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January 22, 2020

**Via True Filing and Electronic Transmission**

The Honorable Tani Cantil-Sakauye, Chief Justice
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-3600

**Re: *Daly, et al. v. Board of Supervisors of San Bernardino County, et al.***
**California Supreme Court No. S260209**
**California Court of Appeal, Fourth Appellate Distr., Div. 2, Case No E07370**
**County of San Bernardino Superior Court, Case No. CIVDS1833846**

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Appellants San Bernardino County Board of Supervisors, Robert A. Lovingood, Janice Rutherford, Curt Hagman, Josie Gonzales, and Dawn Rowe ("Appellants") submit this reply in letter brief format in support of their Petition for Review.

## I. INTRODUCTION

I.E. United fundamentally misconstrues the well-established definition of "status quo" for determining whether an injunction is mandatory or prohibitory in nature. It is this flawed legal analysis that gives rise to the ultimate error at issue here: the Court of Appeal's flawed conclusion that the automatic stay pursuant to Code of Civil Procedure § 916(a) does not apply. Unless this Court corrects the error and stays the Judgment, the consequences resulting from the error will be significant and irreversible: Supervisor Rowe will be removed from office, San Bernardino County's

governance will be impeded, and California law on quo warranto will be upended based on a flawed superior court Judgment that has not yet been subject to appellate review.

## II. THE JUDGMENT AND PEREMPTORY WRIT OF MANDATE IRREVOCABLY ALTER THE STATUS QUO

In Appellants' Petition for Writ of Supersedeas, Appellants explained that California law was clear that the status quo – for purposes of resolving whether a permanent injunction is mandatory or prohibitory – is the relative position of the parties at the time the injunction is issued. I.E. United asserts in its Answer that the relevant definition for status quo is the "*last uncontested state* preceding the parties' dispute." (Answer at p. 20.) I.E. United is simply wrong. However, this Court need not even resolve this issue in order to find that the Judgment and Peremptory Writ at issue are mandatory in nature and automatically stayed. That is because the Judgment and Peremptory Writ create an entirely new status that is substantially different from both the status at the time the Judgment was entered, and different from the status at the purported "last uncontested state" of the parties back in December of 2018.

### A. Enforcing the Judgment Would Not Return the Parties to the "Last Uncontested State" That Existed in December 2018

I.E. United asserts that the trigger point to assess the status quo was at December 18, 2018, when I.E. United first alleged a Brown Act violation and prior to Supervisor Rowe's appointment to the Third District seat. (Answer at p. 21; Petition for Writ of Supersedeas at ¶ 14.) Even if the status as of December 18, 2018 were the correct status for purposes of determining whether the automatic stay applies – and it is not – Appellants are still entitled to supersedeas because the Judgment and Peremptory Writ do not return the parties to the state that existed on that date. At that point in time, it is undisputed that the Board was within the 30-day time period (and, indeed, had 12 more days) to make an appointment to the Third District Supervisor

seat under the County Charter. (See Petition for Writ of Supersedeas at ¶ 6; Exh. 1 at p. 9, Art. 1, sec. 7.) The Judgment and Peremptory Writ, however, do not purport to return to the parties to that status; instead the Judgment and Peremptory Writ "command[] [the Board] to immediately seat any person duly appointed to the position of Third District Supervisor by the Governor." (Exh. 13.) Thus, the Judgment and Peremptory Writ do not maintain the "status quo" even under the strained offering put forward by I.E. United. I.E. United simply ignores this fact, as it has consistently done. (See Reply Brief in Support of Petition for Writ of Supersedeas at pp. 22–23; Petition for Review at p. 38.)

### B. Enforcing the Judgment Alters the Status Quo Under the Correct Definition

Aside from the fact that the Judgment and Peremptory Writ do not return the parties to any prior status, I.E. United's position is also flawed because they misinterpret the definition of status quo for purposes of determining whether the automatic stay applies.

As explained in Appellants' Petition for Review, the rule is clear: the status quo is defined as the relative rights of the parties **at the time the injunction was issued**. (See *Clute v. Superior Court* (1908) 155 Cal. 15, 18–19; *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835–836; *Dosch v. King* (1961) 192 Cal.App.2d 800, 804.) I.E. United seems to argue that the outcome of these decisions would be the same under its proposed "last uncontested state" rule and, therefore, these cases must have been simply applying the "last uncontested state" rule. (See Answer at pp. 28–30.) But that is not what the decisions say. Each case expressly laid out the rule for defining the status quo as the relative rights of the parties at the time the injunction was issued:

- The relevant status quo is "[t]he *status* of the parties, at the time the injunction was issued . . . ." (*Clute*, *supra*, 155 Cal. at p. 19.)

- A change in status quo "contemplates a change in the relative rights of the parties at the time injunction is granted." (*Paramount Pictures*, *supra*, 228 Cal.App.2d at p. 836.)
- A change in the status quo is one that "necessarily contemplates a change in the relative rights of the parties at the time injunction is granted." (*Dosch*, *supra*, 192 Cal.App.2d at p. 804.)

The courts meant what they said: the status quo is the relative rights of the parties at the time the decree is granted. And here, the status at the time the Judgment was issued was that Supervisor Rowe was seated as Third District Supervisor.

I.E. United desperately wants to redefine the status quo but uses a definition that is only appropriately used when a court determines whether to issue a preliminary injunction in the first instance, namely the "last actual peaceable, uncontested status which preceded the pending controversy." (Answer at p. 21, citing *People v. Hill* (1977) 66 Cal.App.3d 320, 331.) But this case is not at such a preliminary stage; the Judgment was a final decree by the superior court after a full trial on the merits.

In *United Railroads of San Francisco v. Superior Court In and For City and County of San Francisco* (1916) 172 Cal. 80 ("*United Railroads*"), the Court considered whether a preliminary injunction was "prohibitive and restrains continuous acts of trespass upon plaintiff's property." (*Id.* at p. 89). *United Railroads*, in fact, refers to these as "preventive" injunctions, making clear that its scope was limited to addressing preliminary—or *pendente lite*—injunctions rather than injunctive relief ordered in a final judgment. (*Id.* at p. 82.) Here, there is nothing "preventative" about the final Judgment and Writ issued after a trial on the merits and *United Railroads* does not offer anything that contradicts the well-established authority defining status quo on appeal in assessing the applicability of the automatic stay.

In fact, one Court of Appeal has directly considered the competing definitions of status quo and expressly rejected I.E. United's position. (See *URS Corp. v.*

*Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 885–886.) The issue arose after the superior court granted a motion by defendant Atkinson/Walsh Joint Ventures ("Atkinson") to disqualify the attorneys for plaintiffs URS Corp. and AECOM ("URS"). (*Id.* at p. 877.) URS appealed and, on petition for writ of supersedeas, it contended the attorney disqualification order was automatically stayed. (*Id.* at p. 877.) URS urged that the relevant status quo should be based on the status of the parties prior to the court's issuance of an order disqualifying attorney – namely that the putatively disqualified attorneys were still counsel of record for URS. (*Id.* at p. 885.) Atkinson instead argued the status quo was defined as "the last actual peaceable, uncontested status which preceded the pending controversy" – namely before there was any attorney representation or involvement. (*Id.* at p. 885, citing *United Railroads*, *supra*, 172 Cal. at pp. 87–90.) The court of appeal rejected the definition of status quo from *United Railroads.* (*Atkinson*, *supra*, 15 Cal.App.5th at p. 886.) Instead, the court explained that the automatic stay was necessary to avoid the likely mooting of the appeal – i.e., by the time the appeal is decided the underlying action would likely be resolved and the client would no longer need representation. (*Id.*)

These same policy considerations at play here support the automatic stay because absent the automatic stay, Appellants will be effectively denied their right to appeal. (See *Atkinson*, *supra*, 15 Cal.App.5th at p. 886.)

### C. The "Null and Void" Finding Does Not Render the Judgment Self-Executing Such That It Could Evade the Automatic Stay

I.E. United argues that the superior court's "null and void" finding makes the Judgment self-executing and therefore is not subject to the automatic stay. But it is clear that the Judgment is not self-executing because it required affirmative action by the Board to give it effect.

It is true that a self-executing judgment is not automatically stayed pending appeal. (See, e.g., *People ex. rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517, 519–520.) This rule makes perfect sense: a self-executing judgment requires no affirmative action to give it effect, and therefore "[t]here is nothing to stay . . . ." (*Id.*) But this is in stark contrast to the Judgment and Peremptory Writ at issue here, which command the Board to rescind Supervisor Rowe's appointment and to instead seat a Governor appointee.

Here, I.E. United brought this writ action pursuant to Code of Civil Procedure, section 1085. Section 1085 provides that a "writ of mandate may be issued . . . to any . . . board, or person, to **compel** the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . " (Code Civ. Proc., § 1085, subd. (a), bold added.) And generally, "the filing of a notice of appeal stays a writ of mandate . . . ." (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 762.) Not only did I.E. United choose to bring their challenge as a writ action under Section 1085 rather than as a quo warranto action, but I.E. United also drafted the Judgment and Peremptory Writ of Mandate that compels Board action. If I.E. United believed the Judgment was self-executing, then there was no need for the superior court to even issue a Peremptory Writ, let alone include a provision "COMMAND[ING]" the Board to "[r]escind the appointment of Rowe as Third District Supervisor." (Exh. 23 at p. 412.) Indeed, it is impossible to reconcile I.E. United's bold claim that the Judgment and Peremptory Writ "require no affirmative acts" with their complaint only pages before that "Appellants have taken no steps to comply with the ruling." (Compare Answer at p. 8, Answer at p. 6.)[1]

[1] I.E. United has also attempted to initiate contempt proceedings against Appellants on the unfounded allegation that they have not taken any steps to comply with the Judgment and Peremptory Writ.

Despite I.E. United's efforts, the law, the facts, and even I.E. United's course of conduct throughout this litigation make clear that the Judgment and Peremptory Writ are mandatory injunctions because they require affirmative action by the Board and fundamentally alter the status quo at the time the Judgment was entered.

## III. IF LEFT UNCORRECTED, THE COURT OF APPEAL'S DENIAL OF THE WRIT OF SUPERSEDEAS WILL HAVE THE EFFECT OF DENYING APPELLANTS THEIR RIGHT TO APPEAL AND WILL UPEND CALIFORNIA LAW ON QUO WARRANTO

The Court of Appeal's erroneous denial of Appellants' Petition for Writ of Supersedeas will irreversibly harm Appellants unless this Court grants the temporary stay and review. Appellants will be effectively denied their right to appeal, Supervisor Rowe – even though she admittedly did nothing wrong – will be denied her right to represent the people of the Third District, and the decision of who to appoint to the seat will be removed from the representatives of San Bernardino County and instead granted to the Governor.

But the issues are not just of interest to the parties in this litigation. As demonstrated by the Amicus Curiae letters filed in support of the Petition for Review by the California State Association of Counties (CSAC) and the League of California Cities (LOCC), the issues here are of significant interest to all local governments throughout the state.

### A. A Stay of the Judgment and Peremptory Writ Are Necessary to Ensure That Appellants' Right to Appeal is Preserved

I.E. United argues that Appellants' discussion of the quo warranto law is irrelevant to this Petition for Review. (Answer at p. 19, fn. 4.) The issue presented for review – whether the Judgment and Peremptory Writ are automatically stayed – is informed by whether the automatic stay would further Appellants' constitutional right to review.

As explained in the Petition for Review, the automatic stay is designed to protect the jurisdiction of the Court of Appeal and the parties' constitutional right to review and prevent enforcement action that could moot the appeal. (*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]; *Atkinson*, *supra*, 15 Cal.App.5th at pp. 881, 884–887.)

Thus, Appellants are not asking this Court to decide the quo warranto issue on this Petition for Review; Appellants will raise their arguments on the merits to the Court of Appeal, where a full record and briefing by the parties will give the Court of Appeal the opportunity to address the issue. What Appellants seek by this Petition for Review, and the request for temporary stay, is simply a stay that will allow them to pursue the appeal. Absent a stay, enforcement of the Judgment and Peremptory Writ risks mooting the appeal entirely by replacing Supervisor Rowe with a Governor appointee. If I.E. United is correct on its view of the quo warranto issues (and other issues that Appellants will raise on appeal), the Court of Appeal can affirm the Judgment and I.E. United will be vindicated at that time. Indeed, the only prejudice to I.E. United recognized by the superior court was "to the extent that the actions of the Board deprived [I.E. United] and the members of the community their right to 'monitor and provide input on the Board's collective acquisition and exchange of facts'" with respect to that limited portion of the application process by which persons were invited to public interview. (Exh. 12 at p. 316.) I.E. United cannot explain how such prejudice would be exacerbated by a stay of the Judgment pending appeal.

In contrast, enforcing the Judgment and Peremptory Writ will have irrevocable effect on Appellants that cannot be corrected if Appellants later prevail on appeal. For example, though I.E. United disputes that there will be any confusion as a result of enforcement of the Judgment, it is entirely unclear whether a Governor appointee

would be seated absent a stay.[2] The superior court indicated that even "if there's an appeal if I've ruled that she can no longer function as supervisor[,] [i]t can remain vacant." (Dec. 6, 2019 Notice of Submission of Superior Court Hearing Transcript, Exh. A at p. 34.) But, I.E. United has argued that "the portion[] of the judgment requiring the Board to rescind Rowe's appointment and to seat any person appointed the Governor" are not mandatory and are enforceable. (See Preliminary Opposition to Request for Immediate Stay and Petition for Writ of Supersedeas at p. 34, fn. 5.) It is hard to see how any confusion on this critical point is of "Appellants' own making." (See Answer at p. 17.)

I.E. United also discounts the harm to residents of San Bernardino County if the seat were to remain vacant. It is telling that I.E. United apparently believes that the Third District having representation on the Board is nothing more than "rewarding Appellants." (See Answer at p. 18.) I.E. United's only response is that such harm "can easily be remedied by the Governor's appointment of a replacement . . . ." (Answer at p. 17.)[3] But such an appointment would only lead to even greater chaos, whereby there would be competing claims to the office.

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[2] Appellants also note the irony that the effect of usurping the Board's authority to make an appointment and instead give that power to the Governor is at cross-purposes with I.E. United's stated goal of Brown Act compliance and to "facilitate public participation in all phases of local government decisionmaking . . . ." (Answer at p. 18, citing *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293.) The Governor is not subject to the Brown Act and is removed from the local governance of San Bernardino County. (Gov. Code, § 54951.)

[3] This response also underscores the coercive effect of all the provisions of the Judgment, which demonstrates why these provisions are in fact mandatory, including those that are cast in prohibitory language. (See *Paramount Pictures*, *supra*, 228 Cal.App.2d at p. 838 [finding provision of "injunctive order, although framed in prohibitory language, was intended to coerce or induce defendant into immediate affirmative action"].)

Additionally, I.E. United has sought to (and is presently seeking) to leverage the Judgment to obtain additional relief – and hold Appellants in contempt – of provisions that were nowhere requested or granted by the superior court. Specifically, I.E. United is seeking to hold Appellants in contempt based upon, among other things, election ballots and campaign websites. Supervisor Rowe's campaign website constitutes fundamental political speech, which "of course, is at the core of what the First Amendment is designed to protect." (*Morse v. Frederick* (2007) 551 U.S. 393, 403, citations omitted.) Indeed, the "fullest and most urgent application" of the First Amendment is political speech, that is, speech about which candidates should be elected or not. (*Monitor Patriot Co. v. Roy* (1971) 401 U.S. 265, 272.)

Moreover, if the Board is required to vote to rescind its appointment of Supervisor Rowe, as directed in the Peremptory Writ, there is no mechanism by which it could later un-rescind its appointment and re-seat Supervisor Rowe if Appellants prevail on appeal. And I.E. United would certainly contend in that scenario that the Board's 30-day window had passed and the Governor should make an appointment notwithstanding the reversal of the Judgment. It is exactly that kind of irreversible change that the automatic stay is intended to prevent.

Furthermore, Appellants are constitutionally entitled to appellate review of the Judgment and Peremptory Writ. I.E. United's position flows from its belief that decision on appeal is preordained in its favor. Contrary to this conclusory assumption, Appellants respectfully assert that the superior court's Statement of Decision contains multiple errors of fact and law, which go to the core of its conclusions. For example, the superior court made findings that were entirely unsupported by the evidence, such as its recital that the Supervisors transmitted their list of preferred candidates to interview via email. (See Exh. 12 at p. 303.) It is just such errors that Appellants have not yet been able to address because they have not

yet had their appeal. And without the stay, Appellants will be entirely denied that right.

Finally, the importance of the quo warranto issue gives context to why this Court should grant review – not only is the specific automatic stay issue an important legal issue that is now subject to a split of authority, but the quo warranto issue is of great significance to all local governments. The Amicus Curiae letters filed by CSAC and LOCC demonstrate how both the application of the automatic stay, and ultimately resolution of the quo warranto issue, have consequences that reach far beyond this immediate case. And absent a stay, the appeal would be rendered effectively moot and these important quo warranto issues will evade review. The significance of appellate review of the quo warranto issues is aptly demonstrated by the Amicus Curiae letters offered in support of review and an immediate stay.

**B. An Immediate Stay Is Necessary**

For the same reason that a stay is necessary pending appeal, an immediate stay is necessary. That is because the superior court has set an order to show cause re compliance with its Judgment and Peremptory Writ of Mandate for January 24, 2020 at 10:00 a.m. Thus, any order granting a stay or writ of supersedeas issued after that time may already be too late.

I.E. United urges this Court to consider the upcoming March 3, 2020 Presidential Primary Election in denying Appellants' request for a temporary stay. (See Answer at pp. 16, 18.) I.E. United argues that if a stay is granted, it "will allow Appellants to further capitalize on the Board's unlawful appointment by enabling Rowe to continue to represent to the public that she presently serves as Third District Supervisor." (Answer at p. 18.) I.E. United appears to be referring to Supervisor

Rowe's designation on the ballot for the March 3, 2020 Presidential Primary.[4] But I.E. United's aim appears to be to modify the terms of the superior court's Judgment and obtain relief it failed to seek through appropriate action under the Elections Code. Questions related to the upcoming March 3, 2020 Presidential Primary Election and the specifics of the ballot for same are entirely outside the scope of this proceeding, which was brought to address a violation of the Brown Act. The ballot issue is neither pled nor prayed for, is not factually developed in the superior court or appellate court record, and is not included in the terms of the Judgment and Peremptory Writ. Indeed, just two months ago, I.E. United conceded that it is not making such a challenge (despite also now seeking to leverage the Judgment as a back door method to secure exactly such relief, a practice that will undoubtedly occur unabated absent a stay). (Dec. 6, 2019 Notice of Submission of Superior Court Hearing Transcript, Exh. A at p. 7 ["We are not bringing any sort of election contest."].)

Moreover, contrary to I.E. United's implication, the Board does not control the elections or the candidate designations for same. The contents of ballot designations and related materials are the exclusive purview of the Registrar of Voters under mandates of the Elections Code. (See Elec. Code, §§ 320, 13000, 13107, 13307; see also *Cook v. Superior Court* (2008) 161 Cal.App.4th 569, 578 ["[I]n those cases where the Secretary of State is not involved (e.g., a purely local election, such as a race for a seat on the county board of supervisors) and the local elections official *is* the person substantively responsible for the acceptance or rejection of a ballot designation"].) Challenges to a candidate's designation on a ballot or contents of the voter information guide must be brought by a mandamus petition under Elections

[4] I.E. United has raised this issue directly in proceedings in the superior court seeking to "enforce" the Judgment.

Code §§ 13313 or 13314, based on express statutory grounds, defined time limits, and must include the elections official as an indispensable party.

In dealing with statutory duties of a similarly situated county official, the county-assessor, this Court has held that where the duties at issue are established by statute, the county board of supervisors may not be compelled to perform the duties of the office even though the county officer is subject to supervision by the board of supervisors. (*Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1113; see also *People v. Langdon* (1976) 54 Cal.App.3d 384, 390 [county board of supervisors "does not have the power to perform county officer's statutory duties for them or direct the manner in which duties are performed"]; *Hicks v. Board of Supervisors* (1977) 69 Cal.App.3d 228, 242.)

I.E. United ultimately complains that the effect of the automatic stay will allow for ballots indicating Supervisor Rowe is the current supervisor. But I.E. United makes no explanation of its failure to bring an appropriate action under the Elections Code or why such failure should now justify denying Appellants their entitlement to the automatic stay. And the complaint is particularly inapposite here, where the ballot designation was set last November, there was a public viewing period in December, the 18,000 unique ballot faces have already been finalized, and ballots have already been mailed to overseas military voters on January 18, 2020 as required by federal law. I.E. United's attempt to tie the request for stay to issues related to the March 3, 2020 Presidential Primary Election is legally flawed and outside the scope of the issues at play in the underlying Brown Act writ proceeding.

## IV. CONCLUSION

For the reasons stated herein, Appellants respectfully request that this Court grant the request for temporary stay and grant review of the Court of Appeal's Order denying the Petition for Writ of Supersedeas.

Respectfully,

Deborah J. Fox
Attorneys For Respondents/Real Party In Interest/Appellants
BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY; ROBERT A. LOVINGOOD; JANICE RUTHERFORD; CURT HAGMAN; JOSIE GONZALES; DAWN ROWE

DJF:KG

## WORD CERTIFICATION

I hereby certify that, as counted by my MS Word word-processing system, this brief contains 4,133 words exclusive of the signature block and this certification.

Executed this 22nd day of January, 2020 at Redondo Beach, California.

Deborah J. Fox

**DECLARATION OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, #1500, Oakland, CA 94607.

On January 22, 2020, I served true copies of the following document(s) described as **Informal Letter Brief Reply ISO Petition For Review** on the interested parties in this action as follows:

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Rancho Cucamonga District
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Rancho Cucamonga, CA 91730

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Fourth Appellate District
3389 Twelfth Street
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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 January 22, 2020, at Oakland, California.

Kathy Glass

Kathy Glass

3466116

**STATE OF CALIFORNIA**
Supreme Court of California

# *PROOF OF SERVICE*

**STATE OF CALIFORNIA**
Supreme Court of California

Case Name: **DALY v. BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY**
Case Number: **S260209**
Lower Court Case Number: **E073730**

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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.

1/22/2020

Date

/s/Kathy Glass

Signature

Fox, Deborah (110929)

Last Name, First Name (PNum)

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Law Firm