No. 21-290

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

PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION

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PETITIONERS' REPLY TO THE BRIEF IN OPPOSITION OF JEFFERSON COUNTY PLAN COMMISSION

I. Introduction.

Pursuant to Rule 15(6) of the Supreme Court Rules the Petitioners now submit their Reply to the Brief in Opposition filed by the Jefferson County Plan Commission (JCPC).

The issue set forth in the Petition for a Writ of Certiorari raised the primary issue of whether officers of a local political subdivision who fail to take an oath to uphold the U.S. Constitution as mandated by state law qualify for a *de facto* officer status. The Brief in Opposition (at page i) seeks to distract the Supreme Court's attention from the oath of office by raising multiple new points, which have not been subjected to a final judgment in the ongoing state litigation.

The only issue presented to the Supreme Court that has been a subject of a final judgment is the failure of local political subdivision officers to take an oath to uphold the U.S. Constitution, where there is an infringement of constitutional rights. Accordingly, the new points in the Brief in Opposition should be rejected by the Court.

II. Claim Failure to Take Oath Was Inadvertent.

The only point the Brief in Opposition presented that the Supreme Court could consider was found on page 1 of the Brief in Opposition. There the JCPC stated, "The failure to file oaths of office was inadvertent." By making this statement the JCPC has admitted that the mandated oath to uphold the U.S. Constitution was not taken by the individuals claim-

ing to hold the JCPC offices. The Brief in Opposition then seeks to justify the failure due to inadvertence.

Inadvertence may be a defense for a *de facto* officer status argument, but is not viable for constitutional violations. https://www.merriam-webster.com/dictionary/inadvertent defines inadvertent as 1.) unintentional an inadvertent omission; or 2.) not focusing the mind on a matter: inattentive. Neither definition fits the actions of the individuals claiming a *de facto* officer status. The claim of inadvertence is simply another way of saying "we were ignorant (inattentive or careless) of law," which is no excuse.

It is well settled that ignorance of the law is no excuse. See *Bellwether Props., LLC v. Duke Energy Ind., Inc*., 87 N.E.3d 462, 467 (Ind. 2017), citing *Cotton v. Commonwealth Loan Co.,* 206 Ind. 626, 632, 190 N.E. 853, 856 (1934). "It is a maxim of universal application that every man is presumed to know the law,"

Since Indiana law §5-4-1-1.2 makes it mandatory for officers of local subdivisions to take an oath to uphold the U.S. Constitution, inadvertence cannot be a viable excuse to fail to take the oath. In other words, the JCPC is boldly advocating that the mandates of the General Assembly laws can be ignored and/or violated with no repercussions or recourse for persons affected by the violation. When it involves a violation of a constitutional right, inadvertence is not a viable excuse.

The U.S. Constitution is the supreme law of the land. Article VI, Clause 2 of the Constitution states,

> ***This Constitution***, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, ***shall be the supreme***

> ***Law of the Land***; and the Judges in every State shall be bound thereby, any Thing in the Constitution or ***Laws of any state to the Contrary notwithstanding***. (Emphasis added)

The term "notwithstanding" according to the thesaurus has various connotations of "despite, in spite of, regardless of." Thus, the U.S. Constitution is the supreme law regardless of any other law.

Thus, the zoning ordinance cannot be enforced, or applied, in a manner that is inconsistent with the US Constitution and the Laws of the General Assembly. In the recent decision in *Roman Catholic Diocese v. Cuomo*, 592 U. S. ____, 141 S.Ct. 63 (2020) the Court stated in regards to pandemic restriction, "even in a pandemic, the Constitution cannot be put away and forgotten." This cardinal principle can be effectively restated as, "even in zoning ordinances, the Constitution cannot be put away and forgotten." The JCPC requests the Court on page 15 to "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." Since the shooting range was prohibited through the initial preliminary injunction court action initiated by the vacant offices of the JCPC, based on the claim the shooting range violated the zoning ordinance, the statement is a clear message the JCPC considers the zoning ordinance superior to the U.S. Constitution.

III. Requirement of Final Judgment.

The first part of the Brief in Opposition issue is based on a false premise regarding the Indiana state court actions. The issue in part reads,

> 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 . . .

This portion of the issue falsely alleges that the Indiana Court of Appeals affirmed a trial court's decision to uphold the actions of the County Board of Zoning Appeals (JCBZA) and JCPC. No court in Indiana has made such a ruling.

On page 12 of the Brief in Opposition it is claimed,

> 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.

This claim is a misguided attempt to argue the criteria of 28 U.S.C. §1257(a) was not met by the Chapos' Petition. Contrary to the Brief in Opposition claim, the Supreme Court does have authority to exercise jurisdiction over discretionary decisions of state supreme courts, see *Yee v. City of Escondido, California*, 503 U.S. 519, 533 (1992), wherein the Supreme Court reviewed a decision of the Supreme Court of California that denied a discretionary review.

The vital question of whether the Supreme Court has jurisdiction to review the oath of office issue, as stated in the Petition, depends on whether the decision to be reviewed resulted from a final decision of the state courts. The Petition briefly stated at page 5 the final judgment aspect of a denial of a Rule 60(B) motion.

Because the Brief in Opposition did not mention, or acknowledge, the final judgment status of a denial of an Indiana Trial Rule 60(B) motion, and because a denial of a Rule 60(B) is unique to Indiana, a further explanation of the rule is warranted.

Not mentioned in the Brief in Opposition is that, as a matter of Indiana law, a denial, or a granting, of a Rule 60(B) motion is a final appealable order. Pursuant to Rule 60(C) an order "denying or granting" a motion under Rule 60(B) "shall be deemed a final judgment, and an appeal may be taken therefrom as in the case of a judgment." Thus, a Rule 60(B) motion may be filed in an ongoing case even though a final judgment in the case has not yet been made. This was confirmed by the Indiana Supreme Court in *Mitchell v. 10th & the Bypass, LLC*, 3 N.E.3d 967, 973 (Ind. 2014), which acknowledged that Rule 60(B) was amended in 2008 to be effective on January 1, 2009. The Court ruled, "Thus, the express language of the rule no longer limits relief only from a 'final' judgment . . . .".

Rule 60 of Federal Rules of Civil Procedure does not permit the filing of a Rule 60(B) motion before a final judgment in an ongoing case. Thus, the Supreme Court has never addressed a Rule 60(B) motion that was deemed a final judgment prior to the "final judgement" in the ongoing case, *i.e*., a decision on the merits of the issues. Because the Indiana State Supreme Court made a discretionary decision not to review a final judgment of a denial of the Chapos' Rule 60(B) motion, the United States Supreme Court has jurisdiction to review the oath of office issue.

In view of the final judgment status of the Rule 60(B) denial and the lack of a final judgment regarding the new points raised in the Brief in Opposition, The Supreme Court has jurisdiction to review the oath of

office issue and only that issue. The Supreme Court, however, does not have jurisdiction to review the new points cited in the Brief in Opposition, as they have yet to be the subject of a final judgment decision on the merits in the Indiana courts.

A. Alleged Misstatements of Petitioners.

The JPC alleged the Petitioners misstated several issues of fact and law on pages 2 through 5 as follows:

1. Claim that the Zoning Ordinance has not and does not regulate shooting ranges.
2. Claim the shooting range was built in 1991.
3. Claim that the denial of the shooting range was noise.
4. Claim of a misstatement regarding the JCZA Officer's statement on noise.
5. Claim of a misstatement regarding the JCBZA Chairman acknowledging the existence of the shooting range.
6. Claim of a misstatement that the JCBZA actions were in violation of the Indiana Shooting Range Protection Act.

Items 1 through 5 are all new points that are being claimed as misstatements of fact. These disputes of facts are not appropriate for the Supreme Court to review as they actually demonstrate genuine issues of material fact, pursuant to the Summary Judgment Rule 56, that have not yet been subject to a final judgment in any Indiana court. The same is true of the item 6, except, it is a question of law. The question of the application of the Indiana Shooting Range Protection Act to the shooting range of the Chapos has

not yet been the subject of a final judgment in any Indiana court.

Accordingly, the claims of misstatements made in the Brief in Opposition are not supported by any facts or law that has been the subject of a final decision in the Indiana courts. The claims of misstatements are nothing more than a deflection from the main issue of the failure to take a statutory mandated oath that includes an oath to uphold the U.S. Constitution. Accordingly, the JCPC in its Brief in Opposition is actually misrepresenting both the law and the facts, which have nothing to do with the oath of office mandate.

B. Claim of Collateral Attack Shield.

The second portion of the JCPC issues reads,

> 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.

There are two factors in this portion of the issue that render the JCPC's issue inappropriate for the Supreme Court's consideration.

1. Technical Defect.

First, the JCPC claims the *de facto* officer doctrine is viable due to a technical defect. The Petition at page 21 addressed the technical defect aspect of the *de facto* doctrine and cited three cases that refuted the *de facto*

doctrine when constitutional issues are present. See *Norton v. Shelby County*, 118 U.S. 425, 437 (1886); *Ryder v. United States*, 515 U.S. 177, 182 (1995); and *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962). A fourth Supreme Court reached the same conclusion. Citing *Ryder, supra,* the Supreme Court has made it clear that "This Court has held that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief," *Lucia v. Sec.*, 138 S.Ct. 2044, 2055 (2018).

Thus, since the alleged technical defect involves a constitutional issue, the argument is really a constitutional error and the *de facto* doctrine is not applicable.

The Court in *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991) used the term "constitutional error" to refer errors that are not subject to harmless error. The Supreme Court in *McDonald v. City of Chicago, Illinois*, 561 U.S. 742 (2010) did not use any of the terms, but it addressed a violation of a 2nd Amendment. See 561 U.S. at 790,

> "[T]he enshrinement of constitutional rights necessarily takes certain policy choices off the table." *Heller*, 554 U.S., at ——, 128 S.Ct., at 2822. This conclusion is no more remarkable with respect to the Second Amendment than it is with respect to all the other limitations on state power found in the Constitution.

Thus, if it is a structural error to violate the 6th Amendment, in a criminal case, it is also a constitutional structural error to violate the 2nd Amendment.

The statement by JCPC that a structural error" is to make certain harmless errors the basis for

reversal," is contrary to the law. *Arizona*, *supra*, 499 U.S. at 301.

> "Since our decision in *Chapman*, other cases have added to the category of constitutional errors which are ***not subject to harmless error*** the following: unlawful exclusion of members of the defendant's race from a grand jury,"

Thus, the claim of "structural error" in the Brief in Opposition is misplaced and cannot support its claim that a technical defect protects an individual who is alleged to have violated the 2nd Amendment.

2. Collateral Attack Shield.

At page 9 of the Brief in Opposition the JCPC claimed its alleged officers were *de facto* officers and not subject to collateral attack. This claim was made even though the individuals claiming possession of the offices were usurpers since IC §5-4-1-1.2 made the offices vacant as a matter of law. It was again raised on pages 24-26 in more detail.

The JCPC has in effectively struggled to paint the direct attack on the JCPC offices as a "collateral attack." There are two problems with JCPC's characterization. First, as demonstrated in Subsidiary Question 3 of the Petition beginning at page 25, the alleged JCPC office holders cannot not *de-facto officers*, because they violated a state mandated requirement after taking office and their actions are *ultra vires*. Second, the action in this case is not a collateral attack, but a direct attack. This is consistent with *Lucia, supra,* which made it clear that a person is entitled to relief, if he timely makes a challenge.

The Chapos made a direct attack through the Rule 60(B) Motion. A direct attack has been defined by the Indiana Supreme Court in *State ex rel. Lacy v. Probate Court, Marion County*, 182 N.E.2d 416, 418 (Ind. 1962) ("an assailant is pursuing a very direct attack when he strikes at the judgment with one of the procedural weapons thus placed at his disposal.").

The direct challenge was based on §5-4-1-1.2, which mandated individuals appointed to political subdivision to take an oath to uphold the U.S. Constitution. §5-4-1-1.2 was violated by the individuals claiming to hold the JCPC offices and was ignored by the state court.

Constitutional violations are the at the core of the Constitution's structure in protecting the individual's constitutional rights. §5-4-1-1.2 was passed to protect the public's constitutional rights by mandating the political subdivision officers take an oath to uphold the U.S. Constitution. The necessary and logical result is clear. When persons unlawfully holding offices by failing to take a mandated oath to uphold the U.S. Constitution, the actions of such usurpers are *ultra vires*.

Accordingly, the JCPC claim the JCPC members are shielded from a collateral attack is not supported by law.

CONCLUSION

The only issue before the Supreme Court that has been made a subject of a final judgment is the issue regarding the failure of individuals claiming to possess the JCPC offices to take an oath to uphold the U.S. Constitution. The Brief in Opposition has presented several new points that have not been subjected to a final judgment in any Indiana state court. Instead of supporting the JCPC's erroneous claim that the

Supreme Court lacks jurisdiction, these points actually demonstrate there are genuine issues of material facts that have yet to be decided by the state trial court. Accordingly, these arguments in the Brief in Opposition should be rejected by the Court.

If the ruling of the Indiana courts that allows local subdivision officials to make constitutional decisions affecting the public without taking an oath to uphold the U.S. Constitution is allowed to stand by this Court not reviewing the issue, then a perilous precedence will be established. This unfortunate precedent will be used to erode the requirement of governmental officers to take an oath to uphold the U.S. Constitution in other counties of Indiana and in other states. The Constitution recognized certain established rights to protect individuals. Protecting government officials who do not take an oath of uphold the Constitution and violate the constitutional rights of the public is the antithesis of the purpose of the Constitutional rights.

Accordingly, the Petitioners respectfully request the Supreme Court to reject the arguments presented in the Brief in Opposition that are destructive and detrimental to the protection of individual constitutional rights and grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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