S260209

No.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY and INLAND EMPIRE UNITED

Petitioners (in superior court) and Respondents (on appeal),

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, et al.

Respondents and Real Party in Interest (in superior court) and Appellants,

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

On Appeal From the Superior Court for the State of California,
County of San Bernardino, Case No. CIVDS1833846,
Hon. Janet M. Frangie
Dept. S-29; Telephone: (909) 521-3467

PETITION FOR REVIEW

IMMEDIATE STAY REQUESTED by January 23, 2020 at 5:00 p.m.; Superior Court's order to show cause set for January 24, 2020 at 10:00 a.m.

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA

I. ISSUE PRESENTED FOR REVIEW

Is a judgment automatically stayed pending appeal as a mandatory injunction where it commands a county board of supervisors to rescind its appointment of a sitting supervisor and prohibits the sitting supervisor from exercising her official duties?

II. INTRODUCTION

The Court of Appeal's error in denying Appellants' Petition for Writ of Supersedeas gives immediate, irreparable, and damaging effect to the superior court's fundamentally flawed Judgment.

The mandamus proceeding in the superior court resulted in the Judgment and Peremptory Writ of Mandate commanding the San Bernardino Board of Supervisors (the "Board") to remove Supervisor Dawn Rowe from her position as Third District Supervisor. Mandate relief is improper here because an action to try title to public office may only be brought in a quo warranto action. No quo warranto action was sought or obtained.

California's long-standing rule that title to public office may only be tried in a quo warranto action is, in part, intended to ensure that a court-ordered removal from office does as little as possible to disrupt the

functioning of local government. Given the high stakes for a quo warranto proceeding, it may only be brought by or with the authorization of the Attorney General. And quo warranto comes with specific procedures: the judgment is self-executing, and it is therefore not stayed pending appeal. These statutory procedures provide certainty to the parties as to what will happen in the event a superior court orders removal of an officer under quo warranto.

But this case did not proceed in quo warranto or with the authorization of the Attorney General. Unlike in quo warranto, the superior court's finding that Supervisor Rowe's appointment was "null and void" was not self-executing; rather the court issued the Peremptory Writ commanding affirmative action by the Board to effect its Judgment which is automatically stayed while the appeal is pending.

The Court of Appeal erred in denying Appellants' Petition for Writ of Supersedeas, which Appellants are entitled to as a matter of right. The error gives immediate, irreparable, and damaging effect to the flawed Judgment, resulting in the eviction of Supervisor Rowe from her Board seat, declaring a retroactive vacancy, and usurping the Board's appointment authority by ordering the Board to immediately seat the Governor's appointee. Review by this Court is not only necessary to prevent the irrevocable harm in this case, but also to resolve this legal issue critical to all local governments in the state. Likewise, a temporary stay should issue

to maintain the status quo while this Court considers this Petition for Review.

Supreme Court review is necessary to resolve the issue – whether the Judgment was automatically stayed – because the Court of Appeal's decision created a split of authority by departing from the long-standing rule that injunctive relief altering the status quo is automatically stayed pending appeal. Moreover, absent a stay, enforcement of the Judgment could render the appeal moot by giving immediate effect to the mandate forcing Supervisor Rowe to vacate her seat. And, appellate review of the superior court's fundamental error is necessary to ensure that lower courts follow the statutorily-mandated strictures of quo warranto, an issue of great importance to local governments who rely on the clarity and certainty of quo warranto actions to ensure orderly operation of government. The uncertainty created by the Court of Appeal, combined with the chaos of competing claims to an office, can be prevented by this Court clarifying that such orders are subject to the automatic stay.

Appellants therefore request this Court grant review and issue a writ compelling the Court of Appeal to issue a corrective writ of supersedeas affirming the automatic stay of the Judgment and Peremptory Writ. Additionally, because the superior court has set an order to show cause hearing and return on the Peremptory Writ for January 24, 2020, **the Board**

also requests an immediate stay by 5:00 p.m. on January 23, 2020, pending the outcome of this Petition for Review.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. The Parties

Petitioners here are the Board, Supervisors Robert A. Lovingood, Janice Rutherford, Curt Hagman, Josie Gonzales, and Dawn Rowe. The Board, along with Supervisors Lovingood, Rutherford, Hagman, and Gonzales, are respondents in the underlying writ proceeding. Supervisor Rowe is the Real Party in Interest in the underlying writ proceeding.

Respondents Michael Gomez Daly and Inland Empire United (collectively, "I.E. United") are the petitioners in the underlying writ proceeding.

B. San Bernardino County Board of Supervisors

The County of San Bernardino, the largest in the country, is a charter county and a political subdivision of the state of California. The County's legislative and governing body is the Board. The Board consists of five members, one from each of the five supervisorial districts in the County. The Board has regularly scheduled meetings in each month as set by action of the Board in the previous calendar year to address the County's business. (Petition for Writ of Supersedeas ("Petition") at ¶ 3.)

At those meetings the Board is also sitting as the Governing Board of the following: the Successor Agency to the County of San Bernardino

Redevelopment Agency; County Industrial Development Authority; In-Home Supportive Services Public Authority; Inland Counties Emergency Medical Agency; County Flood Control District; Board Governed County Service Areas; Inland Empire Public Facilities Corporation; San Bernardino County Financing Authority; San Bernardino County Fire Protection District; Big Bear Valley and Bloomington Recreation and Park Districts. An official act of the Board on behalf of any of those agencies can only be performed in a regularly or specially convened meeting. (Petition at ¶ 3.)

The agenda for each regularly scheduled Board meeting is publicly posted at least 72 hours prior to each meeting as required under the Ralph M. Brown Act ("Brown Act"). The agendas typically include a host of official acts for the Board, including but not limited to developing and implementing the policies and legislative priorities of the County, approving budgetary expenditures for the numerous County departments and constituent agencies, overseeing labor negotiations and all pending and potential litigation, and conducting public hearings as required on issues related to taxation as well as various private development projects along with large public works projects. At least three Supervisors are required to form a quorum at a Board meeting, and a quorum is required for the Board to consider and vote on resolutions, ordinances, and all other legislative and administrative actions. A majority of all the members must concur on any act of the Board, though some actions – such as approval of changes to a

final budget, certain real estate transactions, and adopting emergency ordinances – require four affirmative votes. (Petition at ¶ 4.)

When a vacancy arises on the Board, the County Charter provides that it "will be filled by appointment by majority vote of the remaining members of the Board from amongst the qualified electors of the supervisorial district in which such vacancy exists." (Exh. 1 at p. 9, Art. 1, sec. 7.) In the event the Board does not make an appointment to fill the vacancy within this designated 30-day period, then the Governor of California makes the appointment. Notably, there is no mandated process for the Board's appointment in the Charter. (Petition at ¶ 5; see Exh. 1 at p. 9, Art. 1, sec. 7.)

In the November 6, 2018 General Election, then Third District Supervisor James Ramos was elected to the California State Assembly. On December 3, 2018, Ramos took the oath of office for the State Assembly, thereby creating a vacancy in the office of Third District Supervisor. Pursuant to the County Charter, the Board had thirty (30) days to appoint a replacement to the Third District seat, i.e., by January 2, 2019. (Petition at ¶ 6.)

C. The Board Unanimously Appoints Dawn Rowe as Third District Supervisor Following Several Public Meetings and Hours of Public Discussion

Understanding that the County was faced with a highly expedited time frame to fill the vacancy which included the holiday season, the Board proactively established a process to handle filling the vacancy. The Charter does not call out a required specific process and leaves this determination to the Board in its sole discretion. (Petition at ¶ 7.)

On November 13, 2018, the Board convened a special meeting to set up a process for filling the impending vacancy and to set another special meeting for December 11, 2018, to interview applicants. (Petition at ¶ 8.)

At the next regularly scheduled Board meeting on December 4, 2018, the Clerk of the Board informed the Board of the unexpectedly large number of applicants and that fifty-two (52) individual applications had been received by the Clerk's office and forty-eight (48) applicants were eligible for consideration. Accordingly, the Board reconsidered the process in light of this vast applicant pool. The Board voted 3-1 to modify the selection process. (Petition at ¶ 9.)

Under the new process, the Clerk of the Board was directed to send a Supplemental Questionnaire to all 48 applicants and answers were due back to the Clerk's office by 12:00 noon on Friday, December 7, 2018. Those supplemental responses would be sent to the Board of Supervisors by 5:00

p.m. on Friday, December 7, 2019. Next, each Board member could individually submit up to ten names of applicants to the Clerk of the Board by Monday, December 10, 2018 at 10:00 a.m. and any applicant receiving at least two acknowledgements would then be interviewed. (Petition at ¶ 9.)

After reviewing questionnaires completed by forty-three (43) of the applicants, the Supervisors each individually notified the Clerk of the Board of the applicants that he or she wished to publicly interview. There were no discussions or deliberations. Thirteen applicants received two or more acknowledgements and were invited to the December 11, 2018 special Board meeting to be publicly interviewed. (Petition at ¶ 10.)

At the December 11, 2018 Board meeting, after public interviews of the thirteen applicants and a following public comment period, the Board unanimously identified five applicants for further public interviews at a special Board meeting to be held on December 13, 2018. (Petition at ¶ 11.)

On December 11, 2018, the Board received a letter from a citizen alleging that the process for selecting applicants for public interviews was a Brown Act violation. Ultimately, the Board did not take any action at the December 13, 2018 Board meeting. (Petition at ¶ 12.)

For the next regularly scheduled Board meeting on December 18, 2018, the Board noticed agenda items to:

a. Rescind the appointment process;

b. Rescind the December 10, 2018 establishment of an interview list of thirteen applicants;

c. Rescind the December 11, 2018 list of five finalists;

d. Adopt a new appointment process; and

e. Appoint a new Third District Supervisor. (Petition at ¶ 13.)

However, at about 6:30 a.m., before the December 18, 2018 Board meeting convened, I.E. United sent an email correspondence alleging a Brown Act violation in the Board's December 10, 2018 process of inviting applicants for public interview which had narrowed the applicant pool to a more manageable number. I.E. United specifically demanded that all applicants be interviewed as the only feasible cure for the alleged violation. (Petition at ¶ 14.)

The December 18, 2018 Board meeting convened at 9:00 a.m. At the meeting, the Board took several separate actions, including:

a. Rescinding its prior public interview list of 13 applicants and the 5 publicly-selected finalists;

b. Rescinding the prior appointment procedure;

c. Adopting a new process for filling the Third District vacant seat whereby each Supervisor would publicly submit up to three names to the Board Clerk from the entire list of forty-three (43) qualified applicants (five applicants did not return the Supplemental Questionnaire); and

d. Conducting an open session interview of the publicly-selected nominees: Chris Carrillo, Rhodes Rigsby, William Emmerson, Sean Flynn, William Jahn, and Dawn Rowe. (Petition at ¶¶ 15, 16.)

Mr. Carrillo had not been interviewed before. The Board heard public comments from twenty-one (21) individuals, both on site and remotely from its Joshua Tree location, for nearly two and one-half (2 ½) hours. After the public selection, public comments, and public applicant interviews, the Board publicly deliberated and voted unanimously to appoint Dawn Rowe as Third District Supervisor. Supervisor Rowe was sworn in on December 18, 2018 and has held the office of Third District Supervisor for the past year plus, capably performing all acts and duties incumbent in the office. (Petition at ¶ 16.)

On December 20, 2018, County Counsel sent written notice of the curative/corrective action to I.E. United, specifically detailing the new process that the Board had adopted on December 18, 2019, pursuant to Government Code § 54960.1(c)(2). I.E. United did not at any time provide a notice to cure any alleged Brown Act violation related to the Board's rescission and new actions taken at its December 18, 2018 Board meeting. Absent further notice of an alleged Brown Act violation due to the actions taken on December 18, 2018, the Board was deprived of any opportunity to take further curative action, which it could have done through January 2, 2019. (Petition at ¶ 17.)

D. I.E. United Files Its Petition For Writ of Mandate

On December 31, 2018, I.E. United filed a Verified Petition for Writ of Mandate, challenging the Board's unanimous appointment of Supervisor Rowe on the basis that an early step in the process of inviting applicants to be publicly interviewed allegedly violated the Brown Act and thereby irretrievably tainted the entire lengthy public process that followed. (Petition at ¶ 18; Exh. 2.)

On February 11, 2019, Appellants demurred to the Petition for Writ of Mandate on the basis that quo warranto is the exclusive means to challenge the right to hold office and I.E. United had failed to meet the requirements for a quo warranto action. (Petition at ¶ 20; see Exhs. 3 and 4 at pp. 96–100.)

On March 27, 2019, the superior court overruled the demurrer in part, and rejected Appellants' legal argument that quo warranto is the exclusive remedy. (Petition at ¶ 21; Exh. 8 at p. 152.)

On April 8, 2019, I.E. United filed its First Amended Petition for Writ of Mandate. (Exh. 9.) I.E. United prayed for the superior court to "order [the Board], and each of them, to rescind to appointment of Dawn Rowe as Third District Member of the San Bernardino County Board of Supervisors." (Petition at ¶ 22; Exh. 9 at p. 169, ¶ 70.)

After several rounds of briefing and oral argument, the superior court entered a minute order and Statement of Decision on September 18,

2019, granting I.E. United's Petition for Writ of Mandate. (Exhs. 11, 12.)

The relief ordered by the superior court was, in its entirety:

> a. The process by which Dawn Rowe was selected to the San Bernardino County Board of Supervisors violated the Ralph M Brown Act;
>
> b. Respondents failed to cure and correct their violations of the Brown Act;
>
> c. The appointment of Dawn Rowe as Third District Supervisor is null and void. Respondents and each of them shall rescind the appointment of Dawn Rowe as Third District Supervisor. Pursuant to Board's Charter the appointment of the Third District Supervisor shall be made by the Governor; and
>
> d. Petitioners are entitled to reasonable attorney's fees and costs.

(Petition at ¶ 23; Exh. 12 at p. 317.)

The superior court also directed I.E. United to prepare a judgment consistent with the statement of decision. (Petition at ¶ 24; Exh. 12 at p. 317.)

I.E. United submitted a Proposed Judgment and Proposed Writ of Mandate on September 27, 2019. (Exhs. 13, 14.) The Proposed Judgment included additional relief incidental to the mandatory relief ordered in the Statement of Decision. Specifically, the Proposed Judgment included that a "peremptory writ of mandate shall issue from the Court":

> a. [C]ommanding Respondents immediately to rescind the appointment of Rowe as Third District Supervisor;
>
> b. [P]rohibiting Respondents from allowing Rowe to participate in an official capacity in any meetings or Board

> actions, and from registering or otherwise giving effect to any further votes case by Rowe;
>
> c. [P]rohibiting Respondents from making any appointment to the position of Third District Supervisor of the San Bernardino Board of Supervisors; and
>
> d. [C]ommanding Respondents to immediately seat any person duly appointed to the position of Third District Supervisor by the Governor.

(Petition at ¶ 26; Exh. 13.)

On October 9, 2019, Appellants filed objections to the Proposed Judgment. (Exh. 15.) On October 15, 2019, Supervisor Rowe filed supplemental objections to the Proposed Judgment. (Exh. 17.) Among other things, Appellants argued that enforcement of the Statement of Decision and Minute Order were automatically stayed pending the outcome of the appeal, because they constituted an order granting a mandatory injunction. (Petition at ¶ 27; Exh. 15 at p. 337.)

On October 22, 2019, I.E. United filed its responses to the objections, arguing that an appeal "would not stay the prohibitory relief ordered by this Court: the order prohibiting the Board from continuing to give force and effect to Rowe's nullified appointment, and prohibiting the Board from attempting a new appointment." (Exh. 18 at p. 368.) As well, I.E. United argued that the entirety of the relief was prohibitory in nature because it merely ordered Appellants not to continue to violate the law. (Petition at ¶ 29; Exh. 18 at p. 368.)

On November 8, 2019, the superior court overruled Appellants' objections, but acknowledged that all relief flowed from its decision to order the Board to rescind Supervisor Rowe's unanimous appointment. (Petition at ¶ 31; see Exh. 21 at p. 398.) The order did not directly address the issue of whether any of the relief identified in the Statement of Decision was prohibitory or mandatory in effect. (Exh. 21.)

On November 8, 2019, the superior court signed and entered the Proposed Judgment submitted by I.E. United without changes. (Exh. 22.) The superior court also signed and entered the Peremptory Writ of Mandate in the form proposed by I.E. United without changes. (Exh. 23.) On November 13, 2019, Appellants filed an Amended Notice of Appeal from the Judgment. (Exh. 24.)

On November 21, 2019, Appellants appeared ex parte in the superior court seeking to vacate the hearing on the order to show cause and to confirm that enforcement of the Judgment and Peremptory Writ was automatically stayed pending resolution of the appeal. (Petition at ¶ 34; Exhs. 25, 26, 27.) I.E. United opposed the ex parte application, contending that there was no automatic stay because the relief amounted to a prohibitory injunction. (Petition at ¶ 35; Exhs. 32, 33.) The superior court denied Appellants' ex parte application, ruling that portions of the Judgment were prohibitory and therefore not automatically stayed by the appeal.

Appellants immediately filed a petition for writ of supersedeas on November 21, 2019, seeking an immediate temporary stay and issuance of a writ of supersedeas affirming that the Judgment was automatically stayed in its entirety. On November 25, 2019, I.E. United filed a Preliminary Opposition to Request for Immediate Stay and Petition for Writ of Supersedeas ("Opposition"). On November 26, 2019, the Court of Appeal granted the immediate temporary stay and invited Appellants to file a reply to the Opposition. On December 6, 2019, Appellants filed their Reply. On January 8, 2020, the Court of Appeal issued an order summarily denying the petition for writ of supersedeas and dissolving the stay. A true and correct copy of the Order is attached hereto as Exhibit A.

E. Need For An Immediate Temporary Stay

This petition requests an immediate temporary stay pursuant to Rule 8.112(c)(1) of the California Rules of Court pending a ruling on this petition. On January 28, 2020, the Board will hold its next regularly scheduled meeting. Absent an immediate temporary stay, there will be confusion about who, if anybody, occupies the Third District Supervisor seat at that meeting (and beyond).

Additionally, the Board's ability to function in the event two members are absent, or to address any emergencies that may arise, would be impeded if the seat is made effectively vacant. The Board must adopt emergency declarations or ratifications in order to permit emergency

response to threats including wildfires, floods, earthquakes, and other disasters. It is not always feasible to gather more than a quorum in such circumstances and having a vacant seat necessarily jeopardizes the Board's ability to act quickly. The immeasurable damage these threats can cause even under the best of circumstances presents even greater risk if the Board is immobilized and unable to act swiftly. As well, there are a number of Board actions that require four affirmative votes to pass and a vacant seat similarly hamstrings the Board's ability to confidently and timely address such issues. If Supervisor Rowe is effectively unseated, it leaves the Board short-handed and adversely impacted for the entirety of the appeal.

Further, absent an immediate stay, a new appointment may be prematurely made to the Third District Supervisor seat by the Governor. If this new individual claimed the seat, it would dramatically and irreversibly change the status quo and risk mooting the Court of Appeal's ability to effectively grant relief on appeal. Further problems would then arise as to the two competing claims to the seat and determining what procedure or requirements would be in place if Appellants' appeal succeeds. A collateral quo warranto proceeding could erupt in the wake of such competing claims to office.

Finally, the superior court has requested Appellants file a return to the writ of mandate by January 24, 2020, and has concurrently set an Order to Show Cause regarding Compliance with the writ for 10:00 a.m. that

morning. I.E. United has also sought to hold Appellants in contempt, and the superior court has set an Order to Show Cause regarding Contempt concurrently. Accordingly, an immediate stay is necessary prior to the January 24, 2020 hearings on the two orders to show cause.

In sum, an immediate stay is necessary to avoid rendering the Board unable to conduct its necessary duties, to keep County government efficiently functioning, and to preserve the status quo pending resolution of this writ (and ultimately of the appeal below). Immediate action is necessary to avoid confusion prior to the January 24, 2020 hearing on the Order to Show Cause and the January 28, 2020 Board meeting. **Appellants therefore request an immediate temporary stay by 5:00 p.m. on January 23, 2020**.

IV. LEGAL ARGUMENT

A. Review Should Be Granted To Secure Uniformity Of Decision And To Settle An Important Issue Of Law

The Supreme Court may grant review "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review is necessary in this case for these two, interrelated reasons.

First, resolution of this issue – whether the Judgment is automatically stayed as a mandatory injunction – is necessary because the decision by the Court of Appeal below created a split of authority. In a

case nearly identical in relevant respects to this one, the Second Appellate District Court of Appeal found that the judgment was automatically stayed. (See *City of Santa Monica v. Pico Neighborhood Association* (B295935, app. pending, writ of supersedeas issued Mar. 27, 2019)[1] ("*Santa Monica*") [granting writ of supersedeas of injunction effectively requiring Santa Monica City Councilmembers to surrender their seats].) Indeed, the *Santa Monica* Court's holding was in line with the long line of California authority on the issue.

Second, resolution of the legal issue is critical to ensure that local governments have clear and certain rules for governing during the course of litigation and related appellate proceedings in which title to office is at issue.

B. In Holding The Relief At Issue Is Prohibitory, The Court Of Appeal Departed From Longstanding California Authority Finding Similar Injunctive Relief Is Mandatory In Nature

1. The Court Of Appeal Erred in Ruling That The Judgment Did Not Require Affirmative Action And Alter The Status Quo

Where a superior court threatens to enforce a judgment subject to automatic stay while an appeal is pending, an appellant is entitled to writ of supersedeas as a matter of right. (*Chapala Management Corp. v. Stanton*

[1] See Exhibit 29 [Petition for Writ of Supersedeas], Exhibit 30 [Order Granting Temporary Stay], and Exhibit 31 [Order Issuing Writ of Supersedeas].

(2010) 186 Cal.App.4th 1532, 1541, fn. 8; *Feinberg v. One Doe Co.* (1939) 14 Cal.2d 24, 29.) There is no dispute that the general rule, applicable in writ of mandate proceedings, is that "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." (Code Civ. Proc., § 916, subd. (a); *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) I.E. United also does not dispute that if the Judgment at issue orders mandatory injunctive relief it is subject to the general rule; only if the injunctive relief at issue is prohibitory can it escape the automatic stay. (See Opposition at p. 28, citing *Ohaver v. Fenech* (1928) 206 Cal. 118, 123.) Finally, the parties agree that injunctive relief is mandatory "where it requires affirmative action and changes the status quo." (*Hayworth*, *supra*, 129 Cal.App.3d at pp. 727–728, citing *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835.)

The Court of Appeal erred, however, by holding that the Judgment's injunctive relief does not require affirmative action or alter the status quo. That finding sets the Fourth Appellate District at odds with the Second Appellate District and every California Appellate and Supreme Court decision to address this issue.

2. Courts Look To The Effect Of The Provision To Determine Whether It Is Mandatory Or Prohibitory

In determining whether a judgment is mandatory or prohibitory, courts must focus on the *effect* of the injunctive relief on the parties, rather than simply the *form* of the judgment:

> The character of an injunction [] and whether it is prohibitive or mandatory in its operation upon the parties whom it affects, is determined not so much by the particular designation given to it by the court directing its issuance, as by the nature of its terms and provisions, and the effect upon the parties against whom it is issued.

(*Paramount Pictures*, *supra*, 228 Cal.App.2d at p. 835, quoting *Ohaver*, *supra*, 206 Cal. at p. 122.) One court has succinctly explained the distinction between mandatory and prohibitory injunctions:

> An injunction is prohibitory if it merely has the effect of preserving the subject of the litigation *in statu quo*, while generally it is mandatory if it has the effect of compelling performance of a substantive act and necessarily contemplates a change in the relative rights of the parties at the time injunction is granted. [] *If an injunction compels a party to surrender a position he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory.* [citations.] An injunction is prohibitory if its effect is to leave the parties in the same position as they were prior to the entry of the judgment, while 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. [citations.]

(*Dosch v. King* (1961) 192 Cal.App.2d 800, 804, italics added.)

3. The Mandates To Rescind Supervisor Rowe's Appointment And To Seat Any Person Appointed By The Governor Are Mandatory

The relief ordered by the superior court is mandatory because it requires the Board to take affirmative action and changes the status quo. The Peremptory Writ commands the Board to "[r]escind the appointment of Dawn Rowe as Third District Supervisor." (Exh. 23.) Further, the Peremptory Writ commands the Board to "[i]mmediately seat any person duly appointed to the position of Third District Supervisor by the Governor." (Exh. 23.) The Peremptory Writ thus "compel[s] performance of [the] substantive act[s]" of both rescinding the appointment and seating whomever the Governor appoints to the seat. (*Dosch*, *supra*, 192 Cal.App.2d at p. 804.) Moreover, the relief dramatically alters the status quo: Supervisor Rowe's appointment would be invalidated and she would have to vacate her seat. "If an injunction compels a party to surrender a position he holds and which upon the facts alleged by him he is entitled to hold, it is mandatory." (*Dosch*, *supra*, 192 Cal.App.2d at p. 804.) Indeed, the Second District Court of Appeal recently granted a writ of supersedeas in a similarly complex matter involving legal disputes that impacted the ongoing make-up of the Santa Monica City Council and the sitting Councilmembers' right to hold office. (See *City of Santa Monica v. Pico Neighborhood Association* (B295935, app. pending, writ of supersedeas

issued Mar. 27, 2019)[2] [granting writ of supersedeas of injunction effectively requiring Santa Monica City Councilmembers to surrender their seats].) In fact, even the superior court agreed that these mandatory provisions of the Judgment would not be enforced pending appeal:

> It would be not necessary for [the Board] to rescind the appointment if I ruled that -- if there's an appeal if I've ruled that she can no longer function as a supervisor. It can remain vacant.

(December 6, 2019 Notice of Submission of Superior Court Hearing Transcript at 34:21–25.)

The Court of Appeal's Order, however, goes beyond what the superior court ordered. The Court of Appeal Order instead holds that "the seemingly mandatory acts required in the superior court's injunction and writ of mandate are merely incidental to [the null and void] finding and the injunction and writ of mandate are prohibitory in nature." The Court of Appeal's decision puts it squarely in conflict with all of the California courts, including the Second Appellate District's March 2019 Order.

[2] See Exhibit 29 [Petition for Writ of Supersedeas], Exhibit 30 [Order Granting Temporary Stay], and Exhibit 31 [Order Issuing Writ of Supersedeas].

4. The Provisions Of The Peremptory Writ Prohibiting The Board From Giving Effect To Supervisor Rowe's Votes And Prohibiting The Board From Making A New Appointment Are Mandatory

Likewise, the other provisions of the Judgment and Peremptory Writ that are framed as prohibitory are in fact mandatory because they are part and parcel of the mandatory injunctive relief, and therefore also compel Board action and change the status quo. When the Court of Appeal implicitly found otherwise, it created a split of authority that this Court should resolve.

The Judgment includes two provisions framed in prohibitory language:

> b. [P]rohibiting [the Board] from allowing Rowe to participate in an official capacity in any meetings or Board actions, and from registering or otherwise giving effect to any further votes case by Rowe; [and]
>
> c. [P]rohibiting [the Board] from making any appointment to the position of Third District Supervisor of the San Bernardino Board of Supervisors[.]

(Exh. 22.) The Peremptory Writ mirrors these requirements, replacing "prohibiting" with "refrain". (Exh. 23.) Although cast in prohibitory language, these provisions both compel action by the Board and change the status quo.

The mandate to rescind Supervisor Rowe's appointment necessarily means the Board would no longer give effect to her votes (unless and until she were later appointed or elected to the seat). And the converse is also

true. The provision of the Judgment "prohibiting [the Board] from allowing Rowe to participate in an official capacity . . . and from registering or otherwise giving effect to any further votes cast by Rowe" is necessarily intended to give effect to the crux of the Judgment: that the Board rescind its appointment of Supervisor Rowe and remove her from her Board seat. As a Supervisor's primary duty is to participate in Board meetings and vote on official acts, such cannot be reasonably separated from the mandate that the Board rescind Supervisor Rowe's appointment. Prohibiting Supervisor Rowe from participating is effectively no different than affirmatively removing her from office. Indeed, the superior court has already recognized exactly that, stating that these provisions of the Judgment are "a natural consequence of" and "merely expound on the effect of this Court's decision to nullify, void, and rescind Rowe's appointment." (Exh. 21 at p. 398.) The superior court's November 21, 2019 ruling – and the Court of Appeal's decision to deny supersedeas – directly contradicts this prior ruling.

Likewise, the prohibition on the Board making any appointment is necessarily included in the mandate that the Board seat any person appointed by the Governor. Each of these provisions is therefore mandatory in effect because, "the injunctive order, although framed in prohibitory language, was intended to coerce or induce [the Board] into

immediate affirmative action . . . ." (*Paramount Pictures*, *supra*, 228 Cal.App.2d at p. 838.)

The Court of Appeal's denial of the writ created a split of authority on the key issue of whether an order commanding a local government to rescind or unseat an official is automatically stayed pending appeal.

5. Similar Injunctions Are Routinely Held To Be Mandatory Injunctions Subject To Automatic Stay

Courts have routinely held that injunctions similar to the Judgment and Peremptory Writ here are mandatory in effect, even though they may be in prohibitory form or description. (See *Feinberg*, *supra*, 14 Cal.2d at p. 28 ["[C]ourts are not bound by the form of the [injunction] but will look to its substance to determine its real nature."]; see also *Union Pacific R.R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 158 [This inquiry "does not depend on semantic characterizations."].)

For example, the provision of the Judgment prohibiting the Board from giving effect to Supervisor Rowe's votes closely mirrors the injunctive relief at issue addressed by the California Supreme Court in *Clute v. Superior Court* (1908) 155 Cal. 15. In *Clute*, the plaintiff corporation's board of directors voted to remove the treasurer, Clute, from his office and Clute disputed the validity of his ouster. (*Id.* at p. 17.) The trial court ultimately granted an injunction "restraining the defendant Clute from collecting any moneys of the corporation or disbursing the same . . .

[,] restraining him from representing himself as manager and treasurer of the corporation and 'from interfering with, or directing, or attempting to direct or control the employees of said corporation.'" (*Id.*) The Supreme Court explained that where an injunction, "though couched in terms of prohibition, is mandatory in effect," the automatic stay applies pending appeal. (*Id.* at p. 18.) Applying the rule, the Court held it was "clear that the injunction in question was mandatory." (*Id.* at p. 19.) "The *status* of the parties, at the time the injunction was issued" was that Clute was claiming to be the treasurer, and the injunction "would certainly, if executed, operate to change that *status*." (*Id.* at pp. 19–20.) The Court concluded succinctly: "If the injunction compels him affirmatively to surrender a position which he holds, and which, upon the facts alleged by him, he is entitled to hold, it is mandatory." (*Id.* at p. 20.)

The injunction issued in *Clute* and held by the Supreme Court to be clearly mandatory is analogous to the Peremptory Writ here commanding Supervisor Rowe to vacate her seat. Just as in *Clute*, the effect of each of the provisions in both the Judgment and Peremptory Writ would be to change the status quo because it forces Supervisor Rowe to vacate the Third District seat. Supervisor Rowe would be compelled to effectively surrender her office and the Board coerced to give effect to such change. Put more simply, because the injunctive relief would "compel[] [her] affirmatively to surrender a position which [s]he holds, and which, upon the facts alleged by

[her], [s]he is entitled to hold, it is mandatory." (*Clute*, *supra*, 155 Cal. at p. 20.) More broadly, enforcement of the Judgment and Peremptory Writ would change the status of the Board and the Third District, as well. The Board would effectively be down to only four members at first and later potentially include a fifth member whose status as a Supervisor would be in limbo pending the outcome of the appeal. Similarly, the Third District would be without representation at all initially, and later represented by a Supervisor whose appointment may well be vacated if Appellants are successful on the appeal. Avoiding chaos like this is precisely the reason the automatic stay exists.

In *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, Paramount Pictures sued actress Bette Davis when she refused to film an additional scene for an unfinished film. (*Id*. at pp. 830–831.) The trial court granted a preliminary injunction enjoining Davis from filming any movies unless and until she filmed the scene for Paramount. (*Id.* at pp. 833–834.) Davis appealed from the preliminary injunction, and the parties disputed whether the automatic stay applied. (*Id.* at p. 834.) The Court of Appeal granted Davis' writ of supersedeas, holding that "the injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action, i.e., to make the additional scene for Paramount." (*Id.* at p. 838.) In this case, just as in *Paramount*, even the portions of the Judgment and Peremptory Writ that

are framed as prohibitory are intended to coerce or induce the Board and Supervisor Rowe into action, i.e., to rescind her unanimous appointment, vacate her seat, and ultimately seat a person appointed by the Governor; and effectively provide the same ultimate relief by "prohibiting" Supervisor Rowe from continuing to fulfill the duties and obligations of the office of Third District Supervisor and "prohibiting" the Board from giving force and effect to same. (See also Exh. 21 at p. 398 [the provisions of the injunction that are framed in prohibitory language "merely expound on the effect of th[e superior] Court's decision to nullify, void, and rescind Rowe's appointment"].)

6. The Automatic Stay Here Serves To Protect the Appellate Court's Jurisdiction

Finally, application of the automatic stay in this case would serve its intended function. The automatic stay is designed to protect the jurisdiction of the Court of Appeal and the parties' constitutional right to review. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 ["The purpose of the automatic stay provision of section 916, subdivision (a) is to protect the appellate court's jurisdiction by preserving the status quo until the appeal is decided," internal quotations omitted.].) Absent the stay, the appeal could be rendered moot once the ordered action is taken. (*See URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884–887.)

The basis for the automatic stay is well-served here. Absent a stay of the Judgment and Peremptory Writ in full, the status quo will be fundamentally and irreparably altered because the result would be to (1) unseat Supervisor Rowe as Third District Supervisor, (2) leave the Board with a vacancy until the Governor makes an appointment, and (3) have a new person appointed as Third District Supervisor. And, if the Governor is allowed to make the appointment and replace Supervisor Rowe, the whole appeal is at risk of being mooted.

The Court of Appeal's order denying supersedeas fails to address this important policy basis for the stay, again demonstrating the need for this Court's review.

C. The Authorities Relied Upon By The Court Of Appeal Do Not Support Denial Of The Writ

The Court of Appeal found the injunctive relief here is prohibitory in nature because any affirmative acts are "merely incidental to the [null and void] finding." (Exh. A, citing *People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.) The Court of Appeal is incorrect, however, because the null and void finding is not self-executing and does not act to remove Supervisor Rowe from office.

1. The Affirmative Relief Is Not Incidental To The Superior Court's Null And Void Finding Because The Null And Void Finding Is Not Self-Executing.

The Court of Appeal's order was incorrectly premised on its belief that all of the relief ordered by the superior court ultimately flowed from its finding that Supervisor Rowe's appointment was null and void. But a null and void finding is not self-executing, nor does the Peremptory Writ even include any null and void finding. The Peremptory Writ and Judgment demand Board action, in sharp contrast to a quo warranto proceeding in which a judgment is self-executing. (See *People ex. rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517, 519–520.) "The term 'self-executing' denotes a judgment that accomplishes by its mere entry the result sought, and requires no further exercise of the power of the court to accomplish its purpose." (*Feinberg*, *supra*, 14 Cal.2d at p. 29.) Were this a quo warranto proceeding, the superior court's judgment would have been self-executing and the lower court would not have had to issue the Peremptory Writ. But I.E. United did not bring a quo warranto proceeding, and it cannot now obtain the benefits of this special proceeding by claiming the superior court's Brown Act ruling against the Board (but not against Supervisor Rowe herself) is somehow self-executing in removing Supervisor Rowe from office – it is not.

Indeed, this underscores the fundamental error with the proceedings in the superior court – in particular, the superior court's error in overruling

Appellants' demurrer on the grounds that I.E. United failed to bring forward a quo warranto action. Courts have long held that title to public office cannot be tried by traditional mandamus, and that quo warranto is the exclusive remedy in cases where it is available. (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633 [quo warranto is the exclusive remedy where it is available]; *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225–1226 [title to office cannot be tried in traditional mandamus]; Code Civ. Proc., § 803 [quo warranto is the action by which one challenges "any person who usurps, intrudes into, or unlawfully holds or exercises any public office"].) Thus, where a petitioner alleges that an office is vacant notwithstanding a *de facto* occupant, and asks that the proper authority be forced to fill the seat which they contend is vacant, courts have held that mandate is an improper remedy. (*Klose v. Superior Court* (1950) 96 Cal.App.2d 913, 924.)

The Legislature has recognized the high stakes of a quo warranto action, and therefore ensured that it may only be brought by or with the express authorization of the Attorney General. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1228; Code Civ. Proc., § 803.) The statutes and case law also provide all parties with certainty about the procedures: the judgment is self-executing, and as a result there is no automatic stay because "[t]here is nothing to stay . . . ." (*Boarts*, *supra*, 135 Cal.App. at pp. 519–520; see also Code Civ. Proc., § 917.8, subd. (a).)

Here, I.E. United's Petition for Writ of Mandate was fatally flawed and should have been dismissed because a writ proceeding cannot try title and because a quo warranto proceeding must be authorized by the Attorney General. By ignoring the underlying premise that the remedy of quo warranto allows the state in its sovereign capacity to protect the interests of the people as a whole, allowing the Judgment to be enforced will simply reward litigants who find a procedural hiccup in order to exploit the asserted error and to create uncertainty in local governance.

2. The Null And Void Finding Does Not Change The Fact That The Judgment Alters The Status Quo.

For the same reason, the Court of Appeal's conclusion that "the finding of a null and void appointment means there was no change in status quo by the superior court's order" also conflicts with existing California law on the issue. In determining whether the automatic stay applies, courts define the status quo as the state of the parties at the time the decree or injunction issues. (See *Atkinson*, 15 Cal.App.5th at pp. 884–885; *Clute*, *supra*, 155 Cal. at pp. 18–19 [defining status quo as "[t]he status of the parties, at the time the injunction was issued"]; *Paramount Pictures*, *supra*, 228 Cal.App.2d at pp. 835–836 [defining status quo as "relative rights of the parties at the time injunction is granted"]; *Dosch*, *supra*, 192 Cal.App.2d at p. 804 [defining status quo as "relative rights of the parties at the time injunction is granted"].)

On November 8, 2019, Dawn Rowe held the position of Third District Supervisor following her unanimous appointment one year prior – this is the status quo. This conclusion – that the Judgment alters the status quo – is further supported by the undisputed fact that the Judgment does not return the parties to their respective positions in December 2018. At the time that the Board seat first became vacant on December 3, 2018, Appellants had thirty days to fill the vacancy (and only if they did not do so would the Governor make an appointment). Thus, maintaining the status quo at that time would be a vacant seat with thirty days for a Board appointment. It is exactly such a dramatic change in the relative position of the parties that defines a change to the status quo, and is therefore avoided by the automatic stay on appeal.

The Court of Appeal's ruling cannot be squared with the relevant case law. Indeed, its reliance upon *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 212–213, is unpersuasive. *Hernandez* did not involve the application of the automatic stay, let alone address the definition of status quo.

3. *Mobile Magic* Underscores The Importance Of Focusing On The Crux Of The Injunctive Relief

While it is true that an injunction may be prohibitory even where it incidentally requires some affirmative act, *Mobile Magic* underscores that

courts must look to the crux of the injunctive relief to determine whether it is mandatory or prohibitory.

In *Mobile Magic*, the People brought an action against mobilehome dealers and the operator of a mobilehome park based upon alleged misrepresentations about the availability of mobilehome homesites at the mobilehome park. (*Id.* at p. 5.) The trial court granted a preliminary injunction against the operator, prohibiting it from displaying model homes in violation of the law, and also requiring it to remove models that were currently on display in violation of the law. (*Id.* at p. 13.) On appeal, the court concluded that the injunction was prohibitory because, "while the act of removal is an affirmative act, it is incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision." (*Ibid.*) *Mobile Magic* demonstrates that any language in an injunction that is "incidental" to its primary objective will not serve to transform the nature of the injunction.

Here, it is the provisions of the Judgment and Peremptory Writ that are framed as prohibitory which are incidental to the primary objective of the injunctive relief, i.e., a mandate that the Board rescind Supervisor Rowe's appointment and immediately seat a Gubernatorial appointee in her place. Such is clear from the September 18, 2019 Statement of Decision, which only included this affirmative and mandatory relief. Indeed, I.E. United admitted that the prohibitory language in their Proposed Judgment

"simply spells out obligations that are necessarily included in the relief set forth in this Court's Statement of Decision." (Exh. 18 at p. 369.) It is clear, then, that any prohibitory aspect of the injunction is merely incidental to the crux of the injunctive relief, which is a mandate to the Board to rescind Supervisor Rowe's appointment.

D. Review Is Necessary To Provide Guidance On This Important Legal Issue

Supreme Court review is necessary to resolve the issue presented here because it is necessary for local governments to have certainty and clarity, particularly for an issue like this one that will often evade appellate review.

The practical implications of the Court of Appeal's decision, both in this case and in future cases, make this a ripe issue for the Supreme Court to address. Denial of the stay would give effect to the flawed Judgment and Peremptory Writ, issued in contravention of the well-established quo warranto exclusivity. Once enforced, the bell cannot be unrung. And the ruling will no doubt encourage litigants to use various procedural flaws to manufacture disputes and urge a court to issue an order unseating an official. If the order is appealed, will the order be automatically stayed – as the Second Appellate District held in *City of Santa Monica v. Pico Neighborhood Association* – or will the order be immediately enforceable notwithstanding the appeal, as the Court of Appeal ruled here? That

uncertainty poses severe risks to local governments, who will be left unsure whether they can meet quorum requirements, achieve a super majority vote on mandated actions, or face challenges to official actions. (See, e.g., Petition at ¶ 4.) The uncertainty is particularly difficult to address, as a writ relief in the appellate court must be done on an expedited basis is often decided in summary orders.

These risks are not hypothetical. In this case, these uncertainties left Supervisor Rowe and her staff uncertain about their positions, their employment, and Supervisor Rowe's ability to represent her constituents while the parties have litigated these stay issues. Here, the Supreme Court has the opportunity to weigh in on the issue and provide guidance to the lower courts and future litigants to avoid the uncertainty that has arisen in this case.

V. CONCLUSION

The Court of Appeal erred by denying supersedeas and finding that the superior court's null and void language precluded the automatic stay. This Court should issue an immediate stay and grant review to correct the error, and prevent the fundamentally flawed Judgment from taking immediate and irreparably harmful effect.

DATED: January 17, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: Deborah J. Fox

DEBORAH J. FOX
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WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 8,241 words exclusive of the tables, signature block and this certification.

Executed this 17th day of January, 2020 at Los Angeles, California.

Deborah J. Fox

EXHIBIT A

COURT OF APPEAL -- STATE OF CALIFORNIA
FOURTH DISTRICT
DIVISION TWO

ORDER

MICHAEL GOMEZ DALY,
Plaintiff and Respondent,

v.

BOARD OF SUPERVISORS OF
SAN BERNARDINO COUNTY et al.,
Defendant and Appellant.

E073730

(Super.Ct.No. CIVDS1833846)

The County of San Bernardino

THE COURT

The court has considered the petition for writ of supersedeas with request for immediate stay and its exhibits, the preliminary opposition thereto, and the reply. We granted the request for immediate stay on November 26, 2019, while briefing was in progress. We now summarily DENY the petition (*Kowis v. Howard* (1992) 3 Cal.4th 888, 893) and lift the stay.

The request for a writ of supersedeas as of right is denied because, upon a finding that the appellant Board of Supervisor's appointment of real party Dawn Rowe was null and void as arising out of a violation of the Brown Act (Government Code sections 54950, *et seq.*), the seemingly mandatory acts required in the superior court's injunction and writ of mandate are merely incidental to that finding and the injunction and writ of mandate are prohibitory in nature. (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.) The same finding of a null and void appointment means there was no change in status quo by the superior court's order. (Cf. *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 213-214.)

The alternative request for a discretionary writ of supersedeas is denied because any injury to appellants is not "irreparable" and the potential injury to respondents becomes disproportionate relative to appellants. (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2019) §§ 7:279–7:281.) Further, while we do not here determine the merits of the appeal, "To support issuance of the writ [of supersedeas], appellant must show that 'substantial questions' will be raised on the appeal [citation] and must *explain* the underlying case in a manner that 'facially' demonstrates the merit of these issues." (*Id.*, §§ 7:286–7:287.) Appellants have not

facially demonstrated the merits of the issues they present for the purpose of a discretionary writ of supersedeas.

The stay imposed on November 26, 2019, is LIFTED.

MILLER
Acting P. J.

Panel: Miller
Ramirez
Menetrez

cc: See attached list

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SBSC no. CIVDS1833846 / Appeal Case no. E073730

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Kathy Glass

Kathy Glass

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SBSC no. CIVDS1833846 / Appeal Case no. E073730

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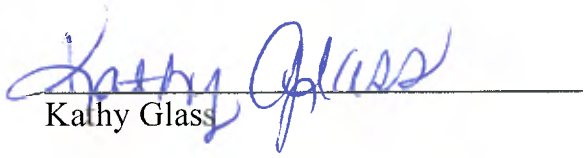

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SBSC no. CIVDS1833846 / Appeal Case no. E073730

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Julie Pfister

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STATE OF CALIFORNIA
Supreme Court of California

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