CASE NO. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY et al.,

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

ANSWER TO AMICUS CURIAE BRIEF BY FIRST AMENDMENT COALITION

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I. INTRODUCTION

The First Amendment Coalition's (the Coalition) amicus curiae brief rests on one central argument: application of the Code of Civil Procedure section 916's automatic stay to the Judgment and Peremptory Writ would establish a rule "allow[ing] a legislative body to violate the Brown Act but continue with business as usual while the case winds its way through the appellate process."[1] The Coalition's concerns are unfounded, however, because a decision in favor of appellants on either of the issues before this Court—whether quo warranto is the exclusive remedy and (if not) whether the automatic stay applies to this Judgment and Peremptory Writ—will not undermine the Brown Act. And indeed, it is important here that quo warranto is the exclusive remedy to challenge a public official's title to office, which serves to protect the stability of local governance. But the Coalition's arguments are unfounded for two reasons.

First, in the context of an appointment of a public official, quo warranto is the exclusive remedy to challenge the official's title and remove her from office, including where the underlying basis for the challenge is an alleged violation of the Brown Act. And, unlike writs of mandate,

[1] Application to File Amicus Curiae Brief and Amicus Curiae Brief of First Amendment Coalition in Support of Plaintiffs and Respondents (Amicus Brief) at p. 9.

judgments in quo warranto are expressly excluded from the scope of the automatic stay.

Moreover, even if mandamus is an available remedy for I.E. United's challenge to Supervisor Rowe's title to office, the Coalition's policy rationale is premised on the false assumption that application of the automatic stay here would apply to other Brown Act writs. But application of the automatic stay in this case would not undermine the efficacy of Brown Act challenges in the courts, as the automatic stay would only apply where the order disturbs the status quo by removing an elected official from office and not to more common Brown Act challenges. Furthermore, the Coalition's policy arguments ignore the fundamental benefits that the automatic stay provides—including protecting the parties' right to appellate review and ensuring the stability of local governance.

II. RELEVANT FACTUAL BACKGROUND

Appellants' Opening Brief includes a Statement of the Case summarizing the relevant factual and procedural background. Appellants provide this additional summary only to correct the inaccuracies in the Amicus Brief and to apprise this Court of relevant updates since appellants' Reply Brief was filed.

The Coalition wrongly states that the Board "ignored judicial orders to correct the [Brown Act] violation." (Amicus Brief at p. 8.) Quite to the contrary, the Board has never ignored any judicial order, has acknowledged

on the record it would abide by judicial orders, and has extensively sought judicial clarification to avoid any such scenarios. The Coalition appears to be referring to the superior court's Judgment and Peremptory Writ of mandate, which was entered by the superior court on November 8, 2019. (Exhs. 11, 12[2].) Since at least November 13, 2019, when appellants perfected their appeal, the Judgment and Peremptory Writ have been automatically stayed. Moreover, the superior court, the Court of Appeal, and this Court have each entered orders expressly staying the Judgment and Peremptory Writ for nearly the entire period since November 13, 2019. (See December 6, 2019 Notice of Submission of Superior Court Hearing Transcript at 35:15–23 [superior court ordering stay from November 21, 2019 through December 2, 2019]; Court of Appeal Order dated November 26, 2019 [ordering stay pending determination of petition for writ of supersedeas]; Court of Appeal Order dated January 8, 2020 [denying petition for writ of supersedeas and lifting the stay]; Supreme Court Order dated January 23, 2020 [issuing stay that is still in effect].)[3]

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[2] All references to Exhibits are to the Exhibits to Appellants' Petition for Writ of Supersedeas unless otherwise specified.

[3] Thus, the only periods since November 13, 2019 that there was not an express stay in effect were November 13–21, 2019 and January 8–23, 2020. There is no allegation that the Board or Supervisor Rowe took any actions in violation of the Judgment or Peremptory Writ during either of these very brief periods, nor did they "ignore" the Judgment as they actively sought judicial confirmation that the automatic stay was in effect.

The Coalition also misconstrues the proceedings below by insisting that "both the trial court and the Court of Appeal" found that the Board violated the Brown Act. (Amicus Brief at p. 9.) This is simply not true. The Court of Appeal has not addressed the merits of this action. In the Court of Appeal's Order denying appellants' Petition for Writ of Supersedeas, the Court of Appeal expressly explained that it was not "determin[ing] the merits of the appeal." (Court of Appeal Order dated January 8, 2020.) Indeed, several of these merits issues—including whether the Board's actions violated the Brown Act in the first instance and, if so, whether the Board's subsequent curative actions cured any such violation—are still pending in the Court of Appeal.[4] Appellants' right to an appellate determination on the merits of the Judgment and Peremptory Writ issued against them is one of the key reasons that the automatic stay applies.

Finally, Supervisor Rowe's appointed term ended on December 6, 2020. As noted in the AOB, Supervisor Rowe appeared on the March 3, 2020 primary ballot for the office of Third District Supervisor and won more than 50 percent of the vote, meaning she was elected to the office for the term beginning on December 7, 2020. (See San Bernardino County

[4] By Order dated June 26, 2020, the Court of Appeal granted the parties' joint request for a stay of all proceedings in the Court of Appeal pending the outcome of the Court's decision on this Petition for Review.

Registrar of Voters Final Certified Election Results, available at https://www.sbcounty.gov/rov/elections/results/20200303/, accessed December 6, 2020.) On December 7, 2020, Supervisor Rowe was sworn in to office for the next term. Accordingly, Supervisor Rowe no longer holds office pursuant to the appointment at issue in this case.[5]

III. ARGUMENT

The Amicus Brief focuses on one central public policy argument: "[i]f an order that nullifies an illegal vote can be automatically stayed upon the filing of a notice of appeal, the Brown Act will lose the 'teeth' the Legislature added in 1986—the ability to nullify unlawful actions." (Amicus Brief at p. 9.) But this policy argument simply does not support the Coalition's position for two reasons.

First, unless this Court deviates from over a century of its own authority and determines that quo warranto is no longer the exclusive remedy to challenge title to office, then the Court need not even reach the

[5] Although the stay issue is therefore moot in this case, the Board believes this important issue should be addressed by this Court *if* this Court holds that quo warranto is not the exclusive remedy here. (See, e.g., *California Cannabis Coal. v. City of Upland* (2017) 3 Cal.5th 924, 933, as modified on denial of reh'g (Nov. 1, 2017) ["While the case is thus technically moot, it nonetheless presents important questions of continuing public interest that may evade review."]; *Eblovi v. Blair* (2016) 6 Cal.App.5th 310, 313 ["disputes concerning election procedures are properly reviewable by an appellate court even though the particular election in question has already taken place … since the issues raised are of general public interest, and are likely to occur in future elections in a manner evasive of timely appellate review."] (internal quotes omitted).)

issue of an automatic stay because (a) the issue will be moot here as the Judgment and Peremptory Writ will be vacated and (b) the issue will not arise again because there will be no occasion for a court to enter a Peremptory Writ ordering a legislative body to remove an official from office. Indeed, the Coalition's policy argument actually supports a decision by this Court confirming that quo warranto is the exclusive remedy to challenge title to public office because quo warranto provides the immediate relief that the Coalition argues is necessary, without either upending established law on quo warranto's exclusivity and the scope of the automatic stay.

On the other hand, if this Court instead holds that mandamus is an appropriate remedy for I.E. United's challenge to Supervisor Rowe's title to office, then the Coalition's policy argument ignores how the automatic stay is necessary to protect against the possibility of an untested superior court judgment derailing the stability of local governance. Furthermore, application of the automatic stay here would not, as the Coalition worries, undermine the efficacy of Brown Act challenges in the courts, as the automatic stay would only apply where the order disturbs the status quo by removing an elected official from office and not to other, more common Brown Act challenges.

A. Quo Warranto Provides For Immediate Relief Not Subject To The Automatic Stay

If this Court affirms the longstanding rule that quo warranto is the exclusive remedy for challenging title to office, then future challenges to office based upon Brown Act violations will not be subject to the automatic stay because quo warranto judgments are excluded from reach of the automatic stay statute. Therefore, the Coalition's central argument that an automatic stay will delay or effectively deny relief in a Brown Act case, in fact equally supports holding that quo warranto is the exclusive remedy here, in addition to the reasons extensively briefed by appellants in their prior briefing. (See AOB at pp. 27–56; Appellants' Reply Brief at pp. 10–35; see also *Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633; *San Ysidro Irrigation District v. Superior Court of San Diego County* (1961) 56 Cal.2d 708, 714–715; *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225.)

The quo warranto remedy is immediately effective and not subject to the automatic stay. In contrast with a writ of mandate, a quo warranto judgment is self-executing and thus no party to the action is required to take any action to give it effect. (See *People ex. rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517, 519–520; see also Code Civ. Proc., §§ 806, 809.) As a result, a judgment in quo warranto is not subject to an automatic stay on appeal because "[t]here is nothing to stay . . . ."

(*Boarts*, *supra*, 135 Cal.App. at pp. 519–520.) The Legislature in fact specifically excluded quo warranto judgments from the scope of the automatic stay. (Code Civ. Proc., § 917.8, subd. (a) ["The perfecting of an appeal does not stay proceedings, in the absence of an order of the trial court providing otherwise or of a writ of supersedeas, . . . [i]f a party to the proceeding has been adjudged guilty of usurping, or intruding into, or unlawfully holding a public office, civil or military, within this state."]; see also *Day v. Gunning* (1899) 125 Cal. 527, 529 [holding that this provision, formerly at Code of Civil Procedure section 949, applies to quo warranto proceedings]; *People ex rel. Bledsoe v. Campbell* (1902) 138 Cal. 11, 18 [same].)

Thus, where a party challenges title to office based on a Brown Act violation—and assuming this Court holds that quo warranto is the appropriate and exclusive means of doing so—then any future quo warranto judgment based upon a Brown Act violation, such as alleged here, will not be subject to the automatic stay. In other words, if this Court holds that quo warranto is the exclusive remedy for trying title to office, the Coalition's imagined problem simply could not arise. That is because either (a) the Brown Act challenge implicates title to office, and therefore a quo warranto judgment is not subject to an automatic stay; or else (b) the Brown Act challenge does not implicate title to office and this Court's decision here

will have no bearing on application of the automatic stay to such a writ of mandate.

B. If Challenges to Title May Proceed in Mandamus, A Writ of Mandate Removing an Officeholder From Her Office Should Be Subject To The Automatic Stay

If this Court determines that mandamus is an appropriate remedy for challenging title to office where the challenge is based on a Brown Act violation, then the Court should hold that the automatic stay applies to such a writ of mandate. The Coalition's public policy argument does not counsel a different result because neither appellants nor existing authority suggest that application of the automatic stay in this case would require its application in any Brown Act proceeding other than where title to office is at issue.

The Coalition appears to suggest that applying the automatic stay here would serve to undermine the effectiveness of the Brown Act because it "would allow a legislative body to violate the Brown Act but continue with business as usual while the case winds its way through the appellate process." (Amicus Brief at p. 9.) This fear is unfounded however, since it assumes that a writ of mandate removing an elected official from office would be subject to the same rules as any other writ of mandate in a Brown Act case. But appellants do not assert such a broad rule, and such a rule is unsupported by the law in any event.

1. The Judgment and Peremptory Writ Here Are Mandatory Injunctions Subject To The Automatic Stay

The Coalition argues, as I.E. United has, that the automatic stay does not apply here because the superior court found that Supervisor Rowe's appointment was "null and void," thereby making the injunctive relief prohibitory. (Amicus Brief at p. 9.) But the Coalition asks this Court to ignore the effect of the Peremptory Writ, which (if it had not been stayed) would have forced the Board to remove Supervisor Rowe from office and seat a new appointee by the Governor. Thus, while relief that declares legislative action "null and void" may often be prohibitory, these words alone do not control whether the injunctive relief is mandatory or prohibitory. Instead, the effect of the injunctive relief controls and it is mandatory where, as here, its effect is to require affirmative action that changes the status quo.

As addressed in appellants' Opening and Reply Briefs, injunctive relief is mandatory "where it requires affirmative action and changes the status quo." (*Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727–728, citing *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835.) And as repeatedly explained by this Court and California's appellate courts for decades, the "status quo" is the position of the parties "prior to the entry of judgment." (*Dosch v. King* (1961) 192 Cal.App.2d 800, 804; see also *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15

Cal.App.5th 872, 884–885; *Clute v. Superior Court* (1908) 155 Cal. 15, 19–20; *Paramount Pictures*, *supra*, 228 Cal.App.2d at pp. 835–836.) *Dosch* speaks directly to this issue: "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.)

The cases cited by the Coalition do not change this result. In *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287 (*International Longshoremen's*), an agreement entered into by a legislative body was declared null and void under the Brown Act. The Coalition argues that the agreement did not "regain validity" pending appeal. (Amicus Brief at p. 13.) Although these issues were not addressed by the court, the writ that issued would not have been subject to the automatic stay because declaring an agreement null and void does not require any affirmative action by the legislative body and therefore is not a mandatory injunction. (See *Hayworth*, *supra*, 129 Cal.App.3d at pp. 727–728 [injunctive relief is mandatory "where it requires affirmative action *and* changes the status quo."] (italics added).)

Shapiro v. San Diego City Council (2002) 96 Cal.App.4th 904, like *International Longshoremen's*, does not address the automatic stay and therefore had no occasion to consider whether the injunctive relief was mandatory or prohibitory for purposes of a stay. Nonetheless, the

injunctive relief in *Shapiro* was clearly prohibitory, in that it only ordered that City Council was prohibited from violating its obligations under the Brown Act. (*Id.* at p. 910.) The relief did not change the status quo or require any affirmative action by the City Council, apart from the affirmative duties it was already statutorily bound to follow.

The Coalition next addresses cases that broadly define "null and void" as "eliminating the existence of the object and returning affairs back to the state before the object existed." (Amicus Brief at p. 13.) The Coalition is correct, but this does nothing to address the issue at play here—all parties agree that the superior court's Judgment and Peremptory Writ sought to remove Supervisor Rowe from office; the only question is whether the relevant "status quo" is the time before Judgment was entered or else some other time. As explained, the "status quo" is the position of the parties "prior to the entry of judgment." (*Dosch*, *supra*, 192 Cal.App.2d at p. 804; see also *URS Corp.*, *supra*, 15 Cal.App.5th at pp. 884–885.)[6]

Finally, the cases cited by the Coalition addressing the "status quo" are all outside the context of Code of Civil Procedure section 916's

[6] Additionally, the Coalition, like I.E. United, fails to recognize that the Judgment and Peremptory Writ here would not return the parties to their position prior to Supervisor Rowe's appointment to office, which is its urged "status quo." At that time, the Board still had 15 remaining days to fill the vacancy, but the Judgment and Peremptory Writ instead command the Board to immediately seat the Governor's appointee. (See Appellants' Reply Brief at pp. 40–41.)

automatic stay. (See *People v. Rodriguez* (2016) 1 Cal.5th 676, 696 (Corrigan, J., concurring) [discussing status quo in the context of applying contract principles to withdrawal of plea bargain]; *Harry Carian Sales v. Agricultural Labor Relations Bd.* (1985) 39 Cal.3d 209, 232 [quoting a bargaining order by the Agricultural Labor Relations Board that described the order as returning "events to the status quo prior to the unfair labor practices"]; *Runyan v. Pacific Air Industries, Inc.* (1970) 2 Cal.3d 304, 316 fn. 15 [explaining that the common law rescission remedy in contract law returns affairs to the "*status quo ante*"].)

Various discussions about "status quo" in cases that are not addressing the application of the automatic stay offer little insight into interpreting the Code of Civil Procedure. Section 916 provides that "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 . . . ." Thus, it is entirely consistent with its statutory basis that the "status quo" for purposes of the automatic stay should look to the parties' position prior to the entry of that judgment. Definitions of "status quo ante" for purposes of common law contract remedies are simply inapposite and unhelpful.

2. None of the Policy Bases Offered by the Coalition Support Denying Application of the Automatic Stay Here

The Coalition argues that application of the automatic stay to this case would undermine the entire Brown Act. As an initial matter, the Coalition's argument that application of the automatic stay "encourages and rewards Brown Act violations" makes little sense, given that the argument would apply the broad spectrum of any mandatory injunctive relief a superior court might order after finding a violation of civil law. (Amicus Brief at p. 14.) But the Legislature has made it clear that mandatory injunctive relief *is* automatically stayed in the normal course during appellate proceedings. (Cal. Code Civ. Proc., § 916, subd. (a).) The Coalition does not and cannot explain why *mandatory* injunctive relief ordered in a Brown Act case should receive different treatment.

Moreover, this policy argument is not supported by the realities of Brown Act litigation. Indeed, as the Coalition itself has noted, writs issued in Brown Act cases are generally not mandatory injunctions; instead they often simply declare the offending conduct null and void and do not require affirmative action by the legislative body that changes the status quo. (See, e.g., *International Longshoremen's*, *supra*, 69 Cal.App.4th 287; *Shapiro*, *supra*, 96 Cal.App.4th 904.)

Furthermore, the Amicus Brief ignores the public policy benefits inherent in the automatic stay, which are exemplified by this case. 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.)

These procedural protections are crucial if title to office can be challenged in mandamus proceedings. Quo warranto proceedings ensure that the public is protected from the harm to local governance that would arise if an official is erroneously removed from office by ensuring adequate protections on the front end—the Attorney General must first determine that the action raises substantial questions and would be in the public interest. In the absence of those procedural protections at the outset of an action, the automatic stay serves to prevent an official from being erroneously removed from office before she has even had her right to appellate review. The Coalition and I.E. United offer no justification for eliminating both these procedural protections, which would create disruption and instability for local governments based on an erroneous superior court order removing an official from office.

IV. CONCLUSION

The Coalition is rightly concerned about protecting the integrity and "teeth" of the Brown Act. But the Coalition incorrectly argues that appellants' position in this case would somehow undermine the Brown Act. On the contrary—appellants first contend that quo warranto is the exclusive remedy for challenges to title. If this Court rules in favor of appellants on this issue, any allegations of a Brown Act violation in appointing a public official can be expeditiously tried in a quo warranto proceeding and a judgment against the official in such an action would be immediately effective without any automatic stay. If quo warranto is not the exclusive remedy, then appellants contend that the automatic stay must apply to a writ of mandate commanding a legislative body to remove a sitting public official. In such cases, the automatic stay will ensure stability of local governance is not impeded by an erroneous superior court judgment. Neither of these straightforward positions would have an effect on superior court writs of mandate or prohibition arising from Brown Act actions other than where title to office is at stake. Accordingly, nothing in the Amicus Brief supports holding that the automatic stay does not apply to the Judgment and Peremptory Writ here.

DATED: December 21, 2020

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.520(c)

Pursuant to California Rules of Court Rule 8.520(c), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 3,831 words.

DATED: December 21, 2020

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STATE OF CALIFORNIA
Supreme Court of California

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