No. 21-290

In The
Supreme Court of the United States

JOSEPH CHAPO, ET AL.,

Petitioners,

v.

JEFFERSON COUNTY PLAN COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Indiana

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether review by the United States Supreme Court is appropriate where the Indiana Courts of Appeals have affirmed a State trial court decision upholding the actions taken by a County Board of Zoning Appeals and Plan Commission to enforce a County Zoning Ordinance on the basis of Indiana State caselaw which shields the decisions of *de facto* officers, whose titles to office are imperfect due to technical defects, from collateral attack based on the public policy favoring the protection of the public and the orderly functioning of the government against a property owner who built and operated a tactical test firing / shooting range without the necessary permits and in violation of the County Zoning Ordinance.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

RESPONDENT'S BRIEF IN OPPOSITION

The Jefferson County Plan Commission (JCPC) respectfully opposes the Petition for Writ of Certiorari to review the decision of the Indiana Supreme Court, issued May 27, 2021, denying Transfer for discretionary review and the decision of the Indiana Court of Appeals, issued January 22, 2021, affirming the trial court's denial of the Petitioner's Motion for Relief from Judgement, issued on November 25, 2019, and April 17, 2020.

STATEMENT OF THE CASE

A. Factual Background

In 2012 and 2016 the members of the Jefferson County Board of Zoning Appeals (JCBZA) and Jefferson County Plan Commission (JCPC) had not filed an oath of office. The failure to file oaths of office was inadvertent. Each of the members of the JCBZA and JCPC were authorized to claim their position by virtue of their status as mandatory members or as appointed members pursuant to Indiana Code. Each of the members were publicly in possession of the office as demonstrated by the appearance as members and the inclusion in quorum during public meetings and hearings. Each of the members publicly performed their duties under the color of election or appointment as demonstrated by their participation in the meetings of and being counted in the vote of final decisions. The

Petitioners, Sherry and Joseph Chapo, do not dispute these facts.

The Chapos' Petition misstates the facts by alleging the Jefferson County Zoning Ordinance has not and does not regulate shooting ranges. (Pet. pg.6). The JCZO regulates **all uses** of land. The Jefferson County Zoning Ordinance 28-4-1(A)(1) requires a landowner to obtain a permit and comply with all regulations for the district they are in before using their land. Section 28-4-2 of the JCZO adopts an official schedule of regulations for each zoning district and explicitly identifies "each land use" as being either conditional, permitted or prohibited.

Section 28-5-18, the official schedule of regulations, provides more than 250 categories of use; each use is identified as a permitted use, a conditional use, or a prohibited use in each of the district designations. Category of use number 739 "Other Amusements" is a conditional use in Agricultural districts. Conditional uses are defined by the JCZO as "A special use permitted within a district . . . requiring a conditional use permit and approval of the Board of Zoning Appeals . . . " Section 28-9-1 requires a landowner seeking to put their land to a use designated as a conditional use to "follow the procedures and requirements set forth" in section 28-9 et al.

Thus, according to the JCZO, before a landowner may use their property, they must obtain any necessary permit and comply with all district regulations for the district they are in. "[E]ach land use" is identified

in the official schedule of uses table. A landowner in an Agricultural district is required to obtain a conditional use permit before using their land for "Category 739: Other Amusements." The failure to obtain such a permit prior to said use of the land or going forward with said use of the land after having been denied such a permit is a violation of the JCZO and subjects the landowner to the enforcement provisions of the ordinance which, under section 28-8-23, includes a suit for injunctive relief and imposition of fines.

The Chapos' Petition misstates the facts by alleging they built and continuously operated a shooting range on the property from 1991 through the date of litigation. (Pet. pg.6). The Chapos, are the sole owners of a piece of property located in Jefferson County, Indiana at 10214 Deputy Pike, Deputy, Indiana, 47230. In September of 2012, the Chapos filed an Application for Conditional Use with the JCBZA. The Application identified the property as "zoned Agricultural" and described the intended use, in part, as:

> **[I]n the future** an 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 #739 in Section 7.00 – official schedule of district regulations). (emphasis added).

The Chapos' application was heard by the JCBZA on October 2 and November 7 of 2012 and the Chapos were given an opportunity to be heard on their Application. Between the October 2, 2012, hearing and the

November 7, 2012, hearing the Chapos incorporated their business naming it Deputy Big Shot. Deputy Big Shot is solely owned and operated by the Chapos and operates solely on the property owned by the Chapos. The JCBZA denied Application and issued written findings of fact expressly finding the Application was not supported by substantial evidence. The Chapos did not appeal the JCBZA's denial of their Application for Conditional Use within thirty (30) days as provided for under Ind. Code Sec. 36-7-4-1605.

The Chapos' Petition misstates the facts by alleging JCBZA denied the Application based solely on noise. The JCBZA denied the Application because the Chapos failed to demonstrate by substantial evidence that their proposed use of the property would "not involve uses, activities, processes, materials, equipment and conditions of operation that will be detrimental to any persons, property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare or odors" as required for a Conditional Use under the JCZO Section 28-9-3(G). The Chapos' Petition misstates the facts by alleging the Jefferson County Zoning Enforcement Officer established there was no law restricting noise. The Zoning Enforcement Officer is not a legal authority and was referencing County nuisance noise ordinances. The Chapos' Petition misstates the facts by alleging the Chairman of the JCBZA acknowledged the existence of prior existing shooting ranges on the Chapos property. The Chairman of the JCBZA lacks authority to make any final determination unilaterally and was repeating for clarification

claims made by the Chapos at the hearing. The Chapos' Petition misstates the facts by alleging the decision of the JCBZA was in violation of the Indiana Shooting Range Protection Act; the statute cited is not relevant to a newly constructed public commercial tactical test firing / shooting range.

In March of 2016, the JCBZA received a written complaint from a property owner in Jefferson County, Indiana regarding excessive noise at the Chapos' property. Following an investigation by the zoning enforcement officer, it was discovered the Chapos were in the process of preparing their land for the "Grand Opening" of their tactical and test firing range, or shooting range, business. The Chapos were soliciting members of the public to the property to use the tactical and test firing range, or shooting range, for a fee. The Chapos were actively advertising for their tactical and test firing range, shooting range, business. An Order Enforcing the Jefferson County Zoning Ordinance (JCZO) was issued to the Chapos ordering them to discontinue operation of the tactical and test firing / shooting range. The JCPC held a hearing on April 20, 2016, and the Chapos were given an opportunity to be heard on the issue of enforcement. The JCPC voted to approve litigation. The Jefferson County Plan Commission filed the underlying Complaint in this action.

B. Procedural Background

On May 25, 2016, the JCPC filed a complaint against the Chapos for enforcement of the Jefferson County Zoning Ordinance (JCZO). The JCPC sought to enjoin the Chapos' illegal use of the property as a public commercial tactical test firing / shooting range on the basis that the use was a Conditional Use in an Agricultural District and the Chapos had been denied a Conditional Use permit. On January 4, 2017, the trial court issued an Order granting a preliminary injunction in favor of the JCPC. On May 29, 2018, the Indiana Court of Appeals issued a decision affirming the trial court's grant of a preliminary injunction. *Chapo v. Jefferson County Plan Commission*, 102 N.E.3d 354 (Ind. Ct. App. 2018) *transfer denied*.

On February 1, 2017, the Chapos filed a Motion to Dismiss arguing, in part, that the JCPC's action to enforce the JCZO was in violation of the 2nd Amendment and *ultra vires*. On July 14, 2017, the JCPC filed a Citation for Contempt because the Chapos were in violation of the preliminary injunction and continuing the illegal use of the property. On October 17, 2017, the trial court issued an Order denying the Chapos' Motion to Dismiss and granting the JCPC's Citation for Contempt. (App. pg.1a). The trial court made the following findings and conclusion relevant to the issue presented:

> 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)."

. . .

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.

On April 17, 2020, the trial court issued an Order Denying the Chapos' Motion to Correct Error challenging the trial court's denial of a Motion for Reconsideration. (App. pg.14a). The trial court found the Chapos' motion to be without merit saying "[a]ny 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 actions." (App. pg.21a). The trial court also concluded:

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 protection of 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. (App. pg.26a).

On January 22, 2021, the Indiana Court of Appeals issued a published decision affirming the trial court's decision. (App. pg.28a). The Court of Appeals held the actions of the JCPC, proceeding with litigation to enforce the JCZO, were not subject to collateral attack as the members of the JCPC were *de facto officers*. (App. pg.34a). On May 27, 2021, the Indiana Supreme Court denied transfer for discretionary review. (App. pg.36a).

REASONS FOR DENYING THE PETITION

As outlined above and further discussed below, the Chapos disagree with the Indiana Court of Appeals' determination that the Indiana trial court properly applied the Indiana *de facto officer* doctrine to members of an Indiana county Plan Commission. The issue presented is a pure issue of State law and is not an appropriate issue for this Court's review. To create a federal question, the Chapos allege the case involves a 2nd Amendment violation and a "structural error." The Chapos fail to provide a cogent argument regarding the 2nd Amendment and have not demonstrated the application of a general zoning ordinance in any way restricts their 2nd Amendment rights. The Chapos misconstrue the "structural error" doctrine which has been applied exclusively in criminal matters to make certain harmless errors the basis for reversal. While the Indiana courts' application of the Indiana *de facto officer* doctrine is not an appropriate issue for review by this court, the decision below was decided correctly. The members of the JCPC were properly appointed to

their positions, held their positions in an open manner, and acted under the color of their appointment. The technical defect in their qualification due to their failure to file an oath does not subject their actions to collateral attack as they are at least *de facto officers*. The Court should deny the Petition for Certiorari.

A. A State Court Decision Applying the *De Facto Officer* Doctrine to Members of a Local Plan Commission is Not an Appropriate Issue for This Court's Review

The Court should deny review by certiorari because the issue presented is a pure issue of state law that does not involve a federal question. The Indiana Court of Appeals' determination of the application of the Indiana *de facto officer* doctrine to the qualifications of local County Plan Commission Members is not an issue appropriate for this Court's review. The federal statute outlining the Court's jurisdiction to review cases on certiorari does not contemplate review in cases such as this. The Court's own rules do not contemplate review in cases such as this. The caselaw cited by the Chapos does not contemplate review in cases such as this. This is a state law issue resolved by a State Court and the Court should deny the Chapos' Petition for Certiorari.

The Chapos provide two footnotes to their argument where they stipulate the "question presented to the Supreme Court deals only with the question of applying the *de facto officer* doctrine. . . ." (Pet. pg.iii

ft.nt.2; pg.4 ft.nt.1). The Indiana Court of Appeals stated the issue presented below as follows:

> [T]he 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. (App. pg.32a).

The Indiana Court of Appeals stated the rule of law applied in this case as follows:

> 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. The authority of a de facto official cannot be collaterally attacked. (App. pg.33a) (citing *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981).

Thus, the issue presented below was an issue of State interest, the status of the qualification of a local Plan Commission, and was resolved by State law, Indiana's *de facto officer* doctrine. On its face the decision below does not involve or even touch upon any Constitutional or federal law issue.

The Chapos recognize that 28 U.S.C. Sec.1257(a) limits review by certiorari of the decisions made by the highest court of a State to circumstances " . . . 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. . . ."

As a threshold matter, the only decision made by the Indiana Supreme Court was the discretionary decision to deny transfer of the case to the Court's docket for review and decision. Moreover, the Chapos' Petition does not challenge any statute of the State of Indiana as unconstitutional or otherwise contrary to federal law. The scope of review by certiorari provided by Sec.1257(a) is not applicable to the Indiana Court's application of the Indiana *de facto officer* doctrine to the qualifications of Indiana Plan Commission members.

The Chapos also recognize Supreme Court Rule 10(c) indicates the character of the reasons the Court considers for certiorari including "a state court . . . has decided an important question of federal law . . . or has decided an important federal question." Again, the Chapos' Petition does not identify any question of federal law or important federal question that was resolved by the Court of Appeals below. The scope of the character of reasons the Court considers for certiorari is not applicable to the Indiana Court's application of the Indiana *de facto officer* doctrine to the qualifications of Indiana Plan Commission members.

The Chapos' reference to case law does not provide an appropriate basis for review by certiorari in this case. The Chapos cite to *Norton v. Shelby County*, 118 U.S. 425, 439 (1886) because the Court declined to review a state law issue. The *Norton* case was heard 100 years prior to the 1988 passage of 28 U.S.C. Sec.1257 which was the act of Congress that eliminated appeals as of right form state court decisions to the United States Supreme Court. Even though the

Court's jurisdiction at the time of *Norton*, the Court still declined to review a state court decision that did not touch upon federal law. The *Norton* case provides no support for the Chapos' Petition.

The Chapos cite to *Ryder v. United States*, 515 U.S. 177, 180 (1995) where the Court reviewed a challenge to authority of the members of the Coast Guard Court of Military Review because the appointments to that Court violated the Appointments Clause of the United States Constitution and trespassed on the appointment power of the executive. *Id*. While it is true that the Court declined to extend the *de facto officer* doctrine to the facts before it, the case is fully distinguishable. The issue began within the military court and rose through the federal appellate courts. The case did not involve the review of a State Court's decision on state law. Additionally, as further discussed below, the Court did not apply the *de facto officer* doctrine because the challenge was the legal authority to appoint the judges to the military court in the first place; it was not a challenge to some technical defect in the judges' titles.

Similarly, the Chapos cite *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962) where the Court reviewed a challenge to the authority of members of the Court of Claims at a time when it was not clear whether the appointment authority for said Court sprang from Article I or Article III of the Constitution. Again, the case did not involve a State Court decision on state law. And the Court did not apply the *de facto officer* doctrine because the challenge was to the legal authority to

appoint the judges in the first place; it was not a challenge to some technical defect in the judges' title.

The Chapos attempt to shoehorn this case into a federal review posture. Specifically, the Chapos insinuate that in this case the 2nd Amendment and the "structural error" doctrine somehow create issues of federal interest. As outlined below, there is no viable claim under either the 2nd Amendment or the "structural error" doctrine in this matter. However, even if some cognizable claim could be made under either of these issues, the Chapos have not demonstrated any nexus between those issues and the issue presented, which remains the Indiana Court of Appeals' determination of the application of the Indiana *de facto officer* doctrine to the members of an Indiana county Plan Commission.

B. The JCBZA's Application of a General Zoning Ordinance to a New Commercial Public Shooting Range Does Not Implicate the 2nd Amendment

The Chapos have failed to provide any cogent argument that a 2nd Amendment violation has occurred or even been threatened in this case. At least eight times in the Chapos' Petition for Writ of Certiorari the Chapos make some variation on the claim that the Jefferson County Plan Commission has infringed the Chapos' 2nd Amendment right to maintain proficiency of firearms through the use and operation of a shooting range. (Pet. pg.11, 13, 15, 16, 20, 22, 28, 30). The Chapos appear to take it as a given that some violation of the

2nd Amendment has occurred. However, the Chapos never provide any cogent argument describing or demonstrating any such violation. The Court should deny the Petition because this is a county zoning matter under the law of the State of Indiana that does not implicate the 2nd Amendment.

The Chapos repetitively cite the 7th Circuit's decision in *Ezell v. City of Chicago*, 651 F.3d 684 (7th Cir. 2011) (hereinafter "*Ezell I*"). The Chapos' cherry pick one observation made by the 7th Circuit that "the right to maintain proficiency in firearm use [is] an important corollary to the meaningful exercise of the core right to possess firearms for self-defense." *Id.* at 708. The Chapos pointedly ignore the factual and procedural background of *Ezell* as well as its holding and the holding in its descendant case *Ezell v. City of Chicago*, 846 F.3d 888 (7th Cir. 2017) (hereinafter "*Ezell II*"). Because the Jefferson County Zoning Ordinance does not have the intent or effect of banning shooting ranges, the issues in *Ezell I* and *Ezell II* are not implicated and the holdings are not applicable.

The *Ezell* Court applied an "intermediate scrutiny" to a City of Chicago regulation where a severe burden on a core 2nd Amendment right requires an extremely strong public interest and a close fit between the means and the ends, whereas restriction of activities at the margins of the 2nd Amendment, "laws that regulate rather than restrict," are more easily justified. *Ezell I*, 651 F.3d at 708. The Court applied this level of scrutiny to a Chicago Ordinance that required a citizen to have a permit prior to owning any firearm and

required a certain amount of training and proficiency before receiving the permit. *Id*. at 691. However, the Ordinance went on to facially prohibit "all shooting galleries, firearm ranges, or any other place where firearms are discharged." *Id*. The challengers to the Ordinance challenged the Ordinance on its face, arguing it was facially unconstitutional because it completely removed the ability to train with a firearm. The 7th Circuit applied the intermediate scrutiny review to the complete ban of all firing ranges in Chicago and ruled that it was an unconstitutional infringement of the "corollary" 2nd Amendment right. The *Ezell I* Court expressly pointed out, however, the "City may promulgate zoning and safety regulations governing the operation of ranges not inconsistent with the 2nd Amendment rights of its citizens." *Id*. at 711.

The case returned to the 7th Circuit because the City of Chicago, in response to *Ezell I*, "promulgat[ed] a host of new regulations governing firing ranges, including zoning restrictions, licensing and operating rules, construction standards, and environmental requirements." *Ezell II* at 891. The primary challenge was to zoning provisions that specifically restricted the placement of shooting ranges which had the effect of limiting the placement of shooting ranges to only about 2.2% of the city's total acreage. *Id*. at 894. The Court agreed with the challenger's position that the Ordinance acted as a *de facto* ban. As a result, the Court applied intermediate scrutiny and found the "package of ordinances" aimed at regulating shooting ranges had the effect of banning shooting ranges. However,

the *Ezell II* Court expressly pointed out "Chicago has room to regulate the construction and operation of firing ranges to address genuine risks to public health and safety. This includes setting rules about where firing ranges may locate. . . ." *Id*. at 898.

The *Ezell* cases dealt first with an absolute ban on shooting ranges followed by a set of city regulations that operated as a *de facto* ban on shooting ranges within the City of Chicago. The Jefferson County Zoning Ordinances are completely distinguishable from the regulations at issue in *Ezell*. The Jefferson County Zoning Ordinance is an ordinance of general application that does not single out shooting ranges for special or different treatment. Jefferson County has made no express or implied effort to eliminate or severely restrict the creation and operation of shooting / tactical and test firing ranges in Jefferson County. To the contrary, shooting / tactical and test firing ranges are subject to the exact same regulations and permitting procedures as any other uses in an Agricultural district. Unlike the issue in *Ezell*, there is no "package" of restrictions. This is the only Application for a Conditional Use for a shooting range challenged, there is not a group of shooting range denials demonstrating a severe restriction.

Contrary to the Chapos' assertion, the trial court has addressed this exact issue on more than one occasion. (Pet. pg.18). On October 17, 2017, the trial court issued an Order on the Chapos' Motion to Dismiss and the JCPC's Citation for Contempt. (App. pg.1a). The trial 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. (App. pg.5a).

Thus, on April 17, 2020, the trial court was correct when it issued its decision denying the Chapos' Motion to Correct Error finding:

> 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 protection of 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. (App. pg.26a).

The trial court applied the appropriate level of scrutiny to the claims made by the Chapos and found there was no evidence that the JCZO was on its face or as applied violated the Chapos rights under the 2nd Amendment.

The Agricultural District where Defendants' property and business is located does not have any restriction regarding the use of personal firearms on personal land. The Chapos' efforts to broadly read the decision in *Ezell I* and *Ezell II* would lead to the absurd result that every citizen has the right under the 2nd Amendment to open a public tactical and test firing range on any land under any circumstances and the State has no legitimate interest in providing for the appropriate zoning for such a use. The 2nd Amendment does not forbid a County from regulating the zoning of a shooting range in the same manner it regulates other uses. The 7th Circuit decisions in *Ezell I* and *Ezell II* expressly recognize the legitimate interest in regulating zoning. The Chapos have failed to provide any cogent evidence that Jefferson County's enforcement of its general zoning ordinance is facially, effectively, or as applied a violation of their 2nd Amendment freedoms.

C. The Chapos' Petition Fundamentally Misconstrues the "Structural Error" Doctrine Which is Not Applicable in This Case

The Chapos, seeming to recognize the weakness in their effort to convert a local zoning case into a 2nd Amendment issue, have reached for an alternative source of Constitutional review. The Chapos have put their effort into contorting the "structural error doctrine" into some avenue by which this Court would properly review Indiana's application of the *de facto officer* doctrine to a local zoning issue. The Court should

deny the Petition because there is not "structural error" in this matter.

In *Weaver v. Massachusetts*, 137 S.Ct. 1899, 1907 (2017) the Court explained the origin of the "structural error doctrine." In criminal trials there is a general rule that a constitutional error is deemed a "harmless error" and does not automatically require reversal if the government can show beyond a reasonable doubt that the error did not contribute to the conviction. *Id*. However, there are certain errors that can occur in the criminal trial structure that should not be deemed harmless. *Id*. "The precise reason why a particular error . . . [is] deemed structural varies in a significant way from error to error." *Id*. at 1908. Some, like the right to defend oneself, protects the fundamental principle that a defendant must be allowed to make their own choices even if they do not protect the defendant from erroneous conviction. Some, like the right to selection of the attorney choice, are just too difficult to measure the harm of denying. And others, like the failure to be provided an attorney, are fundamentally unfair. *Id.* All examples of the "structural error doctrine" demonstrate the purpose "to ensure insistence on certain basic, constitutional guarantees that should define the framework of any **criminal trial**." *Id*. at 1907.

No matter how hard to define, "structural errors" share four basic components: they are errors that occurs because of constitutional violations, they occur during trial, they occur in criminal cases, and they have been determined by the Courts to not be harmless. While is it is unclear precisely what error the

Chapos allege falls afoul of the "structural error doctrine" it is apparent the doctrine is not applicable in this case. First, this case has not yet proceeded to trial. Second, none of the cited cases applying the structural error doctrine apply here. Third, and most importantly, this is not a **criminal** matter. As further argued above, there is not cogent argument in this case that Jefferson County's application of a general zoning ordinance to the Chapos' Application for a permit to locate a shooting range violates or even implicates the Chapos' 2nd Amendment rights. However, even if there were some cogent arguments for constitutional violation, the "structural error doctrine" does not apply in a civil zoning matter that has not proceeded to trial and that does not contain any "structural error" recognized by the Courts.

D. The Indiana Court's Application of the *De Facto Officer* Rule is a Pure Issue of State Law and Was a Legally Proper Decision in This Case

When deciding the issue presented, application of the *de facto officer* doctrine to county Plan Commission members who failed to file an oath, the Indiana Court of Appeals relied primarily on two Indiana Court of Appeals decisions interpreting that doctrine *Fields v. State*, 91 N.E.3d 597 (Ind. Ct. App. 2017) and *Carty v. State*, 421 N.E.2d 1151 (Ind. Ct. App. 1981). The Indiana Court of Appeals recognized "[t]his 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. The doctrine has been accepted law in Indiana for over 100 years and is supported by the strong public policy that "[t]he public is not to suffer because those discharging the function of an officer may have a defective title, or no title at all." *Parker v. State ex rel. Powell*, 32 N.E. 836, 843 (Ind. 1892).

All that is required to establish a person as a *de facto officer* is that the person: (1) claim the office (2) be in possession of the office, and (3) perform its duties under the color of election or appointment. *Fields*, 91 N.E.3d at 600 and *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). Each of the members of the JCPC were authorized to claim their position by virtue of their status as mandatory members or as appointed members pursuant to Ind. Code Sec. 36-7-4-208. Each of the members publicly were in possession of the office as demonstrated by appearance as members and inclusion to form a quorum during public meetings and hearings of the JCPC. Each of the members publicly performed their duties under the color of election or appointment as demonstrated by their participation in the meetings of and being counted in the vote of the JCPC. The Chapos do not dispute the members meet the three factors of the test laid out above. Indeed, the Chapos' express complaint is that the members of the JCPC claimed and possessed their office, and publicly pursued official action by filing this cause of action,

although they had not taken and deposited the oath of office.

The Chapos cite to *Norton v. Shelby County*, 118 U.S. 425 (1886) for the proposition that this Court will review a State Court's *de facto officer* decisions if the decision rises to the level of conflicting or impairing the efficacy of some principle of the federal constitution, or of a federal statute. It is strange that the Chapos cite to *Norton* which provides such an extensive recital of both the purposes and applications of the *de facto officer* doctrine:

> The doctrine which gives validity to acts of officers *de facto*, **whatever defects there may be in the legality of their appointment of election**, is founded upon considerations of policy and necessity, for the protection of the public and individuals whose interests may be affected thereby. Offices are created for the benefit of the public, **and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices**, and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed **until, in some regular mode prescribed by law, their title is investigated and determined**. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question. *Norton v. Shelby Cty.*, 118 U.S. 425, 441–42 (1886). (emphasis added).

However, the *Norton* Court went on to point out that "for the existence of a *de facto officer*, there must be an *office de jure*. . . ." *Id*. at 449. Where no office legally exists, the pretended officer is merely a usurper, to whose acts no validity can be attached." *Id*. This is a very succinct distinction between a *de facto officer* and a usurper. The former is a person who occupies an office that legally exists and, apart from some technical defect in their title, legally occupy the office. The latter is a person who attempts to occupy an office that never legally existed or has no colorable claim to the office.

The Chapos also cite *Ryder v. United States*, 515 U.S. 177, 180 (1995) wherein the Court again succinctly stated the *de facto officer* doctrine and found that it did not apply in the case before it. The issue presented was a challenge to the composition of the Coast Guard Court of Military Review on the basis the appointments to that Court violated the Appointments Clause of the United States Constitution and trespassed on the appointment power of the executive. *Id*. This was differentiated from decisions such as the misapplication of statutes providing for the assignment of already appointed judges. *Id*. Thus, the challenge was not that there was some technical defect in the title of the Coast Guard Court judges, rather that they were unconstitutionally appointed in the first place.

The Chapos erroneously argue that the Indiana courts effectively suspended the operation of Ind. Code Sec. 5-4-1-1.2(c)&(d). It bears repeating that the Chapos' challenge is not an appropriate issue for review by certiorari. Supreme Court Rule 10 ends saying

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." The appropriateness of review notwithstanding, the Indiana courts' decision in this case does not suspend the operation of any law.

Ind. Code Sec. 5-4-1-1.2(c)&(d) provides in relevant part:

> (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.

The authority of a de facto official cannot be collaterally attacked. (App. pg.33a) (citing *Carty v. State*, 421 N.E.2d 1151, 1154 (Ind. Ct. App. 1981). Collateral attack here means that the authority of a public officer cannot be attacked as a means of attempting to invalidate the public officer's past actions. In Indiana the "rule that the acts of an officer *de facto*, performed before ouster, are, as to the public, as valid as the acts of an officer *de jure*, is too familiar to the profession to need the citation of authority. The public is not to suffer because those discharging the functions of an officer may have a defective title, or no title at all."

Parker v. State ex rel. Powell, 133 Ind. 178, 32 N.E. 836, 843 (1892).

The legal fact that a *de facto officer's* actions may not be collaterally attacked does not prevent the direct attack of the *de facto officer's* status in an appropriate action. For example, the authority who appoints members to an Indiana county Plan Commission may appoint a different person to that office if a previously appointed person fails to qualify. A contest between the appointing authority and the *de facto officer* or between the *officer de jure* and the *de facto officer* would result in the ouster of the *de facto officer* and would be a direct attack upon their authority. Even then, however, the prior acts of the *de facto officer*, conducted prior to the appointment of the *officer de jure* would not be subject to collateral attack.

Thus, the Indiana courts' decisions do not suspend the operation of Ind. Code Sec. 5-4-1-1.2(c)&(d). To the contrary, the Section would provide a strong basis for an appointing authority or an *officer de jure* to attack the qualification of a *de facto officer* and oust them from the office they hold. However, until such time as the *de facto officer* is properly ousted, "the acts of an officer *de facto*, performed before ouster, are, as to the public, as valid as the acts of an officer *de jure*."

CONCLUSION

For the foregoing reasons, the Jefferson County Plan Commission respectfully requests the Court deny the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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