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.	)	Petition for Leave to 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

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The July 10, 2019 decision ("Decision") of the First District Appellate Court ("First District") erroneously allowed Plaintiffs to file a premature Circuit Court lawsuit against the Cook County Sheriff's Merit Board ("Merit Board") before the agency had issued a disciplinary decision in any Plaintiff's case and before the Merit Board could resolve disputed questions of fact relating to backpay and agency appointments. The result was simultaneous litigation in both the Merit Board and the Circuit Court, which undermined the well-settled doctrine of exhaustion of administrative remedies. The First District further erred in creating an unprecedented "old decisions" exception to the *de facto* officer doctrine, in an approach that places the First District far out of step with other Illinois courts and state courts across the nation.

The Decision is also bad public policy. First, it encumbers limited judicial resources because it forces judges to engage in fact-finding and other litigation procedures that the legislature delegated to the Merit Board. Second, it allows Sheriff's officers to have the Circuit Court review their disciplinary cases more than once. Finally, the Decision upends decades of sound reasons to enforce exhaustion of administrative remedies and the *de facto* officer doctrine, which invites the chaos that these policies are designed to avoid. Plaintiffs' response briefs (Response Brief of Evans & Shaffer ("Evans Br.") and Response Brief of Goral, Badon, Mendez and Stojkovic ("Goral Br.")) fail to overcome these fundamental problems. The Decision should be reversed.

I. The First District Decision Should Be Reversed on the Ground of Failure to Exhaust Administrative Remedies.

A. It was not "futile" to require the Merit Board to decide whether to discipline Plaintiffs before their case goes to the Circuit Court.

Plaintiffs argue that the Merit Board was biased against them because of deficient appointments, and as a result, they should get the benefit of the "futility" exception to the

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doctrine of exhaustion set forth in *Castaneda v. Ill. Human Rights Comm'n*, 132 Ill. 2d 304, 322 (1989). (Evans Br. at 5-11.) The First District considered and did not apply that exception, reasoning that "futility" turns on the Due Process Clause of the Fourteenth Amendment as interpreted in opinions of the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit"). Decision ¶¶ 60-74.

Since the Decision was published, the Seventh Circuit issued three more decisions which held that deficient appointments of Merit Board members do not violate the Due Process Clause. *See Vargas v. Cook Cnty. Sheriff's Merit Bd.*, 952 F.3d 871 (7th Cir. 2020) (dismissing claims); *Campos v. Cook Cnty.*, 932 F.3d 972 (7th Cir. 2019) (same); and *Oesterlin v. Cook Cnty. Sheriff's Dep't*, 781 F. App'x 517 (7th Cir. 2019) (same).[1] Consistent with long-standing due process law, *Vargas*, *Campos* and *Oesterlin* each found the Administrative Review Law ("ARL"), 735 ILCS 5/3-101 *et seq*., to be an adequate remedy for Sheriff's officers to challenge a Merit Board decision in Illinois state courts, regardless of alleged deficient appointments of Merit Board members or alleged agency bias. These federal decisions are fatal to Plaintiffs' "futility" argument.

Further, the Record on Appeal ("Record") shows that it was *not* futile for Plaintiffs to exhaust their remedies before the Merit Board. Indeed, when finally given the opportunity to decide these Plaintiffs' cases (which it did in March 2019 and July 2019), the Merit Board exonerated five of the six Plaintiffs of the disciplinary charges against them. These favorable results are somehow not enough as all of the exonerated Plaintiffs

[1] As these cases reflect, the Due Process Clause requires only an internal hearing with a supervisor, pursuant to *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), before the Sheriff can place the officer on unpaid leave during the pendency of a Merit Board case. It is undisputed that all six Plaintiffs in this case received a *Loudermill* hearing before the Sheriff brought them before the Merit Board.

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reargue to this Court that they were not liable on the disciplinary charges, and rehash what reads like a closing argument to the Merit Board. (Goral. Br. at 1-5.) On top of that, Plaintiffs cite purported evidence from their Merit Board hearings (*id*. at 2, citing supposed testimony of Officer Goral and his supervisor) which appears nowhere in the Record. Plaintiffs' tactic of rearguing their innocence, including using undocumented facts, underscores the point: the First District erred in denying the parties a chance to finish trial before the Merit Board and allowing the filing of a premature Circuit Court case.

B. *Castaneda*'s "authority" exception does not apply here, and, at minimum, the Merit Board should receive appointment challenges and complete a disciplinary case before the challenge can be heard in the Circuit Court.

The First District Decision erroneously shoehorned this case into *Castaneda*'s "authority" exception, allowing litigants to challenge agency appointments in Circuit Court at any time while a case is still pending before an agency on the ground that deficient appointments somehow leave the entire agency without "authority." Decision ¶¶ 28-43. Plaintiffs' arguments here for the "authority" exception (Evans Br. at 6-14; Goral Br. at 16-17) do not overcome the infirmities in the Decision, which took Illinois law to a place this Court has never gone, and allowed unwieldy simultaneous litigation in both the Circuit Court (on appointment challenges) and in the agency (on disciplinary charges).

The Decision cannot be squared with a long line of decisions of this Court, which forbid simultaneous litigation in the agency and the Circuit Court, in the interests of public policy and efficiency. *See Cinkus v. Stickney Mun. Officers Electoral Bd.,* 228 Ill. 2d 200, 213 (2008) (requiring all issues to be resolved in an agency before they can be raised in circuit court serves the purpose of "orderly procedure" and "justice" in forbidding new arguments on ARL review); *Texaco-Cities Serv. Pipeline Co. v. McGaw*, 182 Ill. 2d 262,

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279 (1998) ("administrative review is confined to the proof offered before the agency. Such a practice serves the purpose of avoiding piecemeal litigation and, more importantly, allowing opposing parties a full opportunity to present evidence" in the agency); *Fredman Bros. Furniture Co. v. Dep't of Rev.*, 109 Ill. 2d. 202, 210-11 (1985) (holding that the ARL, 735 ILCS 5/3-102, is the exclusive remedy to challenge an administrative agency); *Castaneda*, 132 Ill. 2d at 322 (1989) (requiring litigants to exhaust remedies).

In the same vein, *Vuagniaux v. Dep't of Prof'l Reg.*, 208 Ill. 2d 173, 187 (2003), made clear that an agency commissioner's authority to act must at minimum be exhausted in agency proceedings before it can be raised in a circuit court. *See also Bless v. Cook Cnty. Sheriff's Office*, Case. No. 13 C 0271, 2019 U.S. Dist. LEXIS 155426 at *30 (N.D. Ill. Sept. 12, 2019) (citing *Vuagniaux* and reasoning that an appointment challenge should be made "at a time the Merit Board could have addressed it").[2]

Contrary to the Decision's overbroad reading of the "authority" exception, *Castaneda* applies the exception only when a challenge to the "legislature's intent to vest the [agency] with the authority and ability to decide all matters" is at issue. *Castaneda*, 132 Ill. 2d at 322. In that spirit, this Court has allowed litigants the benefit of the "authority" exception only when an administrative agency attempted to exercise a rulemaking power that it did *not* have under the legislature's enabling statute. *See*

[2] *Taylor v. Dart*, 2017 IL App (1st) 143684-B (argued in Evans Br. at 2) also misapplies *Vuagniaux*. Contrary to *Vuagniaux*, the *Taylor* plaintiff waited over a year after exhausting agency proceedings and raised an appointment challenge for the first time on ARL review in circuit court. 2017 IL App (1st) 143684-B, ¶¶ 1-8. The *Taylor* plaintiff's tactic gave the defendants no chance to correct the problem *before* the Merit Board hearing. *See Cinkus,* 228 Ill. 2d at 213 (arguments not made in the agency cannot be held in wait for ARL review); *accord Bless*, 2019 U.S. Dist. LEXIS 155426 at *30.

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Crittenden v. Cook Cnty. Comm'n on Human Rights, 2013 IL 114876, ¶ 18 (agency lacked rulemaking power under Illinois Human Rights Act); *Cnty. of Knox ex rel. Masterson v. Highlands, LLC*, 188 Ill. 2d 546, 558 (1999) (agency lacked rulemaking power under Livestock Management Facilities Act); *City of Chicago v. Fair Employment Practices Comm'n*, 65 Ill. 2d 108, 113 (1979) (agency lacked rulemaking power under the Fair Employment Practices Act). Although cited in the Evans brief (Evans Br. at 6-11) and the Decision below (Decision ¶¶ 32-33), none of these cases allowed premature appointment challenges to an agency in circuit court before the agency had a chance to resolve them.

Importantly, nothing in the Counties Code, 55 ILCS 5/3-7001 through 7012, leaves the Merit Board without authority to decide in the first instance whether a Merit Board member has been deficiently appointed. Plaintiffs assert that the Circuit Court has superior "expertise" to receive appointment challenges (Evans Br. at 13-18; Goral Br. at 17) but wrongly presume such challenges involve pure questions of law, rather than mixed questions of law and fact that are best presented to the agency in the first instance. As *Vuagniaux* teaches, an administrative agency is closest to the facts of its own members' appointments and is in the superior position to address appointment deficiency challenges that are "raised" in the agency before a final decision. 208 Ill. 2d at 187.

This case is a textbook example of why, at minimum, appointment challenges should be resolved in the agency before they are reviewed in circuit courts. For instance, Plaintiffs' challenges to the political affiliation of Merit Board members (that one too many members is a Democrat, 2d Am. Compl., A 9-64), are ones that the members themselves may easily resolve. The members know their own political party affiliations and are in the best position to determine whether such challenges are well-taken or baseless. When the

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Merit Board decided the appointment challenges in December 2018 (for Shaffer), March 2019 (for Evans) and July 2019 (for other Plaintiffs), the Merit Board found itself "duly appointed" under the 2017 amendments to 55 ILCS 5/3-7002. (A 61, A 70, A 90.)

Unable to come to terms with *Castaneda* and *Vuagniaux*, Plaintiffs segue to blame the Sheriff for their own failures to exhaust their appointment challenges before the Merit Board. (Evans Br. at 5-7.) Plaintiffs' position is not only beside the point – because *Castaneda* and *Vuagniaux* were law regardless of the parties' positions – it is also a misstatement of the Record. The Record shows that Sheriff's counsel repeatedly argued in the Circuit Court that the Merit Board could and should hear appointment challenges. (*See, e.g.*, R 52-R 90, C 2300-22.) Plaintiffs complain that the Sheriff opposed their "motions to dismiss" before the Merit Board (Evans. Br. at 6-7) (citing record), but Plaintiffs surely know the Merit Board's written rules do not allow any litigants to file a motion to dismiss.[3] No Merit Board rule prevented the Plaintiffs from arguing appointment challenges during the evidentiary hearing before the Merit Board. Plaintiffs simply chose not to do so, instead prematurely forcing their challenges into the Circuit Court while simultaneously litigating in the Merit Board.

C. The Merit Board is the correct forum to decide factual disputes about any back pay owed to officers while on unpaid leave.

One additional question before this Court is whether to award back pay to the five exonerated Plaintiffs, with an appropriate setoff for other jobs worked while they were on unpaid administrative leave. *See Thaxton v. Walton,* 106 Ill. 2d 513, 515 (1985) (plaintiff

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[3] The Merit Board's rules and regulations are published online at https://www.cookcountysheriff.org/wp-content/uploads/2018/10/Cook-County-Sheriffs-Merit-Board-Rules-Regulations-4-19-18-AMENDED.pdf (last visited Apr. 11, 2020).

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was "entitled to recover his salary for the period that he was prevented from performing his duties, *reduced by what he earned in other employment*") (emphasis added); *Feldstein v. Guinan*, 148 Ill. App. 3d 610, 613 (1st Dist. 1986) (holding back pay owed a wrongfully discharged but "moonlighting" County employee should be "offset" by salary for other jobs worked); *Fruhling v. Cnty. of Champaign,* 95 Ill. App. 3d 409, 418 (4th Dist. 1981) (finding back pay owed to a reinstated sheriff's officer was subject to "setoff" for other jobs worked).[4] (*Contra* Evans Br. at 20-24 Goral Br. at 11.) The Merit Board is best positioned to resolve in the first instance a disputed factual question: the calculation of back pay and setoff for other jobs worked.

As Plaintiffs recognize (Evans Br. at 20-25; Goral Br. at 17-18), the First District has issued conflicting decisions about the correct forum to calculate the back pay and benefits owed to officers who are placed on unpaid leave and later exonerated from disciplinary charges. *Compare Mitchem v. Cook Cnty. Sheriff's Merit Bd.*, 196 Ill. App. 3d 528, 533-34 (1st Dist. 1990) (interpreting ARL, 735 ILCS 5/3-110 & 3-111, to require the Merit Board to take evidence of backpay) with *Cole v. Ret. Bd. of Policemen's Annuity & Benefit Fund*, 396 Ill. App. 3d 357, 372 (1st Dist. 2009) (distinguishing *Mitchem*).

The correct and most logical approach is the one set forth in *Mitchem*. Sections 3-110 and 3-111 of the ARL do not permit a circuit court to calculate backpay. Because 55 ILCS 5/3-7012 vests the Merit Board with original jurisdiction over disciplinary matters, it follows that the Merit Board is the correct forum to take "additional evidence related to back pay and related benefits." *Mitchem*, 196 Ill. App. 3d at 533-34. The *Mitchem* rule

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[4] Defendants' brief (Opening Br. at 21) inadvertently collapsed the *Feldstein* and *Fruhling* cases into a single citation. Defendants apologize for any resulting confusion.

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best serves the legislature's intent to put the discovery and fact-finding process where it most efficiently resides: in the Merit Board. Members of the Merit Board have subject-matter expertise in law enforcement, and stand in a superior position to calculate any backpay offset for other jobs worked during an officer's unpaid leave of absence (*e.g.*, work as a private security guard). This case shows the benefit of this approach, where the Merit Board ruled in favor of five of the six Plaintiffs on disciplinary charges, with the natural next step being a calculation of their claims for back pay.

Plaintiffs would "overrule" *Mitchem* and consign back pay disputes in the first instance to the ARL review process in the Circuit Court. (Goral Br. at 17-19.) That approach would needlessly crowd circuit court dockets with discovery and evidentiary issues that properly belong in Merit Board proceedings. Plaintiffs' own briefs reinforce that very point, as they assert with no Record support that they should not have their backpay offset for other jobs worked, and likewise assert claims of financial hardship with no Record support. (Goral Br. at 1-5.) Questions regarding offset, hardship, and the like are disputed factual questions for the Merit Board. As *Mitchem* wisely contemplates, the Merit Board should calculate back pay in the first instance, and the Circuit Court should be limited to affirming or reversing the backpay award on administrative review.[5]

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[5] *Thaxton*, 106 Ill. 2d at 513, offers no aid to Plaintiffs (*contra* Goral Br. at 11) because it did not address the issue here: whether the Merit Board is the correct forum to determine backpay. *Id*. at 519. The other cases that Plaintiffs cite – *Cole*, 396 Ill. App. 3d at 357, *Promisco v. Dart*, 2012 IL App (1st) 112655, and *Walker v. Dart*, 2015 IL App (1st) 140087 – also fail to address this issue. (*Contra* Goral Br. at 17-18.) Plaintiffs' authority is inapposite.

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II. The *De Facto* Officer Doctrine Makes the Merit Board's Actions Valid, Regardless of the Alleged Appointment Deficiencies.

The *de facto* officer doctrine has a long history in which the actions of deficiently appointed agency officials are valid as a matter of law. If the appointment of any agency member is thought to be deficient, the legislature has determined that the Attorney General or his designee may bring a challenge under a *quo warranto* proceeding. *See* Opening Br. at 41; Br. of Amici Atty. Gen. Raoul & City of Chicago at 6-11; *see also Quo Warranto* Act, 735 ILCS 5/18-101 *et seq*. More recently, the First District, following a nonprecedential concurrence in *Daniels v. Indus. Comm'n*, 201 Ill. 2d 160, 168-78 (McMorrow, J., concurring), has changed both the scope of the *de facto* officer doctrine and adherence to the *quo warranto* statute, allowing private parties to mount challenges to appointment deficiencies and creating a "first challenger" exception. The result is conflict between the First District and the Second and Fifth Districts. Opening Brief at 34-36.

Plaintiffs' response is to ask this Court to wholesale abandon both the customary *de facto* officer doctrine and the First District approach. (Evans Br. at 28-30.) Instead, Plaintiffs for the first time offer an arcane, newly invented five-part test based on "seriousness" that has no connection to existing law. (Evans Br. at 40-41.)

Given this situation, it is timely for this Court to issue an opinion reinforcing application of the *de facto* officer doctrine and use of the *quo warranto* statute.

A. The long-standing *de facto* officer doctrine correctly limits relief to that allowed under the *quo warranto* statute.

The First District Decision purported to follow the *Daniels* concurrence, 201 Ill. 2d at 168-78 (McMorrow, J. concurring), which departs from the customary *de facto* officer doctrine in favor of a "first" challenger to a deficient agency appointment. *See* Decision, ¶¶ 92-94 (adopting *Daniels* concurrence). The Decision went on to find that each of the

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six Plaintiffs is a first challenger, even though their challenges "look a lot like" the earlier challenge in *Taylor*, 2017 IL App (1st) 143684-B. *See* Decision, ¶ 108.

The better approach, contrary to the First District Decision and the position of the Plaintiffs, is application of the customary *de facto* officer doctrine. As recognized in the well-reasoned *Daniels* dissents, the *de facto* officer doctrine and *quo warranto* statute protect the "orderly administration of government." *Daniels v. Indus. Comm'n*, 201 Ill. 2d 160, 179 (2002) (Fitzgerald, J., dissenting) (citing *People ex rel. Chillicothe Twp. v. Bd. of Rev.*, 19 Ill. 2d 424, 426 (1960) and *People ex rel. Rush v. Wortman*, 334 Ill. 298, 302 (1928)). *See also, e.g.*, *Daniels*, 201 Ill. 2d at 181 (Thomas, J., dissenting); *Bless v. Cook Cnty. Sheriff's Office*, Case No. 13 C 0271, 2019 U.S. Dist. LEXIS 155426 at *25-27 (N.D. Ill. Sept. 12, 2019) (Lee, J.) (suggesting this Court adopt the *Daniels* dissents as law).

Under the *de facto* officer doctrine – as articulated in a line of decisions of this Court as well as the Second and Fifth Districts – a circuit court may not entertain a private civil lawsuit to disqualify public officials holding office under deficient title. *See, e.g.*, *Chillicothe Twp.*, 19 Ill. 2d at 426; *accord Mank v. Bd. of Fire & Police Comm'rs of Granite City*, 7 Ill. App. 3d 478, 483 (5th Dist. 1972) (holding that a deficient appointment to the Granite City merit board did not require that the merit board's disciplinary decision be declared void). This approach has been the law in Illinois for more than a century, dating back at least as far as *Lavin v. Bd. of Comm'rs of Cook Cnty.*, 245 Ill. 496, 505-06 (1910); *Lopez v. Dart*, 2018 IL App (1st) 170733, ¶¶ 47-53 (detailing history of *de facto* officer doctrine and collecting cases);. Instead, the Attorney General investigates and brings court challenges to the qualification of a public official, and private litigants may not bring challenges for their personal benefit. *See Chillicothe Twp.*, 19 Ill. 2d at 426.

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The *de facto* officer doctrine recognizes that the legislature has created a procedure for a private citizen to pursue a concern about a deficient appointment: petitioning the Attorney General or his state's attorney designee to initiate a *quo warranto* proceeding under 735 ILCS 5/18-101 to remove the appointee from office. *See* Defs. Opening Br. at 41-43; Amicus Br. of Atty. Gen. Raoul & City of Chicago (arguing that *quo warranto* should be Plaintiffs' exclusive remedy). If the Attorney General or his state's attorney designee declines to bring an action, but the challenge is reasonably timely and has merit, only at that point does the statute allow a complaining citizen to petition to be named "relators" under 735 ILCS 5/18-101 and 735 ILCS 5/18-108. *See People ex rel. Rahn v. Vohra*, 2017 IL App (2d) 160953, ¶¶ 2-5, 13 (declining to appoint relator and explaining *quo warranto* process). The *quo warranto* statute is a longstanding remedy for deficient appointments, and reflects that the legislature balanced the public interest in correcting deficient appointments with the need to limit windfall relief to private parties who would seek to take unfair advantage of technical appointment deficiencies.

Plaintiffs argue against the *de facto* officer doctrine with the notion that they are in some sort of "circle of no relief." (Evans Br. at 4.) But nothing has ever stopped the Plaintiffs from petitioning the Attorney General under 735 ILCS 5/18-101. Nor do the Plaintiffs suggest that they have actually asked the Attorney General to investigate appointments to the Merit Board. As the Attorney General makes clear, he is elected to serve the public and act in the first instance to investigate alleged deficiency of agency appointments. And the Attorney General does not act in an information vacuum; they act under §18-101 upon petition from members of the public. The *quo warranto* process is hardly a "circle of no relief."

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Here, Plaintiffs and scores of other officers ignored the 735 ILCS 5/18-101 remedy, instead bringing a flood of private actions in the Circuit Court to challenge Merit Board appointments. *See Lopez v. Dart*, 2018 IL App (1st) 170733, ¶ 59 n.4. By avoiding the *quo warranto* process, these officers have nullified the important and constitutional function[6] of the Attorney General or his designee to act on appointment deficiencies.

Moreover, allowing private circuit court challenges to void actions of agency officials resonates far beyond the Merit Board. Bypassing the statutory process opens the door to countless circuit court challenges to the qualifications of Illinois public servants for dozens and dozens if not hundreds of major administrative agencies. (*See* Opening Br. at 23 (listing other agencies, from the Board of Elections to DCFS, that may find themselves subject to attack under the Decision below)). The list of privately litigated attacks is almost without end. Even here, Plaintiffs' counsel announced that they have filed a new private lawsuit attacking qualifications of lawyers at the Sheriff's Office. (Evans Br. at 3 n.2.)

Allowing endless private challenges to the qualifications of public servants would defeat the orderly administration of government – and defeat the primary purpose of the *de facto* officer doctrine. This power should not be placed without constraints in private hands. This is why both § 18-101 and the *de facto* officer doctrine exist: the Attorney General, an elected prosecutor, is the proper party to remedy appointment deficiencies.

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[6] Although the duties of the Attorney General are statutorily set forth, this Court has ruled that those duties are constitutional in nature. *Lyons v. Ryan*, 201 Ill. 2d 529, 540 (2002). *See also Cnty. of Cook ex rel. Rifkin v. Bear Stearns & Co*., 215 Ill. 2d 466, 478 (2005) (holding that the statutory duties of the State's Attorney are likewise constitutional in nature).

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B. The "first challenger" exception works against the orderly administration of state government and agencies.

The First District's recent "first challenger" exception to the *de facto* officer doctrine is an outlier. The exception is contrary to application of the doctrine in the Second and Fifth Districts, which limit relief to the *quo warranto* statute in all circumstances of deficient appointments. *See Rahn*, 2017 IL App (2d) 160953, ¶ 24; *Arnold v. Mt. Carmel Pub. Util.*, 369 Ill. App. 3d 1029, 1034 (5th Dist. 2006); *accord Mank v. Bd. of Fire & Police Comm'rs of Granite City*, 7 Ill. App. 3d 478, 483 (5th Dist. 1972) (holding that a deficient appointment to the Granite City merit board did not require that the merit board's disciplinary decision be declared void). Other jurisdictions likewise do not allow a plaintiff to "void" an agency decision and start from scratch based on improper appointments – not even New Jersey, the jurisdiction that the *Daniels* concurrence purported to follow. *See* Def. Opening Br. at 32-33 (discussing *In re Fichner*, 677 A.2d 201 (N.J. 1996)).

This appeal illustrates some of the problems that arise when a lower court deviates from the customary doctrine. Here, the First District Decision confusingly treats all six Plaintiffs as if each were the "first challenger" to post-*Taylor* appointment deficiencies, even though the record is clear that one of the Plaintiffs, Officer Evans, filed his appointment challenge in the Merit Board on July 6, 2017, long before the other five Plaintiffs did so. (Opening Br. at 10.) The First District went on to hold that all of Plaintiffs' appointment challenges were "new" and different from *Taylor* although at the same time those challenges "look a lot like those in *Taylor*." (Decision ¶ 108.) The First District Decision does not set forth a coherent definition of a "first challenger" for lower courts to follow, highlighting the unworkable, amorphous nature of the first challenger rule. Even Plaintiffs label the "first challenger" exception "extremely confusing" and

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"lottery based." (Evans Br. at 28.) Plaintiffs also concede that the *Daniels* and *Baggett* dissenters were correct in their criticism of the *Daniels* concurrence (approvingly citing *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 203 (Thomas, J., dissenting, joined by Fitzgerald, J., and Garman, J.)).

Going further afield than even the *Daniels* concurrence, Plaintiffs ask this Court to substitute a confusing five-part definition of the *de facto* officer doctrine, which is not the law in any jurisdiction and makes no sense. (Evans Br. at 31-41.) For example, Plaintiffs' five-part definition is based in part on the "seriousness" of the appointment deficiency, but does not distinguish a "serious" from an "unserious" deficiency. (Evans Br. at 31.) Plaintiffs also rely in large part on the nonprecedential two-Justice plurality opinion in *Daniels*, 201 Ill. 2d at 160-66 (Harrison, J.). (Evans Br. at 31, 36 (citing *Daniels* plurality)). But the *Daniels* plurality, if made law, amounts to a wholesale abandonment of the *de facto* officer doctrine in Illinois. As the First District has recognized, this approach leads to untenable "chaos that would result in the invalidation of hundreds of decisions" of the Merit Board, to say nothing of any other agency with an appointment deficiency. *Lopez*, 2018 IL App (1st) 170733, ¶¶ 46-48, 57-58 (rejecting *Daniels* plurality).[7]

The better and fairer approach, consistent with the legislature's intent to make the Attorney General the gatekeeper of appointment challenges, is to apply the *de facto* officer doctrine as it was applied for decades and limit relief to that allowed under the *quo warranto* statute. To do otherwise would encourage countless picayune challenges in scores of agencies by litigants with supposed "newly discovered" and "different"

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[7] Plaintiffs also cite *Newkirk v. Bigard*, 109 Ill. 2d 28 (1985), but that case validated an agency order and offers no basis for any exception to the *de facto* officer doctrine.

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deficiencies that vary only slightly from each other. The result would swamp administrative and judicial systems – the very opposite of the orderly administration that the *de facto* officer doctrine provides.

C. The *de facto* officer doctrine applies to all agency actions, not just "old decisions" of the Merit Board.

The First District Decision held that the *de facto* officer doctrine applies only to validate "old decisions" of the pre-December 2017 Merit Board, and does not validate any other agency action, including even ministerial receipt of a disciplinary complaint. Decision, ¶¶ 100-106. But the "old decisions" limitation has no basis in this Court's jurisprudence, or any other decision that Defendants could find. Noticeably, the Plaintiffs offer no authority to support that notion, either.

The First District's "old decisions" limitation not only came out of thin air, it also defeats the purpose of maintaining the orderly function of government bodies. As shown in detail in the opening brief, and as Plaintiffs fail to rebut, this Court has repeatedly used the *de facto* officer doctrine to validate *all* actions of an officeholder, not simply old decisions of former officeholders. Opening Br. at 38-40 (collecting cases including *Chillicothe Twp*., 19 Ill. 2d at 424). Other jurisdictions likewise do not limit the *de facto* officer doctrine to "old decisions." Opening Br. at 38-40 (collecting cases).

Plaintiffs cannot salvage the First District's unprecedented "old decisions" limitation on the *de facto* officer doctrine – which Plaintiffs relabel as a "continuous operation" limitation – through its argument that Merit Board members Brady and Mateo-Harris were somehow serving in "knowing" violation of *Taylor*. (Evans Br. at 2, 38-39, 46-7; Goral Br. at 13-14.) The *de facto* officer doctrine and *quo warranto* statute do not

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distinguish between "knowing" and unknowing appointment deficiencies, either of which may be brought to the Attorney General's attention.

Further, the Brady and Mateo-Harris appointments were not "knowing" violations of *Taylor*. Plaintiffs base their argument on a 2014 circuit court ruling in *Taylor* about a different Merit Board member, John Rosales ("Rosales"), who was not even on the Merit Board when these Plaintiffs were charged. (Evans Br. at 1-2.) The Rosales appointment was vigorously disputed in court until the final decision in *Taylor v. Dart*, 2017 IL App (1st) 143684-B ¶¶ 1-7, *appeal denied*, 77 N.E.3d 86 (Ill. Sept. 27, 2017).[8] Prior to September 27, 2017, Defendants took the good faith legal position that Rosales was properly serving on the Merit Board. Defendants did not "know," as a matter of law, that other appointments were deficient when made.

In sum, no principled reason exists to carve out an exception for an "old decision" of the Merit Board. The First District decision should be reversed.

D. This case does not fit the narrow circumstances of the *Vuagniaux* exception to the *de facto* officer doctrine.

At bottom, Plaintiffs' argument for relaxing the *de facto* officer doctrine comes down to one case: *Vuagniaux*. (Evans Br. at 47 (urging expansion of *Vuagniaux*, 208 Ill. 2d at 182); Decision, ¶ 89 (purporting to follow *Vuagniaux*)). *Vuagniaux*'s narrow, distinguishable exception to the *de facto* doctrine should not be expanded to fit the entirely

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[8] Although the First District issued an earlier opinion on September 23, 2016, this Court vacated that opinion on January 25, 2017 in light of the First District's error in failing to address the home rule doctrine. *Taylor v. Dart*, 2016 IL App (1st) 143684, *vacated by* 77 N.E.3d 86 (Ill. 2017). The September 23, 2016 opinion is without precedential value, and Plaintiffs improperly (Goral Br. at 11) argue that it bears on this appeal.

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different facts of this case. *Vuagniaux* involved a unique situation where a medical review board appointed a new officer in the middle of the plaintiff's disciplinary hearing, in violation of the Medical Practices Act's clear language stating that only the Governor could fill the vacancy. 208 Ill. 2d at 182. This Court relaxed the *de facto* officer doctrine for the *Vuagniaux* plaintiff's benefit because he made an objection to the appointment during the "proceeding" in which the appointment was made and "at the time the appointment was made" – i.e., *before* the appointee took office under deficient title. 208 Ill. 2d at 187.

Here, unlike *Vuagniaux*, Plaintiffs did not object to the Brady and Mateo-Harris appointments (which were a matter of public record) before those members took office, or during the proceedings that led to their appointments. For that matter, Plaintiffs did not object to any Merit Board appointments before any members took office, including the members newly appointed in December 2017 following the legislative dissolution of the old agency. All of these appointments took place at duly noticed County Board meetings that are open to the public. Under *Vuagniaux*, Plaintiffs were required to object to the County Board at the time, rather than lie in wait for an appointment challenge.

Further, the contrast between chiropractors and sheriff's officers is glaring. *Vuagniaux* concluded that the dispute before the Court – involving technical questions about advertising regulations applicable to a Madison County chiropractor – did not impact the "public." 208 Ill. 2d at 187. In contrast, Sheriff's officers are sworn public employees who serve and protect the people of Cook County. The Sheriff is likewise elected to serve and protect the people of the County. It is essential to the public safety to have a forum to discipline officers who violate the public trust, including people like Plaintiff Shaffer, who interfered with his partner's investigation of a domestic abuse suspect. *See also, e.g.*,

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Pietryla v. Dart, 2019 IL App (1st) 182143, ¶ 3 (affirming discipline of officer who pleaded guilty to criminal battery); *Lopez*, 2018 IL App (1st) 170733, ¶ 81 (affirming discipline of officer for "chronic absenteeism"); *accord Vargas*, 952 F.3d at 871 (declining to void Merit Board discipline on grounds ranging "from the use of excessive force to unauthorized absences from work to theft of a prosecutor's iPad."). It would endanger the public if wayward officers could avoid the Merit Board's disciplinary process through an end run around that process in the Circuit Court, lasting years before discipline is decided. Yet that would be the immediate and grave result of affirming the First District Decision.

Based on the impact to public safety alone, the *Vuagniaux* exception for a private chiropractor should not apply here. *See, e.g.*, *Lopez*, 2018 IL App (1st) 170733, ¶¶ 61-62 (distinguishing *Vuagniaux* on public safety and timing grounds); *Bultas v. Bd. of Fire & Police Comm'rs of Berwyn*, 171 Ill. App. 3d 189, 198 (1st Dist. 1988) ("the discharge of a police officer for conduct unbecoming to the department is not only for the purposes of punishing that individual, but is also for the protection of the community at large.") (citing *Degrazio v. Civ. Serv. Comm'n*, 31 Ill. 2d 482, 483 (1964)). The First District Decision failed to account for public safety factors and should be reversed.

III. Plaintiffs' Appointment Challenges Fail on the Merits.

Plaintiffs' other arguments (Evans Br. at 41-47) focus on the merits of their challenges to the appointments of certain Merit Board members who served from the start of Plaintiffs' disciplinary cases in September 2016 to the present. As detailed above, those arguments fail under the exhaustion doctrine and the *de facto* officer doctrine. Moreover, the First District Decision did not reach the merits of Plaintiffs' challenges. Should the Court nonetheless wish to consider Plaintiffs' arguments, their challenges fail.

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First, Plaintiffs argue (Evans Br. at 43-44) that because certain Merit Board members resigned in 2017 following the final *Taylor* decision, the Merit Board was illegally constituted because it only had five members. This position rests on a hairsplitting analysis of 55 ILCS 5/3-7002, but ignores 55 ILCS 5/3-7005 and the express instructions of the First District in *Taylor*. While *Taylor* prevented the Defendants from filling Merit Board vacancies until the December 2017 statutory amendments became law, *Taylor* also instructed that under 55 ILCS 5/3-7005, the agency should continue to "transact business" as long as it had a "quorum" of "four" members. 2017 IL App (1st) 143684-B, ¶¶ 32-34. Under *Taylor* itself, §3-7005 allowed the agency to temporarily operate with five members.

Second, Plaintiffs argue for "term limits" of the Merit Board chairman and secretary (Evans Br. at 44-46), a position that reads nonexistent term limit language into 55 ILCS 5/3-7005 of the Counties Code. The argument is also irrelevant to whether members of the Merit Board are duly appointed, because naming the chairman and secretary is an internal agency function unrelated to the appointment process. *See* 55 ILCS 5/3-7006.

Third, Plaintiffs' position that too many Democrats were appointed to the Merit Board in December 2017 is baseless. (Evans Br. at 42-43.) Counties Code § 3-7002 does not limit a seven-member Merit Board to three Democrats. Indeed, the statute clearly states that "one half" plus "one" of the Merit Board members may belong to the same political party – allowing up to *four* Democrats to serve on a seven-member agency. Plaintiffs cite old language in the statute requiring a 3 to 2 balance (Evans Br. at 42-43.) But this language clearly refers only to the *original* Merit Board created in the early 1960s which was limited in size to five members, of whom no more than three could belong to the same party as then-Sheriff Richard Ogilvie, a Republican. In 1991, the size of the Merit Board was

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increased to between seven and nine members. The 3 to 2 requirement applies only to a maximum five-member agency, has not been law for decades, and is immaterial here.

Fourth, Plaintiffs offer no case law supporting their argument for attacking Merit Board appointments under a "negligent misrepresentation" or "fraud" theory. (Goral. Br. at 17.) In fact, the ARL, 735 ILCS 5/3-102, bars these "common law" tort claims. *See Fredman*, 109 Ill. 2d. at 210-11. Further, Plaintiffs fail to plead essential elements of negligent misrepresentation or fraud. *See, e.g.*, *Midwest Bank, N.A. v. Stewart Title Guar. Co.*, 218 Ill. 2d 326, 341 (2006) (negligent misrepresentation applies only to professional "business transactions").

Last, Plaintiffs do not even respond to two of the legal arguments in the Defendants' opening brief: (1) that the home rule doctrine operated to validate the interim appointments of Brady and Mateo-Harris during 2015, and (2) that the December 2017 amendments to 55 ILCS 5/3-7002 retroactively validate their interim appointments. *See* Opening Br. at 42 (citing *People ex rel. Alvarez*, 2016 IL 120729 (retroactivity) and *Scadron v. City of Des Plaines*, 153 Ill. 2d 164 (1992) (home rule)). Plaintiffs have thus conceded these arguments for purposes of this appeal. *See, e.g.*, *Vukusich v. Comprehensive Accounting Corp.*, 150 Ill. App. 3d 634, 644 (2d Dist. 1986).

CONCLUSION

For the foregoing reasons and the reasons set forth in their Opening Brief, Defendants pray that the Court reverse the First District's July 10, 2019 decision and affirm the Circuit Court's July 26, 2018 Order dismissing the case below.

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CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 341

I certify that this petition conforms to the requirements of Rules 315(d), 341(a) and (b). The length of this petition, excluding the pages containing the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the petition under 342(a), is 20 pages.

/s/ Stephanie A. Scharf

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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, Plaintiffs-Respondents, v. THOMAS J. DART, Sheriff of Cook County; COOK COUNTY, ILLINOIS; and THE COOK COUNTY SHERIFF'S MERIT BOARD, Defendants-Petitioners.	)	Petition for Leave to 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

PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statement set forth in this instrument are true and correct. On April 17, 2020, the foregoing **Reply Brief of Petitioners Thomas J. Dart, The Cook County Sheriff's Merit Board and Cook County, Illinois** was at the same time (1) filed with the Clerk of the Supreme Court of Illinois, using the court's electronic filing system, and (2) served by transmitting a copy from my e-mail address to the e-mail addresses of the persons named below:

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