCPC members are not de facto officers because their failure to take and file the required oath made the offices vacant. *See* Ind. Code § 5-4-1-1.2 (stating if an individual appointed or elected to an office of a political subdivision does not comply with the oath requirement within thirty days of taking office, the office becomes vacant). But a vacancy in an office does not preclude de facto status. *See United States v. Royer*, 268 U.S. 394, 397-98 (1925) (finding claimant a de facto officer of a vacant office).

The JCPC members were required to take and file the oath set out in Section 5-4-1-1. However, invalidating the actions of the JCPC based on this technical defect would undermine the exact purpose of the de facto officer doctrine—"to insure the orderly func-

tioning of the government despite technical defects in title to office.” *Fields*, 91 N.E.3d at 601.

We therefore affirm the trial court’s denial of the Chapos’ motion for relief from judgment.

Affirmed.

Bailey, J., and Weissmann, J., concur.

APPENDIX E

IN THE INDIANA SUPREME COURT

Court of Appeals Case No. 20A-CT-01197

Trial Court Case No. 39C01-1605-CT-380

JOSEPH CHAPO; SHERRY CHAPO;
DEPUTY BIG SHOT, LLC,

Appellant(s),

v.

JEFFERSON COUNTY PLAN COMMISSION,

Appellee(s).

Filed May 27, 2021

ORDER

This matter has come before the Indiana Supreme Court on a petition to transfer jurisdiction, filed pursuant to Indiana Appellate Rules 56(B) and 57, following the issuance of a decision by the Court of Appeals. The Court has reviewed the decision of the Court of Appeals, and the submitted record on appeal, all briefs filed in the Court of Appeals, and all materials filed in connection with the request to transfer jurisdiction have been made available to the Court for review. Each participating member has had the opportunity to voice that Justice's views on the case in conference with the other Justices, and each participating member of the Court has voted on the petition.

37a

Being duly advised, the Court DENIES the petition to transfer.

Done at Indianapolis, Indiana, on 5/27/2021.

/s/ Loretta H. Rush
Loretta H. Rush
Chief Justice of Indiana

All Justices concur.

APPENDIX F

**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS**

Amendment II to the United States Constitution

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

**Amendment XIV Clause 1 to the United States
Constitution**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

IC § 5-4-1-1

§ 5-4-1-1. Oaths; officers and deputies; prosecuting attorneys and deputies

- (a) Except as provided in subsection (c), every officer and every deputy, before entering on the officer's or deputy's official duties, shall take an oath to support the Constitution of the United States and the Constitution of the State of Indiana, and that the officer or deputy will faithfully discharge the duties of such office.
- (b) A prosecuting attorney and a deputy prosecuting attorney shall take the oath required under subsection (a) before taking office.
- (c) This subsection applies to a deputy of a political subdivision. An individual appointed as a deputy is considered an employee of the political subdivision performing ministerial functions on behalf of an officer and is not required to take the oath prescribed by subsection (a). However, if a chief deputy assumes the duties of an office during a vacancy under IC 3-13-11-12, the chief deputy must take the oath required under subsection (a) before entering on the official duties of the office.

IC § 5-4-1-1.2

§ 5-4-1-1.2. Time for taking oath; exceptions; failure of officer of political subdivision to take and deposit oath

- (a) This section does not apply to an individual:
 - (1) appointed or elected to an office the establishment or qualifications of which are expressly provided for in the Constitution of the State of Indiana or the Constitution of the United States; or
 - (2) holding over in an office under Article 15, Section 3 of the Constitution of the State of Indiana.
- (b) Subject to subsection (c), an individual appointed or elected to an office of a political subdivision may take the oath required under section 1 of this chapter at any time after the individual's appointment or election.
- (c) An individual appointed or elected to an office of a political subdivision must take the oath required by section 1 of this chapter and deposit the oath as required by section 4 of this chapter not later than thirty (30) days after the beginning of the term of office.
- (d) If an individual appointed or elected to an office of a political subdivision does not comply with subsection (c), the office becomes vacant.

Indiana Rules of Trial Procedure, Rule 60(B)**Rule 60. Relief from judgment or order**

(A) Clerical mistakes. Of its own initiative or on the motion of any party and after such notice, if any, as the court orders, clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the trial court at any time before the Notice of Completion of Clerk's Record is filed under Appellate Rule 8. After the filing of the Notice of Completion of Clerk's Record and during an appeal, such mistakes may be so corrected with leave of the court on appeal.

(B) Mistake - Excusable neglect - Newly discovered evidence - Fraud, etc. On motion and upon such terms as are just the court may relieve a party or his legal representative from a judgment by default, for the following reasons:

- (1) mistake, surprise, or excusable neglect;
- (2) any ground for a motion to correct error, including without limitation newly discovered evidence, which by due diligence could not have been discovered in time to move for a motion to correct errors under Rule 59;
- (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;
- (4) entry of default or judgment by default was entered against such party who was served only by publication and who was without actual knowledge of the action and judgment, order or proceedings;
- (5) except in the case of a divorce decree, the record fails to show that such party was represented by a

42a

guardian or other representative, and if the motion asserts and such party proves that

- (a) at the time of the action he was an infant or incompetent person, and
 - (b) he was not in fact represented by a guardian or other representative, and
 - (c) the person against whom the judgment, order or proceeding is being avoided procured the judgment with notice of such infancy or incompetency, and, as against a successor of such person, that such successor acquired his rights therein with notice that the judgment was procured against an infant or incompetent, and (
 - (d) no appeal or other remedies allowed under this subdivision have been taken or made by or on behalf of the infant or incompetent person, and
 - (e) the motion was made within ninety [90] days after the disability was removed or a guardian was appointed over his estate, and
 - (f) the motion alleges a valid defense or claim;
- (6) the judgment is void;
- (7) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (8) any reason justifying relief from the operation of the judgment, other than those reasons set forth in sub-paragraphs (1), (2), (3), and (4). The motion shall be filed within a reasonable time for reasons (5), (6), (7), and (8), and not more than one year after the judgment, order or proceeding was entered or

taken for reasons (1), (2), (3), and (4). A movant filing a motion for reasons (1), (2), (3), (4), and (8) must allege a meritorious claim or defense. A motion under this subdivision (B) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding or for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(C) Appeal - Change of venue. A ruling or order of the court denying or granting relief, in whole or in part, by motion under subdivision (B) of this rule shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment. No change of venue in such cases shall be taken from the judge or county except for cause shown by affidavit.

(D) Hearing and relief granted. In passing upon a motion allowed by subdivision (B) of this rule the court shall hear any pertinent evidence, allow new parties to be served with summons, allow discovery, grant relief as provided under Rule 59 or otherwise as permitted by subdivision (B) of this rule.

(E) Infants, incompetents, and governmental organizations. Except as otherwise provided herein, this rule shall apply to infants, incompetents, and governmental organizations. The time for seeking relief against a judgment, order or proceeding allowed or recognized under subdivision (B) of this rule or any other statute shall not be tolled or extended as to such persons.

44a

**Article I, Section 26, to the
Indiana Constitution**

The operation of the laws shall never be suspended, except by the authority of the General Assembly.

**Article I, Section 32, to the
Indiana Constitution**

The people shall have a right to bear arms, for the defense of themselves and the State.

**Article 6, Section 9 to the
Indiana Constitution**

Vacancies in county, township, and town offices, shall be filled in such manner as may be prescribed by law.