Case No. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

v.

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

RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEFS

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INTRODUCTION

In urging this Court to set aside the plain text of the Ralph M. Brown Act (Brown Act or Act; Gov. Code, § 54950 et seq.; all undesignated statutory references are to this code), and conclude that quo warranto provides the exclusive means of challenging the San Bernardino County Board of Supervisors' (Board) violations of the Act, amici curiae California State Association of Counties (CSAC) and League of California Cities (LCC) largely reprise the same arguments advanced by the Board and real party in interest Dawn Rowe (collectively, Appellants). But, as explained in respondents Michael Gomez Daly and Inland Empire United's (Respondents) answer brief, none of those arguments warrants contravening the Legislature's stated intent to authorize "any interested person" to "commence an action by mandamus or injunction." (§ 54960.1, subd. (a).)

Like Appellants, CSAC and LCC give unreasonably short shrift to section 54960.1's text and legislative history, downplay key differences between that statutory remedy and quo warranto, and completely ignore the gaps in enforcement that would result from giving the Attorney General exclusive authority to police violations of the Act arising from the appointments of local officials. CSAC and LCC also repeat Appellants' baseless concerns about vexatious litigation and potential government instability, albeit to no avail: Section 54960.1 amply protects against frivolous challenges by allowing mandamus or injunctive relief only where, as here, a local agency refuses to cure or correct a material violation of the Act, and the party seeking relief complies with the statute's strict conditions and timelines.

Nor do Appellants' amici establish that the effectiveness of an order granting section 54960.1 relief should be stayed pending the appeal of such an order. Writ proceedings are subject to the same rules governing stays

pending appeal as other proceedings. LCC's argument that the entire injunction must be stayed ignores both the generally applicable rule that prohibitory aspects of a mixed injunction are not stayed pending appeal, and clear precedent establishing 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.

At bottom, CSAC and LCC ask this Court to limit the Brown Act's statutory remedy in a manner that would shield their members from meaningful consequences for violating the Act. Because eliminating such consequences would once again enable violators to "skirt the spirit and letter of the law" (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 (hereafter AB 2674 Analysis)), the Court should affirm the Court of Appeal's order in its entirety.

ARGUMENT

I. Respondents properly challenged the Board's violations of the Act through a section 54960.1 mandamus action.

CSAC and LCC identify no persuasive reason to forego a literal application of section 54960.1, which authorizes "any interested person" 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 [certain enumerated sections of the Act] is null and void under this section." (§ 54960.1, subd. (a).) Despite CSAC's and LCC's claims to the contrary, section 54960.1 evinces the Legislature's unmistakable intent to authorize mandamus relief irrespective of the availability of other remedies, and material differences between section 54960.1 and quo warranto establish that quo warranto is a poor—and, at times, completely ineffectual—vehicle for enforcing the Act. Even if the

statute did not so provide, the alleged availability of quo warranto would not bar mandamus relief, because Respondents direct their petition solely against the Board, and in fact initiated their challenge to the Board's unlawful conduct before the Board even appointed Rowe, and thus do not challenge Rowe's office directly. Nor do public policy concerns warrant giving the Attorney General exclusive authority to challenge the Board's violations, as CSAC and LCC contend: If anything, the strict conditions governing section 54960.1 actions provide *greater* protection against frivolous claims than quo warranto, while also addressing the Legislature's concern for direct, swift, and effective enforcement of the Act.

A. Section 54960.1 provides an available statutory remedy for the Board's violations.

As CSAC and LCC acknowledge, "the Legislature may create new statutory remedies for claims that would otherwise be exclusively subject to the *quo warranto* process." (LCC Br. at p. 22; see CSAC Br. at p. 14 [noting that quo warranto is exclusive only "[i]n the absence of constitutional or statutory regulations providing otherwise"].) That is precisely what the Legislature did here: In response to rampant violations of the Brown Act by local agencies, the Legislature authorized individual citizens to enforce the Act through mandamus or injunction and thereby give the Act " 'teeth.' " (AB 2674 Analysis, *supra*, at p. 4.) CSAC and LCC assert that "settled principles of statutory and common law" compel otherwise (CSAC Br. at p. 21), but they either misstate or misapply those principles, and elide key differences between section 54960.1 and quo warranto.

1. Quo warranto does not provide the exclusive remedy where, as here, a statute prescribes a different remedy.

Although CSAC and LCC recognize that quo warranto cannot displace applicable statutory remedies, they argue that the Brown Act's

remedy is unavailable here because the Legislature did not expressly state that a mandamus action may be commenced even if quo warranto is also available. Like Appellants, CSAC and LCC rely on the general principle that " 'it should not be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.' " (CSAC Br. at p. 22; see LCC Br. at p. 23.)

That principle is of no moment here. Neither Appellants nor their amici point to any decision applying that principle to the question whether the Legislature created a statutory alternative to quo warranto. The apparent absence of such authority makes sense given that the Legislature's creation of an applicable statutory remedy does not overturn or otherwise alter the common law rule regarding quo warranto's exclusivity.[1] To the contrary, the creation of such remedies is wholly consistent with that rule, which operates *only* "[i]n the absence of constitutional or statutory regulations providing otherwise." (*San Ysidro Irrigation District v. Superior Court* (1961) 56 Cal.2d 708, 714-715; accord CSAC Br. at p. 14.) Because the Brown Act expressly "provide[s] otherwise" by setting forth its own remedy in section 54960.1, quo warranto does not provide the exclusive remedy for violations of the Act.

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[1] To the extent that CSAC or LCC is alleging a conflict with the quo warranto statute itself (see CSAC Br. at p. 23 [attempting to "harmonize section 54960.1, the mandamus statute, and the quo warranto statute"], the principle that " 'more specific provisions take precedence over more general ones,' " as well as the principle that " 'later enactments supersede earlier ones' " (*Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 634), would warrant section 54960.1's application over the quo warranto statute in this case. Section 54960.1 is the specific remedy for Brown Act violations and was enacted in 1986, over a century after the quo warranto statute's enactment.

Article I, section 3 of the California Constitution fortifies this reading of the Brown Act. That provision affirms the right of individual citizens, as established by the Act, "to information concerning the conduct of the people's business" (Cal. Const., art. I, § 3, subd. (b)(1); see also *id.*, subd. (b)(7)), and provides that "[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" (*id.*, subd. (b)(2)). As the Legislature found in enacting section 54960.1, allowing members of the public to invalidate action taken in violation of the Act is critical to preventing local agencies from denying such right, and thus furthers the people's right of access within the meaning of article I, section 3.[2] (See AB 2674 Analysis, *supra*, at p. 4.) This Court should therefore construe section 54960.1 as authorizing Respondents' challenge. (See *National Lawyers Guild, San Francisco Bay Area Chapter v. City of Hayward* (2020) 9 Cal.5th 488, 507-508 [applying article I, section 3].)

Even if CSAC and LCC's heightened intent standard were to apply, neither of Appellants' amici offers any explanation for why section 54960.1's unambiguous authorization to "any interested person … to commence an action by mandamus or injunction" fails to meet that standard. Although CSAC notes that the legislative history of section 54960.1 contains only one reference to quo warranto (see CSAC Br. at pp. 22-23, 23, fn. 6), that reference is directly on point. As discussed in Respondents' answer brief (see ABM at pp. 30-31), the Legislature

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[2] Neither CSAC nor LCC—nor Appellants, for that matter—dispute Respondents' contention that prohibiting members of the public from challenging the appointments of local officials under section 54960.1 would limit their right of access. (See ABM at p. 35.) In fact, Appellants and their amici fail to respond to Respondents' constitutional argument entirely.

previously considered—but rejected—the use of quo warranto to enforce the Act. (Compare Assemb. Bill No. 2297 (1969 Reg. Sess.) § 5, as introduced Apr. 8, 1969 (hereafter AB 2297), with Stats. 1969, ch. 494, § 2, p. 1106.) Contrary to CSAC and LCC's misrepresentations, that bill did not only "propose[] to make knowing violators of the Brown Act removable through a quo warranto proceeding" (CSAC Br. at p. 23, fn. 6; see LCC Br. at p. 21, fn. 3), but also proposed using quo warranto to "set aside any action taken at a meeting in violation of [the Act]" (AB 2297, § 5).[3] Necessarily implicit, therefore, in the Legislature's rejection of the use of quo warranto—as well as its subsequent decision to vest individual members of the public, rather than the Attorney General, with the authority to enforce the Act through mandamus or injunction—is the Legislature's intent to authorize direct mandamus relief in the circumstances presented here. (See also *post*, at pp. 12-19.)

2. Quo warranto is not a plain, speedy, and adequate remedy for violations of the Act.

CSAC and LCC also insist that the Legislature prescribed mandamus as a vehicle for remedying violations of the Brown Act with the understanding that the traditional requirements of mandamus would still apply. Because, according to CSAC and LCC, the Legislature further understood that quo warranto would provide a plain, speedy, and adequate remedy in the ordinary course of law for violations involving the

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[3] Nor did LCC oppose the bill on the ground that it would allow for the removal of violators of the Act, as LCC now suggests. (See LCC Br. at p. 21, fn. 3.) Rather, the only ground stated by LCC was that it believed "that the Attorney General has evidenced complete bias in connection with opinions under the Brown Act and … much prefer[red] to rely on the courts rather than the Attorney General to determine whether there has been a violation of the law." (Respondents' Motion to Take Judicial Notice, Exh. F at p. 1.)

appointment of local officials, CSAC and LCC maintain that the Legislature anticipated that such violations could only be addressed through quo warranto. (See CSAC Br. at pp. 23-25; LCC Br. at pp. 23-24.)

But nothing in section 54960.1 or its enactment history suggests that the Legislature intended its chosen remedy to be precluded by the availability of others.[4] To the contrary, the Legislature adopted section 54960.1 precisely because any other available remedies were inadequate. (See AB 2674 Analysis, *supra*, at p. 4 ["[T]he Brown Act needs 'teeth' because local agencies are currently able to skirt the spirit and letter of the [Act], and thus conduct public business without public participation."].) Accordingly, if, as CSAC and LCC contend, the Legislature was "aware of the quo warranto statute" and of "caselaw establishing that quo warranto provides a speedy and adequate legal remedy for challenging title to office based on procedural defects" (CSAC Br. at pp. 23-24; see LCC Br. at p. 23), then the Legislature's decision to prescribe an entirely different remedy in section 54960.1 evinces the Legislature's view that quo warranto is not a suitable remedy for violations of the Act.[5] (See *Shoemaker v.*

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[4] LCC points to a handful of Court of Appeal decisions applying the traditional requirements of mandamus to actions arising under Code of Civil Procedure section 437c, subdivision (m)(1) (section 437c), which provides for mandamus review of certain orders specified in that statute. (See LCC Br. at pp. 24-25.) But the application of those principles in section 437c cases makes sense, as section 437c authorizes mandamus only as an *exception* to the primary remedy of an appeal. (See Code Civ. Proc., § 437c, subd. (m)(1) ["A summary judgment entered under this section is an appealable judgment as in other cases."].) In contrast, section 54960.1 expressly authorizes mandamus and injunction as the principal means of enforcing the Act.

[5] There is no merit to the argument that section 54960.1 established a basis for quo warranto actions where none previously existed. (See CSAC Br. at p. 21; LCC Br. at p. 22; see also RB at pp. 19-20.) Contrary to

Myers (1990) 52 Cal.3d 1, 22 ["If the Legislature had considered [existing remedies] to be adequate, it would not have been necessary to add the … statute …."]; see also First Amendment Coalition (FAC) Br. at p. 15 ["Quo warranto, which operates with its own unique rules and procedures, is no substitute for the Brown Act's clear and efficient remedy for transparency violations."]; ABM at pp. 29-30.) Thus, the alleged availability of quo warranto does not bar mandamus relief in this case.

CSAC and LCC's own authorities confirm that quo warranto is a poor substitute for a section 54960.1 mandamus action. Both of Appellants' amici cite various Attorney General opinions for the proposition that the need to obtain leave to sue from the Attorney General does not present a significant barrier to relief, because the Attorney General typically grants nonfrivolous quo warranto applications, i.e., applications that raise " 'a substantial question of fact or law.' " (CSAC Br. at p. 9; LCC Br. at p. 26.) But as those same opinions show, the Attorney General will deny even meritorious applications if they involve "overriding considerations" (84 Ops.Cal.Atty.Gen. 135 (2001), 2001 WL 962156, p. *4), and one such consideration is if "judicial proceedings"—including any appellate proceedings—"may not reasonably be expected to terminate until after the expiration of [the officeholder's] current term[] of office," (83 Ops.Cal.Atty.Gen. 181 (2000) 2000 WL 1138109, p. *3; see 75

Appellants' assertion that section 54960.1 consists of distinct "substantive" and "procedural" components, section 54960.1 did not establish any new substantive rights or obligations. Rather, as LCC itself acknowledges, section 54960.1 merely "create[d] a mechanism"—by mandamus or injunction, and not quo warranto—"for interested parties to challenge the validity of past governmental actions." (LCC Br. at p. 21.) Thus, if quo warranto was not available to enforce the Act at the time of section 54960.1's enactment, then it remains unavailable.

Ops.Cal.Atty.Gen. 10 (1992) 1992 WL 469697, p. *3 ["While it cannot be accurately predicted how long it would take for the present action to be filed, heard, and resolved, even in the absence of an appeal, it is at least reasonably probable that the issue would become moot prior to resolution."]).[6] Notably, the Attorney General has previously treated this consideration as "dispositive." (83 Ops.Cal.Atty.Gen., 2000 WL 1138109 at p. *3.)

The upshot of these Attorney General opinions is that adopting CSAC and LCC's reading of the statute would lead to significant gaps in enforcement of the Act. If, as CSAC and LCC insist, quo warranto is the exclusive remedy for Brown Act violations involving appointments, then any such violations occurring "reasonably" close to the relevant end of term would be entirely shielded from challenge.[7] (See 83 Ops.Cal.Atty.Gen., *supra*, 2000 WL 1138109 at p. *3 [denying application because term ended within four months of date of Attorney General's resolution of application]; 75 Ops.Cal.Atty.Gen., *supra*, 1992 WL 469697 at p. *3 [same].) In such circumstances, quo warranto would not merely provide an inadequate

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[6] The other "overriding considerations" cited in the Attorney General's opinions are "the existence of prior litigation" and "whether the issues are pending in a judicial action." (84 Ops.Cal.Atty.Gen., *supra*, 2001 WL 962156 at p. *4.)

[7] The cited Attorney General opinions thus belie LCC's suggestion that the Attorney General's "primary function is not to stymie potentially meritorious claims, but to supervise the presentation of those claims, ensuring that they are raised for the purpose of ensuring the law is followed and not for the vindication of parochial, private, or partisan interests." (LCC Br. at pp. 26-27.)

remedy; it would provide no remedy at all, as local agencies seeking to fill relatively short-term vacancies could violate the Brown Act with impunity.[8]

The Legislature enacted section 54960.1 with the express purpose of preventing such conduct, regardless of the timing of the violation. (See AB 2674 Analysis, *supra*, at p. 4.) Accordingly, section 54960.1 prescribes a direct and speedy remedy by way of mandamus or injunction (see, e.g., Code Civ. Proc., § 1088 [providing for mandamus relief within as little as 10 days]), and it places the decision whether (and how quickly) to grant relief in the hands of courts rather than the Attorney General—just as LCC previously requested (see *ante*, at p. 12 & fn. 3).

LCC notes that the Attorney General may, "in special circumstances … grant leave to sue immediately." (LCC Br. at p. 25.) But LCC fails to provide a single example of the Attorney General granting such relief—even where, as in the Attorney General opinions discussed above, timely resolution of the application may have resulted in meaningful relief for the applicant. CSAC and LCC also observe that "the Attorney General's refusal to grant leave to sue may be reviewable by writ of mandate" (CSAC Br. at p. 30; see LCC Br. at pp. 25-26), but that alleged safeguard rings similarly hollow in the absence of any "such instance of mandamus issuing" (*International Assn. of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 697 (*IAFF*)).

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[8] As FAC notes, even short-term appointments warrant strict adherence to the Act, especially where, as here, the appointee subsequently runs for a full term in the appointed office. (See FAC Br. at p. 8 ["[I]n the case before the Court, the San Bernardino County Board of Supervisors filled a vacant board seat through a secret vote, ignored judicial orders to correct the violation, and kept the unlawfully appointed member in place until she could appear as the 'incumbent' on the ballot, thereby enhancing her ultimately successful bid for election."].)

CSAC further contends that quo warranto actually "promotes the prompt resolution of a claim by requiring a putative plaintiff to produce its supporting evidence at the start of the case." (CSAC Br. at p. 12.) But CSAC's assertion that quo warranto actions are typically resolved in an expeditious manner is belied by the Attorney General opinions described above, as well as the authorities cited in Respondents' answer brief (see ABM at p. 33, citing *People ex rel. Lacey v. Robles* (2020) 44 Cal.App.5th 804, 812-813 [quo warranto application filed April 2015; application granted December 2015; complaint filed January 2016; judgment issued May 2018]; *Rando v. Harris* (2014) 228 Cal.App.4th 868, 873 [quo warranto application filed May 2013; application denied October 2013].) Moreover, the facts in Brown Act cases are rarely in dispute—especially where, as here, the violations occurred in open session and were recorded—and can therefore usually be decided on the basis of the facts alleged in the mandamus petition.[9]

CSAC also argues that "quo warranto provides a more speedy and effective alternative to mandamus to resolve *title to office*" because "it ensures that all relevant parties are heard in one proceeding and bound by its results." (CSAC Br. at p. 25, emphasis added; see *id.* at p. 6 [similar].) Whether quo warranto is better suited than mandamus for determining title to office is beside the point: Although CSAC and LCC repeatedly mischaracterize this case as concerning a "disagreement[] about who should hold public office" (LCC Br. at p. 12; see, e.g., CSAC Br. at p. 5 [similar]),

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[9] CSAC's related argument—that "[t]he quo warranto process provides [more] meaningful protections for weeding out unmeritorious and speculative lawsuits because it requires a party to provide detailed evidence to support its allegations at the outset"—fails for the same reason. (CSAC Br. at p. 11; see *id.* at pp. 11-12.)

Respondents' dispute lies solely with the Board for conducting a secret, serial vote in violation of the Act.[10] The relevant question is therefore not whether quo warranto is the proper means of resolving title to office, but whether quo warranto provides a plain, speedy, and adequate remedy in the ordinary course of law for the Board's violations of the Act.

The answer to that question is clearly no. As CSAC itself notes, the only "necessary parties" to a quo warranto action are "the party challenging title to office and the incumbent officeholder." (CSAC Br. at p. 25; see Code Civ. Proc., § 803 [providing only for an "action … against [the] person who usurps, intrudes into, or unlawfully holds or exercises any public office"].) But, again, Respondents seek to address the conduct of the Board, which would *not* be a necessary party to a quo warranto action. In contrast, the Board *would* be a necessary party to a mandamus action under section 54960.1, as "a mandamus action is directed at the appointing entity, and not the allegedly usurping officer." (CSAC Br. at pp. 25-26.) In light as well of the fact that "[m]andamus … is the traditional remedy for the failure of a public official to perform a legal duty" (*Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 442 (*Common Cause*)), mandamus would provide the proper means of addressing the Board's violations even if the Brown Act did not expressly prescribe mandamus as a remedy (which it does).

CSAC and LCC try to resist this conclusion by pointing to cases suggesting that quo warranto may provide a plain, speedy, and adequate remedy in certain other contexts. (See CSAC Br. at pp. 30-31, citing, e.g., *IAFF*, *supra*, 174 Cal.App.3d 687; LCC Br. at p. 25, citing *People v. Olds*

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[10] As discussed in Respondents' answer brief (see ABM at p. 37) and *post* at pp. 24-25, Respondents initiated their challenge to the Board's unlawful conduct before the Board appointed Rowe.

(1853) 3 Cal. 167.) But none of those cases involved the Brown Act or similar circumstances to the instant case, and " ' " '[t]he question whether there is a "plain, speedy and adequate remedy in the ordinary course of law" … is one of fact, depending upon the circumstances of each particular case.' " ' " (*Flores v. Department of Corrections & Rehabilitation* (2014) 224 Cal.App.4th 199, 206; see also *McKannay v. Horton* (1907) 151 Cal. 711, 716 ["The rule [of quo warranto exclusivity] is not jurisdictional, and its application to a particular case involves only the exercise of sound legal discretion."].) Nor does the Attorney General's nonbinding opinion that Brown Act violations *may* be addressed through quo warranto establish that such violations *must* be addressed through quo warranto, or that quo warranto is better suited to addressing those violations than the Brown Act's own remedy. (See CSAC Br. at p. 25, fn. 7; see also LCC Br. at pp. 20-21.)

In sum, the traditional requirements of mandamus provide no basis for precluding Respondents' statutorily authorized mandamus action.

3. Quo warranto cannot be harmonized with section 54960.1 as CSAC and LCC suggest.

In a further attempt to downplay the many functional and operational distinctions between section 54960.1 and quo warranto, CSAC and LCC dispute Respondents' observation that section 54960.1's specific procedural requirements and timelines do not apply to a quo warranto action. (See CSAC Br. at p. 25, fn. 8; LCC Br. at pp. 27-28, fn. 4; see also ABM at pp. 31-34.) As this Court has recognized, section 54960.1 mandamus actions are subject to "strict conditions" that "str[ike] a balance between two, at least potentially conflicting, objectives—to permit the nullification and voidance of certain actions, but not to imperil the finality of even such actions unduly." (*Regents of University of California v. Superior Court* (1999) 20 Cal.4th 509, 527 (*Regents*) [interpreting similar remedy in

Bagley-Keene Act].) Because the quo warranto statute and accompanying regulations fail to strike the same balance (see Code Civ. Proc., § 803 et seq.; Cal. Code Regs., tit. 11, § 1 et seq.), the Legislature clearly did not intend for quo warranto to serve as the exclusive means of enforcing any violations of the Act. (See *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 435 (plur. opn.) [differences between two remedies "establishe[s] that the Legislature made a choice to afford both … remedies"].)

In arguing that section 54960.1's conditions would also attach to a quo warranto action, CSAC and LCC implicitly concede that section 54960.1 generally applies to Respondents' challenge, but they urge this Court to adopt a nonsensical and atextual interpretation of the statute that tips its balance sharply in local agencies' favor. Specifically, CSAC and LCC contend that section 54960.1's "notice and cure" requirements apply to *any* action seeking to invalidate a local agency's action on the basis of a Brown Act violation. (See CSAC Br. at p. 25, fn. 8; LCC Br. at pp. 27-28, fn. 4.) CSAC and LCC thus seek to avail local agencies of the statute's numerous protections—including the limitations period applicable to the demand that the agency cure and correct—while precluding any challenge to the action taken under the statute itself. The Court should not allow local agencies to have it both ways. (See Civ. Code, § 3521 ["He who takes the benefit must bear the burden."].)

Moreover, section 54960.1 simply cannot be read in the manner that Appellants' amici describe. Subdivision (b)—which contains the notice-and-cure requirements—states that the requirement applies "[p]rior to any action being commenced pursuant to subdivision (a)," *not* prior to *any* action alleging a violation of the Act (§ 54960.1, subd. (b).) And subdivision (a) specifically and only authorizes "an action *by mandamus or injunction*." (§ 54960.1, subd. (a), emphasis added.) Because a quo

warranto action is indisputably not an action by mandamus or injunction, section 54960.1's notice-and-cure requirements do not apply to quo warranto.

LCC suggests that "the Attorney General could reasonably determine that a *quo warranto* action … based on an alleged Brown Act violation is not in the public interest when notice and an opportunity to cure the violation has not been provided to the public agency." (LCC Br. at p. 28, fn. 4.) But like many of CSAC and LCC's other arguments about the Attorney General's administration of quo warranto (see *ante*, at pp. 14-17), this argument is based on pure conjecture. LCC cites nothing in the quo warranto statute, the Attorney General's quo warranto regulations, or the Attorney General's opinions to support its statement. Nor do CSAC and LCC otherwise explain how section 54960.1's requirement that an action be commenced within 15 days of the end of the cure-or-correct period can be reconciled with quo warranto's indeterminate and often lengthy application process. (Compare § 54960.1, subd. (c)(4), with ABM at p. 33.) And LCC's appeal to the "reasonabl[e] determinat[ions]" of the Attorney General rings especially hollow in light of LCC's previous contention that "the Attorney General has evidenced complete bias in connection with opinions under the Brown Act." (Respondents' Motion to Take Judicial Notice, Exh. F at p. 1; see *ante*, at p. 12 & fn. 3.)

CSAC and LCC also repeat Appellants' mistake of conflating direct citizen enforcement of the Act with enforcement by the Attorney General. (See, e.g., CSAC Br. at pp. 28-29, 29, fn. 10; LCC Br. at pp. 16-17.) According to Appellants and their amici, because a quo warranto action is "brought in the name of the People of the State," such action serves the "same public interest in ensuring that government officials to whom the sovereign people have delegated their authority are acting in accordance with the law." (CSAC Br. at p. 28.)

But as this Court has recognized, the Legislature's decision to "authorize *citizen* enforcement of state-adopted rules governing how the state and its subdivisions will conduct the public's business" is intentional: In the instant context, it reflects the Legislature's concern that "there may be particular procedures with which a subordinate public agency is reluctant to comply." (*Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 731, emphasis added, citing, e.g., enforcement provisions of Brown Act.) Precluding such direct citizen enforcement in order to confer *exclusive* enforcement authority on the Attorney General's office—another subordinate public agency—plainly fails to address that concern, regardless of in whose name the Attorney General purports to act. (See *Green v. Obledo* (1981) 29 Cal.3d 126, 144 (*Green*) [discussing with approval "the policy of guaranteeing *citizens* the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right" (emphasis added)]; see also, e.g., *ante*, at pp. 14-16 [explaining why giving exclusive enforcement authority to Attorney General would allow local agencies to escape any consequences for certain violations of Act].)

Notably, the Legislature declined to assign the Attorney General *any* role, much less an exclusive one, in enforcing the Brown Act. (See § 54960.1, subd. (a) [authorizing only "the district attorney or any interested person" to "commence an action" under that provision]; see also, e.g., *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) The same is true of the Bagley-Keene Act—the Brown Act's state agency counterpart—even though the Attorney General is the state analogue to the district attorney. (See § 11130.3, subd. (a) [authorizing only "[a]ny interested person" to "commence an action"].) CSAC and LCC identify no basis for contravening these deliberate legislative choices. (Cf.

Common Cause, *supra*, 49 Cal.3d at p. 440 ["In the absence of either an express limitation on citizen standing or any indication of legislative intent to confer exclusive powers on the Attorney General, we decline to impose such a limitation on citizen actions …."].)

B. Any challenge to Rowe's title is merely incidental.

Although CSAC and LCC acknowledge that incidental challenges to title need not be resolved through quo warranto, they argue that "Respondents' claims against the Board, on their face, fall within the core of the quo warranto statute" because "Respondents contend that … Rowe unlawfully holds the office of Third District Supervisor." (LCC Br. at p. 18; see CSAC Br. at p. 16 [describing Respondents' petition as "challeng[ing] the lawfulness of an incumbent officeholder's position"].) But the "face" of Respondents' petition contains no such allegation; in fact, the petition alleges nothing at all against Rowe. Thus, even if the Brown Act did not expressly prescribe mandamus as a vehicle for resolving Respondents' claims against the Board, the common law rule regarding quo warranto's exclusivity would not bar mandamus relief. (See *McKannay v. Horton* (1907) 151 Cal. 711, 715 [quo warranto does not bar mandamus relief where title to office is "incidentally involved in a proceeding which a third party has a right to institute"].)

None of the authorities cited by CSAC and LCC compels a different result. CSAC and LCC echo Appellants' reliance on *Klose v. Superior Court* (1950) 96 Cal.App.2d 913, 925 (*Klose*), for the proposition that quo warranto provides the exclusive remedy "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." (CSAC Br. at p. 17; LCC Br. at p. 21; see also CSAC Br. at pp. 17-19 [discussing cases cited in *Klose*].) But, as Respondents noted in their answer brief (see ABM at p. 36), *Klose* specifically distinguished cases like the instant one,

where the dispute is "not a matter of trying title … but rather an inquiry as to whether [the appointing entity] had obeyed the plain requirement of the law" in making the appointment (*Klose*, at p. 924).[11]

CSAC and LCC also point to various other cases purportedly establishing that "challenges to the appointment process by which an officeholder acquires title must be pursued exclusively through quo warranto." (CSAC Br. at p. 19; see *id.* at pp. 17-21; LCC Br. at p. 21, fn. 3.) Besides ignoring the statement from *Klose* above, CSAC and LCC's contention ignores a critical feature of Respondents' action that distinguishes it from other suits held to attack title more directly: Respondents initiated their challenge under the statute *before the Board appointed Rowe*. (See ABM at pp. 15-16 [describing how, pursuant to section 54960.1, subdivision (b), Respondents sent cure-or-correct letter to

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[11] Appellants try to dispute *Klose*'s statement by distinguishing this Court's decision in *Independence League v. Taylor* (1908) 154 Cal. 179 (*Taylor*), on which *Klose* relied. (See RB at pp. 16-17.) In fact, *Taylor* is closely analogous to the instant case. As in *Taylor*, this case only involves claims against the appointing entity, not the appointee. (See *Taylor*, at pp. 180-181.) Appellants nevertheless insist that Respondents' petition "cannot be separated from … Rowe's title to office," because "granting the Petition necessarily means that her appointment was null and void and she therefore does not hold legal title." (RB at p. 17.) The implications of Respondents' petition, however, are no different from the implications of the petition in *Taylor*, which required the appointing entity to make new appointments (to allegedly occupied offices) in accordance with the law. (See *Taylor*, at p. 180.)

In any event, even if this Court were to conclude that some of the relief sought by Respondents in their petition challenges Rowe's title directly, that would not bar a judicial determination that the Board's secret, seriatim vote violated the Act. (See ABM at pp. 37-38, fn. 10; see also *post*, at pp. 31-34.) Contrary to Appellants' assertion otherwise, and as the superior court found, the Board *did not* cure or correct this violation as required by the Act. (See ABM at pp. 15-17, 18-19.)

Board before Board selected Rowe from remaining applicants].) The fact that the Board refused to meaningfully cure or correct its violation and appointed Rowe in brazen reliance on its earlier violation of the Act does not alter the fundamental character of Respondents' initial challenge, which had nothing to do with Rowe in particular.[12]

C. Giving section 54960.1 its plain meaning will not lead to government instability or other adverse consequences.

Finally, CSAC and LCC further argue that allowing citizens to challenge violations of the Act directly—as section 54960.1 expressly provides—without "quo warranto's assurance that such challenges are based on substantial questions of law or fact and are in the public interest … would introduce uncertainty into public governance, undermine trust in government decisionmaking, and require local governments to devote scarce resources towards defending unmeritorious claims." (CSAC Br. at p. 33; see *id.* at pp. 10-14, 31-34; LCC Br. at pp. 26-27.) Because, as CSAC and LCC noted in arguing that quo warranto provides an adequate substitute for mandamus, the inquiry into whether a challenge is based on a substantial question of law or fact and whether the challenge is in the public interest is usually one and the same (see LCC Br. at p. 26; CSAC Br. at p. 9; *ante*, at pp. 14-15 & fn. 6 [discussing the few "overriding considerations" that may preclude even meritorious challenges]), CSAC and LCC's concern is essentially that giving section 54960.1 its plain

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[12] *IAFF*, *supra*, 174 Cal.App.3d 687, does not provide otherwise. (See CSAC Br. at pp. 20-21.) There, the Court of Appeal determined that a "*resolution* proposing … amendments be[] placed on the ballot" could not be separated "from the *enactment* of the amendments themselves." (*IAFF*, at p. 692, fn. 7.) Here, however, Respondents initiated their challenge at an even earlier stage of the process, i.e., before the Board specifically proposed the appointment of Rowe, and thus before Rowe's title to office was even arguably at issue.

meaning would open the floodgates to frivolous litigation. That concern is completely unfounded.

The Legislature expressly anticipated the potential for vexatious claims under section 54960.1 and thus included numerous safeguards to ensure that agencies are not "threaten[ed] … with frivolous litigation." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 214 (1985-1986 Reg. Sess.) as amended June 19, 1985, p. 3 [discussing near-identical remedy in Bagley-Keene Act]; see *Regents*, *supra*, 20 Cal.4th at p. 527 [noting that "strict conditions" on Bagley-Keene Act remedy "restrict its range"].) For example, section 54960.1's reach is limited to certain enumerated violations of the Act (see § 54960.1, subd. (a)), and a mandamus or injunction action under the statute may only be commenced after providing notice and an opportunity to cure to the local agency (see *id.*, subds. (b)-(c)). Even then, relief is subject to numerous exceptions (see *id.*, subd. (d)), including an exception for action "taken … in substantial compliance with [the Act]" (*id.*, subd. (d)(1)), and the action must be dismissed if the local agency cures its violation at any point during the pendency of the litigation (*id.*, subd. (e)). And crucially, the Act provides for the award of attorneys' fees against parties who bring frivolous claims. (See § 54960.5.) CSAC and LCC fail to grapple with these "strict conditions" or explain how they provide inadequate protection to local agencies. (*Regents*, at p. 527.) If anything, the express and specific nature of these conditions offers even greater protection for local agencies than quo warranto. (See *ante*, at p. 12 & fn. 3 [noting LCC's concern regarding potential "bias" on the part of the Attorney General].)

Indeed, it is relatively uncommon for potential litigants even to meet the criteria for filing suit under section 54960.1, because in the vast majority of cases, the local agency promptly addresses its violation after

receiving a cure-or-correct notice.[13] (See FAC Br. at p. 8.) Only where, as here, a local agency commits certain nontrivial violations of the Act, receives timely notice of its violations, but refuses to take sufficiently curative or corrective action, will the agency be subject to a mandamus or injunction action under the Act. And in such circumstances, both the Legislature and the people have plainly determined that any risk of uncertainty or instability is outweighed by the public's right to access and transparency. (See § 54960.1; AB 2674 Analysis, *supra*; Cal. Const., art. I, § 3.)

Tellingly, neither CSAC nor LCC muster even a single example of section 54960.1's actual misuse, even though they acknowledge that section 54960.1 mandamus relief has been available to address "the vast majority of actions subject to the Brown Act" since the statute's enactment in 1986. (CSAC Br. at p. 24; see LCC Br. at p. 22.) Appellants' amici also do not squarely allege that the mandamus action in *this* case was motivated by "parochial, private, or partisan interests." (LCC Br. at p. 27.) Nor could they: As evinced by the allegations set forth in Respondents' petition, Respondents have no private quarrel with Rowe, but solely seek to ensure that the Board comply with the strictures of the Brown Act. And compelling public officials to follow the Act is indisputably a proper use of both mandamus and section 54960.1.[14] (See, e.g., *Common Cause*, *supra*,

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[13] Any contention that cure-or-correct notices are themselves vexatious is flatly inconsistent with CSAC's and LCC's earlier insistence that quo warranto actions arising from violations of the Act are also subject to section 54960.1's notice-and-cure requirement. (See CSAC Br. at p. 8, fn. 8; LCC Br. at pp. 27-28, fn. 4.)

[14] Even if Respondents were motivated by "parochial, private, or partisan interests"—which they are not—nothing in the Brown Act or its

49 Cal.3d at p. 442; *Green*, *supra*, 29 Cal.3d at pp. 144-145; CSAC Br. at p. 28 ["[A]n 'interested person' suing under the Brown Act need [only] show … an interest 'in seeking vindication of the *public*'s right to know' and the '*public*'s ability to ensure democratically elected government officials are following the law,' " quoting *McKee v. Orange Unified School Dist.* (2003) 110 Cal.App.4th 1310, 1319].)

In the absence, therefore, of any indication that section 54960.1's safeguards fail to provide the same "meaningful protections for weeding out unmeritorious and speculative lawsuits" as quo warranto (CSAC Br. at p. 11), it is apparent that the only interest served by requiring the use of quo warranto in Brown Act cases would be CSAC's and LCC's members' interest in delaying and otherwise making it more difficult to achieve timely and effective enforcement of the Act. Because that interest runs directly counter to the Legislature's purpose in enacting section 54960.1, the Court should reject CSAC and LCC's alleged policy concerns as groundless. (See AB 2674 Analysis, *supra*, at p. 4.)

II. The writ of mandate is prohibitory and not automatically stayed pending appeal.

As with its arguments regarding quo warranto, LCC's arguments regarding the nature of the superior court's injunction largely reiterate the position of Appellants. Like Appellants, LCC urges the Court to give effect to unlawful appointments made in contravention of the Brown Act during the pendency of appeal, despite the Brown Act's mandate that such appointments are null and void and therefore without legal effect. None of LCC's arguments has any merit.

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legislative history suggests that such motivation precludes relief for the Board's violations.

A. Writ proceedings are subject to the same stay rules as other proceedings.

LCC first argues that actions brought as writs of mandate always require mandatory action and are therefore stayed pending appeal. (LCC Br. at pp. 30-31 [citing statutory definition in Code Civ. Proc., § 1085].) But in "proceedings on a writ of mandate," like in other proceedings, "the rule of automatic stay does not apply to an injunction which is 'prohibitory' in nature, rather than 'mandatory.' " (*Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727.) Instead, the general rule applies that whether a writ is prohibitory or mandatory "does not depend on semantic characterizations" but instead depends on whether it was "designed to preserve the status quo between the parties" or alter it. (*Union Pac. R. Co. v. State Bd. of Equalization* (1989) 49 Cal.3d 138, 158 (*Union Pac.*) [citing *Hayworth* for principle that general stay rules apply to writs]; see also Code Civ. Proc., § 1109 [unless otherwise stated, same rules apply to writ proceedings as to other civil actions].) That this appeal arises from a writ proceeding does not alter the general rule governing stays pending appeal: "The writ was prohibitory and was thus not stayed by the [B]oard's appeal."[15] (*Union Pac.*, at p. 158.)

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[15] The other cases that LCC cites in support of its argument that writs of mandate are always stayed pending appeal do not so hold. (LCC Br. at p. 31.) LCC relies on dicta in *Agricultural Labor Relations Board v. Tex-Cal Land Management, Inc*. (1987) 43 Cal.3d 696, 706, fn. 9, to argue that writs of mandate are stayed pending appeal, regardless of their substance. But that case merely held that petitions to modify or set aside Agricultural Labor Relations Board orders are subject to "normal appellate-stay rules [that apply] to superior court enforcement orders" and that "[p]rohibitory portions of an order are not automatically stayed pending appeal." (*Id.* at pp. 708-709.) It did not address whether writs of mandate must always be treated as mandatory, regardless of substance. This Court confirmed two years later, with the issue squarely presented, that writs with

There is no merit to the argument that the judgment is stayed pending appeal because it is not "self-executing." (LCC Br. at pp. 30-31.) Self-executing judgments are not stayed pending appeal (*Bulmash v. Davis* (1979) 24 Cal.3d 691, 699, fn. 3), and "[p]rohibitory injunctions and prohibitory features of not purely prohibitory decrees are generally considered to be such self-executing decrees" (4 Cal.Jur.3d (2020) Self-Executing Judgments; Prohibitory Injunctions, § 470). Accordingly, prohibitory injunctions, such as judgments that a government body's action was without legal effect, are not stayed pending appeal. (See *People ex rel. Boarts v. City of Westmoreland* (1933) 135 Cal.App. 517 (*Boarts*).) *Boarts* did not rely on anything unique to the nature of quo warranto but rested on the self-executing nature of a prohibitory injunction. (*Id*. at pp. 519-520, citing, e.g., *Tyler v. Superior Court of Sonoma County* (1887) 72 Cal. 290, 292 [order disbarring attorney self-executing]; *In re Graves* (1923) 62 Cal.App. 168, 169 [order suspending attorney self-executing].) In *Boarts*, the superior court issued an order declaring that a city had never legally come into existence. The 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

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a prohibitory effect are not stayed pending appeal. (*Union Pac*., *supra*, 49 Cal.3d at p. 158.)

[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.)

The same logic applies here. The Board's violations of the Act—which, again, Respondents challenged prior to Rowe's appointment—rendered its subsequent appointment of Rowe null and void. (See *Hernandez v. Town of Apple Valley* (2017) 7 Cal.App.5th 194, 209 [town council violated Brown Act at meeting at which it placed voter initiative on ballot, rendering that action, and election itself, "null and void"; see also *id*. at p. 197 [violation of Act "invalidates the special election on the Initiative"].) The injunction here deeming the local government action to be without legal effect, just as in *Boarts*, was a self-executing prohibitory injunction and not stayed pending appeal. (See *Sun-Maid Raisin Growers of Cal. v. Paul* (1964) 229 Cal.App.2d 368, 374 (*Sun-Maid*) ["A prohibitory injunction is self-executing and its operation is not automatically stayed by an appeal from the order granting it."].)

B. Prohibitory provisions of an injunction are not stayed pending appeal, even if other provisions are mandatory.

LCC examines the "primary function" of the writ of mandate that the trial court issued and concludes that its main thrust is to compel affirmative action that changes the status quo. (LCC Br. at p. 31.) This is wrong. LCC identifies no authority to support its argument that the "primary function" of an injunction determines whether it is stayed pending appeal, because that is not the rule. As explained in Respondents' answer brief, injunctions that are prohibitory in nature are given effect pending appeal; mandatory injunctions are stayed pending appeal; and injunctions that contain provisions of each character are stayed or given effect according to the rule applicable to each provision, with one exception: Where mandatory

provisions are ancillary to prohibitory relief, then those mandatory provisions are not stayed pending appeal. (See ABM at pp. 51-54.)

LCC, like Appellants, identifies no authority for the proposition that the undisputedly prohibitory provisions of the injunction—that the Board refrain "from allowing Rowe to participate as Third District Supervisor in any Board meetings or actions," "from registering or otherwise giving effect to any further votes cast by Rowe," and "from making any appointment to the position of Third District Supervisor of the San Bernardino Board of Supervisors" (Exh. 22 at p. 408)—lose their prohibitory character because LCC believes that *other* provisions of the injunction are mandatory. LCC cites only one case in support of this argument (see LCC Br. at p. 32), and it holds exactly the opposite: An injunction "may partake of a dual nature, in which event 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.) This is black-letter law. In *Ironridge Glob. IV, Ltd. v. ScripsAmerica, Inc*. (2015) 238 Cal.App.4th 259, 265, fn. 4, for instance, the defendant echoed LCC's argument here, urging that an injunction that included mandatory and prohibitory provisions was stayed in its entirety pending appeal, as the "only purpose" of the prohibitory provisions "was to enforce compliance with the mandatory portion of the order." The court rejected that argument, because this Court has held since at least 1928 that " '[a]n injunction may grant both prohibitive and mandatory relief, and when it is of this dual character, and an appeal is taken, such appeal will not stay the prohibitive features of the injunction, but as to its mandatory provisions said injunctions will be stayed.' " (*Ibid.*, quoting *Ohaver v. Fenech* (1928) 206 Cal. 118, 123.) The two provisions that LCC argues are mandatory do not change the character of the remaining injunctive provisions or of the superior court's order declaring the Board's appointment "null and void."

They are ancillary to the prohibitory provisions, give legal effect to them, and are not stayed pending appeal. (See ABM at pp. 53-54.) And regardless of whether they were properly characterized as mandatory provisions stayed pending appeal, the remaining prohibitory features of the injunction would be unaffected. (See *ibid.* & fn. 18.)

Even if the proper test were to determine the character of the relief framed by the injunction by examining the primary relief sought by the petitioner, here Respondents sought to enjoin the Board's ongoing violations of the Act. The judgment that the Board's appointment of Rowe was null and void, and the provisions of the injunction preventing the Board from permitting her to participate in meetings and votes and preventing the Board from making any appointments to the office, all advance the purpose of preventing the Board from giving effect to and enjoying the fruits of its unlawful conduct. The result would be the same regardless of whether the provisions that LCC insists are mandatory took effect, with the Board's act null and void. LCC's claim that the primary purpose of the injunctive relief was to compel affirmative Board action is meritless.

Avoiding the plain language and effect of the prohibitory provisions of the injunction, LCC relies on an inapt analogy. The injunction preventing the Board from giving effect to its violations of the Act is, in LCC's view, akin to an injunction requiring the termination of a lawfully hired employee. (See LCC Br. at p. 31.) But that example, and the cases that LCC cites, involve injunctions requiring that employment relationships that were undisputedly valid at the time the dispute arose be severed, thereby altering the status quo. (See *Feinberg v. Doe* (1939) 14 Cal.2d 24, 27-28 [injunction mandatory where it prevented continued employment of worker who was employee in good standing at time dispute arose]; *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 885

[injunction mandatory where disqualification dispute arose *after* attorneys had appeared in lawsuit and filed pleadings on party's behalf]; *Agricultural Labor Bd. v. Superior Court* (1983) 149 Cal.App.3d 709, 712-713 [injunction mandatory in dispute over rehiring striking workers where it required employer to fire lawfully hired current employees and rehire former workers].) The better comparison for the Board's action here is an employer who lacked authority to hire an employee, was warned against hiring the employee due to a lack of authority, hired the employee anyway, and then received an adverse judgment on the merits confirming that the employer lacked authority to make the hire. (See *People ex rel. City of Downey v. Downey County Water Dist*. (1962) 202 Cal.App.2d 786, 802 [void act does not change status quo; it has "no effect and no legal rights may be predicated thereon"].) Under those circumstances, requiring the employee to remain during the appellate process in the position to which she was never lawfully hired is a proposition for which LCC, like Appellants, have identified no supporting authority.

C. The status quo is measured from the last peaceable, uncontested status between the parties.

Finally, LCC mirrors Appellants' argument that the status quo for purposes of determining whether an injunction is mandatory or prohibitory should be measured from the time after the Board unlawfully appointed Rowe to the Board. (See LCC Br. at pp. 32-33.) This is wrong for the reasons explained in Respondents' answer brief. (See ABM at pp. 45-50.) This Court has repeatedly identified the status quo for purposes of injunctive relief to be the "last peaceable, uncontested status between the parties," and that status ended when Respondents sent their cure-or-correct notice to the Board, prior to the Board's appointment of Rowe. (See *id.* at pp. 45-46, citing *United Railroads of San Francisco v. Superior Court* (1916) 172 Cal. 80, 87 (*United Railroads*).) LCC and Appellants contend

that measuring the status quo from the last peaceable, uncontested status applies only to preliminary relief (LCC Br. at p. 32 [citing RB at p. 38]), but there is no principled basis for having a different rule for preliminary and permanent injunctions. Adopting such a rule 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, the injunction would be stayed—so that parties would be better off obtaining only temporary, not final, relief. Neither the Court of Appeal decisions nor LCC offers a sensible basis for why that should be the case. (Cf. *Sun-Maid*, *supra*, 229 Cal.App.2d at p. 376 [" '[T]he effect of [a supersedeas] order by this court suspending the operation of a [preliminary] prohibitory injunction, is to reverse, *pro tanto*, the judgment granting the injunction …. The situation does not differ where the injunction is embraced in a final judgment,' " quoting *Hulbert v. California Portland Cement Co.* (1911) 161 Cal. 239, 255-256 (conc. opn. of Sloss, J.)].)[16]

LCC attempts to distinguish cases measuring the status quo from the last peaceable, uncontested status between the parties by arguing that such cases limited to situations in which an injunction "that prevents a party from engaging in future injurious acts that are themselves illegal," which are "prohibitory in nature and should not be stayed on appeal." (LCC Br. at pp. 33-34, citing *United Railroads*, *supra*, 172 Cal. at pp. 81-82, 88-90;

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[16] *Integrated Dynamic Solutions, Inc. v. VitaVet Labs, Inc.* (2016) 6 Cal.App.5th 1178, 1183-1184, is not to the contrary. (See LCC Br. at p. 33.) That case simply explains the standard for preserving the status quo pending a determination on the merits. It does not explain whether the standard should be different for purposes of final relief or why, as LCC contends, a preliminary injunction should be more protective than a permanent injunction, which serves the same goal but occurs after a party has fully demonstrated the merit of its claim.

People v. Hill (1977) 66 Cal.App.3d 320, 322-331.) Staying such injunctions pending appeal, LCC contends, would fail to preserve the status quo because the stay would allow "new legal violations to occur." (*Id*. at p. 34.) But because the *de facto* officer doctrine does not render Rowe's actions "illegal," LCC argues, there is no ongoing harm that the injunction would remedy. LCC's argument ignores the ongoing harm to the people's right of access caused by the Board's continued reliance on its violations of the Act. Moreover, although *United Railroads* is not limited to cases of ongoing illegal acts, the situation here fits exactly into the circumstances to which LCC believes it applies: The Board refused to cure or correct its violations and continued to enjoy the fruits of its violations even after the superior court declared the Board's conduct unlawful. As LCC concedes, injunctions preventing a party from engaging in ongoing unlawful action are prohibitory and not stayed pending appeal. (See *ibid.*; see also *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 ...."].) The Board's appointment of Rowe was an ongoing harm that the superior court's order prohibited, and which was not automatically stayed pending appeal.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Respondents' answer brief, the Court of Appeal's order should be affirmed.

DATED: December 21, 2020 STACEY LEYTON
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CERTIFICATE OF COMPLIANCE

I hereby certify that the attached **RESPONSE TO AMICUS CURIAE BRIEFS** is proportionally spaced, has a typeface of 13 points or more, and contains 9,532 words. Counsel relies on the word count of the word-processing program used to prepare the attached document.

DATED: December 21, 2020

/s/ Stacey Leyton
STACEY LEYTON

PROOF OF SERVICE

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CASE NUMBER: S260209
CASE NAME: *Daly, et al. v. Board of Supervisors of San Bernardino County, et al.*

I am employed in the County of San Francisco, State of California. I am over the age of 18 years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On December 21, 2020, I served the following document:

RESPONDENTS' RESPONSE TO AMICUS CURIAE BRIEFS

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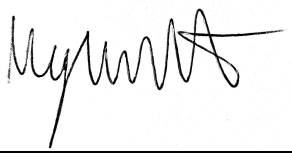
I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 21, 2020, in Oakland, California.



Meghan Herbert

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

12/21/2020

Date

/s/Stacey Leyton

Signature

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