January 21, 2020

Hon. Tani Cantil-Sakauye, Chief Justice,
& Associate Justices of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ***Daly v. Board of Supervisors of San Bernardino County***
Supreme Court Case No. S260209
Amicus Curiae Letter from the League of California Cities in Support of Petition for Review (Cal. Rules of Court, Rule 8.500(g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

We write on behalf of the League of California Cities to urge that this Court grant the petition for review filed by the Board of Supervisors of San Bernardino County and its five members (together, "the Board"), appellants in the above-captioned case. The League of California Cities (hereafter, "the League") is an association of 478 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

I. FACTUAL AND PROCEDURAL BACKGROUND

This Court has long recognized that "certainty, predictability and stability in the law are the major objectives of the legal system ...." (*Estate of Duke* (2015) 61 Cal.4th 871, 893, citations and quotation marks omitted.) This principle is a critical consideration for the judiciary when it undertakes the difficult task of resolving the many public and private disputes that cross its doorstep. "[P]arties should be able to regulate their conduct and enter into relationships with reasonable assurance of the governing rules of law." (*Ibid.*, citations and quotation marks omitted.) And

when disputes do arise, a clear and stable procedural path for the resolution of those disputes is necessary to "ensure the fair and orderly administration of justice." (*People v. Scott* (1994) 9 Cal.4th 331, 351.)

Nowhere is the need for stability more important than in disputes challenging the right of a sitting government official to hold office—a right so important that it is considered "a fundamental right of citizenship ...." (*Woo v. Superior Court* (2000) 83 Cal.App.4th 967, 977.) Such disputes are often politically charged, and they inevitably generate uncertainty about who is vested with the legal authority to act on behalf of the people that the governing body at issue represents. In short, they go to the very heart of democratic legitimacy.

Prior to the filing of this lawsuit, the procedure in California for resolving claims that a person "unlawfully holds or exercises any public office" was clear; the Attorney General may bring a *quo warranto* action, in the name of the people of California, against that person. (Code Civ. Proc. § 803.) Because "the remedy of *quo warranto* belongs to the state, in its sovereign capacity, to protect the interests of the people as a whole and guard the public welfare[,]" the Attorney General alone may seek it. (*Citizens Utilities Co. v. Superior Court* (1976) 56 Cal.App.3d 399, 406; *Rando v. Harris* (2014) 228 Cal.App.4th 868, 876.) The Attorney General may do so directly or instead delegate the authority to proceed in *quo warranto* to a private party who applies for "'leave to sue' in the name of the people ...." (11 Cal. Code Regs. §§ 1-6.) But even if leave is granted, the Attorney General maintains strict control over the conduct of the lawsuit, retaining ultimate decision-making authority over the complaint and the right to "withdraw, discontinue or dismiss" or "assume the management of" the lawsuit "at any stage thereof." (11 Cal. Code Regs. §§ 8, 11.) *Quo warranto* "is the exclusive remedy in cases where it is available." (*Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225-26.)

Michael Gomez Daly and Inland Empire United (together, "IE United") did not follow this established procedure when they filed suit against the Board. Instead, IE United—claiming that the Board violated the Ralph M. Brown Act (Gov. Code § 54950 *et seq.*) when it appointed Dawn Rowe to fill the position of Third District Supervisor of the County of San Bernardino, after the prior incumbent was elected to the California State Assembly—brought this action under section 54960.1(a) of the Government Code, which authorizes "any interested person" to

"commence an action" for certain violations of the Brown Act. In particular, IE United alleged that the process undertaken by the Board to select candidates for the vacancy that was ultimately filled by Supervisor Rowe did not comply with the Brown Act's requirement that all meetings of, and actions taken by, the legislative body of a local agency occur in public view. (Gov. Code §§ 54952.2(b)(1), 54953(a), (c).) And it sought, as its sole remedy, a writ of mandate. The trial court agreed that the Board's appointment process violated the Brown Act and entered judgment accordingly.

In the trial court, the Board argued that IE United's lawsuit is premised entirely on the claim that Supervisor Rowe was unlawfully appointed to the office of Third District Supervisor and should be removed. As a result, under established precedent, the suit could not proceed in mandamus and must instead be brought as a *quo warranto* action under section 803 of the Code of Civil Procedure—an action that would be subject to the Attorney General's approval and control. The Board also argued that even if the appointment process ran afoul of the Brown Act in some way, any error was cured before the Board finally approved Supervisor Rowe's appointment, such that the trial court lacked the power to invalidate the Board's decision. (Gov. Code § 54960.1(e).) The League shares the Board's views on both of these points, and it intends to seek leave from the Court of Appeal to file an *amicus* brief in support of the Board when the merits of the appeal are heard. But it is what happened after judgment was entered—the remedy ordered by the trial court—that brings the Board, and the League, to this Court.

The trial court, consistent with IE United's prayer for relief, issued a writ of mandate. That writ directed the Board to "immediately … rescind" the appointment of Supervisor Rowe to the office of Third District Supervisor, prevent her from participating as a supervisor in any Board meetings or actions, and refuse to register or give effect to any vote she may attempt to cast. It also compelled the Board to refrain from appointing anyone to fill the vacated position and to immediately seat any person duly appointed by the Governor. This final direction stems from a provision in the San Bernardino County Charter stating that if the Board does not fill a vacancy by appointment within 30 days, the appointment shall be made by the Governor instead. (See Board's Petition for Review at 11.)

The Board appealed and sought a writ of supersedeas from the Court of Appeal, arguing, as relevant here, that the appeal automatically stayed enforcement

of the writ under section 916(a) of the Code of Civil Procedure. The Court of Appeal denied the petition, reasoning that because the trial court had concluded that the appointment of Supervisor Rowe was "null and void" (Gov. Code § 54960.1(a)), the relief it granted did not change the status quo between the parties. The following week, the Board filed its petition for review with this Court.

II. ARGUMENT

The Court "may order review of a Court of Appeal decision" whenever review is "necessary to secure uniformity of decision or to settle an important question of law ...." (Cal. Rules of Court, Rule 8.500(b)(1).) At first glance, the question presented by the Board's petition might seem dry and technical: Does the appeal of the trial court's judgment automatically stay enforcement of the writ directing the Board to rescind the appointment of Supervisor Rowe and leave that seat vacant until the Governor appoints someone else to the office of Third District Supervisor? However, the proper application of the automatic stay in this case is essential to ensuring "the fair and orderly administration of justice." (*Scott*, *supra*, 9 Cal.4th at 351.) Allowing the writ to go into effect during the pendency of the Board's appeal threatens to irreversibly alter the status quo between the parties and to generate confusion, or chaos, in the event that the Governor makes an appointment to the Board and the trial court's judgment is subsequently reversed. And if the Court of Appeal's reasoning were employed to resolve similar disputes in the future, it will have costly and destabilizing effects on other public agencies—particularly cities—throughout the State.

A decision from this Court affirming the application of the automatic stay will provide critical guidance to lower courts, outlining how they should handle politically sensitive disputes over the appointment of government officials. Accordingly, the League urges this Court to grant the Board's petition for review.

A. Staying enforcement of the trial court's writ of mandate is necessary to ensure that the status quo between the parties is maintained on appeal.

Under section 916(a) of the Code of Civil Procedure, except as otherwise provided by statute, "the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, <u>*including enforcement of the judgment or order*</u> ...." (Code Civ. Proc. § 916(a).) "The purpose of the automatic stay under section 916 is to preserve

'the status quo until the appeal is decided' … by maintaining 'the rights of the parties in the same condition they were before the order [appealed from] was made.'" (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 198.) The automatic stay ensures that the trial court does not take any action that could result in irreversible consequences if the appellate court overturns the judgment. "[I]f trial court proceedings during the pendency of the appeal conflict with the reviewing court's resolution of the appeal, then the appeal will likely be futile because the prevailing party, in most instances, will have no adequate remedy left." (*Ibid.*)

Courts have developed a variety of rules to implement section 916, the most well-known being that "[a]n appeal stays a mandatory [injunction] but not a prohibitory injunction." (*Kettenhofen v. Superior Court* (1961) 55 Cal.2d 189, 191.) The rationale for the distinction is that prohibitory injunctions are "self-executing ...." (*Food and Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174, 177.) Unfortunately, although "[the] rule is clear," its application typically is not. (*Kettenhofen*, *supra*, 55 Cal.2d at 191.) "The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative positions of the parties." (*People v. Mobile Magic Sales, Inc.* (1979) 96 Cal.App.3d 1, 13.) A prohibitory injunction, in contrast, "seeks to restrain a party from a course of conduct or to halt a particular condition." (*Ibid.*) "But an order which is entirely negative or prohibitory in form may prove upon analysis to be mandatory and affirmative in essence and effect …." (*Garfield*, *supra*, 18 Cal.2d at 177.) And "[t]he character of prohibitory injunctive relief … is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act." (*Mobile Magic Sales*, *supra*, 96 Cal.App.3d at 13.)

Generally, "the filing of a notice of appeal stays a writ of mandate ...." (*D.H. Williams Construction, Inc. v. Clovis Unified School District* (2007) 146 Cal.App.4th 757, 762; see Code Civ. Proc. §§ 916, 1110b.) Indeed, a writ of mandate—an order that "compel[s] the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station"—is, by definition, a form of mandatory relief. (Code Civ. Proc. § 1085(a).) And the League agrees with the Board that the particular writ issued here is mandatory in nature.

The writ's most important command is that the Board immediately rescind the appointment of Supervisor Rowe to the office of Third District Supervisor—an affirmative act that is not, in any sense of the word, "self-executing." (See *URS*

Corp. v. Atkinson/Walsh Joint Venture (2017) 15 Cal.App.5th 872, 876-87 [trial court order disqualifying attorney from continuing to represent party in litigation was mandatory in nature and subject to automatic stay on appeal]; *Feinberg v. Doe* (1939) 14 Cal.2d 24, 25-29 [trial court order was automatically stayed on appeal because, in effect, it required the defendants to terminate an employee].) It also directed the Board to seat any person duly appointed to the office by the Governor. If a command to terminate employment is a mandatory act, a command to employ someone else surely is as well. The remaining provisions—an order requiring the Board to prevent Supervisor Rowe from exercising the powers of her office and participating as a supervisor in any Board meetings or actions, and an order compelling the Board to refrain from appointing anyone to fill the office until the Governor makes an appointment—are all subordinate to, and in furtherance of, the primary effect of the writ: the removal of Supervisor Rowe and the appointment of another supervisor by the Governor.

The fact that the trial court found the appointment of Supervisor Rowe to be "null and void" is not, as the Court of Appeal believed, determinative of the mandatory or prohibitory nature of the writ. In all suits challenging the validity of governmental action, a finding that the disputed action is unlawful is a necessary precursor to the issuance of <u>*any*</u> remedy. The character of the remedy is instead established by what it requires of the party who must comply with the judgment. The Brown Act itself anticipates that once a court has determined "that an action taken by a legislative body of a local agency … is null and void[,]" the remedy will be coercive, since the underlying suit must be brought "by mandamus or injunction ...." (Gov. Code § 54960.1(a).) IE United, and the trial court, chose the former.

The most important point, however, is that allowing the writ to go into effect during the pendency of the appeal would prevent the Court of Appeal from restoring the parties to their original positions in the event of a reversal. If Supervisor Rowe is removed from office and then later reinstated, she will lose her "fundamental right" to participate in policy decisions made by the Board during her absence. During the period of any vacancy, residents of San Bernardino's Third District will also be forced to go without any political representation. And if the Governor appoints someone else as Third District Supervisor during the appeal and then the Court of Appeal subsequently reverses the judgment, it is not at all clear that Supervisor Rowe's claim to the office would prevail over the claim of the new

appointee; after all, the office will, by virtue of the trial court's writ, be vacant at the time of the Governor's appointment. (Gov. Code § 1770(d).)

Finally, the League notes that because the trial court's writ will have the effect of withdrawing the Board's power of appointment and giving it to the Governor instead, staying enforcement of the writ may ultimately further the Brown Act's underlying goal of "facilitat[ing] public participation in local government decisions …." (*Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1116.) The Governor is not subject to the Brown Act, and his appointment decision will not be made in compliance with the Act's open-meeting requirements. (Gov. Code § 54951.) If the Court of Appeal determines that no Brown Act violation occurred and that the appointment process—which took place almost entirely in open meetings—was valid, the stay will ensure that the public did, in fact, have a voice in the decision of who should fill the office of Third District Supervisor.

B. The difficult problems generated by the Court of Appeal's decision not to honor the automatic stay in this case can arise for cities as well, and if they do, the consequences will be even worse than they are here.

As the discussion above will hopefully demonstrate, the stakes are high in this case, and maintaining the status quo during the pendency of the appeal is critical. However, the circumstances that have generated this dispute are not unique to San Bernardino County. Indeed, the League is asking the Court to take this case up precisely because there is a very real possibility that similar disputes over appointments to municipal offices could arise in the future.

It is, for instance, not at all uncommon for vacancies to arise on city councils after a councilmember's election to higher office, as happened here, and sometimes for other reasons as well, such as death, resignation, or removal. (Gov. Code § 1770.) Informal polling conducted by the League in 2010 identified more than 30 city council vacancies over a two-year period. And unlike the procedure that governed the Board's appointment of Supervisor Rowe, many cities in California must call a special election to fill a vacant seat if an appointment to the city council is not made within 60 days of the vacancy. (Gov. Code § 36512(b).) Such elections can be tremendously expensive.[1] And yet, if the Court of Appeal's interpretation of

[1] Alameda County currently estimates that the cost of a standalone special election is $12 to $15 per registered voter. (See *Official Election Site of Alameda*

section 916 of the Code of Civil Procedure is correct, a trial court could issue a judgment ordering a city council to rescind an appointment and call a special election instead, and that election would go forward on appeal, at great cost, even if the judgment was ultimately determined to have been issued in error.

The League is also concerned that a court-ordered vacancy might interfere with the conduct of the people's business. City councils are typically comprised of an odd number of members, in order to eliminate the possibility that the council will be unable to agree on the appropriate disposition of a proposed action. A vacancy increases the risk of a tie vote, which ordinarily causes no action to be taken on the proposal. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1175-76.) And for some land use matters, taking no action will actually cause a project to be "deemed approved," even though it lacks the support of a majority of the council. (See, e.g., Gov. Code §§ 66452.4, 65956(b); *Ciani v. San Diego Trust & Savings Bank* (1991) 233 Cal.App.3d 1604, 1613.) Vacancies also make it more difficult for city councils to take actions that require a supermajority vote. (See, e.g., Gov. Code §§ 36937(b) [four-fifths vote needed for ordinance to take effect immediately]), 53724(b) [general tax can only be submitted to voters after two-thirds vote of the governing body]; Code Civ. Proc. §§ 1245.210-1245.240 [two-thirds vote needed to initiate condemnation of property].)

In short, a decision from this Court will not just aid the resolution of the current dispute between IE United and the Board. It will help ensure that the next dispute, when it inevitably comes, is expeditiously resolved by the courts in a manner that is consistent with the "certainty, predictability and stability" required by the law. (*Estate of Duke*, *supra*, 61 Cal.4th at 893.)

III. CONCLUSION

In light of the politically sensitive nature of appointments to public office and the importance of ensuring the prompt and orderly resolution of disputes that impact

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County, Election Cost, available at https://www.acvote.org/election-information/election-cost [last accessed January 16, 2020].) And a recent special election held by the City of Sunnyvale to fill a single vacant city council seat for four months cost $794,978. (See Victoria Kezra, *Sunnyvale's August special election cost $794,978*, available at https://www.mercurynews.com/2016/11/04/sunnyvales-august-special-election-cost-794978/ [last accessed January 16, 2020].)

the makeup of legislative bodies, a clear precedent clarifying the application of the automatic stay in this case would be invaluable, both for the parties and for public agencies throughout California. Accordingly, the League respectfully asks that the Court grant the Board's petition for review.[2]

Very truly yours,

JARVIS, FAY & GIBSON, LLP

Gabriel McWhirter, SBN 280957
Alexandra Barnhill, SBN 240195

[2] Because it is the League's view that enforcement of the trial court's writ should be automatically stayed on appeal, the League also supports the Board's request for a temporary stay of further enforcement proceedings pending action by this Court.

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay & Gibson, LLP, 492 Ninth Street, Suite 310, Oakland, California 94607.

On January 21, 2020, I served the within

Amicus Curiae Letter from the League of California Cities in Support of Petition for Review (Cal. Rules of Court, Rule 8.500(g))

on the parties in this action as follows:

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VIA TRUEFILING: I caused a copy of the document to be sent to the parties listed above via the Court-mandated vendor, truefiling.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

VIA FIRST CLASS MAIL: I an envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California to:

Clerk of the Court
San Bernardino County Superior Court
8303 N. Haven Avenue
Rancho Cucamonga, CA 91730

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

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

Jennifer Dent

Jennifer Dent