NO.

IN THE

Supreme Court of the United States

LOUIS CAPRA, SATKAR HOSPITALITY INC.,
SHARAD K. DANI, AND HARISH DANI

Petitioners,

v.

COOK COUNTY BOARD OF REVIEW,
LARRY ROGERS, JR., JOSEPH BERRIOS,
BRENDAN F. HOULIHAN, SCOTT M. GUETZOW,
JOHN P. SULLIVAN, THOMAS A. JACONETTY

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under this Court's decisions in *Hibbs v. Winn*, 542 U.S. 88 (2004) and *Commerce Energy, Inc. v. Levin* 130 S. Ct. 2323 (2010), what is the scope of the principle of comity in relation to the Tax Injunction Act, 28 U.S.C. § 1341, when state tax schemes are alleged to violate Equal Protection, the First Amendment, and Due Process?

PARTIES TO THE PROCEEDING

Louis Capra was an original plaintiff in the trial court. Satkar Hospitality, Inc.; Harish Dani; and Sharad Dani are original plaintiffs in the trial court. Louis Capra was an appellant before the Seventh Circuit Court of Appeals. Satkar Hospitality; Harish Dani; and Sharad Dani were appellees and cross-appellants before the Seventh Circuit Court of Appeals. All the appellants and cross-appellants join as petitioners to this Court.

The Cook County Board of Review; Larry Rogers Jr.; Joseph Berrios; Brendan F. Houlihan; Scott M. Guetzow; John P. Sullivan; and Thomas A. Jaconetty are all original defendants in the trial court against all the plaintiffs. All the original defendants were appellees against the appellant Louis Capra before the Seventh Circuit Court of Appeals. All the original defendants were cross-appellees and appellants against Satkar Hospitality, Inc.; Harish Dani; and Sharad Dani before the Seventh Circuit Court of Appeals.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners state that Satkar Hospitality, Inc., is a privately held company incorporated under the laws of the State of Illinois and that it is wholly owned by Sharad Dani.

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PETITION FOR A WRIT OF CERTIORARI

Louis Capra, Satkar Hospitality, Inc., Harish Dani and Sharad Dani respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is not reported and is included below at Petitioners' Appendix 1a-27a. The opinion of the district court in Louis Capra is not reported and is included below at Petitioners' Appendix 28a-40a. The opinion of the district court in Satkar Hospitality is reported at 819 F. Supp. 2d 727 (N.D. Ill. 2011) and included below at Petitioners Appendix 41a-63a.

JURISDICTION

The Court of Appeals entered its judgment on August 21, 2013. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioners allege that the Respondents violated their rights under the United States Constitution's Fourteenth Amendment, Section 1, which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any

> law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioners allege that the Respondents violated their rights under the United States Constitution's First Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATUTORY PROVISIONS INVOLVED

The Tax Injunction Act, Section 1341 of Title 28 of the United States Code, provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

Petitioners brought the underlying action under 42 U.S.C. § 1983, which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

> District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

INTRODUCTION

The Tax Injunction Act, 28 U.S.C. § 1341 reads, "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts."[1] The language of this statute would seem to deprive federal courts of discretion over jurisdiction in matters involving state and local taxes. This Court in *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981) erected a high bar against section 1983 suits

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[1] 28 U.S.C. § 1341 (2006).

involving state tax systems as to preclude them from being brought in federal court based on the principle of comity. Then in *Hibbs v. Winn*, this Court held that the Tax Injunction Act permits relief in federal court where the relief requested would result in an increase in-state or local tax revenue. What this Court has not addressed is whether comity alone requires that federal courts abstain from jurisdiction over state or local tax matters cases brought under § 1983 when § 1341 may allow jurisdiction.

The Tax Injunction Act was enacted by Congress in part to prevent people from using the federal courts to delay paying their taxes.[2] As discussed in *Hibbs v. Winn*, according to a Senate report, the Tax Injunction Act was intended to serve two different, but related purposes: 1) to "eliminate disparities" between in-state and out-of-state taxpayers, and 2) "to stop taxpayers, with the aid of federal injunction, from withholding large sums, thereby disrupting state government finances."[3]

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[2] *Hibbs v. Winn*, 542 U.S. 88, 105-06 (listing cases in which the Tax Injunction Act has been applied).

[3] *Id.* at 104 construing Senate Report No. 75-1035, at 1 (1937). Also in this Senate report, "*It is the common practice for statutes of the various States to forbid actions in State courts to enjoin the collection of State and county taxes unless the tax law is invalid or the property is exempt from taxation, and these statutes generally provide that taxpayers may contest their taxes only in refund actions after payment under protest. This type of State legislation makes it possible for the States and their various agencies the survive while long-drawn-out tax litigation is in progress."*

The Tax Injunction Act does not apply to the Petitioners because they have paid the taxes that are the basis of their complaints and are seeking relief from an unconstitutional process by which property taxes are assessed at the local and state level—not a reduction or delay in their assessed and already paid taxes.

What is more, there is no plain, adequate, efficient or complete forum at the state or local level for the Petitioners in this case because of the unique nature of Cook County Illinois, by which the Petitioners can reasonably expect justice.

The resolution of whether comity is a bar to federal court for litigants even where § 1341 is not is an important matter and because of the split among the courts of appeal, one that presently invites different outcomes depending upon where a litigant is situated. As this Court noted in *Hibbs v. Winn*, after its decision in *Brown v. Board of Education*,[4] certain southern states used tax credit policies to attempt to avoid this Court's mandate in *Brown*.[5] This Court stated in *Hibbs* that when § 1983 claims were brought post-*Brown*, the Tax Injunction Act was not a bar to their being heard in federal court.[6] The Tax Injunction Act was not a bar to the federal

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[4] *Brown v. Board of Education*, 347 U.S. 483 (1954)

[5] *Hibbs*, 124 S.Ct. at 2281.

[6] *Id.* (citing *Griffin v. County School Board* 377 U.S. 218 (1964) granting tax credits to private schools

courts enforcement of the Establishment Clause in *Hibbs*.[7]

This Court's recent decision in *Commerce Energy, Inc. v. Levin* does little to clarify the scope of comity but instead seems to indicate that the courts of appeal have misread *Hibbs*.[8] In *Commerce Energy*, the Court stated that *Hibbs* did not preclude federal court jurisdiction under the Tax Injunction Act because it was grounded on the Establishment Clause. This decision seems to suggest that comity after *Commerce Energy* forecloses federal court to all litigants in cases involving state tax schemes unless such cases implicate the Establishment Clause and only the Establishment Clause—thus making red-headed stepchildren of every other interest or right protected by the United States Constitution. In the aftermath of *Commerce Energy*, the scope of comity remains unclear.

In this case, the Petitioners are seeking enforcement in the only forum in which they can hope to secure it for rights that are no less important than the Establishment Clause—their First Amendment, Due Process and Equal Protection rights.

This Court's immediate review is warranted to address the scope of comity and federalism in relation to the Tax Injunction Act and to resolve the

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[7] *Hibbs*, 542 U.S.88, 107 n.9 (2004).

[8] *Levin v. Commerce Energy, Inc.* 130 S. Ct. 2323, 2335-36 (2010) (noting that the Hibbs Court sought to "convey only that the Establishment Clause-grounded case cleared both the TIA and comity hurdles.")

remaining split among the federal courts of appeals on the question of whether comity and federalism apply beyond the Tax Injunction Act.

STATEMENT

A. Regulatory Background

The principle of comity is the deference federal courts have for state courts. This doctrine was articulated by this Court in *Younger v. Harris* as a "proper respect for state functions" and was meant to ensure that federal courts do not, "unduly interfere with the legitimate activities of the states."[9] *Fair Assessment in Real Estate Assoc., v. McNary*, extended comity as the, "traditional doctrine that courts of equity will stay their hand when remedies at law are plain, adequate, and complete."[10] In *McNary*, Justice Rehnquist writing for the majority concluded that The Court could not intervene to review parts of Missouri's property tax scheme that were challenged as depriving the plaintiffs of equal protection and due process of law because a successful challenge would disrupt Missouri's tax scheme and thereby interfere with an important state function.[11] *McNary* expressed the concern that

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[9] *Younger v. Harris*, 401 U.S. 37, 44 (1971).

[10] *Fair Assessment in Real Estate v. McNary*, 454 U.S. 100, 108 (1981)

[11] *Id.* at 115-116. The majority opinion while discussing the Tax Injunction Act did not use it as the basis for its decision but used the principle of comity instead.

comity counseled restraint in relation to decisions having to do with state taxes:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it." *Id.* (Emphasis added.)

Thus, the Supreme Court reasoned (quoting an earlier decision, *Boise Artesian Water v. Boise City*, 213 U.S. 276 (1909)) that there exists "a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."[12] *McNary* adopted the "plain, adequate, and complete" language in its ruling that the principles of comity usually prevent federal courts from hearing matters related to state and municipal taxes.[13] It saw "no significant difference," between the prior usage of that term and its usage with respect to the federal courts' reluctance to interfere with state and municipal taxes.[14]

McNary does not stand for the proposition that no federal court can hear matters pertaining to state

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[12] *Id.* at 109, citing *Boise Artesian* at 282.

[13] *Id.* at 116.

[14] *Id.*, footnote 8.

taxes (even if the existence of an adequate remedy at the state level can be assumed) for the simple reason that the Supreme Court does hear appeals, upon writs of certiorari, from state supreme courts.[15]

Boise underscored "that it must not be forgotten that the legal remedy must be as complete, practicable and efficient as that which equity could afford."[16] The corollary would be that state remedies must be as complete, as practical, and as efficient as the Northern District of Illinois. For example, this Court, prior to *McNary*, determined that New Jersey's system for adjudication of alleged discriminatory assessment of property taxes was not to reassess the petitioner's own burden; "His remedy is restricted to proceedings against other members of his class for the purpose of having their taxes increased."[17] Though *Cromwell* predated *McNary* by quite a few years, it is still cited as a standard for when a state's adjudication system constitutes a "plain, adequate, and compete" remedy.[18]

In *Hibbs v. Winn*, 542 U.S. 88 (2004), the Supreme Court determined that federal courts did have jurisdiction to hear complaints regarding tax credits on Establishment Clause grounds. While this case does not involve the Establishment Clause of

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[15] See *Alleghen Pittsburg Coal v. County Commission of Webster Cty.*, West Virginia, 488 U.S. 335 (1989).

[16] *Boise*, 213 U.S. at 281.

[17] *Hillsborough v. Cromwell*, 326 U.S. 620 (1946).

[18] See *United States v. Rural Electric Convenience Cooperative*, 922 F.2d 429 (7th Cir. 1991).

the First Amendment, it does involve Due Process, Equal Protection and First Amendment claims that are similar in their constitutional source, and in their ambit, to claims falling under the Establishment Clause and not *per se* bearing a lower rank in a putative constitutional hierarchy. The *Hibbs* decision recognized the importance of suits under § 1983 to right the constitutional wrongs that have sometimes been perpetrated by states:

> "It is hardly ancient history that States, once bent on maintaining racial segregation in public schools, and allocating resources disproportionately to benefit white students to the detriment of black students, fastened on tuition grants and tax credits as a promising means to circumvent *Brown v. Board of Education*, 347 U. S. 483 (1954). The federal courts, this Court among them, adjudicated the ensuing challenges, instituted under 42 U.S.C. § 1983, and upheld the Constitution's equal protection requirement." *Id.* at 93.

Therefore, even in the context of principles of comity, the Supreme Court has recognized the possibility that certain state or local court systems were incapable of providing substantial justice. Indeed, that concern was the very reason that 42 U.S.C. § 1983 was passed. *see Monroe v. Pape*, 365 U.S. 167, 174 (1961) "[the aim of § 1983] was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice."

In *Commerce Energy, Inc. v. Levin*, the Court reiterated *McNary* in stating that, "comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction."[19] This Court also suggested that *Hibbs* did not foreclose federal court jurisdiction because it implicated the Establishment Clause.[20] What remains perfectly unclear is whether the doctrine of comity, as articulated by The Court in *McNary*, removes federal jurisdiction under comity even for cases in which the federal courts do have jurisdiction.

B. Split Among the Courts of Appeal

This Court has not answered the question of whether the federal district courts may exercise jurisdiction in cases where § 1341 permits jurisdiction. This has led to a split among the federal courts of appeal. In the Fourth and Tenth Circuits, comity and federalism are invoked to constitute a bar to federal court for plaintiffs even in instances where the Tax Injunction Act would not be a bar. By contrast, in the First, Sixth and Seventh Circuits, comity does not deprive a plaintiff of being in federal court if the Tax Injunction Act is not a bar to jurisdiction.

Before this Court's 2010 decision in *Commerce Energy* and in its aftermath, the split between the Circuit Courts of Appeal on whether comity removes federal jurisdiction even if a case is not barred from

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[19] *Levin v. Commerce Energy, Inc.,* 560 U.S. 413, -, 130 S. Ct. 2323, 2330 (2010).

[20] *Id.*

federal jurisdiction by the Tax Injunction Act remains.

In *DIRECTV, Inc. v. Tolson*, the Fourth Circuit concluded that the principle of comity was broader than any jurisdictional limit imposed by the Tax Injunction Act and dismissed the plaintiffs' claims based on comity.[21] In *DIRECTV, Inc.,* plaintiff satellite providers brought suit in federal court under the dormant Commerce Clause alleging that a state tax scheme constituted an unconstitutional subsidy for cable television providers.[22] The Fourth Circuit ruled that *Hibbs* did not limit the principle of comity because comity "was simply not before the Supreme Court in *Hibbs*."[23]

The Tenth Circuit in *Hill v. Kemp*, declined to consider the plaintiffs' case in which the plaintiffs alleged that Oklahoma's pro-life license plates discriminated against supporters of abortion rights.[24] The Tenth Circuit decided that *Hibbs* did not create an exception to the Congress' prohibition through the Tax Injunction Act of federal court interference in state tax schemes, whether the

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[21] *DIRECTV, Inc. v. Tolson*, 513 F.3d 119, 127 (4th Circuit 2008) holding that, "comity principle underlying the TIA is broader than the Act itself, and its scope is not restricted by [the TIA]."

[22] *Id.* at 123

[23] *Id.* at 128

[24] *Hill v. Kemp*, 478 F.3d 1236, 1239 (10th Cir. 2007).

plaintiffs would increase or decrease state tax revenue.[25]

By contrast in *Levy v. Pappas*, the Seventh Circuit Court of Appeals dismissed the Plaintiffs' claims on the basis that granting them would decrease state revenue and therefore be a jurisdictional bar invoking *McNary*,

> "In the end, it is not how Levy has described his complaint, but what relief he ultimately seeks, that matters. We must determine whether his claims are more like those in *Hibbs* or those in *Fair Assessment*. If the relief sought [would operate] to reduce the flow of state tax revenue or would tie up rightful tax revenue, then the [Tax Injunction] Act bars federal jurisdiction over the claims."[26]

In *Levy,* the Seventh Circuit conflates comity and the Tax Injunction Act as having the same reach in terms of being bars to jurisdiction in federal court. What the Seventh Circuit did not address in *Levy* was a situation where a state tax scheme would not fall under the Tax Injunction Act and whether comity would still be a bar to barrier to federal jurisdiction.[27]

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[25] *Id.* at 1250 where court stated, "there is nothing in [the Tax Injunction Act] or Hibbs suggesting that federal courts can entertain challenges to state taxes on the basis of predictive judgments that doing so will not harm state coffers"

[26] *Levy v. Pappas* 510 F.3d 755, 762 (7th Cir. 2007).

[27] *Id.*

Similarly, the First Circuit in *Coors Brewing v. Mendez-Torres*, found that comity was not a bar to federal court jurisdiction when plaintiffs did not seek to arrest state tax collection.[28]

However, the Seventh Circuit in this case, acknowledges the existence of this ambiguous state of affairs when it remarks that this Court has not resolved the reach of comity where a federal court may have jurisdiction.[29] (App. 16a)

C. Facts

In their complaints in district court, the Plaintiffs/Petitioners alleged that the Defendant, the Cook County Board of Review ("BOR") increased Plaintiffs' property taxes in retaliation for Plaintiffs' perceived relationship with State Representative Paul Froehlich.

Satkar is an Illinois Corporation that owns operates and manages a Wingate Hotel in Schaumberg, IL. Satkar is owned and operated by Sharad Dani and Harish Dani. Louis Capra is a business owner in Cook County, Illinois, who also owns property in Cook County.[30]

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[28] *Coors Brewing Company v. Mendez-Torres*, 562 F.3d 3, 18 (2009).

[29] Petitioners' Appendix 16a, footnote 6: "In *Werch* we said that the court lacked "jurisdiction" to hear such a claim, but the Supreme Court has not been clear on whether *Fair Assessment* removes such suits from federal jurisdiction or rather precludes courts from hearing certain cases even though they might fall within their jurisdiction."

[30] The facts of Petitioner Capra's federal complaint mirror

The Cook County Board of Review's role is to hear appeals of property tax valuations and the Illinois Constitution mandates that the BOR render its valuations in a uniform manner.

From May through July of 2009, and for several months thereafter through December 2009, a local Fox News affiliate began to run a story on their local television station alleging that Illinois State Rep. Paul Froehlich was engineering successful Board of Review appeals for his constituents in return for large campaign contributions. The story originated from a political blog, where the accusations of guilt by association to Rep. Froehlich, considered a political pariah by the blog for switching political parties, ran rampant.

Seemingly in response to the reports, and for the appearance of clean hands in light of an actual investigation of the BOR itself, the BOR decided to find a scapegoat. The BOR required Plaintiffs to appear and answer questions regarding their relationship with Paul Froehlich at an impromptu "hearing" ostensibly about their property valuations.

While the Plaintiffs had the impression that the Defendants were interested in finding out what their property was worth and presented evidence that the Hotel had lost revenue and that occupancy levels were down from 2007 through 2008 as part of the larger economic downturn and financial crisis, the

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those of the other Petitioners with one distinction: Petitioner Capra did not know State Representative Paul Froehlich but was presumed by the BOR to have known him.

Defendants, ignored the evidence and said simply, "we can do anything we want."

The Defendants without offering any reason, rescinded the lower assessments that they had themselves produced only months before. Defendant Guetzow explained that the Board's position regarding the assessments, "was a larger issue between the relationship between the people involved" (in other words, the relationship or perceived relationship between Plaintiffs and Rep. Froehlich). Defendant, Larry Rogers, a Commissioner for the Board, stated that the denials were a result of Plaintiffs' connection with Rep. Froehlich and not due to the merits of Plaintiffs' appeal.

On information and belief, the Board has already red-flagged Plaintiffs' properties, preventing the Property Tax Assessment Board ("PTAB"), the body that hears appeals from the Board, from rendering substantial justice. Plaintiffs' 2009 appeals were denied by the BOR outright after the hearing.

In their answers to the Plaintiffs' complaints, the Defendants have identified two avenues for Plaintiffs to pursue if they had wanted to appeal the decision of the Board: The Property Tax Appeal Board ("PTAB"), or the Circuit Court of Cook County, Illinois. PTAB is not authorized to hear issues of substantive due process or equal protection.

1. **The Property Tax Appeal Board cannot provide a plain, adequate, and complete remedy.**

The Satkar Plaintiffs allege, at paragraph 56 of their Complaint, that Larry Rogers, a Defendant, and a Commissioner of the Board of Review, explained to the Satkar Plaintiffs' attorney that the decision to rate-change Plaintiffs' properties stemmed from Plaintiffs' relationship with Rep. Paul Froehlich. Due to the political nature of the Board's decision to rate-change Plaintiffs' properties, the properties were red-flagged at PTAB. Petitioner Satkar complaint at ¶ 53; Petitioner Capra complaint at ¶ 38. Even if Plaintiffs could get a fair trial at PTAB, it will take seven to eight years for PTAB to render a decision. Satkar complaint at ¶ 66; Capra complaint at¶ 46.

Setting aside the red flagging of their property, and the long period that it for takes PTAB to render a decision, there is also the issue of PTAB's standard of review. An appeal to PTAB would not necessarily be *de novo.* Though the regulations state that the PTAB's proceedings are *de novo*, a petitioner to PTAB has the burden of proof, and must prove that the BOR made an incorrect determination. Ill. Admin. Code at 86:1910.63(a). The regulations state further that:

> Under the burden of going forward, the contesting party must provide substantive, documentary evidence or legal argument sufficient to challenge the correctness of the assessment of the subject property. Failure to do so will result in the dismissal of the

appeal. Ill. Admin. Code at 86:1910.63(b).

The BOR responds before PTAB. Ill. Admin. Code at 86:1910.63(c). That regulation sheds some light on the Complaints' allegations: *de novo* though the review may be, PTAB does not actually hear the matter anew. It entertains objections to the BOR's decision, but places the burden of proof upon the objector while listening to the BOR's explanation of its decision. When the basis of an appeal is "unequal treatment in the assessment process," the inequity of the assessments must be proven by clear and convincing evidence. Ill. Admin. Code at 86:1910.63(e). Most *de novo* reviews do not require "clear and convincing" evidence of error as in point of fact the "clear and convincing evidence" standard is nearly the opposite of *de novo.*

In the Petitioners' cases, there was no rationale offered by way of comparable properties, changes in property value or investigation or analysis of characteristics of the subject properties based upon any acceptable or commonly utilized metrics for property valuation. The stated reason was political. Therefore, in arguing against the BOR at PTAB, the Petitioners would be making arguments in all instances against strawmen or more aptly—apparitions.

2. The Circuit Court of Cook County does not provide a plain, adequate and complete remedy in Plaintiff's case.

The other option is the Circuit Court of Cook County. But the Plaintiffs' complaints allege that the Commissioners of the BOR are powerful members of

the Cook County Democratic Party and exert political influence over the State judiciary. Satkar Complaint at ¶ 68; Capra Complaint at ¶ 47. There are conflicts of interests between many members of the judiciary in Cook County and Joseph Berrios.

Joseph Berrios has been Chairman of the Cook County Democratic Party for over four years. Satkar Complaint at. ¶ 69; Capra Complaint at ¶ 48. He has been a committeeman of the Cook County Democratic Party for over 18 years. In that capacity, he also has served as the Vice Chairman of Slating for the Judiciary Committee of the Cook County Democratic Party for almost a decade, and has been involved in the slating of well over two hundred judges in Cook County. Non-slated candidates are not nearly as successful as slated candidates during judicial elections. Satkar Complaint at ¶ 72; Capra Complaint at ¶ 51.

Even ignoring the conflicts of interest at the Cook County Circuit Court, the circuit courts do not even claim to offer a *de novo* review. The statute provides that a "tax objection complaint [. . .] shall be filed in the circuit court of the county in which the subject property is located." 35 ILCS 200/23-15(b)(1)." But the

> "Taxes, assessments, and levies that are the subject of the objection shall be presumed correct and legal, but the presumption is rebuttable. The plaintiff has the burden of proving any contested matter of fact by clear and convincing evidence." 35 ILCS 200/23-15(b)(3).

At oral arguments, the Seventh Circuit suggested that if there was no basis for Defendants' rate-change of the Plaintiffs' properties, the administrative review would be "simple." The problem with that suggestion is that, on administrative review, "taxes, assessments, and levies . . . . Shall be presumed correct and legal." 35 ILCS 200/23-15(b)(3). It is in all instances the plaintiff who "has the burden of proving any contested matter of fact by clear and convincing evidence." *Id.*

To some extent, the subjective nature of property valuation makes it difficult to prove, by "clear and convincing evidence" that a given property is not whatever random value the Board assigns it. But in these cases, it is not subjectivity but chimera and gorgons against whom the Petitioners would have sought battle. There is no evidence that could be brought–particularly clear and convincing evidence–to prove that Plaintiffs' properties were not worth exactly what the BOR assigned them because the BOR did not, by its own admission, use any evidence for its decisions. If the BOR wanted to stick the Petitioners with improper rate-changes, there is very little the Petitioners could do about it on the state level, under the laws made available to Petitioners by the State of Illinois.

Finally, the lower court entertained the idea that the Petitioners were asking that the entire judiciary in Cook County be held to be unconstitutional. This humorous quip, however, does not really do justice to Plaintiff's position. Justice Sandra Day O'Connor herself noted that state

judiciaries–due to their tendencies to rely on elections to fill judicial slots–"can be marred by judicial elections that permit expensive campaign contributions and encourage majoritarian decisions at the expense of minority rights."[31]

Historically, the federal courts have played an important role in restraining state tyranny and are at times as they are as a forum for Title IX of the Organized Crime Control Act or RICO, the only forum capable of delivering justice. Cook County is unique among American political ecosystems in that it cultivates an acceptance of disenfranchisement and cynicism with the political process that is so famously corrupt that in describing modern political corruption, the most extreme form is dubbed "Chicago-style politics."

Not entirely unlike the Klu Klux Klan, the Cook County Democratic Party, through the use of what is its primary fundraising arm, the BOR, has tentacles of control and influence into all three branches of local government in Cook County. In these cases and for these particular Petitioners, not unlike plaintiffs that sought redress in federal court under the Klu Klux Klan Act, there is no remedy at the local level.

The Chicago Appleseed Fund for Justice, in partnership with the Chicago Council of Lawyers, found that if a candidate for judicial election in

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[31] David Fautsch, *The Tax Injunction Act and Federal Jurisdiction: Reasoning from the Underlying Goals of Federalism and Comity.,* 108 Mich. L. R. 795, 816 (March 2010). (Hereinafter *Fautsch*).

countywide races was not slated, he had a 5.8% chance of winning the Democratic primary, which may as well be the general election for all of the chance a Republican candidate has of winning countywide.[32] In the sub-circuits, the probability of a non-slated candidate winning the Democratic primary is 8.9%. Clearly, slating is the main factor in winning elections–putting Joseph Berrios front and center in this matter. While Berrios may not flex his political muscle on every appeal from a Board decision, the same may not be true here, where the decision was public, and pointedly political.

What is more, each of the Respondent Commissioners and many of their staff, accumulate millions of dollars each year in campaign contributions from the very tax attorneys and tax firms that practice before them. The firms that contribute more, achieve better tax reductions—this is otherwise termed, graft or pay-to-play. Some of these donations are placed in the coffers of the Cook County Democratic Party which slates and backs statewide political candidates. The BOR is a uniquely political Chicago apparatus, more comparable to a racketeering enterprise that collects a street tax in very much the way the Mob used to than a regular quasi-judicial agency.

For example, Mr. Berrios and Larry Rogers are both referenced in wiretaps and the prosecutions of two Cook County Board of Review employers,

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[32] The Chicago Appleseed Fund for Justice, *Electing Judges in Cook County: The Role of Money, Political Party, and the Voter* at 23.

Thomas Hawkins and John Racasi, who worked right under them, who are now being tried soliciting for bribes in exchange for commissioner tax reductions by the United States Department of Justice (12 CR 528).

So while Petitioners are not asking that the entire judiciary of Cook County be declared unconstitutional (as one Justice suggested, in jest, at the oral arguments), they are asking this Court to take note of a meaningful incongruity: if a court dismisses these cases, premised upon a theory that they should have been pursued in front of a the Cook County judiciary that has, by and large, been selected by Respondent Berrios himself, it would effectively be suggesting that a Cook County Judge can be trusted to bite the hand that feeds it, especially if this judge has any aspirations towards the appellate or state supreme court. The Petitioners would only be allowed a one-time motion for substitution of a judge in the circuit court, not two hundred motions for substitution. When a case is a highly political case against the man who selected the majority of the county judiciary, state remedies cannot be called "plain, adequate, and complete." Petitioners do not suggest that there is some deficiency on the part of Cook County's judiciary. They do suggest that the Cook County judiciary could not adequately hear *these specific cases* due to the political nature of the claims. 42 U.S.C. § 1983 was made for these Petitioners.

Far from attempting to direct the affairs of the State of Illinois from an ivory tower perch in the United States District Court, Petitioners here are

trying to "set only the outer limit of acceptable state behavior." *Fautsch* at 817. That is, Petitioners' suits do not challenge Illinois' own administration of its state and municipal taxes. Petitioners' cases are qualitatively different from that of the vast majority of dissatisfied litigants before the BOR. In these cases, the BOR members acted out of a concern that they be tied to the downward spiraling political career of a *persona non grata* turned pariah. Their decision to rate change these properties was brazenly a political decision, and not a decision on the merits– to expect the Cook County judiciary to treat it as anything other than a political hot potato is naïve.

Based upon these factors, there is no "plain, adequate and complete" state remedy in this matter, due to the highly political nature of the BOR's decisions, the powerful political influence of the Defendants, and the nature of the cause of action against Defendants.

In their federal complaints, Plaintiffs/Petitioners were not seeking to have a reduction in their assessed taxes, the assessed taxes that are the subject of their complaints were already paid by the Petitioners prior to their bringing their complaints to federal court. The Petitioners brought suits to enforce their rights to equal protection under the laws, which were denied to them because of their political association. As such, the Petitioners did not seek injunctive relief in the form of a lower taxes— they seek a constitutional process which they cannot achieve without coming to federal court. The justice sought by the Plaintiffs was not a reduction in their taxes but for the federal court to find that the state

property assessment policy was unconstitutional and in violation of the Equal Protection Clause. A constitutional application of Cook County's real estate tax assessment policy would not lead to a reduction in revenue for the state or the county, but more likely more revenue through a legal process other than mere whim or pay to play. In other words, a process other than what was reminiscent of the Queen's court in Alice in Wonderland—the rendering of a sentence before the need for judgment.

D. Proceedings Below

The Satkar and Capra Complaints–though extremely similar for the purpose of this petition[33]–were brought separately. The Capra Complaint was dismissed on May 30, 2012. The Memorandum Opinion found that Plaintiff Capra had failed to state claims upon which relief could be granted, and did not discuss the issue of comity at all. Plaintiff Capra appealed that decision.

In pertinent part, the District Court in Satkar sustained the Petitioner's Complaint for constitutional violations against the BOR, though the District Court dismissed the individual actors on the Board. The District Court denied the BOR's motion for judgment on the pleadings brought on qualified immunity grounds on August 2, 2012.

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[33] There were several key differences that are not important here. The Dani family, which owns Satkar Hospitality, was featured on a local Fox News affiliate's report about "government corruption." Capra was not. Also, Capra had never met Rep. Froehlich.

The BOR filed an interlocutory appeal of that decision.

The Seventh Circuit Court of Appeals heard the Satkar and Capra matters separately, but all parties argued on the same day, and through the same group of attorneys for all the Defendants and the same attorney for the Plaintiffs. At oral arguments, the Seventh Circuit asked all parties to brief the matter of comity in light of the *McNary* decision.

On August 21, 2013, the Seventh Circuit issued its opinion, in which it found that the Plaintiffs' complaints had stated proper claims under the constitution for due process and equal protection violations (and, in the case of the Satkar Plaintiffs for First Amendment violations), and that the Board was not immune to those claims. Nonetheless, the lower court ruled that the principle of comity prevented federal courts from exercising jurisdiction over the parties' claims.

The Seventh Circuit Court of Appeals held that the Petitioners' cases are barred from consideration by the federal courts based upon comity and the existence of an adequate state remedy as prescribed under *Fair Assessment in Real Estate Association v. McNary*. The Seventh Circuit found this case to fall within the Tax Injunction Act. However, in this case the Tax Injunction Act is not a bar to Petitioners' suits because they are not asking for injunctive relief in the form of lower assessed local property taxes. The Petitioners are not seeking to avoid or countermand a state tax—they are only seeking the application of a levy process that does not offend the Constitution.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THE FOURTH, TENTH CIRCUITS AND FURTHERS AN AMBIGUITY OF WHEN COMITY APPLIES — AN AMBIGUITY COURT'S DECISION IN *COMMERCE ENERGY* LEAVES INTACT

The Court has also not addressed to what extent the Tax Injunction Act is a bar to federal court for § 1983 litigants and there is a split among the courts of appeals regarding this issue that the Court's recent decision in *Commerce Energy Inc. v. Levin* does not resolve.[34]

Footnote number nine of the Court's *Hibbs* decision states that the Court has "relied upon 'principles of comity' . . . to preclude original federal court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection."[35] This is called the *Hibbs* Rule.

The *Hibbs* rule was relied upon in several courts of appeal as opening a door to federal court jurisdiction in those instances when a litigant is not seeking to disrupt state tax revenue. For example in *Levy v. Pappas*, the Court of Appeals for the Seventh Circuit found that, "*Hibbs*, therefore leaves the doors of the federal court open to a narrow category of state tax challenges."[36]

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[34] *Levin v. Commerce Energy, Inc.* 130 S. Ct. 2323 (2010).

[35] *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004).

[36] *Levy v. Pappas*, 510 F.3d 755, 760 (7th Cir. 2007),

Before this Court's decision in *Commerce Energy*, there was a split among the Courts of Appeal regarding whether principles of comity were a bar to federal court jurisdiction even when the federal courts have jurisdiction under the Tax Injunction Act. *Commerce Energy* has not clarified this issue because as the Seventh Circuit pointed out in this case, this Court has not made it clear whether comity closes the doors of federal court to litigants even where federal courts may have jurisdiction otherwise over federal claims.[37] The distinction raised in *Commerce Energy* about third party plaintiffs in *Hibbs* as opposed to the litigants in *Commerce Energy* is not discernibly meaningful either.[38] This leaves the *Hibbs* Rule after *Commerce Energy* to mean that the federal courts are only to hear state tax credit cases in which the Establish Clause is implicated.[39]

In effect, this Court through *Commerce Energy* has made the Tax Injunction Act meaningless by expanding the doctrine of comity in state tax cases that implicate constitutional interests far beyond what Congress intended through the Tax Injunction Act.

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[37] Petitioners' Appendix 16a, footnote 6.

[38] *Levin v. Commerce Energy, Inc.*, 130 S. Ct. 2323, 2335-36 (2010).

[39] *See Id.*, in which The Court notes that the *Hibbs* Court meant to "convey only that the Establishment Clause-grounded case cleared both the TIA [Tax Injunction Act] and comity hurdles."

II. THIS COURT SHOULD REVERSE THE SEVENTH CIRCUIT'S DECISION

The lower court erred in holding that the Petitioners' cases fell under the Tax Injunction Act. The Petitioners paid their assessed taxes and have incurred expenses in coming to federal court far greater than the taxes they paid. They would be happy to pay more taxes if they knew that the tax assessments were not done in violation of their Constitutional claims. The Petitioners did not come to federal court, to the Seventh Circuit Court of Appeals or here before the United States Supreme Court to avoid paying their taxes or ask for a reduction, they came here at formidable cost, far in excess of their assessed taxes, in an almost quixotic belief in the principle that the rule of law cannot be trumped by the rule of a few corrupt men. They understood *ab initio* the lessons of recent history that it falls on them to protest perhaps because as Martin Neimemoller observed, at times there is no one else. Petitioners' cases do not fall under the Tax Injunction Act because they are not seeking "to arrest or countermand state tax collection."[40]

Respondents have turned a vital and legitimate public office into what is essentially a racketeering enterprise, employed for their personal enrichment in stunning breach of the trust of the public trust. Their power in Cook County and Illinois is unchecked by statute and by a judiciary it has by and large chosen. There is a silent and deadly consequence to these situations—millions of people

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[40] *Hibbs*, 542 U.S. at 107 n.9 (citations omitted).

lose faith and trust in their government because the actions of local officials go unchecked by law and decency undermining faith in representative democracy. It is with a last breath of hope that the Petitioners came to the federal court, not for a reduction in assessed taxes, but because of a stubborn faith that in this great nation there is a forum that is above the fray—the only place in their cases the disenfranchised can go for what may seem in legal terms and by legal precedent a gossamer thing—justice and their seemingly irrational belief in the sanctity of their Constitutional rights.

III. THIS CASE REPRESENTS A RECURRING QUESTION OF EXCEPTIONAL IMPORTANCE WARRANTING THE COURT'S IMMEDIATE RESOLUTION

Federalism has become a more popular and political ideology. Yet the principles of federalism and comity do not trump the acts of Congress either in the Tax Injunction Act, Section 1983 or Congress' Article III authority. The limiting of judicial power by a great expansion in the principle of comity is akin to its disposal and "the disposal of the judicial power . . . belongs to Congress."[41]

As if by a thousand cuts, the judiciary has nullified portions of the Civil Rights Act through the judicially created doctrines of immunity and the expansion of doctrines of comity. Justice Brennan must have foreseen the dangers to

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41 *Sheldon v. Sill*, 49 U.S. 441, 449 (1850).

Section 1983 when in his concurrence in *McNary* he remarked,

> "I cannot agree that this case, and the jurisdiction of the federal courts over an action for damages brought pursuant to express congressional authority, is to be governed by applying a 'principle of comity' grounded solely on this Court's notion of an appropriate division of responsibility between the federal and state judicial systems. Subject only to constitutional constraints, it is exclusively Congress' responsibility to determine the jurisdiction of the federal courts. Federal courts have historically acted within their assigned jurisdiction in accordance with established principles respecting the prudent exercise of equitable power. But this practice lends no credence to the authority which the Court asserts today to renounce jurisdiction over an entire class of damages actions brought pursuant to 42 U. S. C. § 1983."[42]

The Court's foreclosure of the federal courts for litigants whose constitutional rights are damaged through state tax schemes under *McNary* and *Commerce Energy* will allow the states, as in the aftermath of *Brown v. Board of Education*, a vehicle by which to discriminate with immunity. Yet there is no rational reason to think

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[42] *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 117 (1981) Justice Brennan concurring in the judgment.

that human nature has so collectively changed that the human race has somehow evolved to exist in a post-discrimination era.

State tax schemes have often been the expression of political stances and one group's attempt to prove a point or disadvantage another. They remain so. On November 8, 2013, the Virginia Department of Taxation announced a new state tax policy that discriminates against same-sex married couples by denying them the ability to file joint tax returns.[43] California lawmakers are advocating Bill SB323 that if passed will threaten tax-exempt status for youth organizations like Little League International Baseball, the Boy Scouts of America and the Girl Scouts of the USA—it has been suggested that this law was proposed specifically because the Boy Scouts have banned gay adult leaders.[44]

This Court should clarify its position on the role of comity with respect to the Tax Injunction Act because states will not cease to use tax schemes to violate Constitutional interests as they have done in the past. It falls to the federal courts to come to the defense of the Constitution as they did in *Brown v. Board of Education*, and as they should in this matter.

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[43] http://www.tax.virginia.gov/Documents/TB_13-13_DOMA.pdf

[44] http://legiscan.com/CA/bill/SB323/2013

CONCLUSION

For the reasons set forth above, Petitioners respectfully ask that the petition for a writ of certiorari be granted.

Respectfully Submitted,

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NOVEMBER 19, 2013

APPENDIX

APPENDIX A

OPINION OF THE SEVENTH CIRCUIT COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Argued June 4, 2013 – Decided August 21, 2013

No. 12-2540

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 11 CV 04028 – Sharon Johnson Coleman, *Judge*.

LOUIS CAPRA

Plaintiffs-Appellants,

v.

COOK COUNTY BOARD OF REVIEW, *et al.*

Defendants-Appellants.

Nos. 12-2848 and 12-3116

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 10 CV 06682 – Matthew F. Kennelly, *Judge*.

SATKAR HOSPITALITY, INC. *et al.*

Plaintiffs-Appellees, Cross-Appellants,

v.

LARRY R. ROGERS *et al.*

Defendants Cross-Appellees,

–and–

COOK COUNTY BOARD OF REVIEW, *et al.*

Defendants-Appellants.

Before FLAUM, SYKES, and HAMILTON, *Circuit Judges.*

HAMILTON, *Circuit Judge.* These appeals present issues concerning local taxpayers' ability to sue local tax officials for alleged federal constitutional violations. Both cases stem from news reports in 2009 claiming that then-Illinois State Representative Paul Froehlich had offered property

tax reductions to his constituents and implying that he received campaign contributions and political support in exchange. The news reports claimed that Rep. Froehlich arranged for many of his constituents' property taxes to be reduced on appeal to the Cook County Board of Review. The plaintiffs in these two cases, Louis Capra and Satkar Hospitality (and two of its owners), had appealed their property tax assessments and had won such reductions on appeal. After several news reports highlighted the potential impropriety of their reductions, though, both were called back before the Board of Review and the Board reversed both reductions.

Capra and Satkar Hospitality filed these separate federal lawsuits against the Cook County Board of Review and its individual members and staff alleging several constitutional violations. We address the two cases together because the issues involved are so similar. As both district courts held, the individual defendants are entitled to absolute quasi-judicial immunity and the Board itself is not. We conclude, however, that the damages claims against the Board cannot proceed. They are not cognizable in federal courts under *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100, 116 (1981), which requires federal courts to abstain in suits for damages under 42 U.S.C. § 1983 challenging state and local tax collection, at least where an adequate state remedy is available, as it is here.

I. Factual and Procedural Background

In April and May 2009, a political blog and a Chicago television station began reporting on Illinois State Rep. Paul Froehlich. The reports suggested

that Rep. Froehlich offered his constituents reductions in their county property taxes in exchange for political favors. A companion appeal, *Satkar Hospitality v. Fox Television Stations, Inc.*, No. 11-3572, addresses the content of the reports in greater detail, but here it suffices to say that the reports at least implied that Rep. Froehlich had handled his constituents' property tax appeals in a way that consistently resulted in tax reductions, and that he had done so in exchange for political favors and support. The reports specifically highlighted Satkar Hospitality, reporting that it and its owners had donated thousands of dollars' worth of hotel rooms to Froehlich's campaign.

Both plaintiffs here, Satkar Hospitality and Louis Capra, appealed their property tax assessments for the years 2007 and 2008 and won reductions. But in June 2009, after the publicity about Rep. Froehlich, both were called back before the Board of Review for new hearings. Both plaintiffs' complaints allege that in these second hearings, the Board inquired not into the value of their properties but into the nature of their relationships with Rep. Froehlich. The Board rescinded the reductions for both plaintiffs. Plaintiffs allege that the Board, when questioned about its actions, claimed that "we can do anything we want."

The plaintiffs filed these federal lawsuits against the Board itself as well as its three commissioners (Larry Rogers, Joseph Berrios, and Brendan Houlihan), its chief deputy commissioner (Scott Guetzow), and its first assistant commissioners (Thomas Jaconetty and John

Sullivan). Both complaints allege that the Board and its commissioners and staff (the "individual defendants") violated the plaintiffs' right to equal protection by singling them out for their association with Rep. Froehlich, their right to due process by arbitrarily rescinding their reductions without a fair hearing, and their First Amendment rights by retaliating against them based on their political ties to Rep. Froehlich. Both plaintiffs also allege that any appeal available to them from the Board's decisions would not satisfy due process. They allege that their appeals before the state tax appeal board are "red-flagged" and could take seven to eight years to decide. They also allege that appeal to the Cook County Circuit Court would not provide impartial review because judges in that court are slated for election by the county Democratic Party, of which two individual defendants are leaders.[1]

In the *Satkar Hospitality* case, the district court denied the defendants' motion to dismiss for failure to state a claim but granted the individual defendants' motion to dismiss on the ground that they are absolutely immune because their work reviewing tax appeals is quasi-judicial. *Satkar Hospitality Inc. v. Cook County Bd. of Review*, 819 F. Supp. 2d 727 (N.D. Ill. 2011). As the sole remaining

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[1] The Satkar Hospitality complaint also included as defendants the local television station, political blog, and reporters and staff members of both, and alleged defamation and false light claims under Illinois law. The appeal from dismissal of those counts is pending in *Satkar Hospitality v. Fox Television Stations, Inc.*, No. 11-3572.

defendant, the Board moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that it is entitled to either the same quasi-judicial absolute immunity as the individual defendants or Eleventh Amendment sovereign immunity. The district court denied the motion, finding that the Board, as a municipal entity, is not entitled to quasi-judicial absolute immunity and that the Eleventh Amendment does not apply because the Board is a county entity operating independently of the state treasury. *Satkar Hospitality Inc. v. Cook County Bd. of Review*, No. 10 C 6682, 2012 WL 3151376 (N.D. Ill. Aug. 2, 2012). The plaintiffs appealed the district court's finding of absolute immunity for the individual defendants. The Board cross-appealed the district court's finding that the Board was not entitled to absolute immunity. We have jurisdiction because the district court properly certified its dismissal of the individual defendants as a final judgment under Federal Rule of Civil Procedure 54(b), and the Board's appeal from the denial of its immunity defense is appealable under the collateral order doctrine. *see Behrens v. Pelletier*, 516 U.S. 299, 307 (1996); *Nixon v. Fitzgerald*, 457 U.S. 731, 742–43 (1982).

In the *Capra* case, the district court also found that the individual defendants were entitled to quasi-judicial absolute immunity but that the Board was not. *Capra v. Cook County Bd. of Review*, No. 11-cv-4028, 2012 WL 1969393 (N.D. Ill. May 30, 2012). The district court in *Capra*, however, dismissed the entire case, holding that Capra had failed to state a claim against the Board for a violation of his equal protection or due process rights. (Capra had conceded

the First Amendment claim. Unlike the *Satkar* plaintiffs, he never had any contact with Rep. Froehlich and had not contributed to his campaign.) Capra has appealed the final judgment against him.

II. Analysis

These section 1983 actions for damages against the Board and its members and staff face obstacles they cannot overcome. We begin by explaining why the individual defendants are entitled to quasi-judicial absolute immunity. We then explain why the Board itself is not entitled to the same absolute immunity but that the damages claims against the Board itself must be dismissed without prejudice based on comity concerns under *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981). We conclude with a brief discussion of the pleading requirements for plaintiff Capra's claims against the Board.[2]

A. Quasi-Judicial Absolute Immunity for Individual Defendants

"Absolute immunity is available to members of quasi-judicial adjudicatory bodies when they perform duties that are functionally comparable to those of a judicial officer," regardless of the identity of the actor. *Tobin for Governor v. Illinois State Bd. of*

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[2] In *Satkar Hospitality*, the Board argued before the district court that the *Rooker-Feldman* doctrine barred subject matter jurisdiction and that the Board was protected by Eleventh Amendment sovereign immunity. The district court correctly rejected both arguments, which have not been renewed on appeal.

Elections, 268 F.3d 517, 521 (7th Cir. 2001), citing *Butz v. Economou*, 438 U.S. 478, 512-13 (1978). Both district courts found that the individual defendants—the members and staff of the Board of Review—are entitled to such absolute immunity. The district courts followed our decision on the same question with regard to individual members of a different Illinois county's Board of Review. In *Heyde v. Pittenger*, 633 F.3d 512 (7th Cir. 2011), we affirmed a district court's dismissal of a similar section 1983 suit, alleging equal protection, due process, and retaliation claims against individual members of the Tazewell County Board of Review. We found that those individual defendants were entitled to absolute immunity based on their quasi-judicial functions. *Id.* at 516–19.

We considered the function and role of the Tazewell County Board of Review in light of the six factors for analyzing quasi-judicial immunity articulated in *Butz*: (1) the need to assure that the individual can perform her functions without harassment or intimidation; (2) the presence of safeguards that reduce the need for damages actions as a means for controlling unconstitutional conduct; (3) the insulation from political influence; (4) the importance of precedent; (5) the adversarial nature of the process; and (6) the correctability of error on appeal. *see id.* at 517, citing *Butz*, 438 U.S. at 512. We observed that the Board's hearing process was similar to a judicial proceeding—with notice and the opportunity to be heard and to present evidence—as laid out by the Board's governing statute. *Id.* at 518; 35 Ill. Comp. Stat. § 200/16-10 (board has power to "summon any assessor, deputy, or other person to

appear before it to be examined under oath concerning the method by which any evaluation has been ascertained, and its correctness"); §§ 200/16-25,-30,-35 (requiring notice in writing to taxpayer and opportunity to be heard). We also observed that the Board's function of reviewing property assessments warranted insulation from harassment or intimidation because it was "inherently controversial and likely to result in disappointed parties and, unless checked, a multitude of lawsuits." *Heyde*, 633 F.3d at 519. Finally, we observed that Illinois law provided adequate opportunity to appeal from an unfavorable Board decision, noting that taxpayers may appeal as a matter of right to the Property Tax Appeal Board, whose decisions are appealable to Illinois state courts of general jurisdiction. *Id.*

Heyde controls here. The Tazewell County Board of Review serves the same function as the Cook County Board of Review, just in a different county. The Boards are defined and governed by parallel Illinois statutes.[3] The plaintiffs offer no convincing argument for distinguishing *Heyde*. They argue that the Board in *Heyde* actually did an investigation and provided its reasons and rationale for its ruling, whereas the Board here allegedly made its decisions before the taxpayers' respective hearings. But the

[3] The Tazewell Board is governed by sections 200/16-20 through 200/16-90 of chapter 35 of the Illinois code, which apply to counties with fewer than 3,000,000 residents. The Cook County Board is governed by sections 200/16-95 through 200/16-155, which apply to the only county with more than 3,000,000 residents. The language is not identical, but the powers, duties, and required procedures are equivalent.

actual conduct or alleged wrongdoing of an official acting in a quasi-judicial capacity does not temper the protection of absolute immunity. *see Tobin for Governor*, 268 F.3d at 524 ("judicial officers are entitled to that immunity even when they act in error, maliciously, or in excess of their authority"). That is the rule because "the threat of being subjected to *any* litigation impedes the officers' ability to engage in independent and fearless decision-making." *Id.* We find no reason to question *Heyde.* The individual defendants are entitled to quasi-judicial absolute immunity.

B. No Absolute Immunity for the Board of Review

The Cook County Board of Review argues that it should also be entitled to the same quasi-judicial absolute immunity since it performs the same functions. Unlike individuals sued in their individual capacities, though, municipal entities are not entitled to absolute immunity. The Supreme Court made this quite clear in *Monell v. Department of Social Services*:

> we express no views on the scope of any municipal immunity beyond holding that *municipal bodies sued under § 1983 cannot be entitled to an absolute immunity*, lest our decision that such bodies are subject to suit under § 1983 "be drained of meaning."

436 U.S. 658, 701 (1978) (emphasis added), quoting *Scheuer v. Rhodes*, 416 U.S. 232, 248 (1974).

We have followed this directive and held consistently that municipal entities are not entitled

to absolute immunity even where the entity's officers are entitled to immunity. In *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), we held that a village mayor who served as local liquor commissioner was entitled to quasi-judicial absolute immunity, but the immunity did not extend to the village itself. *Id.* at 953. We reasoned that the rationale of *Owen v. City of Independence*, 445 U.S. 622 (1980), which declined to afford qualified immunity to a municipality despite the good faith of its individual officers, should apply with as much force to legislative and judicial officers and did not extend to the village the absolute judicial and legislative immunity we afforded to its mayor and trustees as individuals. *Reed*, 704 F.2d at 953 ("[T]he municipality's liability for such acts extends to acts for which the policy-making officials themselves might enjoy absolute immunity because the acts were legislative or judicial in character.").

More recently, we explained in *Hernandez v. Sheahan*, 455 F.3d 772 (7th Cir. 2006), that "units of government are not entitled to immunity in suits under § 1983," in part because immunities are "personal defenses designed to protect the finances of public officials whose salaries do not compensate them for the risks of liability," unlike local governments, "which can tap the public fisc." *Id.* at 776 (finding city and sheriff's department not entitled to quasi-judicial immunity from § 1983 suit).[4]

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[4] Other circuits have held similarly that municipal entities are not entitled to the immunities that protect their officers. *See Bass v. Attardi*, 868 F.2d 45, 51 (3d Cir. 1989) (per curiam) (city

The Board points to no examples of a circuit court applying absolute immunity to a municipal entity, and we have found none. Most of the cases it cites involved state entities, which frequently will be protected from suit by Eleventh Amendment sovereign immunity or its statutory parallel under *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) (holding that states and state officials sued in official capacities are not "persons" who can be sued under § 1983). *see*, *e.g.*, *Olsen v. Idaho State Bd. Of Med.*, 363 F.3d 916, 924–26 (9th Cir. 2004) (state medicine and professional discipline boards; court did not address why the state boards were entitled to the same immunity as their members and staff); *Goluszek v. H.P. Smith Paper Co.*, No. 93 C 5329, 1993 WL 358160 (N.D. Ill. Sept. 14, 1993)

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planning board, "as a governmental entity has no immunity whatsoever" against damages suit under § 1983); *Aitchison v. Raffiani*, 708 F.2d 96, 100 (3d Cir. 1983) (in suit under § 1983, "liability against the municipality is not precluded simply because the defendants were found immune in their individual capacities"); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1196 (5th Cir. 1981) ("We consider the Supreme Court's decision in *Owen* and its caveat in *Lake Country Estates* to be dispositive of the city's argument and hold that the City of Lafayette is not entitled to a legislative immunity from damages under § 1983 in connection with its zoning regulations."); *cf. Turner v. Houma Mun. Fire and Police Civil Serv. Bd.*, 229 F.3d 478, 483–486 (5th Cir. 2000) (affirming denial of absolute quasi-judicial immunity for individuals in official capacity and municipal fire and police board, as "defenses such as absolute quasi-judicial immunity, that only protect defendants in their individual capacities, are unavailable in official-capacity suits[,]" which are entitled to only the immunities that would apply to the entity).

(Illinois attorney disciplinary commission, which is a committee of the Illinois Supreme Court); *Tate v. Nevada Bd. of Med. Examiners*, No. 2:11-CV-1613 JCM (VCF), 2011 WL 5101987 (D. Nev. Oct. 26, 2011) (state board of medical examiners; in brief preliminary injunction opinion, court did not differentiate between board members and board itself), aff'd, *Tate v. Neyland*, 485 F. App'x 861 (9th Cir. 2012).

The Board also cites a district court opinion from Louisiana that extended absolute quasi-judicial immunity to a city alcohol control board, but the Fifth Circuit later interpreted the case as finding only immunity only for individual defendants. *Compare Brossette v. City of Baton Rouge*, 837 F. Supp. 759, 763 (M.D. La. 1993), aff'd, 29 F.3d 623 (5th Cir. 1994) (per curiam), with *Turner v. Houma Mun. Fire & Police Civil Serv. Bd.,* 229 F.3d 478, 485 & n.13 (5th Cir. 2000) (clarifying that *Brossette* and other cases' possible extension of immunity to municipal entities was necessarily limited to individual capacity claims because a "grant of official-capacity immunity would also have barred the claim against the city, contrary to *Monell* and its progeny"). Whatever the district court in *Brossette* might have intended, the Fifth Circuit's clarification in *Turner* was certainly correct. The Board also cites *Crenshaw v. Baynerd*, 180 F.3d 866 (7th Cir. 1999), and *Thompson v. Duke*, 882 F.2d 1180 (7th Cir. 1989), for broad language that quasi-judicial immunity applies to agencies, but in both cases the language referred to state entities that were not even parties to the suits.

Given *Monell* and the history of the Civil Rights Act, extending absolute immunity to the Board here would be a dramatic expansion of immunity that would severely limit the scope of section 1983 further than Congress intended and further than the Supreme Court ever has. Insulating municipalities from suit on a theory of quasi-judicial immunity when a policy, custom, or policymaker has violated the Constitution would, as the Supreme Court noted in *Monell*, drain that important decision of its meaning. 436 U.S. at 701. The Board is not protected by quasi-judicial absolute immunity.

C. Comity

1. The General Rule of Abstention

There is, however, another narrower reason that these suits cannot proceed against the Board itself. In *Fair Assessment in Real Estate Ass'n v. McNary*, 454 U.S. 100 (1981), the Supreme Court relied on principles of comity to erect a high barrier to section 1983 damages suits against state and local tax systems such as this. In *Fair Assessment*, taxpayers sued county and state tax officials claiming that certain taxing practices deprived them of equal protection and due process. The Court considered whether such a suit could be entertained by a federal court at all, acknowledging the tension between section 1983, which provides broadly for suits under federal law against state and local governments and employees, and the Tax Injunction Act, 28 U.S.C. § 1341, which forbids federal courts from enjoining or interfering with the collection of state taxes. The Court ultimately concluded that the principles of

comity and federalism underlying the Tax Injunction Act should apply, and the Court held that "taxpayers are barred by the principle of comity from asserting § 1983 actions against the validity of state tax systems in federal courts." *Fair Assessment*, 454 U.S. at 116. Instead, taxpayers alleging that their federal rights have been violated by state or local tax practices must first seek relief through the available state remedies, as long as those remedies are "plain, adequate, and complete." *Id.*[5]

Like the Tax Injunction Act, this comity doctrine "serves to minimize the frictions inherent in a federal system of government" and embodies longstanding "federal reluctance to interfere with state taxation." *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, 651 F.3d 722, 725 (7th Cir. 2011) (*en banc*); *see also National Private Truck Council, Inc. v. Oklahoma Tax Comm'n*, 515 U.S. 582, 589–90 (1995) (extending *Fair Assessment* to hold that plaintiffs cannot seek declaratory or injunctive relief

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[5] The parties did not raise or address *Fair Assessment* in the district courts or in this court. We raised the issue at oral argument and ordered the parties to file post-argument briefs addressing the case. We view abstention under *Fair Assessment* as comparable to other abstention doctrines rooted in federalism concerns, which an appellate court may raise even if it is not a jurisdictional issue that must be raised. See *Int'l Coll. of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998) (*Pullman* and *Burford* abstention); *Barichello v. McDonald*, 98 F.3d 948, 955 (7th Cir. 1996) (all abstention doctrines); *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983) (*Pullman* abstention). Also, our opinion in *Heyde*, which was addressed in detail in the district courts in both cases, discussed and applied *Fair Assessment* in a very similar case. See 633 F.3d at 519–22.

against state taxes in state courts under § 1983 where state law provides an adequate legal remedy).

Fair Assessment has been applied consistently to bar plaintiffs from bringing section 1983 suits challenging the validity or imposition of state and local taxes in federal courts unless the available state remedies for those injuries are not adequate, plain, and complete. In *Werch v. City of Berlin*, 673 F.2d 192 (7th Cir. 1982), we considered a section 1983 suit for injunctive relief and damages against the city of Berlin, its Common Council and Board of Review, and several individual city officials alleging that the city's tax on the plaintiff's farm equipment denied him equal protection of the law. We found that the district court could not consider the plaintiff's claims: "Principles of comity bar a taxpayer from contesting the validity of a state tax in a section 1983 damage action," and Wisconsin state law provided "plain, adequate, and complete" remedies for his claim. *Id.* at 194–95.[6] *See also Kerns v. Dukes*, 153 F.3d 96,

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[6] In *Werch* we said that the court lacked "jurisdiction" to hear such a claim, but the Supreme Court has not been clear on whether *Fair Assessment* removes such suits from federal court jurisdiction or rather precludes courts from hearing certain cases even though they might fall within their jurisdiction. Compare *Hibbs v. Winn*, 542 U.S. 88, 107 n.9 (2004) (noting that *Fair Assessment* "preclude[d] original federal-court jurisdiction only when plaintiffs have sought district-court aid in order to arrest or countermand state tax collection"), with *Levin v. Commerce Energy, Inc.*, 560 U.S. 413, —, 130 S. Ct. 2323, 2330 (2010) (citing *Fair Assessment* for proposition that "comity doctrine counsels lower federal courts to resist engagement in certain cases falling within their jurisdiction"). Since *Werch*, the Supreme Court has been more precise in narrowing the scope of truly jurisdictional doctrines. See

101–03 (3d Cir. 1998) (suit against county tax officials and state environmental agencies alleging change requiring property owners to join local sewer system, which imposed fees and service charges, was barred by *Fair Assessment* and the Tax Injunction Act because suit essentially challenged a state and local tax and Delaware provided adequate remedies). Our decision in *Heyde v. Pittenger* is directly relevant on this point, too. There, after finding the individual defendants were absolutely immune, we applied this doctrine of comity and abstention to affirm dismissal of the remaining equal protection and due process claims against the county board of review itself. 633 F.3d at 520–21.

Capra and Satkar Hospitality's lawsuits fall squarely within the rule of *Fair Assessment*. The plaintiffs challenge the application of a local tax under section 1983 on federal constitutional grounds. We must abstain from considering the claims unless the available state remedies are not adequate, plain, and complete.

2. The Exception to Abstention

After we raised the *Fair Assessment* abstention problem, plaintiffs argued that their cases fall within the exception because there are no "adequate, plain,

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generally *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 160–61 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510–16 (2006). In light of the Supreme Court's more recent decisions, the better understanding is that *Fair Assessment* presents not a mandatory jurisdictional limit but a prudential comity issue that the court may raise itself.

and complete" state remedies available to them. We disagree.

In determining whether available state remedies are "adequate, plain, and complete" for purposes of *Fair Assessment*, we have used the comparable standard from the Tax Injunction Act, which bars federal courts from enjoining state taxes where a "plain, speedy and efficient" state remedy is available. 28 U.S.C. § 1341. *see Werch*, 673 F.2d at 194–95; *see also Lawyer v. Hilton Head Pub. Serv. Dist. No. 1*, 220 F.3d 298, 304–06 (4th Cir. 2000) (relying on language from section 1341 cases to explicate the "plain, adequate, and complete" exception under *Fair Assessment*); *Kerns*, 153 F.3d at 101 (where both section 1341 and *Fair Assessment* applied, court considered whether state remedies were "plain, speedy and efficient"). Thus, we take guidance from both comity and Tax Injunction Act case law in determining whether available state remedies are so flawed as to allow plaintiffs to avoid the *Fair Assessment* abstention doctrine.

State remedies are "plain, speedy and efficient" if they provide the taxpayer with a "full hearing and judicial determination at which she may raise any and all constitutional objections to the tax." *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 514 (1981) (internal quotations omitted). A state remedy is not deficient merely because it will not result in the taxpayer's desired outcome. The analysis focuses on whether the state court remedy "meets certain minimal *procedural* criteria." *Id.* at 512 (reversing our circuit's decision that had allowed case challenging Cook County property tax assessments

to proceed under federal Constitution); *accord*, *Huber Pontiac, Inc. v. Whitler*, 585 F.2d 817, 821 (7th Cir. 1978) (finding Illinois courts afforded a "viable method of contesting" state tax hearing procedures and noting that "[m]ere futility of state court proceedings does not allow a federal court to ignore the explicit prohibitions of Section 1341"). The focus is on the *procedural* sufficiency of state remedies, not their substantive outcomes. *Rosewell*, 450 U.S. at 512 (in past analyses of "plain, speedy and efficient" language from section 1341, "the Court has emphasized a *procedural* interpretation in defining both the entire phrase and its individual word components").

Under Illinois law, taxpayers dissatisfied with a decision of a county Board of Review have two options for appeal. They can either appeal to the Property Tax Appeal Board (PTAB), 35 Ill. Comp. Stat. § 200/16-160, or file a tax objection complaint directly with a county circuit court, § 200/23-15. *See also Millennium Park Joint Venture, LLC v. Houlihan*, 948 N.E.2d 1, 10–11 (Ill. 2010). If they select the PTAB route, they can appeal the PTAB's decision directly to Illinois state courts. 35 Ill. Comp. Stat. § 200/16-195. Although the PTAB is not expressly authorized to consider claims beyond objections to assessment values, we have found no provision in its authorizing statute or regulations precluding it from doing so.[7] And before the PTAB,

[7] The regulations provide in part: "The Property Tax Appeal Board may consider appeals based upon contentions of law. Such contentions of law must be concerned with the correct assessment of the subject property. If contentions of law are raised, the party shall submit a brief in support of his position."

taxpayers may supplement the record with evidence beyond what was before the Board of Review. § 200/16-180 ("A party participating in the hearing before the Property Tax Appeal Board is entitled to introduce evidence that is otherwise proper and admissible without regard to whether that evidence has previously been introduced at a hearing before the board of review of the county.").

Thus, through either the PTAB or the circuit courts, any statutory or constitutional claims can be heard by a state court of general jurisdiction and can be appealed through the Illinois court system to the Illinois Supreme Court and the Supreme Court of the United States. In *Heyde* we found that these appeal procedures were adequate for *Fair Assessment* purposes, noting that we "have continually found

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86 Ill. Admin. Code § 1910.65(d). The second sentence of that provision could be interpreted as allowing constitutional challenges to the Board of Review procedures used to determine the "correct assessment," or perhaps might be interpreted more narrowly. We have found no Illinois case law that would bar the PTAB from considering such challenges. We recognize that the Supreme Court has said on several occasions that uncertainty surrounding the scope of a state remedy "may make it less than 'plain.'" See *Rosewell*, 450 U.S. at 517, citing *Tully v. Griffin, Inc.*, 429 U.S. 68, 76 (1976) (dictum), citing in turn *Township of Hillsborough v. Cromwell*, 326 U.S. 620, 625 (1946) (state remedies were at best speculative where long line of state supreme court precedents barred effective relief). Whatever the scope of this uncertainty exception might be, any uncertainty surrounding the scope of the PTAB's powers could not overcome the federal-court barrier here because the state courts will ultimately have jurisdiction to hear and decide the constitutional challenges plaintiffs contemplate. See *Rosewell*, 450 U.S. at 517 ("There is no question that under the Illinois procedure, the court will hear and decide any federal claim.").

that the available state procedures for challenging the Illinois tax system are acceptable" under *Fair Assessment*. 633 F.3d at 520 (collecting cases).

Despite these precedents, plaintiffs maintain that appeals through the PTAB and directly to the circuit courts are procedurally inadequate. They argue that the entire Cook County judiciary "could not adequately hear these specific cases" because the cases are highly political and "against the man who selected the majority of the county judiciary," referring to defendant Joseph Berrios. Pl. Supp. Br. 8. They refer to Berrios and his "cohorts on the Board of Review" as "corrupt 'Chicago-style' politicians" whose property tax decisions were so "brazenly and openly" political that "to expect the Cook County judiciary to treat [the decisions] as anything other than a political hot potato is naive." *Id.* at 8–9.

The federal Constitution does not prohibit popular election of state court judges. Plaintiffs' argument amounts in essence to an argument that some issues and claims are, as a matter of federal constitutional law, simply too hot for elected state judges to handle fairly. To accept this theory would both accept an extraordinary expansion of federal power and endorse a sweeping condemnation of the state judiciary. We reject plaintiffs' theory. Where there are corrupt or incompetent individuals, there are remedies. If plaintiffs find themselves before a Cook County circuit judge who they believe has too close ties to the Board, Illinois law provides a procedural mechanism to substitute judges. *see* 735 Ill. Comp. Stat. § 5/2 1001(a)(2)-(3), (c) (parties entitled to one substitution of a judge as matter of

right and may request substitution for cause, possibly to different county). Thus, we see no procedural inadequacy with a direct appeal to the state courts: Illinois law provides ample opportunity for plaintiffs to receive a fair hearing before a Cook County circuit judge, and plaintiffs can appeal an adverse circuit court decision through the Illinois court system.

But plaintiffs did not appeal directly to the circuit courts. They chose instead the option of appealing to the PTAB. They argue that the PTAB also cannot provide a plain, adequate, and complete remedy because their cases with the PTAB were "red-flagged," will take too long to be decided, and will not be reviewed *de novo*, but rather that the PTAB will "rubber stamp" the Board's decisions. We are not persuaded.

First, significant delay does not doom the adequacy of state remedies. In *Heyde* we found that a delay of more than two years alleged by the plaintiff did not render Illinois procedures inadequate. 633 F.3d at 521. Relying on *Rosewell*, where the Supreme Court found that delays in Illinois tax appeals were not "outside the boundary" of a speedy remedy, 450 U.S. at 521, we held that, "while the delays in the Illinois system are unfortunate, this case fits within the parameters of [*Fair Assessment*] and our previous decisions." *Heyde*, 633 F.3d at 520–21. The same is true here. Briefing before the PTAB proceeded in a timely manner and was completed by late 2011. The parties now wait for a hearing to be scheduled. This is not the seven-to eight-year delay plaintiffs alleged in

their complaints. Even if it is "unfortunate," it still falls within the range considered acceptable in *Rosewell* and *Heyde*. *Id.* at 521.

Second, plaintiffs allege that the PTAB is not an adequate state remedial process because their cases have been "red-flagged." In oral argument they explained that by "red-flagged" they mean that someone within the Board of Review has been in contact with the PTAB and that nothing would be done to change the Board's decisions. We do not know the factual basis for this allegation, but even if the PTAB affirms the Board's decisions and the plaintiffs can show that was because the cases were "red-flagged" or otherwise the subject of improper influence, further appeal to Illinois state courts will be available. *see Huber Pontiac*, 585 F.2d at 820–21 (availability of appeal through Illinois courts and ultimately Supreme Court of United States meant state remedies were plain, speedy, and efficient where plaintiff alleged that tax hearing officer was prejudiced by *ex parte* contacts with the state tax department). We cannot say that the appeal procedure through the PTAB is inadequate or incomplete because parties fear they may be dissatisfied with the process and ultimate outcome.

Plaintiffs also argue that PTAB review is not adequate because it is only a "rubber stamp" for the Board. Pl. Supp. Br. 5. They point to provisions of the relevant regulations that place the burden of proof on the appealing property owner and require parties to prove unequal treatment by "clear and convincing evidence." *see* 86 Ill. Admin. Code § 1910.63(e). By law the PTAB is required to review appeals *de novo*.

35 Ill. Comp. Stat. 200/16-180 ("All appeals shall be considered *de novo* . . . ."); 86 Ill. Admin. Code § 1910.63(a) ("Under the principles of a *de novo* proceeding, the Property Tax Appeal Board shall not presume the action of the board of review or the assessment of any local assessing officer to be correct.").

The provisions plaintiffs cite do not address the standard of review but set out a burden-shifting procedure for PTAB appeals. Contesting taxpayers must first provide evidence or legal argument "sufficient to challenge the correctness of the assessment," and once they have done so, the Board is required to provide evidence or legal argument "sufficient to support its assessment." *see* 86 Ill. Admin. Code § 1910.63(b)–(c). Plaintiffs' argument confuses the *de novo* standard of review with the evidentiary burdens applicable in PTAB appeals. The fact that the plaintiffs bear an evidentiary burden does not render the PTAB appeal process inadequate or incomplete. The prospect that the PTAB's decisions on the merits of these plaintiffs' appeals might be wrong falls well short of any showing that state remedies are inadequate.

Even if these allegations about the adequacy and partiality of the PTAB and the Cook County circuit courts plausibly affected the adequacy of those processes, they are premature. Certainly, tax appeal procedures *exist* in Illinois, and we have repeatedly held that those procedures are adequate for purposes of *Fair Assessment* and the Tax Injunction Act. *see Heyde*, 633 F.3d at 520 (collecting cases). Plaintiffs' claim that facially adequate procedures will not

function adequately in the future is premature. *see*, *e.g.*, *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195–97 (1985) (federal courts should abstain from considering challenges to state eminent domain proceedings if state remedies have not been exhausted, in part because the claims are not ripe as a prudential matter without state court exhaustion).

Thus, under *Fair Assessment*, the district courts in these cases were required to abstain from considering the merits of plaintiffs' claims for damages against the Board under section 1983 because the available state remedies were plain, adequate, and complete.

D. Final Disposition

Comity requires that the claims against the Board be dismissed without prejudice, *i.e.*, without a ruling on the merits. This ruling therefore should not bar plaintiffs from raising any federal constitutional issues in their state proceedings to appeal their property tax assessments. On this topic, we also note that the district court in *Capra* erred in applying too-stringent pleading requirements for a class-of-one equal protection claim. The court found that Capra did not state such a claim because he did not identify in his complaint similarly situated properties that were not subject to the same (allegedly improper) reductions.

Plaintiffs alleging class-of-one equal protection claims do not need to identify specific examples of similarly situated persons in their complaints. As we

explained in *Geinosky v. City of Chicago*, 675 F.3d 743 (7th Cir. 2012):

> Even in a case where a plaintiff would need to identify a similarly situated person to prove his case, . . . we see no basis for requiring the plaintiff to identify the person in the complaint . . . . Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Even the more demanding pleading requirements under *Iqbal* and *Twombly* do not require a plaintiff to identify specific comparators in a complaint.

Id. at 748 n.3. Here the plaintiffs alleged in *Satkar Hospitality* that "[s]imilarly situated property owners, who had not contributed to Rep. Froehlich, were not singled out thusly," Satkar Compl. ¶ 51, and in *Capra*, "[s]imilarly situated taxpayers who were not suspected of associating with Rep. Paul Froehlich were not denied the right to petition the Board of Review." Capra Compl. ¶ 41. At the pleading stage these allegations suffice.[8]

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[8] We need not address the extent to which plaintiffs would need to provide evidence of near-exact similarly situated property owners after discovery. But the question is an open and interesting one, especially in light of *Swanson v. City of Chetek*, where we reversed summary judgment for a defendant and held that a "clear showing of animus, absent a robust comparison to a similarly situated individual, may sustain a class-of-one equal protection claim." 719 F.3d 780, 783, 785 (7th Cir. 2013) (where plaintiff "identified his specific harasser, provided a plausible motive and detailed a series of alleged actions by [the defendant] that appear illegitimate on their face").

III. Conclusion

In the *Capra* appeal, No. 12-2540, we affirm the judgment. The claims against the individual defendants are dismissed with prejudice, and the due process and equal protection claims against the Board of Review are dismissed without prejudice. In the *Satkar Hospitality* appeals, we affirm the judgment in favor of the individual defendants in No. 12-3116, and remand for dismissal of the claims against the Board of Review without prejudice in No. 12-2848.

APPENDIX B

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (CAPRA)

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Case No. 11-cv-4028

May 30, 2012

LOUIS CAPRA,

Plaintiff,

vs.

COOK COUNTY BOARD OF REVIEW, LARRY ROGERS, JR., JOSEPH BERRIOS, BRENDAN F. HOULIHAN, SCOTT M. GUETZOW, JOHN P. SULLIVAN, THOMAS A. JACONETTY,

Defendants.

Plaintiff Louis Capra has filed suit against the Cook Country Board of Review (the "Board"), three commissioners of the Board, ("Rodgers", "Berrios" and "Houlihan"), the Chief Deputy Commissioner of the Board ("Guetzow") and two first assistant commissioner employees of the Board ("Sullivan" and "Jaconetty"), collectively, the "Board defendants" and together with the Board, the "Defendants"). The purpose of the Board is to hear appeals of property tax valuations made by the Cook County Assessor.

Plaintiff claims that the Board defendants revoked his property tax reduction without providing him due process and in violation of a number of constitutional provisions.

Defendants have moved to dismiss plaintiff's complaint in its entirety. The Court grants defendants' motion to dismiss.

BACKGROUND

Plaintiff is a resident and owner of real property in Cook County, IL. Compl. ¶ 6. The Board is a government office of Cook County that considers appeals of real estate valuations made by the Cook County Assessor for property tax purposes. *Id.* ¶ 11. In 2007, plaintiff appeared before the Board to appeal an advised assessment that had been made on his property. *Id.* ¶ 17. In response, the Board lowered the property's valuation such that plaintiff would save over $45,000 per year. *Id.*

In 2009, the news media ran reports that Representative Paul Froehlich, a member of the Illinois General Assembly, held "undue influence" at the Board. *Id.* ¶ 18. Specifically, the reports suggested that in exchange for campaign contributions, Representative Froehlich would promise constituents a reduction in their property taxes.

Plaintiff alleges that in response to the media reports and for "the appearance of clean hands", the Board required plaintiff to appear in June 2009 to ostensibly discuss his 2007 property assessment. *Id.* ¶ 20, 26. Instead of discussing the valuation

assessment of plaintiff's property, the Board focused the hearing on plaintiff's relationship with Representative Froehlich. *Id.* ¶ 26. Following the hearing, although plaintiff testified that he did not know Representative Froehlich nor had he engaged in any illegal or improper behavior with him, the Board defendants "arbitrarily rescinded [plaintiff's] reduction in property taxes that it itself granted close to one year prior . . . simply stating, 'we can do anything we want.'" *Id.* ¶ 21, 32. Plaintiff contends that his new property assessment did not accurately reflect the property's actual value, as evidenced by the fact that one year prior the Board found that the property was worth significantly less. *Id.* ¶ 37. Additionally, plaintiff asserts that Chief Deputy Commissioner Guetzow explained that the plaintiff's revocation occurred based upon a "larger issue between the relationship between the people involved." *Id.* ¶ 33. Plaintiff has interpreted this statement to mean that his property tax reduction was revoked based upon the Board's mistaken belief that he had a suspicious relationship with Representative Froehlich. *Id.* ¶ 35, 36.

In response to the revocation, plaintiff appealed the Board's decision with the Illinois Property Tax Appeal Board ("PTAB"). *Id.* However, the PTAB has not yet rendered a decision regarding plaintiff's property valuation and plaintiff contends that the PTAB will not do so for an "unconscionably long time, if ever" because the Board has already "red-flagged plaintiff's case with the PTAB." Plaintiff further contends that the PTAB may take as long as seven or eight years to resolve this issue and it may take another two to four years for plaintiff to recoup the

money he has lost as a result of the inaccurate increase of his property taxes. *Id.* ¶ 46. Lastly, plaintiff further alleges that the Board defendants are "powerful members of the Cook County Democratic Party and exert political influence over the State judiciary." *Id.* ¶ 47. Therefore, the plaintiff "cannot expect justice in this matter in Circuit Court because there are inherent conflicts of interests between many members of the State judiciary and at least two [d]efendants." *Id.* As a result, plaintiff contends that he has "no plain, adequate and complete state remedy in this matter." *Id.* ¶ 55.

Consequently, plaintiff brings forth claims in federal court under 42 U.S.C. § 1983 against the Board and the Board defendants in their individual capacities for violation of the Equal Protection and Due Process Clauses of the Fifth and Fourteenth Amendment (Counts 1 and 2) and violation of the First Amendment (Count III). Defendants have moved to dismiss all claims.

DISCUSSION

Initially, plaintiff has acknowledged that he has no viable Fifth Amendment Due Process claim and that he has not sufficiently pled a First Amendment claim. He has also clarified that he is not seeking punitive damages from the Board. Therefore, plaintiff's § 1983 claims based upon the First and Fifth Amendments are dismissed.

The defendants have moved to dismiss all the remaining claims against the individual Board defendants on the grounds that the individual board members qualify for absolute and/or qualified

immunity. They also contend that the plaintiff has failed to state a claim for violation of his equal protection or due process rights. Lastly, because defendants believe that plaintiff has failed to state any claims against the individual Board defendants, defendants argue that all claims against the Board should be dismissed as well. When considering a motion to dismiss, well-pleaded facts in the complaint are accepted as true and any ambiguities are resolved in favor of the plaintiff. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

The Court will address each of the defendants' arguments in turn.

A. Absolute and Qualified Immunity

Defendants contend that all claims against the individual Board defendants should be barred by absolute immunity. Absolute immunity is a defense that immunizes certain individuals from lawsuits "to free the *judicial* process from [. . .] harassment and intimidation" associated with litigation. *Burns v. Reed*, 500 U.S. 478, 479 (1991) (emphasis in the original). When determining whether an official is entitled to absolute immunity, courts apply a functional approach. *Heyde v. Pittenger*, 633 F.3d 512, 517 (7th Cir. 2010). In other words, courts look to the nature of the function performed by an official and not just their title or identity to determine whether the official is entitled to absolute immunity protection. *Id.* Consequently, absolute immunity is not limited to judges or prosecutors, but has been granted to protect members of quasi-judicial adjudicatory bodies who function similarly to

traditional judges, but fall outside of the judicial branch. *Id.*

For example, in *Heyde*, the plaintiff brought a § 1983 claim against members of the Tazewell County Board of Review in their individual capacities in connection with the Tazewell County Board's decision to increase the plaintiff's property tax assessment. *Id.*, at 514. The individual Tazewell County Board defendants moved to dismiss all claims against them by arguing that they were entitled to absolute immunity. *Id.* The district court granted defendants' motion and the Seventh Circuit affirmed reasoning that because the plaintiff received notice and a hearing before the Tazewell Board to contest his assessment as well as opportunity to appeal the Tazewell Board's decision, the Tazewell Board functioned in a quasi-judicial manner. Therefore, the board members were entitled to absolute immunity.

Here, the Board defendants are entitled to the same immunity. As in *Heyde*, the plaintiff here has brought claims against certain individual members and employees of the Board for setting his property assessment at a disproportionately high level. Plaintiff received notice of his advised assessment, appeared before the Board to petition his property valuation and has appealed the Board's decision. Thus, similar to the Tazewell Board in *Heyde*, the Board functions as a quasi-judicial adjudicatory body which makes absolute immunity an available defense for the individual Board defendants. Accordingly, all claims against the Board defendants in their individual capacities are dismissed. Having found that the Board defendants are entitled to absolute

immunity, the Court need not decide whether the defendants should also receive qualified immunity from plaintiff's § 1983 claims.

B. Failure to State a Claim

The defendants also contend that plaintiff has failed to state a valid claim for violation of his equal protection and due process rights under the Fourteenth Amendment. To state a valid claim under 42 U.S.C. § 1983, "[a] plaintiff must allege that a government official, acting under color of state law, deprived [him] of a right secured by the Constitution or laws of the United States." *Estate of Sims ex rel. Sims v. County of Bureau*, 506 F.3d 509, 514 (7th Cir. 2007). Conversely, dismissal of the complaint is proper if the plaintiff fails to set forth enough facts to state a claim for relief that is plausible on its face. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007).

1. Equal Protection Claim

The Equal Protection Clause of the Fourteenth Amendment provides that "no State shall deny to any persons within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV, § 1. Traditionally, the Equal Protection Clause is understood to protect members of vulnerable groups from unequal treatment committed by the state. *Bell v. Duperrault*, 367 F.3d 703, 707 (7th Cir. 2004). The clause also prohibits state action in a so called "class of one." To state an equal protection claim under a "class of one" theory, the plaintiff must allege that he has been "intentionally treated differently from others similarly situated and that there is no

rational basis for the difference in treatment." *Engquist v. Oregon Dep't Agric*. 553 U.S. 591, 601-02 (2008). To be considered "similarly situated" a plaintiff and his person of comparison must be "identical or directly comparable in all material respects." *Reget v. City of LaCrosse,* 595 F,3d 691, 695 (7th Cir. 2010).

Here, plaintiff has failed to allege that any similarly situated individuals exist that have been treated differently by the Board. In his complaint, plaintiff alleges that the Board, motivated by the mistaken assumption that plaintiff is affiliated with Representative Froehlich, arbitrarily increased the valuation of his property. Determining whether a property's valuation is correct involves a consideration of a number of factors including, but not limited to, the property's condition, vacancy rates, rental rate, income and expense information and applicable contracts or leases. Nowhere in the complaint does plaintiff identify any constituents with property similar to his own, (as related to the aforementioned factors), that received a lower valuation. Instead, plaintiff speculates that, because the Board originally lowered the value of his property, then subsequently raised it one year later, he has been treated differently from other constituents. Mere speculation, however, falls short of stating a plausible claim for equal protection. Further, the equal protection clause has no application where the plaintiff is seeking a reinstatement of a more favorable property valuation as opposed to a restoration of equality. Because plaintiff has failed to plead facts suggesting that he was treated differently from similarly situated

property owners, he has failed to make out a claim for violation of his equal protection rights.

2. Due Process Claim

While it is unclear whether plaintiff has brought forth a procedural or substantive due process claim, defendants seek to dismiss plaintiff's claim for a violation of due process claim in either form. In his amended complaint, plaintiff sets forth a procedural due process claim based on the defendants' refusal to hear plaintiff's appeal of his revised assessment. To state a claim for the deprivation of a property interest without due process "a plaintiff must demonstrate that (1) he had a constitutionally protected property interest, (2) he suffered a loss of that interest amounting to a deprivation and (3) the deprivation occurred without due process." *Moss v. Martin*, 473 F.3d 694, 700 (7th Cir. 2007).

First, defendants object to plaintiff's due process violation arguing that plaintiff has failed to establish that he has a constitutionally protected property interest and has failed to demonstrate the fundamental unfairness of the state procedures available to him. In his complaint, plaintiff has alleged that the state officials in question have engaged in misconduct by unfairly and arbitrarily increasing his property valuation assessment in retaliation for his presumed association with Representative Froehlich. As was recently decided in this District, plaintiffs have a constitutionally protected property interest in a correct property tax assessment. *Satkar v. Cook County Board of Review* 10 c 6682, 2011 WL 2011486, at *7 (N.D. Ill. May 20,

2011). Therefore, plaintiff has met the first element for a due process claim.

Second, plaintiff has alleged that the incorrect property assessment has resulted in significant monetary loss. Plaintiff has sufficiently met the second element for a due process violation.

Third, plaintiff also alleges that has been deprived his right to an accurate property tax evaluation and consequently suffered monetary losses without due process. Because plaintiff's allegations against the Board constitute "random and unauthorized" acts and because this misconduct is inherently unpredictable, "it is the state's obligation under the Due Process Clause to provide the plaintiff with sufficient remedies after its occurrence rather than to prevent its occurrence from happening altogether." *Michalowicz*, 528 F.3d 530, 534 (7th Cir. 2008). Therefore, under the Due Process Clause a plaintiff must either avail himself of the remedies provided by state law or demonstrate that the available remedies are fundamentally unfair.

In this case, plaintiff alleges that the state remedies provided are fundamentally unfair. Specifically, plaintiff states that he has not been provided an opportunity for appeal of the Board's revocation because "the PTAB will not render any decision for an unconscionably long time, if ever." Plaintiff contends that he faces this burdensome delay because the Board has "red-flagged" his appeal. Plaintiff also claims that "Commissioners of the Board are powerful members of the Cook County Democratic Party and exert powerful influence over the State judiciary" and he "cannot expect justice in

this matter in Circuit Court because there are inherent conflicts of interests between many members of the State judiciary and at least two of the defendants." Defendants reject plaintiff's allegations and assert that the PTAB decision will not take an unconscionable amount of time, the PTAB will not give undue influence to the Board's decision and plaintiff will receive a fair adjudication in state court and will be afforded the protection of recusal of any judge if it is deemed necessary.

This Court acknowledges that there are over 400 judges that preside in the Cook County Circuit Court System. These judges have ascended to their offices in a variety of paths, some of which include election or appointment. Thus, the Court is skeptical of plaintiff's claims that a "conflict of interest" will cause most of these judges to have difficulty remaining impartial towards plaintiff's case. While, at the motion to dismiss stage, the Court must accept the allegations of the non-moving party as true, a plaintiff must also present to the Court factual allegations that raise a right to relief above the speculative level. *Twombly*, 550 U.S. at 555-56. Plaintiff has failed to allege sufficient facts that bolster his speculative claim that the procedures afforded to him are fundamentally unfair. Plaintiff currently has an appeal before the PTAB which will be reviewed *de novo* and, upon a decision being rendered, will have the opportunity to challenge that decision before the Circuit Court, during which he would have the right to seek recusal of any state court judge he felt was biased against him. The Court does not find that there is anything fundamentally unfair about this procedure.

Therefore, plaintiff's due process rights have not been violated.

In his response to defendants' motion to dismiss, plaintiff attempts to clarify that his due process claim is instead substantive in nature. To prevail on a substantive due process claim involving deprivation of a property interest, plaintiff must prove that an independent constitutional violation exists or that state law remedies are inadequate. *Gable v. City of Chicago*, 296 F.3d 531, 541 (7th Cir. 2002). In light of the Court's conclusion that plaintiff failed to establish a "class of one" equal protection claim, and because plaintiff has voluntarily dismissed his First Amendment claim, plaintiff has failed to establish an independent constitutional violation from which to base his substantive due process claim. Further, for the reasons stated above, namely that plaintiff has failed to plead beyond a speculative level, that the state law remedies available to him are unfair or inadequate; plaintiff has also failed to set forth a claim alleging a violation of his substantive due process rights. Accordingly, defendants' motion to dismiss is granted with respect to plaintiff's procedural and substantive due process claims.

C. Derivative Liability

Lastly, defendants argue that plaintiff's § 1983 claims against the Board are derivative in nature and must be dismissed if the plaintiff fails to state an underlying constitutional violation against the individual defendants. Because municipalities are not entitled to immunity under § 1983, upon sufficiently pleading an underlying constitutional

violation, the Board still could be held liable under § 1983, even though the individual defendants are protected by absolute immunity from individual liability. *Hernandez v. Sheahan*, 455 F.3d 772, 776 (7th Cir. 2006); *Owen v. City of Independence, MO*, 445 U.S. 622, 638, 100 S.Ct. 1398, 1409 (1980). Here, however, plaintiff has failed to sufficiently allege any of his constitutional rights have been violated. Thus defendants' motion to dismiss claims against the Board is granted.

CONCLUSION

For the foregoing reasons, this Court grants the motion by Defendants Cook County Board of Review, Larry Rogers, Jr., Joseph Berrios, Brendan F. Houlihan, Scott M. Guetzow, John P. Sullivan and Thomas A. Jaconetty. Specifically, the court dismisses plaintiff's claims against all individual Board defendants with prejudice. Additionally, plaintiff's First and Fifth Amendment claims are dismissed with prejudice. Plaintiff's equal protection and due process claims are dismissed without prejudice.

IT IS SO ORDERED. May 30, 2012

/s/ Sharon Johnson Coleman
United States District Court

APPENDIX C

MEMORANDUM OPINION AND ORDER OF THE DISTRICT COURT (SATKAR HOSPITALITY)

819 F. Supp. 2d 727 (N.D. Ill. 2011)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 10 C 6682

May 20, 2011

SATKAR HOSPITALITY INC.,
SHARAD K. DANI, and HARISH DANI,

Plaintiffs,

vs.

COOK COUNTY BOARD OF REVIEW,
LARRY ROGERS, JR., JOSEPH BERRIOS,
BRENDAN F. HOULIHAN, SCOTT M. GUETZOW,
JOHN P. SULLIVAN, THOMAS A. JACONETTY,
FOX TELEVISION STATIONS, INC., FOX
CHICAGO NEWS, NEWS CORP., ILLINOIS
REVIEW, FRAN EATON, DENNIS G. LACOMB,
DANE PLACKO, MARSHA BARTEL, CAROL
FOWLER, PATRICK MULLEN, and FOX
TELEVISION HOLDINGS, INC.,

Defendants.

MATTHEW F. KENNELLY, District Judge:

Plaintiffs Satkar Hospitality, Inc. and its two principals have sued the Cook County Board of Review, three individuals who were the commissioners of the Board at the relevant time, the chief deputy commissioner, and two first assistant commissioners (collectively, the Board defendants); the Illinois Review and several affiliates (collectively, the Illinois Review defendants); and the local Fox Television station and several affiliates (collectively, the Fox defendants). The Board of Review considers appeals of real estate valuations made by the Cook County Assessor for property tax purposes. Plaintiffs claim that the Board defendants revoked their property tax reduction without providing due process and in violation of other constitutional prohibitions and that the Illinois Review and Fox defendants defamed plaintiffs and placed them in a false light.

All of the defendants have moved to dismiss plaintiffs' first amended complaint. In this decision, the Court considers the Board defendants' and Illinois Review defendants' motions to dismiss. For the reasons stated below, the Court grants the Board defendants' motion in part and denies it in part. The Court denies the Illinois Review defendants' motion.

Background

Satkar owns a hotel in Schaumburg. Plaintiffs allege that Satkar appealed its 2007 tax assessment and that the Board lowered the assessment in a way that represented a $40,000 annual tax savings. In 2009, the news media ran reports that Paul Froehlich, a member of the Illinois General Assembly, was "engineering successful Board of Review appeals for his constituents in return for

large campaign contributions." Am. Compl. ¶ 27. Plaintiffs allege that the reports accused them of bribing Froehlich in return for his agreement to arrange a successful appeal. *Id.* ¶ 28. This, plaintiffs allege, was a false accusation. *Id.* ¶ 35.

Plaintiffs allege that in response to the media reports, "and for the appearance of clean hands," the Board required them to appear in June 2009 "ostensibly . . . to discuss the assessment appeal." *Id.* ¶ 39. But rather than posing questions about the valuation of the hotel, plaintiffs allege, the Board defendants "asked repeated questions about the relationship between Plaintiffs and Rep. Froehlich." *Id.* Following the hearing, plaintiffs contend, "the Board arbitrarily rescinded the reduction in property taxes that it itself granted close to one year prior . . . , stating simply, 'we can do anything we want.'" *Id.* ¶ 46. The chief deputy commissioner allegedly attributed the reduction directly to "the relationship between the people involved," *i.e.*, plaintiffs and Froelich. *Id.* ¶ 47.

Plaintiffs allege that they were "arbitrarily selected" due to the fact that they had made contributions to Froehlich's campaigns, "merely for their association with Rep. Froehlich" and contrary to their First Amendment right to contribute to political candidates without fear of retaliation. *Id.* ¶¶ 48-50. Plaintiffs allege that similarly situated property owners who had not contributed to Froehlich were not treated as plaintiffs were. *Id.* ¶ 51. They also allege that the revised assessment that the Board issued following the June 2009

hearing "did not accurately reflect the property's actual value . . . ." *Id.* ¶ 52.

Plaintiffs allege that they have appealed the revised assessment to the Illinois Property Tax Appeal Board (PTAB) but that the "PTAB will not render any decision for an unconscionably long time, if ever" because the Board has "red-flagged" the appeal. *Id.* ¶ 53. They contend that there is a good chance that the appeal will take as long as seven or eight years to resolve and that in the meantime they are deprived of the use of the amounts they have been forced to pay in higher taxes. *Id.* ¶¶ 66-67.

Plaintiffs also allege that the Board erroneously denied their appeal of a later assessment. *Id.* ¶ 54. According to plaintiffs, Larry Rogers, one of the commissioners of the Board, "explained to counsel for Plaintiffs that the denial was as a result of Plaintiffs' relationship with Rep. Froehlich, and not due to the merits of Plaintiffs' appeal and that under no circumstances would the Board grant a reduction of the Plaintiffs' property taxes." *Id.* ¶ 56. Plaintiffs allege that this, too, was in retaliation for their association with Froehlich, contrary to the way the Board treated other similarly situated property owners, and not based on the merits of the assessment. *Id.* ¶ 57-58. Plaintiffs allege that the Board's actions denied them due process because they did not have a real opportunity for a hearing on the merits. *Id.* ¶ 59.

Plaintiffs allege that under Illinois law, a property owner may appeal to the PTAB or to state circuit court (but not both) and that the PTAB lacks authority to review issues of due process and equal

protection. *Id.* ¶ 61. They allege that the Board's commissioners "are powerful members of the Cook County Democratic Party and exert political influence over the State judiciary." *Id.* ¶ 68. As a result, plaintiffs allege, they "cannot expect justice in this matter in Circuit Court because there are inherent conflicts of interests between many members of the State judiciary and at least two of the Defendants," including (former) commissioner Berrios, who is identified as chairman of the Cook County Democratic Party, which, plaintiffs allege, "slates all [D]emocratic judicial candidates" in the county, as well as former vice chair of slating for the party. *Id.* ¶¶ 69-70. Plaintiffs contend that "[t]here is a great likelihood that in state court, Plaintiffs would be before a judge who owes his position, in some way, to the political party currently chaired by . . . Berrios." *Id.* ¶ 73. They also allege that (former) commissioner Rogers, "was President of the Cook County Bar Association, which rates and effectively recommends candidates for judicial office." *Id.* ¶ 75. As a result of these factors, plaintiffs contend, "[t]here is no plain, adequate, and complete state remedy in this matter." *Id.* ¶ 76.

Plaintiffs assert claims under 42 U.S.C. § 1983 against the Board of Review and the individual Board defendants for violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment (Counts 1 and 2) and the First Amendment (Count 3). Plaintiffs assert state law defamation claims against the Illinois Review defendants. Defendants have moved to dismiss these claims on various grounds.

Discussion

On a motion to dismiss, the Court accepts the facts stated in the complaint as true and draws reasonable inferences in favor of the plaintiff. *Hallinan v. Fraternal Order of Police of Chicago Lodge No. 7*, 570 F.3d 811, 820 (7th Cir. 2009).

I. The Board defendants' motion

The Board defendants have moved to dismiss plaintiffs' first amended complaint on the basis of absolute immunity, qualified immunity, and the *Rooker-Feldman* doctrine. The Board defendants also contend that plaintiffs fail to state a claim for violation of their equal protection, due process, and First Amendment rights. Finally, the Board defendants ask this Court to dismiss all claims against the Board on the ground that plaintiffs fail to state claims against any individual Board defendants. The Court addresses each argument in turn.

A. Absolute and qualified immunity

A recent Seventh Circuit decision requires the dismissal of the claims against the members of the Board–Berrios, Rogers, and Houlihan–on the basis of absolute immunity. In *Heyde v. Pittenger*, 633 F.3d 512 (7th Cir. 2011), the Seventh Circuit considered claims against the members of the Tazewell County Board of Review, which performs the same function in that county as the Cook County Board of Review. The plaintiff in *Heyde* alleged that the board set his property assessment at a disproportionately high level, in violation of his equal protection rights and in

retaliation for his earlier exercise of his right to challenge assessments. *See id.* at 514. The court held that the defendants were entitled to absolute quasi-judicial immunity from suit under section 1983 because the claims arose from their performance of an adjudicative function. *Id.* at 517-19.

The same immunity applies to Guetzow, Sullivan, and Jaconetty, who are deputy and assistant commissioners. The factual predicate for plaintiffs' claims against them is less than crystal clear. Plaintiffs lump them in with the other Board defendants without distinguishing who did what–except for their reference to Guetzow's alleged statement that the Board had acted as it did because of "the relationship between the people involved." Am. Compl. ¶ 47. What is clear, however, is that plaintiffs have sued the non-Board member defendants because of their alleged activities in connection with the setting and conduct of the June 2009 hearing and the ensuing decisions regarding the hotel's assessment.

Even a court clerk is entitled to absolute immunity for non-ministerial actions integral to the adjudicative process. *See, e.g., Kincaid v. Vail*, 969 F.2d 594, 601 (7th Cir. 1992). Absolute immunity "is designed to free the *judicial process* from the harassment and intimidation associated with litigation." *Burns v. Reed*, 500 U.S. 478, 479 (1991) (emphasis in original). When a court deals with the application of the immunity doctrine to auxiliary judicial personnel, it must bear in mind the "danger that disappointed litigants, blocked by the doctrine of absolute immunity from suing the judge directly, will

vent their wrath on clerks, court reporters, and other judicial adjuncts . . . ." *Kincaid*, 969 F.3d at 601 (internal quotation marks omitted). Because it is clear from the complaint that plaintiffs are suing Guetzow, Sullivan, and Jaconetty for their actions in connection with the quasi-judicial decision making performed by the Board, they are entitled to absolute immunity from suit under section 1983.

This leaves the claims against the Board itself. The Board does not contend that quasi-judicial immunity extends to the Board itself, as opposed to its individual commissioners, deputy commissioners, and assistant commissioners. *See, e.g.,* Mem. in Support of Mot. to Dismiss (dkt. no. 35) at 8 ("Even had plaintiffs properly pled their claims against Berrios and Jaconetty, those claims would be barred by the defense of absolute immunity."); Motion to Cite Add'l Authority (dkt. no. 61) ¶ 2 ("Berrios and Jaconetty have asserted the defense of absolutely [sic] immunity . . . ."). Nor does qualified immunity apply to a judicial body like the Board; the doctrine protects only individual government officials and agents. *Hernandez v. Sheahan*, 455 F.3d 772, 776 (7th Cir. 2006) (citing *Owen v. City of Independence*, 445 U.S. 622 (1980)). The Board is therefore entitled to neither absolute nor qualified immunity from plaintiff's section 1983 claims.

B. *Rooker-Feldman* doctrine

The Board argues that plaintiffs' claims are barred by the so-called *Rooker-Feldman* doctrine, which bars federal "cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court

proceedings commenced and inviting district court review and rejection of those judgments." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 294 (2005). The doctrine stems from the fact that Congress has authorized only the Supreme Court to review state court judgments. As a result, lower federal courts lack jurisdiction to nullify the judgment of a state court. *See id.* at 284-85.[9]

The first question is whether the *Rooker-Feldman* doctrine even applies in view of the fact that plaintiffs litigated and lost not before a state court but before the Cook County Board of Review, a state administrative agency. The Seventh Circuit has repeatedly held that the doctrine "presents no jurisdictional obstacle to judicial review of [state] executive action, including decisions made by state administrative agencies." *See Gilbert v. Illinois State Bd. of Educ.*, 591 F.3d 896, 900 (7th Cir. 2010) (citing *Verizon Maryland Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 644 n.3 (2002)); *see also Hemmer v. Indiana State Bd. of Animal Health*, 532 F.3d 610, 614 (7th Cir. 2008).

In support of a contrary proposition, defendants note that "*Feldman* itself involved a federal lawsuit seeking review of a decision made by a Committee of the District of Columbia Bar that denied one of the petitioners in that case admission to practice law." Bd. of Review Defs.' Reply at 16. That contention is a bit of a stretch. It is true that the *Feldman* case,

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[9] One fairly obvious exception to this concerns habeas corpus proceedings under 28 U.S.C. § 2254. Plaintiffs, however, have identified no exception that applies in the present context.

entitled *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), stemmed from a bar committee's decision to deny the plaintiff admission to the bar. But before the plaintiff filed suit in federal court, he had challenged the bar committee's decision in the local District of Columbia courts and had lost. The issue the Supreme Court considered was not whether the plaintiff could challenge the bar committee's decision in federal court; rather the Court considered "what authority the United States District Court . . . and the United States Court of Appeals . . . have to review *decisions of the District of Columbia Court of Appeals* in bar admission matters." *Id.* at 463 (emphasis added). The Court considered whether the local court's ruling was a judicial proceeding as opposed to an administrative or ministerial proceeding, but the premise of that assessment was the rule that a district court is "without authority to review final determinations of [a state court] in judicial proceedings." *Id.* at 476.

The other cases that defendants cite for the proposition that *Rooker-Feldman* applies to the Board's decision likewise do not support the weight that defendants seek to place on them. In *Edwards v. Illinois Bd. of Admissions to the Bar*, 261 F.3d 723 (7th Cir. 2001), much as in *Feldman*, the Board of Admissions' decision had been reviewed and upheld by a state court. Thus although the plaintiff's complaint concerned matters that had occurred before the Board of Admissions, she was attacking the judgment of a state court, not simply the judgment of the Board. And in *Buckley v. Illinois Judicial 8Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), which defendants also cite, "[t]he judgment of

the Illinois Courts Commission . . . was the judgment of the highest court of the State of Illinois because it could not be reviewed by any other Illinois court, so only the U.S. Supreme Court could review it further . . . ." *Id.* at 227.

Defendants argue that, under state law, the Board of Review is a "quasi-judicial tribunal" rather than an administrative agency. Reply in Support of Mot. to Dismiss at 17. The authorities they cite, however, are distinguishable. First, in *Parker v. Kirkland*, 298 Ill. App. 340, 18 N.E.2d 709 (1939), an Illinois appellate court held that a privilege rule applicable to statements by counsel in judicial proceedings and "hearings before bodies whose duties are quasi judicial, boards, or commissions" applied to statements made in administrative proceedings before the Board of Appeals. *Id.* at 713. The court reasoned that, "[t]hough a branch of the executive department of the government, the Board of Appeals, which succeeded the Board of Review, nevertheless exercises quasi judicial powers." *Id.* at 713. The court's recognition that the Board exercises quasi-judicial powers does not alter its status as an administrative agency of the executive branch.

Second, in *Goodfriend v. Bd. of Appeals of Cook County*, 18 Ill. App. 3d 412, 305 N.E.2d 404 (1973), an Illinois appellate court held that the Board of Review was an "inferior tribunal" for purposes of a rule permitting state circuit courts "to issue common law writs of certiorari addressed to all inferior tribunals whenever it is shown either that they have exceeded their jurisdiction or have proceeded illegally, and no direct appeal or other mode of direct

review of their proceedings is provided." *Id.* at 418. The court stated that the Board exercised a judicial "power" when it decided the property rights of others. *Id.* at 418. The court made it clear, however, that "[t]axation of property is a function that is legislative, rather than judicial" and it characterized the Board's decisions as "administrative." *Id.* As in *Parker*, the Board's exercise of judicial powers does not make it part of the judicial branch of the state government.

Nor does this Court's earlier determination that the individual Board defendants are entitled to absolute quasi-judicial immunity dictate that the *Rooker-Feldman* doctrine applies in this case. In the immunity context, the Court applies "a functional approach" and considers whether the claims arise from an official's performance of an adjudicative, as opposed to ministerial or administrative, function. *Heyde*, 633 F.3d at 517. In contrast, in the *Rooker-Feldman* context, the Court considers whether a plaintiff was a "state court loser" or instead merely lost in "state administrative agency proceedings." *Hemmer*, 532 F.3d at 614.

Contrary to defendants' assertions, the *Rooker-Feldman* doctrine does not come into play merely because the Board of Review's decision was subject to challenge and review in state court. Indeed, the Seventh Circuit held otherwise in *Hemmer*. In that case, a plaintiff obtained an adverse state administrative agency decision and then failed to get state court review due to his own error. *Hemmer*, 532 F.3d at 614. Despite the plaintiff's failure to exhaust available state court remedies, the court concluded

that the plaintiff was not a "state-court loser" for purposes of the *Rooker-Feldman* doctrine because "the only relevant prior history was a loss in state agency proceedings." *Id.* The plaintiffs in this case are similarly not "state-court losers" merely because they lost their appeal before the Board of Review. The Court therefore concludes that the Board's decision to reassess plaintiffs' property is not a state court judgment that subjects it to *Rooker-Feldman*'s jurisdictional bar.

C. Failure to state a claim

The Board defendants contend that plaintiffs fail to state a claim for violation of their equal protection, due process, and First Amendment rights. "A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. Proc. 8(a). Rule 8(a) imposes three requirements:

> First, a plaintiff must provide notice to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

The Court begins with plaintiffs' equal protection claim. To state an equal protection claim under a "class of one" theory, the plaintiffs must

allege that they have "'been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 601-02 (2008) (quoting *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000)). No rational basis for differential treatment exists if a defendant acted for "reasons of a personal nature unrelated to the duties of the defendant's position," such as the "desire to find a scapegoat in order to avoid adverse publicity." *Bell v. Duperrault*, 367 F.3d 703, 710 (7th Cir. 2004). Plaintiffs have squarely alleged an equal protection violation under this theory.

The Supreme Court's decision in *Engquist* does not compel a different result. In that case, the Court identified two exceptions to the class of one theory of equal protection. *See Engquist*, 553 U.S. at 603-05; *Avila v. Pappas*, 591 F.3d 552, 554 (7th Cir. 2010) (discussing *Engquist*). First, *Engquist* held that "disputes related to a public employee's interactions with superiors or co-workers never may be litigated as class-of-one claims under the equal protection clause." *Avila*, 591 F.3d at 554. Second, it held that "class-of-one claims cannot rest on governmental activity that is discretionary by design," such as prosecutorial charging decisions. *Id.*; *see also Srail v. Village of Lisle*, 588 F.3d 940, 945 (7th Cir. 2009) (holding that village's "decision to extend water mains to some communities and not others" was "the exact type of individualized and discretionary decision-making to which the *Engquist* court was referring"). Plaintiffs' claim does not implicate a public employee's interactions with superiors or co-

workers. It also does not involve discretionary and intentionally selective governmental activity. Accordingly, *Engquist* does not bar plaintiffs' equal protection claim.

The Court turns next to plaintiffs' due process claim. Plaintiffs assert that both their procedural and substantive due process rights were violated. "To plead a procedural due-process claim, [plaintiffs] must allege a cognizable property interest, a deprivation of that interest, and a denial of due process." *Palka v. Shelton*, 623 F.3d 447, 452 (7th Cir. 2010) (citation omitted). Plaintiff must also allege "a challenge to the fundamental fairness of the state procedures." *Michalowicz v. Village of Bedford Park*, 528 F.3d 530, 534 (7th Cir. 2008) (citation and internal quotation marks omitted). "In order to prevail on a substantive due process claim involving a deprivation of a property interest, [plaintiffs] must 'show either the inadequacy of state law remedies or an independent constitutional violation.'" *Gable v. City of Chicago*, 296 F.3d 531, 541 (7th Cir. 2002) (quoting *Doherty v. City of Chicago*, 75 F.3d 318, 326 (7th Cir. 1996)); *see also Palka*, 623 F.3d at 453.

The Board defendants contend that plaintiffs' procedural due process claim fails because plaintiffs do not allege a cognizable property interest or the fundamental unfairness of the state procedures available to them. They argue that plaintiffs' substantive due process claim fails because plaintiffs do not allege either the inadequacy of state law remedies or an independent constitutional violation.

The Court disagrees. First, plaintiffs squarely allege the deprivation without due process of their

property interest in a correct property tax assessment. Second, plaintiffs adequately allege both the fundamental unfairness of state procedures and the inadequacy of state law remedies. Plaintiffs allege that the Board adjudicated their tax assessment not on the merits but in retaliation for their association with Froehlich, Am. Compl. ¶¶ 37-52, 54-59; the "PTAB will not render any decision for an unconscionably long time, if ever" because the Board has "red-flagged" their appeal, *id.* ¶¶ 53, 66; and plaintiffs "cannot expect justice in this matter in Circuit Court because there are inherent conflicts of interests between many members of the State judiciary and at least two of the Defendants," *id.* ¶¶ 68-75.

To be sure, defendants counter that the PTAB will not give undue influence to the Board's decision; PTAB procedures will not take a constitutionally inadequate amount of time; and plaintiffs will receive a fair adjudication in state court and can obtain recusal of any state court judge if appropriate. At the motion to dismiss stage, however, the Court accepts the allegations in the complaint as true and considers only whether plaintiffs' allegations are plausible enough to provide sufficient notice to defendants of the plaintiffs' claim. *Brooks*, 578 F.3d at 581. Though plaintiffs' allegations may be quite difficult to prove, that is a matter properly addressed by a motion for summary judgment, not a motion to dismiss for failure to state a claim.

Finally, the Court considers plaintiffs' First Amendment retaliation claim. To prevail on such a claim, a plaintiff "must prove that (1) he engaged in

constitutionally protected speech; (2) the defendants, as public officials, engaged in adverse conduct against him; and (3) the defendants were motivated, at least in part, by his protected speech." *Bivens v. Trent*, 591 F.3d 555, 559 (7th Cir. 2010) (citing *Springer v. Durflinger*, 518 F.3d 479, 483 (7th Cir. 2008)). A campaign contribution constitutes protected political expression because it expresses support for a particular candidate. *See Buckley v. Valeo*, 424 U.S. 1, 20-21 (1976) (per curiam). The Board defendants contend that plaintiffs do not sufficiently allege the causation element of the claim. Plaintiffs allege, however, that the Board engaged in adverse conduct against them (the rescission of a property tax reduction and the erroneous denial of a later assessment appeal) in retaliation for their associations with and contributions to Froehlich. The Court concludes that plaintiffs have adequately alleged a First Amendment retaliation claim.

D. Derivative liability

Defendants argue briefly that plaintiffs' section 1983 claims against the Board are derivative in nature and must be dismissed absent an underlying constitutional violation by the individual defendants. Because plaintiffs have stated an underlying constitutional violation against at least some of the individual Board defendants, this argument fails, even though the individual defendants are immune from individual liability. *See Owen*, 445 U.S. at 638; *Hernandez*, 455 F.3d at 776.

II. Illinois Review defendants' motion

The Illinois Review defendants move to dismiss plaintiffs' state law defamation and false light claims on the following grounds: (a) the Court lacks supplemental jurisdiction over the claims because they do not arise from a common nucleus of operative fact as the federal claims against the Board defendants; (b) the Court should decline to exercise supplemental jurisdiction over the state claims because they will require the Court to decide novel issues of state law; and (c) plaintiffs have failed to identify the particular statements they claim were defamatory or placed them in a false light. In their reply brief, the Illinois Review defendants further contend that this Court should dismiss the claims on the basis of a statute of limitations defense.

A. Common nucleus of operative fact

The plaintiff has the burden of establishing federal jurisdiction. *Kontos v. United States Dept. of Labor*, 826 F.2d 573, 576 (7th Cir. 1987). If, as here, a district court has original jurisdiction over an action, the court has supplemental jurisdiction "over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). Two claims are part of the same case or controversy if they "derive from a common nucleus of operative facts. A loose factual connection between the claims is generally sufficient." *Baer v. First Options of Chicago, Inc.*, 72 F.3d 1294, 1299 (7th Cir. 1995) (citation and internal quotation marks omitted). The Illinois Review defendants

argue that the operative facts at issue in the state and federal claims are "entirely different" because "there is no suggest [sic] that the Illinois Review Defendants . . . were involved in the Board Defendants' purported actions" rescinding plaintiffs' property tax reduction. Illinois Review Defs.' Mot. to Dismiss at 3.

In a previous decision in this case, the Court held that plaintiffs' state law claims against the Fox defendants and plaintiffs' federal claims arise from a common nucleus of operative fact. *See Satkar Hospitality Inc. v. Cook County Bd. of Review*, No. 10 C 6682, 2011 WL 1303227, at *1-2 (N.D. Ill. Apr. 4, 2011). The Court reasoned:

> Satkar alleges that the Board of Review acted in direct response to the stories reported by the media defendants. It is reasonably likely that the Board of Review defendants will cite the information reported by Fox as providing a legitimate basis to reopen the determination of Satkar's assessment. The factual basis for the contentions regarding Satkar's dealings with the state representative is likely to be at issue in the determination of both the constitutional claims against the Board of Review defendants and the claims against the media defendants. It is also likely that the discovery that the parties will conduct regarding Satkar's claims against the Board of Review defendants will overlap significantly with the discovery they will conduct on the defamation and false light

claims.

Id. at *2. The same analysis applies here. The Court concludes that supplemental jurisdiction exists over the state law claims against the Illinois Review defendants.

B. Novel issue of state law

A court may decline to exercise supplemental jurisdiction over a claim if, among other things, it "raises a novel or complex issue of State law." 28 U.S.C. § 1367(c)(1). "But while a district court may relinquish its supplemental jurisdiction if one of the conditions of § 1367(c) is satisfied, it is not required to do so." *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 608 (7th Cir. 2008) (citation omitted). "A district court deciding whether to retain jurisdiction pursuant to the factors set forth in § 1367(c) 'should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity.'" *Id.* (quoting *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 173 (1997)).

Defendants contend that adjudication of their statute of limitations defense will require the Court to decide a novel issue of state law. Specifically, they contend that no Illinois state court has yet considered whether, under Illinois' Uniform Single Publication Act, 740 ILCS 165, the limitation period applicable to plaintiffs' claims begins to run on the date of a blog entry's first appearance online or whether its continued availability online restarts the clock. Though the Illinois Appellate Court provided some guidance on proper construction of the Uniform

Single Publication Act in *Blair v. Nevada Landing P'ship*, 369 Ill. App. 3d 318, 859 N.E.2d 1188 (2006), the Illinois Supreme Court has not yet decided this issue.

The Court concludes that, on balance, the values of judicial economy and convenience weigh in favor of this Court retaining jurisdiction over plaintiffs' state law claims. Because the state and federal claims arise from a common factual nucleus, judicial economy would best be served by deciding all of the claims in this Court. Moreover, the state claims are unlikely to require significantly more factual development than already will be required by the remaining federal claims. *cf. De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 312 (2003) (reaching a contrary result because the case raised novel state law issues that would require greater factual development than the federal issues and because "the federal action is an appendage to the more comprehensive state action"). For these reasons, the Court declines to dismiss plaintiffs' state law claims against the Illinois Review defendants.

C. Sufficiency of plaintiffs' allegations

The Illinois Review defendants contend briefly that the Court should dismiss plaintiffs' state law claims pursuant to Rule 12(b)(6) for failure to identify the particular statements that plaintiffs claim were defamatory or placed them in a false light. In support, they incorporate the arguments raised in the Fox defendants' motion to dismiss the first amended complaint. This Court rejected those arguments in a previous decision in this case. *See*

Satkar Hospitality Inc., 2011 WL 1303227, at *6-8. For the same reasons, the Court rejects them here.

D. Statute of limitations defense

In their reply brief, the Illinois Review defendants assert for the first time a statute of limitations defense to plaintiffs' state law claims. In response, plaintiffs move to strike the defense on the basis of forfeiture.

The Court agrees with plaintiffs that defendants have forfeited the defense for purposes of the motion to dismiss by failing to raise it in their opening brief. "Arguments raised for the first time in a reply brief are waived." *James v. Sheahan*, 137 F.3d 1003, 1008 (7th Cir. 1998); *see also APS Sports Collectibles, Inc. v. Sports Time, Inc.*, 299 F.3d 624, 631 (7th Cir. 2002) (same). "The reason for this rule of waiver is that a reply brief containing new theories deprives the respondent of an opportunity to brief those new issues." *Wright v. United States*, 139 F.3d 551, 552 (7th Cir. 1998).

Contrary to defendants' contention, the statute of limitations defense asserted in defendants' reply does not fairly respond to matters raised in the plaintiffs' response. Nor are defendants entitled to assert the defense merely because plaintiffs attached four blog posts containing allegedly defamatory statements to their response brief. Defendants may, however, raise the defense in a motion for summary judgment at a later stage in the case.

Conclusion

For the reasons stated above, the Court grants the Board defendants' motions to dismiss in part and denies them in part. Specifically, the Court dismisses plaintiffs' claims against the individual Board defendants but otherwise denies the Board defendants' motions to dismiss [docket nos. 31, 70, 72]. The Court denies the Illinois Review defendants' motion to dismiss [docket no. 39]. The case is set for a status hearing on June 2, 2011 at 9:30 a.m.

/s/ Matthew F. Kennelly
United States District Judge

Date: May 20, 2011