Case No. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY and INLAND EMPIRE UNITED,
Petitioners and Respondents,

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY; ROBERT A. LOVINGOOD; JANICE RUTHERFORD; CURT HAGMAN; and JOSIE GONZALES,
Respondents and Appellants,

DAWN ROWE,
Real Party in Interest and Appellant.

After an Order by the Court of Appeal of the State of California,
Fourth Appellate District, Division Two
Case No. E073730

Appeal from the Superior Court of the State of California,
County of San Bernardino, Department 29, Honorable Janet M. Frangie
Case No. CIVDS1833846

ANSWER TO PETITION FOR REVIEW AND TO REQUEST FOR IMMEDIATE STAY

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INTRODUCTION

This petition arises out of the San Bernardino County Board of Supervisors' ("Board") repeated efforts to avoid the San Bernardino County Superior Court's September 18, 2019 ruling that the Board violated the Ralph M. Brown Act ("Brown Act" or "Act"; Gov. Code, § 54950 et seq.; all undesignated statutory references are to this Code) when it held a secret, seriatim vote to winnow the pool of eligible applicants for a vacant Board seat before ultimately selecting real party in interest Dawn Rowe ("Rowe") to fill the seat.

After months of proceedings that included two demurrers and multiple hearings, the superior court issued a thoroughly reasoned decision holding that the Board's vote violated the Brown Act's prohibition on secret actions, that it was not cured by the Board's purely ceremonial, purported rescission of the vote before officially selecting Rowe, and that the Act's statutory remedy was not foreclosed by quo warranto. The Court of Appeal correctly concluded that the challenge to this ruling by the Board and Rowe (collectively, "Appellants") raised no substantial issues.

On November 8, 2019, the superior court issued a peremptory writ of mandate and entered judgment declaring Rowe's appointment to be "null and void" and, among other things, prohibiting the Board from allowing Rowe to participate in further Board meetings or from giving effect to further votes taken by Rowe. Since that time, Appellants have taken no steps to comply with the ruling. Instead, they have requested multiple temporary stays of the superior court's judgment on the basis of hyperbolic and purely speculative claims of "confusion" and "emergency," filed a meritless petition for a writ of supersedeas in the Court of Appeal, and now seek review in this Court. In doing so, Appellants have made clear their objective is to run out the clock on the superior court's judgment until Rowe runs for election in the upcoming March 3, 2020 election as an

"incumbent" supervisor—with all the advantages that the designation and powers of incumbency provide—and until the current supervisorial term expires on December 7, 2020—after which point, the relief ordered by the superior court will become moot.

Not only would such a result completely undermine the effectiveness of the superior court's judgment, it would also frustrate the purposes of the Brown Act and the specific remedy established by the Legislature for violations of the Act. Local legislative bodies such as the Board exist for the public's benefit, and the Act is intended to protect the public's right to monitor and participate in all phases of the local governmental decisionmaking process. In 1986, because local agencies had persisted in "skirt[ing] the spirit and the letter of the law" after the Act's enactment, the Legislature amended it to establish that actions taken in violation of the Act were "null and void," and thereby give "teeth" to the Act. Staying the superior court's judgment would work at cross purposes with this legislative design, particularly in light of the upcoming election, as it would allow the Board to avoid any consequences for its blatant violations of the Act. The Court should thus reject Appellants' latest attempt to reap the benefits of the Board's unlawful conduct and deny the petition for review and request for an immediate stay.

Appellants fail to identify any grounds for the Court's intervention. They present a single, narrow issue for review—whether the judgment prohibiting Rowe from serving in an office to which she was never lawfully appointed was in reality a mandatory injunction that is automatically stayed pending appellate review—and contend that the Court of Appeal's summary order denying supersedeas created a split of authority and confusion over the "rule for governing during the course of litigation … in which title to office at issue." Appellants are mistaken: Their claims of purported error by the Court of Appeal are premised on a misunderstanding

of the distinction between mandatory and prohibitory injunctions. The superior court's order that the appointment of Rowe was null and void, and prohibitions on allowing any future participation as a Supervisor given that appointment's unlawful nature, require no affirmative acts. And the last uncontested status before the instant controversy arose was at the time that Respondents sent their letter protesting the Brown Act violation, before Rowe was appointed—that is, when the seat was vacant. Thus, these injunctive provisions merely preserve the status quo, and the authority on which Appellants rely is inapposite.

Appellants and amicus also complain here, as Appellants did below, that Respondents' exclusive remedy for the Board's Brown Act violation was through a quo warranto proceeding. Appellants are incorrect, but in any event, they do not seek review on this issue, which can be resolved at a later date in the appeal on the merits.

The Court should deny Appellants' petition and request for an immediate stay.

COUNTERSTATEMENT OF ISSUE PRESENTED FOR REVIEW[1]

Is a judgment automatically stayed pending appeal as a mandatory injunction where the judgment declares an action by a local agency null and void under the Brown Act, and orders additional relief relating to that declaration?

[1] Appellants' statement of the issue presented fails to comply with Rule of Court 8.504(b) insofar as it fails to state that the relevant judgment declared Rowe's appointment to be null and void, which is a necessary detail.

FACTUAL BACKGROUND

On December 3, 2018, then-Third District Supervisor James Ramos was sworn in to the State Assembly, leaving a vacancy on the Board. (Supersedeas Exhs., Vol. II, Exh. 12, p. 294.) In anticipation of this vacancy, on November 13, 2018, the Board voted to invite qualified electors to submit applications for the vacancy and committed to public interviews of all eligible applicants. (*Id*. at pp. 293-294.) Fifty-two individuals submitted timely applications, 48 of whom were determined to be eligible for the position. (*Id*. at p. 294.)

At its next meeting, over one Supervisor's objection, the Board decided to modify the process and interview only a subset of the applicants. (Supersedeas Exhs., Vol. II, Exh. 12, p. 294.) The Board decided that, outside any public meeting, each Supervisor could submit up to 10 candidate names to the Board's Clerk, and the Board would interview only those applicants who received at least two votes. (*Ibid*.)

Accordingly, on or prior to December 10, 2018, the Board voted outside a publicly noticed meeting and via secret e-mailed ballot for their preferred candidates.[2] (Supersedeas Exhs., Vol. II, Exh. 12, pp. 294-295.) The result of this vote was recorded on a "Tally Sheet," which was provided to Respondents in response to a public records request and shows the number of votes received by each of the 48 candidates, but not which Supervisor was the source of each vote. (*Id.* at p. 295; see *id.*, Vol. I, Exh. 9, p. 211.)

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[2] The Board misleadingly dismisses its violations of the Act as mere "procedural hiccup[s]." (Petn., p. 37; see also Amicus Letter Brief of California State Association of Counties, p. 4 (CSAC Brief) [suggesting that there were only "procedural irregularities or technical flaws" in the Board's appointment process].)

The Board then notified the 13 "nominees" who survived the secret ballot that they would be interviewed at a Special Meeting on December 11, 2018. (Supersedeas Exhs., Vol. II, Exh. 12, p. 295.) The 35 candidates not selected via secret ballot received no further consideration and were not invited to interview. (*Ibid*.) At the conclusion of the December 11 interviews, the Board selected five of the 13 "nominees" as finalists. (*Ibid*.) The Board noticed a Special Meeting for December 13, 2018; the agenda stated that the Board would conduct final interviews and select the Third District Supervisor. (*Ibid*.)

The Board received two demand letters urging that it cure or correct the December 10 secret ballot conducted in violation of the Act by "voiding the secret ballot and 'allow[ing] the equal processing of all 48 applicants with equal time to give their speech to the Board' before the BOARD took its final vote to fill the Third District Supervisor position." (Supersedeas Exhs., Vol. II, Exh. 12, pp. 295-296.) Rather than conduct a second round of interviews, the Board adjourned the December 13, 2018 Special Meeting shortly after it opened, on County Counsel's advice. (*Id.* at p. 296.)

At its December 18, 2018 meeting, following a public comment period, the Board voted to "rescind [its] prior actions." (Supersedeas Exhs., Vol. II, Exh. 12, p. 297.) But the Board did not cure or correct the unlawful vote by interviewing the unlawfully excluded candidates or otherwise meaningfully reopening the process. Instead, immediately following this "rescission," the Board Chairperson moved to appoint Rowe. (*Ibid*.) The motion narrowly failed by a 2-2 vote. (*Ibid*.) The Board then voted to engage in an ad hoc interview process by which each Board member would submit three names and select six candidates for interviews. (*Ibid*.) Five of the six candidates selected for interviews had already been interviewed on December 11 and then chosen as finalists. (*Id*. at p. 297.)

The interviews with the candidates were brief, ranging from 10-17 minutes (compared to 30-40 minutes in the earlier interviews). (Supersedeas Exhs., Vol. II, Exh. 12, p. 298; *id.*, Vol. I, Exh. 9, pp. 161, 164.) The Supervisors' conduct was inconsistent with any purported rescission of the prior unlawful selection process. For instance, three of the four Supervisors declined to ask the sole new candidate any substantive questions. (*Ibid*.) The Board Chairperson declined to ask questions of *any* candidates. (*Ibid*.) Notwithstanding the Board's purported "rescission" of the earlier interviews, the Supervisors asked candidates questions that explicitly referred to those candidates' answers in previous interviews. (*Id.* at p. 298.) Two candidates declined to make statements to the Board "and instead chose to rely on their previous remarks and invited questions." (*Ibid*.) One Supervisor "openly acknowledged" that his vote for Rowe was in reliance "on the preferences of the other Board Members as expressed during the December 10, 2018 secret ballot process," even stating that Rowe "came up high on everyone's list." (*Id*. at pp. 298-299.)

Immediately following these six interviews, and without further public comment or discussion, the Board voted to appoint Rowe as Third District Supervisor. (Supersedeas Exhs., Vol. II, Exh. 12, p. 299.)

PROCEDURAL HISTORY

On December 31, 2018, Respondents filed a petition for writ of mandate asserting that the Board's process of appointing Rowe violated the Brown Act. (Exhs. to Petn. for Writ of Supersedeas (Supersedeas Exhs.), Vol. I, Exh. 2, pp. 28-29; see § 54960.1.) Appellants demurred to Respondents' petition on the grounds that quo warranto provided the exclusive remedy for their claims and that Respondents had failed to state a claim under the Act. (*Id.*, Exh. 3.) After the superior court overruled Appellants' demurrer as to quo warranto but granted the demurrer with leave to amend on another ground (*id.*, Exh. 8), Respondents filed an amended petition on April 8, 2019 (*id.*, Exh. 9). Despite Respondents' efforts to have their petition promptly heard on the merits (see, e.g., *id.*, Exh. 6 [noticing motion for peremptory writ of mandate to be heard on April 16, 2019]; Exh. 8, p. 153 [noting Respondents' willingness to forego full 30 days to amend petition]), Appellants again demurred on essentially the same grounds as their earlier demurrer, including the quo warranto claim that the superior court had already overruled. (See *id.*, Vol. II, Exh. 18, pp. 365-366.)

Finally, after overruling Appellants' second demurrer in its entirety, the superior court heard Respondents' motion for a peremptory writ of mandate on June 28, 2019. (Supersedeas Exhs., Vol. I, Exh. 10.) On September 18, 2019, the superior court issued a thorough, 27-page Statement of Decision holding that the process by which the Board appointed Rowe violated the Brown Act. Specifically, the court concluded that "[i]t is undisputed from the record that after the December 4, 2018 meeting, the BOARD MEMBERS conducted … an off-the-record seriatim meeting and vote." (*Id.*, Vol. II, Exh. 12, p. 304.) The court further found that, "in violation of the open meeting requirement of the Brown Act, the

BOARD did not provide a public record of the candidate lists provided by the BOARD MEMBERS." (*Ibid.*)

The court also found that "the purported corrective actions taken by the BOARD at the December 18, 2018 meeting were pro forma at best and did not constitute a cure." (Supersedeas Exhs., Vol. II, Exh. 12, p. 306.) Rather than " 'restore' the candidates to the positions they would have had absent the illegal actions" or " 'void' those actions such that they had no legal force or effect," the Board simply conducted "a 'ceremonial' hearing to satisfy the open meeting requirement, while continuing to rely on findings and votes previously taken in secret," which "does not establish a 'cure' of the BOARD's previous violations." (*Id.* at p. 308.) Accordingly, the court determined that "[t]he appointment of Dawn Rowe as Third District Supervisor is null and void," granted Respondents' motion for a peremptory writ, directed Respondents to prepare a judgment consistent with the Statement of Decision, and set a show cause hearing regarding Appellants' compliance with its yet-to-be-entered judgment. (*Id.* at p. 317.)

Respondents submitted a proposed judgment and peremptory writ of mandate on September 27, 2019. (Supersedeas Exhs., Vol. II, Exhs. 13, 14.) Appellants filed two sets of objections, which the superior court overruled before issuing the judgment and peremptory writ of mandate as proposed. (*Id.*, Exhs. 15, 17, 18, 21, 23, 24.)

On November 21, 2019, Appellants applied ex parte to vacate the superior court's scheduled show cause hearing, confirm that all the relief the superior court ordered was mandatory rather than prohibitory, and set a writ return date no earlier than *sixty* days following the Court of Appeal's issuance of a remittitur. (Supersedeas Exhs., Vol. II, Exh. 25.) In the alternative, and without explanation, Appellants sought a 30-day temporary stay of the judgment. (*Ibid.*) Following Respondents' opposition, the

superior court denied Appellants' application but granted them a 10-day temporary stay to seek relief from the Court of Appeal.

Later that day, Appellants filed a petition for writ of supersedeas and request for an immediate stay in the Court of Appeal, which Respondents opposed on November 25, 2019. The Court of Appeal granted a temporary stay on November 26, 2019, but on January 8, 2020, lifted that stay and denied the supersedeas petition. (Petn. for Review (Petn.), Exh. A, pp. 1–2 (Order).) As relevant here, the court determined that, "upon a finding that the appellant Board of Supervisor's appointment of real party Dawn Rowe was null and void as arising out of a violation of the Brown Act [citation], 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. [Citation.] The same finding of a null and void appointment means there was no change in status quo by the superior court's order." (*Id.* at p. 1.) Further, in denying Appellants' alternative request for a discretionary writ of supersedeas, the Court of Appeal stated that "any injury to appellants is not 'irreparable' and the potential injury to respondents becomes disproportionate relative to appellants," and that "Appellants have not facially demonstrated the merits of the issues they present." (*Id.* at p. 2.)

Appellants filed the instant petition for review and request for an immediate stay on January 17, 2020.

ARGUMENT

I. Appellants' request for an immediate temporary stay should be denied.

Appellants seek a temporary stay by January 23, 2020, for the ostensible purposes of avoiding "confusion about who, if anybody, occupies the Third District Supervisor seat at [the Board's January 28, 2020] meeting (and beyond)"; ensuring the Board is not "short-handed and adversely impacted for the entirety of the appeal"; preventing the Governor from appointing someone to the Third District Supervisor seat (as the County Charter expressly allows); and "avoid[ing] confusion prior to the [superior court's] January 24, 2020 hearing" regarding Appellants' compliance with its prior rulings. (Petn., pp. 20-22.)

However, there is no reason for any confusion about whether Rowe continues to serve as Third District Supervisor—she does not. Appellants fail to justify any need for an immediate temporary stay before this Court has the opportunity to consider their petition for review and Respondents' answer. Moreover, Appellants fail to acknowledge that the March 3, 2020 election for the next Third District Supervisor term is rapidly approaching, and that Rowe has already sought to leverage the Board's unlawful appointment by declaring her candidacy as the incumbent Supervisor. Because allowing Appellants to capitalize on the Board's violations of the Act runs counter to the Act's purposes and specific statutory remedy and would undermine the effectiveness of the relief the superior court ordered, and because Appellants have otherwise failed to present adequate grounds for a stay, Appellants' request should be rejected.

A. Appellants fail to state adequate grounds for an immediate temporary stay.

Appellants urge a stay "to avoid confusion prior to the [superior court's] January 24, 2020 hearing on the Order[s] to Show Cause"

regarding compliance and contempt and "about who, if anybody, occupies the Third District Supervisor seat at [the Board's January 28, 2020] meeting (and beyond)." (Petn., pp. 20-22.) But the only possible confusion here would be of Appellants' own making. The superior court has unequivocally held Rowe's appointment to be null and void and prohibited Rowe from continuing to act as Supervisor pending further proceedings in the Court of Appeal, which has declined to stay the superior court's judgment while it considers Appellants' appeal. Appellants' disagreement with these rulings does not establish uncertainty.

Nor is a stay justified by Appellants' assertion that "the Board's ability to function in the event two members are absent, or to address any emergencies that may arise, would be impeded if the Third District Supervisor seat is made effectively vacant." (Petn., p. 20.) Any harm caused by a vacancy on the Board can easily be remedied by the Governor's appointment of a replacement pursuant to the County's charter. (Supersedeas Exhs., Vol. I, Exh. 1, p. 14.) Moreover, Appellants identify no specific actions requiring four votes, point to no evidence regarding the likelihood of such actions arising, and concede that there can still be a quorum for such actions even if the Third District Supervisor seat remains vacant.

Finally, in light of the superior court's determination that Rowe's appointment was null and void, the fact that Ramos vacated the Third District Supervisor seat over a year ago, and the County Charter provision authorizing the Governor to fill vacancies on the Board unless an appointment occurs within 30 days, Appellants' claim that an immediate stay is required because "a new appointment may be prematurely made to the Third District Supervisor seat by the Governor" also fails. (Petn., p. 21.) And any claim of "competing claims to the seat … if Appellants' appeal succeeds" (*ibid.*) is speculative and unlikely given the Court of

Appeal's determination that Appellants failed even to "facially demonstrate[] the merits of the issues they present[ed]" in their supersedeas petition (Order, p. 2).

B. An immediate temporary stay would irreparably frustrate the relief ordered by the superior court, the purposes of the Brown Act, and the remedy set forth therein.

As noted, the election to fill the Third District Supervisor seat for the next full term will take place on March 3, 2020.[3] (Supersedeas Exhs., Vol. II, Exh. 33, pp. 563, 570.) Despite the superior court's judgment, Rowe has identified herself for purposes of that election as the incumbent "San Bernardino County Supervisor." (*Id.* at p. 579.)

Although Appellants premise their request for an immediate temporary stay on the pending January 24, 2020 show cause hearing and January 28, 2020 Board meeting, granting their request will allow Appellants to further capitalize on the Board's unlawful appointment by enabling Rowe to continue to represent to the public that she presently serves as Third District Supervisor. But rewarding Appellants in this way would run directly contrary to the Brown Act's purposes and its nullification remedy: The Act is intended "to facilitate public participation in all phases of local government decisionmaking and to curb misuse of the democratic process by secret legislation of public bodies." (*International Longshoremen's and Warehousemen's Union v. Los Angeles Export Terminal, Inc.* (1999) 69 Cal.App.4th 287, 293.) Although before 1986 "action taken at a meeting in violation of the … Act [remained] nonetheless valid" (e.g., Legis. Counsel's Dig., Assem. Bill No. 2674 (1985-1986 Reg. Sess.) as amended June 4, 1986, p. 2), the Legislature amended the Act to

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[3] The Board unlawfully appointed Rowe to fill the remainder of the *current* Third District Supervisorial term, which ends on December 7, 2020. (Supersedeas Exhs., Vol. II, Exh. 33, p. 563.)

"render these actions null and void, thus putting 'teeth' into the Brown Act" and preventing local legislative bodies from "skirt[ing] the spirit and letter of the law" (e.g., Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2674 (1985-1986 Reg. Sess.) as amended June 4, 1986, p. 4). Because granting an immediate temporary stay would allow the Board to skirt the spirit and letter of the law, the Court should deny Appellants' request.

In sum, Appellants fail to present any reason why the Court must grant an immediate stay rather than decide the petition for review in due course.

II. Appellants' petition for review should also be denied.

As noted, Appellants present a single issue for review: whether the superior court's judgment is automatically stayed pending appeal.[4] But

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[4] Appellants' and CSAC's quo warranto arguments are irrelevant. Appellants do not raise quo warranto as an issue presented for review. Moreover, that issue was not addressed by the Court of Appeal's Order and is therefore not before this Court (see Order, p. 1 ["[W]e do not here determine the merits of the appeal …."]).

In any event, Appellants and CSAC are mistaken about quo warranto's purported exclusivity. Although neither Appellants nor CSAC dispute that the Brown Act applied to the Board's appointment of Rowe, they apparently contend that the express remedy established by the Legislature for violations of the Act is foreclosed. But as CSAC itself notes, quo warranto provides the exclusive remedy *only* " '[i]n the absence of constitutional or statutory regulations providing otherwise.' " (CSAC Brief, p. 7, quoting *San Ysidro Irrigation District v. Superior Court of San Diego County* (1961) 56 Cal.2d 708, 714-715). Here, the Act expressly authorized Respondents to "commence an action by mandamus or injunction for the purpose of obtaining a judicial determination that an action taken by a legislative body of a local agency in violation of [the Act] is null and void." (§ 54960.1, subd. (a)). As in cases involving statutory remedies under the Elections Code (see, e.g., *Salazar v. City of Montebello* (1987) 190 Cal.App.3d 953, 957; *Powers v. Hitchcock* (1900)

their arguments are premised on a fundamental misunderstanding of the law regarding prohibitory injunctions. The Court of Appeal's Order correctly applied the law, created no split of authority, and does not otherwise meet the Court's criteria for review.

A. The trial court's order is prohibitory, not mandatory.

Appellants focus on two of the judgment's provisions: the requirements that the appointment be rescinded and that the Board seat whomever the Governor appoints (as the law requires). But Appellants' argument that the entire injunction must be stayed ignores *both* the rule that the prohibitory aspects of a mixed injunction are *not* stayed pending appeal *and* clear precedent that for purposes of determining whether an injunctive provision is mandatory—in that it requires a change to the status quo—the "status quo" is the *last uncontested state* preceding the parties' dispute. Although Respondents made these points below, Appellants fail to address them here, because they are fatal to Appellants' petition.

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129 Cal. 325, 326-327), the availability of quo warranto relief does not foreclose available statutory remedies.

Moreover, as the superior court correctly found, "[a]lthough the ultimate effect may result in Rowe[']s removal [from] the Third District Supervisor Seat[,] [t]his is not an action against Dawn Rowe for unlawfully holding or usurping public office." (Supersedeas Exhs., Vol. I, Exh. 8, p. 153.) Rather, this is an action against the *Board* for failing to comply with the Act in appointing Rowe. And it is well established that "[t]itle to office may be *incidentally* determined in mandamus [citations], and discretion rests with the court to determine whether the title should be so determined." (*Stout v. Democratic County Central Committee of City and County of San Francisco* (1952) 40 Cal.2d 91, 94, emphasis added.) Indeed, this Court long ago rejected "the proposition that the title to an office cannot be tried—that is, inquired into—when it is incidentally involved in a [mandamus] proceeding which a third party has a right to institute." (*McKannay v. Horton* (1907) 151 Cal. 711, 715.)

1. The injunctive provisions at issue here are prohibitory in that they neither require any affirmative acts nor modify the status quo.

"An injunction is prohibitory which merely has the effect of preserving the subject of the litigation in statu quo …." (*Johnston v. Superior Court In & For Los Angeles County* (1957) 148 Cal.App.2d 966, 970.) An injunction is mandatory, by contrast, where it *both* "requires affirmative action *and* changes the status quo." (*Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 728 (*Hayworth*), emphasis added.) Appellants acknowledge these principles but misunderstand how the status quo is defined, and therefore operate from the mistaken presumption that the status quo is Rowe's appointment to the Third District Supervisor position. In fact, the status quo is defined as "'the last actual peaceable, uncontested status which preceded the pending controversy.'" (*People v. Hill* (1977) 66 Cal.App.3d 320, 331.) Here, the last actual peaceable, *uncontested* status—indeed, the status when Respondents first alerted the Board to its Brown Act violation—was a vacancy in the Third District Supervisor position.

As explained in *United Railroads of San Francisco v. Superior Court In and For City and County of San Francisco* (1916) 172 Cal. 80, 87 (*United Railroads*), "[t]here is no magic in the phrase 'maintaining the status quo' which transforms an injunction essentially prohibitive into an injunction essentially mandatory." The *United Railroads* plaintiff successfully sought to enjoin San Francisco from using railcars on a portion of its tracks and related infrastructure in excess of the number provided for in the parties' contract. San Francisco argued on appeal that because it had "for several months" been operating excessive numbers of railcars under of claim of right without having been prevented from doing so, it "was in legal possession of the interest claimed and, consequently, the injunction, though

prohibitory in form, requiring it merely to cease operating such cars, is, in effect, an order directing the city to relinquish its possession of the incorporeal hereditament and, therefore, mandatory in character." (*Id*. at p. 86.) The Supreme Court disagreed, explaining that "the phrase [status quo] has been defined to mean 'the last actual peaceable, uncontested status which preceded the pending controversy[,]'" and that "[t]here was no such uncontested possession" because "petitioner [had] protested before beginning its action, protested vigorously against the misuse of its property, and only brought its action when its protests were disregarded." (*Ibid.*) Though the defendant's wrongful use of the contested lines existed when the case was filed and the injunction entered, that did not alter the status quo: "It is not easy to perceive what more the plaintiff should have done in the assertion and maintenance of its rights. Nor, upon the other hand, can it be perceived how the conduct of the city officials conferred upon the city any new rights." (*Ibid*.)

The same is true here. Respondents "protested before beginning [their] action" by sending a letter on December 18 (prior to Rowe's appointment) alerting the Board to its Brown Act violation, and "only brought [their] action when [their] protests were disregarded." (*United Railroads*, *supra*, 172 Cal. at p. 86; compare Supersedeas Exhs., Vol. I, Exh. 9.) Moreover, just as with the city's ongoing use of the contested railroad lines, Rowe's appointment did not create any new rights—rather, as the trial court below held, it was null from the outset. Rowe *never* held the position of Supervisor "uncontested."

Although relating to quo warranto rather than a Brown Act action, *People ex rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517

(*Westmoreland*), is similarly on point.[5] There, the trial court issued an order declaring that a city had never legally come into existence; the accompanying injunction was held by the Court of Appeal to be "essentially negative in character." (*Id.* at p. 521.) Echoing arguments Appellants here make, the *Westmoreland* petitioner sought to stay the judgment pending appeal, arguing that, although couched in prohibitory language, the judgment was mandatory in substance because it "change[d] the status which was enjoyed by petitioner at the time the judgment was rendered" and "disturb[ed] the relative position or rights of the parties." (*Id*. at p. 520.) The court disagreed, holding that because the superior court held that the petitioner "had never legally come into existence," "its legal status subsequent to that time [of alleged incorporation] has not been changed by the judgment." (*Id*. at p. 521.) Because it had never "been established that [the city] ever enjoyed the status of a legally constituted municipality," the trial court's order requiring the city to wind up its affairs (which entailed incidental affirmative action) did not alter the status quo and was thus prohibitory in nature. (*Id*. at pp. 520-521.) Here, too, because Rowe never lawfully held the seat, the injunction forbidding her from voting and participating in Board affairs was prohibitory, not mandatory.

CSAC incorrectly argues that the rule that the status quo is measured from " 'the last actual peaceable, uncontested status which preceded the pending controversy'" (*Hill*, *supra*, 66 Cal.App.3d at p. 331) applies only to injunctions *pendent lite* (CSAC Brief, pp. 17-18). But the only authority amicus contends supports this proposition does not so hold. *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872 (*URS*) addressed

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[5] As discussed *infra*, nothing in *Westmoreland* suggests that its holding is inapplicable to an order under § 54960.1 that an action is "null and void."

whether an attorney disqualification order was prohibitory or mandatory. The court considered whether the appropriate measuring point for the status quo was the filing of the overall lawsuit between the parties or the specific issue—the filing of the disqualification motion—that was the subject of the injunction. The court judged that it was the latter, pointing to a string of policy reasons in support of this conclusion. (*Id*. at p. 886-887 ["severing the tie between client and attorney cannot be classified as routine or a return to the normal state of affairs"; lack of stay "(probably) sounds the death knell of the representation … at hand" and may have broader effects on attorney-client relationship; and discussing administrative ease of bright-line rule automatically staying attorney disqualification order on filing of appeal].) The policy reasons here point in the opposite direction: the rule that CSAC posits would mean that a preliminary injunction remains in effect during an appeal but then, after conversion to a permanent injunction and entry of final judgment, would be stayed—so that parties would be better off obtaining only temporary, not final, relief. Even putting aside policy rationales, measuring the status quo from the filing of the disqualification motion is consistent with the principle that the status quo is defined as "the last actual peaceable, uncontested status which preceded the pending controversy," which was the dispute over attorney disqualification, not the underlying lawsuit.

In any event, regardless of how the status quo is measured, the result is the same: Rowe was not Third District Supervisor. When the superior court entered judgment, Rowe had never been lawfully appointed to the position. Therefore, the judgment that she may not serve in the position neither requires an affirmative act *nor* changes the status quo—as measured from any point in time.

Hernandez v. Town of Apple Valley (2017) 7 Cal.App.5th 194 (*Hernandez*), which the Court of Appeal referenced in its Order, illustrates

the point. In *Hernandez*, where a town council violated the Brown Act at the meeting at which it placed a voter initiative on the ballot, that action, and the election itself, were "null and void." (*Id.* at p. 209; see also *id*. at p. 197 [violation of Act "invalidates the special election on the Initiative"].) As discussed in *Westmoreland*, *supra*, 135 Cal. App. at p. 521, where a superior court's judgment was that the petitioner "had never legally come into existence," "its legal status subsequent to that time [of alleged incorporation] has not been changed by the judgment." The same principles apply here.

2. The Court of Appeal correctly concluded that the superior court's order was prohibitory rather than mandatory.

The Court of Appeal correctly denied Appellants' petition for writ of supersedeas as of right, finding that the inhibitory injunction did not alter the status quo and that the "seemingly mandatory acts required in the superior court's injunction and writ of mandate are merely incidental" inhibitory portions." (Order, p. 1.)

The central operative provisions of the injunction do not compel Appellants to undertake any affirmative actions. Prohibiting the Board from giving effect to Rowe's future votes and from allowing her participation as Supervisor does not require the Board to alter any decisions it took while Rowe may have held the position on a *de facto* basis or otherwise "compel [Appellants] to violate a contract … [or] to surrender any rights that were lawfully held when the injunction was issued." (*People ex rel. Brown v. iMergent, Inc.* (2009) 170 Cal.App.4th 333, 343 (*iMergent*).) Rather, the judgment directs the Board to cease engaging in a continuing unlawful course of conduct contested by Respondents from the outset. That is a prohibitory injunction. (*See Dry Cleaners & Dyers Institute of San Francisco & Bay Counties v. Reiss* (1936) 5 Cal.2d 306,

309 ["An order or decree restraining the further continuance of an existing condition does not take on the character of a mandatory injunction merely because it enjoins the defendants from continuing to do the forbidden acts."]; *Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1048 ["An injunction designed to preserve the status quo as between the parties and to restrain illegal conduct is prohibitory, not mandatory …."].)

A "prohibitive order seeks to restrain a party from a course of conduct or halt a particular condition. [Citation.] The character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act. [Citation.]" (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13 (*Mobile Magic*).) That the Board may be required to take certain incidental affirmative steps—such as removing Rowe's name from the County website or other official documents—does not alter the character of the injunction.[6] (See *ibid.* [injunction prohibiting mobile home park from continuing to display model mobile homes prohibitory, even though it required affirmative act of removal of model homes currently displayed,

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[6] Appellants argue that the judgment's requirements that the Board rescind Rowe's appointment and seat any person appointed by the Governor are mandatory because they require affirmative action and alter the status quo. But besides being ancillary to the injunction's prohibitory nature, these provisions do not alter the status quo in place at the last time period preceding the parties' dispute, because they do not order Appellants "to surrender any rights that were lawfully held when the injunction was issued." (See *iMergent*, *supra*, 170 Cal.App.4th at p. 343.) The former merely returns them to the position they were in before Rowe was appointed in violation of the Brown Act, and the latter merely orders them to obey their own Charter, which requires that absent (a lawful) appointment after passage of 30 days, the Governor shall make the appointment. In any event, as discussed *infra*, even if these provisions were mandatory and non-ancillary, that would not preclude giving effect to the prohibitory parts of the injunction.

because removal was "incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision"]; *Jaynes v. Weickman* (1921) 51 Cal.App. 696, 699-700 (*Jaynes*) [requirement that defendant remove trade names from place of business and vehicles did not make otherwise prohibitory injunction mandatory].)

Appellants argue that the Court of Appeal erred because a finding that the appointment was null and void is not self-executing. (Petn., p. 35.) Appellants point to no authority supporting this contention, however, but instead cite *Westmoreland* for the proposition that a judgment in a quo warranto proceeding is self-executing.

Appellants make no effort to explain why a judgment in a quo warranto proceeding finding that a government action was without legal effect is self-executing (*Westmoreland, supra*, 135 Cal.App.at p. 520), while a judgment in a Brown Act case finding a government action "null and void" (see, e.g., *Hernandez*, *supra*, 7 Cal.App.5th at p. 209) is not.[7] The superior court's order that Rowe's appointment was "null and void," and its injunctive provisions prohibiting her participation or official action

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[7] Insofar as Appellants and amicus urge the Court to adopt a rule whereby local agencies can, as a matter of course, automatically stay the nullification of their secret actions by filing an appeal, the Court should reject such invitation as contrary to the Act as a whole and to section 54960.1 in particular. (See, e.g., § 54950 ["The people insist on remaining informed so that they may retain control over the instruments they have created."]; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2674 (1985-1986 Reg. Sess.) as amended June 4, 1986, p. 4 [Legislature added section 54960.1 to "put[] 'teeth' into the Brown Act" and prevent local agencies from "skirt[ing] the spirit and letter of the law"]; see also Cal. Const., art. 1, § 3, subd. (b)(1) (added by Prop. 59, as approved by voters, Gen. Elec. (Nov. 2, 2004) ["A statute, court rule, or other authority … shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."].) The availability of supersedeas is sufficient to protect local agencies' rights pending appeal.

as a Board member, are likewise self-executing. (See Eisenberg, Cal. Practice Guide: Civil Appeal and Writs (The Rutter Group 2019) § 7:2.4 [self-executing means no process for enforcement is required]; *Veyna v. Orange County Nursery, Inc*. (2009) 170 Cal.App.4th 146, 156 ["The rule has always been that '[i]f the judgment is self-executing and requires no process for enforcement, there is no statutory stay, and, as a general rule, supersedeas is equally inappropriate.' " (quoting 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 301, p. 340)].)

3. Appellants' authority does not hold otherwise, and there is no split of authority justifying review.

Appellants' claim that similar injunctions are routinely held to be mandatory rests on a misunderstanding of how the relevant status quo is identified. In *all* of these cases, the injunction at issue required reversal of the last uncontested status of the parties *and* required the parties to take some kind of affirmative action.

In *Clute v. Superior Court in and for City and County of San Francisco* (1908) 155 Cal. 15, on which Appellants heavily rely, it was uncontested that at the time the dispute at issue arose the defendant was the duly elected treasurer and appointed manager of the plaintiff corporation. (*Id*. at p. 17.) During the time that he validly held this office, the board of directors of the plaintiff corporation voted to remove him from his positions. (*Ibid*.) He disputed whether the board had either the authority to do so or to initiate legal action. (*Id.* at p. 19). The superior court issued an injunction preventing him from "collecting any moneys of the corporation or disbursing the same except on the written order of the president and secretary, … representing himself as manager and treasurer of the corporation and 'from interfering with, or directing, or attempting to direct or control the employees of said corporation.' " (*Id*. at p. 17.) That injunction was mandatory because there was no dispute that the defendant

had validly held the treasurer and manager positions before any dispute arose.

Feinberg v. Doe (1939) 14 Cal.2d 24, is similarly unhelpful to Appellants. There, the Court held mandatory an order enjoining the defendants "from employing … Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers' Union" because at the time predating the lawsuit and issuance of the order Greenwood was indisputably an employee. (*Id.* at p. 27.) Here, by contrast, the status quo is the vacancy in the position of Third District Supervisor.

The portion of *Paramount Pictures Corp. v. Davis* (1964) 228 Cal.App.2d 827 (*Paramount*), on which Appellants rely is similarly inapposite; indeed, it supports Respondents' position in important respects. There, a movie studio sued Bette Davis for specific performance of a contract to require her to shoot an additional scene for a movie for which principal photography had completed. At the time the suit was filed, Davis was under an exclusive contract to film a movie with a different studio, the validity of which no party disputed. (*Id*. at pp. 832, 838.) The superior court issued an injunction restraining Davis from rendering her services for *any* movie studio unless she agreed to participate in the additional scene for Paramount. (*Id*. at p. 833.) The Court of Appeal held that the portion of the injunction restraining Davis from fulfilling her valid contract to the third-party studio was a mandatory injunction that would be stayed pending appeal but that the injunction was in all other respects prohibitory. (*Id*. at p. 839.) The mandatory portion of the injunction altered the status quo because it had the effect of terminating her rights under a valid contract that was in place at the time the dispute arose. (*Id.* at p. 838.) Contrary to Appellants' argument, the court's determination that this injunctive provision was mandatory did not rest solely on the fact that, "although

framed in prohibitory language, [it] was intended to coerce or induce defendant into immediate affirmative action, i.e., to make the additional scene for Paramount." (Petn., p. 32.) In fact, the portion of the injunction that prohibited Davis from entering into *new* contracts, while *also* intended to coerce her into filming the additional scene, was held "prohibitory and [wa]s not stayed by the appeal." (*Paramount*, at p. 839.) The provision prohibiting Davis from fulfilling her obligations to the third-party studio was mandatory because it compelled her to breach a different contract that was *operative and valid* at the time the dispute arose. (*Ibid*.)

Appellants also place great weight on *Dosch v. King* (1961) 192 Cal.App.2d 800, 804 (*Dosch*), and quote it for the proposition that an injunction is mandatory where it "compels a party to surrender a position he holds and which upon the facts alleged by him he is entitled to hold." (Petn., p. 25.) The actual scope of the case does not sweep so broadly, however, and does not alter the well-established rule that an "injunction is prohibitory if it merely has the effect of preserving the subject of the litigation in *statu quo*." (*Dosch*, at p. 804.) The key to *Dosch*, as with other cases, was defining the relevant status quo. At issue was the disputed ownership of a business that was the subject of a contract between the parties. Dosch had been the rightful owner of the business and had entered into a contract to sell the business to King. The Court of Appeal determined that Dosch had never transferred possession of the business, meaning that the injunction preventing King from operating the business was prohibitory. (*Id*. at pp. 804-805.) Having determined that possession had not been transferred, the Court of Appeal declined to stay enforcement of the prohibitory injunction pending appeal. Here, by contrast, Rowe never lawfully held the Third District Supervisor position; in fact, Rowe did not hold the position at all at the time Respondents sent the Brown Act letter.

Finally, there is no split of authority regarding the distinction between prohibitory and mandatory injunctions. Appellants argue that *City of Santa Monica v. Pico Neighborhood Association* (B295935), in which an injunction was automatically stayed, is "nearly identical in relevant aspects to this one" (Petn., p. 23), because it is a "similarly complex matter" involving a dispute "that impacted the ongoing make-up of the Santa Monica City Council" and members' right to hold office (*id.* at p. 26). But the sole issue on appeal in *Santa Monica* was the nature of paragraph 9 of the judgment at issue, which prohibited "[a]ny person, other than a person who has been duly elected to the Santa Monica City Council through a district-based election in conformity with this judgment, … from serving on the Santa Monica City Council after August 15, 2019." (Supersedeas Exhs., Vol. II, Exh. 29, p. 500, ¶ 28.) The injunction suspended the operation of the entire Santa Monica City Council until the city held new elections that complied with other portions of the court's judgment, and the electoral system the city was required to abandon had been in operation *for over seven decades* before judgment was entered. (*Id*. at p. 505, ¶ 38(e).) Here, the injunction at issue does not require the Board to adopt a new selection system, and there is no longstanding status quo that the injunction alters.[8]

In sum, the Order below was in accord with long-established law on prohibitory injunctions.

4. Whether an injunction is prohibitory or mandatory is examined provision by provision.

Finally, even if Appellants were correct that *parts* of the superior court's order were mandatory in nature, the appeal still would not stay the

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[8] CSAC's separate argument that the Order below conflicts with *URS* (CSAC Brief, p. 17), is mistaken for the reasons discussed *supra*.

injunction's prohibitory aspects. (See *Ohaver v. Fenech* (1928) 206 Cal. 118, 123 [prohibitory aspects of injunction are not stayed pending appeal even if injunction also contains mandatory aspects that are stayed]; *Hayworth*, *supra*, 129 Cal.App.3d at p. 727 [automatic stay provisions of Code of Civil Procedure section 916 apply to writs of mandate].) Where a judgment includes both prohibitory and mandatory provisions, "an appeal will stay operation of the mandatory features but not of the prohibitory." (*Kettenhofen v. Superior Court In and For Marin County* (1961) 55 Cal.2d 189, 191; see also *Ironridge Glob. IV, Ltd. v. ScripsAmerica, Inc*. (2015) 238 Cal.App.4th 259, 265 fn.4 [same].

Appellants suggest that the rule is otherwise: that this Court should determine whether the "crux" of the injunction is prohibitory or mandatory, rather than considering the individual injunctive provisions. (Petn., pp. 38-39.) But Appellants cite no authority for this proposition, aside from misreading *Mobile Magic*, *supra*, 96 Cal.App.3d 1. In *Mobile Magic*, the challenged injunction prohibited the display of a company's model homes and ordered that any noncomplying model homes be removed within 45 days. (*Id.* at p. 5.) The Court of Appeal disagreed that the injunction was mandatory, reasoning that "[w]hile the act of removal is an affirmative act, it is incidental to the injunction's prohibitive objective to restrain further violation of a valid statutory provision." (*Id*. at p. 13.)

Mobile Magic's holding aligns with the general rule that where injunctions contain provisions of each type, they must be examined provision-by-provision and the prohibitory provisions are not stayed. (See *Paramount*, *supra*, 228 Cal.App.2d at p. 839.) Appellants' own cases demonstrate that prohibitory provisions of a mixed injunction take effect during appeal. (See, e.g., Supersedeas Exhs., Vol. II, Exh. 29, p. 491 [appellant in *Santa Monica* seeking writ of supersedeas for automatic stay of only one paragraph of superior court's judgment and noting that parties

agreed that another paragraph was mandatory].) The limited exception to that provision-by-provision rule is that where any mandatory provisions are merely incidental to a prohibitory provision, those mandatory provisions remain effective pending appeal. (See *Mobile Magic*, 96 Cal.App.3d at p. 5; *Jaynes,* 51 Cal.App. at pp. 699-700 [requirement that defendant remove trade names from place of business and vehicles did not make otherwise prohibitory injunction mandatory].)

There can be no question that the superior court's order that Rowe's appointment was "null and void," and its injunctive provisions "[1] prohibiting [Appellants] from allowing Rowe to participate in an official capacity in any meetings or Board actions, and [2] from registering or otherwise giving effect to any further votes cast by Rowe," as well as "[3] from making any appointment to the position of Third District Supervisor of the San Bernardino Board of Supervisors," were prohibitory. (Supersedeas Exhs., Vol. I, Exh. 22, p. 3.) Even if it were assumed that other injunctive provisions on which Appellants focus are mandatory (which they are not), at the least, the above-cited provisions may stand on their own as restraining further violations of the law and are far more than "ancillary" or "incidental" to other relief the superior court awarded.

5. The Court of Appeal's Order does not otherwise warrant review.

Appellants contend that the Court's review is necessary to provide local governments with "certainty and clarity" regarding the effects of "order[s] unseating officials." (Petn., p. 40; see also CSAC Brief, pp. 14-15.) But as discussed *supra*, the only confusion here regarding the effects of the orders below is of Appellants' own making. At bottom, Appellants ask this Court to grant review solely to correct what they perceive (wrongly) to be an error committed by the Court of Appeal in the course of issuing an interlocutory order in an idiosyncratic and fact-intensive case.

(See, e.g., Petn., p. 41 ["This Court should issue an immediate stay and grant review to correct the error …."].) Because such purpose is not grounds for the Court's review, and because directing the Court of Appeal to issue a writ of supersedeas would allow Appellants to run out the clock on the superior court's judgment, the Court should deny Appellants' petition and request for immediate stay.[9]

[9] Despite Appellants' claims of urgency and "emergency," they have not even sought appellate calendar preference, further demonstrating their objective of evading compliance with the superior court's judgment until the relief ordered therein becomes moot.

CONCLUSION

For these reasons, Respondents respectfully ask the Court to deny Appellants' request for an immediate stay and petition for review.

DATED: January 21, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached **ANSWER TO PETITION FOR REVIEW AND TO REQUEST FOR IMMEDIATE STAY** is proportionally spaced, has a typeface of 13 points or more, and contains 8,399 words. Counsel relies on the word count of the word-processing program used to prepare the attached document.

DATED: January 21, 2020

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this January 21, 2020, at San Francisco, California.

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Lower Court Case Number: **E073730**

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