No. 125085

IN THE SUPREME COURT OF ILLINOIS

MATTHEW GORAL, KEVIN BADON, MICHAEL MENDEZ, MILAN STOJKOVIC, DAVID EVANS III, and LASHON SHAFFER, on behalf of themselves and others similarly-situated, Plaintiffs-Respondents, v. THOMAS J. DART, Sheriff of Cook County; COOK COUNTY, ILLINOIS; and THE COOK COUNTY SHERIFF'S MERIT BOARD, Defendants-Petitioners.	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-18-1646 There Heard on Appeal From The Circuit Court of Cook County, No. 17-CH-15546 The Hon. Sophia H. Hall Judge Presiding

BRIEF OF PLAINTIFFS DAVID EVANS III AND LASHON SHAFFER

ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

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Plaintiffs-Respondents David Evans III ("Evans") and LaShon Shaffer ("Shaffer") (collectively, "Plaintiffs"), by their undersigned counsel Cass Thomas Casper, Esq., TALON LAW, LLC, submit as follows as their argument as to why this Court should affirm *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646 (1st Dist. 2019) ("*Goral*") in its entirety.

NATURE OF THE CASE

This case is about the power of citizens and workers to petition the Courts to hold their government accountable when it does wrong. With the increasing number of recent indictments, arrests, and guilty pleas by and of government officials in Illinois at large, and in Cook County, Illinois and the City of Chicago in particular, this is not a time for the Courts to limit the rights of citizens and employees to petition the Courts to challenge government malfeasance, or misfeasance, when it occurs.

The prelude to the instant case began in 2014, when the Circuit Court of Cook County, Illinois ("Circuit Court"), held that the Cook County Sheriff's Merit Board ("Board") was

improperly constituted at the time of Cook County Sheriff's Police Officer Percy Taylor's termination proceedings due to the presence of member John Rosales on the Board, who was not appointed to a six-year term on the Board as required by 55 ILCS 5/3-7002 of the Cook County Sheriff's Merit Board Act ("Act"). Considering the issue on interlocutory appeal, the First District Appellate Court of Illinois ("First District") ruled in *Taylor v. Dart*, 2016 IL App (1st) 143684 (1st Dist. 2016) ("*Taylor I*"), that the plain language of the Act did not authorize the Sheriff to appoint individuals to the Board for less than a six-year term. *Id.* at ¶36. It also ruled that Taylor's termination decision was void because the "Merit Board was illegally constituted at the time of the decision to terminate the plaintiff's employment." *Id.* at ¶47. The First District considered this again in *Taylor v. Dart*, 2017 IL App (1st) 143684-B (1st Dist. 2017) ("*Taylor II*"). And once again the First District held Section 7002 of the Act "did not authorize Sheriff Dart to appoint Mr. Rosales to less than a six-year term" and it upheld the Circuit Court's order vacating the Board's decision and remanding for a new hearing before a legally-constituted Board. *Id.* at ¶46.

Despite these clear and repeated directives from both the Circuit Court and the First District, Sheriff Thomas J. Dart ("Sheriff Dart") thumbed his nose at the Courts and continued administering the law his own way. In so doing, he appointed Gray Mateo-Harris and Patrick Brady to the Board for shockingly less than six-year terms, right after and during all of the *Taylor* litigation – Dart appointed Brady[1] on December 17, 2014 to a term to expire in March 2020 (C832), and Mateo-Harris to a term of November 18, 2015 to expire in March 2018

[1]In a decision not unrelated to the overall concerns about the composition of the Board raised in this case, one of Brady's decisions at the Board was vacated by the Circuit Court of Cook County, Illinois on November 15, 2019 for bias. *See Kavroulakis v. Dart*, 19 CH 3634 (Memorandum Opinion and Order entered November 15, 2019) ("The court notes that it has never reviewed a final decision exhibiting such conduct by an administrative hearing officer.").

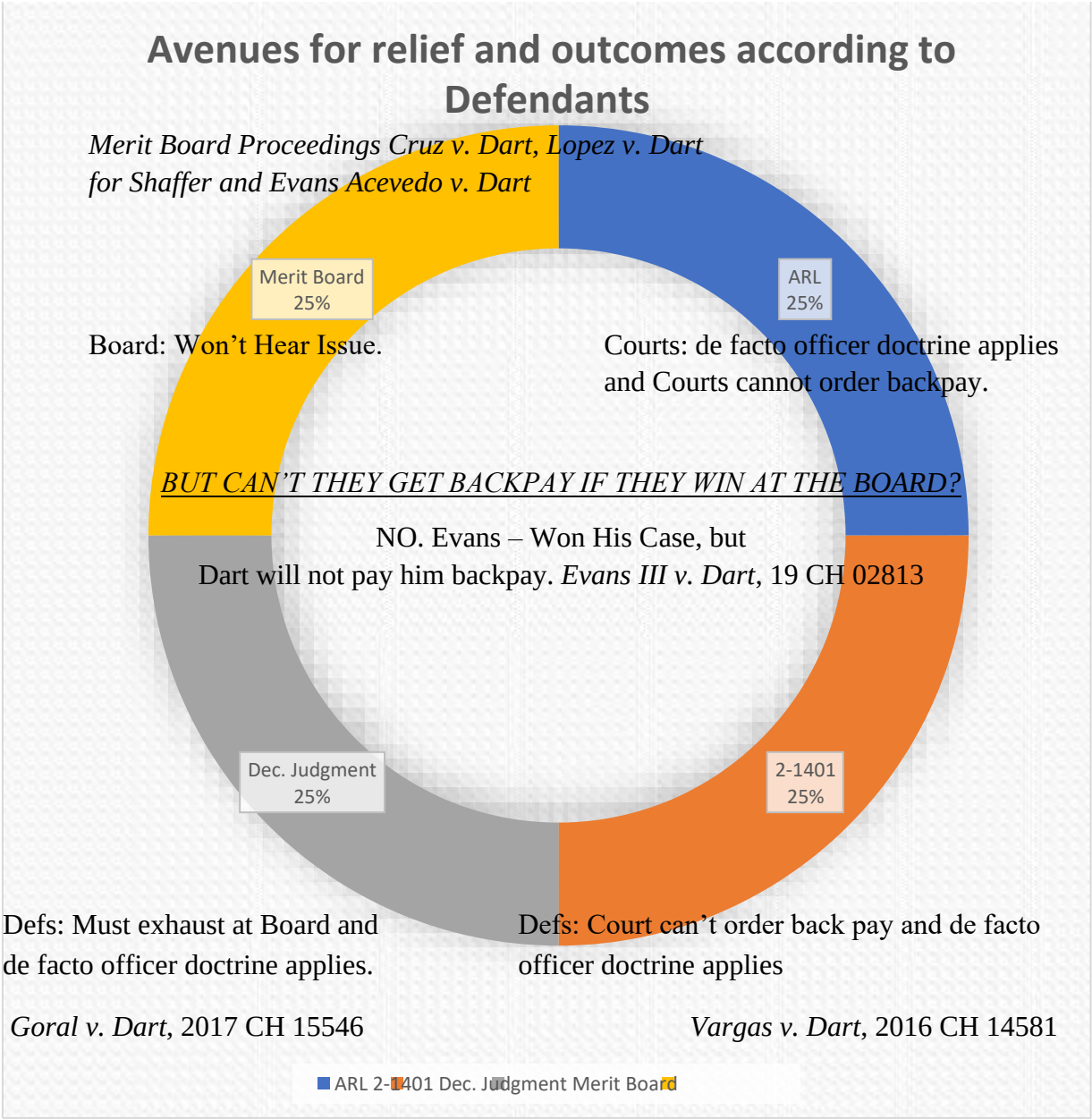
(C834)! Even worse, Plaintiffs' attorneys discovered that, indeed, the entire Board was improperly constituted for a host of reasons, including non-staggered terms, short terms, holdover terms (where the member's term expired, but they remained on the Board), a chairperson who remained in that spot for over a decade in excess of the shorter term contemplated by the Act, and, later, political imbalances on the Board. All of these issues could have been fixed by Sheriff Dart and the Board, but, rather than fixing them, they did nothing until the General Assembly amended the Act on December 13, 2017. But even after that the problems continued with the political imbalance, non-staggered terms under the new statute, and excessive officerships.Plaintiffs, meanwhile, both rank-and-file officers, were suspended without payand sent to the Board for Board for termination proceedings – a Board that was, as noted above, so riddled with defects as to undermine its authority to act.

Aware of the problems with the Board's composition, both Plaintiffs filed extensive motions with the Board itself, raising all of the foregoing issues and some others.[2] In the height of irony and double-speak, the Sheriff opposed the Board even deciding any of the compositional issues before it, taking the position that the Board's power was limited to only considering disciplinary charges on the merits under its Act. (C1065). The Board also declined to rule.

Seeing no relief at the Board, Plaintiffs Evans and Shaffer joined Goral and the other Plaintiffs here. Contrary to his position at the Board and to suit the litigation of the moment,

[2] Another issue pending in separate litigation and not before this Court, but illustrative of the bevy of problems going on at the Board, is that State's Attorney Kim Foxx unilaterally withdrew all her Assistant State's Attorney's from representing the Sheriff at the Board in late 2017 due to a fight she and with Sheriff Dart had with each other. Since the inception of the Board, the State's Attorney has *always* – for nearly 70 year -- represented the Sheriff at these proceedings pursuant to her duties set forth in 55 ILCS 5/3-9005. *See, e.g., Squeo v. Dart*, 2018 CH 12385 (J. Cohen). As will be remarked later about his absence from goings-on in Cook County that explain why he should not be promoted to exclusive gatekeeper of challenges such as this, is that the Attorney General has not stepped up to deal with this situation, either.

Sheriff Dart opposed Plaintiffs' action here on the ground that Evans and Shaffer should have to exhaust at the Board – the same Board that would not consider these issues. Worse still, while Shaffer has been fired, the Board exonerated Evans, but the Sheriff now refuses to pay him any backpay. *See Evans v. Dart*, 19 CH 02813. All of this has led the instant Plaintiffs to dub their current predicament, the "Circle Of No Relief." Illustrated, it looks this:



See (C2379 (earlier version submitted below)). The Answer to the Circle was provided by the First District in the case at bar. This Court should uphold that answer, and should extricate Plaintiffs from the Seventh Circle Sheriff Dart has made of these cases.

ISSUES PRESENTED FOR REVIEW

1. Whether the First District is correct in holding that the authority to act exception to exhaustion applies to Plaintiffs' complaint?

2. Whether the First District is correct in holding that agency expertise does not require exhaustion of Plaintiffs' claims before the Board?

3. Whether the First District is correct in implying that the futility exception to exhaustion applies to Plaintiffs' complaint where Plaintiffs raised the issues at the Merit Board, the Sheriff opposed to Board deciding such issues, and the Board declined to address such issues?

4. What is the proper test for the *de facto* officer doctrine in Illinois?

5. Does the *de facto* officer doctrine bar Plaintiffs' complaint?

STATEMENT OF JURISDICTION

Plaintiffs do not dispute Defendants' statement of jurisdiction.

STANDARD OF REVIEW

"A section 2-619 motion admits the legal sufficiency of the complaint; we accept as true the complaint's allegations and interpret them in the light most favorable to plaintiffs." *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646, ¶25 (1st Dist. 2019) (citing *American Family Mutual Ins. Co. v. Krop*, 2018 IL 122556, ¶13 (2018)). Review is *de novo*. *Id.*

I. THE APPELLATE COURT CORRECTLY RULED THAT PLAINTIFFS SATISFIED THE AUTHORITY TO ACT, LACK OF EXPERTISE, AND FUTILITY EXCEPTIONS TO THE DOCTRINCE OF EXHAUSTION OF ADMINISTRATIVE REMEDIES.

1. The "Authority To Act" And "Futility" Exceptions To Exhaustion Apply Here.

The Court below considered the authority to act and futility exceptions to the exhaustion doctrine and concluded that they apply to the instant case under a long line of cases holding that defects in the composition of an agency undercut its authority to act, including this Court's rulings in *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 186 (2003) and *Daniels v. Industrial Commission*, 201 Ill. 2d 160, 166-67 (2002). *Goral*, 2019 IL App (1st) 181646 at ¶32. The Court below also correctly concluded that the complaint in this case fit within the *Vuagniaux* and *Daniels* line-of-cases because it found that the complaint alleged the "Board has either had illegally appointed members with unlawful terms of less than six years, had illegally-appointed members with non-staggered terms, been composed of only five members, failed to meet the Act's political affiliation requirements, and/or had a chairperson and secretary who occupied such positions in excess of the statutory limit." *Goral*, 2019 IL App (1st) 181646 at ¶38. On a separate basis, *Goral* noted that a second exception to exhaustion is relevant in this case, futility, that is, when "the agency cannot provide an adequate remedy or where it is patently futile to seek relief before the agency." *Id.* at ¶30 (citing *Castaneda v. Illinois Human Rights Commission*, 132 Ill. 2d 304, 308 (1989)).

Based upon those cases and the allegations in the instant complaint, the Court below found several reasons supporting application of the authority to act exception in this case. First, it concluded that "if the Board lacks the authority to hear the case, the merits of the underlying case are irrelevant, so there is no reason why a court should wait for a developed underlying record to decide the legal question." *Goral*, 2019 IL App (1st) 181646 at ¶40 (citing *County of Knox ex rel. Masterson v. Highland, L.L.C.*, 188 Ill. 2d 546, 552 (1999) and *Cinkus v. Village of Stickney Municipal Officers Electoral Board*, 228 Ill. 2d 200, 210 (2008)). It recognized that the "determination of the scope of the agency's power and authority is a judicial function and is not

a question to be finally determined by the agency itself." *Id.* (quoting *County of Knox*, 188 Ill. 2d 546 at 554).

Second, the Court below considered the fact that each of the Plaintiffs raised the statutory-authority questions before the Board, "but the Sheriff has taken the position that the Board cannot decide such questions, and thus far the Board has not." *Goral,* 2019 IL App (1st) 181646 at ¶41. It found that the "Board's (alleged) refusal to even address plaintiffs' statutory authority claim within the confines of the agency's hearing process is strong evidence that the claim is not subject to the usual exhaustion requirement." *Id.* (citing *Mercury Sightseeing Board, Inc. v. County of Cook*, 2019 IL App (1st) 180439, ¶¶70-71 (1st Dist. 2019)). The Court below is correct, too, because Plaintiffs Evans, Shaffer, and former Plaintiff Frank Donis[3] all submitted long motions to dismiss at the Board itself seeking to dismiss their cases for exactly the reasons listed in the Circuit Court Complaint. *See, e.g.*, (C1000-C1087, 2354-2379 (example motions and briefs)). Importantly, every one of the arguments raised in the Complaint in the Circuit Court was raised before the Board. *See* 1053 (5-member Board), 1058 (non-staggered terms), 2356 (short terms), 2366-2368 (political affiliation requirement), 2368-2369 (excessive chairman and secretary terms). But the Board did not address these issues, although given the opportunity. Instead, the Board stated that it would not consider motions to dismiss. Plaintiffs submitted Frank Donis' ruling at the Board on these motions to the Circuit Court and in the Appellate Court. (C2348-C2353). In that ruling, the Board's Commissioner stated as follows:

[3] Frank Donis' claims settled and he is no longer part of this case. (C2382-C2384).

> THE COMMISSIONER: I do want, before we start any of our cases, I do want to have some comments concerning the motions that have been presented to the Merit Board, and the Merit Board as a board met in relationship to all of these motions, and so there are four elements that I want to share with each and every one of you on the record.
>
> Concerning the motions to dismiss, the Merit Board Rules and Regulations do not provide for motions to dismiss, so the Merit Board will not consider the motions. Accordingly, the Merit Board will neither grant nor deny the motion.

(C2349). And this was the Board's ruling in all of the cases where such motions were filed. The Court below was, thus, correct that the Board has refused to decide these issues for itself. So too, the Sheriff has affirmatively resisted the Board deciding the issues, as can be seen from its Responses to the Motions filed at the Board. (C1063-C1066). Indeed, the Sheriff's Response argued that the Board's authority was strictly limited to "adjudicating each case based on the evidence presented at the hearing." (C1065). In more detail, the Sheriff argued as follows:

7) Once the Sheriff files a complaint against a respondent, and upon the conclusion of all the evidence presented at a hearing, the Board can order any of the following disciplinary measures pursuant to its authority under 55 ILCS 5/3-7012: separation; reduction in rank; suspension for a period not to exceed a total of one hundred and eighty days; or any other such sanctions prescribed by the Rules and Regulations of the Board.
8) The Board's authority is limited to adjudicating each case based on the evidence presented at the hearing. It clearly does not encompass dismissing complaints in a pretrial setting.
9) Accordingly, Respondent's motions to dismiss must be denied by this Board due to this Board's lack of authority to dismiss the Sheriff's Complaints.

(C1065). The Court below was also, thus, correct that "the Sheriff has taken the position that the Board can't decide such questions." *Goral*, 2019 IL App (1st) 181646 at ¶41. Nor was the Sheriff's argument at the Board just limited to the Board not being able to consider motions to dismiss; rather, it was arguing that the Board was limited to just adjudicating cases before it based on evidence presented at the hearing. (C1065). Yet, in the instant proceedings, the Sheriff advocates for the opposite: that the Board should decide all these issues in the first instance, even though, when presented with the opportunity at the Board, the Board refuses to consider them and the Sheriff opposes the Board considering them. Under these circumstances, the Sheriff's conduct, and the Board's, clearly shows that the "authority to act" exception to the exhaustion doctrine *does apply* – the Board and the Sheriff took the position, at the Board, that the Board would not or could not consider these issues.

Third, the Court below also reasoned that "even if an agency were inclined to decide such an issue, these questions would be subject to *de novo* review by a court." *Goral*, 2019 IL App (1st) 181646 at ¶41. This is the same reasoning employed in *County of Knox*, where it was recognized that "where an agency's statutory authority to exercise jurisdiction is at issue, no questions of fact are involved. . .[t]he agency's particular expertise is not implicated in the

necessary statutory interpretation." *County of Knox*, 188 Ill. 2d 546 at 552. It also follows the rule discussed in *Cinkus* that "an agency's interpretation of the meaning of the language of a statute constitutes a pure question of law. . .[t]hus, the court's review is independent and not deferential." *Cinkus*, 228 Ill. 2d 200 at 210.

Defendants spend several pages of their Brief discussing limited review of agency decisions, and citing to *Marbury v. Madison*, 5 U.S. 137 (1803), largely for the bombshell propositions that review of agency decisions is limited and confined to the Administrative Review Law, that agencies have special expertise warranting deferential review, and that exhaustion promotes judicial economy. *Brief*, pp. 15-19. The problem is that none of the cases they cite in support of these propositions involved an improperly-composed agency, as here. *Ameren Transmission Co. v. Hutchings*, 2018 IL 122973 (2018), involved review of final agency action by a specifically defined procedure in the Public Utilities Act providing for appellate court review of decisions of the Public Utilities Commission. *Id.* at ¶14. *Ameren* did not involve a challenge to the Public Utilities Commission itself, but rather a challenge to a decision made by that agency. *Id.* at ¶8 (noting that the challenge was to the Commission's approval of certain easements by eminent domain). *Texaco-Cities Service Pipeline Co. v. McGaw*, 182 Ill.2d 262 (1998), has nothing to do with a challenge to agency authority, but instead involved waiver of a due process challenge that was not raised during administrative proceedings. *Id.* at 278. *Texaco-Cities* also recognizes that "it is advisable to assert a constitutional challenge on the record before the administrative tribunal, because. . .such a practice serves the purpose of avoiding piecemeal litigation and, more importantly, allowing opposing parties a full opportunity to present evidence to refute the constitutional challenge." *Id.* at 278-79. But how is that purpose served here when Plaintiffs *did* raise these issues at the Board level, gave the Board and the

Sheriff an opportunity to present evidence and rule on the compositional issues, but the Board refused to rule and the Sheriff took the position that the Board could not even consider the issue? (C1063-C1066, C2349). Not only is *Texaco-Cities* factually irrelevant, but the purposes recognized for raising issues at the agency level are not met here, where, as the Court below recognized, Plaintiffs have "all but shouted. . .from the mountaintop," only to be ignored by the agency. *Goral*, 2019 IL App (1st) 181646 at ¶99.

Dubin v. Personnel Board of the City of Chicago, 128 Ill.2d 490, 497-98 (1989), again, had nothing to do with a challenge to the agency itself, but to the sufficiency of an agency's findings of fact, which was an issue that fell within the "review" procedures of the Administrative Review Law. *Id.* at 499. The Court was clear that the controversy surrounding the agency's findings of fact "must be exercised within the course of reviewing the Board's discharge order and not in a separate proceeding." *Id.* And such a ruling makes sense in that context because it implicates the Administrative Review Act's provision that "the scope of judicial review extends to all questions of law and fact presented by the record before the court." 735 ILCS 5/3-110 (West 2000). The sufficiency of an agency's findings of fact in a particular decision directly implicates a reviewing court's ability to determine if such findings are against the manifest weight of the evidence or clearly erroneous. *See, e.g., Kouzoukas v. Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago*, 234 Ill.2d 446, 465 (2009); *Medina Nursing Center, Inc. v. Health Facilities & Services Review Board*, 2013 IL App (4th) 120554, ¶27 (4th Dist. 2013) (remanding an agency decision where insufficient findings of fact precluded judicial review); *Roman v. Cook County Sheriff's Merit Board*, 2014 IL App (1st) 123308, ¶¶81-82 (1st Dist. 2014) (finding Board's decisions inadequate so as to prevent meaningful judicial review). Accordingly, *Dubin* is a review-based decision directly implicating

a reviewing court's ability to engage in the administrative review analysis. The instant case has nothing to do with the manifest weight, clearly erroneous, or cause-based reviews done in the administrative review context.

Fredman Brothers Furniture Co. v. Dep't of Revenue, 109 Ill.2d 202 (1985), involved a determination of whether or not the 35-day period under the administrative review law is jurisdictional or not, whether a motion to reconsider filed with the agency tolls the 35-day filing period, and, again, sought review of a final decision of the Department of Revenue as to a final tax assessment. *Id.* at 206-07. Not only are those facts not in issue here, but *Fredman Brothers* intimates that the exceptions to exhaustion are not as narrow as the Defendants in this case characterize them. *Id.* at 215 ("It has been held that lack of subject matter jurisdiction can be raised at any time, in any court, either directly or collaterally." (citing *City of Chicago v. Fair Employment Practices Commission*, 65 Ill. 2d 108 (1976); *Jarrett v. Jarrett*, 415 Ill. 126 (1953); *Dorr-Wood, Ltd. v. Dep't of Public Health*, 99 Ill. App. 3d 170, 173 (1981)). Finally, *People ex rel. Chicago and N.W.R. Co. V. Hulman*, 31 Ill. 2d 166 (1964), involved an original mandamus action in the Supreme Court to obtain a property valuation reassessment, but this Court ruled that the ARL was designed to provide a uniform method of review of administrative decisions. *Id.* at 169. Because the petitioner in *Hulman* was seeking review of an assessment, he should have used the ARL, which abolished preexisting modes of review. *Id.* at 170. Again, that case has nothing to do with compositional defects in the Department of Revenue.

Defendants next attempt to limit the authority to act exception to cases where agencies enacted rules or regulations outside of their statutory authority. *Brief* at p. 24. But *Goral* relied on *County of Knox v. The Highlands, L.L.C.*, 188 Ill. 2d 546 at 554 (1999), which involved an injunction brought against a zoning board that tried to regulate agricultural land when its

empowering statute did not allow it to do so. *Id.* The Supreme Court allowed the challenge, and its reasoning did not turn on the enactment of any rules or regulations[4], but just the fact that the agency was deciding agricultural zoning matters when it was not allowed to under its statute. Plaintiffs hate to say it, but Defendants' subsequent citations are sloppy. For example, Defendants' cite to *Van Dyke v. White*, 2019 IL 121452 (2019), but do not provide a pinpoint citation and the case does not appear to stand for the proposition they claim it for – the case recognizes attorneys' fees under the Administrative Procedure Act, but found them not to be justified. *Id.* at ¶¶88-94. *Crittenden v. Cook County Commission on Human Rights*, 2013 IL 114876, ¶¶12-13 (2013), also does not include a pinpoint citation, and also just involves a difference in interpretation as to whether or not an agency had authority under its statute to award punitive damages. Despite Defendants so stating, neither *Van Dyke* nor *Crittenden* involve situations where the agency promulgated a rule or regulation beyond the scope of its authority. Neither does *County of Knox*'s reasoning turn on that fact. Accordingly, the Defendants are simply incorrect in their case law interpretation when they attempt to restrict the "authority to act" exception to cases where an agency enacts a rule or regulation beyond its statutory authority.

2. Agency Expertise Is Not Involved In Interpreting 55 ILCS 5/3-7002.

Following the foregoing citations, Defendants argue that the Board should have been allowed to utilize its expertise in this case as part of "adjudicating the subject matter that the legislature consigned to the agency." *Brief* at 17. Once again, this ignores the key fact that the Plaintiffs *did* raise all these issues at the Board, which then declined to rule on them, and that the

[4]There were zoning rules in issue in the case, but the Supreme Court's reasoning does not focus on those as the basis for its exhaustion ruling. *County of Knox*, 188 Ill. 2d 546 at 550.

Sheriff opposed the Board ruling on them. Now that the Sheriff received an unfavorable ruling from the Appellate Court, he wants to change his position that the Board should be deciding these issues after all, ignoring the fact that the Board had the opportunity to do so and declined, and that the Sheriff had the opportunity to persuade the Board to address these issues, too, but he instead opposed that. (C1063-C1066, C2349). This point also counters the Sheriff's "economy" argument because it is the Sheriff's double-speak before the Board and in court that is, in part, responsible for the *Goral* decision. *See Goral*, 2019 IL App (1st) 181646 at ¶99 (noting that the Plaintiffs have been raising these issues before the Board since their cases began, that they continue to raise them, and that they raised them in the instant lawsuit).

In a somewhat separate argument, the Sheriff cites to *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006), for the proposition that exhaustion allows for success before an agency and avoids interruption in agency proceedings, leaving it unable to function. *Brief* at 18. First, *Woodford* involved exhaustion of an inmate grievance procedure as a prerequisite to prisoners asserting constitutional claims in lawsuits, and was concerned for disregard of an agency's procedures and depriving agencies of the opportunity to correct mistakes. *Id.* at 84, 89. Not only does *Woodford* have nothing to do with an invalidly-composed agency, but the factual background of this case shows that Plaintiffs did not ignore the Board's proceedings – they raised all of the issue before the Board, were ignored, and then proceeded to hearings on the merits despite the pendency of these proceedings. So too, the complaint below has alleged problems with the Board's composition before the December 13, 2017 amendments to the Act, as well as after, meaning that the Board, in fact, did not correct the problems. *See* (A-11 – A-13 (asserting, *inter alia*, that political imbalance was a problem after the December 13, 2017 amendments)). The concerns in *Woodford*, then, are not implicated in this case. As far as the allowance for success before the

agency is concerned, the Sheriff's argument ignores the giant elephant in the room: if Plaintiffs are correct, here, debatably Board decisions in their favor would be void or voidable.[5] In that instance, the Sheriff's concern with Plaintiffs' complaint causing an interruption in proceedings ignores the fact that the Sheriff's ignorance of the Board's compositional problems as much threatens finality of decisions, as the Plaintiffs; suit does temporary interruption to proceedings. Which is really the better outcome here: the expense of oodles of agency time and resources to adjudicate cases that are then forever void or voidable, or a temporary interruption in the proceedings pending the reconstitution of the defective agency? Plaintiffs submit that the latter option is less chaotic, less wasteful, and gives the agency the ability to fix its problems before expending time and resources on a first set of hearings, and then a second set after the first proceedings are declared void. The point of all of this is that (1) the Sheriff's argument about economy ignores the very non-economical outcome of the Board issuing decisions that are void or voidable and having to redo cases, and (2) its argument about obviating circuit court review of Board decisions ignores the fact that a favorable decision is as void or voidable as an unfavorable one, undermining the winner's ***and*** the loser's confidence in finality, and ignoring that the Sheriff may challenge a losing decision as void or voidable as much as an officer may.[6] And therein is the problem with the Sheriff's argument at page 21 of its Brief -- that Plaintiff Evans is a textbook example of a litigant who should be forced to exhaust his remedies. Arguably, Plaintiff Evans' decision is subject to the same problems as Shaffer's decision, if Plaintiffs are correct in their Complaint here. And the Sheriff can and did challenge Evans' decision through

[5] Without trying to have it both ways, Plaintiffs are reserving all arguments about this issue in the event of further litigation. The issue has not arisen, but it is certainly a possibility that Plaintiff's argument means that *all Board* decisions are void or voidable, even Plaintiff-favorable ones.
[6] As will be discussed in the next section, the *de facto* officer doctrine does not solve this when the compositional defects are so severe as to deprive the agency of jurisdiction.

the ARL, as much as Shaffer can challenge his own. *See Dart v. Evans*, 19 CH 04416 (affirming the Board's decision).

Finally, Defendants argue that relaxing exhaustion would induce "frequent and deliberate flouting of administrative processes." *Brief* at 17-18 (citing *McGee v. U.S.*, 402 U.S. 479, 485-86 (1971)). The first problem with this argument is that there absolutely no evidence that that is what was going on here in the record. Plaintiffs have never deliberately flouted administrative processes. In fact, as noted, they all but shouted about the compositional issues from a mountaintop, only to be ignored. *Goral*, 2019 IL App (1st) 181646 at ¶99. Evans and Shaffer, having raised the issue and been ignored, proceeded through the remainder of the proceedings at the Board and to final decisions. (A-61 – A-69 (Shaffer's Decision)), (A-70-A-76 (Evans' Decision)). There was no "deliberate flouting" of anything by either of them. So too, Courts have mechanisms to deal with litigants who abuse the system, such as motions to dismiss -- and sanctions -- and the concern anticipated by the Attorney General and the Sheriff that *Goral* means that all kinds of litigants will file frivolous lawsuits challenging "technical" defects in agency compositions simply ignores that these kinds of challenges have not been particularly common in this State. They are, indeed, rare challenges, even though *Vuagniaux v. Department of Professional Regulation*, 208 Ill. 2d 173, 186 (2003) and *Daniels v. Industrial Commission*, 201 Ill. 2d 160, 166-67 (2002), have been around for nearly 20 years. Both of those cases invite challenges to the composition of agencies – yet, where are all the anticipated challenges to agency composition since those cases were decided? Indeed, the parties to the instant litigation on all sides have cited to only perhaps a dozen or less such challenges all over the State of Illinois since *Daniels* and *Vuagniaux*. Has this been chaos?

But *McGee* cites to *McKart v. United States*, 395 U.S. 185 (1969), in which the United States Supreme Court acknowledged that exhaustion should not be inflexibly applied, and that where "[t]he resolution of [the] issue does not require any particular expertise on the part of the appeal board; the proper interpretation is certainly not a matter of discretion," or where a petitioner's failure to exhaust "only deprived the Selective Service System of the opportunity of having its appellate boards resolve a question of statutory interpretation," in those cases judicial scrutiny "would not be significantly aided by an additional administrative decision. . ." *Id.* at 197-99. *McGee* even recognized *McKart's* exception to exhaustion in the Selective Service Cases as a distinguishing characteristic between *McKart* and *McGee*. *McGee*, 402 U.S. 479 at 486 ("Unlike the dispute about statutory interpretation involved in *McKart*, McGee's claims to exempt status. . .depended upon the application of expertise. . .").

The lack of necessity for agency expertise in this case is best evidenced by the Board's empowering statute and Rules and Regulations. The Act[7] itself consigns oversight of classifications of ranks, hiring, promotion, and discipline of certain Cook County sworn staff members to the Board. *See, e.g.*, 55 ILCS 5/3-7006 ("The Board shall establish a classification of ranks including those positions which shall be exempt from merit classification."); 55 ILCS 5/3-7006 ("The Board shall establish a classification of ranks of the deputy sheriffs in the County Police Department. . ."); 55 ILCS 5/3-7008 (defining requirements for certification of applicants for sworn Sheriff's positions); 55 ILCS 5/3-7009 (defining requirements for certification of promotions to sergeant and lieutenant); 55 ILCS 5/3-7012 (providing for written charges to be filed by the Sheriff against sworn officers, triggering a hearing before the Board and Board

[7] This section cites to the current, but for purposes of the "expertise" argument herein, any of the three versions of the Act -- pre-December 2017, December 2017, and August 2018 -- may be examined and each shows that the Board's expertise is confined to the above-noted areas.

powers regarding such hearings); 55 ILCS 5/3-7016 (Board powers of certifications of appointments and vacancies to the county clerk). The Board's Rules and Regulations simply expound in more detail upon the statutorily-enumerated powers listed above. (C1253-C1280); *see generally Article VIII* (rules regarding disciplinary hearings under Section 7012 (C1274-C1279)); *Article III* (appointment standards to Sheriff's divisions (C1262-C1266)); *Article IV* (classification of ranks (C1267)); *Article V* (promotional standards (C1268-C1272).

Important here is the fact that *none* of the foregoing enumerated powers or implementing regulations at all vest the Board with expertise in interpreting the Board's compositional provision, 55 ILCS 5/3-7002. Nowhere does the statute provide that the Board makes its own appointments, ordains its own members, or otherwise has any expertise in the appointment of its own members. Accordingly, the application of agency "expertise" rationale relied upon by the Sheriff in its Brief misses the mark.

The Sheriff next briefly argues that the Merit Board actually did make findings about its membership and procedures in Evans' and Shaffer's final decisions. *Brief* at 20. But those findings, *first*, came without Evans or Shaffer having any opportunity to respond, *second*, do not address the numerous defects that Evans and Shaffer raised in their Motions to Dismiss filed with the Board, and, *third*, are also not findings within the Board's enumerated areas of expertise – classification of ranks, standards for promotion and appointment, and discipline of officers. Furthermore, allowing the Board to deem itself properly-constructed is absurd – what administrative agency would ever find itself not to be properly-constructed and without authority to act? There does not seem to be an example of this in Illinois case law, anywhere. And if the Board is itself improperly-composed, then the Board's actions in "employing clerical and technical staff assistants" are as void or voidable as its disciplinary decisions, and, thus, the

Sheriff's argument only makes the Board's compositional-problems devolve onto its clerical and technical staff assistants. *See* 55 ILCS 5/3-7004.

So too, the Board's language in the Shaffer and Evans decisions attempts to sever the act of "filing" of the complaint as separate from the status of the Board's members. Here is the problem with that: the Rules and Regulations of the Board provide rules for proceedings that occur *before a Board member* after a complaint is filed, but before a hearing is held. For example, they state that "[a]t the preliminary hearing, the hearing officer shall enter, with the assistance of the parties: (a) dates of completion of any pre-hearing discovery, with the assistance of the parties." *Rules and Regulations of the Board*, Article IX(C) (C1275). They state that "[t]he Board, or any member thereof, or designee, will hear the case and receive the evidence thereto." *Id.* at (E)(1) (C1276). They state that "[a]ll witnesses will be sworn by any member of the Board. . ." *Id.* at (E)(6) (C1276). Also, that "[t]he Board or any member thereof will first hear the evidence and witnesses supporting the charges which have been made. . .[t]he Board will have the right to examine and to recall witnesses." *Id.* at (E)(7) (C1276). "If the case is heard by one Merit Board Member, the entire Board will review the evidence and the hearing transcript." *Id.* at (F)(1) (C1276). And the Rules and Regulations go on from there to allow the hearing officer to "allow supplemental interrogatories," determine the reasonableness of document requests, request each party to submit conclusions of law, and grants them subpoena power. *See generally* (C1275-C1278). Accordingly, separate and apart from the initial filing of the complaint with the Board, there are all kinds of proceedings that occur between the filing and the issuance of a decision that happen before a Board member, who may rule on such matters, swear witnesses, and render an initial decision. The Board's fixation on the moment of filing does nothing to render valid the foregoing actions occurring after an initial filing.

3. *Goral* Is Correct That The Circuit Court May Determine Backpay; So Too, Evans Is Entitled To Backpay Under The Board's Order And In The *Goral* Case.

The Court below also concluded that Plaintiffs' claims for backpay are not subject to the exhaustion requirement in this case. *Goral*, 2019 IL App (1st) 181646 at ¶51. Defendants counter this portion of *Goral* by claiming here that backpay is a disputed question of fact, and that "the Merit Board and not the Circuit Court must in the first instance determine the back pay, if any, owed to the officer, minus setoff and mitigation for other jobs worked." *Brief* at pp. 21-22.

The Sheriff's argument conveniently omits the fact that Evans *still* has not been paid any backpay whatsoever, despite that he prevailed on his case at the Board in a March 1, 2019 order that retroactively reinstated him to February 22, 2017. (A70-A75). When Evans sought backpay based upon the Board's retroactive reinstatement date, the Sheriff refused him to pay him, and Evans has filed a separate lawsuit to be made whole, which is now stayed by order of the Circuit Court, which stay order was recently affirmed by the First District. *See Evans III v. Dart, et al.*, 2020 IL App (1st) 192626-U (March 6, 2020). In other words, even when officers *win* at the Board, Sheriff Dart *still* refuses to pay them backpay, even when the Board retroactively reinstates them. Once again, the Sheriff in this case argues that it is the Board that needs to determine backpay, and, yet, when the Board orders Evans reinstated retroactively to February 22, 2017, the Sheriff refuses to pay Evans any backpay. So when is ever the time to be made whole, according to the Sheriff? Of course, he wants it to be never, even when he unjustly suspends an employee without pay pending a Board proceeding.

The case law is overwhelming that Circuit Courts *can* and *do* order backpay in these scenarios. For example, in *Thaxton v. Walton*, 106 Ill.2d 513, the Illinois Supreme Court – in a decision that has never been overruled, limited, modified, or attacked in any manner and that

remains good law today – expressly authorized a public employee who was wrongfully discharged to file a petition in *mandamus* seeking (1) reinstatement and (2) back pay. Considering almost identical facts to this case, the *Thaxton* court considered a civil service commission's termination of a city employee, and the Circuit Court's subsequent reversal of that decision under the ARL. *Id.* at 514. When the City failed to reinstate the employee, the plaintiff filed a petition in mandamus seeking reinstatement, back pay, and attorneys' fees for bringing the action. Making its way up to the Illinois Supreme Court, the sole issue was the question of the employee's entitlement to back pay and attorneys' fees in a mandamus action. In controlling language, the Illinois Supreme Court stated:

"The Illinois Municipal Code [] contains no provision for back pay for a wrongfully suspended or discharged civil service employee. It has long been recognized, however, that where an employee is reinstated following a determination that his suspension or discharge was illegal, he is entitled to recover his salary for the period that he was prevented from performing his duties, reduced by what he earned in other employment."

Id. at 515 (citing *People ex rel. Bourne v. Johnson*, 32 Ill. 2d 324 (1965); *People ex rel. Krich v. Hurley*, 19 Ill.2d 548 (1960); *Kelly v. Chicago Park District*, 409 Ill. 91 (1951)). Ultimately, the Court held that the employee was entitled, in a mandamus action, "to recover full compensation" from "the date he was illegally removed from his position. . ." *Id.* at 519. Other cases have established the same right to seek back pay for periods. *See, e.g., Criswell v. Rosewell*, 70 Ill.App.3d 320, 322, 324 (1st Dist. 1979) (affirming mandamus order for back pay for wrongfully suspended officer and specifically finding that "plaintiff had a clear right to his compensation"). Accordingly, the Sheriff is wrong that the Board has exclusive jurisdiction to award back pay, as the foregoing cases note that the Circuit Courts may order back pay in these scenarios.

More recent authority from the First District also so holds. In *Walker v. Dart*, 2015 IL App (1st) 140087, ¶34 (1st Dist. 2015), for example, the First District considered a complaint seeking review of a termination decision of the Board. The First District could not have more clearly awarded reinstatement and back pay under the ARL, as follows:

"Based on the foregoing, we reverse the judgment of the circuit court of Cook County and the decision of the Merit Board terminating plaintiff's employment. Plaintiff's request for reinstatement with back pay should be granted and the Merit Board is directed to enter an order consistent with this opinion on remand."

Id. at ¶62. Just a few years prior, the First District did the same thing in *Promisco v. Dart*, 2012 IL App (1st) 112655 (1st Dist. 2012). That case also involved a complaint seeking review of a termination decision of the. *Id.* at ¶1. The First District awarded reinstatement and back pay under the ARL as follows:

"Without that testimony, which formed the crux of the Board's case against the plaintiff, we agree with the plaintiff that the Board lacked sufficient evidence to justify his termination. For that reason, we agree with the circuit court's decision to set aside the Board's decision and order the plaintiff reinstated to his prior position of employment with full back pay and benefits."

Id. at ¶17. So too, in *Cole v. Retirement Bd. of Policemen's Annuity and Benefit*, 396 Ill.App.3d 357, 372 (1st Dist. 2009) the Court distinguished the earlier *Mitchem* case on the grounds that there was no basis to award back pay in the record in that case, but stating that "[i]n the present case, the circuit court's determination that the plaintiff was entitled to the 50% duty disability benefit was based on the record before it." The First District explicitly rejected the agency's reading of *Mitchem* in *Cole*, stating:

"The Board contends that the circuit court lacked the authority under the Administrative Review Law to order it to award the plaintiff duty disability benefits. We disagree. Under the Administrative Review Law, the circuit court has the power:

'(5) to affirm or reverse the decision in whole or in part;

(6) where a hearing has been held by the agency, to reverse and remand the decision in whole or in part, and, in that case, to state the questions requiring further hearing or

proceedings and to give such other instructions as may be proper.' 735 ILCS 5/3–111 (West 2006).

The circuit court did not exceed its authority here. It remanded the case with directions to award the plaintiff the 50% duty disability benefit to which she was clearly entitled under the record in this case. The Board's reliance on *Mitchem v. Cook County Sheriff's Merit Board,* 196 Ill.App.3d 528, 143 Ill.Dec. 396, 554 N.E.2d 331 (1990), is misplaced. There the appellate court found the circuit court had exceeded its powers by awarding back pay. The court was limited to the record before it, and the award of back pay and benefits required the taking of additional evidence. *Mitchem,* 196 Ill.App.3d at 534, 143 Ill.Dec. 396, 554 N.E.2d 331. In the present case, the circuit court's determination that the plaintiff was entitled to the 50% duty disability benefit was based on the record before it."

Based on the foregoing, Defendants are incorrect when they state that it is the Board that must determine backpay, not the Circuit Court. The foregoing precedents make clear that the Circuit Court may order backpay under the ARL (such as in *Promisco*, *Walker,* and *Cole*), and via mandamus (such as in *Thaxton* and *Criswell*).[8]

Even further, Evans *did* present evidence of backpay to the Board, and there was specific discussion about the *Mitchem v. Cook County Sheriff's Merit Board* case as his basis for doing that, as noted in his Circuit Court action seeking backpay. Notably, the Sheriff's Attorney made the following objection[9] at the Board hearing as to damages evidence:

> "MR. NELLIGAN: In terms of the actual findings of the – the charges within the complaint, I don't believe it has any merits. If and when Mr. Evans is successful in his defense of his claim, maybe that can be raised at that point in a subsequent

[8] While it is not in the record in this case, it is relevant for the Court to be aware that in the complaint underlying Evans' mandamus action for backpay, he alleges that the Sheriff has always, historically, paid back pay to officers retroactively reinstated by the Board. Dart's refusal to do that with Evans and the other Plaintiffs in this case is the subject of that now-stayed litigation.). Judicial notice requested that Evans has made that allegation in a publicly-filed document. *See May Dep't Stores v. Teamsters Un. Local No. 743*, 64 Ill.2d 153, 159 ("no sound reason exists to deny judicial notice of public documents which are included in the records of other courts…"). If the Sheriff would just pay Evans his backpay and benefits, Evans' case arguably would be mooted, and Shaffer could continue here for purposes of the public interest exception to mootness.

[9] Judicial notice requested of this statement on the public record at Evans' hearing, too. *See FN 8, supra*.

> proceeding, but I don't believe it's relevant in terms of the charges that are currently pending against him."

(So, once again, the Sheriff commits double-speak by claiming in this case that backpay must be decided at the Board, then objects to such argument and evidence when actually presented at the Board, and then refuses to pay officers such as Evans who are actually retroactively reinstated by the Board! *Thaxton*, and the other cases, demand a different result, and that is that Plaintiffs be allowed to state their claims for backpay in the Circuit Court where the Sheriff has refused to pay it. In terms of offset and mitigation, there is nothing stopping the Defendants from claiming those as counterclaims or defenses in a Circuit Court case. *See Rozny v. Marnul*, 43 Ill.2d 54, 73 (1969) ("The law is clear that failure to mitigate damages is an affirmative defense and must be pleaded and proved by the defendant."); *Dudek, Inc. v. Shred Pax Corp.*, 254 Ill.App.3d 862, 872 (1st Dist. 1993) (setoffs a form of counterclaim under 735 ILCS 5/2-608).

The Sheriff also takes the opposite position in federal litigation when it suits him. For example, Sheriff has repeatedly argued in the federal court in opposition to due process claims that state law remedies, such as mandamus and the ARL, are available remedies for backpay and reinstatement. *See Russell v. Cook County Sheriff's Merit Board*, 196 Ill.App.3d 742, 748 (1st Dist. 1990) (explicitly modifying a Sheriff's suspension pending a Board hearing to 180 days); *Fruhling v. County of Champaign*, 95 Ill.App.3d 409, 416 (4th Dist. 1981) ("As an employee, plaintiff was entitled to his salary unless and until he was lawfully suspended or discharged."); *Ores v. Village of Dolton*, 152 F.Supp.3d 1069, 1086 (N.D. Ill. 2015) (J. Chang) (recognizing availability of mandamus to seek back pay for an unlawful suspension so as to foreclose a federal due process claim); *Battle v. Alderden*, 2015 WL 1522943, at *4 (N.D. Ill. 2015) (J. Lee) (recognizing mandamus as a post-deprivation remedy in Illinois for recovery of back pay so as to

foreclose a federal due process claim); *Burton v. Sheahan*, 2001 WL 563777, at *7 (N.D. Ill. 2001) (J. Aspen) (recognizing mandamus as a basis for officers suspended by the Cook County Sheriff's Merit Board to recover back pay). A review of the foregoing shows that the Sheriff has repeatedly argued in the federal court that suspended officers cannot sue for due process violations as to unlawful suspensions because *mandamus* is an adequate remedy under state law. *See Battle*, 2015 WL 1522943, at *4 (Sheriff Dart); *Burton*, 2001 WL 563777, at *7 (Sheriff Sheahan). Yet, in this case, the Sheriff is claiming that Plaintiff cannot bring a mandamus claim because, he claims, the ARL is Plaintiff's exclusive remedy. Under these circumstances, the Court should find the Sheriff judicially estopped from denying that Plaintiff may pursue backpay in this Court. *See Seymour v. Collins*, 2015 IL 118432, ¶36 (2015) ("the uniformly recognized purpose of the [estoppel doctrine] is to protect the integrity of the judicial process by prohibiting parties from 'deliberately changing positions' to the exigencies of the moment.").

Rounding out Plaintiffs' backpay argument in support of *Goral* is the fact that, as stated above, determinations of backpay, mitigation, and setoffs are not something that falls within the competencies of the Merit Board according to its empowering statute. *See* 55 ILCS 5/3-7001, *et seq.* Defendants note that the Board's Members are "either lawyers with experience in law enforcement or government practices, or are non-lawyers with experience in law enforcement, local government or community organizing experience." *Brief* at 19. What about these qualifications speak to determining backpay as a subject of expertise? And why should the Board determine backpay, rather than the Circuit Court as recognized in this Court's sensible ruling in *Thaxton*?

For all of the foregoing reasons, this Court should affirm the *Goral* ruling that Plaintiffs are allowed to state their claims for backpay in the Circuit Court below.

4. <u>The Chaos Argument Is A Manufactured Crisis; The Attorney General Should Not Be Dubbed Exclusive Gatekeeper Of Compositional Challenges Given His Tardy Arrival On Scene.</u>

Defendants' final argument is that the *Goral* decision will cause chaos in the courts below by "allowing any claimant to raise any type of technical appointment challenge and thereby skip over the agency." *Brief* at 22. Plaintiffs have responded to this argument above by pointing out that Courts have tools to deal with frivolous defects claims, and also point out that neither of them "skipped over the agency" nor are they making frivolous defects claims. Both raised the issues before the Board, were ignored by the Board and opposed by the Sheriff there, and also filed in the Circuit Court. While the Circuit Court case was pending, both Evans and Shaffer continued their Board proceedings, went to trial, and Shaffer was fired and Evans exonerated. There is nothing about the facts of this case that involved any "skipping over of the agency."

So too, Defendants' argument that the agency issued a decision in favor of Evans, ignores the 800-pound gorilla – is Evans' decision void or voidable because of the Board's compositional defects? What if Evans prevailed and Dart challenged the decision as void or voidable based on the compositional defects in order to get a do-over? This is not so unrealistic a charge given that Dart has gone so far as to refuse to even pay Evans any backpay.

Defendants next recite the names of agencies that could be impacted by the *Goral* decision, such as the Illinois Human Rights Commission, the Illinois State Board of Elections, and others. *Brief*, p. 23. But Defendants do not claim that claimants before those bodies could not make challenges to agency composition under the ARL; indeed, Defendants claim that such challenges could and should be made under the ARL. *Brief*, pp. 23-24. If a litigant makes such a claim under the ARL – as Officer Taylor did in *Taylor v. Dart* – it not only undoes that officer's

decision, but possibly others that have already been decided. Isn't it more efficient for the challenge to be heard first, or contemporaneously with agency proceedings, *before* the agency expends hours and resources issuing decisions that are then void or voidable and subject to a redo? If anything, it is *more* efficient to all parties if Plaintiffs bring this action before or contemporaneously with agency proceedings – that is especially so where, as here, the agency refuses to hear the issue when raised before it.

Finally, where are all the challenges to appointment defects in other agencies? The Defendants' brief lists no other instances where these challenges have been recently made (except, of course, to the instant Merit Board). Even the *amici curiae* brief is limited to three instances of removal of public officers through *quo warranto* in the past five years, and those were where the agency member was convicted of a felony. *Amici Curiae Brief*, at p. 27. The "chaos" claimed by Defendants is a fantasy. *Cf. Illinois Trial Lawyers Ass'n*, "Court Statistics Reveal Civil Lawsuit Filings Are Dropping," (https://www.iltla.com/court-statistics-reveal-civil-lawsuit-filings-are-dropping/) (accessed February 11, 2019) (noting that by "manufacturing a mythical 'lawsuit crisis,' [powerful interests] are trying to pressure policymakers into shielding wrongdoers from financial liability when their dangerous actions harm innocent people"); *see also Annual Report of the Illinois Courts*, Statistical Summary – 2017, p. 9 (noting that 2,528,512 cases were filed in Illinois Courts in 2017).[10] For its part, the Attorney General wants to assume a designated gatekeeper function for these kinds of issues by relegating challenges to officials holding public office to *quo warranto* proceedings. Yet, where has the Attorney General been since the *Taylor* litigation and its progeny began? The instant *amici curiae* brief is

[10]http://www.illinoiscourts.gov/SupremeCourt/AnnualReport/2018/2017_Statistical_Summary_Final.pdf.

the very first time it has ever appeared in *Taylor* and its progeny, and, lo and behold, it does so to laud that it is the appropriate entity to police these issues. Where has it been all this time? However, given the Attorney General's evident abdication of any such role as to the Merit Board, and its non-involvement in fixing the Merit Board's alleged defects, why should this Court entrust it with exclusive gatekeeping authority at this late hour?[11] The more sensible route is to allow litigants to make claims such as this, and deter those litigants who do so frivolously or for tactical gamesmanship as Courts already have the power to do.

II. The *De Facto* Officer Doctrine Does Not Bar Challenges To Agency Defects That Undermine The Agency's Authority To Act, Nor Challenges To Other Defects Raised At The Agency Level During The Proceedings.

1. Introduction: Why Propose A Restatement Of The Test?

Plaintiffs have conducted a careful analysis of seminal cases in this jurisdiction that discuss the *de facto* officer doctrine and formulated, in test form, a synthesized statement of the law as a means to clear up the muddled history of *when* and *how* the doctrine applies in Illinois. This is necessary because the Defendants propose eliminating the "First Challenger Exception" to the *de facto* officer doctrine and invite a wholesale elimination of the ability of individual litigants to challenge defects in agency composition. *Brief* at 36-40. Plaintiffs cannot credibly disagree that the First Challenger Exception poses an extremely confusing and lottery-based rule that is unfair to litigants, as best articulated by Justice Thomas in *Baggett v. Industrial Commission*, who, of course, was opposing wholesale litigants obtaining any relief in circumstances like this case:

[11]The *Taylor I* and *Taylor II* decisions came out in 2016 and 2017, and this litigation has all been quite public. *See, e.g.*, https://www.chicagotribune.com/news/breaking/ct-met-cook-county-merit-board-costs-20180313-story.html; https://cookcountyrecord.com/stories/511568941-ex-cook-sheriff-s-deputy-loses-bid-to-use-merit-board-controversy-to-boost-lawsuit-over-termination; https://www.illinoispolicy.org/fired-cook-county-police-officers-could-be-back-on-the-job-due-to-technicality/; https://www.chicagolawbulletin.com/1st-district-upholds-merit-board-in-firing-of-deputy-20180830.

"Litigation is not a raffle, and appellate relief should not be a door prize. . .how will this court decide who the lucky recipient of undeserved appellate relief will be? Again, 100 lawsuits are filed on the same day. Presumably, those cases will take varying amounts of time to work their ways through the system. Will the door prize go to the first to have his or her challenge adjudicated by the trial court? Surely not, for this would punish litigants whose arguments are more complex or whose cases are assigned to backlogged courtrooms. The first case to be decided by the appellate court? This presents the same inequities that arise in the trial court. The first petition for leave to appeal filed in this court? This is a possibility, but this court often passes on an issue several times before finally granting leave to appeal. The first petition for leave to appeal allowed by this court? Maybe, but again, what if the first petition allowed is not the first one filed? The answer, of course, is that there is no answer, because courts should not be in the business of singling out and conferring upon isolated litigants relief that the law clearly prohibits."

Baggett v. Industrial Commission, 201 Ill.2d 187, 208 (2002) (J. Thomas, dissenting). He continued his criticism, too:

"This analysis is flawed in several respects. . .Other than Pervis Daniels, no member of the public will benefit from this court's determination that Kane and Reichart were appointed unlawfully. From the public's perspective, Kane and Reichart might as well have been appointed lawfully, because all of their decisions but one are valid and enforceable. Just ask the District.

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"Borrowing from the vocabulary of microeconomics, the special concurrence asserts that, by arbitrarily singling out Daniels for undeserved appellate relief, "the incentive to discover and pursue [unlawful office holding] is maintained." *Daniels,* 201 Ill.2d at 176, 266 Ill.Dec. 864, 775 N.E.2d 936 (McMorrow, J., specially concurring, joined by Freeman, J.) (modified upon denial of rehearing). ***But is it?*** The District, of course, endeavored to pursue unlawful office holding and had the door slammed in its face. And this reveals the flaw in the special concurrence's theory of incentives. By dangling the prospect of undeserved appellate relief before the public, this court is inviting an indeterminate number of future litigants to pursue what, for all but one of them, will be an empty exercise. Consider the following hypothetical. The Chicago Tribune runs a story bearing the headline, "Governor's appointment procedures called into question." The very next day, and in direct response to the special concurrence's invitation, 100 lawsuits are filed challenging the validity of the decisions rendered by the officers in question. Assuming the challenged decisions are *de facto* valid, only one of those litigants will receive undeserved relief. This means that 99 other litigants, all of whom invested a great deal of time, grief, and expense *at the invitation of this court,* will have done so in vain. **Given this reality, the rational litigant would *not* file suit because, while bearing one hundred percent of the litigation's costs, he or she would stand only a one percent chance of reaping the litigation's benefit. Litigation is not a raffle, and appellate relief should not be a door prize**."

Baggett v. Ind. Comm'n, 201 Ill.2d 187 at 206-207 (J. Thomas, dissenting) (emphases added). Indeed, the *amici curiae* point out well that the First District has applied the First

Challenger rule differently just within several cases decided in last couple of years: *Pietryla v. Dart*, 2019 IL App (1st) 182143, ¶18 (1st Dist. 2019) (plaintiff not first challenger, even though he was first to challenge entire Board); *Cruz v. Dart*¸ 2019 IL App (1st) 170915, ¶38 (1st Dist. 2018) (plaintiff not first challenger even though he was first to challenge three Board members not previously challenged); *Acevedo v. Dart*, 2019 IL App (1st) 181128, ¶36 (1st Dist. 2019) (plaintiff not first challenger even though challenged different board members than previously challenged). *See Brief of Amici Curiae* at 14. Plaintiffs cannot credibly disagree with Justice Thomas and the *amici cuiae* on this point, but will even add that the First Challenger exception is confusing *if applied to this case.* Technically, Evans and Shaffer joined this lawsuit *after* the other four plaintiffs, but Shaffer was the first out of all of them to challenge the issues at the Board level. So, was it Evans and Shaffer, or the other four plaintiffs who are first challengers? It is simply practically impossible to demarcate who and where the first challenger is.

The "incentive in discovering defects" is perverse for an additional reason. Take this hypothetical: what if Attorney Cass T. Casper discovers the defects, tells Attorney Christopher Cooper about them, only to have Christopher Cooper run to court first to complain about the defects to obtain first challenger status? Under this scenario, the First Challenger Exception creates an incentive *to hide* defects, not publicize them. This is a bizarre outcome.

Based upon the undeniable confusion in the test, and given that it appears likely that this Court will consider clarifying the rules on the *de facto* officer doctrine in this case, Plaintiffs Evans and Shaffer propose the following restatement of the test based upon a careful analysis of governing case law.

2. **Summary: A Synthesized Restatement Of The Test For The *De Facto* Officer Doctrine From *Newkirk*, *Daniels*, *Vuagniaux*, *Gilchrist*, *Peabody Coal*, *Lopez*, *Cruz*, and *Acevedo*.**

The proposed test form for the doctrine is largely drawn from Justice McMorrow's Special Concurring Opinion in *Daniels v. Ind. Comm'n*, 201 Ill. 2d 160 (2002) and the case under review, *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646 (1st Dist. 2019). It is as follows:

(1) Are there statutory defects in the composition of an agency?

(2) If there are, are the defects serious enough to deprive the agency of its statutory authority to act?

(3) If the answer to (2) is "no," then the issue is voidable, must be objected to, and the *de facto* officer doctrine may apply. (This is where *Cruz*, *Lopez*, *Taylor*, and *Vuagniaux* end). If it is objected to at the agency level or on direct review, then the decision is voidable and may either be voided or subject to Justice McMorrow's formulation of the *de facto* officer doctrine (and its exceptions), depending upon the facts of each case.

(4) If the answer to (2) is "yes," no objection ever needs to be made, the decision may be attacked directly or collaterally at any time, and the *de facto* officer doctrine may never be applied because the agency lacked authority to act. (This is *Daniels*' plurality decision, plus Justice McMorrow's Special Concurring Opinion, and the present case). The proceedings are void, with or without objection, and with or without distinguishing between direct and collateral attacks – "may be attacked, directly or collaterally, at any time." *Daniels v. Industrial Commission*, 201 Ill.2d 160, 166 (2002) (citing *Business & Prof'l People*, 136 Ill.2d 198, 243-44 (1990)).

(5) But, once a court declares an agency's composition invalid, it cannot utilize the *de facto* officer doctrine to continue operating with those same defects. *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646, ¶101 (1st Dist. 2019).

In order to explain how this proposed test was derived, Plaintiffs now discuss the seminal cases in this jurisdiction, and how each of the above principles of law are derived from that jurisprudence. In so doing, Plaintiffs first explain the long-standing principle that "voidness" can be attacked at any time, directly or collaterally.

3. **Clear As Mud In Illinois: The Tensions Between The Principle That Voidness Can Be Attacked At Any Time, The Direct/Collateral Attack Distinction, And The Void And Voidable Distinctions.**

It is a fundamental principle of law that voidness is a defect that cannot be waived. *See, e.g., Daniels*, 201 Ill.2d 160, 166 (2002) ("agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, directly or collaterally"); *Siddens v. Industrial Commission*, 304 Ill. App. 3d 506, 511 (4th Dist. 1999) ("A void order may be attacked, either directly or collaterally, at any time or in any court."); *In re Estate of Steinfeld*, 158 Ill.2d 1, 12 (1994) (same); *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976) (same); *Barnard v. Michael*, 392 Ill. 130, 135 (1945) (same); *Anderson v. Anderson*, 380 Ill. 435, 439 (1942); *Buford v. Chief, Park District Police*, 18 Ill.2d 265, 271 (1960) ("A judgment entered by a court in which there is a total want of jurisdiction or which lacks inherent power to make or enter the particular order involved is void and subject to collateral attack."); *Thayer v. Village of Downers Grove*, 369 Ill. 334, 339 (1938) (same), *disapproved on other grounds by James v. Franta*, 21 Ill.2d 377, 383 (1961).

Given the long-standing approval of the foregoing principle, how, then, did *Taylor I* and *Taylor II* state that it mattered whether or not Officer Taylor raised his challenge on direct review or in a collateral attack? *See Taylor v. Dart*, 2017 IL App (1st) 143684-B *10 (1st Dist. 2017). The answer is that *Taylor I* and *II* cited to *Peabody Coal Company v. Industrial Commission*, 349 Ill.App.3d 1023 (5th Dist. 2004) ("*Peabody Coal*"), which misread this Court's decision in *Daniels*. *See Taylor II*, 2017 IL App (1st) 143684-B, ¶¶40-44 (discussing *Peabody Coal* extensively). *Taylor II* specifically made this statement, following from its discussion of *Peabody Coal*: "However, even if the Merit Board's decision was voidable, the *de facto* officer doctrine would not apply in this case because the plaintiff raised the illegality of Mr. Rosales' appointment to the Merit Board on direct review, not in a collateral proceeding." *Id.* at ¶44. The

answer to the near contradictory tension between *Daniels*' proposition that void judgments may be attacked at any time, directly or collaterally, and *Taylor II*'s distinctions between a direct and a collateral attack, and void and voidable, is that *Peabody Coal* misread *Daniels*. To get to that error, we start with a discussion of *Daniels*.

a. Four Justices In *Daniels* Recognize That Extra-Statutory Appointments Of Agency Members Are Void, And Decisions Of An Improperly-Constituted Agency Are Void.

Daniels involved the improper appointment of two commissioners to the Illinois Industrial Commission by the Commission's chairmen, when such were supposed to be done by gubernatorial nomination. *Daniels* at 938 – 939. Chief Justice Harrison emphasized that "[t]he law is carefully designed to insure that the Industrial Commission represents a balance of interests" between employers, employees, and neutrals. *Id.* Political balance was a core purpose of the structural provisions of the Act in issue, he wrote. *Id.* at 939. Based on these considerations, Chief Justice Harrison concluded that the nominations were "directly contrary to the Act's objectives." *Id.* Because the two improperly-appointed commissioners were acting on the panel that decided the plaintiff's decision, and their votes were necessary, Chief Justice Harrison concluded that "[w]here an administrative agency acts outside its specific statutory authority, as the Commission did when it appointed Kane and Reichert, it acts without jurisdiction. Its actions are *void*, a nullity from their inception. . .The appointment of Kane and Reichert therefore had no legal effect." *Daniels* at 939 – 940. For purposes of the present case, that is two Justices in *Daniels* who conclude that the *Daniels* decision was *void* (not voidable).

Justice McMorrow agreed with Chief Justice Harrison that the plaintiff's decision was *void*, but first articulated a means of analyzing these kinds of cases, stating:

> "[h]ere, as in *Newkirk*, it is only after this court determines whether the appointments constituted error that this court can consider whether the error is

> serious enough to constitute a *jurisdictional defect*. In other words, this court can make no reasoned decision on Daniels' voidness claim unless this court first determines whether there was error in the appointment procedures followed and whether the error was of such a nature that it affected the Commission's jurisdiction."

Daniels at 943 (J. McMorrow). Justice McMorrow agreed with Justice Harrison that "if commissioners are not appointed in conformity with the statute, there exists the potential for undermining 'the balance of interests contemplated by the Act.'" *Id.* Justice McMorrow also agreed with Chief Justice Harrison "that the statute, properly construed, mandates a finding that two of the three commissioners who sat on the panel reviewing Daniels' case (Kane and Reichart) were not appointed in conformity with statutory requirements." *Id.* at 944. Justice McMorrow, however, wrote separately to preserve her view that she would apply the *de facto* officer doctrine to all *but* the plaintiff's decision in *Daniels*. *Id.* That nuance will be discussed later in this brief, but what is important presently, though, is that nothing in Justice McMorrow's concurring opinion ever states that the *Daniels* plaintiff's decision is *merely voidable*. Accordingly, *four justices* in *Daniels* (Harrison, Kilbride, McMorrow, and Freeman) agreed that appointments not in conformity with an agency's statute are *void*, and that *Daniels*' decision was *void*. That is the third principle in the chart above. Justice McMorrow finally states that other decisions by the Commission in *Daniels* were not void, but only because of the *de facto* officer doctrine – the point here, is that she never calls any decisions of the industrial commission "merely voidable," as the *Peabody Coal* court claimed. *Peabody Coal*, 349 Ill.App.3d 1023 at 1027-1029.

There is a fourth principle that four Justices agree with in *Daniels*. Justice McMorrow, agrees with Chief Justice Harrison that the *purpose* of a statute's structural provisions is a key part of the agency's administration of its statute. She recognizes this in her exceptions to

application of the *de facto* officer doctrine where she states that the doctrine does not apply where "the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business" and "[i]t also has been held that the *de facto* officer doctrine should not be invoked when an officer's appointment is in violation of a statute and the officer lacks certain qualifications which were statutorily required for the benefit and protection of the individual subject to the officer's authority." *Daniels* at 944 – 945. Chief Justice Harrison's stated the same thing when he wrote that Kane and Reichert's appointments violated the Act because political balance was a core purpose of the structural provisions in issue. *Id.* at 939. In other words, Kane's and Reichert's invalid appointments made the *agency* impotent to produce the plaintiff's decision because of the lack of structural safeguards required by the Act – both Chief Justice Harrison and Justice McMorrow agree with this.

Equally important, *waiver* of the issue by failure to raise it is <u>*never*</u> made a governing principle by these four Justices. In fact, Chief Justice Harrison eschews waiver entirely when he states:

"The qualifications of Kane and Reichart were not challenged prior to the appeal to the appellate court. That, however, is of no consequence. Because agency action for which there is no statutory authority is void, it is subject to attack at any time in any court, either directly or collaterally. [*Business & Professional People*, 136 Ill.2d 243 – 244 (1989)]. Even if the parties themselves do not raise the question, courts have an independent duty to vacate and expunge void orders and thus may *sua sponte* declare an order void. *See* [*Siddens v. Industrial Commission*, 711 N.E.2d 18 (4th Dist. 1999)]." *Daniels* at 940.

Justice McMorrow eschews waiver too, when she states:

"It is true that, as a general proposition, issues not raised before an administrative agency will be deemed "waived" for purposes of review. Voidness, however, is a fundamental defect that cannot be waived by a failure to object. Whether there is a lack of jurisdiction which renders a judgment void is a matter which can be raised at any time [], either on direct review or collaterally, as in *Newkirk.*" *Daniels* at 943 (citation omitted).

In summary, *Daniels* and its antecedents leads to the following statements of law relevant for the instant analysis:

1. Void decisions are subject to collateral attack. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
2. Void decisions are those where the agency lacked jurisdiction or the inherent power to make or enter the order involved. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
3. Appointments not in conformity with an agency's statute are *VOID (NOT VOIDABLE)*. *Daniels* at 944.
4. Appointment procedures designed to insure an agency has balanced interests are a foundational basis for an agency's authority to administer its empowering statute. *Daniels* at at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman).

Therefore, it is unquestionable that post-*Daniels*, <u>*waiver*</u> is inapplicable to *void* decisions, and is *not* a part of the *de facto* officer analysis. Neither is the direct/collateral distinction important for purposes of the *de facto* officer analysis in the context of <u>*void*</u> decisions.

b. <u>*Vuagniaux* Cements *Daniels* In A Majority Opinion: Extra-Statutory Appointments Of Agency Members Are Void.</u>

A year after *Daniels*, the Illinois Supreme Court again addressed problems with non-statutory appointments in *Vuagniaux v. Department of Professional Regulation*, 208 Ill.2d 173, 802 N.E.2d 1156 (2003). In that case, the problem was that the Department of Professional Regulation appointed a special chiropractor – Dr. Roger Pope – to sit on the Medical Disciplinary Board for the plaintiff's disciplinary proceedings. *Id*. at 1162. The plaintiff alleged that this appointment was in violation of the statute, which provided that such appointments needed to be made by the Governor with the advice and consent of the Senate. *Id.* The plaintiff in *Vuagniaux* had, in fact, raised the issues with the Board's constitution <u>via declaratory judgment and injunction</u>, which claims were consolidated with his ARL action later. *Id.* at 1163. This time, without ambiguity, the Illinois Supreme Court ruled that:

"The problem with the proceedings is that the Medical Disciplinary Board, the administrative body charged with enforcing the provisions of the Act pertaining to discipline, was not properly constituted when it considered Vuagniaux's case on the merits and recommended that his license be disciplined. It was improperly constituted because it included Pope, the chiropractor appointed by the Board to replace Cook after Cook was excluded from further participation in the case by the administrative law judge. As Vuagniaux has consistently argued, and as the circuit court correctly determined, Pope's appointment was impermissible because the Board had no statutory or constitutional authority to make it."

Id. at 1164. The Illinois Supreme Court then articulated the consequences of this, again, without ambiguity:

"As an administrative agency, the Medical Disciplinary Board is and was constrained by these limitations. It has no general or common law authority. The only powers it possesses are those granted to it by the legislature, and any action it takes must be authorized by statute. *Business & Professional People for the Public Interest v. Illinois Commerce Comm'n*, 136 Ill.2d 192, 243-44 (1989). Because the Board had no authority to appoint Pope, it was not lawfully constituted at the time it recommended that Vuagniaux be reprimanded and fined. The Department's decision, which was based on the Board's recommendation, is therefore invalid and cannot be given effect. See *Gilchrist v. Human Rights Comm'n*, 312 Ill.App.3d 597, 603 (2000). *Id.* at 1164 – 1165.

At the end of this analysis, *Vuagniaux* builds on *Daniels* by holding that extra-statutory appointments of agency members are *void*, period, and, as a result, so are decisions from such an agency. Accordingly, in the analysis from *Newkirk* to *Vuagniaux*, the following principles of law exist:

1. Void decisions are subject to collateral attack. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
2. Void decisions are those where the agency lacked jurisdiction or the inherent power to make or enter the order involved. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
3. Appointments not in conformity with an agency's statute are *VOID (NOT VOIDABLE)*. *Daniels* at 944.
4. Appointment procedures designed to insure an agency has balanced interests are a foundational basis for an agency's authority to administer its empowering statute. *Daniels* at at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman).

c. The Error In *Peabody Coal* Perpetuated In *Taylor I* and *Taylor II*.

Given the foregoing discussion of *Daniels* and *Vuagniaux*, it is clear that the First District in both *Taylor* cases made the following – erroneous -- statement, which it got from *Peabody Coal Company*:

> "Of the four concurring justices in *Daniels*, only two held that the Commission's decision was void because of the illegality of the appointments of the two participating commissioners. *Peabody Coal Co.*, 349 Ill.App.3d at 1028, 286 Ill.Dec. 206, 813 N.E.2d 263 (citing *Daniels*, 201 Ill.2d at 165-67, 266 Ill.Dec. 864, 775 N.E.2d 936). The two specially concurring justices as well as the three dissenting justices would find that the Commission's decision was **not void**. *Peabody Coal Co.*, 349 Ill.App.3d at 1028-29, 286 Ill.Dec. 206, 813 N.E.2d 263. (emphasis added)."

This is wrong. As discussed above, *four justices* in *Daniels* found the decision in that case *void because of the statutory defects*, and the Supreme Court in *Vuagniaux* was unanimous on the point that improper agency appointments are void, and so are decisions therefrom. *Peabody Coal* conflated Justice McMorrow's application of the *de facto* officer doctrine, with the first part of her analysis about simply whether or not agency defects render decisions *void*. But the analyses must remain separate: only after concluding whether or not agency defects render decisions void or voidable, does one get to whether or not to apply the *de facto* officer doctrine.

Put another way, the problem is that *Peabody Coal* is wrong in its reading of *Daniels* that "five of seven justices" concluded that the Commission's decision was "not void." It compounds this error by concluding from it that waiver applied to preclude the plaintiff from challenging the decision. *Peabody Coal*'s error is its conclusion that the decision was not void, when *Daniels* and *Vuagniaux* clearly teach that decisions from improperly-constituted agencies *are* void or voidable. This error in its reading of *Daniels* is why *Peabody Coal* concluded that the issue may be waived by failure to object. But voidness cannot be waived, as *Daniels, Vuagniaux*, and all of

the above-cited cases make clear. *Daniels* at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman); *Vuagniaux* at 1164 – 1165 (all Justices).

Following *Peabody Coal*, *Taylor v. Dart* erroneously stated that issues of *voidness* must be raised before the agency or on direct review:

"Since the decision of the Commission was not void, the court held that "any attack on [the decision's] validity by reason of [Ms.] Ford's participation has been waived by reason of [the plaintiff's] failure to raise the issue." *Peabody Coal Co.*, 349 Ill.App.3d at 1029, 286 Ill.Dec. 206, 813 N.E.2d 263. However, even if the Merit Board's decision was voidable, the *de facto* officer doctrine would not apply in this case because the plaintiff raised the illegality of Mr. Rosales's appointment to the Merit Board on direct review, not in a collateral proceeding."

Taylor v. Dart, 64 N.E.3d 123, 131 (1st Dist. 2016). Accordingly, the entire conclusion from *Taylor* that problems with appointments must be raised at the agency level, or on direct review, is erroneous because it is based on *Peabody*'s misreading of *Daniels*, *that is*, that decisions of improperly-constituted agencies are *not void*, and that these issues are waived unless raised.

Contrary to the language in *Taylor I* and *Taylor II* (coming from *Peabody Coal*), voidness is a fundamental defect that cannot be waived, whereas voidability *can* be waived. By reading *Daniels* to state that the decision was not void, *Peabody Coal* incorrectly concluded that decisions of improperly-constituted agencies are merely voidable and subject to waiver. This is wrong, as four Justices agreed in *Daniels*. *Daniels* at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman), and as they all agreed in *Vuagniaux*. *Vuagniaux* at 1164 – 1165 (all Justices).

4. Conclusion: The Test For The *De Facto* Officer Doctrine Has Never Required That Compositional Issues Be Raised Before The Agency Or On Direct Review And The Doctrine Does Not Apply Where The Compositional Defects Undermine The Basic Objectives Of An Agency's Empowering Act.

Properly understood and as articulated by Justice McMorrow in *Daniels*, the *de facto* officer doctrine does not depend on the distinction between "direct" and "collateral," and it has no "waiver" component whatsoever implied as a result of that distinction. *De facto* officer is an equitable doctrine used to validate otherwise *voidable* decisions. *Daniels*, 201 Ill.2d at 173. The principles governing this case, are, therefore, the following:

1. Void decisions are subject to collateral attack. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
2. Void decisions are those where the agency lacked jurisdiction or the inherent power to make or enter the order involved. *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill.2d 108, 112 (1976); *Newkirk v. Bigard*, 109 Ill.2d 28, 39-40 (1985).
3. Appointments not in conformity with an agency's statute are *VOID (not VOIDABLE)*. *Daniels* at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman); *Vuagniaux* at 1164 – 1165 (all Justices).
4. Appointment procedures designed to insure an agency has balanced interests are a foundational basis for an agency's authority to administer its empowering statute. *Daniels* at at 939 (J. Harrison and J. Kilbride) *and* 944 (J. McMorrow and J. Freeman).
5. The *de facto* officer *can* be applied to validate otherwise voidable decisions (not void ones), but should not be mechanically applied and should not apply in the circumstances listed as exceptions in Justice McMorrow's concurring opinion in *Daniels*. *See Daniels* at 944 – 945 (J. McMorrow).

What is *not* an operative principle is that voidness may be waived by failure to object at the agency level or on direct review, or that "direct" versus "collateral" impacts the doctrine's application. No Illinois case has ever held this, until *Peabody Coal* misread *Daniels*. The above-five principles are the good, black letter law in this area, and waiver is not a part of it. In test form, these principles look like this:

(1) Are there statutory defects in the composition of an agency?

(2) If there are, are the defects serious enough to deprive the agency of its statutory authority to act?

(3) If the answer to (2) is "no," then the issue is voidable, must be objected to, and the *de facto* officer doctrine may apply. (This is where *Cruz*, *Lopez*, *Taylor*, and *Vuagniaux* end). If it is objected to at the agency level or on direct review, then the decision is voidable and may either be voided or subject to Justice McMorrow's formulation of the *de facto* officer doctrine (and its exceptions), depending upon the facts of each case.

(4) If the answer to (2) is "yes," no objection ever needs to be made, the decision may be attacked directly or collaterally at any time, and the *de facto* officer doctrine may never be applied because the agency lacked authority to act. (This is *Daniels*' plurality decision, plus Justice McMorrow's Special Concurring Opinion, and the present case). The proceedings are void, with or without objection, and with or without distinguishing between direct and collateral attacks – "may be attacked, directly or collaterally, at any time." *Daniels v. Industrial Commission*, 201 Ill.2d 160, 166 (2002) (citing *Business & Prof'l People*, 136 Ill.2d 198, 243-44 (1990)).

(5) But, once a court declares an agency's composition invalid, it cannot utilize the *de facto* officer doctrine to continue operating with those same defects. *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646, ¶101 (1st Dist. 2019).

5. Application Of The Test To This Case.

Plaintiffs have alleged that there were numerous defects in the Board's appointments during the pendency of their cases. (A-21-A-26). Evans and Shaffer alleged that Members Gray Mateo-Harris and Patrick Brady were both unlawful appointments for less than six years during the pendency of his case there, that the Board only had five members between September and December 2017, and that Members Winters and Dalicandro has non-staggered terms. (A-21-A-26). After the December 2017 amendments to the Act, Evans and Shaffer filed another Motion to Dismiss there alleging that there was now a political imbalance on the Board, excessive officerships still remained a problem, and there were still non-staggered terms even under the new statute. (A-23, A-25-A-26). The complaint in the Circuit Court laid out two periods of invalid appointments: Period 1, consisting of pre-December 13, 2017 issues that included less than six-year terms, a five-member Board, non-staggering of members' terms, and excessive officerships. (A-12). Period 2 consisted of political imbalance on the Board in violation of the

Act's requirement that no more than three persons be affiliated with the same political party, that excessive officerships still existed, that the Board had no authority to allow amended complaints to be filed, and that each Plaintiff was owed backpay at least between the time each was suspended without pay through the date the Board was/is determined to be lawfully constituted. (A-12-A-13). So too, these defects are so severe and pervasive that they undercut authority to act. They are itemized as follows.

1. Defects In Political Balance.

Under the above-formulated test, Plaintiffs' proceedings at the Board were *void* because the defects undercut the Board's authority to act. Both the pre-December 2017 Act and the current Act contain the identical provision about the Board's political make-up:

"No more than 3 members of the Board shall be affiliated with the same political party, except that as additional members are appointed by the Sheriff, the political affiliation of the Board shall be such that no more than one-half of the members plus one additional member may be affiliated with the same political party."

55 ILCS 5/3-7002. Once again, the holdings of *Taylor II* and *Daniels* would apply equally to a violation of this provision as any other portion of Section 7002. *See Taylor II*, 2017 IL App (1st) 143684-B, ¶32 ("The agency's authority must either arise from the express language of the statute or 'devolve by fair implication and intendment from the express provisions of the [statute] as an incident to achieving the objectives for which the [agency] was created.'" (quoting *Vuagniaux*, 108 Ill.2d 173 at 188)).

2. Defects In Compositional Terms.

But even beyond that provision, *Taylor* emphasized, too, the importance of political balance on the Board enshrined in its compositional provision, Section 7002, stating, "we glean that the purpose of Section 3-7002 is to select individuals to serve on the Merit Board with the goal of achieving an experienced and politically balanced

Merit Board" and "section 3-7002 of the Code is designed to ensure that the goals of experienced membership and political balance are met." *Id.* at ¶21. Accordingly, political balance is not only enshrined in the plain language of both the pre-December 2017 Act and the amended Act, but the First District has now read such as a core purpose of the Board's structuring provisions.

3. The Board Cannot Operate With Only Five Members.

With respect to the five-member Board issue, The plain language of the Act requires a minimum of a seven-member Board, with the Sheriff having discretion to appoint up to a nine-member Board. While not explicitly called a "definition," the pre-December 2017 Act actually does "define" what the Board is, providing in pertinent part, "[t]here is created the Cook County Sheriff's Merit Board . . . . consisting of 7 members appointed by the Sheriff with the advice and consent of the county board, except that on and after the effective date of this amendatory Act of 1997, the Sheriff may appoint 2 additional members, with the advice and consent of the county board, at his or her discretion." 55 ILCS 5/3-7002. This is a definition and the term "Board" must be interpreted throughout the entire Act as meaning the seven- to nine-member body referred to in this statutory provision. Nowhere does the Act contemplate that anything less than seven members is permitted. In fact, the provision actually supports that the Sheriff has the "discretion" whether to make a seven-member Board into a nine-member Board, but it does nothing to water down the minimum seven-member requirement. Further, the initial appointment terms laid out in the statute add up to seven members:

> "Of the members first appointed, **one** shall serve until the third Monday in March, 1965 **one** until the third Monday in March, 1967, and **one** until the third Monday in March, 1969. Of the 2 **additional** members first appointed under authority of this amendatory Act of 1991, **one** shall serve until the third Monday in March, 1995, and **one** until the third Monday in March, 1997. Of the 2 **additional** members first appointed under the authority of this amendatory Act of the 91st General Assembly,

> **one** shall serve until the third Monday in March, 2005 and **one** shall serve until the third Monday in March, 2006."

55 ILCS 5/3-7002 (emphases added). The "additional" language is perhaps best viewed as a chart:

Pre-Act Appointments	**Term Ending**
Member	March 1965
Member	March 1967
Member	March 1969

1991 "Additional" Appointments	**Term Ending**
Member	March 1995
Member	March 1997

1997 "Additional" Appointments	**Term Ending**
Member	March 2005
Member	March 2006

The 1997 Amended Act then gives the Sheriff "discretion" to appoint up to nine members. However, the plain language of the definition language of the Act requires a minimum of a seven-member Board: the three from the original Act, the "additional" two from the 1991 amendments, and the final "additional" two from the 1997 appointments. Accordingly, the only reading of the statute that gives effect to every word in the definitional language, including the "additional" language, is that the Board is required to have a minimum of seven members.

The statutory provisions regarding expiration of terms also recognizes a minimum seven-member Board. It states:

> "Upon the expiration of the terms of office of those first appointed (including the 2 **additional** members first appointed under authority of this amendatory Act of 1991 and under the authority of this amendatory Act of the 91st General Assembly), their respective successors shall be appointed to hold office from the third Monday in March of the year of their respective appointments for a term of 6 years and until their successors are appointed and qualified for a like term. As **additional** members

> are appointed under authority of this amendatory Act of 1997, their terms shall be set to be staggered consistently with the terms of the existing Board members."

55 ILCS 5/3-7002. This section recognizes that there were pre-1991 amendment members, and then two sets of "additional" members to be appointed following the 1991 and 1997 amendments. Accordingly, this section also recognizes that the Board must have a minimum of seven members to operate.

4. The Same Person Cannot Be Chairperson And Secretary For Term-After-Term.

Both the pre-December 2017 Act and the new Act contain the identical provision about the occupation of the Board's chairperson and secretary positions:

> "The initial chairman and secretary, and their successors, shall be selected by the Board from among its members for a term of 2 years or for the remainder of their term of office, whichever is the shorter."

55 ILCS 5/3-7005. The cardinal rule of statutory construction, to which all other rules of construction are subordinate, is that the true intent and meaning of the legislature must be ascertained and given effect. *United States Steel v. Pollution Control Bd.*, 64 Ill. App.3d 34, 43 (1st Dist. 1978). "The language used in a statute is the primary source for determining this intent, and where that language is certain and unambiguous, the proper function of the courts is to enforce the statute as enacted." *See, e.g., General Motors Corp. v. Industrial Com.*, (1975), 62 Ill.2d 106, 112. It appears that the Board's current chairman and secretary have occupied those positions far longer than the "2 years or remainder of their term of office" contemplated by the Act. From a plain language analysis, the Act does *not* support one person occupying these positions for two-year term, after two-year term, after two-year term, *etc*. It in fact contemplates that these positions should be more limited in time, as noted by the final clause, "whichever is the shorter." This means that the drafters were concerned about a member even occupying one of these positions for as long as the

entire six-year term, because they limited it to not only "2 years," but they made it even shorter if the occupying member's term is less than 2 years by adding the "whichever is the shorter" limitation. Under no fair reading of this statutory language is it legally proper for the same persons to hold the chairman or secretary positions for term, after term, after term, *etc*. This problem, too, presents a structural defect in the Board's constitution that undermines its authority to function, for, as noted above, it is axiomatic that where an administrative agency acts outside its specific statutory authority, it acts without jurisdiction and its actions are void, a nullity from their inception. *Daniels,* 201 Ill.2d 160 at 165.

5. The Foregoing Defects Mean The Proceedings, From Inception To Legal Composition Of The Board, Were Void.

As noted above, *Daniels* and *Vuagniaux* already found agencies with one to two defective appointments to have invalidly-appointed members, and that decisions from those agencies were void. Accordingly, there can be no question in this case that Plaintiffs have alleged that the there were defects in the appointments on the Board.

Moving to the second step of the proposed test, *Taylor I* and *Taylor II* already found that the purpose of Section 7002 was to ensure political and experiential balance was on the Board at all times. *See Taylor II*, 2017 IL App (1st) 143684-B at *5-6 ("we glean that the purpose of Section 3-7002 is to select individuals to serve on the Merit Board with the goal of achieving an experienced and politically balanced Merit Board" and "section 3-7002 of the Code is designed to ensure that the goals of experienced membership and political balance are met."). Because Plaintiffs have alleged less than six-year terms as to Mateo-Harris and Brady, non-staggered terms as to the pre-December 2017 and post-December 2017 Board, political imbalance as to the post-December 2017 Board, and

excessive officerships as to the pre-December 2017 and post-December 2017 Board, they have alleged agency defects that go to the core purpose of the political and experiential balance called for by the Act, and have alleged facts that, if true, would render their proceedings *void* under *Daniels* and *Vuagniaux*. *Daniels v. Ind. Comm'n*, 201 Ill. 2d 160 (2002); *Vuagniaux v. Department of Professional Regulation*, 208 Ill.2d 173, 802 N.E.2d 1156 (2003). It is worth reprinting Justice McMorrow's two-step analysis now:

> "[h]ere, as in *Newkirk,* it is only after this court determines whether the appointments constituted error that this court can consider whether the error is serious enough to constitute a *jurisdictional defect*. In other words, this court can make no reasoned decision on Daniels' voidness claim unless this court first determines whether there was error in the appointment procedures followed and whether the error was of such a nature that it affected the Commission's jurisdiction."

Daniels at 943 (J. McMorrow). She continued, that "if commissioners are not appointed in conformity with the statute, there exists the potential for undermining 'the balance of interests contemplated by the Act.'" *Id.* As alleged here, Plaintiffs have alleged defects that are violative of the plain language of the Act, as well as ones that undermine the core purposes of the Act. This fits within Justice McMorrow's two-step test for when proceedings are *void*. Plaintiffs, therefore, have alleged defects that render proceedings void, and Plaintiffs may attack those proceedings at any time, directly or collaterally, and the *de facto* officer doctrine does not apply.

III. The Continuous Operation Rule Also Bars Application Of The De Facto Officer Rule, As Do Justice McMorrow's Exceptions To The De Facto Officer Rule.

Separate and apart from the above-analysis, there are two other reasons why the *de facto* officer rule does not bar the instant case: *Goral*'s "continuous operation" interpretation of the doctrine, and Justice McMorrow's exceptions to application of the doctrine.

1. The Continuous Operation Interpretation Bars Application Of The Doctrine.

In *Goral*, the First District clearly held that *de facto* officer doctrine does not permit an invalid Board to continue operating while invalid, stating as follows:

"Once a court decides that a board is illegally constituted, that board can't keep hearing pending cases, much less entertain newly-filed ones. To say otherwise would be to say that court decisions mean nothing.

The '*de facto* officer' doctrine looks backward. It does not look forward. Once a court declares a board's composition invalid, we may protect its old decisions, but absolutely do *not* allow it to keep doing business – illegally – as if we had never issued our ruling.

***

To put it plainly: Once *Taylor* was decided, any new Sheriff's employee whose case was then-pending before the Board, or who was charged in a new case post-*Taylor*, had every right to challenge the Board's composition, for the same reasons as in *Taylor* (or for different reasons). Old cases already finally decided, no, but pending or new administrative cases, yes. Plaintiffs' cases were pending at the time of the *Taylor*, and the '*de facto* officer' doctrine did not prevent them from challenging the Board's composition."

Goral, ¶¶100-101, 105 (original emphases). The *Taylor* ruling came down on May 12, 2017. *Taylor v. Dart*, 2017 IL App 1st 143684B (1st Dist. 2017). At the time these Plaintiffs' complaints were filed at the Board, the Sheriff and the Board was already on notice of this Court's ruling in *Taylor v. Dart*, and could easily have corrected the issues with its composition. It did not, it continued operating as if this Court's orders did not exist, it continued to be invalid as alleged in the complaint in this case, and, accordingly, it ran afoul of *Goral*'s holding that an invalidly-constituted Board cannot continue operating despite compositional defects. To do so would be as if the Circuit Court and the First District had never issued the August 2014, September 2016, and May 2017 rulings in *Taylor*, and would permit the Board and the Sheriff to thumb their noses at the Court.

The existence of the *Taylor* decision in August 2014, and the appellate decisions in September 2016 and May 2017, are sufficient to defeat the application of the *de facto* officer doctrine as to the Plaintiffs' cases. This is because, in Illinois, the doctrine is premised on a

balancing of the value of uncovering defects in agency composition with stability in agency decisionmaking; yet, that core purpose is flummoxed if the Board is entitled to ignore deficiencies in its composition, despite court orders, and to continue operating to the detriment of those officers appearing before it. Accordingly, while the August 2014 *Taylor* order might not be precedential, it *is* sufficient to defeat the core purpose of the *de facto* officer doctrine, given that the Board continued operating with the adjudicated defects notwithstanding this Court's ruling. If that Court Order is insufficient to do so, certainly the First District's multiple *Taylor* rulings were sufficient.

Accordingly, Plaintiffs are not barred from their challenge by the *de facto* officer doctrine due to *Goral*'s continuous operation interpretation of it, and because the purposes of the doctrine are not satisfied if a Board continues to operate with its defects uncovered.

2. Justice McMorrow's Exceptions To Application Of The *De Facto* Officer Doctrine.

Justice McMorrow herself anticipated that there would be cases where the defects were so severe, it would knock the agency off of its statutory foundation, or where the defects were the result of malfeasance. That is why she stated in her Special Concurring Opinion, that:

"This doctrine, however, like any other equitable doctrine, must not be applied mechanically. As noted in *Glidden Co. v. Zdanok,* 370 U.S. 530, 535-36, 82 S.Ct. 1459, 1465, 8 L.Ed.2d 671, 678-79 (1962), "[t]he rule does not obtain, of course, when the alleged 945*945 defect of authority operates also as a limitation on this Court's appellate jurisdiction * * * [or] when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, [so that] this Court has treated the alleged defect as `jurisdictional' and agreed to consider it on direct review even though not raised at the earliest practicable opportunity * * * [or] when the challenge is based upon nonfrivolous constitutional grounds." It also has been held that the *de facto* officer doctrine should not be invoked when an officer's appointment is in violation of a statute and the officer lacks certain qualifications which were statutorily required for the benefit and protection of the individual subject to the officer's authority. . . ***Nor has it been claimed that these commissioners' appointments were the result of malfeasance or a deliberate attempt to subvert the goals of the Act."***

Daniels at 174 (emphasis added). She anticipated that there would be defects, such as those alleged here, that would undermine the empowering statute's strong policy concerning the proper administration of business or due to malfeasance. As discussed above, Plaintiffs have alleged defects cutting to the Board's structural safeguards enshrined in Section 7002 – political and experiential balance. As far as malfeasance, what about the fact that Sheriff Dart and the Board knew about all these problems, but continued to operate the Board anyway in contravention of at least three Court orders? Do Court orders just have no power or effect on public officials such as Sheriff Dart and the Board? If there is ever a case crying out for restraint in the application of the doctrine, it is one like this, where Sheriff Dart has been told – repeatedly – to stop improperly-constituting the Board, but he did so anyway.

Justice McMorrow's exceptions to the doctrine, therefore, should also prevent its application to Plaintiffs' claims here.

CONCLUSION

For the forgoing reasons, Plaintiffs David Evans III and LaShon Shaffer respectfully request that this Honorable Court extricate them from the Circle-of-No-Relief, and affirm *Goral, et al., v. Dart, et al.*, 2019 IL App (1st) 181646, (1st Dist. 2019) in its entirety.

Respectfully submitted,

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No. 125085

IN THE SUPREME COURT OF ILLINOIS

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

CERTIFICATE OF COMPLIANCE WITH ILLINOIS SUPREME COURT RULE 341(c)

The undersigned hereby certifies 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 50 pages.

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CERTIFICATE OF FILING AND SERVICE

On March 12, 2020, the foregoing **BRIEF OF PLAINTIFFS DAVID EVANS III AND LASHON SHAFFER** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the Court's electronic filing service provider, Odyssey E-file, on which the counsels named below are registered e-filers, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the counsels named below:

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Additionally, upon its acceptance by the Court's electronic filing system, the undersigned will mail thirteen copies of the Brief to the Clerk of the Supreme Court of Illinois, Supreme Court Building, 200 East Capital Avenue, Springfield, Illinois 62701.

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

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