S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY and INLAND EMPIRE UNITED,
Petitioners and Respondents,

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, ROBERT A. LOVINGOOD, JANICE RUTHERFORD, CURT HAGMAN, and JOSIE GONZALES
Respondents and Appellants,

DAWN ROWE
Real Party in Interest and Appellant.

After an Order by the Court of Appeal,
Fourth Appellate District, Division Two, Case No. E073730

Appeal from the San Bernardino County Superior Court,
Case No. CIVDS1833846, Honorable Janet M. Frangie, Judge

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS; PROPOSED *AMICUS CURIAE* BRIEF

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TO THE HONORABLE CHIEF JUSTICE OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the League of California Cities (the "League") requests permission to file the attached *amicus curiae* brief in support of Appellants Board of Supervisors of San Bernardino County, et al. (together, "the Board"). The League is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State, which monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Municipalities in California, like counties, are governed by boards—city councils—comprised of government officials chosen periodically by local voters. Vacancies, however, can arise on city councils between elections, and when they do, they are often filled by appointment. (Gov. Code § 36512(b).) Under the Ralph M. Brown Act (*id.* § 54950 *et seq.*), such appointments, like most other acts of a local agency, must take place in public view.

This case raises two important questions about the procedures that apply when an alleged Brown Act violation is

invoked as the basis for overturning an appointment made to the governing board of a local agency. These questions are:

(1) If a party wishes to challenge a government official's right to hold a seat on the governing board of a local agency based on allegations that the official was appointed to that board in violation of the Brown Act, must it seek leave from the Attorney General of the State of California to bring a *quo warranto* action under section 803 *et seq.* of the Code of Civil Procedure? Or may it instead file a petition for writ of mandamus under section 54960.1 of the Government Code, seeking a writ that directs the agency's governing board to rescind the appointment?

(2) If the challenger may proceed in mandamus and then prevails in the Superior Court, must the Superior Court refrain from enforcing its judgment during the pendency of an appeal by the governing board? Or may the Superior Court, before the Court of Appeal has had the chance to review the judgment, require the governing board to rescind the appointment and fill the vacancy in a manner directed by the Court?

The League supported the Board's petition for review in this case, and it now joins the Board in urging the Court to hold that all challenges to the appointment of government officials to public office, including those based on alleged violations of the Brown Act, must proceed under the *quo warranto* statute. Because Respondents Michael Gomez Daly and Inland Empire United (together, "Respondents") did not seek leave to sue in *quo warranto*—because they refused to do so—the Superior Court should have dismissed their lawsuit. The League, like the Board, also believes that if mandamus is an appropriate procedure for

challenging appointments to public office based on alleged violations of the Brown Act, and the challenger prevails in the Superior Court, a judgment directing the governing board to rescind the appointment and fill the vacancy in another manner should be automatically stayed during the pendency of the appeal pursuant to section 916(a) of the Code of Civil Procedure.

Vacancies can arise on a city council in many different circumstances, including a councilmember's election to higher office, as occurred in this case, or his or her death or resignation. (Gov. Code § 1770.) And they are not infrequent. Informal polling conducted by the League in 2010 identified more than 30 city council vacancies over a two-year period. Because the Court's resolution of the dispute between Respondents and the Board will clarify the procedural framework that applies to future disputes over appointments made to fill future vacancies, the League has a substantial interest in presenting its views on what that procedural framework is under California law. It hopes that its perspective will be of assistance to the Court.

The undersigned attorneys have carefully examined the briefs submitted by the parties and represent that the League's brief, while consonant with the Board's arguments, will highlight a number of critical points that the League believes warrant further analysis. They also represent that they authored this brief in whole, on a pro bono basis; that their firm is paying the full cost of preparing and submitting the brief; and that no party to this action, or any other person, authored the brief or made any monetary contribution to help fund the preparation and submission of the brief. (Cal. Rules of Court, Rule 8.520(f)(4).)

For these reasons, the League respectfully asks that the Court grant its application and accept the attached *amicus curiae* brief, offered in support of the Board, for filing in this case.

JARVIS, FAY & GIBSON, LLP

Dated: October 15, 2020 By: /s/ Gabriel McWhirter
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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS, BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, ET AL.

I. INTRODUCTION

In a representative democracy, public offices are a public trust, "'created in the interest and for the benefit of the people.'" (*California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 138, citations omitted.) But "the people" often disagree about who should hold that trust—who should decide what best serves the interests of, and provides the most benefit to, the community as a whole. Such disagreements can, in a state as diverse as California, be quite heated; in the public square and in the press, "debate on public issues 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on ... public officials.'" (*Fletcher v. San Jose Mercury News* (1989) 216 Cal.App.3d 172, 183, citing *New York Times Co. v. Sullivan* (1964) 376 U.S. 254, 270.) This should be expected, maybe even welcome; democracy, after all, is a raucous affair.

When disagreements about who should hold public office spill over into the courts, however, different considerations are at play. Lawsuits that question whether a government official has the legal right to hold public office, like all public and private disputes, should be resolved in a "fair and orderly" manner. (*People v. Scott* (1994) 9 Cal.4th 331, 351.) But they also insert the judiciary into disputes that the public may view as political in nature and so, unless carefully managed, can undermine the public's confidence in the legitimacy of government itself.

This case poses two questions about the procedures that must be followed when an interested party files a lawsuit seeking to force the removal of a government official from public office on the grounds that the official's appointment to that office violated the Ralph M. Brown Act (Gov. Code § 54950 *et seq*.):

(1) Must the party seek leave from the Attorney General of the State of California to challenge the appointed government official's right to hold office in a *quo warranto* action? Or may it instead file a petition for writ of mandamus under section 54960.1 of the Government Code against the governing board of the public agency that made the appointment, seeking a writ directing the board to rescind the appointment?

(2) If the challenger may proceed in mandamus and then prevails in the Superior Court, must the Superior Court refrain from enforcing its judgment during the pendency of an appeal by the governing board? Or may it require the board to rescind the appointment and fill the resulting vacancy in a manner directed by the Court before appellate review is complete?

On the first question, Appellants—the Board of Supervisors of the County of San Bernardino and its individual members (together, "the Board")—contend that a Brown Act challenge to the appointment of a government official to public office, like all other appointments challenges, must be brought pursuant to the *quo warranto* statute. The League agrees. The *quo warranto* statute provides a robust process for the airing of appointment-related disputes. But it also takes such disputes out of the realm of "'private quarrel'" by placing them under the supervision of the Attorney General, so that they are not litigated in a way that threatens to undermine the public's confidence in the machinery

of government. (*Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1228, citations omitted.) Respondents' action in mandamus does not provide these same protections. And while the Legislature could create a different procedure for challenging appointments to public office, there is no indication that it intended to do so when it adopted section 54960.1 of the Government Code, the Brown Act's primary enforcement statute.

As for the second question, if the Court holds that Respondents were not required to proceed in *quo warranto*, and that their mandamus action was proper, it should also hold that enforcement of the Superior Court's writ directing the Board to rescind its appointment of Supervisor Rowe and allow the Governor to fill the resulting vacancy was stayed during the Board's appeal pursuant to section 916(a) of the Code of Civil Procedure. Applying the "automatic stay" preserves the *status quo* at the time the Superior Court entered judgment, as the law requires, and ensures that the Court of Appeal, and this Court, have a meaningful opportunity to review the propriety of the Superior Court's decision to remove Supervisor Rowe from office.

II. STATEMENT OF FACTS

The facts underlying the current dispute have been laid out in detail in the briefs submitted by the Board and Respondents. Accordingly, the League will provide only a brief summary here.[1]

In late 2018, a vacancy arose on the Board of Supervisors for the County of San Bernardino when the sitting supervisor for the Third District, James Ramos, was elected to the California State Assembly. (Board's Br. at 15-16.) The County's charter

[1] The League's summary of the facts is taken from the Board's opening brief, cited herein as "Board's Br." Citations to "Respondents' Br." refer to Respondents' answer brief on the merits, and Board's reply brief will be cited as "Board's Reply Br."

provides that any vacancy on the Board may, within 30 days, "be filled by appointment by majority vote of the remaining members of the Board ...." (*Id.* at 15.) If the Board does not make an appointment within 30 days, the Governor will do so. (*Ibid.*)

30 days is not a lot of time. Nevertheless, the Board solicited applications, conducted interviews of fourteen candidates over the course of two public meetings, and on December 18, 2018, with 15 days to spare, voted to appoint Dawn Rowe to the office of Third District Supervisor. (*Id.* at 16-20.)

Shortly thereafter, Respondents filed a petition for writ of mandate against the Board in the San Bernardino County Superior Court under section 54960.1 of the Government Code and section 1085 of the Code of Civil Procedure, alleging that Supervisor Rowe's appointment was "null and void" because the process the Board used to select the candidates to be publicly interviewed violated the Brown Act. (*Id.* at 21; Gov. Code §§ 54952.2(b)(1), 54953(a).) Respondents asked the Court to issue a writ directing the Board to rescind its appointment of Supervisor Rowe and to allow the Governor to fill the office of Third District Supervisor instead. (Board's Br. at 21-22.)

In response to the petition, the Board argued that Respondents' claim that Supervisor Rowe has no legal right to hold the office of Third District Supervisor could not proceed in mandamus and instead must be raised in a *quo warranto* action—an action that would be subject to the Attorney General's supervision. (*Id.* at 22.) The Board also argued that even if its process for selecting interview candidates ran afoul of the Brown Act in some way, any error was "cured," rendering Supervisor Rowe's appointment lawful. (See Gov. Code § 54960.1(e).)

The Superior Court ultimately entered judgment for Respondents and issued a writ of mandate that directed the Board to "immediately ... rescind" Supervisor Rowe's appointment and to thereafter prevent her from participating as a supervisor in any Board meetings or actions or register or give effect to any vote she might attempt to cast. (Board's Br. at 22-23.) The writ also compelled the Board to refrain from appointing anyone to fill the vacated office and to immediately seat any person appointed to the office by the Governor. (*Ibid.*)

The Board appealed and sought a writ of supersedeas from the Court of Appeal, arguing, as relevant here, that under section 916(a) of the Code of Civil Procedure, the appeal automatically stayed enforcement of the writ of mandate. (*Id.* at 23-24.) The Court of Appeal denied the Board's petition, reasoning that the relief granted by the Superior Court was prohibitory in nature and therefore not subject to the automatic stay. (*Id.* at 24.)

This Court granted review of the Court of Appeal's order denying the Board's petition for writ of supersedeas and instructed the parties to address both the applicability of the automatic stay and whether Respondents' lawsuit should have proceeded under the *quo warranto* statute in the first instance.

III. ARGUMENT

A. Seeking leave from the Attorney General to sue in *quo warranto* is the appropriate procedure for challenging the appointment of government officials to public office, even when alleged violations of the Brown Act serve as the basis of the challenge.

Section 803 of the Code of Civil Procedure authorizes the Attorney General of the State of California, acting "in the name of the people of this state, upon his own information, or upon a complaint of a private party," to bring an action "against any

person who usurps, intrudes into, or unlawfully holds or exercises any public office ...." It is modeled on the writ of *quo warranto*, used by the English Crown to determine "whether a subject ... had the right to occupy a public office." (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 875.) California, of course, has no Crown or subjects; instead, it vests the *quo warranto* remedy in "the state, in its sovereign capacity"—in "the people as a whole"—on the theory that "'disputes over title to public office'" are best viewed "'as a public question of governmental legitimacy and not merely a private quarrel among rival claimants ....'" (*Citizens Utilities Co. of California v. Superior Court* (1976) 56 Cal.App.3d 399, 406; *Nicolopulos*, *supra*, 91 Cal.App.4th at 1228, citations omitted.)

Because a *quo warranto* "cause of action is vested in the People, and not in any individual or group," a complaint in *quo warranto* may only be brought by the Attorney General, acting either "on his or her own information or by the request of a private party." (*Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170; *Rando*, *supra*, 228 Cal.App.4th at 875.) The Attorney General may bring a *quo warranto* action directly or instead delegate the authority to proceed in *quo warranto* to a private party by granting that party "'leave to sue' in the name of the people ...." (11 Cal. Code Regs. §§ 1-2, 6.) When leave to sue is granted to a private party, the Attorney General will maintain a supervisory role in the conduct of the lawsuit and may even, in appropriate circumstances, assume direct management of the case. (*Id.* §§ 7-9, 11.)

When a defendant in a *quo warranto* action is found to be "unlawfully holding any office ...[,] judgment must be rendered that such defendant be excluded from the office ...." (Code Civ. Proc. § 809.) A judgment removing a government official from public office under the *quo warranto* statute is generally

considered to be "the exclusive remedy in cases where it is available." (*Nicolopulos*, *supra*, 91 Cal.App.4th at 1225.) "[M]andamus, injunction, writ of certiorari, or ... declaratory relief" may not be used to try "[t]itle to an office[.]" (*Id.* at 1225-26.) However, because *quo warranto* is a creature of statute, the Legislature may provide alternative statutory methods for the removal of government officials from public office—as may the People, through the Constitution. (See *San Ysidro Irrigation District v. Superior Court* (1961) 56 Cal.2d 708, 714-15.)

Respondents' claims against the Board, on their face, fall within the core of the *quo warranto* statute. Respondents contend that Supervisor Rowe unlawfully holds the office of Third District Supervisor because her appointment by the Board, in alleged violation of the Brown Act, is null and void. And the primary remedy they sought below—a remedy that the Superior Court granted—was the exclusion of Supervisor Rowe from office, through an order directing the Board to rescind her appointment.

Nevertheless, Respondents believe that *quo warranto* is not the appropriate remedy in this case, for two reasons. First, they assert that the *quo warranto* statute does not apply, in the first instance, to their claims against the Board. Second, they contend that the Brown Act's primary enforcement statute, section 54960.1 of the Government Code, provides an alternative remedy for the resolution of disputes over the Board's compliance with the Brown Act. Respondents are mistaken on both points.

1. An action in *quo warranto* is the proper procedure for resolving claims that an appointment to public office is void because it was made in violation of the Brown Act.

On the question of *quo warranto*'s applicability in the first instance, Respondents' principal argument is that the *quo*

warranto statute is not implicated in this case because the parties' dispute over Supervisor Rowe's right to serve as Third District Supervisor is "incidental" to their dispute over whether the Board violated the Brown Act. The League does not agree.

The League acknowledges, as has the Board, that mandamus is sometimes an available remedy in cases where title to office is incidental to the relief sought. "Title to an office cannot be determined in mandamus where there is another specific remedy prescribed, or where there is another plain, speedy, and adequate remedy at law[,]" this Court has said, but it can be "*inquired into* ... when it is incidentally involved in a proceeding which a third party has a right to institute." (*McKannay v. Horton* (1907) 151 Cal. 711, 715, emphasis altered.)

However, the League struggles to see how the question of Supervisor Rowe's "title to office" can reasonably be characterized as incidental to the parties' dispute. Respondents asked the Superior Court to determine—and the Superior Court did, in fact, determine—that Supervisor Rowe has no authority to serve as Third District Supervisor because her appointment to that office by the Board violated the Brown Act. Supervisor Rowe's right to hold office was the central disputed issue before the Court.

In any event, the League does not wish to repeat the Board's arguments on this issue. It would instead like to briefly address two other points raised by Respondents in support of their argument that the *quo warranto* statute does not apply.

First, Respondents claim that disputes over the lawfulness of the process by which a vacancy is filled are excluded from the scope of the *quo warranto* statute, and that *quo warranto* is an available remedy only when a lawsuit challenges a government official's "qualifications or eligibility to serve ...." (Respondents'

Br. at 35-36.) The League is not aware of any authority limiting the *quo warranto* statute in this way, and Respondents cite none. Moreover, the Attorney General regularly considers *quo warranto* applications based on alleged violations of law that have nothing to do with an official's qualifications or eligibility to serve.

For instance, in 1993, the Attorney General's Office granted leave to sue in *quo warranto* to remove a member of the Compton City Council based, in part, on allegations that his appointment was not made within the time prescribed by the city's charter. (76 Ops.Cal.Atty.Gen. 254 (1993).) In 2006, it granted leave to sue in *quo warranto* to remove a director of the Mojave Water Agency from office based on allegations that the office was not vacant at the time the director was appointed. (89 Ops.Cal.Atty.Gen. 55 (2006).) In 2017, it granted leave to sue in *quo warranto* to remove a trustee of the Deer Creek Storm Water District from office based on an allegation that the wrong legislative body made the appointment. (100 Ops.Cal.Atty.Gen 29 (2017).) And just last year, it considered, but rejected, an application to proceed in *quo warranto* based on allegations that the Santa Barbara City Council made an appointment to the governing board of the Santa Barbara County Association of Governments in violation of the City Council's rules of order. (102 Ops.Cal.Atty.Gen. 13 (2019); cf. 102 Ops.Cal.Atty.Gen. 20 (2019) [granting leave to sue in *quo warranto* to remove trustees of the Board of Retirement of the Fresno County Employee Retirement Association based on alleged procedural irregularities during the Board election].) Thus, whether a government official's right to hold office is challenged on substantive grounds relating to his or her qualifications or eligibility to serve or

procedural grounds relating to the method or timing of his or her appointment, *quo warranto* is the proper and exclusive remedy.[2]

Second, Respondents suggest that regardless of the nature of the dispute, *quo warranto* does not apply when title to office is at issue but no one else is claiming the right to hold that office. (Respondents' Br. at 36.) As the Board has explained, however, the rule is the exact opposite; *quo warranto* is considered the appropriate remedy "where there are no conflicting claimants and the appointing power has refused to determine the existence of the vacancy, and there is an incumbent claiming the office ...." (*Klose v. Superior Court* (1950) 96 Cal.App.2d 913, 925.) Although the *quo warranto* statute allows the Attorney General or interested party to "set forth in the complaint the name of the person rightly entitled to the office, with a statement of his right thereto[,]" doing so is not required. (Code Civ. Proc. § 804.)

Accordingly, Respondents' claim that this case is not really about "title to office," or that it is otherwise outside the scope of the *quo warranto* statute, lacks merit and should be rejected.[3]

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[2] The League also notes that procedural irregularities have been asserted as the basis for *quo warranto* relief in other circumstances, such as lawsuits seeking to overturn the adoption of city charter provisions. (See *City of Palo Alto v. Public Employment Relations Board* (2016) 5 Cal.App.5th 1271, 1301; *Pulskamp v. Martinez* (1992) 2 Cal.App.4th 854, 859; *Oakland Municipal Improvement League*, *supra*, 23 Cal.App.3d at 167-69.)

[3] The fact that fifty years ago, the Legislature rejected—and the League opposed—a proposed statute that would have treated knowing violations of the Brown Act as "misconduct" justifying removal of the violator from office in a *quo warranto* proceeding has no bearing on the question presented here: whether *quo warranto* is the appropriate remedy for removing a government official from public office when the process by which that official was appointed allegedly did not comply with the Brown Act. (Respondents' Br. at 39; Board's Reply Br. at 21-22.)

2. Government Code section 54960.1 does not create an alternative remedy to the *quo warranto* statute for challenging the appointment of a government official to public office based on an alleged Brown Act violation.

In addition to arguing that the *quo warranto* statute does not apply in the first instance, Respondents contend that the Brown Act's primary enforcement statute, Government Code section 54960.1, creates an alternative to the *quo warranto* remedy by authorizing interested parties to seek the removal of appointed government officials from public office through a mandamus proceeding. The League, like the Board, disagrees.

Prior to the adoption of section 54960.1, civil enforcement of the Brown Act was limited. Lawsuits could be brought "for the purpose of stopping or preventing" future violations of the Act (Gov. Code § 54960(a)), but the Act did not create a mechanism for interested parties to challenge the validity of past governmental actions. (*Griswold v. Mt. Diablo Unified School District* (1976) 63 Cal.App.3d 648, 658 & n.1.) Section 54960.1 altered this state of affairs, in 1986, by providing that "any interested person may commence an action ... for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of" certain provisions of the Brown Act "is null and void under this section." Such actions may be brought "by mandamus or injunction ...."

As explained above, the Legislature may create new statutory remedies for claims that would otherwise be exclusively subject to the *quo warranto* process. (*San Ysidro Irrigation District*, *supra*, 56 Cal.2d at 714-15; see, e.g., *Protect Agricultural Land v. Stanislaus County Local Agency Formation Commission* (2014) 223 Cal.App.4th 550, 558.) The question here is: did it?

Respondents cite no case holding that section 54960.1 overrides the *quo warranto* statute. Nor is there any indication that the Legislature, when it authorized the use of mandamus as a general remedy for a wide variety of Brown Act violations, intended to displace the preexisting rule that lawsuits seeking to remove government officials from public office must proceed in *quo warranto*, when the *quo warranto* remedy is available. (*Nicolopulos*, *supra*, 91 Cal.App.4th at 1225.) "[C]ourts should not presume [that] the Legislature in the enactment of statutes intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication ...." (*Torres v. Automobile Club of Southern California* (1997) 15 Cal.4th 771, 779.)

The key to understanding why section 54960.1 does not displace the *quo warranto* statute in this case—why it does not provide an alternative remedy for seeking the removal of Supervisor Rowe from office—lies in the fact that section 54960.1 does not create an entirely new remedial scheme, and instead incorporates the preexisting equitable remedies of injunction (to prevent a local government from taking an action in violation of the Brown Act) and mandamus (to require a local government to reverse an action taken in violation of the Act). (Cf. *City of Tiburon v. Northwestern Pacific Railroad Co.* (1970) 4 Cal.App.3d 160, 178.) With some limited exceptions, injunctive relief is generally available only when legal remedies are not (*AIU Insurance Co. v. Superior Court* (1990) 51 Cal.3d 807, 838-39; Civil Code § 3422), and mandamus is not an available remedy where there is a "plain, speedy, and adequate" remedy at law (*City of Culver City v. Cohen* (2017) 14 Cal.App.5th 1, 16-17; Code Civ. Proc. § 1086). Of course, in most cases there is no legal remedy for Brown Act violations, and so equitable relief is appropriate. But when the Brown Act is invoked as a basis for

removing a government official from public office, *quo warranto* relief is available and should be pursued. (*People v. Olds* (1853) 3 Cal. 167, 175.) This interpretation of section 54960.1 gives full effect to that section without impairing the long-standing rule that the *quo warranto* statute provides the exclusive remedy for trying title to office. It also respects the central role that the Legislature has deliberately given to the Attorney General in the handling of disputes over appointments to public office.

Respondents reject this interpretation of section 54960.1, arguing that mandamus may be invoked, even if there is a plain, speedy, and adequate remedy at law, when a mandamus remedy is statutorily authorized. However, they cite no authority supporting such a rule. And the case law interpreting one of the most commonly-used statutory mandamus provisions—section 437c(m)(1) of the Code of Civil Procedure—suggests the opposite.

Although a Superior Court order granting a motion for summary adjudication is not appealable, section 437c(m)(1) of the Code of Civil Procedure authorizes parties to seek immediate review of such an order by filing a petition for writ of mandate in the Court of Appeal. (*Jacobs-Zorne v. Superior Court* (1996) 46 Cal.App.4th 1064, 1072.) In Respondents' view, this authorization is enough to *guarantee* writ review. But the law is to the contrary; a writ directing the Superior Court to rescind a summary adjudication order may only issue when "'there is not a plain, speedy, and adequate remedy, in the ordinary course of law[,]'" and "[a]ppealing from a judgment after trial ordinarily provides an adequate remedy at law ...." (*Ibid.*; *Rehmani v. Superior Court* (2012) 204 Cal.App.4th 945, 949; see *Local TV, LLC v. Superior Court* (2016) 3 Cal.App.5th 1, 7 [Court of Appeal "may grant writ relief for the erroneous denial of a motion for

summary judgment[,]" but "writ relief is extraordinary because a party often has an adequate remedy"—"a postjudgment appeal"].)

Nor is there any merit to Respondents' claim that the *quo warranto* statute is, per se, an "inadequate" remedy. The Court rejected this position more than 150 years ago, when it held that the precursor to Code of Civil Procedure section 803—section 310 of the Practice Act—provided "a plain, speedy, and adequate remedy at law ...." (*Olds*, *supra*, 3 Cal. at 175; Stats. 1851, Ch. 5, pp. 100-101.) Respondents have identified no circumstances that would support revisiting the Court's holding on this point. Indeed, a cursory review of the *quo warranto* process should dispel any doubt that the remedy is a meaningful one.

The California Code of Regulations establishes a robust procedural framework for evaluating *quo warranto* applications. The Attorney General will consider a "verified statement of facts" submitted by the party seeking leave to sue, as well as "[p]oints and authorities ... supporting the contention ... that a public office ... is usurped, intruded into or unlawfully held or exercised by the proposed defendant." (11 Cal. Code Regs. § 2; see, e.g., 102 Ops.Cal.Atty.Gen. 20 (2019) [considering "witness declarations and other documentary evidence" in support of *quo warranto* application].) Once the proposed defendant has responded, a reply is permitted. (11 Cal. Code Regs. §§ 3-4.) This process—from the filing of the application to the filing of the reply—is designed to take just one month, and in special circumstances, the Attorney General may grant leave to sue immediately, subject to the withdrawal of such leave if the application is ultimately denied. (*Id.* §§ 3-4, 10; Board's Reply Br. at 26-27.)

The substantive standards used by the Attorney General to decide whether a *quo warranto* application should be granted are also reasonable. "In determining whether to grant an application

to file a quo warranto action, the Attorney General does not resolve the merits of the controversy ...." (93 Ops.Cal.Atty.Gen. 144 (2010).) Instead, leave to sue will be granted if "the application presents a substantial issue of law or fact" and "granting the application would serve the overall public interest." (101 Ops.Cal.Atty.Gen. 24 (2018).) And the Attorney General typically "view[s] the need to judicially resolve a substantial question of fact or law to be a sufficient public purpose ...." (101 Ops.Cal.Atty.Gen. 70 (2018).) If this factor is satisfied, "leave to sue will be denied only in the presence of other overriding considerations." (84 Ops.Cal.Atty. Gen. 135 (2001); see 83 Ops.Cal.Atty.Gen. 181 (2000) [leave to sue denied where dispute would likely not be resolved before term of office expired].)

Finally, a decision by the Attorney General to deny an application for leave to sue can itself be challenged in a mandamus proceeding. (*Rando*, *supra*, 228 Cal.App.4th at 876.) Although the Attorney General's discretion to grant or deny such applications is broad, any decision to deny leave to sue may be overturned if it is "'arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair.'" (*Ibid.*, citations omitted; see *Lamb v. Webb* (1907) 151 Cal. 451, 454; *City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 642-51.)

In short, Respondents' attempt to paint the Attorney General's control over *quo warranto* proceedings as an unreasonable impediment to the resolution of valid claims is misplaced. Although the Attorney General's Office does serve as a "gatekeeper" in very limited circumstances, its primary function is not to stymie potentially meritorious claims, but to supervise the presentation of those claims, ensuring that they are raised for the purpose of ensuring the law is followed and not for

the vindication of parochial, private, or partisan interests—to restore, rather than undermine, confidence in government.

Respondents allege that the Board did not follow the proper procedures when it appointed Supervisor Rowe to the office of Third District Supervisor. They insist that procedures matter. The League agrees. Compliance with the Brown Act serves an important public purpose, and Respondents' allegations deserve to be fully vetted. But it is just as important that Respondents follow the proper procedures for challenging Supervisor Rowe's right to hold office. The *quo warranto* statute, too, serves a public purpose; it ensures that disputes over the appointment of government officials to public office are not litigated in a way that undermines the legitimacy of government. By invoking section 54960.1 as a way to avoid the Attorney General's involvement in the resolution of their Brown Act claims, Respondents undermine this purpose. The League respectfully asks that the Court reject their efforts and affirm that *quo warranto* is the exclusive remedy in appointments challenges.

For these reasons, the Court should hold that Respondents were required to seek leave from the Attorney General to challenge Supervisor Rowe's appointment as Third District Supervisor under the *quo warranto* statute. Because they did not seek or secure such leave, the judgment should be reversed.[4]

[4] The Brown Act provides that an interested party, before filing suit to invalidate a government action allegedly taken in violation of the Act, must submit a written notice describing the "nature of the alleged violation" to the agency that took the challenged action and then give the agency a chance to "cure or correct" the violation. (Gov. Code § 54960.1(b)-(c), (e).) In a cursory argument, Respondents suggest that this "notice and cure" requirement only applies to actions brought under section 54960.1, and thus, that it would not apply if a Brown Act challenge to the appointment of a government official to public office must proceed in *quo warranto*. (Respondents' Br. at 31-32.)

B. Enforcement of the Superior Court's writ of mandate directing the Board to remove Supervisor Rowe from office and seat the Governor's appointee instead was stayed when the Board filed its notice of appeal.

Section 916(a) of the Code of Civil Procedure states that, except as otherwise provided by statute, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order ...." The purpose of this "automatic" stay on appeal "'is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided[,]'" thereby "maintaining 'the rights of the parties in the same condition they were before the order [appealed from] was made ....'" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189, 198, citations omitted.)

Because Respondents did not proceed under the *quo warranto* statute, whether the Brown Act's "notice and cure" requirement would apply in a *quo warranto* action is a question that is not squarely presented by this case and need not be resolved. The League simply notes, here, that it agrees with the Board that the "notice and cure" provisions are best understood as a substantive limitation on the ability to invalidate a government action based on a Brown Act violation (Board's Reply Br. at 19-20, 25), rather than a procedural prerequisite to filing suit under section 54960.1. This understanding is consistent with the treatment of similar notice provisions found elsewhere in the law. The Government Claims Act (Gov. Code § 900 *et seq.*), for instance, requires any party that intends to sue a public agency for money or damages to first submit a written claim describing the basis for the monetary demand and then allow the agency an opportunity to settle, if possible (*id.* §§ 905, 912.6, 945.4). The Court has described this pre-suit notice requirement as a "'substantive limitation ... couched in procedural language'"—i.e., as an element of any cause of action seeking monetary relief from a public agency. (*State of California v. Superior Court* (2004) 32 Cal.4th 1234, 1240, citations omitted.)

Moreover, in light of the important role that the "notice and cure" provisions play, the Attorney General could reasonably determine that a *quo warranto* action to remove a government official from public office based on an alleged Brown Act violation is not in the public interest when notice and an opportunity to cure the violation has not been provided to the public agency.

Amongst other things, the stay ensures that the Superior Court does not take any enforcement action that cannot effectively be undone should the Court of Appeal overturn the judgment. "[I]f trial court proceedings during the pendency of the appeal conflict with the reviewing court's resolution of the appeal, then the appeal will likely be futile because the prevailing party, in most instances, will have no adequate remedy left." (*Id.* at 198.)

The automatic stay, however, is not absolute. As relevant here, "[a]n appeal stays a mandatory [injunction] but not a prohibitory injunction[,]" since the latter is considered to be "self-executing." (*Kettenhofen v. Superior Court* (1961) 55 Cal.2d 189, 191; *Food and Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174, 177; *Ohaver v. Fenech* (1928) 206 Cal. 118, 122.) "'An order enjoining action by a party is prohibitory in nature if its effect is to leave the parties in the same position as they were prior to the entry of the judgment[,]'" and "'it is mandatory in effect if its enforcement would be to change the position of the parties and compel them to act in accordance with the judgment rendered.'" (*URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884, citations omitted*;* see also *Ambrose v. Alioto* (1944) 62 Cal.App.2d 680, 685.)

This distinction might seem clear, but in practice, it is sometimes difficult to determine whether an injunction is mandatory or prohibitory. An order that is "entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect." (*Kettenhofen*, *supra*, 55 Cal.2d at 191.) And "prohibitory injunctive relief ... is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act." (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.) Thus, while the form of an injunction is relevant to its proper characterization, the

critical question is: what effect does the injunction have on the status quo? "[A]n injunction ... is mandatory if it has the effect of compelling the performance of a substantive act and necessarily contemplates a change in the relative position or rights of the parties at the time the injunction is granted ...." (*Ambrose*, *supra*, 62 Cal.App.2d at 685, emphasis omitted.) If an injunction does not have this effect—if it "merely ... preserv[es]" the position of the parties at the time it is granted—it is prohibitory. (*Ibid.*)

The Superior Court's judgment in this case authorized the issuance of a writ of mandate that compelled the Board to immediately rescind the appointment of Supervisor Rowe to the office of Third District Supervisor and directed the Board to seat any person duly appointed to the office by the Governor. It also restrained the Board from appointing anyone else to the office of Third District Supervisor and required the Board to prevent Supervisor Rowe from exercising the powers of her office or otherwise participating as a supervisor in any Board meetings or actions. For the reasons set forth below, the League agrees with the Board that the writ, on the whole, functions as a mandatory injunction, and that enforcement of the writ should have been automatically stayed when the Board filed its notice of appeal.

1. The writ of mandate issued by the Superior Court is a "mandatory" injunction in form.

Respondents do not seriously argue that the writ of mandate issued by the Superior Court is prohibitory in form, nor could they. A writ of mandate is, by definition, a type of mandatory relief—an order that "compel[s] the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station ...." (Code Civ. Proc. § 1085(a).) And unlike prohibitory injunctions, a writ of mandate is not self-executing; the recipient must submit a return demonstrating that

it has complied with the writ, after which the Superior Court is tasked with evaluating whether the writ has been satisfied. (*Los Angeles International Charter High School v. Los Angeles Unified School District* (2012) 209 Cal.App.4th 1348, 1354-56.) Accordingly, the general rule in California is that "the filing of a notice of appeal stays a writ of mandate unless otherwise ordered …." (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 762; *Agricultural Labor Relations Board v. Tex-Cal Land Management, Inc.* (1987) 43 Cal.3d 696, 706, n.9; cf. Code Civ. Proc. § 1110b; see also *City of Carmel-By-The-Sea v. Board of Supervisors of Monterey County* (1982) 137 Cal.App.3d 964, 970-71 ["an order regarding adequacy of a return [is] one relating to enforcement of a judgment"].)

Nor is there any question that the primary function of the writ in this case is to "compel[] the performance of a substantive act ...." (*Ambrose*, *supra*, 62 Cal.App.2d at 685.) The Superior Court ordered the Board to take the affirmative steps of rescinding Supervisor Rowe's appointment as Third District Supervisor and seating any person appointed to the office by the Governor. The former is akin to an injunction requiring the termination of an employee, which has long been understood to be mandatory in nature. (See *Feinberg v. One Doe Co.* (1939) 14 Cal.2d 24, 27-28 [holding that a Superior Court injunction "directing" a company to "discharge" one its employees was mandatory]; *URS*, *supra*, 15 Cal.App.5th at 876-87 [holding that a Superior Court order disqualifying an attorney from continuing to represent a party was, in effect, an injunctive order requiring the party to fire its attorney, and thus mandatory].) And if a command to terminate employment is a mandatory act, a command to employ someone else surely is as well. (*URS*, *supra*, 15 Cal.App.5th at 885; see also *Agricultural Labor Board v. Superior Court* (1983) 149 Cal.App.3d 709, 712-13 [in a case

challenging the termination of striking workers, an injunction directing the defendant to "rehire the strikers" was mandatory].)[5]

The remaining directives in the writ—an order requiring the Board to prevent Supervisor Rowe from exercising the powers of her office and participating as a supervisor in Board meetings or actions, and an order compelling the Board to refrain from appointing anyone to fill the office until the Governor makes an appointment—are all subordinate to the writ's primary purpose: the removal of Supervisor Rowe and the appointment of another person by the Governor. Even the Superior Court acknowledged that these directives are really just secondary effects of the order to remove Supervisor Rowe from office. (Board's Reply Br. at 37.) Thus, notwithstanding the "negative" or "prohibitory" language in which these portions of the writ are drafted (*Kettenhofen*, *supra*, 55 Cal.2d at 191), the writ is a mandatory injunction.

2. The writ of mandate issued by the Superior Court alters the status quo between the parties.

Respondents and the Board agree that the impact of an injunction on the status quo is a critical factor in determining whether the injunction is mandatory or prohibitory. But the question remains: the status quo at what time? Respondents claim that the status quo is determined as of the "last actual peaceable, uncontested status which preceded the pending controversy." (Respondents' Br. at 45, citations, quotation marks omitted.) The Board contends that the status quo is determined by the position of the parties prior to the entry of the judgment or order that has been appealed. (Board's Reply Br. at 38.)

[5] In contrast, an injunction that prevents a defendant from terminating an employee would be prohibitory. (Cf. *Youngblood v. Wilcox* (1989) 207 Cal.App.3d 1368, 1372, n.1 [injunction preventing club from terminating two members was prohibitory].)

The Board has identified the correct rule. The automatic stay, this Court has explained, is intended to "maintain[] 'the rights of the parties in the same condition they were before the order [appealed from] was made ....'" (*Delfino*, *supra*, 35 Cal.4th at 198, citations omitted; see also *URS*, *supra*, 15 Cal.App.5th at 884.) Respondents have confused the purpose of the automatic stay with that of the injunction to which it applies; a prohibitory injunction returns the parties to the conditions that prevailed before their dispute arose, while the stay of such an injunction returns the parties to the conditions that prevailed before the injunction itself was issued. (See *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183-84.)

Prior to the entry of judgment by the Superior Court, Supervisor Rowe held the office of Third District Supervisor. This was the status quo that the automatic stay is intended to preserve, and had the writ gone into effect, it would have been altered—Supervisor Rowe's appointment would have been rescinded, she would no longer have held office, and she would have lost her right to participate in decisions made by the Board during her absence. If the Governor had appointed someone else to serve as Third District Supervisor, it is likely that Supervisor Rowe could not have been reappointed, even if the Board prevailed on appeal. And during the period of any vacancy, residents of San Bernardino's Third District would have been forced to go without any representation on the Board. For these reasons, the writ is mandatory in substance, as well as in form.

Respondents' reliance on *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80 is misplaced. In *United Railroads*, the Court held that an injunction prohibiting one party from continuing to run railcars over tracks owned by the other in breach of the parties' contract "restrain[e]d

continuous acts of trespass" and therefore was not automatically stayed on appeal. (*Id.* at 81-82, 88-90.) The League agrees that an injunction of this type—one that prevents a party from engaging in future injurious acts that are themselves illegal—is prohibitory in nature and should not be stayed on appeal. (Cf. *People v. Hill* (1977) 66 Cal.App.3d 320, 322-31 [injunction preventing defendant from using the word "accounting" in its future advertising in violation of section 17500 of the Business and Professions Code was prohibitory].) A stay of the injunction would not preserve the status quo at the time the injunction issued; it would allow new legal violations to occur.

However, no such "continuous acts" are present here. The only allegedly illegal act that occurred in this case was the appointment of Supervisor Rowe. Even Respondents agree that actions taken by Supervisor Rowe after her appointment are not, in and of themselves, illegal. (Respondents' Br. at 43, citing *In re Redevelopment Plan for the Bunker Hill Urban Renewal Project 1B of the Community Redevelopment Agency of the City of Los Angeles, California, and of Bonds Therefor* (1964) 61 Cal.2d 21, 42 ["The lawful acts of an officer *de facto*, so far as the rights of third persons are concerned, are, if done within the scope and by the apparent authority of office, as valid and binding as if he were the officer legally elected and qualified for the office and in full possession of it."].) Because the Superior Court's writ does restrain any future unlawful conduct, it does not have a prohibitory element that might escape the automatic stay.

The irony is that if Respondents had brought this lawsuit under the *quo warranto* statue, they would likely be entitled to enforce the judgment during the pendency of the appeal; "in the absence of an order of the trial court providing otherwise or of a writ of supersedeas," a *quo warranto* judgment goes into effect

immediately. (Code Civ. Proc. § 917.8(a).) But to secure the benefit of prompt enforcement, Respondents needed to submit their lawsuit to the Attorney General's supervision. By arguing that the automatic stay does not apply to their mandamus action, Respondents, in effect, seek to invest the power to remove government officials from public office in the Superior Court alone, without any truly effective check. Whatever the merits of this position as a matter of policy—and the League questions those merits—it is not what the Legislature has chosen to do.

Accordingly, if this Court ultimately concludes that Respondents could challenge Supervisor Rowe's appointment in a mandamus action, enforcement of the Superior Court's order directing the Board to remove Supervisor Rowe from office was automatically stayed when the Board filed its notice of appeal.

IV. CONCLUSION

When a vacancy occurs on the governing board of a public agency, it can seriously interfere with the regular functioning of government, increasing the risk that the board will deadlock on important votes, making it difficult for the board to take actions requiring a supermajority consensus, and triggering, sometimes, the need to hold expensive special elections. (See Gov. Code § 36512(b).) Appointments play a critical role in minimizing the impact of vacancies, and so a clear mechanism for resolving disputes over such appointments is critical. For more than a century, that mechanism has been the *quo warranto* statute.

The power of a court to remove a government official from public office is a momentous one. When exercised, it will produce shockwaves throughout a public agency and its constituents. It can even prevent a local community from deciding for itself who is best suited to govern—as would have happened here, had this

Court not intervened. To ensure that this power is only called upon for the public good, rather than partisan or personal advantage, the Legislature has chosen to place all disputes over appointments to public office under the supervision of the Attorney General. The Court should reaffirm that choice today.

Accordingly, the League joins the Board in asking the Court to hold that Respondents were required to challenge Supervisor Rowe's appointment to the office of Third District Supervisor under the *quo warranto* statute. However, if the Court instead decides that when the Brown Act is implicated, a private party may seek, and the Superior Court may order, the removal of a government official from public office in a mandamus action where the Attorney General has no role, it should hold that meaningful appellate review of the resulting judgment must be complete before that judgment goes into effect.

JARVIS, FAY & GIBSON, LLP

Dated: October 15, 2020 By: /s/ Gabriel McWhirter
Gabriel McWhirter
Alexandra Barnhill
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF WORD COUNT

I certify that the League's application and *amicus curiae* brief, together, contain a total of 8,429 words, as indicated by the word count feature of Microsoft Word, the computer program used to prepare the application and brief. The brief, alone, contains 7,578 words. Both of these counts exclude the cover page, the tables, the signature blocks, and this certification.

Dated: October 15, 2020 By: /s/ Gabriel McWhirter
Gabriel McWhirter

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay & Gibson, LLP, 492 Ninth Street, Suite 310, Oakland, California 94607.

On October 15, 2020, I served this document:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF APPELLANTS; PROPOSED *AMICUS CURIAE* BRIEF

on the parties in this action as follows:

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VIA TRUEFILING: I caused a copy of the document to be sent to the parties listed above via the Court-mandated vendor, truefiling.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 15, 2020, at Oakland, California.

Jennifer Dent

Jennifer Dent