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

OPENING BRIEF ON THE MERITS

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I. ISSUES PRESENTED

The following issues are presented for review in this matter:

> (1) Did plaintiffs properly challenge real party in interest's appointment as Third District Supervisor by a petition for writ of mandate under Government Code § 54960.1, subdivision (a), or was an action in quo warranto under Code Civ. Proc. § 803 et seq., the exclusive procedure for such a challenge?
>
> (2) 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?

(See Petition for Review; February 19, 2020 Order Granting Petition for Review; March 5, 2020 Order; Cal. Rules of Court, Rule 8.520(b)(2)(A).)

II. INTRODUCTION

This case presents the Court with an opportunity to reaffirm the democratic right of the People to authorize and control judicial challenges to a public official's right to hold office. Quo warranto proceedings, which may only be brought by or with the authorization of the Attorney General, have long been recognized as the generally exclusive procedure for challenging an official's right to office. The doctrine of quo warranto protects the stability of local governance by ensuring challenges are only brought when they are in the public interest, rather than based on a private or political dispute. Quo warranto's important safeguards are crucial not only to appellants, but indeed to every local and county governing body in the State. This case places this important doctrine at stake.

Here, the San Bernardino County Board of Supervisors (the Board) unanimously appointed Dawn Rowe to fill a vacancy in the position of Third District Supervisor after a lengthy public process that spanned several weeks and numerous public meetings. Respondents and petitioners in the superior court, Michael Gomez Daly and Inland Empire United (collectively, I.E. United), filed a petition for writ of mandate seeking an order rescinding the Board's appointment of Dawn Rowe to the Third District seat and commanding that the Board seat a new appointee by the Governor in her place, asserting a procedural error in the early screening of applicants.

I.E. United's attempt to challenge Supervisor Rowe's right to the Third District Supervisor seat through a writ of mandate should never have proceeded. As this Court has long held, "absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available." (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633.) Here, quo warranto is the exclusive remedy because (1) it is an available remedy and (2) there are no constitutional or statutory exceptions to its exclusivity.

First, quo warranto is available here to challenge the right to the Third District seat regardless of the underlying basis for the challenge, including the contested allegation that the process leading to the official's appointment was improper under the open meeting provisions of the Ralph

M. Brown Act (Gov. Code, § 54950 et seq.). I.E. United's action directly challenges Supervisor Rowe's right to hold office and maintain her seat on the Board of Supervisors. Quo warranto is its remedy.

Second, the Brown Act does not provide an exception to quo warranto's exclusivity. Courts have recognized limited exceptions to quo warranto's exclusivity only where there is a statute which expressly provides for challenges to the right of office. But, the Brown Act's general provisions authorizing mandamus relief to nullify action taken in violation of the Act do not address challenges to public office and evidence no intent by the Legislature to create a statutory exception to quo warranto's exclusivity. Under existing law, quo warranto is therefore I.E. United's exclusive remedy for challenging Supervisor Rowe's title and right to the Third District seat.

Furthermore, there are strong public policy reasons to support quo warranto's exclusivity in the circumstances presented by this case. In particular, quo warranto proceedings must be authorized by the Attorney General, which serves to ensure that any challenge to public office is in the best interest of the public at large rather than simply a workaround to address a party's private or political agenda. Moreover, quo warranto is a procedural mechanism that allows for adjudication of any underlying substantive rights, including an asserted Brown Act violation. Thus, the Court does not have to choose between the policy goals of quo warranto

and those of the Brown Act to resolve the quo warranto issue presented for review; maintaining quo warranto's exclusivity promotes the policy goals of quo warranto while adjudicating a Brown Act dispute. The negative effects—not just to appellants, but indeed to all county and local governments in California—from a renunciation of the long-standing quo warranto process would be profound.

In addition to the important questions surrounding a challenge to a public official's right to office, review in this case has also been granted on an important issue of appellate procedure—the scope of the automatic stay. This case comes to this Court after the superior court improperly proceeded in mandamus, and ultimately entered a Judgment and Peremptory Writ of Mandate ordering the Board to rescind Supervisor Rowe's appointment and seat an appointee by the Governor in her place. If the Court ultimately determines that it was appropriate for the superior court to proceed in mandamus, appellants respectfully request that the Court hold that the automatic stay is applicable to the Judgment and Peremptory Writ of Mandate because it orders injunctive relief that alters the status quo (Supervisor Rowe holding public office) and requires affirmative action by the Board (rescinding Supervisor Rowe's appointment). Application of the automatic stay here accords with longstanding rules of appellate procedure, and serves to provide certainty, clarity, and continuity to local governments navigating challenges to officials' right to hold public office.

III. STATEMENT OF THE CASE

A. The County Charter Specifically Vests in the Board of Supervisors the Authority to Fill a Vacant Seat

The County of San Bernardino (the County) is a charter county and the largest county in the United States by area. (See Petition for Writ of Supersedeas (Petition) at ¶ 3.) The County's legislative and governing body is the Board. (*Id.*) The Board consists of five members, one from each of the five supervisorial districts in the County. (*Id*.) The Board also sits as the governing body for ten other districts and agencies. (*Id*.)

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[1].) The Charter does not mandate any specific process for the Board's power of appointment, instead leaving the process entirely to the discretion of the remaining Board members. (*Id.*) In the event the Board does not make an appointment to fill the vacancy within 30 days, then the Governor of California makes the appointment. (*Id.*)

In the November 6, 2018 General Election, then Third District Supervisor James Ramos was elected to represent the 40th Assembly

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

District in the California State Assembly. (Exh. 12 at p. 293.) On December 3, 2018, Ramos took the oath of office for the California State Assembly, thereby creating a vacancy in the office of Third District Supervisor. (Exh 12. at p. 294.) Thus, pursuant to the Charter, the Board had 30 days to appoint a replacement to the Third District seat, *i.e.* by January 2, 2019. (See Exh. 1 at p. 9, Art. 1, sec. 7.)

B. The Board Unanimously Appoints Dawn Rowe as Third District Supervisor Following Several Public Meetings

1. The Board Sets An Initial Process to Fill the Vacant Third District Seat

Understanding that the County was faced with a highly expedited time frame to fill the vacancy, which included the holiday season, the Board proactively exercised its discretion to establish a process for filling the vacancy. (See Exh. 12 at pp. 293–294.) On November 13, 2018, the Board convened a duly-noticed special meeting as part of its concerted effort to expeditiously plan for, and manage, the appointment process during this abbreviated time frame. (*Id*.) The Board originally planned to interview the applicants at a public meeting on December 11, 2018. However, when the Board received an unexpectedly large pool of 52 applications, 48 of which were eligible for consideration, it determined the process needed to be reevaluated. (Exh. 12 at p. 294.)

2. The Oversized Applicant Pool Results in the Board Modifying the Appointment Process

The oversized pool of candidates meant that it would be nearly impossible for the Board to interview all 48 applicants before making an appointment within the 30-day period over the holidays and, accordingly, the Board opted to reconsider its selected appointment process and agendized this issue for the December 4, 2018 Board meeting. (Petition at ¶ 9.) At that meeting, the Board voted 3–1 to modify the process. (*Id.*) Under the modified process, the Clerk of the Board was directed to send a Supplemental Questionnaire to all 48 qualified applicants and answers were due back to the Clerk's office by Friday, December 7, 2018. (*Id.*) Then, those supplemental responses would be sent to the Board of Supervisors. (*Id.*) 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 by the Board. (*Id.*)

After reviewing questionnaires timely completed by 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. (Petition at ¶ 9.) Importantly, there were no discussions or deliberations between or among any of the Board members. (*Id.*) It is this one-way transmission from each individual Supervisor to the Clerk of the Board that

forms the entire basis of I.E. United's challenge to Supervisor Rowe's appointment.

3. The Board Publicly Interviews Thirteen Applicants

Thirteen applicants received two or more acknowledgements and were invited to the December 11, 2018 publicly-noticed special Board meeting, which notice specifically called out that the Board would be holding these public interviews. (Exh. 12 at p. 295.) After public interviews of the thirteen applicants and a following public comment period, collectively spanning more than five and a half hours, the Board unanimously identified five applicants for further public interviews and set the additional interviews for its upcoming December 13, 2018 special Board meeting. (Exh. 12 at p. 295; see also Motion to Augment, Exh. A at pp. 5–6; Motion to Augment, Exh. B at pp. 252–253; https://www.sbcounty.gov/main/Pages/ViewMeetings.aspx, accessed May 3, 2020.) I.E. United did not object to the propriety of the selection process, nor offer any comments on any of the applicants for the vacant seat at this meeting. (See Motion to Augment, Exh. A at p. 5; Motion to Augment, Exh. B.)

Also on December 11, 2018, the Board received a letter from a County resident (not either of the petitioners) alleging that the process employed to date for selecting applicants for public interviews was a Brown Act violation. (Petition at ¶ 12; see also Exh. 12 at pp. 295–296.)

Ultimately, the Board did not take any action at the December 13, 2018 Board meeting. (Exh. 12 at p. 296.)

4. The Board Rescinds the December 4, 2018 Process and Adopts a New Appointment Process

For the next regularly scheduled Board meeting on December 18, 2018, the Board published its agenda and gave notice that it would be considering:

a. Rescinding the appointment process;

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

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

d. Adopting a new appointment process; and

e. Appointing a new Third District Supervisor.

(Petition at ¶ 13.)

At about 6:30 a.m. on the morning of this Board meeting, I.E. United sent an email correspondence alleging the process of inviting only some applicants for public interview on December 11, 2018 was a violation of the Brown Act. (Exh. 12 at p. 296; Petition at ¶ 14.) I.E. United specifically demanded that all 48 qualified applicants be interviewed as the only feasible cure for the alleged violation. (Exh. 12 at p. 296; Petition at ¶ 14.)

At the December 18, 2018, meeting, out of an abundance of caution, the Board voted to:

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

b. Rescind the prior appointment procedure;

c. Adopt 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; and

d. Conduct an open session interview of the publicly-selected nominees under the new process.

(Petition at ¶ 16.)

5. The Board Publicly Interviews Six Applicants

The new nomination process resulted in the interviews of six applicants, including one who had not been interviewed before. (Exh. 12 at p. 297.) The Board listened to public comments from twenty-one (21) individuals, which spanned nearly two and one-half hours. (Exh. 12 at p. 298; Petition at ¶ 16.) After the public selection of nominees, public comments, and public applicant interviews, the Board publicly deliberated and voted unanimously to appoint Dawn Rowe as Third District Supervisor. (Exh. 12 at pp. 298–299; Petition at ¶ 16.) Supervisor Rowe was sworn in on December 18, 2018 and has held the office of Third District Supervisor since, capably performing all acts and duties incumbent in the office. (Exh. 12 at p. 299; Petition at ¶ 16.)

On December 20, 2018, County Counsel responded to I.E. United's prior demand letter, providing written notice of the curative/corrective action to I.E. United and specifically detailing the new process that the

Board had adopted on December 18, 2018 pursuant to Government Code section 54960.1, subdivision (c)(2). (Exh. 12 at p. 299; Petition at ¶ 17.) I.E. United did not serve any notice objecting to the modified procedures implemented at the December 18, 2018 Board meeting. (Petition at ¶ 17.)

C. I.E. United Files a Petition For Writ of Mandate Seeking the Removal of Supervisor Rowe From Office Without Following the Statutory Requirements to Bring a Quo Warranto Action

On December 31, 2018, I.E. United filed a Verified Petition for Writ of Mandate pursuant to Code of Civil Procedure section 1085, 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. (Exh. 2.) The Petition was not brought as a quo warranto proceeding under Code of Civil Procedure section 803, nor with the authorization of the Attorney General of California. (See Exh. 2.)

I.E. United's Petition for Writ of Mandate requested the superior court "order [the Board] to rescind the appointment of Dawn Rowe as Third District Member of the San Bernardino County Board of Supervisors" and order that "the appointment of the Third District Member of the San Bernardino County Board of Supervisors shall be made by the Governor."

(Exh. 2 at pp. 28–29, ¶¶ 58–59; see also Exh. 9 at pp. 169–170, ¶¶ 70–71 [First Amended Petition for Writ of Mandate requesting same relief].)

Appellants twice 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. (See Exhs. 3, 4 at pp. 96–100; Motion to Augment, Exhs. C at p. 288, D at pp. 308–310.) The trial court overruled the demurrers, in part, rejecting appellants' legal argument that quo warranto is the exclusive remedy. (Exh. 8 at pp. 152–153; see also Motion to Augment, Exh. E at p. 316.) The Court ruled that "the ultimate effect may result in Rowe's removal [from] the Third District Supervisor seat," but nevertheless, denied appellants' motion to terminate the improper writ matter. (Exh. 8 at p. 153.) Appellants again raised the need for this challenge to proceed by way of quo warranto in the writ briefing on the merits. (Motion to Augment, Exh. F at p. 334.)

The writ of mandamus case proceeded despite appellants' continued objections as to the need for a quo warranto proceeding, resulting in the superior court entering 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 Judgment entered by the superior court ordered 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 cast 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.

(Exhs. 13, 22.) The superior court also signed and entered the Peremptory Writ of Mandate that substantially mirrored the Judgment. (Exh. 23.)

D. Notwithstanding Appellants' Immediate Appeal From the Judgment, I.E. United Disputes the Automatic Stay

On November 13, 2019, appellants perfected their appeal from the Judgment, seeking to challenge the Judgment and Peremptory Writ on several grounds including, among others, that: (1) the proceeding could only have been brought as a quo warranto action; (2) that the alleged error did not constitute a violation of the Brown Act; (3) that appellants cured any alleged violation, (see Gov. Code, § 54960.1, subd. (e)); and (4) that the superior court erred by not requiring I.E. United to establish prejudice, (see, e.g., *Fowler v. City of Lafayette* (2020) 45 Cal.App.5th 68, 79, as modified on denial of reh'g (Mar. 11, 2020).)

Immediately after appellants perfected their appeal on November 13, 2019, a dispute arose between the parties regarding the enforceability of the

Judgment and Peremptory Writ pending appeal. On November 21, 2019, appellants brought an ex parte application before the superior court, seeking an order confirming that the Judgment was automatically stayed. (Exh. 25.) The superior court denied the ex parte application, but stayed the Judgment for 10 days to allow appellants to seek relief in the Court of Appeal. (See December 6, 2019 Notice of Submission of Superior Court Hearing Transcript at 35:15–23.) Appellants sought a Writ of Supersedeas in the Court of Appeal. (See Petition.) The Court of Appeal granted appellants' request for an immediate stay, but later summarily denied the Petition on January 8, 2020. The Court of Appeal held that the superior court had found Supervisor Rowe's appointment was "null and void" and therefore "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." (Petition for Review, Exh. A.)

The day after the Court of Appeal's summary denial of the Petition for Writ of Supersedeas, I.E. United filed an ex parte application in the superior court seeking an order enforcing the Judgment and Peremptory Writ of Mandate, including ordering that Supervisor Rowe immediately cease function in her official capacity as Boardmember and, in the alternative, seeking to hold appellants in contempt of the Judgment and Peremptory Writ for failing to immediately rescind Supervisor Rowe's

appointment to the Third District seat. (Motion to Augment, Exh. G at p. 339.) Among other things, I.E. United sought to hold appellants in contempt based on Supervisor Rowe's designation as San Bernardino County Supervisor on the ballot for the March 3, 2020 California primary election. (*Id.*) On January 13, 2020, the superior court heard the ex parte application and set the matter over for hearing on January 24, 2020.

On January 17, 2020, appellants filed a Petition for Review in this Court, seeking review of denial of the Writ of Supersedeas and including a request for immediate stay. This Court issued an Order on January 23, 2020, immediately staying all proceedings in the superior court pending further order. This Court granted review by order dated February 19, 2020, and continued the stay. Review was granted as to one of the underlying merits issues, whether I.E. United could properly challenge Supervisor Rowe's right and title to office outside of a quo warranto proceeding ("the Quo Warranto Issue"), as well as on the issue presented in the Petition for Review as to whether the Judgment is subject to automatic stay ("the Stay Issue"). (See February 19, 2020 Order Granting Petition for Review; March 5, 2020 Order.)

After review was granted, Supervisor Rowe was on the ballot for Third District Supervisor in the March 3, 2020 Presidential Primary Election. She won more than 50 percent of the vote and therefore has been elected Third District Supervisor for the term beginning on December 7,

2020. (See San Bernardino County Registrar of Voters Final Certified Election Results, available at https://www.sbcounty.gov/rov/elections/results/20200303/, accessed May 3, 2020.)

IV. THE STANDARD OF REVIEW IS DE NOVO

The Quo Warranto Issue is reviewed de novo. Determining whether mandamus is permissible to challenge an appointment of a public official, or whether quo warranto is instead the exclusive remedy, is a purely legal question. Thus, it is reviewed de novo. (*People v. Cromer* (2001) 24 Cal.4th 889, 894 [appellate court "reviews determinations of law under a nondeferential standard, which is independent or de novo review"].) As well, appellants properly raised this issue in their demurrer to I.E. United's Petition for Writ of Mandate, urging that the writ action was improper because quo warranto was the exclusive remedy to try Supervisor Rowe's title to public office. The superior court's order overruling the demurrer on that ground is reviewed de novo by this Court. (*Cryolife, Inc. v. Superior Court* (2003) 110 Cal.App.4th 1145, 1152 ["The standard of review for an order overruling a demurrer is de novo."].)

The Automatic Stay Issue is also subject to de novo review as a mixed question of law and fact, where the predominant inquiry is the consideration of the legal principles and their underlying values.

> Mixed questions of law and fact concern the application of the rule to the facts and the consequent determination whether the rule is satisfied. If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, in a factual context, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.

(*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888.) Here, the Automatic Stay Issue turns on the application of legal principles, including the relevant point in time for defining the "status quo," and the underlying reasoning for the automatic stay.

V. AN ACTION IN QUO WARRANTO IS THE EXCLUSIVE PROCEDURE FOR CHALLENGING SUPERVISOR ROWE'S TITLE TO OFFICE

This Court has explained that "absent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available." (*Cooper*, *supra*, 70 Cal.2d at p. 633; see also *San Ysidro Irrigation District v. Superior Court of San Diego County* (1961) 56 Cal.2d 708, 714–715, citing 74 C.J.S., Quo Warranto, § 4, pp. 179–181.) This rule has been applied consistently by courts since, including when title to public office is at issue. (See, e.g., *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225.)

Determining whether quo warranto is the exclusive remedy therefore turns on two questions: (1) whether quo warranto is an available remedy and, if so, (2) whether there are constitutional or statutory regulations

permitting an exception to quo warranto's exclusivity. In this case, quo warranto is an available remedy because I.E. United's challenge sought to adjudicate Supervisor Rowe's right to the Third District Supervisor seat. Next, the Brown Act is not an exception to quo warranto's exclusivity because it does not expressly authorize the remedy of removal from office. Therefore, I.E. United's attempt to challenge Supervisor Rowe's seat through a mandamus proceeding attacking the validity of the appointment process was improper and appellants' demurrers should have been sustained.

Moreover, application of these long-standing rules in this case promotes the public policy served by quo warranto. In particular, quo warranto serves a democratic function by ensuring a challenge to a public official's title is in the public interest and supports stability and certainty in local government. In contrast, creating a new exception to quo warranto's exclusivity and procedural safeguards to allow Brown Act challenges through mandamus proceedings would eliminate the important role of the Attorney General in promoting the public interest and open up public officials to challenges from those who hold a different political or ideological view, or by those folks who simply see an opportunity for litigation without the keen discerning eye of the Attorney General present in quo warranto.

A. The Nature of Quo Warranto

1. Quo Warranto Is a Special Form of Legal Action to Determine the Legal Right to an Occupied Public Office

Quo warranto is the specific action by which one challenges "any person who usurps, intrudes into, or unlawfully holds or exercises any public office." (Code Civ. Proc., § 803.) Quo warranto is appropriately sought in a number of contexts, including to "try title" to public office. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1228; see also 81 Ops.Cal.Atty.Gen. 207, 208 (1998)[2] ["It is well settled that a quo warranto action . . . is an appropriate remedy to test the right of a person to hold public office."].)

To "try title" to public office is to evaluate whether a person has the right to hold a particular office, including by virtue of eligibility requirements, valid election procedures, or the absence of disqualifying factors. (96 Ops.Cal.Atty.Gen. 36, 39 (2013).) Quo warranto is also appropriate for trying title of appointed officials. (See *Hallinan v. Mellon* (1963) 218 Cal.App.2d 342 [quo warranto was appropriate and exclusive remedy for trying title of appointed police commissioner]; see also 76 Ops.Cal.Atty.Gen. 254 (1993).)

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[2] "Attorney General opinions are entitled to considerable weight." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1087, fn. 17; see also *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17 ["Opinions of the Attorney General, while not binding, are entitled to great weight."].)

Quo warranto is procedural in nature—it is properly used to try title regardless of the underlying basis for the challenge. (See, e.g., *Hallinan*, *supra*, 218 Cal.App.2d at p. 348 [quo warranto available to test eligibility requirements]; 76 Ops.Cal.Atty.Gen. 254 (1993) [authorizing a quo warranto proceeding to determine if city councilmember was properly appointed on basis that there was no vacancy in the office]; 102 Ops.Cal.Atty.Gen. 20 (2019) [authorizing a quo warranto proceeding to challenge whether election of retirement board trustees violated election procedures].) Courts have thus recognized that quo warranto, as a procedural vehicle, is a proper mechanism for addressing underlying substantive rights. (See, e.g., *Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1228 [finding quo warranto procedure provides redress for the alleged deprivation of federal civil rights].)

The recent Attorney General opinion addressing Moreno Valley Councilmember Gutierrez's right to hold office is particularly instructive. There, a relator sought to challenge a city councilmember's appointment asserting that: (1) the councilmember did not live in the district at the relevant time; and (2) the appointment was made in violation of the open meeting and notice provisions of the Brown Act. (97 Ops.Cal.Atty.Gen. 12 (2014).) Because the Attorney General authorized a quo warranto proceeding on the residency issue, the Attorney General did not directly reach the Brown Act question, but explained "that there appear to be

substantial factual disagreements . . . and we are confident that such issues may be resolved within the context of the contemplated quo warranto action, should the court find it necessary or helpful to its consideration on the question of Dr. Gutierrez's eligibility to hold office." (*Ibid.*)

Thus, quo warranto is an available remedy for trying right and title to office where, as is the case here, the underlying challenge is based upon an allegation that the public official's appointment was in violation of the Brown Act's open meeting requirements.

2. A Quo Warranto Action May Only Be Brought with the Authority of the Attorney General

"The key to the remedy of quo warranto is that it can only be brought by the Attorney General, on his or her own information or by the request of a private party." (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 875.) This requirement is jurisdictional: the court may not hear the action unless it is brought or authorized by the Attorney General. (*Cooper*, *supra*, 70 Cal.2d at p. 633.)

The doctrine has a long history in common law:

> "The ancient writ of quo warranto was a high prerogative writ in the nature of a writ of right for the king, against one who usurped or claimed any office, franchise or liberty of the crown, to inquire by what authority he supported his claim, in order to determine the right. It . . . commanded the respondent to show by what right, 'quo warranto,' he exercised the franchise . . . ."

(*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 695, quoting *High, Extraordinary Legal Remedies* (3rd ed. 1896) pp. 544–555.)

The doctrine has evolved, but its essential character is that it is still a prerogative of the sovereign state. "[T]he remedy of quo warranto belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare." (*Citizens Utilities. Co. of Cal. v. Superior Court* (1976) 56 Cal.App.3d 399, 406.) Therefore, the remedy of quo warranto "is vested in the People, and not in any individual or group, no matter how affected they may be . . . . They simply are not entitled to sue." (*Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, 170.) The Attorney General's role is critically necessary, "because disputes over title to public office are viewed as a public question of governmental legitimacy and not merely a private quarrel among rival claimants." (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1228, internal citations omitted.) The Attorney General, then, serves as a steward of democracy in determining whether to authorize a quo warranto challenge that puts title to public office at issue, implicating concerns to the public at large and not just the individual parties to the suit.

The Attorney General has established guidelines for reviewing whether to grant leave for a party to bring suit in quo warranto. (*Id.* at p. 1229; Cal. Code Regs., tit. 11, §§ 1–11; *People v. City of Huntington*

Beach, 128 Cal.App.2d 452, 456 ["the attorney general's office has for many years operated under a set of regulations adopted for the purpose of governing [quo warranto] proceedings"].) This includes notice to the officer holder and an opportunity to respond before the Attorney General makes its determination. (Cal. Code Regs., tit. 11, § 3.) In deciding whether to grant leave to bring a quo warranto action, the Attorney General considers whether there is a substantial question of law or fact which requires judicial resolution and whether the action in quo warranto would serve the overall public interest of the people. (74 Ops.Cal.Atty.Gen. 31 (1991).)

The Attorney General's prerogative, exercised on behalf of the People, is crucial for the operation of quo warranto proceedings. But the Attorney General's discretion is not unlimited. If the Attorney General denies leave to bring a quo warranto action in an arbitrary way, the requestor may be entitled to a writ of mandamus compelling the Attorney General to proceed with the action. (See *Rando*, *supra*, 228 Cal.App.4th at p. 875; *Oakland Municipal Improvement League*, *supra*, 23 Cal.App.3d at pp. 172–173; see also *Lamb v. Webb* (1907) 151 Cal. 451, 454.) The statutory scheme is well-balanced and ensures the Attorney General's role in protecting both the public and local governments from challenges that would not serve the public interest, while allowing an added check on the Attorney General's exercise of its oversight role.

B. Quo Warranto Is the Exclusive Remedy for Cases Involving Right or Title to Public Office

Quo warranto "is the exclusive remedy in cases where it is available." (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1225; see also *Cooper*, *supra*, 70 Cal.2d at p. 633 ["[A]bsent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available."]; *San Ysidro Irrigation District v. Superior Court of San Diego County* (1961) 56 Cal.2d 708, 714–715.) Courts have consistently and thoroughly rejected attempts to try title through other mechanisms, including mandamus, injunctive relief, and declaratory relief.

Here, quo warranto is an available remedy for I.E. United's challenge to Supervisor Rowe's title to public office based on the alleged violation of the Brown Act during the Board's appointment process. And the Brown Act does not provide for removal of a public official from office. (See Section V.C, *infra*.) Therefore, because quo warranto is an available remedy, it is the *exclusive* remedy here. I.E. United's failure to bring an action in quo warranto is fatal to its case.

1. A Writ of Mandamus or Prohibition Cannot Be Used to Try Title to Public Office

Courts have regularly grappled with the issue of whether other seemingly available procedural mechanisms may be used to try title to public office and they have consistently rejected such attempts, whether through mandamus, declaratory relief, or injunctive relief. (See

Nicolopulos, *supra*, 91 Cal.App.4th at pp. 1225–1226, citing *People v. Olds* (1853) 3 Cal. 167, 175, 177.) Of particular relevance here, courts have regularly and expressly held that a petition for writ of mandate or prohibition is not proper where quo warranto is available. (See, e.g., *Oakland Municipal Improvement League*, *supra*, 23 Cal.App.3d at pp. 169–170 [holding that a petition for writ of mandate or prohibition challenging city charter was improper because quo warranto was the exclusive remedy]; *Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1226–1227.) *Klose v. Superior Court* (1950) 96 Cal.App.2d 913, sets forth some of the patterns that have developed in the cases on this issue. These patterns make clear that in a situation where there is an undisputed *de facto* officeholder, mandamus will not lie to try title to that office. (See *id.* at p. 925 ["[W]here there are no conflicting claimants and the appointing power has refused to determine the existence of the vacancy, and there is an incumbent claiming the office, mandamus must be denied."].) Such is the case even where the challenge to office is based upon an allegation of an appointment that was flawed from the outset. (*Hallinan*, *supra*, 218 Cal.App.2d at p. 348.)

The rule that mandamus cannot lie where quo warranto is available also squares with a foundational requirement for writs of mandate generally: the writ is only available where there is no other plain, speedy, and adequate remedy. (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 373, as modified (Feb. 21, 2014) ["[A] writ is available

where the petitioner has no plain, speedy and adequate alternative remedy . . . ."]; *Payne v. Superior Court* (1976) 17 Cal.3d 908, 925; Cal. Code Civ. Proc., § 1086.) Courts have explained that quo warranto does provide a plain, speedy, and adequate remedy so mandamus cannot lie to try title. (*Klose*, *supra*, 96 Cal.App.2d at p. 925.)

2. The Equitable Remedies of Declaratory Relief and Injunctive Relief Cannot Be Used to Challenge the Right to Public Office

Parties attempting to avoid the requirements of quo warranto have fared no better by bringing their claims through the equitable remedies of declaratory relief and injunctive relief. As with mandamus, declaratory and injunctive relief are not available where a party has a remedy at law, such as quo warranto. (*International Assn. of Fire Fighters*, *supra*, 174 Cal.App.3d at pp. 693–694 ["It is of course axiomatic that equity (in whose arsenal declaratory and injunctive relief repose) will not intervene where the remedy at law (even an extraordinary legal remedy such as quo warranto) is adequate."].)

The *Nicolopulos* court also expressly rejected efforts to circumvent quo warranto with an equitable action. There, the Lawndale City Council adopted resolutions declaring the office of city clerk vacant and appointing a new interim clerk, on the basis that the former clerk did not meet the residency requirements. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1224.) The former clerk brought an action for mandamus, declaratory relief, and

injunctive relief to obtain his former office. (*Id.* at pp. 1224–1225.) The former city clerk argued on appeal that even if quo warranto was the exclusive remedy, his declaratory relief claim could be tried so he could obtain a declaration that he was a resident. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1227.) The court rejected the argument, explaining that such a declaration "could not be 'enforced' without a quo warranto action" and was therefore an "idle act that the law does not require." (*Ibid.*, citing Cal. Civ. Code, § 3532.) The *Nicolopulos* court was following an unbroken line of California cases holding that declaratory relief claims cannot be used to try title. (See *Cooper*, *supra*, 70 Cal.2d at p. 634; *San Ysidro*, *supra*, 56 Cal.2d at pp. 715–716 [a party cannot avoid the prerequisites of a quo warranto proceeding by asserting a claim for declaratory relief].)

3. Quo Warranto Is the Exclusive Remedy Regardless of the Underlying Basis For the Challenge

While quo warranto is frequently used to challenge a public officer's title to office based on eligibility grounds, it nevertheless remains as the exclusive remedy where the challenge is based on other statutory or constitutional grounds. (See, e.g., *Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1224.)

For example, in *Oakland Municipal Improvement League*, *supra*, 23 Cal.App.3d 165, an association brought a challenge to the Oakland city charter on the basis that its enactment was in violation of the California

Constitution. (*Id.* at p. 167.) While acknowledging the paramount importance of adherence to constitutional requirements, the court nevertheless explained that quo warranto was available and was therefore the exclusive remedy. (*Id.* at p. 169.)

The *Nicolopulos* court rejected a similar attempt at an end-run around quo warranto when the former city clerk argued that he need not comply with the quo warranto requirements because he was seeking to vindicate his federal Constitutional rights. (*Nicolopulos*, *supra*, 91 Cal.App.4th at pp. 1227–1228.) The court explained that the "quo warranto procedure here provides redress for the alleged deprivation." (*Id.* at p. 1228.) In other words, regardless of the underlying basis for the challenge, quo warranto was the exclusive remedy. The court recognized that quo warranto's exclusivity still allows the challenging party to vindicate any underlying rights because quo warranto is simply the procedural vehicle in which those rights may be adjudicated.

Courts apply the exclusivity rule when quo warranto is available to address statutory challenges, as well. In *International Assn. of Fire Fighters*, *supra*, 174 Cal.App.3d 687, the plaintiffs sought to challenge certain ballot measures on the basis that they were enacted in violation of the Meyers-Milias-Brown Act, and asked the court to "declare void and of no legal effect the purported enactment of the . . . charter amendments." (*Id.* at pp. 690, 692; see also Gov. Code, § 3500 et seq.) Notwithstanding

the fact that mandamus was the general remedy for challenging action based upon a violation of the Meyers-Milias-Brown Act[3], the court held that mandamus was not appropriate in that case because quo warranto was available and therefore it was exclusive. (*International Assn. of Fire Fighters, supra*, 174 Cal.App.3d at p. 698.)

Courts are clear, then, that quo warranto's exclusivity does not depend on the underlying grounds for challenging the right and title to office. This makes sense. Quo warranto is procedural, and allows a court to examine any underlying basis giving rise to the challenge.

4. I.E. United Expressly Challenges Supervisor Rowe's Right and Title to Public Office and Therefore Quo Warranto Is Its Exclusive Remedy

I.E. United's Petition for Writ of Mandate was fundamentally flawed from the inception because it sought to try Supervisor Rowe's right and title to public office by attacking the validity of her unanimous appointment. (Exh. 2 at pp. 28–29.) But, as a direct challenge to Supervisor Rowe's right to hold office, quo warranto is the appropriate remedy for I.E. United. And

[3] The Legislature has since amended the statute to eliminate the private right of action. "Before July 1, 2001, an employee association claiming a violation of the [Meyers-Milias-Brown Act] could bring an action in superior court. (See *Santa Clara County Counsel Attys. Assn. v. Woodside* (1994) 7 Cal.4th 525, 541–542.) Effective July 1, 2001, however, the Legislature vested the California Public Employment Relations Board (PERB) with exclusive jurisdiction over alleged violations of the MMBA. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1077.)

because quo warranto is an available remedy, it was the exclusive remedy. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1225.) I.E. United's mandamus action was legally deficient and should not have gone forward.

Supervisor Rowe is certainly the *de facto* Third District Supervisor. She was appointed by the Board, sworn into office on December 18, 2018, and has exercised the duties of the office since. (Exh. 12 at p. 299; Petition at ¶ 16.) In both purpose and effect, I.E. United's Petition for Writ of Mandate challenges Supervisor Rowe's right to sit as a member of the Board of Supervisors by attacking the validity of her appointment. I.E. United prays that the superior court "issue a judicial determination . . . that the appointment of Dawn Rowe as Third District Supervisor is null and void" and "order [the Board], and each of them, to rescind the appointment of Dawn Rowe as Third District Member of the San Bernardino County Board of Supervisors." (Exh. 2 at p. 28, ¶¶ 57, 58.) Further underscoring that this case is about the Third District Supervisor seat, the Petition also requests that the court order that the "appointment of the Third District Member of the San Bernardino County Board of Supervisors shall be made by the Governor." (Exh. 2 at pp. 28–29, ¶ 59.) I.E. United directly challenges Supervisor Rowe's right and title to office and asks the court to order the Governor make a new appointment in her place.

Such a direct challenge to title, even where based on a defect in the appointment of the officer, is subject to quo warranto. (See *Hallinan*,

supra, 218 Cal.App.2d at p. 348 [holding quo warranto was appropriate avenue to determine whether police commissioner met city charter's eligibility requirement at the time he was appointed]; 76 Ops.Cal.Atty.Gen. 254 (1993) [authorizing a quo warranto proceeding to determine city councilmember was properly appointed on basis that there was no vacancy in the office].)

When faced with a nearly identical fact pattern, the Attorney General expressly found that the issue could be resolved through quo warranto. The Attorney General opinion in speaking to the Brown Act issue noted: "[W]e observe that there appear to be substantial factual disagreements about what occurred both in and out of public view, and we are confident that such issues may be resolved within the context of the contemplated quo warranto action, should the court find it necessary or helpful to its consideration on the question of Dr. Gutierrez's eligibility to hold office." (97 Ops.Cal.Atty.Gen. 12 (2014).)

It is clear that quo warranto is an available remedy for I.E. United to challenge Supervisor Rowe's title, based upon its allegation that the appointment process violated the Brown Act. Quo warranto is I.E. United's plain, speedy, and adequate remedy. Because quo warranto "is the exclusive remedy in cases where it is available," quo warranto is the *exclusive* remedy in this instance. (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1225; see also *Cooper*, *supra*, 70 Cal.2d at p. 633; *San Ysidro Irrigation*

District, *supra*, 56 Cal.2d at pp. 714–715.) I.E. United's Petition for Writ of Mandate is therefore improper, fundamentally flawed, and should have been dismissed on demurrer by the superior court.

5. Supervisor Rowe's Title to Office Is Not "Incidental" to I.E. United's Petition for Writ of Mandate Challenging Her Right to the Third District Seat

In opposing appellants' demurrer, I.E. United argued that quo warranto is not an exclusive remedy where determination of title to office is only incidental to the mandamus relief sought alleging a Brown Act violation. (Exh. 5 at p. 116.) And the superior court agreed, ruling that "although the ultimate effect may result in Rowe's removal [from] the Third District Supervisor seat, this is not an action against Dawn Rowe for unlawfully holding or usurping public office." (Exh. 8 at p. 153.) Both I.E. United and the superior court misconstrue the relevant authorities on an incidental determination of title.

At the outset, the "ultimate effect" of I.E. United's pleading determines its character, not I.E. United's strategically stated intent. "It is an elementary principle of modern pleading that the nature and character of a pleading is to be determined from its allegations, regardless of what it may be called, and that the subject matter of an action and issues involved are determined from the facts alleged rather than from the title of the pleadings or the character of the damage recovery suggested in connection

with the prayer for relief." (*McDonald v. Filice* (1967) 252 Cal.App.2d 613, 622.)

Moreover, *Stout v. Democratic County Central Committee* (1952) 40 Cal.2d 91, upon which I.E. United heavily relied, explained that quo warranto is not exclusive where the question of title is "incidental," such as where the question is whether the office exists at all. (See *id.* at p. 94; see also *Hallinan*, *supra*, 218 Cal.App.2d at p. 346 ["[A]n attack upon the creation of an office is not the trial of title to the office. A taxpayer may attack [in mandamus] the legality of the office, but not the right of an incumbent to an office . . . ."].) But *Stout* is inapplicable here, where it is undisputed that the office of Third District Supervisor exists and that a vacancy was created as a result of the November 2018 election.

Courts have directly addressed whether a mandamus petition, such as the one by I.E. United, puts title at issue or is merely incidental. In *Klose*, *supra*, 96 Cal.App.2d 913, the court addressed a purported city council vacancy that was held by a *de facto* incumbent. The petitioner brought a proceeding in mandamus to force the city council to declare the office vacant and then fill the appointment in the manner proscribed by law—the very same remedy that I.E. United seeks here. (*Id.* at pp. 914–915; Exh. 2 at pp. 28–29, ¶¶ 57–59.) The incumbent argued that mandamus was improper and quo warranto was the exclusive remedy; the petitioner argued that the question of title was merely incidental to the alleged

underlying legal question—whether the incumbent met the residency requirement—and that mandamus could therefore proceed. (*Klose*, *supra*, 96 Cal.App.2d at p. 917.) The court discussed at length the nature and types of cases where courts had determined that the question of title was merely "incidental" and proceeded in mandamus despite the general rule. The Court held:

> (1) . . . [I]t is the general rule that mandamus cannot be used for this purpose unless the fact of vacancy is not disputed; (2) that where the circumstances justify a departure from the rule, the courts have done so, usually only where there are conflicting claimants to the office; and (3) **where there are no conflicting claimants and the appointing power has refused to determine the existence of the vacancy, and there is an incumbent claiming the office, mandamus must be denied.**

(*Id.* at p. 925, bold added.)

The rule is clear and demonstrates that this case is not one in which title is merely "incidental." Supervisor Rowe was unanimously appointed to the office of Third District Supervisor following multiple public hearings and public interviews. Supervisor Rowe claims right and title to the office and has acted in that capacity at all times since being duly sworn in on December 18, 2018. The application of the test articulated in *Klose* leads to a single conclusion—mandamus must be denied.

The conclusion is further bolstered by I.E. United's attempts to enforce the Judgment and Peremptory Writ while this appeal was pending. In its ex parte application to enforce the Judgment, I.E. United specifically

sought an order preventing the County of San Bernardino from sending out ballots for the March 3, 2020 primary election that identified Supervisor Rowe as a County Supervisor. (See Motion to Augment, Exh. G at p. 339.) In the superior court, I.E. United's counsel stated "We've sued every one of the board member supervisors including one who was appointed improperly to not proceed with the printing of ballots. To direct the printer not to proceed with printing of ballots that contain reference to Dawn Rowe as an incumbent[4] in any fashion." (See Motion to Augment, Exh. H at p. 355.) It was evident from the outset, but I.E. United's post-judgment actions only underscored that Supervisor Rowe's right to the Third District Supervisor seat has always been *the* issue in this case, not merely an "incidental" one.

C. The Brown Act Is Not An Exception to the Exclusivity of Quo Warranto

I.E. United argues that the Brown Act serves as an exception to the exclusivity of quo warranto. The superior court's ruling on the demurrer did not address this issue, but instead turned on the finding that the "thrust of this action is an attack/challenge of the process [the Board] used for Rowe's appointment . . . although the ultimate effect may result in Rowe's removal form [sic] the Third District Supervisor Seat. This is not an action

[4] Supervisor Rowe's ballot designation was actually noted as "San Bernardino County Supervisor." (Exh. 33 at p. 579.)

against Dawn Rowe for unlawfully holding or usurping public office." (Exh. 8 at pp. 152–153.) Because review is de novo, appellants address this point notwithstanding the fact that it was not the grounds for the superior court's decision.

The exclusivity of quo warranto is subject to limited and narrow exceptions where the Legislature has provided for alternative remedies for challenging title to public office. (See *Cooper*, *supra*, 70 Cal.2d at p. 633 ["[A]bsent constitutional or statutory regulations providing otherwise, quo warranto is the only proper remedy in cases in which it is available."].) The exceptions have only been recognized where the Legislature expressly provides an alternative procedure for challenging title, as well as specific procedures intended to advance the same public policy goals protected by quo warranto.

The Brown Act does not expressly authorize the remedy of removal from office, nor are there grounds for reading it in to the statute. Accordingly, I.E. United's argument to the contrary fails.

1. The Brown Act Does Not Provide for Removal From Office

The Brown Act does not expressly provide for a remedy of removal from office. Nor is there any authority to support the position that it acts as an exception to quo warranto's exclusivity. Further, general principles of statutory construction show the Legislature did not intend that the Brown

Act's nullification provisions would act as an exception to quo warranto exclusivity.

Appellants are aware of no case, and I.E. United has cited none, in which a court has found a mandamus proceeding based on an alleged Brown Act violation could serve as an exception to quo warranto's exclusivity. (See Exh. 5 at pp. 112–116.) Indeed, the only authority cited by the parties in this case involving the intersection between quo warranto and the Brown Act was an Attorney General opinion that did not decide the issue directly, but held that because it authorized a quo warranto proceeding on other grounds, the Attorney General was "confident that [the Brown Act challenge] issues may be resolved within the context of the contemplated quo warranto action, should the court find it necessary or helpful to its consideration on the question of Dr. Gutierrez's eligibility to hold office." (97 Ops.Cal.Atty.Gen. 12 (2014).)

General principles of equity also support that the Brown Act does not serve as an exception to quo warranto's exclusivity. Mandamus is not available where there is another plain, speedy, and adequate remedy such as quo warranto. (See *Hagopian*, *supra,* 223 Cal.App.4th at p. 373; *Klose*, *supra*, 96 Cal.App.2d at p. 925.) Because the Brown Act incorporates the equitable remedies of mandamus and injunctive relief, normal principles of equity apply. (See, e.g., *Beames v. City of Visalia* (2019) 43 Cal.App.5th 741, 781 fn. 10 [a mandamus proceeding authorized by statute is a suit in

equity].) Thus, mandamus is not available here because quo warranto is a plain, speedy, and adequate remedy.

In addition, the principles of statutory construction show the Legislature did not intend the Brown Act to serve as such an exception. This Court has explained the Legislature should not be presumed to overturn existing law unless it is clearly expressed or necessarily implied. (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135 ["We presume the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted. [citation] We do not presume it meant to overthrow long-established principles of law, unless such an intention is clearly expressed or necessarily implied. [citation]."].) When the Legislature enacted the 1986 amendments to the Brown Act that added the nullification remedy in Section 54960.1, it must be presumed that the Legislature was aware of quo warranto and its exclusivity, which had been both the common and statutory law for more than 100 years. Had the Legislature intended Section 54960.1 to override the long-standing exclusivity of quo warranto, it could have expressly provided that it would apply where an appointment to public office had been made. The Legislature did not do so.

This Court should not adopt a rule that would needlessly expand the scope of the exceptions to the quo warranto rule to cover a statute that does not call for it, because it would undermine quo warranto's important public policy functions.

2. The Elections Code, in Contrast with the Brown Act, Demonstrates How the Limited Exceptions to Quo Warranto Exclusivity Are Recognized Only Where the Legislature Has Expressly Authorized the Remedy of Challenging the Right to Public Office

In contrast to the Brown Act, the remedies authorized by the Elections Code do act as an exception to quo warranto's exclusivity. (See *Powers v. Hitchcock* (1900) 129 Cal. 325, 326–327 ["There are two separate and distinct methods provided in the Code of Civil Procedure to test the title to an office. The first is by proceedings in the nature of quo warranto . . . . The second is by contesting the election as provided in §§ 1111–1127."]; see also Elec. Code, §§ 16000 *et seq.* [current version of election contest provisions]; *Salazar v. City of Montebello* (1987) 190 Cal.App.3d 953, 957.)

The Elections Code is an express statutory exception to the exclusivity of quo warranto because the Legislature expressly authorized election challenges to try title to office. (See Elec. Code, § 16603 ["The court shall continue in session to hear and determine all issues arising in contested elections. . . . [The court] shall pronounce judgment in the premises, either confirming or annulling and setting aside the election. The judgment shall be entered immediately thereafter."].) And the Elections Code reflects careful consideration by the Legislature, as the provisions governing the elections contests are numerous and detailed. The Elections Code details, for example, the form of a statement of contest that a party

must file to contest the election. (Elec. Code, §§ 16400–16404.) The scheme also provides that any and all such statements of contest pertaining to a given election may be tried together, thereby avoiding a multiplicity of actions. (See Elec. Code, § 16500 ["Within five days after the end of the time allowed for filing statements of contest, the clerk of the superior court shall notify the superior court of the county of all statements filed. The presiding judge shall forthwith designate the time and place of hearing . . . ."].)

The Elections Code also provides strict timelines the court must follow. (See, e.g., Elec. Code, §§ 16500 [timing of hearing]; 16603 [time for judgment].) Just as in a quo warranto proceeding, the Elections Code provides that the superior court's judgment is effective while an appeal is pending. (Elec. Code, § 16900; see also Code Civ. Proc., §§ 35, 44 [elections contests entitled to calendar preference on appeal].)

The Elections Code thus indicates the Legislature's thoughtful consideration about a limited, express statutory exception to quo warranto's exclusivity.

This is directly in contrast with the Brown Act. While the Elections Code is *expressly* directed to contesting the right to office where the challenge is based on a violation of the elections laws, (Elec. Code, § 16603), the Brown Act's general remedy provisions do not address challenges to the right to office. (See Gov. Code, § 54960.1.) Nor do the

Brown Act's nullification provisions contemplate or address any of the challenges that arise when adjudicating challenges to the right to office in the same manner provided for in the Elections Code and quo warranto procedures. Thus, this Court should not expand the exceptions to quo warranto's exclusivity to include the Brown Act.

D. This Case Aptly Illustrates How Quo Warranto's Exclusivity Furthers Important Public Policy Concerns

The exclusivity of quo warranto is supported by strong public policy grounds. The quo warranto procedures ensure the public has a voice in a dispute over a public official's title, protects local governments from instability, and provides the courts and interested parties with certainty. But in this case, the superior court disregarded quo warranto's exclusivity with predictable and regrettable consequences.

Adoption of the rule advanced by I.E. United—that there is a private right of action to challenge the appointment of a public official based upon an alleged Brown Act violation—would have disastrous consequences, far beyond this case, to all local governments and the public alike.

1. Quo Warranto's Exclusivity Ensures Meaningful Protection to the Public Along with Providing Stability to Local Governance

Exclusivity ensures that the protections inherent in the quo warranto procedures are meaningful. As discussed more fully in Section V.A.2, *supra*, the primary protection of a quo warranto action is that the right to

bring it is vested in the People, through the Attorney General, "because disputes over title to public office *are viewed as a public question of governmental legitimacy* and not merely a private quarrel among rival claimants." (*Nicolopulos*, *supra*, 91 Cal.App.4th at pp. 1228–1229, italics added and internal citations omitted.)

Moreover, the Attorney General's prerogative ensures that public officers are protected by placing the Attorney General in the role of determining if a lawsuit should proceed. (*Id.* at p. 1229.) "The right to hold public office, either by election or appointment, is one of the valuable rights of citizenship . . . . The exercise of this right should not be declared prohibited or curtailed except by plain provisions of law . . . ." (*People ex rel. Foundation for Taxpayer & Consumer Rights v. Duque* (2003) 105 Cal.App.4th 259, 265, internal citations omitted.) If litigants could initiate an action to try title through mandamus, or declaratory or injunctive relief, it would sideline the Attorney General, and by extension the People, and instead open up public officers to frivolous lawsuits and "private quarrel[s]." (*See id.* at pp. 1228–1229.) In other words, the protections that quo warranto offers would be meaningless if litigants were free to plead around them and invite courts to try title to public office outside of a quo warranto action.

Here, I.E. United did not seek or receive approval from the Attorney General to bring this case. The Attorney General never made a

determination that there was a substantial issue justifying leave to sue, or that the public interest would be served by a quo warranto challenge. I.E. United's failure to seek approval deprived the parties, the Court, and the public at large of any understanding of whether the People, acting through the Attorney General, determined that an adjudication of Supervisor Rowe's claim to office is in the public interest. Deviating in this fashion from quo warranto's exclusivity undermines the very democratic functions it is intended to serve. Allowing I.E. United to circumvent the protections of a quo warranto proceeding and the Attorney General's stewardship here would result in a rule diluting those protections for all such challenges going forward, opening up local governments and officers to potentially frivolous lawsuits, and creating a vehicle for disgruntled would-be plaintiffs to circumvent the procedural protections embedded in quo warranto.

2. Quo Warranto Provides Certainty to the Public, the Courts, Local Governments, Public Officials, and Plaintiffs Alike

Quo warranto actions are subject to well-defined statutory and judicially-established procedures that provide certainty to the parties and the courts. Even more importantly, because the public at large is a stakeholder any time title to public office is at issue, these procedures provide certainty to the public. For example, in a quo warranto proceeding, the judgment is self-executing and there is no action needed to carry out its 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 there is no automatic stay on appeal from a judgment in quo warranto 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).) It also limits the rights to appeal without further authorization from the Attorney General, providing yet another procedural layer of protection against lengthy proceedings and the related impacts on governmental legitimacy and effectiveness. (Cal. Code Regs., tit. 11, § 11.) And importantly, a quo warranto judgment is not retroactive, ensuring stability of government by avoiding the potential for challenges to official actions previously voted on by the challenged public officer. (See *Bray v. Payne* (1930) 210 Cal. 465, 471 ["The final judgment of ouster was not retroactive and had no legal effect upon the exercise of the municipal function prior to the entry of the judgment."].)

I.E. United's Petition illustrates the problems that arise when the well-defined quo warranto procedures are circumvented. A writ of mandate commanding affirmative action by the respondent is subject to automatic stay pending appeal. (See Code Civ. Proc., § 916, subd. (a); *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727 [automatic stay applicable in writ of mandate proceedings].) But in this case, when Judgment was in fact entered and the appeal was perfected, I.E. United then aggressively pressed the position that there was no automatic stay. (See, e.g. Exh. 32 at

pp. 551–555.) This resulted in forcing appellants to seek extraordinary relief asking the appellate court for a writ of supersedeas to protect their entitlement to the automatic stay. The situation became even more difficult after the Court of Appeal denied supersedeas on January 9, 2020, placing the status of the Third District Supervisor seat in doubt until this Court issued a stay on January 23, 2020. (See Section VI.B.2, *infra*.)

The resulting uncertainty placed a cloud on the Board's actions, led to public accusations of the impropriety of Supervisor Rowe holding the Third District seat, and placed at risk the employment of the full time staff of the Third District, to name just a few—all results that the quo warranto process would protect against. But it did not end there; there was yet further litigation in the superior court through I.E. United's ex parte application to enforce the Judgment, demand that the primary election process be revised, demand that overseas ballots be halted, and, in the alternative, hold appellants in contempt of court. (See Motion to Augment, Exh. G at p. 339.) All of this litigation over the stay would have been avoided had this case proceeded properly through a quo warranto action, where the procedures are certain and judgments are given immediate effect by statute. (Code Civ. Proc., § 917.8, subd. (a); *Boarts*, *supra*, 135 Cal.App. at pp. 519–520.)

In sum, the stakes for a quo warranto proceeding are high: the superior court's judgment determines the rightful officeholder and the

judgment is given immediate effect. Thus, the Legislature ensured that a high bar must be met to bring the action in the first place—that the Attorney General, acting on behalf of the People at large, determines if substantial issues are at play and the action is in the public interest. If quo warranto were not the exclusive remedy where it is available, it would result in an anomaly whereby the high stakes of title to public office would be put at issue without the substantive and procedural protections the Legislature enacted. The important protections built into the quo warranto proceedings should not be discarded in this fashion. Rather, quo warranto is and remains the appropriate remedy to adjudicate such a challenge.

VI. THE JUDGMENT AND PEREMPTORY WRIT OF MANDATE ARE AUTOMATICALLY STAYED

The second issue presented for review is whether "a judgment [is] 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?" (Petition for Review.) If this Court holds, as appellants believe it should, that quo warranto is the exclusive remedy for I.E. United to challenge Supervisor Rowe's title to office, the Court need not reach this issue. Assuming arguendo, however, that mandamus was properly issued, the Judgment and Writ of Mandate should have been automatically stayed once the instant appeal was perfected.

A. The Judgment and Peremptory Writ of Mandate Are Mandatory In Nature

1. An Injunction That Requires Affirmative Action and Changes the Status Quo Is Mandatory

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." (Code Civ. Proc., § 916, subd. (a); *Hayworth*, *supra*, 129 Cal.App.3d at p. 727 [automatic stay applicable in writ of mandate proceedings].) Only injunctive relief which is prohibitory, rather than mandatory in nature, may escape the automatic stay. (*Ohaver v. Fenech* (1928) 206 Cal. 118, 123.) Injunctive relief is considered 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.) Where, as here, the injunctive relief commands a county board of supervisors to rescind its appointment of a sitting supervisor and prohibits the sitting supervisor from exercising her official duties, it is mandatory in nature in its entirety and subject to the automatic stay.

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

> 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:

> 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, bold added.)

2. The Injunction Here Requires the Board Take Affirmative Action And Changes the Status Quo

The relief ordered here is mandatory in its entirety because it requires the Board to take affirmative action to "[r]escind the appointment of Dawn Rowe as Third District Supervisor" and 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 a new appointee to the public 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.)

The provisions of the injunctive relief that are cast in prohibitory language are also mandatory in nature. The Judgment "prohibit[s 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." (Exh. 22.) But the mandate to rescind Supervisor Rowe's appointment necessarily means the Board would no longer give effect to her votes. Thus, the "prohibitory" provision 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. The superior court expressly acknowledged this, 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 Judgment also "prohibit[s the Board] from making any appointment to the position." (Exh. 22.) This 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.)

3. The "Null and Void" Finding Does Not Change the Mandatory Nature of the Injunction

The Court of Appeal incorrectly denied appellants' Petition for Writ of Supersedeas because it believed 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 *Boarts*, *supra*, 135 Cal.App. at pp. 519–520.)

Further, it is not true that "the finding of a null and void appointment means there was no change in status quo by the superior court's order." (See Petition for Review, Exh. A.) 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 *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884–885; *Clute v. Superior Court* (1908) 155 Cal. 15, 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, when the writ issued, Dawn Rowe held the position of Third District Supervisor following her unanimous appointment one year prior—this is the status quo. Enforcement of the Judgment and Peremptory Writ would mean Supervisor Rowe would be removed from office; the Judgment and Peremptory Writ would dramatically alter the status quo.

B. The Underlying Purposes of the Automatic Stay Are Served by Recognizing Its Application Here

The automatic stay's inherent goals of protecting the right to appeal and the jurisdiction of the reviewing courts is served by recognizing its proper application here. Moreover, the automatic stay provides certainty to litigants and appellate courts alike, which are otherwise asked to determine time-sensitive requests for stay on bare records.

1. Application of the Automatic Stay Serves Section 916's Intended Purpose

Application of the automatic stay in this case serves 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.*, *supra*, 15 Cal.App.5th at pp. 884–887.)

This Court has already recognized the value of the stay in this case, granting an immediate stay pending a decision on review and then maintaining the stay in the order granting review. As this Court has implicitly recognized in these orders, a stay is necessary to preserve the status quo and, by extension, the pending issues for review. Absent a stay of the Judgment and Peremptory Writ in full, the result would have been to (1) unseat Supervisor Rowe as Third District Supervisor, (2) leave the Board with a vacancy until the Governor made an appointment, and (3) have a new person appointed as Third District Supervisor. And, had the Governor made an appointment, the whole appeal may have been mooted.

2. The Failure to Apply the Automatic Stay Leads to Confusion and Uncertainty

The superior court's failure to recognize the automatic stay was applicable to the Judgment and Peremptory Writ led to confusion and chaos, both in the courts and in San Bernardino's local governance.

Upon perfecting the appeal, appellants maintained that the Judgment and Peremptory Writ were stayed in their entirety. I.E. United asserted that there was no stay at all. The superior court appeared to hold that only some parts of the Judgment and Peremptory Writ were stayed, and some parts

were not. Specifically, the superior court believed that Supervisor Rowe could not serve on the Board, but that the Board would not need to rescind the appointment and the Governor would not need to take action:

> 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 appeared to view it differently, stating 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." (Petition for Review, Exh. A.) The failure to simply apply the automatic stay thus resulted in confusion even among the courts about what appellants would need to do while the appeal was pending to be in compliance with court orders.

The confusion was not just an abstract problem. It left Supervisor Rowe and her staff uncertain about their positions, their employment, and Supervisor Rowe's ability to represent her constituents while the parties litigated over the stay and pursued the merits appeal. These problems were compounded by California's March 3, 2020 primary election. Though I.E. United had never raised any election issues in its Petition and superficially contends that its case was not about Supervisor Rowe's title to office, I.E.

United's January 9, 2020 ex parte application sought to hold appellants in contempt of court because Supervisor Rowe was designated as a County Supervisor on the ballot for the March 3, 2020 primary—a designation that had been made long before Judgment was ever entered. (See Motion to Augment, Exh. G at p. 339.)

In contrast, the certainty of the automatic stay means that parties and courts generally do need to litigate such issues. Confirming that the stay is broadly applicable will reduce the burden on superior courts and the courts of appeal to address time-sensitive requests for stay and writs of supersedeas. Thus, application of the simple rule—an injunction is automatically stayed if it alters the status quo at the time of the injunction and requires affirmative action—serves the orderly functioning of the courts. Because the Judgment commands the Board to rescind its appointment of Supervisor Rowe and prohibits Supervisor Rowe from exercising her official duties, it is automatically stayed.

3. The Exceptions to the Automatic Stay for Quo Warranto Actions Demonstrate the Automatic Stay Should Apply Here

The statutory framework for a quo warranto action specifically provides an exception to the automatic stay in cases in which "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." (Code Civ. Proc., § 917.8, subd. (a); 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].)

The Legislature would not have enacted section 917.8(a) if it was unnecessary. (See *People v. Valencia* (2017) 3 Cal.5th 347, 357 [a statutory "construction making some words surplusage is to be avoided" and "[t]he words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible"], internal citations and punctuation omitted.) In other words, the Legislature believed that a quo warranto order—such as one that found a public officer's appointment was improper—would have been subject to the automatic stay unless the Legislature specifically created an exception. No such exception exists for writs of mandate.

I.E. United has argued from the inception of this case that it is not an action that must be brought in a quo warranto proceeding. As soon as Judgment was entered, however, I.E. United sought to apply the procedural efficiencies of quo warranto for its benefit: that a quo warranto judgment is self-executing and therefore not automatically stayed on appeal. If the Court determines that I.E. United was not required to go through the procedural requirements to bring a quo warranto proceeding, it should not

find that I.E. United is somehow still entitled to the procedural benefits of a quo warranto proceeding.

VII. CONCLUSION

This Court should apply the longstanding rule that, absent constitutional or statutory exceptions, quo warranto is the exclusive remedy where it is available. Application of that rule here would promote in this case and in future challenges to public officials' right to hold office, the important public policy goals of the quo warranto statutory scheme. Specifically, quo warranto's exclusivity ensures that challenges to public office are only brought where they serve the public interest, provides certainty to parties and the courts, and promotes the stability of local governance. Appellants respectfully request that this Court answer the Quo Warranto Issue and hold that I.E. United could not bring this action in mandamus and should instead have brought an action in quo warranto to challenge Supervisor Rowe's title to public office.

If the Court reaches the Stay Issue, it should hold that the automatic stay did apply to the Judgment and Peremptory Writ. The Judgment and Peremptory Writ seek to alter the status quo—Supervisor Rowe serving as Third District Supervisor—and require affirmative action by the Board to rescind her appointment. Accordingly, the injunctive relief is mandatory and appellants respectfully request that the Court confirm it is subject to the automatic stay.

DATED: May 4, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

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DATED: May 4, 2020

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