No. 125085

IN THE
SUPREME COURT OF ILLINOIS

MATTHEW GORAL, KEVIN BADON, MICHAEL MENDEZ, MILAN STOJKOVIC, DAVID EVANS III, FRANK DONIS, and LASHON SHAFFER, on behalf of themselves and others similarly situated,	)	Appeal from the Illinois Appellate Court, First Judicial District, No. 1-18-1646
Plaintiffs-Appellees,	)	There Heard on Appeal from the Circuit Court of Cook County, Illinois,
v.	)	Chancery Division, No. 17 CH 15546
THOMAS J. DART, Sheriff of Cook County; COOK COUNTY, ILLINOIS; and THE COOK COUNTY SHERIFF'S MERIT BOARD,	)	The Honorable SOPHIA H. HALL,
Defendants-Appellants.	)	Judge Presiding.

BRIEF OF *AMICI CURIAE* ILLINOIS ATTORNEY GENERAL KWAME RAOUL AND THE CITY OF CHICAGO IN SUPPORT OF DEFENDANTS-APPELLANTS

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Illinois Attorney General Kwame Raoul

SARAH A. HUNGER
Deputy Solicitor General
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5202
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
shunger@atg.state.il.us

(Additional counsel on signature page)

E-FILED
12/10/2019 12:08 PM
Carolyn Taft Grosboll
SUPREME COURT CLERK

POINTS AND AUTHORITIES

INTEREST OF THE AMICI CURIAE

For more than a century, the *de facto* officer doctrine has protected the official acts of public officers from invalidation because of technical defects in their appointments or elections. In order to preserve the work performed by these officers, the doctrine treats the acts of a *de facto* officer as if they had been performed by a validly appointed or elected officer. At the same time, it allows the Attorney General, a State's Attorney, or a private relator to remove the officer through a *quo warranto* proceeding directly attacking the officer's qualifications. This traditional approach—which protects official actions while remedying defects in an officer's appointment or election—is straightforward, easily applied, and furthers the public interest in stability, efficiency, and finality.

But as shown by the appellate court's decision in this case, some courts have strayed from this tradition by allowing private litigants to challenge an officer's qualifications outside of the *quo warranto* context. *See Goral v. Dart*, 2019 IL App (1st) 181646. In practice, this means that litigants dissatisfied with an agency action may dispute the credentials of an agency official in an attempt to unwind the underlying agency decision. Here, for example, employees of the Cook County Sheriff charged with misconduct are defending against those charges by claiming that the Cook County Sheriff's Merit Board ("Merit Board") is improperly constituted. *Id.* ¶ 1. This recent practice, which grew out of this Court's divided decision in *Daniels v. Industrial Commission*,

201 Ill. 2d 160 (2002), has inserted confusion into an otherwise orderly system and unnecessarily opened agency decisions to attack based on technical defects.

The Illinois Attorney General and the City of Chicago have an interest in ensuring that the *de facto* officer doctrine is properly interpreted to promote the orderly and efficient operation of government. The Attorney General represents dozens of administrative agencies and their officers that make decisions of vital public importance to the State and its residents. *See* Ill. Const. 1970, art. V, § 15; 15 ILCS 205/4. The work of these agencies is often performed by individuals who are appointed, elected, or confirmed in accordance with detailed procedures and who must meet specific prerequisites to hold office. *See*, *e.g.*, 5 ILCS 315/5 (Illinois Labor Relations Board); 10 ILCS 5/1A-1, 1A-2.1, 1A-3, 1A-3.1, 1A-4, 1A-5, 1A-6 (Illinois State Board of Elections); 20 ILCS 5/5-565 (Illinois State Board of Health); 20 ILCS 5/5-605 (general appointment requirements for officers whose offices are created by Civil Administrative Code of Illinois); 35 ILCS 200/7-5, 7-10 (Illinois Property Tax Appeal Board); 115 ILCS 5/5 (Illinois Educational Labor Relations Board); 220 ILCS 5/2-101, 2-102, 2-103, 2-104 (Illinois Commerce Commission); 225 ILCS 60/7 (Illinois Medical Disciplinary Board); 415 ILCS 5/5(a) (Illinois Pollution Control Board); 775 ILCS 5/8-101 (Illinois Human Rights Commission).

The City of Chicago is home to nearly three million residents, including more than 300,000 public school students and 30,000 employees. The General Assembly and Chicago City Council have empowered dozens of officials appointed by the Mayor to serve as commissioners or on boards and commissions that make crucial decisions that affect the public interest, including decisions about public spending, services, development, and employment. *See, e.g.*, 105 ILCS 5/34-3 (Chicago Board of Education); Municipal Code of Chicago, Ill. § 2-32-622 (Chicago Community Catalyst Fund); *id.* § 2-74-040; *id*. § 2-84-020 (Chicago Police Board); *id*. § 2-120-590 (Commission on Chicago Landmarks); *id.* § 2-120-490 (Commission on Human Relations); *id.* § 2-156-370 (Chicago Board of Ethics); *id.* § 17-14-301 (Zoning Board of Appeals).

The appellate court's decision places this important work at risk by allowing technical defects in an officer's appointment or election to call into question otherwise valid agency actions. When an officer's actions are vacated, agencies are forced to duplicate the work of the *de facto* officer, which unduly strains public resources and fosters inefficiency. Restoring regularity and finality to this process is thus important to the Attorney General not only as representative of state agencies, but also in his capacity as representative of the People, *see* 15 ILCS 205/4, who rely on the authority of their public officials and in the orderly functioning of government, as well as to the City of Chicago and its residents.

In addition, the Attorney General is interested in this matter because he is statutorily vested with the authority to pursue *quo warranto* proceedings. *See* 735 ILCS 5/18-102. Proper use of these proceedings—as the exclusive method to challenge a *de facto* officer's claim to office—eliminates the confusion and inefficiencies associated with the appellate court's approach. The *quo warranto* process also has the benefit of providing the Attorney General with the ability to remedy a defect in an appointment or election with the public interest in mind, rather than leaving that responsibility with a litigant seeking personal gain.

In sum, the Attorney General and the City of Chicago have a significant interest in the proper interpretation and application of the *de facto* officer doctrine. As such, they can assist this Court by presenting ideas and insights not offered by the parties to this case who do not have the same institutional knowledge and experience.

ARGUMENT

This case addresses when and how a party may raise challenges to a public official's qualifications to hold office. Historically, the answer was simple: all challenges to an officer's appointment or election were raised in specialized *quo warranto* proceedings, which allowed the circuit court to focus solely on the validity of the appointment or election independent of any underlying actions taken by that officer. This clear-cut rule had the additional benefit of adhering to the *de facto* officer doctrine—a centuries-old common law principle that treats official acts taken by a *de facto* officer as though they had been performed by a validly appointed officer. Coupled together, the *de facto* officer doctrine and *quo warranto* proceedings provided a practical framework that promoted stability, efficiency, and finality.

In the wake of this Court's divided decision in *Daniels*, however, courts have departed from this sensible approach and allowed private litigants to dispute the validity of an officer's credentials outside of the *quo warranto* context. By permitting collateral challenges, these courts have undermined the important principles promoted by the *de facto* officer doctrine and created confusion over when and how litigants can raise alleged defects in an officer's appointment or election. To remedy these newfound problems and effectuate a workable system, this Court should return to first principles and reaffirm the traditional application of the *de facto* officer doctrine.

I. The traditional application of the *de facto* officer doctrine protects official acts from collateral attacks, but allows direct challenges to any technical flaws in the officer's qualifications.

This Court's longstanding precedent reflects a symbiotic relationship between the *de facto* officer doctrine and *quo warranto* proceedings, in which the former protected the acts of public officers from collateral challenges, while the latter allowed parties to attack a public officer's right to hold office in a direct proceeding.

The first of these, the *de facto* officer doctrine, has "'feudal origins,' dating back as far as the 15th century." *Lopez v. Dart*, 2019 IL App (1st) 170733, ¶ 48. The doctrine was brought to the United States as part of English common law and developed at both the state and federal levels. Kathryn A. Clokey, Note, *The* De Facto *Officer Doctrine: The Case For Continued Application*, 85 Colum. L. Rev. 1121, 1132 (1985). Over time, the doctrine "achieved practically universal acceptance by the courts," *Iowa Farm Bureau Fed'n v. Envtl. Protection Comm'n*, 850 N.W.2d 403, 423 (Iowa 2014) (internal quotations omitted), including by this Court, *see Schlenker v. Risley*, 4 Ill. 483, 485 (1842).

In the nineteenth and twentieth centuries, this Court applied the *de facto* officer doctrine in a manner consistent with its ancient roots. Indeed, this Court considered a *de facto* officer to be any public official who, by all appearances, had been validly appointed or elected to public office, but who nevertheless lacked formal title to his or her office because of some technical

defect in the appointment or election. *See Waterman v. Chi. & I.R. Co.*, 139 Ill. 658, 665-66 (1892) ("An officer *de facto* is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law.") (internal quotations omitted). For example, an officer could be considered a *de facto* officer if he or she was appointed by a body lacking appointment authority, failed to take an oath of office or pay a bond, or was appointed pursuant to a law that was later held unconstitutional. *See Harvey v. Sullivan*, 406 Ill. 472, 478 (1950); *People ex rel. Rusch v. Wortman*, 334 Ill. 298, 301 (1928).

Under the *de facto* officer doctrine, the acts of a *de facto* officer were "as valid as those of officers *de jure*." *Wortman*, 334 Ill. at 302. In other words, so long as a *de facto* officer performed the duties of his or her office, those actions were treated as if no defect existed. *Id.* at 301. This approach thus recognized that technical defects in an officer's qualifications have no bearing on the substantive rights of any party impacted by the officer's acts. *See Mapes v. People*, 69 Ill. 523, 529-30 (1873) (applying doctrine because alleged error was "trivial" and did not "work[ ] any injury to the accused"); *see also Hussey v. Smith*, 99 U.S. 20, 24 (1878) ("The acts of [*de facto*] officers are held to be valid because the public good requires it. The principle wrongs no one."). The traditional approach also acknowledged that allowing a party to invalidate a *de facto* officer's official acts based on such technical defects would lead to upheaval and instability. *See*, *e.g.*, *Ryder v. United States*, 515 U.S. 177, 180

(1995) (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") (internal quotations omitted).

In practice, this meant that the doctrine prohibited challenges seeking to unwind a *de facto* officer's actions based on a defect in his or her qualifications to hold office, even if the party making the challenge had been directly affected by the officer's actions. For example, in *People v. O'Neill*, 33 Ill. 2d 184 (1965), a lawsuit brought by the State to collect delinquent taxes from the defendant, this Court held that the defendant could not seek to avoid the tax by challenging the appointments of members of the county board responsible for levying the tax. *Id.* at 187. This Court emphasized that to hold otherwise would create "legislative anarchy" by invalidating "the public laws enacted by the only functioning legislature of a governmental subdivision." *Id.*

Similarly, in *Village of Des Plaines v. Winkelman*, 270 Ill. 149 (1915), the defendant appealed from a judgment condemning his property entered in favor of the Village of Des Plaines, asserting that the condemnation should be invalidated because the village's president "had not filed his official bond at the time he approved the ordinance" authorizing the condemnation. *Id.* at 151-52. This Court rejected that argument, holding that "the question of [the president's] title cannot be raised in this proceeding" because, even if he failed to pay the bond, he was acting as the village president when he approved the ordinance. *Id.* at 152; *see also People ex rel. Chillicothe Twp. v. Bd. of Review*

of Peoria Cty., 19 Ill. 2d 424, 426-27 (1960) (plaintiffs could not raise improper composition of county board of review in proceeding challenging board's decision to increase assessed value of property).

Although the doctrine protected the acts of a *de facto* officer from these "collateral" challenges, it did not shield the officer from "direct" challenges to his or her authority to hold office. *Wortman*, 334 Ill. at 301.[1] During this era, the exclusive procedural mechanism for direct challenges were *quo warranto* proceedings. *See*, *e.g.*, *Osborn v. People ex rel. Lewis*, 103 Ill. 224, 228 (1882) (alleged improper organization of local drainage district could be challenged "only . . . by *quo warranto*"). In *quo warranto* proceedings, the only question was whether the officer was entitled to hold office; courts did not consider the validity of the officer's underlying acts. As one example, in *People ex rel. Ballou v. Bangs*, 24 Ill. 184 (1860), this Court granted a writ of *quo warranto* ousting a circuit court judge elected pursuant to unconstitutional statute, but held that "his acts were as valid . . . as if the law had been constitutional." *Id.* at 187. And in *Chillicothe Township*, this Court held that in a *quo warranto* proceeding, the plaintiffs could not raise an argument that the acts taken by

[1] For purposes of the *de facto* officer doctrine, the terms "collateral" and "direct" have a specialized meaning. Claims focused on attacking an officer's qualifications in order to undermine his or her official actions are known as "collateral" challenges, *see Cleary v. Chi. Title & Trust Co.*, 4 Ill. 2d 57, 58-59 (1954), whereas challenges properly raised in *quo warranto* proceedings are "direct" challenges, *see Osborn*, 103 Ill. at 228.

members of the Board of Review of Peoria County were "unconstitutional and void." 19 Ill. 2d at 426-27.

The authority for *quo warranto* proceedings has taken many forms in Illinois, although its purpose and effect has not changed. The common-law writ of *quo warranto*, like the *de facto* officer doctrine, has "ancient" roots. *City of Highwood v. Obenberger*, 238 Ill. App. 3d 1066, 1079 (2d Dist. 1992). "It was originally a writ of right for the crown against one who claimed or usurped any office, franchise or liberty, to challenge the authority underlying that assertion of the right." *People ex rel. Graf v. Vill. of Lake Bluff*, 206 Ill. 2d 541, 546-47 (2003). Illinois replaced the common-law writ with a statutory *quo warranto* proceeding in 1833. *People v. Wood*, 411 Ill. 514, 518 (1952). Originally, statutory *quo warranto* took the form of a criminal information and, like any other criminal charge, it could be pursued only by the Attorney General or a State's Attorney. *Id.*

But over time, the General Assembly amended the statute to allow private parties to be more involved in these proceedings. *Id.* at 519-20. Since 1937, the *quo warranto* statute has allowed the Attorney General, a State's Attorney, or, if both refused to act, a private individual, to seek relief on behalf of the People of the State of Illinois. *See* 735 ILCS 5/18-102; *People ex rel. McCarty v. Firek*, 5 Ill. 2d 317, 319-20 (1955). Under current law, a *quo warranto* action may be brought where "[a]ny person usurps, intrudes into, or unlawfully holds or executes any office, or franchise, or any office in any

corporation created by authority of this State[.]" 735 ILCS 5/18-101(1). Before bringing a *quo warranto* action, a private individual first must ask the Attorney General and the State's Attorney of the relevant county to sue on behalf of the People. *Id.* 5/18-102. If they refuse, then the plaintiff may bring the action in his or her own name as an "individual relator," with the permission of the circuit court. *Id.*

II. *Daniels* created confusion that undermines the fundamental purposes of the *de facto* officer doctrine.

Illinois courts consistently employed this bifurcated approach until 2002, when this Court issued its decision in *Daniels*. That decision, which ultimately allowed a collateral challenge to an officer's title, *see Daniels*, 201 Ill. 2d at 167, created confusion over how to apply the *de facto* officer doctrine. Since then, some Illinois courts have strayed from the traditional interpretation of the *de facto* officer doctrine to permit challenges outside of the *quo warranto* context. This has created a host of practical problems that undermine the effectiveness of the *de facto* officer doctrine and upset the stability and efficiency of agency actions.

To begin, *Daniels* created uncertainty over whether defects in an administrative agency appointment could render the agency's underlying decision void. The plurality opinion in *Daniels* noted that, generally speaking, any agency action taken without statutory authority is void. *Daniels*, 201 Ill. 2d at 166 (plurality op.). Thus, the plurality would have held that, because the Industrial Commission appointments at issue there were not in compliance

with statutory requirements, the underlying Commission decision should be deemed void. *Id.* And, according to the plurality, because the Industrial Commission's decision was void, it could be attacked "at any time in any court, either directly or collaterally." *Id.* The special concurrence echoed this notion, stating that the plaintiff had not waived his challenge to the Commission's decision because "[v]oidness . . . is a fundamental defect that cannot be waived by a failure to object." *Id.* at 171 (McMorrow, J., concurring). Unlike the plurality, the special concurrence would not have held that the invalid appointments rendered "every decision of the Commission" void, *id.* at 178, but it agreed that the plaintiff should be permitted to invalidate the specific decision before it, *id*. at 175-76. Thus, a majority of the *Daniels* court suggested that an invalid appointment could render an agency decision void.

Some panels of the First District have followed this reasoning and allowed collateral challenges to an officer's qualifications to hold office. *See Taylor v. Dart*, 2017 IL App (1st) 143684-B, ¶¶ 18, 24-37, 55 (relying on *Daniels* to conclude that Merit Board's decision was void based on member's appointment to term of less than six years); *Goral*, 2019 IL App (1st) 181646, ¶ 12 (stating that *Taylor* concluded that Merit Board's final decision "was void, because the Board lacked statutory authority to issue the decision"). *But see Pietryla v. Dart*, 2019 IL App (1st) 182143, ¶ 17 (agency decision not void because *de facto* officer doctrine validated it).

This reasoning, as well as the result it produces, is problematic. Before *Daniels*, it was clear that a *de facto* officer's acts were not void; they were "as valid as those of officers *de jure*." *Wortman*, 334 Ill. at 302. This was true even if an administrative agency's members had not been appointed in compliance with its enabling statute. *See Chillicothe Twp.*, 19 Ill. 2d at 426-27. But by suggesting that the acts of a *de facto* officer may be void, *Daniels* exposed those acts to challenges at any time, in any proceeding. In doing so, it effectuated precisely what the *de facto* officer doctrine was originally designed to avoid. *See Ryder*, 515 U.S. at 180.

Another way in which these recent decisions call into question the foundational principles of the *de facto* officer doctrine is by raising the possibility of a "first challenger" exception. This concept was introduced by the special concurrence in *Daniels*, which stated that the litigant who brings a public officer's improper appointment to a court's attention "as a matter of first impression" should be allowed to avoid the *de facto* officer doctrine. *Daniels*, 201 Ill. 2d at 176 (McMorrow, J., concurring).

In addition to diluting the force of the *de facto* officer doctrine, this exception is difficult to implement in practice because the special concurrence did not specify who would constitute a "first challenger." Nor could it. Any definition of "first challenger" will inevitably raise more questions than it answers. For example, as the dissent in *Baggett v. Industrial Commission*, 201 Ill. 2d 187 (2002), rightly observed, it is unclear whether the first challenger to

an improper appointment would be the first litigant to have his or her case resolved by the trial court, the appellate court, or this Court. *Id.* at 209 (Thomas, J., dissenting).

Indeed, different panels of the First District—which has adopted the first challenger exception—have come to differing conclusions on this point. *Compare Pietryla*, 2019 IL App (1st) 182143, ¶ 18 (plaintiff was not first challenger even though he was first litigant to challenge appointments of all nine members of Merit Board) *and Cruz v. Dart*, 2019 IL App (1st) 170915, ¶ 38 (plaintiff was not first challenger even though he challenged appointments of three board members whose appointments were not challenged in prior cases) *and Acevedo v. Cook County Sheriff's Merit Bd.*, 2019 IL App (1st) 181128, ¶ 36 (plaintiff was not first challenger where he challenged appointments of different board members than had been challenged in previous cases), *with Goral*, 2019 IL App (1st) 181646, ¶¶ 106-10 (plaintiff was first challenger because he was challenging appointments of board members who had not been challenged before based on new legal theories).

The "first challenger" exception is further problematic because it creates a judicial "door prize," *Baggett*, 201 Ill. 2d at 209 (Thomas, J., dissenting), encouraging litigants to raise collateral challenges to agency decisions in hopes of being considered the first challenger. This was shown in the lawsuits filed against the Merit Board, where enterprising plaintiffs made slight factual and legal distinctions in their claims so that they could claim to

be the "first challenger." *See Goral*, 2019 IL App (1st) 181646, ¶ 106 (plaintiff argued he was first challenger because he raised new theories); *Pietryla*, 2019 IL App (1st) 182143, ¶ 18 (plaintiff argued he was first challenger because he was the first to challenge appointments of all nine members); *Cruz*, 2019 IL App (1st) 170915, ¶ 38 (plaintiff argued he was "first challenger" because he challenged three board members who had not been challenged before). Although not all of these efforts have proved successful, administrative agencies waste limited public resources defending against these repetitive challenges.

When combined, these areas of confusion created by *Daniels* significantly undermine the purposes of the *de facto* officer doctrine. They encourage litigants facing an adverse administrative agency decision—even a long-final decision—to challenge it based on any technical appointment defect they can find in the hope that they will be the "first challenger" entitled to void the decision. *See*, *e.g.*, *Pietryla*, 2019 IL App (1st) 182143, ¶¶ 3-4 (plaintiff raised challenge nearly five years after decision was final). Indeed, this is precisely what happened to the Merit Board, which faced a flurry of litigation after one plaintiff discovered that members had been appointed to terms of less than six years. *See Lopez*, 2019 IL App (1st) 170733, ¶ 59 n.4 (after *Taylor*, plaintiffs filed "over sixty cases challenging appointments to the Merit Board"). Had these courts adhered to the traditional interpretation of the *de*

facto officer doctrine, this uncertainty, along with the practical problems it created, would have been avoided, as now explained.

III. This Court should reaffirm the traditional application of the *de facto* officer doctrine.

This Court's longstanding reliance on the *de facto* officer doctrine to protect official actions and on *quo warranto* proceedings to remedy technical defects in appointments should be reaffirmed here. This dual approach strikes a fair balance among competing interests. Indeed, it promotes stability, efficiency, and finality by avoiding relitigation of substantively valid acts. At the same time, it does not harm the legitimate interests of private parties because the Attorney General and State's Attorney are able to bring *quo warranto* proceedings to remedy defects. And if those officials decline to pursue an action, an individual relator may seek appointment by the circuit court. Finally, use of *quo warranto* proceedings would avoid the complicated questions presented by the departure from the traditional approach, which still serves important functions in modern times.

A. A robust *de facto* officer doctrine promotes stability, efficiency, and finality.

As an initial matter, the traditional interpretation of the *de facto* officer doctrine promotes three vital public interests. First, it promotes stability. *See O'Neill*, 33 Ill. 2d at 187 (applying doctrine to validate acts of local legislative body to avoid "legislative anarchy"). By insulating the acts of *de facto* officers from collateral challenges, the traditional approach ensures that state and

local governments will continue to operate without interference despite technical flaws in an appointment or election. Indeed, without the doctrine, "[u]ncertainty would permeate every official action—from the finding of a tax deficiency to the conviction of a criminal." Clokey, *supra*, at 1121.

Relatedly, it reassures the public that it can rely on the actions of its government. *See Commonwealth v. Vaidulas*, 741 N.E.2d 450, 455 (Mass. 2001) (doctrine "protect[s] the public's reliance on an officer's authority and . . . ensure[s] the orderly administration of government"). This reassurance is critical because government agencies make decisions of significant and widespread import, such as overseeing the results of public union elections, *see* 5 ILCS 315/9, holding hearings on objections to nominating petitions of candidates for state offices, *see* 10 ILCS 5/10-9, setting public utility rates, *see* 220 ILCS 5/9-250, and imposing penalties for environmental contamination, *see* 415 ILCS 5/33. These agencies are run by individuals who are appointed through detailed processes and who must possess specific qualifications to hold office. *See*, *e.g.*, 5 ILCS 315/5 (Illinois Labor Relations Board); 10 ILCS 5/1A-1, 1A-2.1, 1A-3, 1A-3.1, 1A-4, 1A-5, 1A-6 (Illinois State Board of Elections); 220 ILCS 5/2-101, 2-102, 2-103, 2-104 (Illinois Commerce Commission); 415 ILCS 5/5(a) (Illinois Pollution Control Board). Absent a robust *de facto* officer doctrine, the important work of these agencies would be in jeopardy simply because of errors in complying with technical prerequisites to holding office.

Allowing collateral challenges, however, could have disastrous effects even if only a single "first challenger" were allowed to invalidate an agency decision. Suppose, for example, that the Illinois Pollution Control Board entered an order requiring a polluter to cease and desist dangerous actions and revoking the polluter's permit to operate its facility. *See* 415 ILCS 5/33(b). But if the polluter discovered that one of the members of the Board was appointed on July 2 rather than July 1, as required by statute, *see* 415 ILCS 5/5(a), it could unwind that otherwise valid decision. In that situation, the polluter could regain its permit until a new member was appointed and a new hearing was held before the reconstituted board. *See Daniels*, 201 Ill. 2d at 162, 167 (plaintiff entitled to new hearing); *Taylor*, 2017 IL App (1st) 143684-B, ¶¶ 10-11 (same). In the interim, the public could face increased health risks and environmental degradation, all because of a technical flaw that had nothing to do with the merits of the decision or the fairness of the proceedings.

Similar hypotheticals could be devised for many administrative agencies in this State. But regardless of the context, the People's interests are best served when they can count on government functioning as they expect it to. Their interests are disserved by encouraging private interests to unearth nonprejudicial, technical defects in agency appointments in hopes of reaping a windfall. Under the traditional approach, public officials like the Attorney General would evaluate and remedy these defects in a separate proceeding designed with the public interest in mind.

Second, government operates more efficiently under the traditional application of the doctrine. Public resources are conserved when the decisions of *de facto* officers remain valid. *See Watson v. Waste Mgmt. of Ill., Inc.*, 363 Ill. App. 3d 1101, 1106-07 (3d Dist. 2006) (Schmidt, J., dissenting) (explaining that allowing individuals to challenge an officer's qualifications to hold office without restriction could, "in sufficient number . . . easily paralyze or bankrupt a unit of government."). As the Alaska Supreme Court emphasized in rejecting a collateral challenge to an agency decision, the traditional view of the *de facto* officer doctrine prevents "wasteful relitigation of issues that were decided before a competent and unbiased judge or official whose appointment or election was only procedurally deficient." *Vroman v. City of Soldotna*, 111 P.3d 343, 348 (Alaska 2005).

Under the approach taken by the *Daniels* plurality and several First District decisions, agencies must redo the actions of a *de facto* officer, even if those actions were substantively and procedurally sound. *See*, *e.g.*, *Daniels*, 201 Ill. 2d at 167 (plurality op.) (remanding to Industrial Commission "for a decision by a legally constituted panel"); *Taylor*, 2017 IL App (1st) 143684-B, ¶ 46 (*de facto* officer's participation in hearing and decision "requires that the Merit Board's decision be vacated and remanded for a hearing before a legally constituted Merit Board"). There is no reason that limited public resources should be spent giving private parties another chance to litigate issues that were fairly resolved in the first place, especially given that *quo warranto*

proceedings could cure the technical defect without these ramifications. *See* Clokey, *supra*, at 1132 (allowing collateral challenges to acts of *de facto* officer would require "a lawful officer . . . to retrace many of the steps taken by a *de facto* [officer]," resulting in "duplication of effort" and a "drain on governmental resources").

Third, the traditional approach to the *de facto* officer doctrine promotes finality. *See People v. Veach*, 2016 IL 120649, ¶ 41 (emphasizing "'the law's important interest in the finality of judgments'") (quoting *Massaro v. United States*, 538 U.S. 500, 504 (2003)). By prohibiting collateral attacks, it ensures that the final decisions of a *de facto* officer remain final. In doing so, the doctrine protects the parties and the public, who have relied on those decisions. *See* Lawson & Seiman, *The Hobbesian Constitution: Governing Without Authority*, 95 Nw. L. Rev. 581, 595 (2001) (*de facto* officer doctrine prevents "technical defects in an officer's title, such as a clerical error or a failure to post a required bond, from having potentially disastrous effects on settled legal rights").

B. The traditional application of the *de facto* officer doctrine does not prejudice private parties.

Along with promoting important public interests, the traditional approach to the *de facto* officer doctrine does not prejudice private litigants. When a decision by a public officer is legitimate in every way except for a defect in the officer's qualifications, the parties subject to that decision do not suffer any real injury. *Hussey*, 99 U.S. at 24; *see also Iowa Farm Bureau*

Fed'n, 850 N.W.2d at 430 ("To err is human, and errors in the process of government that are nonprejudicial and technical in nature should not require government action predicated on that error to be undone.").

While the *Daniels* plurality and special concurrence raised concerns over a party's ability to ensure that his claims were addressed by validly appointed agency members, *see* 201 Ill. 2d at 166-67 (plurality op.); *id.* at 175-76 (McMorrow, J., concurring), any actual prejudice resulting from an improper appointment could be redressed in many different ways. For example, an administrative agency member's bias or interest could be raised on administrative review. *See*, *e.g.*, *Kimball Dawson, LLC v. City of Chi. Dep't of Zoning*, 369 Ill. App. 3d 780, 791-92 (1st Dist. 2006). If any agency member's lack of qualifications caused him or her to reach an incorrect result, that too could be raised on administrative review. *See* 735 ILCS 5/3-110. And if an officer had been appointed or elected pursuant to an unconstitutional rule or statute, a party could seek declaratory relief regarding the validity of the rule or statute. *See Watson*, 363 Ill. App. 3d at 1103-06 (constitutionality of ordinance providing for new method of electing local government officials could be challenged in declaratory judgment action).

Nor would the doctrine protect acts that exceed the scope of a *de facto* officer's authority. To qualify as a *de facto* officer, he or she must act within the scope of the authority of his or her office. *See Chillicothe Twp.*, 19 Ill. 2d at 426. Similarly, an officer who was appointed without any "attempt or even

any pretense" of a valid appointment could not avail himself or herself of the doctrine. *Edward P. Allison Co. v. Vill. of Dolton*, 24 Ill. 2d 233, 241 (1962). And someone merely claiming to be a public officer without "at least a fair color of right or an acquiescence by the public in his official acts" cannot qualify as a *de facto* officer. *Howard v. Burke*, 248 Ill. 224, 228 (1910). In other words, officers cannot flout the law and expect their acts to be upheld.

Accordingly, the traditional approach to the *de facto* officer doctrine only prohibits a narrow range of opportunistic challenges by "those who would [challenge appointments] solely as a means of avoiding adverse governmental action." Clokey, *supra*, at 1132. The doctrine would impose no hurdles for private parties who suffer some actual prejudice from the decision of a *de facto* officer. And as discussed below, *quo warranto* is available to provide a meaningful avenue to challenge a *de facto* officer's claim to public office.

C. Addressing challenges to a public officer's claim to office in *quo warranto* proceedings would avoid many of the complicated questions presented in this case.

Despite its ancient roots, *quo warranto* still exists as a viable means to fix defects in a public officer's appointment or election. In fact, the General Assembly has codified *quo warranto* proceedings, signaling that it remains the proper mechanism to challenge a public official's credentials. *See* 735 ILCS 5/18-102. As in the nineteenth and twentieth centuries, *quo warranto* still offers a specialized and narrow process to determine whether an officer is

entitled to hold office. Isolating this question allows for its swift resolution, without undermining final agency determinations that were otherwise valid.

In addition to providing an outlet for challenges to a public official's qualifications, *quo warranto* proceedings ensure that public officials—the Attorney General, the State's Attorney, and the circuit court—are involved in reviewing whether an official has a valid claim to office. This is important because these actors pursue remedies and evaluate the matter with the public interest in mind. *See People ex rel. Hansen v. Phelan*, 158 Ill. 2d 445, 449 (1994) (in deciding whether to allow private party to act as relator, circuit court "should consider all of the conditions and circumstances in the case, the motives of the relators in instituting the proceedings, the policy of and necessity for the remedy sought, and whether the public interest will be served or damaged by the [action]").

Public offices are created to serve the public. *See Norton v. Shelby Cty.*, 118 U.S. 425, 441 (1886). Questions regarding individuals' qualifications to hold those offices should be resolved "to serve all members of the public and not simply those who are personally subject to official actions." Clokey, *supra*, at 1130. That is precisely why *quo warranto* proceedings, brought on behalf of the People, are the appropriate method of resolving such questions. *See Newman v. United States ex rel. Frizzell*, 238 U.S. 537, 546 (1915) (*quo warranto* "treats usurpation of office as a public wrong which can be corrected only by a proceeding in the name of the government itself").

And along with promoting the public interest, *quo warranto* preserves private parties' ability to directly challenge a public officer's qualifications if the Attorney General and State's Attorney decline to do so. To have standing to pursue a *quo warranto* action, a private party simply must have an interest "sufficiently distinct from the interests of the general public." *People ex rel. Ballard v. Niekamp*, 2011 IL App (4th) 100796, ¶ 26 (internal quotation marks omitted). A party adversely affected by a *de facto* officer's decision likely would meet that standard. *See Graf*, 206 Ill. 2d at 547-48 (plaintiff facing increased fees and taxes as a result of annexation decision had standing to pursue *quo warranto*).

Relevant here, *quo warranto* also offers simplicity. By directing all challenges to a *de facto* officer's qualifications through *quo warranto* proceedings, courts conducting administrative review can avoid complicated questions such as whether a party raising a collateral challenge must exhaust his or her administrative remedies or whether a defect in a *de facto* officer's appointment or election affects an agency's jurisdiction. By requiring all challenges to a public officer's qualifications to proceed through *quo warranto*, courts and litigants can focus on the substantive and procedural merits of agency decisions without wading into these complicated questions.

This case shows how *quo warranto* and the traditional approach to the *de facto* officer doctrine would provide simple solutions to otherwise complex issues. During the pendency of their proceedings before the Merit Board,

plaintiffs filed a separate lawsuit alleging that various members of the Merit Board had improper interim terms, held office longer than statutorily required, had non-staggered terms, and did not have the correct political affiliations. *Goral*, 2019 IL App (1st) 181646 ¶¶ 1, 20-21. But to answer those questions in light of *Daniels* and the First District's subsequent precedent, the appellate court was required to consider, in great detail, whether plaintiffs were required to exhaust each of their claims in their pending agency proceedings in order to qualify as a first challenger, *id.* ¶¶ 43-86, and whether the timing of plaintiffs' collateral challenges affected the application of the *de facto* officer doctrine, *id.* ¶¶ 88-112. Had the appellate court applied the traditional approach to the *de facto* officer doctrine, it could have easily resolved these questions. All challenges to the Merit Board's authority based on its members' appointments would have proceeded through *quo warranto*.

Finally, restoring the traditional application of the *de facto* officer doctrine would be consistent with the practice in the majority of States, which still prohibit collateral challenges to a public officer's acts.[2] In fact, many

---

[2] *See*, *e.g.*, *Vroman*, 111 P.3d at 348; *Jennings v. Woods*, 982 P.2d 274, 291-92 (Ariz. 1999); *Aydelotte v. State*, 146 S.W.3d 392, 397-98 (Ark. Ct. App. 2004); *Marine Forests Soc'y v. Cal. Coastal Comm'n*, 113 P.3d 1062, 1094 (Cal. 2005); *Furtney v. Simsbury Zoning Comm'n*, 271 A.2d 319, 324 (Conn. 1970); *Gates v. Taylor Cty. Sch. Dist.*, 816 S.E.2d 117, 120-21 (Ga. Ct. App. 2018); *Turner v. Evansville*, 740 N.E.2d 860, 862 n.2 (Ind. 2001); *Iowa Farm Bureau Fed'n*, 850 N.W.2d at 423-24; *State v. Miller*, 565 P.2d 228, 235 (Kan. 1977); *Bogard v. Commonwealth*, 687 S.W.2d 533, 536 (Ky. Ct. App. 1984); *City of Baton Rouge v. Cooley*, 418 So. 2d 1321, 1323 (La. 1982); *Baker v. State*, 833 A.2d 1070, 1086 (Md. Ct. App. 2003); *Vaidulas*, 741 N.E.2d at 455; *In re Servaas*, 774 N.W. 2d 46, 51, 51 n.20 (Mich. 2009); *Benne v. ABB Power T&D*

States recognize that *quo warranto*—or an analogous proceeding—should be used as the exclusive method for challenging a *de facto* officer's claim to office.[3] Yet these States have not experienced crises of improper agency appointments. Instead, their experiences show that government officials may be held accountable despite a robust *de facto* officer doctrine. *See*, *e.g.*, *Bateson v. Weddle*, 48 A.3d 652, 654-55, 664 (Conn. 2012) (affirming *quo warranto*

Co., 106 S.W.3d 595, 600-01 (Mo. Ct. App. 2003); *Sanitary & Improvement Dist. No. 57 of Douglas Cty. v. City of Elkhorn*, 536 N.W.2d 56, 60 (Neb. 1995); *Lueck v. Teuton*, 219 P.3d 895, 902 n.3 (Nev. 2009); *State v. Doyle*, 940 A.2d 245, 250 (N.H. 2007); *Matter of Nat'l Restaurant Ass'n v. Comm'r of Labor*, 141 A.D.3d 185, 194-95 (N.Y. App. Div. 2016); *Lathon v. Cumberland Cty.*, 646 S.E.2d 565, 569 n.1 (N.C. Ct. App. 2007); *State ex rel. Calvaruso v. Brown*, 8 N.E.3d 911, 915 (Ohio 2014); *State ex rel. Bd. of Regents for Okla. Agric. & Mech. Colleges v. McCloskey Bros., Inc.*, 227 P.3d 133, 144-47 (Okla. 2009); *Scirica v. State*, 265 N.W.2d 893, 894-95 (S.D. 1978); *Robinson v. Neeley*, 192 S.W.3d 904, 909 (Tex. Ct. App. 2006); *State v. Mitchell*, 458 A.2d 1089, 1090 (Vt. 1983); *State ex rel. Munro v. City of Poulsbo*, 37 P.3d 319, 327 (Wash. Ct. App. 2002); *Walberg v. State*, 243 N.W.2d 190, 198 (Wis. 1976).

[3] *See*, *e.g.*, *People v. Wolf*, 230 Cal. Rptr. 3d 953, 955 (Cal. App. Dep't Super. Ct. 2018) ("[T]he *de facto* officer doctrine requires that a valid challenge to the authority of a public officer must be raised in a separate [*quo warranto*] proceeding."); *Vaidulas*, 741 N.E.2d at 455 (*de facto* officer could only be removed by body that appointed him or by statutory cause of action brought by Attorney General); *Servaas*, 774 N.W.2d at 51 ("[O]ur caselaw has held for more than a century that the *only way* to try titles to office finally and conclusively is by *quo warranto*.") (internal quotations omitted and emphasis in original); *Benne*, 106 S.W.3d at 600-01 (applying doctrine because proper "method for establishing that a person has unlawfully held an office is through a *quo warranto* action"); *People v. Pizzaro*, 552 N.Y.S.2d 816, 818 (N.Y. Sup. Ct. 1990) ("A *de facto* officer's acts may be challenged only by the Attorney General by way of a *quo warranto* proceeding, and the sole remedy is removal from office."); *Lewis v. Drake*, 641 S.W.2d 392, 394 (Tex. Ct. App. 1982) (stating that, aside from "statutory election contest to determine the correct result of an election" or "suit for title to an office by one claiming to be presently qualified to hold it," *quo warranto* is "the exclusive remedy to challenge the authority of a public officer").

judgment removing member of local administrative agency); *State ex inf. McCulloch v. Small*, 435 S.W.3d 118, 119 (Mo. Ct. App. 2014) (mayor ousted via *quo warranto*); *State ex rel. Bates v. Smith*, 65 N.E.3d 718, 720-21 (Ohio 2016) (granting writ of *quo warranto* to remove improperly appointed township trustee); *State ex rel. Banks v. Drummond*, 385 P.3d 769, 772, 776 (Wash. 2016) (en banc) (local prosecutor could bring *quo warranto* action to remove improperly retained lawyer for local administrative agency).

Indeed, *quo warranto* has proved a viable tool to remove unqualified public officials in Illinois, even in modern times. For example, it has been used recently to oust public officers who are disqualified from holding office based on prior felony convictions. *See*, *e.g.*, *People ex rel. Foxx v. Agpawa*, 2018 IL App (1st) 171976, ¶ 1; *People ex rel. Wofford v. Brown*, 2017 IL App (1st) 161118, ¶¶ 1, 3, 18-25; *Alvarez v. Williams*, 2014 IL App (1st) 133443, ¶¶ 1, 3. *Quo warranto* could continue to serve this public purpose without jeopardizing the public good created by the *de facto* officer doctrine.

In sum, this Court should recognize that *quo warranto* is the exclusive means to challenge a public officer's qualifications to hold office. A *de facto* officer's acts should be valid, and not subject to collateral attack, under the *de facto* officer doctrine. By reaffirming this rule, this Court will promote stability, efficiency, finality, and clarity in the law.

CONCLUSION

For these reasons, Kwame Raoul, Attorney General of the State of Illinois, and the City of Chicago respectfully request that this Court hold that the *de facto* officer doctrine bars the plaintiffs' collateral challenge based on defects in the Merit Board members' appointments.

Respectfully submitted,

KWAME RAOUL
Attorney General
State of Illinois

JANE ELINOR NOTZ
Solicitor General

100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-3312

Attorneys for Illinois Attorney General Kwame Raoul

SARAH A. HUNGER
Deputy Solicitor General
CARSON R. GRIFFIS
Assistant Attorney General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5202
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
shunger@atg.state.il.us

MARK A. FLESSNER
Corporation Counsel
of the City of Chicago
BENNA RUTH SOLOMON
Deputy Corporation Counsel
30 N. LaSalle Street
Suite 800
Chicago, IL 60602
(312) 744-7764
benna.solomon@cityofchicago.org

Attorneys for the City of Chicago

Dated December 4, 2019

SUPREME COURT RULE 341(c)
CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 28 pages.

/s/ Sarah A. Hunger
SARAH A. HUNGER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5202
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
shunger@atg.state.il.us

CERTIFICATE OF FILING AND SERVICE

I certify that on December 4, 2019, I electronically filed the foregoing **Brief of *Amici Curiae* Illinois Attorney General Kwame Raoul and the City of Chicago** with the Clerk of the Court for the Supreme Court of Illinois, by using the Odyssey eFileIL system.

I further certify that the other participants in this appeal, named below, are registered service contacts on the Odyssey eFileIL system, and thus will be served via the Odyssey eFileIL system.

Counsel for
Defendant-Appellant
Thomas J. Dart
Stephanie A. Scharf
sscharf@scharfbanks.com

Counsel for
Defendant-Appellant
Cook County Sheriff's Merit Board
Lyle K. Henretty
lyle.henretty@cookcountyil.gov

Counsel for Defendant-Appellant Cook County
Jay Rahman
jay.rahman@cookcountyil.gov

Counsel for Plaintiffs-Appellees
Cass Casper
ctc@talonlaw.com
Christopher Cooper
cooperlaw3234@gmail.com

Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge, information, and belief.

/s/ Sarah A. Hunger
SARAH A. HUNGER
Deputy Solicitor General
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-5202
Primary e-service:
CivilAppeals@atg.state.il.us
Secondary e-service:
shunger@atg.state.il.us