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

REPLY BRIEF ON THE MERITS

MEYERS, NAVE, RIBACK, SILVER & WILSON
Deborah J. Fox (SBN: 110929)*
dfox@meyersnave.com
T. Steven Burke, Jr. (SBN: 247049)
tsburke@meyersnave.com
Matthew B. Nazareth (SBN: 278405)
mnazareth@meyersnave.com
707 Wilshire Blvd., 24th Floor
Los Angeles, California 90017
Telephone: (213) 626-2906

Attorneys for Respondents/Real Party in Interest/Appellants

MCDERMOTT WILL & EMERY LLP
William P. Donovan, Jr. (SBN: 155881)*
wdonovan@mwe.com
Jason D. Strabo (SBN: 246426)
jstrabo@mwe.com
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206
Telephone: (310) 788-4121

Attorneys for Real Party in Interest/Appellant

Michelle D. Blakemore, County Counsel
(SBN: 110474)
Penny Alexander-Kelley, Chief Assistant
County Counsel (SBN: 145129)
Office of County Counsel
County of San Bernardino
385 North Arrowhead Avenue
San Bernardino, California 92415
Telephone: (909) 387-5455
Facsimile: (909) 387-5462

Attorneys for Respondents/Real Party in
Interest/Appellants

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I. INTRODUCTION

This lawsuit challenges San Bernardino County Supervisor Dawn Rowe's unanimous appointment to fill the Third District Board seat, firmly establishing that title to office is the centerpiece of this action. Over a century of common law holds that such claims may only be brought through a quo warranto proceeding authorized by the Attorney General, who may do so when it is in the public interest. Eroding the protections of quo warranto, and permitting challenges to title through mandamus as urged by I.E. United, would undercut the integrity of representative government and disrupt the orderly administration of local governance.

The Brown Act establishes no exception to the long-standing rule that title may only be challenged through a quo warranto action. While the Brown Act generally authorizes mandamus as the procedural vehicle for challenges to action taken in violation of the Act's open meeting or notice provisions, nothing in the Act or its legislative history suggests that mandamus may be used to challenge title when quo warranto is available. Indeed, the traditional legislative or adjudicative action subject to challenge by mandamus—such as enacting ordinances, adopting resolutions, or approving land use entitlements—is fundamentally and categorically different than challenges to title, which put at risk the ability of local governments to meet quorum requirements or effectively govern, and directly contest the official's right to hold office. Quo warranto's

heightened procedural protections ensure these interests are protected when title is challenged. Thus, I.E. United's direct challenge to Supervisor Rowe's title to office could only be brought in a quo warranto proceeding, and this mandamus action should have been dismissed.

Additionally, the Judgment and Peremptory Writ are subject to the general rule that injunctive relief is automatically stayed pending appeal, as they both require affirmative action by the Board and alter the status quo—that is, they require the Board to rescind its appointment of Supervisor Rowe and seat a new Governor appointee in her place. And as this Court has perhaps already recognized in issuing a temporary stay, there is too great a danger in removing a sitting supervisor from office while the appeal is pending, as it would both fundamentally erode the right to appeal and cause unjustified disorder for local governance.

II. QUO WARRANTO IS THE EXCLUSIVE REMEDY FOR CHALLENGING SUPERVISOR ROWE'S TITLE TO OFFICE

A. Quo Warranto is the Only Proper Remedy Where It Is Available Absent a Constitutional or Statutory Regulation Providing Otherwise

This Court, along with various courts of appeal, has consistently and firmly established the rule that frames the issue in this case: "[A]bsent 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; see also *San Ysidro Irrigation District*

v. Superior Court of San Diego County (1961) 56 Cal.2d 708, 714–715; *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225 [quo warranto "is the exclusive remedy in cases where it is available"].) I.E. United does not directly address whether they contend this rule is applicable, remains good law, or should now be discarded. The net result is they simply provide no good basis for departing from this established rule of quo warranto's exclusivity.

Instead, I.E. United's argument relies on finding some exception to the rule, either because the Brown Act serves as a "statutory regulation[] providing otherwise" or because Supervisor Rowe's title to office was only "incidentally involved" in these proceedings. (Answering Brief (AB) at p. 22.) Neither of these exceptions is applicable here as explained in Appellants' Opening Brief (AOB) and further below. (See *infra* at Sections II.C, II.D.)

B. Quo Warranto Is An Available Remedy for Challenging Title Based on an Alleged Brown Act Violation

Quo warranto "is the exclusive remedy in cases where it is available." (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1225.) Here, quo warranto is an available remedy for I.E. United's challenge to Supervisor Rowe's appointment to the office of Third District Supervisor. I.E. United does not dispute that quo warranto is an available remedy here. (See, e.g.,

AB at p. 22 [arguing only that mandamus is appropriate "irrespective of whether quo warranto is available"].)

"[Q]uo warranto is the proper remedy to 'try title' to public office; that is, to evaluate whether a person has the right to hold a particular office by virtue of eligibility requirements, valid election procedures, the absence of disqualifying factors, etc." (96 Ops.Cal.Atty.Gen. 36 (2013).) Quo warranto is available to try title of appointed public officers. (See *Hallinan v. Mellon* (1963) 218 Cal.App.2d 342; see also 76 Ops.Cal.Atty.Gen. 254 (1993).) In fact, the Attorney General recently opined that a quo warranto proceeding could properly include adjudication of the identical issue here—whether an official's appointment was valid in the face of allegations that the appointment was made in violation of the open meeting and notice provisions of the Brown Act. (97 Ops.Cal.Atty.Gen. 12 (2014).) The Attorney General authorized quo warranto on another issue, and then explained that the factual questions on the Brown Act issue "may be resolved within the context of the contemplated quo warranto action" if necessary. (*Ibid.*)

Here, I.E. United's Petition for Writ of Mandate requests the superior court "order [the Board] to rescind the appointment of Dawn Rowe" and order that a new appointment "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].) I.E. United challenges Supervisor Rowe's title to office and, therefore, quo warranto is an available remedy.

C. Supervisor Rowe's Title to Office is Central to I.E. United's Mandamus Action

I.E. United relies on an exception to the general rule that quo warranto is exclusive where it is available—that Supervisor Rowe's title to office is merely incidental to its Petition. (See AB at pp. 35–37.) In so arguing, I.E. United seeks to rewrite both the case law and this case's history.

1. Title Is Not "Incidental" to a Writ Petition That Seeks Relief That Will Conclusively Establish Legal Title to Public Office

I.E. United invents a limitation that title is "incidental" unless the challenge is to the public official's "general qualifications or eligibility" or based on a claim of another individual's entitlement to the seat. (AB at pp. 35–36.) I.E. United's proposed limitation would improperly narrow the scope of quo warranto and dramatically broaden the limited circumstances in which courts have found that title was only incidental. In fact, title is never "incidental" to a proceeding that will conclusively and legally establish title.

First, there is nothing in the statute authorizing quo warranto that supports I.E. United's interpretation. Quo warranto is to challenge "any person who usurps, intrudes into, or unlawfully holds or exercises any

public office." (Code of Civil Procedure (CCP), § 803.) I.E. United's Petition alleges that Supervisor Rowe's appointment was unlawful, and therefore her holding and exercising of office since December 2018 is similarly unlawful.

Nor do the cases cited by I.E. United support such a limitation. *Stout v. Democratic County Central Committee* (1952) 40 Cal.2d 91, explained that title is incidental to the question of whether the office itself exists at all. (See *id.* at p. 94.) In *Hallinan*, *supra*, 218 Cal.App.2d 342, the court explained the difference between a challenge subject to quo warranto's exclusivity and one in which title is merely incidental: "[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 . . . ." (*Id.* at p. 346.) The court even described the challenge—which it found to be a direct challenge to title that invoked quo warranto's exclusivity—as a challenge to the salary paid to a "public officer who has been illegally appointed . . . ." (*Hallinan*, *supra*, 218 Cal.App.2d at p. 344.) Thus, I.E. United's attempt to distinguish between a challenge based on "eligibility" criteria and one based upon an illegal appointment is not grounded on the legal reasoning of these cases.

I.E. United offers *McKannay v. Horton* (1907) 151 Cal. 711, as the centerpiece of its argument that title is merely incidental. That reliance is misplaced, once one sorts through the convoluted fact pattern of *McKannay*

to uncover that title was never actually adjudicated, in contrast to how Supervisor Rowe's title is central to this case. In *McKannay*, the former mayor of San Francisco (Schmitz) had been removed from office by the Board of Supervisors after being found guilty of extortion, the Board of Supervisors appointed a new mayor (Taylor), Schmitz appealed his conviction, and Schmitz claimed the office while his appeal was pending. (*Id.* at pp. 713–714.) Critically, however, the mandamus petition was not brought by either Schmitz or Taylor. Instead, Taylor's secretary, McKannay, filed the writ petition seeking his salary from the Auditor, who in turn refused to pay McKannay's salary while Schmitz's secretary was also claiming a salary based on the same position. (*Id.* at pp. 714–715.) Thus, this Court explained that the title to office of mayor was "incidental[]" to McKannay's writ petition because a decision on the petition would not "operate as an estoppel between Dr. Taylor and Mr. Schmitz [as to] who is the de jure mayor . . . ." (*Id.* at pp. 715–716.) In other words, the writ itself was not binding on either Taylor or Schmitz as to who legally held the title of mayor. Of course, that meant title to the mayor's office was "merely incidental" and the rule of quo warranto's exclusivity was not a bar on McKannay's petition.

McKannay thus counsels that title is incidental where it need not be determined legally and conclusively. The opposite is true here. I.E. United directly challenges Supervisor Rowe's title to office by seeking an order

declaring her appointment null and void, commanding the Board to rescind the appointment, and mandating the Board seat the Governor's appointee to the Third District Board seat. (Exh. 2 at pp. 28–29, ¶¶ 58–59; Exh. 9 at pp. 169–170, ¶¶ 70–71.) And the Judgment and Peremptory Writ did just that: they purported to legally and conclusively establish that Supervisor Rowe did not hold title to office. Title to the seat is central to this case.

Klose v. Superior Court (1950) 96 Cal.App.2d 913, directly explains why Supervisor Rowe's title is not incidental in this case. *Klose* offers that "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.) This is exactly the situation here. I.E. United seeks to avoid this clear conclusion by claiming *Klose* "in fact *distinguished* cases involving challenges to an appointment based on the appointing entity's violations of applicable law." (AB at p. 36.) I.E. United appears to refer to this Court's decision in *Independence League v. Taylor* (1908) 154 Cal. 179, but there (just as in *McKannay*), title was not determined in the mandamus proceeding. Instead, this Court held only that a mayor could be compelled in mandamus to make appointments to an elections commission. (*Ibid.*) As to the question of title, however, this Court explained that the de facto officers' titles were not at issue and these officers had in fact been dismissed from the proceeding. (*Id*. at pp. 180–181.) In contrast, here, I.E.

United's Petition cannot be separated from Supervisor Rowe's title to office—granting the Petition necessarily means that her appointment was null and void and she therefore does not hold legal title.

2. Supervisor Rowe's Title Is Not "Incidental" to the Writ of Mandate Because It Purports to Conclusively Determine That Supervisor Rowe Must Vacate The Third District Seat

In addition to its overly broad interpretation of when title is merely "incidental," I.E. United also mischaracterizes the relief at issue in these proceedings. I.E. United now casts its "objective" not as challenging Supervisor Rowe's title to office, but as "a judicial determination that the Board's secret ballot was null and void." (AB at p. 37, fn. 10.) But this mischaracterizes both what the Petition sought and what the superior court ordered. The Petition requests the court order the Board to "rescind the appointment of Dawn Rowe . . . ." (Exh. 2 at p. 28.) The Petition named Supervisor Rowe as the Real Party in Interest, (see Exh. 2), which is generally defined as "any person or entity whose interest will be directly affected by the proceeding . . . ." *Redevelopment Agency v. Commission on State Mandates* (1996) 43 Cal.App.4th 1188, 1197, internal quotations omitted.) And, the Peremptory Writ ultimately ordered the Board to "[r]escind the appointment of Rowe as Third District Supervisor" and "[i]mmediately seat any person duly appointed to the position" by the Governor in her place. (Exh. 23.) Thus, unlike in *McKannay* and

Independence League, where the writ did not establish legal title (and the title-holders were not even party to the proceedings or involved as real parties in interest), the Peremptory Writ issued by the superior court here purports to conclusively and legally establish that Supervisor Rowe does not hold title to the Board seat. (See *McKannay*, *supra*, 151 Cal. at pp. 715–716; *Independence League*, *supra*, 154 Cal. at pp. 180–181.)

Moreover, I.E. United's characterization of the relief sought in this case makes little sense. The Board already voted to rescind the action taken that I.E. United contends was a "secret ballot."[1] (See Petition at ¶ 16.) Thus, the only dispute is whether Supervisor Rowe's appointment itself was valid or whether, as I.E. United would have it, the appointment process was irretrievably tainted requiring that she cede her Board seat to a new Board member handpicked by the Governor. On this factual record, it cannot be reasonably disputed that I.E. United's actual challenge is to Supervisor Rowe's appointment itself.

I.E. United urges a new test for determining whether title is "incidental" in a mandamus proceeding that is not supported by the case law. And such a rule would obviate the inherent protections to local governance that quo warranto is intended to serve by requiring a case-by-

[1] Appellants also vigorously dispute that the rescinded actions constitute any Brown Act violation, an issue which is preserved on the pending appeal. (See AOB at p. 23.)

case analysis of whether title was merely "incidental" to a challenge. Instead, the case law already offers an established test: title cannot be incidental where the relief sought necessarily establishes legal title to office, as the Peremptory Writ purports to do here.

D. The Brown Act Is Not an Exception to Quo Warranto's Exclusivity

I.E. United also argues that quo warranto is not the exclusive remedy here because the Brown Act provides another statutory remedy. (AB at pp. 23–35.) I.E. United's argument is premised largely on conflating the Brown Act's substantive and procedural components, and thereby ignoring that quo warranto is the appropriate procedural vehicle for I.E. United's challenge to Supervisor Rowe's title based on the allegation of an underlying Brown Act violation.

Government Code section 54960.1 (Section 54960.1) effectively does two things. First, substantively, it provides that action taken in violation of the Brown Act is null and void. (See Appellants' Motion for Judicial Notice, Exh. B, p. 12 ["This bill would make certain actions taken by a legislative body of a local agency null and void."].) Second, it provides a procedural mechanism (mandamus) for courts to give effect to its substantive component. (See *id.* ["This bill would authorize any interested person to commence an action by mandamus, injunction, or declaratory relief to determine if certain actions taken by the local agency

are null and void . . . ."].) The exclusivity of quo warranto only affects the procedural component—quo warranto is a procedural mechanism that is to be used to try title to office including, as here, where the challenge is based upon the alleged substantive violation of the Brown Act. Quo warranto therefore still gives effect to Section 54960.1's substantive aspect (that action taken in violation of the Brown Act may be adjudicated null and void), but supplants the otherwise available mandamus procedure with one that is suited specifically for the unique issues related to challenges to a public official's title and seat.

1. Nothing in the Legislative History of Section 54960.1 Suggests It Creates An Alternative to Quo Warranto

I.E. United argues that the Brown Act's legislative history demonstrates the Legislature's intent that Section 54960.1 was intended to supplement or replace quo warranto. (See AB at p. 29.) But the legislative history does not support this urged interpretation.

First, there is nothing in the legislative history that indicates the Legislature intended to replace the already existing quo warranto procedure for trying title to office where the alleged underlying violation of the Brown Act was in the appointment of a public official. This Court "presume[s] the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted" and "do[es] not presume it meant to overthrow long-established principles of law, unless such an intention is clearly expressed

or necessarily implied." (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135, internal citations omitted; see also *Arthur Andersen v. Superior Court* (1998) 67 Cal.App.4th 1481, 1500 [the Legislature is generally presumed to know existing law].) Nothing in the legislative history of Section 54960.1 evidences any such intention. The legislative history for the 1986 amendments to the Brown Act (which includes other changes in addition to the enactment of Section 54960.1) is 1,593 pages long. (See Appellants' Motion for Judicial Notice, Exhs. B–X.) In the entire 1,593 pages, there is only a single reference to "quo warranto," which is in a summary of the Brown Act's history that describes a proposed amendment from 1969 that was not adopted. (See *id.*, Exh. E, p. 100.) This hardly constitutes a clear expression of legislative intent to overturn the well-established rule of quo warranto exclusivity.

I.E. United also relies upon the proposed 1969 amendment to suggest the Legislature's 1986 amendment was intended to overturn the rule of quo warranto exclusivity. As an initial matter, it is unclear how the legislative intent of the 1986 amendments could be derived from the failed 1969 proposed amendment (adopted some 17 years earlier). (See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 572, as modified (Jan. 12, 2005) ["Unpassed bills, as evidence of legislative intent, have little value."].) Moreover, the 1969 amendment would have made any public

official who knowingly violated the Brown Act subject to removal on that basis, and only through a quo warranto proceeding:

> The attendance at a meeting at which action is taken in violation of this chapter, with knowledge that the meeting is in violation of this chapter, shall constitute misconduct in office on the part of any member of a legislative body so attending.
>
> An action in quo warranto . . . may be commenced for the removal from office of such person, and the court may set aside any action taken at a meeting in violation of this chapter.

(I.E. United Motion to Take Judicial Notice, Exh. E at p. 26.) This is wholly dissimilar from the question here, where a third party seeks to unwind the appointment of a public official. Ultimately the Legislature did not enact the amendment, evidencing the Legislature's determination that a Brown Act violation should not be grounds for removal from office. The only conclusion that can be drawn from the 1969 proposed amendment is that the Legislature in 1969 was aware of quo warranto as the appropriate procedural vehicle for removing an official from office.

Finally, I.E. United argues that the enactment of Section 54960.1 in and of itself reflects a legislative belief that "other available remedies are insufficient." (AB at p. 29.) But I.E. United here paints with too broad a brush. It was the enactment of Section 54960.1 that made a Brown Act violation subject to nullification, so there could have been no basis for any quo warranto proceeding to try title based upon a violation of the Brown Act before it was even enacted. And Section 54960.1 applies to all the

various public agency actions subject to the Brown Act, the vast majority of which are various legislative or adjudicative actions—such as enacting ordinances, adopting resolutions, approving contracts, assessing taxes, or approving land use entitlements—that have never been subject to quo warranto. Thus, there is no indication that the Legislature in 1986 believed the existing quo warranto procedures were somehow insufficient for trying title to office.

2. Nothing in the Plain Language of Section 54960.1 Nor the Related Brown Act Provisions Supports Overturning the Established Rule of Quo Warranto Exclusivity

This Court "presume[s] the Legislature was aware of existing judicial decisions directly bearing on the legislation it enacted" and "do[es] not presume it meant to overthrow long-established principles of law, unless such an intention is clearly expressed or necessarily implied." (*Leider*, *supra*, 2 Cal.5th at p. 1135, internal citations omitted; see also *Arthur Andersen*, *supra*, 67 Cal.App.4th at p. 1500 [the Legislature is generally presumed to know existing law].)

Nothing in the text of Section 54960.1 indicates the Legislature intended that the exclusive quo warranto procedural mechanism was to be replaced or supplemented by an additional procedure for trying title. Rather, Section 54960.1 is drafted in general terms to address action taken in violation of the Brown Act. And the overwhelming majority of local

government actions subject to the Brown Act involves traditional legislative or adjudicative agenda items that are not subject to quo warranto, not the appointment of public officials. Indeed, since Section 54960.1 was enacted in 1986, this case is the first to address its application to nullifying the appointment of a public official.

I.E. United's arguments demonstrate only that the Legislature expressly considered application of the Brown Act's *substantive* provisions—e.g., its open meeting and notice requirements—to a local body's appointment of an official. For example, I.E. United cites Section 54957—which creates an exception to the open meeting provision to discuss the appointment of a public employee other than an "elected official" or "member of a legislative body"—for the proposition that the Brown Act applies to the appointment of an elected official such as Supervisor Rowe. (See AB at p. 25.) But this is irrelevant. Appellants have never disputed that the Brown Act's substantive requirements apply when the Board is making an appointment such as Supervisor Rowe's. Nor do Appellants contend that the appointment of an official in violation of the Brown Act is "insulated" from challenge. (See AB at p. 26.) Thus, the issue is not whether the Brown Act applies here, the question is only whether Section 54960.1's authorization of mandamus as a generally available remedy to enforce the Brown Act is a statutory exception to the

rule of quo warranto's exclusivity. The case law (and legislative history) answers that question in the negative.

I.E. United also argues that Section 54960.1's notice and cure provisions "would not attach to quo warranto actions to try title, insofar as they apply only to actions 'commenced pursuant to [Section 54960.1], subdivision (a) . . . .'" (AB at p. 31, quoting Gov. Code, § 54960.1, subd. (b).) Once again, I.E. United's argument simply ignores the important qualitative difference between the procedural and substantive requirements of Section 54960.1. The notice and cure provisions apply whenever an action is commenced under subdivision (a), and would include within its reach a quo warranto action that is based on underlying substantive component of subdivision (a)—i.e., that action taken in violation of the Brown Act may be adjudicated null and void. Indeed, satisfying the notice and cure requirements are elements of stating a valid Brown Act claim. (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 684.) Thus, the notice and cure provisions apply whenever there is judicial action to nullify an action, whether by quo warranto (to try title) or mandamus (to challenge other actions taken by the legislative body).[2]

[2] Federal courts have also implicitly recognized Section 54960.1's notice and cure provisions to be substantive in nature by applying them to Brown Act cases in federal court, where federal courts apply only state substantive

Finally, I.E. United suggests that the timing requirements of Section 54960.1 are inconsistent with the availability of a quo warranto proceeding. (See AB at pp. 32–33.) However, as I.E. United acknowledges, (see AB at p. 33, fn. 8), the quo warranto regulations already address such a situation, by providing that upon a showing of urgent necessity, the Attorney General will immediately grant a relator "leave to sue" and will later determine relator's right to maintain the action.[3] (Cal. Code Regs., tit. 11, §10 ["In special cases and upon a sufficient showing of urgent necessity, 'leave to sue' will issue forthwith upon the filing of showing and undertaking required by Sections 2 and 6, upon condition that the defendant may thereafter show cause and that the right of the relator to maintain and

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law and not state procedural law. (See, e.g., *SPRAWLDEF v. City of Richmond* (N.D. Cal., Aug. 14, 2020, No. 18-CV-03918-YGR) 2020 WL 4734807, at *4.)

[3] I.E. United's attempts to show that mandamus is a speedier remedy than quo warranto are inapplicable. Petitions for writ of mandate are governed by CCP section 1085, which allows for all the other procedural filings allowed under the code. (See, e.g., *Hilton v. Board of Supervisors* (1970) 7 Cal.App.3d 708, 713.) Moreover, the section cited by I.E. United only permits an alternative writ and order to show cause to come on for hearing on an expedited time frame, it does not provide a mechanism for obtaining a final ruling on a writ of mandate in 10 days. (See CCP, § 1088.) In fact, writ cases often take a year or longer from the time the writ is filed until judgment is entered. (*See, e.g.*, *Fowler v. City of Lafayette* (2020) 46 Cal.App.5th 360, 366 [Brown Act writ petition filed November 2016 and judgment entered December 2018]; *International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 291, 292 [Brown Act writ petition filed March 4, 1996 and judgment entered March 7, 1997].)

prosecute such proceeding shall be thereafter determined."].) Thus, I.E. United could have sought immediate leave to sue and avoided any conflict with the Brown Act's timing requirements.[4]

3. Section 54960.1 Contrasts with Statutes the Legislature Actually Intended to Create an Exception to Quo Warranto's Exclusivity

The Brown Act's plain language does not show that the Legislature intended it to act as an exception to quo warranto's exclusivity, in contrast to other statutes that do serve as an exception. For example, the Elections Code specifically provides that election contests—and therefore title to office—could be adjudicated in alternate proceedings to quo warranto. (Elec. Code, §§ 16000 et seq.)

I.E. United suggests that the Elections Code is no different than the Brown Act because a statute "need not take any specific approach or be subject to any particular conditions to establish an exception to quo warranto's general exclusivity." (AB at p. 26.) While there is no specific language that a statute must include to serve as an exception, this Court has provided the framework for the analysis. The Court "do[es] not presume [the Legislature] meant to overthrow long-established principles of law,

[4] Additionally, a relator's failure to obtain the Attorney General's leave to sue prior to filing a lawsuit may be cured. (See *Nicolopulos*, *supra*, 91 Cal.App.4th at pp. 1229–1230.) Thus, I.E. United could have and should have cured its failure during this litigation, as it has been on notice of this error since at least February 6, 2019. (See Exh. 3 at p. 81.)

unless such an intention is clearly expressed or necessarily implied." (*Leider*, *supra*, 2 Cal.5th at p. 1135.) The Elections Code, unlike Section 54960.1, clearly expresses that title to office may be tried through the procedures outlined therein. The procedures apply to "all issues arising in contested elections." (Elec. Code, § 16603.) That necessarily includes challenges to the election of public officials. (See, e.g., Elec. Code, § 16602 ["'Defendant' means that person whose election or nomination is contested."]; Elec. Code, § 16100 [listing grounds for contesting election, including that the "person who has been declared elected" was ineligible or that the "defendant" bribed an elector].) In contrast to contests under the Elections Code that necessarily focus on challenges to title, the appointment of public officials makes up only a small portion of the kind of conduct covered by the Brown Act. Thus, while the Elections Code provisions clearly express the Legislature's intention that its procedures should serve as an exception to quo warranto, the same cannot be said of Section 54960.1's mandamus remedy.

4. Mandamus Will Not Lie Where There Is Another Plain, Speedy, and Adequate Remedy Such as Quo Warranto

Mandamus is an extraordinary remedy that will not lie where there is another plain, speedy, and adequate remedy. (*Hagopian v. State of California* (2014) 223 Cal.App.4th 349, 373, as modified (Feb. 21, 2014); *Tivens v. Assessment Appeals Bd.* (1973) 31 Cal.App.3d 945, 947.) Thus,

mandamus is not available here to try title because quo warranto is a plain, speedy, and adequate remedy. (*Klose*, *supra*, 96 Cal.App.2d at p. 925.)

I.E. United suggests that quo warranto's exclusivity is not supported in this case because this general mandamus rule does not apply where the Legislature has "specially prescribe[d]" mandamus as a remedy for Brown Act violations. (AB at p. 29.) But where a statute 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].) This is not a novel issue. Courts have consistently explained, in many other statutory contexts, that a provision authorizing mandamus does not obviate the need for a petition to establish that there is no other plain, adequate remedy at law.

For example, CCP section 1094.5 authorizes an aggrieved party to seek judicial review by mandamus of an administrative action. (CCP, § 1094.5; *Tivens*, *supra*, 31 Cal.App.3d at pp. 946–947.) Notwithstanding the express statutory authorization for mandamus, courts have long held that where there is another remedy at law, mandamus is not available. (*Id.* at p. 947 ["The sweep of section 1094.5 is limited, however, by the proposition that a writ of mandate, pursuant to its provisions, is available only where the petitioner has no plain, speedy, and adequate remedy at law."]; see also *Grant v. Board of Medical Examiners* (1965) 232

Cal.App.2d 820, 826 [the enactment of section 1094.5 did not give administrative mandamus "a separate and distinctive legal personality" from common law mandamus].) In other words, mandamus, whether through common law or by statute, can only be issued where there is no other plain, speedy, and adequate remedy at law.

E. The Public Policy Rationale for Both Quo Warranto and the Brown Act Are Furthered by Maintaining Quo Warranto's Exclusivity

I.E. United advances several arguments for why it believes mandamus is better suited than quo warranto for adjudicating claims of a Brown Act violation in the appointment of a public official. Most of these arguments do not address the question at issue, however, and only support the notion that the Brown Act's substantive provisions should apply to appointments of public officials—a point that is not in dispute. Significantly, important public policy grounds including democratic oversight of public officials and stability of local governance lend added strength supporting quo warranto's exclusivity.

1. Quo Warranto Serves a Democratic Function by Protecting Officials From Private Quarrels

First, quo warranto is a unique remedy that protects local government officials from frivolous lawsuits and "private quarrel[s]." (*See Nicolopulos*, *supra*, 91 Cal.App.4th at pp. 1228–1229.) I.E. United takes issue with the Attorney General's role in quo warranto proceedings because

the Attorney General is "subject to political pressure or partiality." (AB at p. 39.) But any such complaint is one that relates to the entire scheme of quo warranto, regardless of whether it is based on a Brown Act violation or otherwise, and therefore is complaining about a statutory scheme that has been in place and reaffirmed in case law for over a century. (See, e.g., *Barendt v. McCarthy* (1911) 160 Cal. 680; CCP, § 803.) Furthermore, this Court has explained that "we must assume [leave to sue in quo warranto] would be granted in all proper cases . . . ." (*Barendt*, *supra*, 160 Cal. at p. 691.) And finally, even if the Attorney General improperly denied leave to sue, that decision is reviewable for abuse of discretion. (See *Rando v. Harris* (2014) 228 Cal.App.4th 868, 875.)

I.E. United also attempts to turn the democratic interests protected by quo warranto on their head. The Attorney General's role in quo warranto proceedings is expressly "in the name of the people of this state." (CCP, § 803.) The Attorney General is directly accountable to the People and therefore acts in the interests of the public as a whole, as opposed to any private interest. "[W]hen title to a public office is involved, sovereign power by quo warranto should be invoked in preference to private interests in order to avoid undue interference with government." (*Stout*, *supra*, 40 Cal.2d at p. 93.) Moreover, quo warranto prevents undue challenges to office that may erode the public's perception of the legitimacy of local government.

Furthermore, quo warranto protects these public interests *without* casting aside the importance of any individual "interested person" in enforcing the Brown Act. Quo warranto allows any interested individual to initiate the action by seeking leave of the Attorney General. (CCP, § 803.) Thus, quo warranto is a balanced remedy that ensures title is challenged only where it is in the public interest, but is open and available to any private individual with a meritorious claim.

2. Challenges to Title Are Fundamentally Different Than Most Challenges to A Legislative Body's Official Actions

The application of quo warranto's exclusivity to this case is supported by the inherent and categorical difference between challenging an official's title to office and challenging the panoply of a board's actions. Challenging an official's title jeopardizes the legitimacy of local governments and inherently puts at risk their ability to meet quorum requirements. And 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.) Challenges to municipal contracts, development agreements, and other garden variety legislative or adjudicative action do not implicate such concerns. (See, e.g., *Fowler*, *supra*, 46 Cal.App.5th 360

[Brown Act challenge to City's approval of a building permit for a tennis cabana on residential property]; *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 510 [Brown Act challenge to community service district's approvals of various invoices]; *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 165 Cal.App.4th 543, 550 [combined writ and civil complaint challenging denial of an application for certificates of compliance for subdivision map].) Thus, while mandamus is appropriate for a variety of challenges, even where the stakes are high, (see, e.g., AB at p. 43, citing *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194), such challenges to various acts or even ballot initiatives are categorically different than challenges to title.

3. Comparisons With the Bagley-Keene Act Do Not Support the Claim that the Brown Act Is an Exception to Quo Warranto's Exclusivity

I.E. United argues that the Bagley-Keene Act, as analogous to the Brown Act, shows that the Attorney General cannot have authority for enforcing the Brown Act through quo warranto. The argument is based on the premise that application of quo warranto exclusivity to the Bagley-Keene Act would lead to the "Attorney General [] stand[ing] in the untenable position of deciding to sue the very agencies that he may be tasked to defend." (AB at p. 41.)

But this argument is undermined by the very legislative history submitted by I.E. United. Indeed, it demonstrates that the Attorney General

did seek to enforce the Bagley-Keene Act against state officials, but was unable to do so prior to the 1986 Amendments. (I.E. United Motion to Take Judicial Notice, Exh. H at p. 31 ["An attorney general's investigation last year concluded that the [state Board of Food and Agriculture] clearly violated the Open Meetings Act. But it also ruled that, because the act was 'directory' and not 'mandatory,' the resolution was valid even though adopted in violation of the law."].) Moreover, history shows that the Attorney General has in fact authorized quo warranto actions against state officials. (See, e.g., 67 Ops.Cal.Atty.Gen. 151 (1984).) Thus, there is nothing "absurd" about the application of quo warranto's exclusivity rule to the Bagley-Keene Act.

4. The Brown Act's Cure Provisions Cannot Replace the Protections of Quo Warranto

I.E. United also argues that the protections of quo warranto are unnecessary because the Board could have "cured its violations at any time before or during the litigation, but chose not to." (AB at p. 43, fn. 13.) In fact, the Board did act to cure the only violation that I.E. United ever alleged prior to filing the suit. On December 18, 2018, I.E. United challenged the Board's December 11 selection of applicants for public interview. (Exh. 12 at p. 296; Petition at ¶ 14.) After receiving I.E. United's complaint, on December 18, the Board voted to rescind that challenged action, adopted a new appointment process, and completed new

interviews. (Exh. 12 at pp. 297–299; Petition at ¶ 16.) County Counsel sent I.E. United written notice of the Board's curative/corrective action, pursuant to Section 54960.1, subdivision (c)(2). (Exh. 12 at p. 299; Petition at ¶ 17.) I.E. United never gave any notice that it was contesting the Board's actions taken on December 18, or that it considered the curative actions insufficient.[5] (Petition at ¶ 17.) Thus, the Board never had notice there was any remaining dispute prior to the filing of the suit, which demonstrates that the Brown Act notice provisions were a poor substitute for the quo warranto procedural protections here.

Moreover, I.E. United's claim that the Board could have "cured its violations at any time," (AB at p. 43, fn. 13.), is inconsistent with I.E. United's position throughout the litigation. It has claimed that the Board could not rescind Supervisor Rowe's appointment and simply go back to the drawing board, but instead would need to seat the Governor's appointee. (Exh. 7 at p. 150.)

III. THE JUDGMENT AND PEREMPTORY WRIT ARE AUTOMATICALLY STAYED

If this Court determines that Supervisor Rowe's title was subject to adjudication in this mandamus proceeding, the Court should hold that the Judgment and Peremptory Writ are automatically stayed pending appeal.

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[5] I.E. United's failure to give the Board such notice after the Board cured any previously alleged violation is one of the reasons the superior court erred in entering the Judgment and Peremptory Writ. (See AOB at p. 23.)

Appellants and I.E. United agree on the general rule that all proceedings in the superior court are stayed pending appeal in writ of mandate proceedings. (CCP, § 916, subd. (a); *Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) There is an exception where the writ is prohibitory in nature, rather than mandatory. (*Ohaver v. Fenech* (1928) 206 Cal. 118, 123.) Injunctive relief is mandatory "where it requires affirmative action and changes the status quo." (*Hayworth*, *supra*, 129 Cal.App.3d at pp. 727–728, citing *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827, 835.)

Appellants and I.E. United urge different results, however, because I.E. United contends that the Judgment and Peremptory Writ are prohibitory. I.E. United's argument is based upon both (1) ignoring the affirmative acts required of the Appellants and (2) misunderstanding what defines the status quo (and also misapplying its own preferred definition). But the rule is simple: "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 v. King* (1961) 192 Cal.App.2d 800, 804.) Here, the Judgment and Peremptory Writ are mandatory because they compel Supervisor Rowe to surrender her position as Third District Supervisor which, under the facts alleged by Appellants, she is entitled to hold.

A. The Judgment and Peremptory Writ Require Affirmative Acts by Appellants

The Judgment and Peremptory Writ require Appellants to take affirmative steps: 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.) I.E. United appears to concede these are affirmative acts (while disputing that they altered the status quo). (See AB at p. 53 ["[P]ortions of the judgment, which required the Board to rescind its appointment and to seat any person appointed by the Governor, appear on their face mandatory because they require affirmative action . . . ."].) Moreover, as the superior court itself recognized, the relief that is cast in prohibitory language is simply a "natural consequence of" these affirmative requirements. (See Exh. 21 at p. 398 ["[I]t is a natural consequence of the rescission of Rowe's appointment that she refrain from participating in Board meetings and other official activities."].)

B. The Judgment and Peremptory Writ Drastically Change the Status Quo

I.E. United advances two arguments for why the Judgment and Peremptory Writ did not alter the status quo. First, I.E. United argues that definition of status quo is the "last peaceable uncontested moment between the parties." (AB at p. 44.) Second, I.E. United argues that the status quo

could not have changed because the Judgment declared Supervisor Rowe's appointment null and void. (*Ibid.*) Both arguments are legally incorrect.

1. The Status Quo Is the Relative Position of the Parties Prior to the Entry of Judgment

As repeatedly explained by this Court and California's appellate courts for decades, the "status quo" is the position of the parties "prior to the entry of judgment." (*Dosch*, *supra*, 192 Cal.App.2d at p. 804; see also *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 884–885; *Clute v. Superior Court* (1908) 155 Cal. 15, 18–19; *Paramount Pictures*, *supra*, 228 Cal.App.2d at pp. 835–836.) I.E. United's alternative definition—the last actual peaceable, uncontested status which preceded the pending controversy—is based on language from two cases that involved preliminary injunctions, not the application of the automatic stay to injunctive relief in a final judgment. (See *People v. Hill* (1977) 66 Cal.App.3d 320; *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, 87.) Indeed, *United Railroads* is limited to preliminary or "preventive" injunctions that are in essence "prohibitive and restrains continuous acts of trespass upon plaintiff's property." (*Id*. at pp. 82, 89).

I.E. United attempts to wave away the many cases that expressly recite the correct standard—the position of the parties prior to entry of the judgment—on the grounds that these courts were actually applying I.E. United's alternative standard. (See AB at p. 47 ["while some Court of

Appeal decisions may recite this standard [], in all such cases the status quo would have been the same whether measured at the moment of the last uncontested status or when the injunction was entered"].) But these decisions should be taken at their word, not reinterpreted under a new standard by focusing only on the fact that the final outcome might have been the same.

One case has directly addressed the conflict between the standards that Appellants and I.E. United advocate for and concluded that Appellants' standard is the correct one. In *Atkinson*, the superior court granted the defendant's motion to disqualify the plaintiffs' attorneys. On a petition for writ of supersedeas, the defendant argued the status quo was the last peaceable uncontested status preceding the controversy between the parties—namely before the plaintiffs were represented by the allegedly conflicted counsel. (*Id.* at p. 885.) The plaintiffs argued that the relevant status quo is the moment immediately preceding the disqualification order—namely that plaintiffs were still represented by their counsel. (*Id.* at p. 885.) The court of appeal affirmed the correct standard, holding that a disqualification order required an affirmative act that "upset the status quo at the time the disqualification motion was filed." (*Id.* at p. 886.)

The standard is clear—the status quo is the relative position of the parties at the time judgment is entered. Here, that status quo is Supervisor Rowe holding the Third District Supervisor seat.

2. A "Null and Void" Finding Does Not Mean the Status Quo Was Unchanged

I.E. United offers a single quo warranto case to support its claim that the superior court's "null and void" finding equates to a finding of no change in the status quo. (AB at p. 51, citing *People ex. rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517.) *Westmoreland* does not compel such a result here because in a quo warranto proceeding, the judgment is self-executing and therefore not stayed pending appeal. (*Id*. at pp. 519–520.) But this is not a quo warranto proceeding (though it should have been) and the Judgment was not self-executing; had the Judgment been self-executing, there would have been no need for the superior court to issue the Peremptory Writ.

Neither of I.E. United's arguments support departing from the simple rule stated in *Dosch* that establishes the Judgment and Peremptory Writ here are in fact mandatory: "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.)

3. The Judgment and Peremptory Writ Alter the Relative Position of the Parties Even Under I.E. United's Alternative Definition

Even if this Court accepts I.E. United's alternative definition of status quo, the Judgment and Peremptory Writ are still undoubtedly mandatory in nature.

First, the last "uncontested" status was the status after Supervisor Rowe had been appointed, but before Respondents filed their lawsuit. At 6:30 a.m. on December 18, 2018, Respondents sent an email alleging that the Board's actions at the December 11 meeting violated the Brown Act. (Exh. 12 at p. 296; Petition at ¶ 14.) After receipt of that notice, at the December 18 Board Meeting, the Board voted to rescind the challenged actions, approved a new process for appointment, and ultimately appointed Supervisor Rowe. (Exh. 12 at pp. 297–299; Petition at ¶ 16.) Respondents never challenged the new appointment process or any other action taken on December 18, until they filed suit on December 31, 2018. Thus, the "last actual peaceable, uncontested status which preceded the pending controversy" was the status of Supervisor Rowe as a newly appointed Supervisor.

Second, even if the Court looks to the time that Respondents point to—the point in time on December 18 after Respondents sent their email and before Supervisor Rowe was sworn in, (see AB at p. 44)—the Judgment and Peremptory Writ *still* altered that status quo. At that time,

the Charter explicitly gave the Board 15 remaining days (from the original 30 days) to fill the vacancy (December 18, 2018 to January 2, 2019). But the Judgment and Peremptory Writ do not return the Board to that position; instead the Judgment and Peremptory Writ go far beyond simply nullifying the appointment and command the Board to seat the Governor's appointee.

C. Application of the Automatic Stay Here Serves Its Intended Purpose

The Legislature saw fit to make the automatic stay the general rule, whereas injunctions that are prohibitory in nature are the exception. I.E. United essentially complains that application of the automatic stay here would benefit Appellants, who lost at the superior court, at I.E. United's expense. But this complaint is fundamentally a complaint about the statutory scheme that the Legislature has enacted. The Legislature long ago decided that the right to appeal is fundamental, and protected that right by preserving the status quo while the appeal proceeds. The Legislature provided some exceptions—including in quo warranto proceedings (which I.E. United elected not to bring)—but none apply here.

Moreover, the recent City of Santa Monica case aptly illustrates how application of the automatic stay here preserved Appellants' right to appeal. There a writ of supersedeas issued, confirming that an order prohibiting candidates from serving on Santa Monica's City Council where they were not elected in a district-based election was automatically stayed pending

appeal. (Exh. 29 at p. 517; Exh. 31 at p. 548, *City of Santa Monica v. Pico Neighborhood Association* (B295935, writ of supersedeas issued Mar. 27, 2019).) The supersedeas writ prevented the City Council from having to hold new elections to replace the sitting councilmembers. (See Exh. 29 at p. 490.) The automatic stay preserved the appeal and avoided the unnecessary confusion that would have occurred if new elections had to be unwound, as the appeal ultimately resulted in a reversal of the superior court's decision. (*Pico Neighborhood Association et al. v. City of Santa Monica* (2020) 51 Cal.App.5th 1002, as modified on denial of rehearing (Aug. 5, 2020).) Just like the appellants in the *Santa Monica* case, Supervisor Rowe and the Board are entitled to the same benefit of the automatic stay and preserving their right of appeal to test the trial court decision.

IV. CONCLUSION

I.E. United filed this mandamus proceeding challenging Supervisor Rowe's title to office based on an alleged violation of the Brown Act. Over a century of California law holds that such challenges to a public official's seat may only be done through quo warranto, as authorized by the Attorney General. This Court should reaffirm this important and long-standing rule and hold that it was improper for I.E. United to challenge Supervisor Rowe's title through this mandamus proceeding. If this Courts holds otherwise, this Court should hold that the Judgment and Peremptory Writ are automatically stayed pending the final outcome of these appellate proceedings.

DATED: September 15, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Deborah J. Fox
DEBORAH J. FOX
T. STEVEN BURKE, JR.
MATTHEW B. NAZARETH
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

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.520(c)(1)

Pursuant to California Rules of Court, Rule 8.520(c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 8,400 words.

DATED: September 15, 2020

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: /s/ Deborah J. Fox
DEBORAH J. FOX
T. STEVEN BURKE, JR.
MATTHEW B. NAZARETH
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

3560486

DECLARATION OF SERVICE
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

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- **Reply Brief on the Merits**
- **Appellants' Motion For Judicial Notice**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume I of VI, Pages 1 – 295 of 1653**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume II of VI, Pages 296 – 593 of 1653**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume III of VI, Pages 594 – 833 of 1653**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume IV of VI, Pages 834 – 1132 of 1653**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume V of VI, Pages 1133 – 1364 of 1653**
- **Exhibits to Appellants' Motion for Judicial Notice - Volume VI of VI, Pages 1365 – 1653 of 1653**

on the interested parties in this action as follows:

Stacey M. Leyton, Esq.
Hunter B. Thomson, Esq.
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
sleyton@altshulerberzon.com
Attorneys for Petitioners, Michael Gomez Daly and Inland Empire United

Via TrueFiling and Email
(Exhibits via TrueFiling only)

Glenn Rothner, Esq.
Juhyung Harold Lee, Esq
ROTHNER, SEGALL & GREENSTONE
510 South Marengo Avenue
Pasadena, CA 91101-3115
grothner@rsglabor.com
hlee@rsglabor.com
Attorneys for Petitioners, Michael Gomez Daly and Inland Empire United

Via TrueFiling and Email
(Exhibits via TrueFiling only)

William P. Donovan, Jr., Esq.
Jason D. Strabo, Esq.
McDermott Will & Emery LLP
2049 Century Park East, Suite 3200
Los Angeles, CA 90067-3206
Wdonovan@mwe.com
jstrabo@mwe.com
Attorneys for Real Party in Interest Dawn Rowe

Via TrueFiling and Email
(Exhibits via TrueFiling only)

Court of Appeal of the State of California
Fourth Appellate District
3389 Twelfth Street
Riverside, CA 92501

Via TrueFiling

Clerk of the Court
San Bernardino Superior Court
Rancho Cucamonga District
8303 Haven Avenue
Rancho Cucamonga, CA 91730

Via Federal Express
(Exhibits omitted)

Alexandra Barnhill, Esq. Gabriel McWhirter, Esq. Benjamin P. Fay Jarvis, Fay & Gibson, LLP 492 Ninth Street, Suite 310 Oakland, CA 94607	**Via TrueFiling and Email** (Exhibits via TrueFiling only)
Stephanie L. Safdi Deputy County Counsel Office of the County Counsel County of Santa Clara 70 West Hedding Street, East Wing San José, CA 95110	**Via TrueFiling and Email** (Exhibits via TrueFiling only)

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/s/ Kathy Glass
Kathy Glass

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S260209**
Lower Court Case Number: **E073730**

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ADDITIONAL DOCUMENTS	RFJN Exhs Vol 2
ADDITIONAL DOCUMENTS	RFJN Exhs Vol 3
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Hunter Thomson Altshuler Berzon 5325311	hthomson@altshulerberzon.com	e-Serve	9/15/2020 2:02:43 PM
Gabriel McWhirter Jarvis, Fay & Gibson, LLP 280957	gmcwhirter@jarvisfay.com	e-Serve	9/15/2020 2:02:43 PM
Stacey Leyton Altshuler Berzon, LLP	sleyton@altshulerberzon.com	e-Serve	9/15/2020 2:02:43 PM
Glenn Rothner Rothner, Segall & Greenstone 67353	grothner@rsglabor.com	e-Serve	9/15/2020 2:02:43 PM
Matthew Nazareth Meyers, Nave, Riback, Silver & Wilson 278405	mnazareth@meyersnave.com	e-Serve	9/15/2020 2:02:43 PM
William Donovan McDermott Will & Emery LLP 155881	wdonovan@mwe.com	e-Serve	9/15/2020 2:02:43 PM
Ted Burke MEYERS, NAVE, RIBACK, SILVER & WILSON 247049	tsburke@meyersnave.com	e-Serve	9/15/2020 2:02:43 PM

Deborah Fox Meyers, Nave, Riback, Silver & Wilson 110929	dfox@meyersnave.com	e-Serve	9/15/2020 2:02:43 PM
Stephanie Safdi County of Santa Clara County Counsel's Office 310517	stephanie.safdi@cco.sccgov.org	e-Serve	9/15/2020 2:02:43 PM
Meghan Herbert Altshuler Berzon LLP	mherbert@altber.com	e-Serve	9/15/2020 2:02:43 PM
Kathy Glass Meyers Nave	kglass@meyersnave.com	e-Serve	9/15/2020 2:02:43 PM
Penelope Alexander-Kelley Office of the County Counsel	palexander-kelley@cc.sbcounty.gov	e-Serve	9/15/2020 2:02:43 PM
Stacey Leyton Altshuler Berzon LLP 203827	sleyton@altber.com	e-Serve	9/15/2020 2:02:43 PM

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9/15/2020

Date

/s/Kathy Glass

Signature

Fox, Deborah (110929)

Last Name, First Name (PNum)

Meyers, Nave, Riback, Silver & Wilson

Law Firm