IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JOSEPH BERRIOS; COMMITTEE TO ELECT JOSEPH BERRIOS COOK COUNTY ASSESSOR; and 31st Ward DEMOCRATIC ORGANIZATION, Plaintiffs, v. COOK COUNTY BOARD OF ETHICS, *et al.* Defendants.	No. 18-CH-4717 18-CH-6937 Calendar 13 Judge Anna H. Demacopoulos

ORDER

This matter comes before the Court on Plaintiffs' Second Amended Complaint for Writ of *Certiorari*. On August 13, 2019, the Court held oral arguments for the Writs of *Certiorari* for 18-CH-4717 and 18-CH-6937. After oral argument on August 13, 2019, the Court permitted both Plaintiffs and Defendants to submit supplemental briefing related to Plaintiffs' Second Amended Complaint for Writ of *Certiorari*. Having reviewed the petitions, response, reply, and exhibits thereto, the Administrative Records, and heard argument, and thereby being fully informed in the premises, for the following reasons, Plaintiffs' Petition is denied.

I. OVERVIEW

A. Parties

Until December 3, 2018, Plaintiff Joseph Berrios (Berrios) was the elected Cook County Assessor and was a candidate for re-election in the March 2018 Democratic Primary. Plaintiff Committee to Elect Joseph Berrios (Committee to Elect Berrios or Committee) is a political candidate committee established to support Berrios' candidacy for office. Plaintiff 31st Ward

Democratic Organization (31st Ward Organization) is a political party committee[1] established to support Berrios' candidacy for office of the Assessor.

Defendant Peggy Daley is the Chairperson for the Cook County Board of Ethics (CCBOE, Board of Ethics, or Board). Defendants David Grossman, Von Matthews, Juliet Sorensen, and Thomas Szromba are all members of the Board of Ethics.

The Cook County Board of Ethics imposed fines on Plaintiff Berrios, the Committee to Elect Berrios, and the 31st Ward Organization. These fines related to sections 2-585(b), 2-585(f), and 2-602(d) of the Cook County Ethics Ordinance (Ethics Ordinance or Ordinance). RA.079, 279.

B. Facts

Three related cases are at issue (1) the Cook County Board of Ethics Administrative Proceedings; (2) Judge Tailor's case, *Berrios I,* affirmed on appeal; and (3) the cases before this court for writ of *certiorari* to review the CCBOE. *See Berrios v. Cook County Board of Comm'nrs,* 2018 IL App (1st) 180654 hereinafter (*Berrios I*). Plaintiffs tend to conflate the cases in their briefs, so the Court will briefly clarify each case and how they are related.

The Board issued two sets of notices to Plaintiffs that they were violating the Cook County Ethics Ordinance. Cook County Code of Ordinances § 2-560 – 2-642 (approved Aug. 3, 1993). The only difference between the two Board notices issued to Berrios and the related committees in support of Berrios is that the second set of notices are for a different reporting period in the election cycle. Each notice was issued based up on the same course of conduct. Only after plaintiffs contested these notices with the Board did the CCBOE Administrative Proceedings come into being and go forward. The finding of both administrative proceedings before the CCBOE was that plaintiffs violated the Ethics Ordinances and were thus subject to monetary fines.

Berrios I concerned causes of action for (1) Injunctive Relief, seeking to prevent the Ethics Board from enforcing certain provisions of the Ethics Ordinance; and (2) Declaratory Judgement, seeking a declaration that certain provisions of the Ethics Ordinance are facially unconstitutional. It did not seek a writ of *certiorari* for review of the CCBOE Administrative Proceedings. 2018 IL App (1st) 180654.

[1] Discussed in more detail in Section IV.(A) Jurisdiction Over the 31st Ward Organization, below.

The cases before this Court seek review of the CCBOE Administrative Proceedings. The Second Amended Complaint has a single labeled cause of action for writ of *certiorari*, seeking, in pertinent part, a finding that the fines imposed by the Ethics Board are excessive and reversal of the Ethics Board findings. One of the reasons the fines are excessive, the plaintiffs plead, is that they are contrary to law as the Ethics Ordinance is unconstitutional as-applied to Berrios. But there is no specific labeled cause of action alleging a violation of due process or asking for a declaration that the Ordinance is unconstitutional as-applied. That relief is not requested. The only prayer for relief concerns the fines, and "such other relief appropriate and necessary under the circumstances underlying this case," a common catch-all provision.

C. Timeline

The Court finds it helpful to review the timeline of the cases. On July 21, 2017, the Cook County Board of Ethics (CCBOE) issued the first of a series of Notices of Excess Contribution to the Committee to Elect Joseph Berrios and the 31st Ward Democratic Organization for 4Q16 and 1Q17 (presumably the Fourth Quarter of 2016 and the First Quarter of 2017 for the Illinois State Board of Election reporting periods). RA.001-04, 311-313.[2] As part of these notices, the CCBOE advised Plaintiffs to return the excess contributions within 30 days, which would bring Plaintiff into compliance with the Ethics Ordinance. RA.004.

On 08/21/17, Berrios' counsel, James Nally, sent a letter to the CCBOE articulating Berrios' position that the Ordinance was unconstitutional and that the CCBOE lacks jurisdiction to enforce it. RA.005-07. On 09/30/17, the Illinois State Board of Elections issued a notice of self-funding (as to Berrios' opponent in the election) to the Committee to Elect Joe Berrios Assessor. RA.130. The Executive Director of the CCBOE, Ranjit Hakim, replied to Nally's August letter on 10/05/17, responding to the legal issued raised and explicitly reminding him that if the excess contributions were not returned he would recommend the maximum fine to the CCBOE. RA.012-16. Nally asked for an extension before the CCBOE on 10/16/17. RA.048. The extension was granted on 10/31/17, giving Nally until 11/27/17 to respond. RA.050. There was a CCBOE meeting on 12/20/17. RA.295. And on 12/21/17, Hakim issued another letter to Nally noting they had not yet received a response, and again warning that if the excess contributions

[2] Citations to the Administrative Record for 18-CH-04717 appear as "RA.___."

were not returned he would recommend the maximum fines. The letter also extended Nally's deadline to 01/05/18 to respond. RA.051-52.

Nally requested another extension or stay of the CCBOE on 01/03/18. RA.053. Hakim responded the next day, 01/04/18, advising it was unlikely Nally's requests (1) to revise the Ethics Ordinance to escape his current liabilities and (2) request to stay would be granted by the CCBOE. RA.064-65. Berrios, in his official capacity as Assessor (who was never a party to any administrative proceeding), finally filed his Memorandum in Opposition to the Excess Contributions before the CCBOE on 01/08/18. RA.066-77. That same day, 01/08/18, the CCBOE issued its decision, e.g., the initial CCBOE Administrative Proceeding findings, the subject of the case before this Court (18-CH-4717). RA.078-83, 377-84. The CCBOE ordered Berrios to either pay the fine or file a Motion to Reconsider within 30 days. *Id.* At the CCBOE meeting Berrios stated he still had not returned the excess contributions. *Id.*

On 01/26/18, *Berrios I* was filed in the Circuit Court (18-CH-1102).[3] Berrios filed a motion asking for a Temporary Restraining Order (TRO) in *Berrios I* a few days later. In support of his motion for TRO, Berrios submitted an affidavit on behalf of himself, the Committee to Elect Berrios, and the 31st Ward Organization that articulates the exact same arguments before this Court. *See* Plaintiffs Motion for TRO, Ex. B., filed 01/30/18 in 18-CH-1102. The motion for TRO was continued on 02/01/18, the same day a briefing schedule on summary judgment was entered in *Berrios I.*

On 02/06/18, Berrios filed a motion to reconsider or to stay the CCBOE Administrative Proceedings findings with the CCBOE. RA.089-103. On 03/13/18, (1) summary judgment was issued by the Circuit Court in *Berrios I* at 1:35 p.m.; (2) the CCBOE held its meeting, stating it

[3] The Court would like to note that the people of Cook County funded both sides (the defense and prosecution) of *Berrios I* instead of the more usual approach of defending only. Mr. Kevin Ford was appointed as Special States Attorney to represent Berrios as Assessor in *Berrios I* and prosecute the case, the appointment occurred in case number 18-CH-0373. Berrios was only able to have the Special States Attorney appointed to represent him because he insisted on suing, not as an individual, but in his official capacity as Assessor. As a candidate running for Assessor whom the Ordinance had been applied to, this Court sees no reason Berrios, as an individual, would have lacked standing to sue. It ultimately cost the county $128,187.92 for Berrios' attempt to bypass the CCBOE. *See In re Petition for Appointment of a Special State's Attorney,* No. 2018-CH-0373 (Cir. Ct. Cook Cty., Ill. July 9, 2019). Berrios tried to sue in his official capacity in this case as well, likely in another attempt to get the County to foot his legal bills, but was denied. In fact, Berrios also attempted to have his legal fees before this Court included in the Special State's Attorney appointment in 18-CH-0373, but was also denied. *Id.*

would issue its findings later that day; and (3) at 3:25 p.m. the CCBOE denied Berrios' motion to reconsider its administrative findings. RA.232-283, R.605.

Then, on 03/16/18, the CCBOE issued new, additional notices of violation to contributors for Berrios' campaign based upon the same course of conduct but in a new reporting period, 4Q17 (Fourth Quarter 2017). RB.001. The primary election took place on 03/20/18, ultimately resulting in Berrios losing. *See Berrios I* at *8. On 03/29/18, the Board of Ethics then issued notices to (a) the Committee to Elect Joe Berrios Cook County Assessor and (b) the 31st Ward Democratic Organization for a different reporting period in the election cycle than the previous set of notices. RB.123-26.[4]

On 04/11/18, the Complaint for writ of *certiorari* in 18-CH-4717 was filed before this Court, alleging the ordinance was facially unconstitutional, but not alleging it was unconstitutional as-applied. The CCBOE met for a meeting on 05/01/18. RB.207-211. On 05/02/18, the Board of Ethics issued its second administrative decision and findings as to the Committee to Elect Berrios and 31st Ward Organization. RB.198-205, 445-52. On 05/31/18, the Complaint for writ of *certiorari* in 18-CH-6937 was filed before this Court, alleging the ordinance was facially unconstitutional, but not alleging it was unconstitutional as-applied.

On 09/21/18 the Appellate Court affirmed the judgement in *Berrios I. Berrios v. Cook County Board of Comm'nrs,* 2018 IL App (1st) 180654. On 01/31/19, the Illinois Supreme Court denied the appeal of *Berrios I. Berrios v. Cook County Board of Comm'nrs,* 2019 Ill. Lexis 160. On 02/15/19, the Second Amended Complaints in each of the cases before this Court ('4717 and '6937) were filed, they are substantially identical documents, and both kept the facially unconstitutional argument and added in language for the as-applied unconstitutional argument. The Court notes that, although these cases have never been formally consolidated, the parties have acted as though the two cases before us (18-CH-4717 and 18-CH-6937) are one and the same, by

[4] Citations to the Administrative Record for 18-CH-06937 appear as "RB.___."

filing identical pleadings and briefs as well as coming in for court status on the same days, at the same time, with the same counsel.[5, 6]

II. RES JUDICATA

Defendants argue that Plaintiffs are precluded from bringing argument as to the constitutionality of the ordinance based upon the doctrine of *res judicata.* Defendants argue that, because the Ordinance was challenged in *Berrios I* as facially unconstitutional, then, under the sub-doctrine of claims splitting, Plaintiffs are barred from bringing an as-applied constitutional challenge here because Plaintiffs should have also brought that argument in *Berrios I.* Defendants also deny that any of the alleged equitable exclusions cited by Plaintiffs apply.

Plaintiffs argue that the Ethics Board fines should be reversed because the fines are contrary to law, and thus arbitrary and capricious. Plaintiffs argue the fines are contrary to law because the Ordinance is unconstitutional as-applied. Plaintiffs argue their constitutional argument is not barred by *res judicata* because certain equitable exclusions apply, namely (1) the parties agreed, in terms or in effect, that the plaintiffs may split their claims; (2) defendants acquiesced to the plaintiff's splitting of claims into two actions; and (3) the Court in *Berrios I* reserved plaintiff's right to bring this subsequent action. Plaintiffs argue they could not have brought the "as-applied" argument in *Berrios I* because the Ordinance, at that time, had not been applied to them.

As this Court has already noted, Plaintiffs have not filed a formal separate cause of action attacking the constitutionality of the Ethics Ordinance. The only formal, specified cause of action before this Court is for writ of *certiorari.* There is no situation in which *Berrios I* could ever bar judicial review of the administrative ethics decisions under the doctrine of *res judicata.* Plaintiffs will always be allowed to seek judicial review of each ethics board administrative decision rendered as to them.

The Second Amended Complaint, however, is replete with allegations as to the constitutionality of the Ordinance, both facial and as-applied. And the parties have consistently

---

[5] *See* Plaintiff's Memorandum In Support of Petition for Writ of *Certiorari* at 1, "This memorandum is submitted in support of two separate Complaints for writ of *certiorari* filed by former Cook County Assessor Joseph Berrios and two political committees that received political contributions that are the subjects of these proceedings. Because of the similarities in the two separate complaints, this memorandum is submitted separately in both cases."

[6] Given the parties conduct in litigating these two cases, the Court takes judicial notice of the Administrative Record in 18-CH-04717 and 18-CH-06937, as applicable.

behaved as though there were a cause of action as to the constitutionality of the Ordinance. It is a well-known principle in Illinois that all pleadings are to be liberally construed to allow for substantial justice between the parties. *Halliburton Co v. Marlen,* 154 Ill. App. 3d 111, 116 (5th Dist. 1987). Thus, courts have not hesitated to characterize a pleading by its content rather than by its title. *Nelson v. Biegel,* 118 Ill. App. 3d 592, 594 (3d Dist. 1983). This allows controversies to be determined by the merits, as opposed to on mere technicalities. *Davis v. United Fire & Cas. Co.,* 81 Ill. App. 3d 220, 224 (3d Dist. 1980). And so, the essential test of a complaint is that it has informed a defendant of a valid claim under a general class of cases of which a court has jurisdiction, as opposed to a complaint that fails to state any cause of action. *Matchett v. Rose,* 36 Ill. App. 3d 638, 652-53 (1st Dist. 1976). This determination requires an examination of the complaint as a whole, not its distinct parts. No pleading is bad in substance that contains such information as reasonably informs the opposing party of the claim the party is called upon to meet. *Lloyd v. County of DuPage,* 303 Ill App. 3d 544, 552 (2d Dist. 1999).

Thus, this Court, in the interests of thoroughness, judicial economy, and finality, will go forward under the theory that that the Second Amended Complaint is actually two counts – one for writ of *certiorari* and one for Declaratory Judgment, seeking a declaration that certain provisions of the Ethics Ordinance are unconstitutional both facially and as-applied.

"Under the doctrine of *res judicata,* a final judgment on the merits rendered by a court of competent jurisdiction acts as a bar to a subsequent suit between the parties involving the same cause of action." *In re Marriage of Lyman,* 27 N.E.3d 126, 147 (Ill. App. 1st 2015) quoting *River Park, Inc. v. City of Highland Park,* 184 Ill. 2d 290, 302 (Ill. 1998). It is "an equitable doctrine and is applied to prevent a multiplicity of lawsuits between the same parties where the facts and issues are the same." *Piagentini v. Ford Motor Co.*, 387 Ill.App.3d 887, 890 (2009). It promotes judicial economy by preventing repetitive litigation and protects parties from being forced to bear the unjust burden of re-litigating essentially the same case. *Id.* The party claiming *res judicata* has "a duty to clarify the record so as to *clearly* demonstrate his entitlement to the doctrine's application." *Hernandez v. Pritikin,* 2012 IL 113054, ¶ 52 (emphasis in original). *Res judicata* applies to bar a claim when (1) a final judgment on the merits is rendered by a court of competent jurisdiction; (2) an identity of the causes of action exists; and (3) the parties or their privies are the same in both actions. *Rein v. David A. Noyes & Co.*, 172 Ill. 2d 325, 334 (1996).

Plaintiffs at no point actually argue that the doctrine *res judicata* itself is inapplicable in this matter – they do not argue (a) there is no final judgment on the merits, (b) no identity of causes of action, or (c) no identical parties or their privies. By failing to argue that *res judicata* is inapplicable in this matter, Plaintiffs concede that point. *See Reliable Fire Equip. Co. v. Arredondo,* 2011 IL 111871 *29 (stating where a party fails to argue or challenge a point then that point is conceded). Instead, Plaintiffs argue that this Court should not apply *res judicata* in the interest of equity, alleging exclusions apply. Plaintiffs later argue, after their discussion of why applying the claims splitting doctrine would be inequitable, that *res judicata* should not apply because the alleged "as-applied" claims did not accrue until after *Berrios I* was decided. This ripeness challenge is simply a roundabout way of alleging there is no identity of cause of action, but is ultimately unpersuasive.

A. Final Judgment on the Merits

Again, this Court notes that Plaintiffs do not explicitly argue against this, or any, of the primary elements of *res judicata*, conceding the point. Regardless, a complete analysis is appropriate in this matter. A judgment is final if it determines the litigation on the merits so that all that remains is to proceed with the execution of judgment, and the possibility of appellate review has been exhausted. *Dookeran v. County of Cook,* 2013 IL App (1st) 111095 *18. *Berrios I* was decided by the Circuit Court on March 13, 2018. It was affirmed by the Appellate Court on September 21, 2018. Lastly, on January 31, 2019, the Illinois Supreme Court denied the appeal of *Berrios I.* This Court finds that there is a final judgment on the merits as to all its claims, namely (1) Injunctive Relief, seeking to prevent the Ethics Board from enforcing certain provisions of the Ethics Ordinance; and (2) Declaratory Judgement, seeking a declaration that certain provisions of the Ethics Ordinance are facially unconstitutional. In *Berrios I* the Court held that the Ethics Ordinance was not facially unconstitutional.

B. Identity of Causes of Action

Plaintiffs do not even attempt to distinguish their facial and as-applied arguments before the Court. Plaintiffs focused their *res judicata* analysis on the claim that the Ethics Ordinance is unconstitutional as-applied and did not fully accrue until the second set of notices of violation were issued on March 16, 2018, three days after *Berrios I* was decided by the Circuit Court. The court notes that these notices concerned the exact same course of conduct as the initial set of notices

issued in September of 2017. The Court further notes that the exact same provisions of the Ethics Ordinances are challenged in *Berrios I* and the Second Amended Complaints at issue in this matter. The final notices of determination for '4717 were issued on January 8, 2018 and covered the Fourth Quarter of 2016 and the First Quarter of 2017 in the Illinois State Board of Election reporting periods. RA.078-88, 377-84. The notices of determination for '6937 were issued on May 2, 2018 and covered the Fourth Quarter of 2017 in the Illinois State Board of Election reporting periods. RB.198-205, 445-52.

Separate claims will be considered the same cause of action for *res judicata* purposes if they arise from a single group of operative facts, regardless of whether they assert different theories of relief. *In re Marriage of Lyman,* 27 N.E.3d 126, 147 (Ill. App. 1st 2015) citing *Doe v. Gleicher,* 393 Ill. App. 3d 31, 37 (Ill. 2009). The test for determining when two causes of action are the same is whether they are based on the same facts or whether the same evidence would be necessary to sustain both actions. *Thorleif Larsen & Son, Inc. v. PPG Indus., Inc.,* 177 Ill. App. 3d 656, 659-60 (2d Dist. 1988). "Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery, assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 22 *citing Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490-91 (1993).

Res judicata applies "not only to what was actually decided in the original action, but also to matters which could have been decided in that suit." *Rein,* 172 Ill. 2d at 224-35. A plaintiff is not permitted to sue for part of a claim in one action and then sue for the remainder in another action, they must assert all the grounds of recovery they may have against the defendant, arising from a single nucleus of facts, in one lawsuit. *Piagenini,* 387 Ill. App. 3d at 890-91. A plaintiff cannot preserve the right to bring a second action after losing their first suit merely by limiting the theories of recovery opened by the pleadings in the first action. *Id.* at 891. This is based upon the principle that litigation should have an end and that no one should be unnecessarily harassed with a multiplicity of lawsuits. *Id.*

Plaintiffs are correct in their statement that an unsuccessful facial challenge to a statute or ordinance does not necessarily bar a subsequent challenge by the same party on an "as-applied" basis. *See Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292, 2305 (2016) (declining to apply

res judicata based upon new material facts). As the U.S. Supreme Court noted in *Whole Women's Health v. Hellerstedt,* when there are new material facts after the decision of an action with respect to the same subject matter, those new material facts bring a claim outside of *res judicata* because they destroy the alleged single group of operative facts at issue. *Id.* But that is not the situation here.

There is no dispute that Plaintiffs' facial challenge is identical to *Berrios I* and barred. But Plaintiffs argue that their as-applied claims did not accrue until after *Berrios I* was decided and after all administrative proceedings were concluded. This is because, Plaintiffs claim, the Ethics Ordinance was not actually applied to their conduct until the CCBOE issued its findings. But that argument ignores the facts in the Record. Berrios, and his campaign and related entities, were always subject to the Ethics Ordinance and the notices issued by the Illinois State Board of Elections. The Record is clear that as late as March 2017 Berrios was subject to the notices, and in fact, at that time, complied with the Board of Elections and CCBOE findings without issue. RA.18, 27, 34.

Only after Berrios became concerned that he would lose his elected office did he begin attacking the Ethics Ordinance, in other words, Berrios only took issue with the Ethics Ordinance once his goal became preserving his power, and he abused his position as Assessor to fulfil that goal. Berrios' affidavit in support of his petition for TRO in *Berrios I* confirms this point, "I will suffer irreparable harm without a temporary restraining order because the Ethics Ordinance inhibits my ability to accept campaign contributions and thus, prevents a level playing field in a contested primary election against a 'millionaire candidate.'"[7] *See* Plaintiffs Motion for TRO, Ex. B. at *27, filed 1/30/18 in 18-CH-1102. Berrios averred that "money damages cannot compensate me for an uneven playing field in the primary election." *Id.* at *28.

Plaintiffs state that any new facts bring their claim as to 18-CH-6937 (the administrative case before this Court that concluded after *Berrios I* was decided) outside of the realm of *res*

[7] Other relevant quotes include,

- "The Cook County Ethics Ordinance purports to prohibit *me and my campaign committees* [Committee to Elect Berrios as Assessor and the 31st Ward Democratic Organization] from accepting contributions in excess of $750;" At *7 (emphasis supplied)
- "Section 2-585(b) of the Ethics Ordinance infringes on my First Amendment right to freely associate with my contributors and supporters;" at *24

judicata. But Plaintiffs do not even claim the "new" facts at issue are material to the analysis. The additional facts at issue are simply more violations based upon the same course of conduct, but this time in the Fourth Quarter of 2017 of the Illinois State Board of Election reporting periods. These new facts show the same behavior and type of violation occurred, but in a different reporting period in the election cycle. These arguments are where plaintiffs continually conflate the various judicial and quasi-judicial actions concerned in this matter. Yes, *Berrios I* cannot prevent Plaintiffs actions for writ of *certiorari* on any given review of an Ethics Board administrative decision; however, merely because Plaintiffs strategically choose to leave out a labeled cause of action for declaratory judgment does not mean Plaintiffs are entitled to re-litigate the same issue, or an issue that should have been brought in *Berrios I.*

In fact, the Second Amended Complaint and the Complaint in *Berrios I* contain substantial similarities. The following paragraphs of the complaints are either identical in whole or in part, and all of them concern the constitutionality of the Ethics Ordinance:

Berrios I Complaint **(18-CH-01102)**	***Second Amended Complaint*** **(18-CH-4717; 18-CH-06937)**
¶44 - identical	¶90 - identical
¶45 - identical	¶91 - identical
¶46 - identical	¶92 - identical
¶47 - identical	¶93 - identical
¶48 - identical	¶94 - identical
¶49 - identical	¶95 - identical
¶50 - identical	¶96 - identical
¶51 - identical	¶97 - identical
¶52 - identical	¶98 - identical
¶53 - identical	¶99 - identical
¶54 - identical	¶100 - identical
¶55 - identical	¶60 - identical
¶56 - identical	¶62 - identical
¶58 –identical, in part	¶69 –identical, in part
¶59 - identical	¶70 - identical
¶60 - identical	¶71 - identical
¶61 - identical	¶72 - identical
¶62 - identical	¶73 - identical
¶66 - identical	¶76 - identical
¶67 - identical	¶77 - identical
¶70 - identical, in part	¶81 - identical, in part
¶71 - identical	¶82 & ¶103 - identical
¶72 - identical, in part	¶83 - identical, in part

Berrios I Complaint (18-CH-01102)	*Second Amended Complaint* (18-CH-4717; 18-CH-06937)
¶73 - identical	¶89 - identical

A single pattern and group of material, operative facts give rise to the claims in *Berrios I* and the claims before this Court. These cases each arise out of Plaintiffs behavior while running for reelection, each case arises as a direct result of the excess contributions solicited by Plaintiffs, and the Notices of Excess Contributions sent out by the Ethics Board. It is all the same course of conduct. The only difference between the Ethics Board notices issued to Berrios is that the second set of notices are for a different reporting period in the election cycle. But again, the behavior is identical. The policy behind *res judicata* is explicitly to prevent repetitive litigation and protect parties from being forced to bear the burden of re-litigating the same case endlessly. *Piagentini v. Ford Motor Co.*, 387 Ill.App.3d 887, 890 (2009). "Although a single group of operative facts may give rise to the assertion of more than one kind of relief or more than one theory of recovery, assertions of different kinds or theories of relief arising out of a single group of operative facts constitute but a single cause of action." *Cooney v. Rossiter*, 2012 IL 113227, ¶ 22 *citing Torcasso v. Standard Outdoor Sales, Inc.*, 157 Ill. 2d 484, 490-91 (1993).

Plaintiffs could have brought an as-applied constitutional challenge in *Berrios I.* At the time of filing, the Ordinance had in fact been applied to them – Notices of Excess Contributions had been sent, and Notices of Determination had been issued against them, and a motion to reconsider the findings before the CCBOE was pending. Nothing at that time precluded Plaintiffs from attacking the constitutionality of the Ordinance as-applied. An identity of claims bars re-litigating this issue.

C. Identical Parties or Parties in Privity

Again, the Court notes that the Plaintiffs have not denied they are in privity with each other for *res judicata* purposes. A party who fails to make an argument to the trial court waives that argument and concedes the point. *See Vantage Hospitality Group., Inc. v. Q Ill. Dev., LLC,* 2016 IL App (4th) 160271 *47-49. Regardless, the Court will analyze whether privity exists in this case.

When determining if identical parties or privity exists, the focus is on the interests of the parties in question. *See Agolf, LLC v. Vill. of Arlington Heights,* 409 Ill. App. 3d 211, 220 (1st Dist. 2011). Privity exists between parties who adequately represent the same legal interests. *See People*

ex rel. Burris v. Progress Land Devs., 151 Ill. 2d 285, 296 (Ill. 1992). It is the identity of interest that controls in determining privity, not the nominal identity of the parties. *Id.* A nonparty to a prior suit may be bound pursuant to privity if its interests "are so closely aligned to those of a party" in that prior suit that the party was, essentially, a virtual representative of the nonparty. *Agolf, LLC v. Vill. of Arlington Heights,* 409 Ill. App. 3d 211, 220 (1st Dist. 2011). The focus is "on the interests of the parties in question," with a "case-by-case" determination usually required. *Id.* In the context of *res judicata*, the issue as to whether privity exists is generally a question of fact. *Atherton v. Connecticut General Life Ins. Co.*, 2011 IL App (1st) 090727 *14.

Many Illinois Courts, including the Illinois Supreme Court, in discussing privity for the purposes of *res judicata,* have relied upon the definition found in the restatement of Judgements: "Privity is a word which expresses the idea that as to certain matters and in certain circumstances persons who are not parties to an action but who are connected with it in their interests are affected by the judgment with reference to interests involved in the action, as if they were parties." *People ex rel. Burris v. Progress Land Devs.*, 151 Ill. 2d 285, 296 (Ill. 1992) (inner citations removed) citing RESTATEMENT OF JUDGMENTS § 83, Comment a, at 389 (1942).

When determining privity between entities, a court should primarily focus on the congruence of legal interests and adequacy of representation. *See also People ex rel. Burris v. Progress Land Devs.*, 151 Ill. 2d 285 (Ill. 1992).

The plaintiffs in *Berrios I* were John K. Norris and Joseph Berrios, in his official capacity as Assessor of Cook County, Illinois. As articulated in the Second Amended Complaint, the Plaintiffs before this Court currently are (1) Joseph Berrios, individually; (2) the Committee to Elect Joseph Berrios Cook County Assessor; and (3) the 31st Ward Democratic Organization. *Berrios I* sought a declaration that the Ethics Ordinance was unconstitutional, which would obviate the CCBOE hearings and levying of fines pursuant thereto.

Joseph Berrios, individually, is the Chair of both (2) the Committee and (3) the 31st Ward Organization. RB.203, 450; RA.378, 384; Plaintiffs Motion for TRO, Ex. B. at *14, filed 1/30/18 in 18-CH-1102 (affidavit of Joe Berrios). The Court finds it important to note that in the initial complaint filed in this matter Plaintiff Berrios was not individually named, instead Berrios tried to

bring this case in his official capacity as Assessor of Cook County, Illinois.[8] This is highly probative in the privity analysis. Only after the CCBOE objected and filed a motion to dismiss did Plaintiff agree to sue individually, as opposed to in his official capacity. Regardless, the goals of Berrios as an individual and the purposes of both the Committee to Elect Joseph Berrios and the 31st Ward Organization in this case were to (1) have the Ethics Ordinance declared unconstitutional, obviating the fines levied against them; and (2) on a larger scale, to try and ensure Berrios' reelection as Assessor.

As the Court will discuss below in Section V. (A) Jurisdiction Over the 31st Ward Democratic Organization, the 31st Ward Organization, though nominally labeled as a democratic "party" committee, was, *de facto,* a committee run by, and exclusively for, Joseph Berrios. The mere revision of a "D-1" Form to change a candidate committee into a party committee, given the unchanged conduct of that committee, cannot be used as a shield for *res judicata* purposes. The 31st Ward Organization was originally formed with the committee name "Joseph Berrios, 31st Ward Committeeman." CCBE00151. Even after changing the name to the 31st Ward Democratic Organization,[9] the facts are clear that the main democratic candidate supported was Joseph Berrios. Berrios received almost 97% of the funding from the 31st Ward Organization. *See* Defendant's Supplemental Brief in Support of their Opposition to Plaintiff's Petitions for Writ of *Certiorari*, Group Exhibit A (31st Ward Organization's D-2 Quarterly Reports). Lastly, the Notices of Determinations that instigated *Berrios I* were assessed against (a) Berrios as himself, and as Chair of both (b) the Committee and (c) the 31st Ward Organization, the same parties in this case. *See Berrios I,* 2018 IL App (1St) 180654.

The goal of all three plaintiffs in this matter, (1) Joseph Berrios, individually; (2) the Committee to Elect Joseph Berrios Cook County Assessor; and (3) the 31st Ward Democratic Organization, were to have the Ethics Ordinance declared unconstitutional obviating the fines against them and to reelect Joseph Berrios as Assessor. Their interests were and are aligned, and all three were adequately represented by Berrios in his official capacity in *Berrios I.* It is indisputable that if Berrios as Assessor had been successful in *Berrios I,* then Berrios individually,

[8] As discussed *infra* in footnote 1, this Court believes this was an effort to avoid paying his own legal fees and instead have them paid by the County.

[9] A change performed by crossing out the words "Joseph Berrios" and "Committeeman" in the previous form, so that the official form reads "~~Joseph Berrios~~, 31st Ward ~~Committeeman~~ Democratic Org." CCBE00151.

the Committee, and the 31st Ward Organization would have directly benefitted by having the Ethics Board Determinations issued against them nullified.

That these entities were not actual parties to *Berrios I* does not change the fact that their legal interests were involved and adequately represented. *See People ex rel. Burris v. Progress Land Devs.*, 151 Ill. 2d 285, 296 (Ill. 1992). Berrios as Assessor, Berrios the individual as candidate for Assessor, the 31st Ward Organization, and the Committee all have the same legal interests: (1) have the Ethics Ordinance declared unconstitutional, obviating any fines levied thereunder, and (2) reelect Joseph Berrios as Cook County Assessor. *See People ex rel. Burris v. Progress Land Devs.*, 151 Ill. 2d 285, 296 (Ill. 1992). It is clear to this court that the interests of each of the three plaintiffs "are so closely aligned to those" of Berrios as Assessor in *Berrios I* that the he was, essentially, a virtual representative of himself individually, the Committee, and the 31st Ward Organization. *See Agolf, LLC v. Vill. of Arlington Heights,* 409 Ill. App. 3d 211, 220 (1st Dist. 2011). An identity of parties with an identity of interests bars re-litigating this issue.

D. Equitable Exclusions to Claim-Splitting

The rule against claim-splitting has been relaxed where there has been an omission due to ignorance, mistake or fraud, or where it would be inequitable to apply the rule. *Rein v. David Noyes & Co.,* 172 Ill. 2d 325, 341 (1996). The Illinois Supreme Court has identified circumstances in which application of the claim-splitting rule would be inequitable, including (1) agreement by the parties, in terms or in effect, that the plaintiff may split their claim or defendant's acquiescence to the plaintiff's splitting of claims into two actions; (2) express reservation by the court in the first action of the plaintiff's right to maintain the second action; (3) the plaintiff was unable to obtain relief on his claim because of a restriction on the subject-matter jurisdiction of the court in the first action; (4) the judgment in the first action was plainly inconsistent with the equitable implementation of a statutory scheme; (5) the case involves a continuing or recurrent wrong; or (6) it is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason. *Rein v. David Noyes & Co.,* 172 Ill. 2d 325, 340 (1996) citing Restatement (Second) of Judgments § 26(1) (1980).

Plaintiffs claim the first two circumstances are met in this case, (1) that Defendants either agreed or acquiesced to this second action and (2) the Appellate Court expressly reserved the right to this second action.

An agreement in terms to claim-splitting would be something that happened before the refiling, and means that the parties explicitly agreed that Defendants would not object to the plaintiff's refiled action on *res judicata* grounds. *Dinerstein v. Evanston Athletic Clubs,* 2016 IL App (1st) 153388 *53. An agreement in effect is something short of an agreement in terms, but still must occur prior to the refiling of the second action. *Id.* at *57. When a defendant engages in conduct that implies the viability of a claim separate and apart from a pending lawsuit, such as lengthy negotiations over a related issue, then the defendant agrees in effect to the litigation of that claim in a separate suit. *Id.* at *58 citing *Saxon Mortg. Inc. v. United Fin. Mortg. Corp.,* 312 Ill. App. 3d 1098, 1102-1110 (1st Dist. 2000). But silence alone is not enough to establish an agreement in effect, the defendant must imply a lack of objection to the claims splitting in either word or deed. *Id.* *61. An acquiescence is the failure to object to claim-splitting once the action is refiled, not an agreement in advance of that re-filed action. *Dinerstein v. Evanston Athletic Clubs,* 2016 IL App (1st) 153388 *49.

The Illinois Appellate Court has found that a defendant acquiesces to the splitting of claims when they (a) actively defend against the second action through answering the complaint, raising affirmative defenses, and initiating discovery and (b) fail to object to claim-splitting in a second case. *See Thorleif Larsen & Son Inc. v. PPG Indus., Inc.,* 177 Ill. App. 3d 656, 662-63 (2d Dist. 1988) (parties were simultaneously litigating cases in both DuPage and Cook County); *Piagentini v. Ford Motor Co.,* 387 Ill. App. 3d 887, 896-98 (1st Dist. 2009) (finding acquiescence to claims splitting where the defendant participates in litigation and fails to object based upon *res judicata* for over three years after refiling). Plaintiffs argues there is a third way to acquiesces to claim-splitting, which is by representing to Court A that plaintiffs have a remedy to certain related claims simultaneously being litigated in Court B based upon a Second District Illinois appellate opinion. *See Thorleif Larsen & Son Inc.,* 177 Ill. App. 3d at 662-63. But the First District Illinois Appellate Court has explicitly rejected that as a basis for acquiescing to claim-splitting, emphasizing it is the failure to object and active litigation in the second filed case which is the basis for acquiescence. *Piagentini v. Ford Motor Co.,* 387 Ill. App. 3d 887, 897 (1st Dist. 2009).

Plaintiffs fail to specify whether they believe there is an agreement in terms, an agreement in effect, or an acquiescence to claim-splitting. Plaintiffs argue that Defendants never sought to bar the Ethics Boards administrative proceedings, and point out that the Appellate Court in *Berrios I* specifically acknowledged that the judicial review of the ethics board cases was proceeding separately. This shows, plaintiffs argue, that defendants either agreed or acquiesced to the claim-splitting and that the appellate court reserved plaintiff's right to maintain this second action. Plaintiffs also do not address the distinction between their claims as to judicial review of the Ethics Board decisions versus claims which constitutionally challenge the Ethics Ordinance.

At the outset, this Court finds that the record is devoid of any allegations of ignorance, mistake, or fraud in filing the as-applied constitutional claims. And it is clear that Defendants did not agree to allow Plaintiffs to split their claims. Plaintiffs have pointed to no express agreement in terms by Defendants that would allow for claim-splitting, and Defendants deny any such agreement exists. Moreover, there is nothing in the record, or specifically argued by the Plaintiffs, that shows the type of conduct by the Defendant such that there is an agreement in effect to allow Plaintiffs to split their claims. The fact that the parties may have, at one point, engaged in settlement discussions as to the administrative proceedings, or even in general as to this matter, is insufficient to establish an agreement in effect. Thus, the Court's analysis will focus on whether Defendants acquiesced to claim-splitting.

Defendants' arguments as to *res judicata* are narrowly drawn as to the constitutional claims alone. Defendants claim they did not actively defend or litigate the case before this Court and timely raised their *res judicata* arguments at the appropriate time.

Defendants point out that the original complaint in this case, filed on 04/11/18 (for 18-CH-4717) and 05/31/18 (for 18-CH-6937), raised no as-applied challenge to the Ordinance, but instead claimed the Ordinance was unconstitutional on its face. The as-applied challenge first appeared alongside the facial challenge in Plaintiffs Amended Complaint on December 21, 2018. Now, the operative complaint, the Second Amended Complaint, contains both facial and as-applied challenges, and this was filed on February 15, 2019. Defendants claim the parties were not at issue until Plaintiffs filed their memorandum in support of their petition. After Plaintiffs petition was filed, Defendants immediately brought their *res judicata* claims. Defendants claim they did not actively "defend" against the action before filing their *res judicata* arguments, rather

Defendants simply filed the Record as their Answer and raised their defenses at the appropriate time when the parties were finally at issue.

Plaintiff claims this case is like *Thorleif Larsen,* and that, as in that case, Defendants have similarly acquiesced to claim-splitting. *See Thorleif Larsen & Son Inc. v. PPG Indus., Inc.*, 177 Ill. App. 3d 656, 662-63 (2d Dist. 1988). The plaintiff in *Thorleif Larsen* filed two suits on the same day involving the same construction project, one in Cook County and one in DuPage County. *Id.* at 657. Defendant moved to dismiss the Cook County action, arguing that plaintiff was not without remedy as it had a pending action in DuPage County which was set for trial. *Id.* at 662. The defendant in *Thorleif Larsen* then went on to defend the DuPage County action never objecting to the claim-splitting. *Id.* at 662. The court concluded that defending the action with no objection to the claim-splitting constituted acquiescence, not the defendant's representation that plaintiff would have a remedy because of the second suit. *Id.* at 662-63.

Plaintiffs claim that because Defendants never tried to stop the second administrative hearing, they acquiesced to the claim-splitting. Defendants point out they had no reason to bar or prevent any administrative proceeding before the Ethics Board, as constitutional claims are outside the Ethics Board's jurisdiction. The Court notes that Defendants would not even have the ability to raise that argument before the Ethics Board. Administrative proceedings themselves are non-adversarial, the only parties are the petitioner and the administrative agency, and the purpose of the hearing is fact-finding. *See Abrahamson v. Ill. Dep't of Professional Regulation,* 153 Ill. 2d 76, 94-95 (Ill. 1992).

Moreover, that Defendants failed to raise this *res judicata* argument in a motion to dismiss does not mean they acquiesced to the claim-splitting either. The only substantive thing Defendants did in this case, before raising this argument, is filing the administrative record as their answer. Defendants did not engage in protracted litigation before raising this argument, all they did was file the administrative record and then supplement it. This Court does not find that sufficient to show an acquiescence to claim-splitting. No equitable exclusions to claim-splitting apply in this matter.

Lastly, this Court finds that the Appellate Court did not expressly reserve Berrios' right to split claims as to the Ethics Ordinance. All the Appellate Court made clear was that (a) it was not

ruling on the "as-applied" basis, expressing no opinion as to several hypotheticals outside the fact pattern of the *Berrios* cases; and (b) that it was not ruling on the judicial review of the Ethics Board administrative proceeding. *See Berrios v. Cook County Board of Comm'nrs,* 2018 IL App (1st) 180654 *41, 74. This Court has already ruled that *res judicata* cannot bar judicial review of the Ethics Board administrative hearings, and it is clear that none of the constitutional hypotheticals reserved by the Appellate Court are at issue.

This Court finds that *res judicata* bars the cause of action claiming the Ethics Ordinance is unconstitutional as-applied, (1) there is a final judgment on the merits in *Berrios I*; (2) an identity of causes of action exist, as there are the same operative facts here and in *Berrios I*; and (3) the parties in *Berrios I* and here are the same and, if not the same, are in privity. No equitable exclusions to claim-splitting apply.

III. AS-APPLIED CONSTITUTIONAL CHALLENGE

A. Plaintiffs' Request for an As-Applied Constitutional Analysis and Plaintiffs' Interpretation of the *Berrios I* Appellate Court Opinion

Even if *res judicata* is not appropriate in this matter, which again, this Court believes it is, for the sake of completeness, the Court will still address Plaintiffs' request for an as-applied constitutional challenge to Section 2-585(b) of the Ordinance.[10] This Court permitted the parties to provide supplemental briefing regarding an as-applied constitutional challenge to the Ordinance. In the Supplemental Briefing and during the August 13, 2019 oral arguments, Plaintiffs had conflicting arguments about the Appellate Court's facial challenge or an as-applied challenge in *Berrios I.* Plaintiffs' Supplemental Brief in Support of Plaintiffs' Petition for Writ of *Certiorari* at 3 ("Plaintiff's Supplemental Brief in Support").

Given the cyclical nature of Plaintiffs' pleadings in the various cases, this Court would like to note that both *stare decisis* and law of the case bind this Court. Courts are bound by controlling legal precedent to the facts of the case before them under the fundamental principle of *stare decisis*. *Yakich v. Aulds*, 2019 IL 123667, ¶ 13 (lower courts are bound by higher court's legal rulings). As it relates to the constitutional challenges, the facts are essentially the same for 18-CH-4717 and

[10] As was pointed out during oral argument on August 13, 2019, Plaintiffs' Second Amended Complaint for this writ of *certiorari* in both 18-CH-4717 and 18-CH-16937 is almost identical to the complaint filed for declaratory judicial action before Judge Tailor in 18-CH-1102. See chart in Section II.(B) Identity of Causes of Action for a more specific comparison.

18-CH-6937 and *Berrios I.* The administrative review challenges will be addressed below in Section IV. Petition for Writ of *Certiorari.*

In addition to *stare decisis*, the "law of the case" also binds this Court. The law of the case doctrine provides that issues presented and disposed of in a prior appeal are binding and will control in the circuit court on remand, as well as the appellate court in a subsequent appeal, unless the facts presented are so different as to require a different interpretation. *Bilut v. Northwestern Univ.*, 296 Ill. App. 3d 42, 47 (1998) citing *Aardvark Art, Inc. v. Lehigh/Steck-Warlick, Inc.*, 284 Ill. App. 3d 627 (1996). Thus, absent substantially different facts, a party cannot re-argue issues previously decided by the appellate court. *Id.* Instead, the remedy for a dissatisfied party is to file a petition for rehearing or petition for leave to appeal to the state's supreme court. *Id.* In the prior appeal for *Bilut*, the court held that defendants' academic judgment of plaintiff was not arbitrary and capricious because there was a discernable rational basis for the decisions of Northwestern and its faculty regarding plaintiff's dissertation. *Id.* Since the facts in the circuit court on remand and in this subsequent appeal are substantially the same as those in the prior appeal, the facts did not require a different interpretation. *Id.*

As shown above in the *res judicata* section, the pleadings and the relevant facts in *Berrios I* and Plaintiffs' Second Amended Complaint for Writ of *Certiorari* are strikingly similar and at times verbatim. Thus, the *Berrios I* decision is binding and controls for these proceedings, especially with regards to the constitutional challenge holdings. *Bilut*, 296 Ill. App. 3d at 47.

According to Plaintiffs and their selective analysis of the *Berrios I* order, the "Appellate Court did not consider Berrios' argument that violations by the other county officers were purposely ignored, saving this issue for an 'as-applied' argument." Plaintiff's Supplemental Brief in Support at 3. However, the Appellate Court never reserved Plaintiffs as-applied argument for a later time. The Appellate Court stated the following regarding an as-applied challenge:

> Again, we note the plaintiffs are not challenging the Ethics Ordinance on an as-applied basis. We express no opinion on whether the Ethics Ordinance would survive such a challenge if, for instance, the Ethics Board took action against someone who sought innocuous or ministerial "official action" from the county such as a marriage license or copy of a document. In sum, we find that the Ethics Ordinance is not unconstitutionally vague.

Berrios v. Cook Cty. Bd. of Commr's, 2018 IL App (1st) 180654 ¶ 19. Clearly, the Appellate Court stated that it is making no comment if there was as an as-applied challenge for *ministerial or*

administrative requests. Contrary to Plaintiffs' confused beliefs, the Appellate Court did not use language reserving the issue for Plaintiffs writ of *certiorari*. *See id.* ¶ 41. Hence, the Appellate Court did not comment on whether another group challenging 2-585(b) for an as-applied basis would succeed.

Plaintiffs believe their request for an as-applied constitutional challenge is justified. In Plaintiffs' Supplemental Brief in Support, they assert that they are entitled to an as-applied analysis: "[a]nd while there is a similarity in the actions (*Berrios I* and the writ cases), the controlling pleading (the February 15, 2019 Second Amended Complaint) repeatedly asserts the *as-applied argument*." *Id.* at 3 (emphasis added). In reviewing the Second Amended Complaint, Plaintiffs pled that: "Section 2-585(b) of the Ethics Ordinance is unconstitutional on its face and as-applied because it is not narrowly tailored to the government's interest in preventing *quid pro quo* corruption." Second Amended Complaint for 18-CH-4717 ("2ACompl.A.") at 15.

While this Court disagrees with Plaintiffs' interpretation of the Appellate Opinion for *Berrios I*, this Court would also like to point out that even *with* an as-applied constitutional challenge that Plaintiffs' arguments fail for the reasons stated below.

1. Facial versus As-Applied Constitutional Challenges

Facial and as-applied constitutional challenges are not interchangeable. *People v. Harris*, 2018 IL 121932, ¶ 52. An as-applied challenge requires a showing that the statute is unconstitutional as it applies to the challenging party's specific circumstances, it is fact specific to the party challenging the statute. *Id.* (citing *People v. Thompson*, 2015 IL 118151, ¶ 36). In contrast, a facial challenge requires the challenging party to establish that the statute is unconstitutional under *any possible set of facts*. *Id.* (emphasis supplied).

Berrios I affirmed that 2-585(b) of the Ethics Ordinance is facially constitutional. *Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654 ¶ 44. This is undisputed.

2. Plaintiffs' Allegations That the Ordinance is Unconstitutional As-Applied

Plaintiffs' Second Amended Complaint alleges that "Section 2-585(b) of the Ethics Ordinance infringes on the First Amendment rights of all citizens of Cook County to support candidates of their choice." 2ACompl.A. ¶ 76. The Second Amended Complaint further claims "[a] restriction on campaign contributions may withstand a constitutional challenge only if the government demonstrates that the restriction promotes a sufficiently important interest and is

closely drawn to avoid unnecessary abridgment of associational freedoms." *Id.* ¶ 77. This is a facial challenge analysis and not at issue here because facial challenges were clearly addressed by the Appellate Court in *Berrios I.* While Plaintiffs use various constitutional analyses interchangeably, this Court will look to the ordinance with an as-applied analysis and with a strict scrutiny standard.

This Court is reviewing CCBOE's final decisions regarding constitutionality under a *de novo* review standard. A *de novo* review is appropriate because this review is based upon a question of law. An administrative agency's conclusion on a question of law is reviewed *de novo. AFM Messenger Serv., Inc. v. Dept. of Emp. Security*, 198 Ill. 2d 380, 390 (2001). The constitutionality of a statute presents a legal question and thus, this Court must review the present as-applied challenge to the Ordinance *de novo. People ex rel. Hartrich v. 2010 Harley-Davidson*, 2018 IL 121636, ¶ 13.

B. Quid pro quo

Plaintiffs assert that: "2-585(b) limits contributions to County officials and candidates for County office *with whom the donor has no connection whatsoever* and therefore, it does not further the only government interest that the Supreme Court has accepted as legitimate – preventing *quid pro quo* corruption." 2ACompl.A. ¶ 86 (emphasis added). Because of this alleged "lack of connection," Plaintiff also asserts that 2-585(b) "does not further the only government interest . . . preventing *quid pro quo* corruption." *Id.* Further, Plaintiffs believe that Cook County "cannot show that its freedom of speech limits, which apply to one class of donors and not to others, are narrowly tailored to meet First Amendment standards." *Id.* The Court will address Plaintiffs' allegations in two sections: (i) Cook County's interest in preventing *quid pro quo* corruption and (ii) that the freedom of speech limits applying to "one class of donors and not to others."

1. Prevention of Actual and Apparent Quid pro quo Corruption

The United States Supreme Court has recognized that preventing actual or apparent *quid pro quo* is a sufficient interest to justify campaign-finance restrictions under the closely drawn standard. *Proft v. Raoul*, 944 *F.3d 686, 691*, 2019 U.S. App. LEXIS 37158, *13, 2019 WL 6835279 (citing *Wis. Right to Life State PAC v. Barland*, 664 F.3d 139, 153; *FEC v. Nat'l Conservative PAC*, 470 U.S. 480, 496-97 (1985)). In Illinois there is a clear limit on the campaign contributions to prevent this very type of *quid pro quo* corruption as shown by the Ethics Ordinance. Cook County Code of Ordinances § 2-585(b) (approved Oct. 5, 2016).

Moreover, CCBOE's Chairman Peggy Daley articulated with specificity the importance of preventing *quid pro quo* corruption:

> The importance of the County's interest in ensuring that candidates for County office do not arrive in office beholden to special interests is clear. The County Board's rationale for enacting Section 2-585 is no different, and no less constitutionally important than the federal or any state government's interest in doing the same. *Buckley v. Valeo*, 424 U.S. 1, 25-29 (1976); *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 390-95 (2000). The history of corruption in Cook County government is well-known. This history includes "pay-for-play" allegations and other serious misconduct in the County's tax assessment offices, including the CCAO.1 Moreover, the public's acute concern about the appearance of *quid pro quo* corruption with respect to the influence of campaign donors who seek official action from Cook County officials they supported as candidates is also well documented.

RA.277. The history of corruption in Cook County is well-known. *Id.* Thus, Cook County created firm boundaries for campaign contributions. *Id.* Property tax appeal attorneys and the Assessor's office have an unparalleled connection and working relationship, such that even the appearance of a *quid pro quo* must be avoided. *See id.* The Assessor's office makes decisions that can allow for property tax appeal attorneys to directly profit. *Id.* It has been noted that after property owners win appeals, the assessed values of many properties immediately "snap right back to the same number in the next reassessment . . . feed[ing] a property tax appeal industry that provides the bulk of Berrios's campaign contributions." *Id.* (citing Jason Grotto, et al., *Assessor's estimates defy logic, benefit lawyers*, CHICAGO TRIBUNE, Dec. 10, 2017).[11] Regardless of the assessed value returning to the same amount or not, the property tax appeal attorneys directly profit and benefit from the actions of the Cook County Assessor's office. *Id.*

In Plaintiffs' Second Amended Complaint, they allege that a "political contribution cannot influence a government action sought by a donor when that action has already occurred, particularly when that action may have occurred up to four years before the contribution was made." 2ACompl.A ¶ 88. This is exactly why a property tax appeal lawyer who has appeared before the Cook County Board of Review is prohibited from over-contributing to a race and is limited by the rules clearly set out in 2-585(b). *See* RA.277. A lawyer is likely to file another tax

[11] Plaintiff does not challenge the factual findings relied upon by the administrative agency, CCBOE, in issuing its final decision.

appeal. *Id.* That is why it is reasonable to infer what motivates a lawyer to contribute, or over-contribute, to the campaign. *Id.* As CCBOE already stated in their Order Denying a Request for Reconsideration, 2-585(b) does not create a "consequence to the law practice of any of the contributors." *Id.* The only consequences of knowingly giving more than $750 are that the attorney must (a) obtain a refund of the excess contribution after receiving a notice of violation, or (b) pay a maximum fine of $1,000." *Id.* Plaintiffs cannot assume that the property tax appeal attorneys that specialize in this area of the law will *never* appear in front of the Assessor's office again for future matters.[12]

2. *Applying 2-585(b) to a Clearly Defined Group and Class of Donors*

The Ordinance articulates a clear group of people that covered by section 2-585(b). Particularly, 2-585(b) deters "the acute risk of corruption presented by campaign contributions from a smaller subset of donors based on their particular relationship with Cook County government as vendors, lobbyists, and now, official action seeker." RA.279. There is not a complete bar to campaign contributions. *Id.* at 277. Rather, the Ethics Ordinance only sets an upper limit for the size of such contributions in the aggregate. *Id.* at 027. Berrios alleged that for these cases "the Board of Ethics applied the Ordinance in an arbitrary and discriminatory manner by limiting the amount of contributions Mr. Berrios and the Committees were permitted to accept from lawyers and law firms who had filed appeals on behalf of property taxpayers." Plaintiff's Memorandum in Support of Writ of *Certiorari* for 18-CH-4717 at 13-14. However, simply "limiting" a campaign contribution amount does not equate to being "arbitrary" and "discriminatory."

The United States Supreme Court has definitively held, on more than one occasion, that a blanket limitation on all campaign contributions passes constitutional muster as closely drawn to address the government's anti-corruption interests. *Id.* (citing *Buckley*, 424 U.S. at 34 (rejecting a facial challenge to $1,000 campaign contribution limits on all donors to federal candidates); *Nixon*, 528 U.S. at 397-98 (upholding $275 campaign contribution limits on all donors to some state candidates against First Amendment challenge). Section 2-585(b), which only applies to some

[12] Some law firms make up large percentages of the property tax appeal cases filed in Cook County: "Crane and Norcross, which filed nearly 20 percent of all appeals filed with the CCAO between 2010-2014." RA.277. Michael Crane of Crane and Norcross is listed as one of the excess contributors that is alleged to have violated 2-585(b). RA.002.

potential donors, is certainly more closely drawn to the County's interest than the campaign contribution limits in *Buckley* and *Nixon*, which expressly applied to every potential donor. *Id.*

If there were not limits on the campaign contributions, these donors with clear connections to the office up for election could inundate a race for a Cook County elected position, like the Assessor's office race. With Cook County's history including "pay-for-play"[13] allegations and other serious misconduct in the County's tax assessment offices, section 2-585(b) is well within the bounds to keep these races for elected office as bipartisan as possible. RA.277. Berrios understood that keeping the improper contributions violated 2-585(b). Further, the Ethics Board did take the time to compare the contributions to public records and make a clear finding that there was a direct correlation between those contributions and the attorneys that sought property tax reductions from the Assessor's Office:

> "As a matter of course of regular business, the Ethics Board compared the contributions that Berrios's committees received and compared them to public records showing that attorneys and law firms sought property tax reductions from the assessor's office. This analysis revealed that some of those attorneys and law firms contributed more than $750 to one or more campaign committees related to Berrios."

Berrios v. Cook Cty. Bd. of Commr's, 2018 IL App (1st) 180654 ¶ 9. Berrios had the opportunity to return the contributions subject to this lawsuit. RA.297. However, Berrios chose not to return that money to the contributors. *Id.* at 282. Berrios' conduct demonstrates that by keeping the excess contribution he was abusing his power in an effort to maintain his power, which is exactly what the 2-585(b) is intended to prevent. *Id.* at 276.

Further, if Berrios hypothetically prevailed for an as-applied claim, he may "enjoin the objectionable enforcement of a statute only against himself, while a successful facial challenge voids enactment in its entirety and in all applications." *Jackson v. City of Chicago*, 2012 IL App (1st) 111044, ¶¶ 26-27 (citing *Morr-Fitz, Inc. v. Blagojevich*, 231 Ill. 2d 474, 498 (2008)). If Berrios enjoined enforcement of 2-585(b) only against himself, then that defeats Cook County's goal to prevent *quid pro quo* corruption in the first place. This outcome would mean that Berrios

[13] Jason Grotto, *Appeals system worsens inequality*, Chicago Tribune, June 10, 2017 (noting that "[i]n 2015, when appeals hit an all-time high, records show that attorneys' fees from residential appeals totaled roughly $35 million, triple the amount in 2003. Many of these lawyers have helped fill the campaign coffers of Berrios, who is also chairman of the Cook County Democratic Party and committeeman of the 31st Ward Organization."). RA.277.

would not be subject to 2-585(b) and the long-standing ordinance that he had previously complied with, would be rendered pointless.

C. Ordinance Narrowly Tailored

To reiterate Plaintiffs' own language, they assert that 2-585(b) is unconstitutional as-applied because it is not narrowly tailored to the government's interest in preventing *quid pro quo* corruption. 2ACompl.A ¶ 86. The phrase "narrowly tailored" arises from a strict scrutiny constitutional challenge. *See Napleton v. Vill. of Hinsdale*, 229 Ill. 2d 296, 307 (2008). In order to survive strict scrutiny, the measures employed by the government body must be necessary to serve a compelling state interest, and must be narrowly tailored meaning that the government must use the least restrictive means consistent with the attainment of its goal. *Id.* (citing *In re R. C.*, 195 Ill. 2d 291, 303).

1. As-Applied Analysis, Generally

A traditional as-applied challenge contains facts unique to the challenger. An as-applied challenge "requires a party to show that the statute violates the constitution as the statute applies to him." *City of Chicago v. Alexander*, 2015 IL App (1st) 122858, ¶ 85. This is a Petition for Writ of *Certiorari*, so this Court is limited to factual findings of the agency. The Administrative Review Law, which applies for this writ of *certiorari*, provides that "the findings and conclusions of an administrative agency on questions of fact shall be held to be prima facie true and correct." 735 ILCS 5/3-110 (Lexis 2016). An administrative agency's findings of fact are not reversed unless they are "against the manifest weight of the evidence." *Lyon v. Dep't of Children & Family Servs.*, 209 Ill.2d 264, 271 (Ill. 2004). "The agency's findings of fact are against the manifest weight of the evidence only if the opposite conclusion is clearly evident." *Bd. of Educ. of Rich Twp. High Sch. Dist. No. 227 v. Ill. State Bd. of Educ.*, 2011 IL App (1st) 110182, ¶ 61 (1st Dist. 2011). Plaintiffs do not challenge the findings of fact. *See generally, id.*

In order to satisfy the "narrow tailoring" requirement, a regulation need not be "the least restrictive or least intrusive means of [achieving the stated governmental interest]." *Id.* ¶ 39 (citing *Mastrovincenzo v. City of New York*, 435 F.3d 78, 98 (2d Cir. 2006) (quoting *Hobbs v. City of Westchester*, 397 F.3d 133, 149 (2d Cir. 2005), quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 798)). Instead, the requirement is satisfied if the substantial governmental interest that the law is designed to serve would be achieved less effectively in the law's absence and the law does not

burden substantially more speech than is necessary to further the government's objective. *City of Chicago v. Pooh Bah Enterprises, Inc.*, 224 Ill. 2d 390, 411 (2006). The First District agreed that the ordinance "responds precisely to the substantive problems which legitimately concern the [Government]." *City of Chicago v. Alexander*, 2015 IL App (1st) 122858-B, ¶ 43 (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 810 (1984)).

The general principles that apply to a "narrowly tailored" approach are to ensure that the actions are protecting: (1) substantial interests of the government and (2) the law does not burden substantially more speech than is necessary.

2. As-Applied Analysis in this Case

While the Court is aware that *Alexander* and this case at hand have differing facts, the analysis for the as-applied constitutional challenge for the ordinance being "narrowly tailored to serve a substantial government interest" is the same. CCBOE has consistently been transparent about 2-585(b) and why the ordinance is in place in Cook County.

In Ranjit Hakim's letter to James P. Nally on October 5, 2017, Hakim elaborates about the intent of the ordinance and why it is constitutional:

> Section 2-585(b) in no way displaces the generally applicable contribution limits in the Election Code or otherwise thwarts the ability of the State to take further action with respect to campaign contributions. Rather, Section 2-585(b) is narrowly targeted toward persons who have an identifiable interest in currying favor with elected officials. The fact that the Election Code provides certain generally applicable contribution limits to individuals, corporations, and political action committees does not preclude the Cook County Board of Commissioners from enacting lower contribution limits upon certain narrow categories of donors whose campaign contributions to County officials or candidates for County office carry the highest risk of *quid pro quo* corruption or an appearance of impropriety.

RA.012. In the Second Amended Complaint, Plaintiffs assert that the Supreme Court requires "a fit that is reasonable and that employs a means narrowly tailored to achieve a desired objective" regarding restrictions on campaign contributions. 2ACompl.A. ¶¶ 76-77. Moreover, Plaintiffs assert that Section 2-585(b) is not narrowly tailored to simply limit the amount a donor can contribute to the County official from whom he or she sought "official action." *Id.* ¶ 79.

Plaintiffs read the plain language of 2-585(b) as prohibiting "a person who has sought official action by the County in the preceding four years from contributing more than $750 to any candidate for County office or to any elected County official – even as to those officials from whom the donor never sought any action." *Id.* ¶ 80. Plaintiffs claim that the Board's interpretation of 2-585(b) means that: section 2-585(b) *prohibits any attorney or law firm who practices before Cook County courts or agencies* from donating more than $750 to any candidate holding or seeking public office in Cook County. *Id.* ¶¶ 81-82 (emphasis added).

In *Berrios I*, the First District addressed concerns over defining "official action" and how attorneys and law firms that represent taxpayers in property tax appeals fall into this category. *Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654, ¶ 36. *Berrios I* clearly articulated what "official action" means for 2-585(b). *Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654, ¶ 36. "The meaning of the term "official action" must be read as applying to action requiring the application of discretion, such that an excessive campaign contribution could be seen as facilitating a *quid pro quo* exchange between the official and the requestor. That being the case, the term "official action" is not unconstitutionally vague." *Id.* Yet Plaintiffs still assert a need for this Court to define "official action."

The term "official action" is defined "as applying to action requiring the application of discretion, such that an excessive campaign contribution could been seen as facilitating a *quid pro quo* exchange between the official and the requestor." *Id.* The term "official action is *not* unconstitutionally vague." *Id.* (emphasis added). Here, Plaintiffs' sweeping generalization that because "official action" is not defined to their liking by the Ethics Ordinance and that "hundreds of thousands of other citizens in Cook County could be deemed to have sought "official action" by the County' is pure speculation and an absurdist reading of the Ordinance. 2ACompl.A ¶ 83.[14] Plaintiffs try to allege that 2-585(b) "prohibits any attorney or law firm who practices before Cook County courts or agencies from donating more than $750." *Id.* ¶¶ 81-82. Indeed, those individuals

[14] Additionally, Plaintiffs allege a hypothetical regarding "official action" in their Second Amended Complaint: "section 2-585(b) prohibits every homeowner in Cook County who has-applied for a Homeowner Exemption (or any other tax exemption) from contributing more than $750 to any candidate for County office or to any elected County official even though each homeowner has sought action solely from the Assessor. 2ACompl.A ¶ 84. This hypothetical is completely outside the bounds of the Record provided and unrelated to these requests for administrative review. Further, Plaintiffs' attempt to say that for this as-applied challenge, a citizen or his or her lawyer who obtains no relief or acts in a pro bono capacity is subject to the prohibitions of this Ordinance. *Id.* ¶ 85. This second hypothetical is also outside the bounds of the Record and not fit for administrative review.

seeking "official action" are a much more specific group than *all* "attorney or law firms that practice in Cook County courts." *See id.*

Looking back to *Alexander*, Plaintiffs need to show that for an as-applied challenge "that the statute violates the constitution as the statute applies to him." *City of Chicago v. Alexander*, 2015 IL App (1st) 122858-B, ¶ 36 (citing *People v. Brady*, 369 Ill. App. 3d 836, 847 (2007)). Plaintiffs have not shown anything in the Record that 2-585(b) violates the constitution, in particular applying 2-585(b) to Berrios and the other Plaintiffs. If anything, information about the ordinance reflects the opposite outcome. The ordinance in question gives Berrios and others in the same exact position, individuals running for office where the caps have been "lifted," the chance to (1) receive notice about the excess funds, (2) return the excess funds that violate 2-585(b), and (3) make a request for reconsideration under Section 5.17 of the Board's Amended Rules and Regulations. RA.083.

3. Section 2-585(b) Does Not Provide for an Absolute Bar to Contributions

Additionally, 2-585(b) does not provide for an absolute bar to campaign contributions; instead, there is an upper *limit* to contributions. In the March 13, 2018 Order Denying Request for Reconsideration, Peggy Daley, Chairperson for CCBOE, states that "[g]iven the importance of this interest, the means the County has selected – a $750 campaign contribution limit – to address this interest is not over inclusive." RA.277. Under strict scrutiny in order to satisfy the "narrow tailoring" requirement, a regulation need not be the "least restrictive or least intrusive means of [achieving the stated government interest]." *Alexander*, 2015 IL App (1st) 122858-B, ¶ 39. This limit on donations for $750 is not overly "restrictive" or intrusive." *See id.* This ordinance should not and does not burden more speech than is necessary to further the government's objective. *City of Chicago v. Pooh Bah Enterprises*, 224 Ill. 2d 390, 432 (2006). A reasonable limit of $750 is not a burden on political donations and this freedom of speech. RA.277.

Cook County has "not banned contributions from official action seekers – though there would have been no constitutional impediment to doing so." *Id.* (citing *FEC v. Beaumont*, 539 U.S. 146, 161-63 (2003) (affirming a ban on federal campaign contributions by all corporations and labor unions); *Wagner v. FEC*, 793 F.3d 1 (D.C. Cir. 2015) (*en banc*) (upholding a ban on federal campaign contributions from individual government contractors as closely drawn). Moreover, the penalty for violating the ordinance is not an automatic penalty. *Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654, ¶ 31. Instead, CCBOE (1) issues a warning *and* (2)

gives the violator an opportunity to return the excess funds. *Id.* The ordinance contains a *scienter* requirement because a fine can only be imposed if one "knowingly violates it. *Id.* (citing Cook County Code of Ordinances § 2-602(d) (approved Oct. 5, 2016)).

4. Berrios Was on Notice and Complied with the Ordinance in the Past

Plaintiffs assert that the ordinance, as-applied by the CCBOE, is void for vagueness. The void-for-vagueness doctrine addresses at least two due process concerns: "(1) that regulated parties should know what is required of them so they may act accordingly; and (2) precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." Plaintiff's Memo in Support of Writ of *Certiorari* for 18-CH-4717 at 9 (citing *Fox Federal Communications Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012)). Defendants have shown that both parts of this void for vagueness are not appropriate for these two cases because: (1) Berrios knew what was required of him because he complied with the very ordinance, 2-585(b), before and (2) as stated above in the *quid pro quo* and as-applied sections, this ordinance is not arbitrary or discriminatory.

As of August 25, 2014, Berrios, as an individual, was aware of the Ordinance and its enforcement procedures because Berrios had previously complied with this exact ordinance. RA.018. Further, Berrios complied with this Notice of Excess Contributions when Berrios *returned* the excess contribution on September 8, 2014 to Walgreens Company. *Id.* at 21. Even two and a half years later, Berrios continued to comply with 2-585(b). *Id.* at 24-25. Berrios retuned two other contributions based on violations of 2-585(b) as recent as March 10, 2017. *Id.* at 27; 34.

The threat of losing the election for Cook County Assessor is what spurred Plaintiffs' new "constitutional" arguments for 2-585(b), in particular the facial and as-applied challenges to 2-585(b), was. It was not until September 2017, when the Illinois State Board of Elections received Fritz Kaegi's Notification of Self-Funding that Berrios started to contest 2-585(b). *Id.* at 130. When Kaegi challenged Berrios in the election and the threat of losing was on the horizon for Berrios, that this challenge to the *constitutionality* of 2-585(b) came up.

By alleging that Berrios and his Committees were acting in good faith and by advice of counsel by not returning the excess campaign contributions, Plaintiffs try to shield themselves from accountability for their actions. Plaintiff's Memorandum in Support of Writ of *Certiorari* for 18-CH-4717 at 18-19. Plaintiffs believe they acted in "good faith by following their counsels' advice not to return the contributions at issue." *Id.* But Plaintiffs' "good faith" claims are

disingenuous. As stated very clearly by this Court, Plaintiffs were aware of the ordinance, complied with the ordinance, knew the repercussions of the ordinance, and actively chose to violate the ordinance by refusing to return the excess contributions. Any "legitimate disputes" Plaintiffs had involving state election law, the constitutionality of the ordinance, and the applicability of 2-585(b) to lawyers and law firms that made excess contributions were self-created disputes done by Plaintiffs. *See id.* at 19.

IV. PETITION FOR WRIT OF *CERTIORARI*

These two cases 18-CH-4717 and 18-CH-6937 are both Writs of *Certiorari*. "A common law writ of *certiorari* is a general method for obtaining circuit court review of administrative actions when the act conferring power on the agency does not expressly adopt the Administrative Review Law and provides for no other form of review." *Finnerty v. Personnel Bd. of the City of Chicago*, 303 Ill. App. 3d 1, 8 (1st Dist. 1999). "The standards of review are essentially the same under a common law writ of *certiorari* and the Administrative Review Law." *Id.*

The standards of review for administrative review are as follows: "agency decisions involving mixed questions of fact and law are reviewed under a "clearly erroneous standard." *Lyon v. Dep't of Children & Family Servs.*, 209 Ill.2d 264, 271 (Ill. 2004). "A mixed question of law and fact asks the legal effect of a given set of facts." *Comprehensive Cmty. Solutions, Inc. v. Rockford Sch. Dist. No. 205*, 216 Ill. 2d 455, 472. "[I]n resolving a mixed question of law and fact, a reviewing court must determine whether established facts satisfy applicable legal rules" and an agency's conclusion on a mixed question of law and fact is reviewed for clear error. *Id.* "Such review is significantly deferential to an agency's experience in construing and applying the statutes that it administers." *Id.* "Under a clearly erroneous standard, the conclusion by the administrative agency "will not be reversed unless, after review of the entire record, we are left with the definite and firm conviction that a mistake has been committed." *Kinsella v. Bd. of Educ. of City of Chicago*, 2015 IL App (1st) 132694, ¶ 23 (1st Dist. 2015).

In Plaintiffs' Second Amended Complaint for Writ of *Certiorari* for 18-CH-4717, Plaintiffs seek review of CCBOE's "Notice of Determination" entered on January 8, 2018. RA.078. CCBOE determined that the 30 campaign contributions reported in the fourth quarter of 2016 and the four campaign contributions reported in the first quarter of 2017 by the Committee to Elect Joseph Berrios Cook County Assessor violated 2-585(b). RA.083. CCBOE ordered that

the Committee and Joseph Berrios pay a fine of $1,000 for failing to return the excess portions of the 30 contributions made in violation, for a total of $30,000. *Id.*

Plaintiffs also seek review in 18-CH-4717 for a separate Notice of Determination entered on January 8, 2018. RA.144. This second Notice of Determination is related to eleven campaign contributions reported in the first quarter of 2017 by the 31st Ward Democratic Organization in violation of 2-585(b). *Id.* CCBOE ordered that the 31st Ward Democratic Organization and Joseph Berrios to pay a fine of $11,000. RA.148.

Plaintiff's other case involves the Second Amended Complaint for Writ of *Certiorari* for 18-CH-6937, and Plaintiffs seek review of the Board's Notices of Determination issued on May 2, 2018. For 18-CH-6937, CCBOE determined whether 50 campaign contributions reported in the last three quarters of 2017 by the Committee to Elect Joseph Berrios Cook County Assessor were made in violation of 2-585(b). RB.198. CCBOE ordered that the Committee to Elect Joseph Berrios Cook County Assessor and Joseph Berrios pay a $50,000 fine. RB.204.

The second Notice of Determination subject to review for 18-CH-6937 was also issued on May 2, 2018. CCBOE reviewed whether 77 campaign contributions reported in the last three quarters of 2017 by the 31st Ward Democratic Organization were made in violation of 2-85(b). RB.445. CCBOE ordered that the 31st Ward Democratic Organization pay a total fine of $77,000. RB.451.

Plaintiffs' do not suggest what standard of review would be appropriate for these Writs of *Certiorari*. This Court is concerned with Plaintiffs' confusing allegations in the Complaint, but these Writs of *Certiorari* involves mixed questions of law and fact and will be reviewed under a clearly erroneous standard as stated above. *Lyon,* 209 Ill. 2d at 271.[15]

A. Jurisdiction Over the 31st Ward Democratic Organization

Plaintiffs claim the CCBOE lacked jurisdiction over contributions made to the 31st Ward Organization because the CCBOE has no authority to regulate political committees created under the Illinois Campaign Finance Act. *See Topinka v. Kimme,* 2017 IL App (1st) 161000 *9-10. Article 9 of the Election Code governs the "Disclosure and Regulations of Campaign Contributions and

[15] In this Court's two cases for Writ of *Certiorari*, Plaintiffs express concerns over the Hakim Affidavit and the Appellate Court's decision not to consider the Hakim Affidavit. *Berrios I,* ¶ 23. The Hakim Affidavit was attached to CCBOE's motion for summary judgment in *Berrios I.* Even if this Court was to consider the Hakim affidavit, it does not change the as-applied interpretation of the 2-585(b). Moreover, this Court does not believe that the Hakim affidavit would affect the requests for administrative review pursuant to the Writs of *Certiorari.*

Expenditures." 10 ILCS 5/9-1 (Lexis 2020). Section 9-8.5 of the Code allows a candidate political committee to accept contributions with an aggregate value of up to $5,600.00 but lifts that limitation against a self-funding candidate. Plaintiffs claim, without citing to any authority, that the Illinois State Board of Elections has exclusive authority and original jurisdiction over the regulations of campaign finances. Thus, Plaintiffs reason, the CCBOE lacked any authority to compel the 31st Ward Organization, as a political party committee, to refund campaign contributions or levy fines.

Plaintiffs claim it is clear error for the CCBOE to claim jurisdiction over the 31st Ward Organization based upon a 2010 D-1 Statement of Organization that listed Berrios as the candidate it was supporting, especially given the 2/4/13 amendment to the D-1 Statement that is devoid of any reference to candidates. Importantly, Plaintiffs point out that all the contributions to the 31st Ward Organization at issue took place after 2/4/13. Plaintiff's Supplement Brief in Support of Writ of *certiorari*, Ex. B.

Plaintiffs primarily rely upon the case of *Topinka v. Kimme* for the proposition that the exclusive jurisdiction regarding campaign finance matters rests with the Illinois State Board of Elections. 2017 IL App (1st) 161000. In *Topinka* the husband of the deceased State Comptroller, Topinka, sued the committee created to support Topinka's political campaigns, seeking funds. *Id.* Appellate Court found that administrative remedies must be exhausted prior to judicial review and that, for matters involving the State Board of Elections judicial review goes straight to the appellate court. *Id.* at *14. This case is distinguishable for two main reasons, (1) the plaintiff in *Topinka* tried to bypass the administrative system and go straight to court, failing to exhaust their administrative remedies, unlike here where a full hearing was held, and (2) it involves a state government position, as opposed to a county position.

Plaintiffs also claim the Ethics Ordinance in Section 2-585(b)(3) limits regulation to political committees established in relation to individuals, bringing the 31st Ward Organization out of its jurisdiction. *See* Cook County Ordinance No. 16-5326, § 2-585(b) (amended October 5, 2016) (Ethics Ordinance or Ordinance). The Ordinance states, in pertinent part

> No person who does business with the County or. . . has sought official action by the County. . . shall make contributions in an aggregate amount exceeding $750.00. . . (3) To any local, state, or

> federal political committee that is established in support of, a specific candidate for County office or an elected County official. *Id.*

Plaintiffs point out that the 31st Ward Organization is registered as a political party committee under the Illinois Campaign Finance Act. The Campaign Finance Act defines a "candidate political committee," in pertinent part, as the candidate or any entity designated by the candidate that accepts contributions or makes expenditures during any 12-month period exceeding $5,000.00 on behalf of the candidate. 10 ILCS 5/9-1.8(b). Whereas "political party committee" is defined as, in pertinent part, a committee formed by a ward of a political party. 10 ILCS 5/9-1.8(c). Since the 31st Ward Organization is a registered political party committee, Plaintiff claims, then the CCBOE has no jurisdiction over it.

Although on paper the 31st Ward Organization claims it supports the Democratic Party, it is clear that it *de facto* supports Joe Berrios' candidacy. This is partly shown through the 31st Ward Organization's D-1 form which shows Joe Berrios' name crossed out in the committee name form. RA.383-84. Moreover, Section 7 of the D-1 form lists Joe Berrios as the sole candidate the Committee is supporting. *Id.* Even taking judicial notice of the updated D-1 form from 2014, which lacks the cross-out in the committee name, Section 7 still only lists Joe Berrios as the sole candidate supported. *See* Plaintiff's Supplement Brief in Support of Writ of *Certiorari*, Ex. B. And even more probative is that fact that, from all the funds the 31st Ward Organization collected from July 2017 to June 2018, $490,225.00, or almost 97% of its collections, went to Berrios. *See* Defendant's Supplemental Brief in Support of their Opposition to Plaintiff's Petitions for Writ of *Certiorari*, Group Exhibit A (31st Ward Organization's D-2 Quarterly Reports).[16] Lastly, Plaintiffs own language makes clear that the 31st Ward Organization was formed to help Joe Berrios and is *de facto* a candidate political committee. The Second Amended Complaint states "Plaintiff 31st Ward Democratic Organization is an organization *established to support Plaintiff Berrios' candidacy for office.*" Second Amended Complaint for 18-CH-4717, ¶ 15, emphasis supplied; Second Amended Complaint for 18-CH-6937, ¶ 14, emphasis supplied.

It is clear that what distinguishes a "candidate political committee" from a "political party committee," according to their mutual definitions, is whether a given committee supports a specific

[16] A court can take judicial notice of matters that are readily verifiable from sources of indisputable accuracy, such as public records. *City of Centralia v. Garland,* 2019 IL App (5th) 180439 *10.

candidate as opposed to anyone within the party. *Compare* 10 ILCS 5/9-1.8(b) (defining candidate political committee) *with* 10 ILCS 5/9-1.8(c) (defining political party committee). The record shows that the 31st Ward Organization's D-1 form states it is only supporting Joe Berrios. And having taken judicial notice of the 31st Ward Organizations D-2 Quarterly reports it becomes even more clear that it was formed to funnel more money into Berrios' campaign. Lastly, via the Second Amended Complaint, Plaintiffs admit it was formed to support Berrios' candidacy for office. Plaintiffs form over function argument is unpersuasive, this Court finds no error by the CCBOE and finds that the CCBOE's findings are supported by the manifest weight of the evidence. It is clear the CCBOE, and this Court, have jurisdiction over the 31st Ward Organization.

B. Writ of *Certiorari* Review for 18-CH-4717

Upon Review of the entire record, this Court must now determine "with the definite and firm conviction that a mistake has been made" regarding CCBOE's Final Order entered on March 2018. *Kinsella,* 2015 IL App (1st) 132694, ¶ 23; 2ACompl.A. ¶ 23.

Plaintiffs allege "[u]nder the Board's reasoning set forth in its Notices of Determination, section 2-585(b) prohibits any attorney or law firm who practices before Cook County courts or agencies from donating more than $750 to any candidate holding or seeking public office in Cook County." 2ACompl.A ¶ 82. These allegations about 2-585(b) were previously addressed in the as-applied analysis in Section III. As-Applied Constitutional Challenge.

To reiterate, Plaintiffs' allege that "official action" applies to a broad of a group of attorneys and law firms, but this argument is not supported by any part of the Administrative Record. This allegation is also not supported by the as-applied analysis stated above. Plaintiffs' huge leap and incorrect interpretation that "any attorney or law firm that practices before Cook County courts or agencies" is seeking "official action" from Cook County. This interpretation and attempt to misconstrue the Record for 18-CH-4717 has been addressed by the Appellate Court in *Berrios I,* where they clearly define "official action." *Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654, ¶ 19.

With an election looming, Plaintiffs had the opportunity to comply with the ordinance and the appropriate remedies but chose not to. This number of Plaintiffs' violations only continued to rise as the election progressed, Berrios' questionable chances of winning the election created higher stakes, and the need for more contributions became dire. In total, Plaintiffs violated

2-585(b) at least 168 times. Defendant's Supplemental Response Brief at 6; RA.083;148; RB.204;451. CCBOE imposes fines of $1,000.00 per each violation against Plaintiffs for the 168 total violations of the Ordinance. *Id.* The total amount of fines incurred by Committee to Elect Joseph Berrios Cook County Assessor, the 31st Ward Democratic Organization, and Joseph Berrios for both cases, 18-CH-4717 and 18-CH-6937, equal $168,000.

Plaintiffs assert that "[g]ood cause exists for issuance of a writ of *certiorari* because CCBOE's decision to fine Plaintiffs is contrary to law and arbitrary. 2ACompl.A. ¶ 82. The Record does not support this contention. Section 2-602(d) of the Ethics Ordinances imparts the Board with the discretionary power to levy fines. It states:

> The Board may impose a fine of up to $1,000.00 per offense on any person, including officials or candidates, found by the Board to have knowingly violated any provision of this article other than Section 2-574 or 2-583, to have knowingly furnished false or misleading information to the Board or to have failed to cooperate with an investigation under this article. Ethics Ordinance, Sec. 2-602(d).

The total fines levied against Plaintiffs in both cases before this Court ('4717 and '6937) are $168,000.00. The Board found that Plaintiffs knowingly engaged in violations of the County's campaign finance rules because Plaintiffs refused to return the contributions at issue within 30 days of having received the Notices of Violation. RA.080-83; RB.204, 451. Essentially the Board warned Plaintiffs, by issuing the Notices of Violation, that they were violating the Ordinance, and if they did not fix their behavior, *e.g.*, return the excess contributions, there would be repercussions. A format the CCBOE uses for all its dealings, and one which the Plaintiffs had complied with in the past. RA.82.

Plaintiffs claim that because there were "legitimate disputes" about the enforceability of the ordinance and authority of the Board when the Notices of Violation issued, then there could be no knowing violation. Plaintiffs support for this novel proposition is solely documents drafted by Plaintiffs' previous counsels. *See* RA.005-11 (08/21/17 Letter from James P. Nally), RA.314-20 (the same 08/21/17 Letter from James P. Nally), RA.365-76 (Plaintiffs Memorandum in Opposition to Notice of Excess Contributions, dated 01/08/18). Plaintiffs argue that because they had a good faith belief (1) the Illinois State Election Code superseded the Cook County Ethics Ordinance; (2) the Cook County Ethics Ordinance was unconstitutional; and (3) Section 2-585(b) of the Ethics Ordinance did not apply to the contributions at issue, then the fines levied against

them are arbitrary and excessive. This self-serving argument is entirely unsupported, Plaintiffs fail to cite a single case in support of this irrational proposition. The only arguably precedential document Plaintiffs use is a 2010 Advisory Letter by the Office of the State's Attorney that answers a question specific to the Board of Review. RA.008-011.

Defendants are correct that the State's Attorney letter is outdated and inapplicable to the issues in this case, and point out that Plaintiffs repeatedly complied with the Ethics Ordinance, including refunding excess contributions, before deciding it was not in their best interests to comply.

The facts in these cases are not disputed. Plaintiffs admit they were notified by the CCBOE of the violations of the ordinance. That Plaintiffs chose to gamble on litigating whether the Ordinance was valid does not act as a shield in this matter. Moreover, the second set of notices issued by the CCBOE in March of 2018 were sent to Plaintiffs a full-two weeks after the Circuit Court issued its ruling in *Berrios I.* RB.123-26. Despite *Berrios I* clearly setting forth the validity of the Ordinance, Plaintiffs still chose not to comply. Until a court order is overturned or rendered obsolete through legislation, it is binding and enforceable. Merely because a party may not agree with any given court order does not mean they get to ignore it, nor are they free from the consequences of failing to follow it. *See Cheek v. United States,* 498 U.S. 192, 206 (1991). A party's view about the validity of a given statute is irrelevant to the issue of willfulness. *See Id.* Although a party has the right to assume that an ordinance is valid and proceed thereunder, there is no corresponding right to assume an ordinance is invalid and proceed in violation thereof. *City of Elgin v. All Nations Worship Ctr.,* 369 Ill. App. 3d 664, 669 (2d Dist. 2006). To allow otherwise would make a mockery of the courts.

Plaintiffs argument that they did not "knowingly" violate the ordinance is self-serving and incorrect. Plaintiffs were aware of the CCBOE's interpretation of the ordinance, which, similar to a court order, is binding until overturned. Plaintiffs had complied with the CCBOE method before and avoided fines. RA.82. Plaintiffs were aware of the Circuit Court's ruling as to the Ordinance, and still chose not to follow the established interpretation of the Ordinance as to the second set of notices. RB.204. And to this day, after *Berrios I* was affirmed by the Appellate Court and appeal was denied by the Illinois Supreme Court, there is no evidence in the Record that Plaintiffs have complied with the Ordinance and returned the funds, even when the donors asked them to.

An unambiguous term in a statute or ordinance is given its plain and ordinary meaning. *Kagan v. Waldheim Cemetery Co.,* 2016 IL App (1st) 131274 *68. The word "knowingly" does have a plain and ordinary meaning, it means "awareness or understanding; well-informed, deliberate; conscious." *Id.* Citing Black's Law Dictionary 888 (8th ed. 2004) (cleaned up quotation). Defendants are correct that the fine provisions of the ordinance, like the substantive provisions establishing standards of ethical conduct, are presumptively valid. *See Express Valet, Inc. v. Chicago,* 373 Ill. App. 3d 838, 854 (1st Dist. 2007). Plaintiffs, indisputably, were well informed as to the CCBOE interpretation of the Ordinance, and later were even better informed after Judge Tailor issued his opinion in *Berrios I.* Plaintiffs sole argument that the fines were levied in a punitive, arbitrary, and excessive manner rests on this imagined defense claiming that because Plaintiffs did not agree and sought judicial action, then Plaintiffs are free from consequences *even though they were wrong.* That is not how the judicial system works.

Fines are only assessed if a candidate fails to return the excess contributions within 30 days after notification from the CCBOE. Here Plaintiffs refused, and still have not, returned the excess contributions. Importantly, all of Plaintiffs arguments about the inequity of having to compete against a "self-funding" candidate are unpersuasive for the simple and clear reason Plaintiffs unethical conduct and the first CCBOE notice of violation related to that conduct happened almost two months before the notice of the self-funding competitor issued. *Compare* RA.001-04, 311-313 (first series of CCBOE Notices of Excess contribution dated 07/21/17) *with* RA.130 (Illinois State Board of Elections notice of self-funding dated 09/30/17). And, it should be noted, even though the maximum fines were assessed against Plaintiffs, the amount of excess contributions far exceeds the amount of the fines. Fiscally, that means it was to Berrios' benefit to keep the excess contributions and challenge the fines. RA.81, 379, RB.203, 450.

Berrios made no good faith effort to save the money during the pendency of his various court cases – the funds were not put in escrow. Of course, the ultimate good faith effort would have been to return the excess contributions, stop collecting excess contributions, and then wait for *Berrios I* to be fully decided with all appeals exhausted. RA.304, 600.[17] Instead, Berrios spent the funds and still has made no move to repay the excess or, at minimum, put it in escrow until all litigation is over. The fines imposed by the CCBOE are a deterrent, and a clearly necessary one at

[17] A method the Record shows other public officials adopted.

that. The fines are neither arbitrary nor capricious, and are supported by the manifest weight of the evidence.

As to the first set of fines (18-CH-4717), the Board issued the maximum fine per penalty ($1,000/excess contribution), for a total amount of $41,000.00. RA.078-88, 377-84. The amount of the excess contributions themselves totaled $62,250.00.[18] RA.081, 379. This means that even if Berrios had paid the fines, which again, he did not, he still gets an extra $21,250.00 for his campaign. And it is clear that the Board carefully considered each excess contribution and their decision, given the fact that the Board removed several of the alleged excess fines before issuing the final determination. RA.80 n.1, 379 n.2. This shows the Board's restraint, attention to detail, and caution in their consideration of whether levying fines would be appropriate. Given these facts, it is extremely reasonable for the Board to impose the maximum fine under the ordinance.

And particularly as to the later set of fines (18-CH-06937), the Board's decision is exceedingly clear and well-reasoned. A total fine of $127,000.00 was issued. RB.203, 450. But again, the amount of excess contributions, $258,250.00, far exceeded the fines themselves. RB.203, 450. This means that even if Berrios had paid the fines, which again, he did not, he would have been up $131,250.00. And again, this is after the Board went through the excess contributions and removed some before issuing their decision. RB.200 n.1, 203 n.2, 447 n.2-3. As the Board stated in its decision,

> Clearly, the Board's enforcement efforts with respect to the excessive contributions made in the first quarter of 2017 [Case 18-CH-04717] did not have a deterrent effect upon the Committee or Berrios's fundraising efforts from "official action seekers" in the final three quarters of the year. Treating the more recent violations more leniently than the prior violations would send the wrong message – *i.e.*, that delay and litigation tactics can help County officials and candidates for County office avoid their obligations to comply with the Ethics Ordinance, and/or avoid consequences when they flout those obligations. That would be particularly inappropriate given that the Board waited to enforce these violations until after the Circuit Court soundly rejected Berrios's constitutional arguments against Section 2-585, such that any legal grounds for continuing to defy the Board's compliance efforts are tenuous at best. RB.451.

[18] The Court wishes to make clear these amounts only reflect what is *excess* over the allowed contributable amount. These figures do not reflect the total amount of contributions.

Lastly, Berrios was given an explicit opportunity to articulate any "mitigating factors," before the Board. RA.304, 600. But he failed to present any, stating, he "relied on state campaign finance limits in good faith and on the advice of counsel." RA.304, 600.

Plaintiffs also allege that CCBOE "is targeting certain attorneys and law firms for enforcement (those who appear before the Assessor or Board of Review), but not other attorneys who request non-ministerial acts from County officials or agencies." 2ACompl.A. ¶ 137. Once again, the Record does not support Plaintiffs' allegations that CCBOE is targeting a specific type of attorney or law firm. A plain reading of the language 2-585(b) and a reading of *Berrios I* show that the ordinance has simply been enforced by CCBOE against those attorneys and law firms that have sought "official action." *See Berrios v. Cook Cty. Bd. of Commr's*, 2018 IL App (1st) 180654, ¶ 19. Plaintiffs failed to show any "targeting" that CCBOE did towards a specific individual attorney or law firm related to their excess contributions. It is clear from the Record and in *Berrios I* that those seeking "official action" are required to comply with the clear rule set out in 2-585(b). In addition to attorneys and law firms seeking "official action," Berrios and his various entities, the Committee to Elect Joseph Berrios Cook County Assessor, the 31st Ward Democratic Organization, the Plaintiffs, are also required to comply with 2-585(b). Nothing in the Record for 18-CH-4717 shows that the fines imposed were excessive or arbitrary for the January 8, 2019 Notices of Determination.

C. Writ of *Certiorari* Review for 18-CH-6937

While the Complaints for both Second Amended Writs of *Certiorari* are nearly identical, this Court notes that Plaintiffs in case 18-CH-6937 sought review of the Notices of Determination from May 2, 2018. Second Amended Complaint for 18-CH-6937 (2ACompl.B.) at 10. These Notices of Determination from May 2, 2018 were still subject to the same 2-585(b) ordinance, and that same ordinance was in place for the violations related to case 18-CH-4717. The Board found that 50 contributions to the Committee to Elect Berrios and 77 contributions to the 31st Ward Organization exceeded the $750 limit in section 2-585(b). 2ACompl.B. ¶ 10. Because Berrios, the Committee to Elect Berrios, and the 31st Ward Organization did not return these contributions within 30 days of having received the notice of the violations, the Board imposed a fine of $50,000 jointly upon Plaintiff Berrios and the Committee to Elect Berrios, and a fine of $77,000 jointly upon Plaintiff Berrios and the 31st Ward Organization. *Id.*

Plaintiffs make the same constitutional and substantive allegations for why they believe the May 2, 2018 Notices of Determination were "arbitrary," "unconstitutional as-applied and on its face," and "not narrowly tailored to prevent *quid pro quo* corruption." 2ACompl.B. ¶¶ 87; 109; 127. Again, this Court notes that there is nothing provided in the Record to show under a clearly erroneous review standard that that the May 2, 2018 Notices of Determination were excessive or arbitrary. The same analysis of fines as discussed in the above section applies. The Board acted reasonably, its decision is not clearly erroneous, and its decision is supported by the manifest weight of the evidence.

IT IS HEREBY ORDERED:

Defendants' Motion to Quash Plaintiff's R.237(b) request is granted.[19]

Plaintiffs Petition for Writ of *Certiorari* is denied.

The Board is Affirmed.

This is a final and appealable order.

Judge Anna Helen Demacopoulos

FEB 26 2020

Circuit Court - 2002

ENTERED:

Anna H. Demacopoulos

Judge Anna H. Demacopoulos, 2002

[19] *See Cohn v. Northern Trust Co.*, 250 Ill. App. 3d 222, 227-28 (1st Dist. 1993).