Case No. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY, et al.,
Petitioners (below) and Respondents (on appeal)

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, et al.,
Respondents/Real Party in Interest (below) and Appellants

After Order by the Court of Appeal
Fourth Appellate District, Division Two
Civil No. E073730

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANTS BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, ET AL.

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APPLICATION FOR LEAVE TO FILE

Pursuant to California Rule of Court 8.520(f), the California State Association of Counties ("CSAC") respectfully requests leave to file the attached amicus brief in support of Respondent/Appellant Board of Supervisors of San Bernardino County and Real Party in Interest/Appellant Dawn Rowe.[1]

INTEREST OF AMICUS CURIAE

CSAC's interest in the issues raised in this case is manifest. CSAC is a non-profit corporation whose members are California's 58 counties. CSAC's primary purpose is to represent the interests of county government and secure counties' ability to provide vital public programs and services. County boards of supervisors routinely fill vacant elective County offices by appointment through processes that are subject to open-meeting and other provisions of the Ralph M. Brown Act (Gov. Code § 54960 *et seq.*). The Court's decision in this case will determine the proceeding through which title to office of these many appointees may be challenged based on an alleged Brown Act violation in the appointment process: whether through an action under the quo warranto statute (Code of Civil Procedure § 803 *et seq.*) brought in the name of the People and by consent of the

[1] Pursuant to Rule of Court 8.520(f)(4), no party or counsel for a party in this appeal authored the proposed amicus brief in whole or part. Further no party, counsel for a party, or person or entity other than amicus curiae made a monetary contribution intended to fund the preparation or submission of the brief.

Attorney General, or by a private challenger in mandamus. CSAC agrees with Appellants that the quo warranto statue supplies the exclusive mechanism for such a challenge, together with critical safeguards to weed out frivolous or vexatious claims, ensure stable and effective local governance, and keep the public interest paramount in disputes over officeholding.[2]

CSAC has a further interest in safeguarding the authority of charter counties to design and implement their own procedures for filling vacancies in elected offices and in ensuring that appointees who fill vacancies in elected office in all counties are empowered to govern. The judgment below in this case would create uncertainty in these appointees' exercise of public office by creating a pathway for private parties to circumvent the quo warranto statute and tie up the appointees' title to office in court simply by alleging procedural irregularities or technical flaws in the appointment process.

CSAC's proposed amicus brief will assist the Court in deciding this matter by further explaining (1) the importance of quo warranto for ensuring orderly public administration, (2) the consistency between the Brown Act and the quo warranto statute, and (3) the destabilizing effects that will follow if private

[2] CSAC previously filed an amicus letter brief in support of Appellants' petition for review. See CSAC Amicus Letter Br. in Support of Pet. for Review (filed Jan. 17, 2020).

litigants can evade quo warranto and challenge public officials' title in mandamus based on alleged Brown Act violations.[3]

Dated: October 15, 2020

Respectfully submitted:

JAMES R. WILLIAMS
County Counsel

By: /s/ *Karun Tilak*
KARUN TILAK
Deputy County Counsel

[3] For the reasons laid out in Appellants' opening and reply briefs, and in CSAC's prior amicus letter brief in support of the petition for review, CSAC further agrees with Appellants that the injunction issued in this case was clearly mandatory and, pursuant to Code of Civil Procedure section 916(a), should have been automatically stayed when Appellants perfected their appeal.

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[PROPOSED] AMICUS BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANTS BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, ET AL.

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INTRODUCTION

This case presents a question of central importance to stable public administration across the State: where a party seeks to remove a sitting public official from office based on alleged Brown Act violations in her appointment, must the party bring their Brown Act challenge in a quo warranto proceeding? Under well-established caselaw, the answer is clearly yes: quo warranto is the *exclusive* remedy to try title to office. The quo warranto remedy safeguards the public's interest in the integrity of public office, protects public officials from vexatious lawsuits that undermine their ability to perform the public's business, and provides certainty in disputes over legal title to office.

In this case, however, Appellees Michael Gomez Daly and Inland Empire United (collectively, "I.E. United") have challenged San Bernardino County Supervisor Dawn Rowe's right to hold office by a petition for writ of mandate, alleging that the Board of Supervisors violated the Brown Act in appointing her. But the mandamus remedy provided in the Brown Act, at Government Code section 54960.1, does not alter the exclusivity of quo warranto, which provides a speedy and adequate remedy where, as here, a party seeks to unseat a sitting public official.

Nothing in the Brown Act compels a contrary result. While Government Code section 54960.1's mandamus or injunction remedies are the only ones available for most Brown Act violations, that is not the case for alleged Brown Act violations directly implicating an officeholder's title. For that discrete subset of challenges, Section 803 of the Code of Civil Procedure

makes quo warranto available. It is axiomatic that mandate will not issue when a plaintiff has another plain, speedy, and adequate remedy. Unlike in a mandamus proceeding, the incumbent officeholder is necessarily a party to a quo warranto proceeding, and quo warranto therefore provides a more efficient and certain method of adjudicating title to an office.

The purpose of the Brown Act is also consistent with a quo warranto action. The Brown Act enables the People, as the ultimate sovereign, to ensure that the officials to whom they delegate their authority are following the law. A quo warranto action sanctioned by the Attorney General serves a similar function: it is an action brought in the name of the sovereign People to decide public questions of governmental legitimacy. And courts have repeatedly found that the quo warranto mechanism adequately protects individuals' interests against governmental overreach.

The ruling below—which allowed I.E. United's Brown Act challenge to Supervisor Rowe's title to proceed outside of quo warranto—has serious statewide ramifications. Many members of the California State Association of Counties ("CSAC"), as well as numerous cities, provide for public offices to be filled by appointment in the event of a vacancy. By removing the Attorney General's gatekeeping role in quo warranto actions, these jurisdictions face the prospect of private lawsuits intended to tie up officeholders' titles based on purported procedural irregularities, without any consideration of benefit to the public interest.

As such, CSAC urges this Court to reverse the ruling below and hold that I.E. United's Brown Act claim should have been brought in a quo warranto action.

ARGUMENT

I. Quo Warranto Balances Stable Governance With the Need to Ensure the Integrity of Public Office

Allegations regarding the usurpation or unlawful exercise of public office raise grave concerns about governmental legitimacy. At the same time, removing an incumbent officeholder is an extraordinary remedy that implicates stable governance and effective representation of the public. The quo warranto statute balances these weighty interests by requiring that any challenge to an officeholder's title be brought by or with the consent of the Attorney General and in the name of the People. This ensures that complaints that raise substantial issues implicating the public interest can be addressed by the courts, while protecting public officials from unmeritorious privately motivated lawsuits that undermine officeholders' title and interfere with officials' ability to carry out important public functions.

A. The Quo Warranto Statute Empowers the Attorney General to Act in the Public Interest

Quo warranto is a specific legal action used to challenge "any person who usurps, intrudes into, or unlawfully holds or exercises any public office." (Code Civ. Proc., § 803; *Nicolopulos v. City of Lawndale* (2001) 91 Cal.App.4th 1221, 1225.) The quo warranto remedy has its roots in English common law, and it was historically used to centralize a monarch's authority by

challenging claims to an office or franchise supposedly granted by the crown. (*Int'l Ass'n of Fire Fighters v. City of Oakland* (1985) 174 Cal.App.3d 687, 695-96, hereinafter "*IAFF*.") But the "ancient writ fell into disuse" (*id.* at p. 695), and its history is "largely irrelevant today," (*Nicolopulos*, *supra*, 91 Cal.App.4th at 1228).

"In California, the 1872 Code formally abolished the equitable writ," substituting a statutory action, Code of Civil Procedure § 803 *et seq.*, by which the Attorney General may, in the name of the People, "determine whether holders of public offices or franchises are legally entitled to hold that office or exercise those powers." (Cal. Atty. Gen. Opinion Unit, Quo Warranto: Resolution of Disputes—Right to Public Office at p. 2, https://oag.ca.gov/sites/all/files/agweb/pdfs/ag_opinions/quo-warranto-guidelines.pdf [as of Sept. 27, 2020], hereinafter "Quo Warranto Guidelines.")

By vesting the remedy of quo warranto in the People, "and not in any private individual or group," the modern incarnation of quo warranto recognizes that "disputes over title to public office are viewed as a public question of governmental legitimacy and not merely a private quarrel among rival claimants." (*Nicolopulos*, *supra*, 91 Cal.App.4th at p. 1228.) Because a quo warranto action seeks to vindicate a public right, "a private party's right to [sue] cannot be absolute; the public interest prevails." (*City of Campbell v. Mosk* (1961) 197 Cal.App.2d 640, 649.)

Under the quo warranto statute, an action challenging an officeholder's title may only be brought by the Attorney General, or by a private party with the Attorney General's consent. (Code Civ. Proc., § 803; Quo Warranto Guidelines at pp. 4-5.) Even where the Attorney General grants a private party leave to sue, however, the matter "is always brought and prosecuted on behalf of the public" and the Attorney General always "remains in control of the case." (Quo Warranto Guidelines at p. 5.)

In determining when to grant leave to sue in quo warranto, the Attorney General "does not attempt to resolve the merits of the controversy," but instead determines "whether the application presents substantial issues of fact or law that warrant judicial resolution, and whether granting the application will serve the public interest." (*Rando v. Harris* (2014) 228 Cal.App.4th 868, 879, citing 95 Ops. Cal. Atty Gen. 50, 51.) "Absent countervailing circumstances," the Attorney General treats "the existence of a substantial question of fact or law as presenting a sufficient 'public purpose' to warrant granting leave to sue in quo warranto." (102 Ops. Cal. Atty. Gen. 20, *5.)[4]

The Attorney General is vested with significant discretion in deciding whether a quo warranto action would advance the public interest. (*Rando*, *supra*, 228 Cal.App.4th at p. 878.) This reflects courts' understanding that determining whether quo warranto is in the public interest requires an "exercise of care

[4] Although not binding, in this context "Attorney General opinions are entitled to considerable weight." (*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1087, fn. 17; accord *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 17.)

and delicacy," and that the Attorney General is best placed to make such a determination. (*Campbell*, *supra*, 197 Cal.App.2d at p. 650; *id.* at p. 648 [noting that the quo warranto remedy "protect[s] the interests of the people as a whole and guard[s] the public welfare," and the Attorney General "is the proper one to determine, in the first instance, when the interests of the public justify a resort to" quo warranto], citation omitted.)

B. The Quo Warranto Statute Safeguards Stable Public Administration

The quo warranto statute not only ensures that substantial questions implicating the integrity of public office proceed to the courts, but it also protects another fundamental aspect of the public interest: the need for stable and effective governance.

As this Court long ago recognized, "the chief object in requiring leave [from the Attorney General] is to prevent vexatious prosecutions" based purely on private interest without any public benefit. (*Lamb v. Webb* (1907) 151 Cal. 451, 456, citation omitted; see also *San Ysidro Irrigation Dist. v. Superior Court of San Diego Cty.* (1961) 56 Cal.2d 708, 715 [the "underlying theory" of quo warranto is that the existence of municipal corporations "should not be subject to indirect attack at the caprice of private interests . . . ."].) Absent the Attorney General's gatekeeping role, a private litigant could destabilize public governance by bringing meritless claims that impinge on the legitimacy of the incumbent officeholder and require a local government to expend time and resources defending officeholders' title, rather than carrying out the public's business.

This Court, in *Lamb*, recognized the pernicious effects of allowing private litigants to bring claims against title to office without leave of the Attorney General. There, the Attorney General declined to grant leave to sue to a challenger who alleged flaws in an election based on a threadbare complaint. The Court emphasized that "the attorney-general was not only not guilty of a violation of his discretion in any extreme sense, but was not guilty of *any* want of discretion" because allowing the plaintiff's speculative claim to go forward would "introduce litigation and confusion into . . . county affairs" "for the purpose of discovering . . . whether there might not have been some error committed." (*Lamb*, *supra*, 151 Cal. at pp. 454, 455-56; see also *Coe v. City of Los Angeles* (1919) 42 Cal.App. 479, 481 [quo warranto actions brought with the Attorney General's consent promote certainty because "if such a case can be maintained by a private citizen, it may be brought at any time within the statutory limitation, and must necessarily lead to uncertainty and interminable confusion"].)

The quo warranto process provides 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—rather than relying on a bare-bones complaint. In an ordinary civil case, a plaintiff can file a complaint without submitting supportive evidence to the court. The first opportunity that the defendant has to dispute the plaintiff's claims is by way of a demurrer. But even then, the standard of review on a demurrer is highly deferential to a

plaintiff, with the court accepting as true the facts alleged in the complaint and sustaining a demurrer only if the alleged facts do not support a cause of action under any possible legal theory. Moreover, a plaintiff can serve discovery within 10 days of serving the complaint—potentially imposing significant costs on the parties.

In contrast, under the quo warranto procedure, a party must first submit its claims to the Attorney General's Office, which requires "great specificity in factual allegations" and often requires that putative relators submit affidavits, "documents, maps," and other direct evidence for examination. (Quo Warranto Guidelines at p. 11.) This Court has upheld the Attorney General's refusal to permit quo warranto actions unless the supporting affidavits contain factual allegations so specific that perjury charges may be brought if any material allegation is false. (*Lamb*, *supra*, 151 Cal. at pp. 455-56.) Thus, under the quo warranto procedure, even before a challenge to title reaches the courts, the Attorney General is able to make an informed determination about whether a proposed relator's claims raise a substantial question based on more than just the face of the complaint. Contrary to I.E. United's argument that quo warranto does not allow for expeditious relief (Answering Br. at 33), in fact the quo warranto process promotes the prompt resolution of a claim by requiring a putative plaintiff to produce its supporting evidence at the start of the case, (see Quo Warranto Guidelines at p. 11 ["The Attorney General's Office believes that quo warranto

litigation is expedited by immediately placing all of the facts before the defendant and the court . . . ."]).

By providing this check on unmeritorious claims, the quo warranto statute promotes stable democratic governance. For example, in *Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, the Court of Appeal observed that the "public is entitled to a sense of security upon the ratification of a charter" and that "withdrawal of the right to attack [the charter] by anyone except the Attorney General, acting for the People" in a quo warranto action was a reasonable way of protecting settled public expectations. (23 Cal.App.3d at p. 172; see also *Boling v. Public Employment Relations Bd.*, (2019) 33 Cal.App.5th 376, 384 ["[b]ecause the voters adopted the Initiative and the Initiative has taken effect, the Initiative's procedural regularity may only be challenged in a quo warranto proceeding."].)

Ultimately, as this Court has held, through quo warranto "[t]he law provides machinery for trying the title to an office, in an action in which the officer is a party, and the right to the office is the question involved." (*Town of Susanville v. Long* (1904) 144 Cal. 362, 365.) Allowing wholly privately motivated individuals to challenge an official's title outside of quo warranto "would lead to endless confusion, and embarrass the government of such municipal corporation. The taxpayer could refuse to pay taxes, and defend a suit brought for their collection on the ground that the assessor was not the *de jure* assessor, or that the tax collector was not the *de jure* tax collector; a person charged with resisting

an officer could defend upon the ground that the officer had not been legally elected or appointed; and so on through the various departments of the municipal government in its varied business transactions with its citizens." (*Ibid*.)

II. I.E. United's Brown Act Challenge to Supervisor Rowe's Title Should Be Resolved Through Quo Warranto

Critical to quo warranto's ability to protect the integrity of public office, while maintaining certainty and stability in governance, is the fundamental precept that a quo warranto proceeding is the exclusive means to challenge title to public office. "In the absence of constitutional or statutory regulations providing otherwise, quo warranto proceedings are the only proper remedy in cases in which they are available." (*Cooper v. Leslie Salt Co.* (1969) 70 Cal.2d 627, 633; *San Ysidro Irrigation District*, *supra*, 56 Cal.2d at pp. 714-15.) The value of the quo warranto statute—ensuring that title to office is only challenged when in the public interest, does not become the subject of private squabbles, and can be determined with certainty—would be undermined if this Court were to sanction the ability of parties to circumvent the quo warranto statute.

Here, based on alleged Brown Act violations, I.E. United sought an order declaring Supervisor Rowe's appointment to the San Bernardino County Board of Supervisors to be null and void and requiring the Board to rescind her appointment and seat a new appointee designated by the Governor. Yet I.E. United sought this relief by writ of mandamus, not quo warranto. I.E. United asserts that this decision was appropriate because (1) its

challenge to Supervisor's Rowe's title is only incidental; and (2) even if its challenge does directly implicate Supervisor Rowe's title, the challenge could be brought under Government Code section 54960.1's mandamus remedy instead of the quo warranto statute.

Neither justification is persuasive. Because the relief that I.E. United seeks necessarily involves the removal of an incumbent officeholder, it is a direct challenge to title that must be resolved through quo warranto under long-standing statutory and common law. And the Brown Act does not alter the exclusivity of quo warranto in this case. Mandate is not available under section 54960.1 because quo warranto remains a speedy and adequate—and therefore the exclusive—remedy, and nothing in the history or purpose of the Brown Act supports a contrary result.

A. I.E. United Directly Challenges Supervisor Rowe's Title Because the Relief It Seeks Would Necessarily Remove Her from Office

As discussed above, an action in quo warranto is the legal recourse to challenge "any person who . . . unlawfully holds or exercise[s] any public office." (Code Civ. Proc., § 803.) Quo warranto is the "sole remedy" by which a court can "conclusively adjudge[]" that an office is vacant and "oust[] the current incumbent." (*Nicolopulos*, *supra*, 91 Cal.App.4th at 1226.) Because I.E. United's petition asks the Superior Court to adjudge Supervisor Rowe's seat vacant and oust her from office—and the Superior Court's judgment purported to grant this relief—quo warranto must provide the exclusive remedy.

I.E. United's claim is that Supervisor Rowe's seat on the Board of Supervisors is vacant because she was appointed through a process that violated the Brown Act. I.E. United thus seeks to oust her from her seat by asking the Superior Court "to rescind the appointment of Dawn Rowe" and order a new appointment by the Governor. (Exh. 2, at pp. 28-29.) In granting a peremptory writ of mandate, the Superior Court did just that by, *inter alia*, ordering the Board to "immediately . . . rescind the appointment of Rowe," prohibiting the Board from "allowing Rowe to participate in an official capacity in any meetings or Board Actions," and requiring the Board to "immediately seat any person duly appointed" to the Board by the Governor. (Exhs. 13, 22, 23.)

Under long-standing precedent, quo warranto is the exclusive remedy where, as here, a petition challenges the lawfulness of an incumbent officeholder's position and the relief sought would remove the incumbent officeholder from office. The Court of Appeal's decision in *Klose v. Superior Court of San Mateo County* (1950) 96 Cal.App.2d 913, is informative. There, a private individual filed a complaint in mandamus to require the city council to fill a vacancy that the plaintiff alleged existed because the incumbent councilmember did not meet the qualifications for the office. The Court of Appeal rejected the petitioner's argument that mandamus was appropriate to fill the alleged vacancy. The court held that the fact of vacancy must be determined in quo warranto, and the trial court could not

circumvent the statute by issuing a writ of mandate. (96 Cal.App.2d at p. 925.)

Surveying the extant quo warranto caselaw, the Court of Appeal in *Klose* synthesized the rulings as follows: "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," quo warranto is the exclusive remedy and "mandamus must be denied." (*Klose*, *supra*, 96 Cal.App.2d at p. 925.) That is precisely the case here: the Board of Supervisors has declined to find a vacancy based on I.E. United's alleged Brown Act violations, and Supervisor Rowe remains the incumbent officeholder. Under these facts, I.E. United's claim directly challenges Supervisor Rowe's title, and must be resolved in quo warranto.

I.E. United resists this conclusion by arguing that "[a]ny arguable attack on Rowe's title was . . . too incidental to trigger quo warranto's exclusivity" because I.E. United challenged the "process of filling" the vacancy, and not Supervisor Rowe's "general qualifications or eligibility to serve on the Board." (Answering Br. at pp. 35-36.) I.E. United further attempts to distinguish *Klose* as involving a challenge to the officeholder's qualifications and eligibility, and not a challenge "to an appointment process." (*Id.* at p. 34.)

But this distinction rings hollow. In several of the cases that *Klose* examined, courts have held that quo warranto, rather than mandamus, is the appropriate remedy to challenge alleged flaws in the process by which an officeholder acquires title. For

example, in *Meeker v. Reed* (1924) 70 Cal.App. 119, after one of the members of a five-member city council died, two other city councilmembers resigned. (70 Cal.App. at p. 121; *see also Klose, supra*, 96 Cal.App.2d at p. 919 [examining *Meeker*].) The mayor subsequently filled the vacant seats by appointment. (*Meeker*, 70 Cal.App. at p. 121.) One of the resigned city councilmembers then filed a petition for writ of mandate, arguing that the seats should have been filled by special election under the city's charter rather than by appointment. (*Id.* at p. 122.) The Court of Appeal held that mandate was an inappropriate remedy to resolve the question of whether a special election should have been called because it would necessarily involve resolving the title of at least one of the incumbent city councilmembers. (*Id.* at p. 126.) Crucially, the petitioner in *Meeker* did not challenge whether the appointed city councilmembers met the qualifications for their offices, but rather whether the process by which they acquired their office was lawful (i.e., whether they should have been appointed or selected by special election).

Similarly, in *Hamilton v. Mallard* (1917) 33 Cal.App. 470, (*see Klose, supra*, 96 Cal.App.2d at p. 923), the City of Los Angeles adopted an ordinance transferring property assessment functions to the County of Los Angeles and abolishing the office of city assessor. A petitioner subsequently brought a petition for writ of mandate against the incumbent and the city council, seeking to require the assessor to carry out his former duties under the theory that the proceedings by which his office was abolished were unlawful. (33 Cal.App. at p. 471.) The Court of

Appeal concluded that mandate was inappropriate to resolve the issue of whether the process by which assessment duties were transferred to the county was lawful because "[t]o issue the writ under such circumstances would be tantamount to permitting its use for the purpose of determining as between two adverse parties, the right and title to the office, for which purpose another proceeding is provided by statute"—i.e., quo warranto. (33 Cal.App. at pp. 472-73.)

Reaching back into this Court's jurisprudence further underscores the long-established common-law principle in this State that challenges to the appointment process by which an officeholder acquires title must be pursued exclusively through quo warranto. For example, in *People v. Sassovich* (1866) 29 Cal. 480, a criminal defendant challenged his trial proceedings on appeal by arguing, *inter alia*, that the governor lacked the constitutional power to appoint the judge who presided over his trial. In other words, the defendant was not alleging that the judge had "usurped any office in [his] own right" (Answering Br. at 36), but solely challenged the lawfulness of the process by which the judge was appointed. Nevertheless, this Court held that "title to the office cannot be questioned in this collateral mode. [The judge]'s title can only be questioned in an action brought directly for that purpose," i.e., quo warranto. (29 Cal. at p. 485; see also *People v. Bowen* (1991) 213 Cal.App.3d 783, 789-

90 [citing *Sassovich* for the proposition that the right of a judge to hold office can only be challenged through quo warranto].)[5]

Examples of courts adjudicating procedural irregularities in quo warranto proceedings abound outside of the context of challenges to public office as well. For example, *IAFF* involved a challenge to the enactment of charter amendments on the ground that the city had not complied with the meet-and-confer process of the Meyers-Milias-Brown Act. (174 Cal.App.3d at p. 698 ["[A]n action in the nature of quo warranto will lie to test the regularity of proceedings by which municipal charter provisions have been adopted."]; see also, e.g., *Boling*, *supra,* 33 Cal.App.5th at p. 384 [involving procedural challenge to citizens' pension reform initiative]; *City of Campbell*, *supra*, 197 Cal.App.2d at p. 643 [challenge to the process by which the City of San Jose annexed certain territory].) Of particular relevance here, the Court of Appeal in *IAFF* rejected a similar attempt by appellants in that case to parse the process of enacting the charter amendments from the enactment itself. (See *id.* at p. 692 n.7 [attempt to separate city council "resolution proposing the amendments . . . from the enactment of the amendments themselves" was "bootless" because the resolution "was indisputably the first step in the 'purported enactment of ... the amendment[s],' i.e.,

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[5] Further, in *Lamb*, the plaintiff sought to challenge title to a seat on a board of supervisors based on purported flaws in the election procedure in a quo warranto proceeding. Although the exclusivity of quo warranto was not squarely presented to the Court, the case further suggests a long-settled understanding in this State that quo warranto proceedings encompass challenges to officeholders' title premised on procedural flaws.

inextricably part and parcel of the procedural regularity of the process of enactment," citation omitted].)

In short, I.E. United's attempt to evade quo warranto by claiming that its lawsuit only incidentally implicates Supervisor Rowe's title is belied by the record in this case and over a century of caselaw establishing that quo warranto is the exclusive remedy for challenges seeking to oust an incumbent officeholder based on flaws in the process by which they acquired title to office.

B. Government Code § 54960.1 Does Not Authorize Mandamus to Remove Supervisor Rowe from Office

I.E. United's claim that the Brown Act—specifically Government Code section 54960.1—displaces or provides an alternative remedy to the quo warranto statute also lacks support. While section 54960.1's mandamus and injunction remedies provide the only method of remedying most Brown Act violations, under settled principles of statutory and common law, mandamus does not lie for challenges to title for which quo warranto provides a speedy and adequate remedy. Nor do public policy concerns counsel against requiring plaintiffs to pursue Brown Act challenges that implicate title to office through quo warranto. Indeed, by situating the remedy in the People, pursuing a violation of the Brown Act via quo warranto vindicates the Act's aim to protect popular sovereignty.

1. *Section 54960.1's Mandate Remedy Does Not Supplant the Quo Warranto Statute, Which Provides a Speedy and Adequate Remedy*

Prior to 1986, a Brown Act violation could not serve as a basis to invalidate any legislative action. Thus, in 1986, the

Legislature put "teeth" into the statute by enacting Section 54960.1, which provides that actions taken in violation of the Brown Act, and not cured, may be declared "null and void." (Gov. Code, § 54960.1(a).) The provision further specifies that an interested person may invalidate an action taken in violation of the Act "by mandamus or injunction." (*Ibid.*)

While I.E. United advocates for an interpretation of section 54960.1 that supplants the available remedy under the quo warranto statute, such a reading would be inconsistent with established principles of statutory interpretation. For example, the Legislature "is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in light of such decisions as have a direct bearing upon them." (*People v. Harrison* (1989) 48 Cal.3d 321, 329.) And "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." (*Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7; see also *ibid.* ["[R]epeals by implication are not favored, and are recognized only when there is no rational basis for harmonizing two potentially conflicting laws."].) Here, there is little reason to believe that the Legislature intended to overthrow the long-established principles of mandamus and quo warranto in enacting 54960.1, particularly where the legislative

history scarcely mentions[6] quo warranto or the established rules of restraint governing the extraordinary remedy of a writ of mandate. Rather, a more reasonable reading of the statute would harmonize section 54690.1, the mandamus statute, and the quo warranto statute.

In 1986, when the Legislature enacted section 54960.1, it was surely aware that writs of mandate in California were governed by Code of Civil Procedure § 1086 and the axiomatic common-law principle that mandate will only lie if there is "not a plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc. § 1086; see also *Phelan v. Superior Court for City & Cty. of San Francisco* (1950) 35 Cal.2d 363, 366 [construing section 1086 in light of the "general rule" that a writ of mandate will not issue if another adequate remedy is available to the petitioner].) Thus, under a harmonized reading, section 54960.1 imports the constraints on mandamus imposed by Code of Civil Procedure section 1086 and California common law. Further, the Legislature was also presumably aware of the quo warranto statute, Section 803 of the Code of Civil Procedure, as well as over a century of caselaw establishing that quo warranto provides a speedy and adequate legal remedy for challenging title

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[6] For example, the entire 1,593-page legislative history contains only a single reference to "quo warranto" in a rejected 1969 amendment. (Reply Br. at p. 21; RJN Exhs. B-X.) But that amendment proposed to make knowing violators of the Brown Act removable through a quo warranto proceeding based on their actions while in office. The Legislature's rejection of the amendment has no bearing on whether quo warranto is an available remedy for removing an officeholder appointed through a process that allegedly violated the Brown Act.

to office based on procedural defects. (See, e.g., *Klose*, 96 Cal.App.2d at p. 925 ["[q]uo warranto gives a plain, speedy, and adequate remedy"]; see also Part II.A, *supra* [discussing cases in which courts held that quo warranto was the appropriate mechanism to challenge an officeholder's title based on flaws in the process by which he acquired title].)

Reading section 54960.1's provision regarding mandamus alongside Code of Civil Procedure sections 803 and 1086 yields a result that is consistent with the Legislature's intent to make the Brown Act enforceable. Section 54960.1 provides mandamus as a default mechanism for adjudicating Brown Act violations where another plain, speedy, and adequate remedy is unavailable. For the vast majority of actions subject to the Brown Act—such as adopting resolutions, approving budgets, making land use decisions, or approving contracts—mandamus or injunction may well provide the only available remedy. But with respect to Brown Act violations implicating title to office, the quo warranto statute supplies a plain, speedy, and adequate remedy for

"obtaining a judicial determination" that the action is "null and void." (Gov. Code, § 54960.1(a).)[7, 8]

Chief among the reasons that quo warranto provides a more speedy and effective alternative to mandamus to resolve title to office is that it ensures that all relevant parties are heard in one proceeding and bound by its results.[9] In a quo warranto action, both the party challenging title to office and the incumbent officeholder are necessary parties. Thus, a court can conclusively adjudge the vacancy of an office in a single proceeding that binds the incumbent officeholder. In contrast, a

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[7] Further supporting this conclusion, the Attorney General's Office has opined that alleged Brown Act violations "may be resolved within the context of the . . . quo warranto action" (97 Ops. Cal. Atty. Gen. 12, at *4 (2014)), and its opinion to this effect is entitled to considerable weight. (*Lexin*, *supra*, 47 Cal.4th at p. 1087 n. 17.)

[8] I.E. United argues that if an action must be brought in quo warranto to address Brown Act violations that implicate title to office, the "notice and cure" requirements of Government Code § 54960.1(b) would not apply. But the statute need not be so construed. Section 54960.1(b) requires that notice and cure be provided "prior to an action being commenced" under 54960.1(a). Thus, notice and cure is required before an interested party can seek "a judicial determination that an action" is "null and void" under section 54960.1(a)—whether by the default mandamus remedy or by another available speedy and adequate remedy.

[9] In addition, as discussed in Part I.B, *supra*, the quo warranto process promotes the efficient resolution of disputes regarding an officeholder's title by requiring a putative relator to supply considerable supporting evidence at the outset, thus enabling the Attorney General—and a court if the Attorney General grants leave to sue—to make an informed determination of the merits of a claim early in a case.

mandamus action is directed at the appointing entity, and not the allegedly usurping officer. A writ of mandate directing an entity to rescind the appointment of an incumbent officeholder and appoint another individual to the position does not automatically bind the incumbent officeholder. As a result, a public entity could appoint someone to the office and the incumbent may not agree to be bound by the mandamus judgment, yielding competing claims to the office and hobbling public governance in the process.

Indeed, a long line of cases has declined to collaterally resolve title to office in a mandamus proceeding precisely because of the uncertainty that such a ruling would create as to the legal title to office. For example, in *Klose*, the Court of Appeal, after reviewing numerous appellate decisions on quo warranto and mandamus, observed that "if mandamus were allowed, and if the trial court should order the council to fill the alleged vacancy, an anomaly would result, as [the incumbent] would not be bound by the decision. If the council, under mandamus, should appoint another councilman, an action in quo warranto or a mandamus action for payment of salary would have to be brought to determine which was legally entitled to the office." (96 Cal.App.2d at p. 925; see also, e.g., *Nicolopulos*, *supra*, 91 Cal.App.4th at pp. 1225-26 [recognizing that "[t]he current incumbent must be a party to the quo warranto proceeding," and "[if] the former officeholder succeeds in quo warranto, ousting the current incumbent, he may be restored to office"]; *Kelly v. Edwards* (1886) 69 Cal. 460, 463 [mandamus was not appropriate

to try title to office "because the incumbent is not a party to th[e] action"]; *Black v. Bd. Of Police & Fire Com'rs of City of San Jose* (1911) 17 Cal.App.310, 317 [declining to resolve title to office by writ of mandate because "the actual occupant of the office, whose rights will be vitally affected by the determination of the other questions discussed, is not before the court"].)

2. *Quo Warranto is Consistent With the Brown Act's Purpose*

I.E. United also seeks to portray the enforcement of the Brown Act through quo warranto as inconsistent with the Brown Act's purpose. Specifically, I.E. United argues that the Brown Act "establishes the rights of individuals *relative to* the state" (Answering Br. at p. 31) and that requiring leave to sue in quo warranto would undermine this goal because the Attorney General is an elected official of the State and a political actor (*id.* at p. 12). But in fact, the quo warranto proceeding was designed to protect the public's interest in the legitimacy and lawfulness of government action.

It is a bedrock principle of governance in California that the people are the ultimate sovereign. (Gov. Code, § 100 (a), (b) ["The sovereignty of the state resides in the people thereof, and all writs and processes shall issue in their name."]; Gov. Code, § 240 ["The people, as a political body, consist of: (a) Citizens who are electors. (b) Citizens not electors."].) The Brown Act is animated by this principle of popular sovereignty: "The people of this State do not yield their sovereignty to the agencies which serve them. . . . The people insist on remaining informed so that they may retain control over the instruments they have created."

(Gov. Code, § 54950.) Indeed, as courts have recognized, an "interested person" suing under the Brown Act need not show any special interest other than 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." (*McKee v. Orange Unified Sch. Dist.* (2003) 110 Cal.App.4th 1310, 1319, emphasis added.)

As discussed in Part I, *supra*, the Attorney General, acting under the quo warranto statute, is empowered to protect this same public interest in ensuring that government officials to whom the sovereign people have delegated their authority are acting in accordance with the law. An action brought in quo warranto is brought in the name of the People of the State (Code Civ. Proc., § 803), and as such, the Attorney General acts for the benefit of the public as the collective sovereign. (See, e.g., *Nicolopulos*, 91 Cal.App.4th at p. 1228 [quo warranto action is premised on the notion that "disputes over title to public office are viewed as a public question of governmental legitimacy"]; *People ex rel. Clark v. Milk Producers' Ass'n of Central Ca.* (1923) 60 Cal.App. 439, 442 ["The complaint in [a quo warranto] case designates the people as the plaintiff: it is the people who complain; the wrongs complained of are of public concern."]; see also *People v. Pac. Land Research Co.* (1977) 20 Cal.3d 10, 17 [enforcement action on behalf of the People is "designed to protect the public and not benefit private parties," with the Attorney General acting as "protector of the public"].) This is not a unique grant of power to the Attorney General, who in numerous

contexts is authorized to act on behalf of the sovereign People and in the public interest.[10]

While I.E. United intimates that the Attorney General would not adequately protect individual rights against government overreach under the Brown Act, quo warranto actions authorized by the Attorney General by their nature involve the assertion of citizens' rights against government officials. I.E. United does not provide any evidence that the Attorney General under-enforces quo warranto in actions involving title to office—and there is no reason to believe he would do so in a Brown Act case. Indeed, a review of the Legal Opinions of the Attorney General between 2010 and 2020 reveals that leave to sue under quo warranto was granted in part in a majority of cases where it was requested. (See Legal Opinions of the Attorney General-Yearly Index, https://tinyurl.com/y3zsbabn [selecting 2010-2020 in drop-down menu].) Further, the Bagley Keene Act—the state government counterpart of the Brown Act—specifically authorizes the Attorney General to sue state agencies "to stop or prevent violations or threatened violations" of the Act. (Gov. Code, § 11130(a).) Thus, while I.E. United argues that

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[10] See, e.g., Bus. & Prof. Code, § 17535 [False Advertising Law]; Civ. Code, § 52(d) [Unruh Civil Rights Act]; *id.* § 52.1(b) [Tom Bane Civil Rights Act], *id.* § 1798.155 [California Consumer Protection Act]; Vehicle Code, § 32004 [transportation of hazardous material]; *id.* § 34511 [vehicle safety regulations], Gov. Code, § 12607 [environmental protection]; *id.* § 12660 [securities laws]; Health & Safety Code, § 445 [for-profit medical referrals]; *id.* § 108780 [Children's Poison Prevention Packaging Act]; *id.* § 25182 [hazardous waste control]; § 25249.7 [Safe Drinking Water and Toxic Enforcement Act].

reading section 54960.1 as Appellants and CSAC suggest would lead to "absurd" consequences under the Bagley Keene Act, (see Answering Br. at p. 41), in fact that statute already contemplates that the Attorney General could pursue an action against a state agency.

Moreover, courts have rejected the argument that the leave-to-sue requirement in a quo warranto action fails to adequately protect an individual's rights against the state. For example, in *IAFF*, a case that involved a challenge to a city charter amendment, the Court of Appeal considered and rejected the identical public policy argument I.E. United advances here—i.e., that "given the Attorney General's complete control of proceedings in the nature of quo warranto, to commit [a plaintiff's] cause to that officer's unbridled discretion is to abandon them to the position of one having to rely on the fox to protect the hen house." (174 Cal.App.3d at pp. 694-95.) The Court of Appeal found that "[i]n a case which is of purely public interest and does not involve any private or individual right or grievance"—such as I.E. United's Brown Act claim—the rules affording the Attorney General significant discretion in granting leave to sue were unproblematic and "obtain to their full extent." (*Id.* at p. 698.) And even in cases where a plaintiff asserts an individual right distinct from the general public interest, the court suggested that quo warranto provides "an individual sufficient protection against abuse" because the Attorney General's refusal to grant leave to sue may be reviewable by writ of mandate. (*Id.* at pp. 696, 697-98.)

Similarly, in *Nicolopulos*, the Court of Appeal rejected the appellant's argument that requiring the Attorney General's consent to sue in quo warranto to challenge an official's title violated due process, and concluded that quo warranto "satisfies constitutional due process for remedying any claimed procedural irregularities leading to the city council's declaration of a vacancy in appellant's office." (91 Cal.App.4th at 1228.) And in *Oakland Municipal Improvement League v. City of Oakland* (1972) 23 Cal.App.3d 165, which involved a challenge to the validity of a city charter, the Court of Appeal declined the appellant's invitation to "reexamine quo warranto . . . because defects in the electoral process of adopting a charter adversely affect the right of the vote," and instead found that requiring the appellant to challenge enacted charter amendments in quo warranto was reasonable. (23 Cal.App.3d at p. 171.)

Ultimately, while the Brown Act undoubtedly implicates important democratic principles, so too do the numerous other contexts in which the quo warranto statute provides the exclusive means to protect the public from unlawful government action. There is no reason, therefore, to exempt Brown Act claims that implicate title to office from quo warranto's purview.

C. Allowing Brown Act Challenges to Title to Proceed in Mandamus Will Destabilize Public Administration

By permitting Brown Act challenges to an officeholder's title to proceed in mandamus, the ruling below effectively carves out a significant loophole in the quo warranto statute. The Brown Act's open meeting requirements apply to any meeting

held to consider appointments to fill vacancies in any elected position or legislative body. (Gov. Code, § 54957(b)(1), (4).) This includes a wide swathe of local officials responsible for vital public functions. At the county level, for example, elected officials include not just members of the Board of Supervisors, but also the district attorney, sheriff, assessor, auditor-controller, tax collector, and clerk-recorder. Many of CSAC's member counties authorize vacancies in these elected positions to be filled by appointment. For example, ten of the fourteen charter counties in the State authorize their boards of supervisors to fill vacancies by appointment,[11] and almost all authorize the board to fill vacancies in other elected offices by appointment.[12] And in California's 44 general law counties, boards of supervisors are

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[11] See Alameda County Charter, § 8; Santa Clara County Charter, Art. I, § 203; Fresno County Charter, § 8; Orange County Charter, Art. I, § 103; Placer County Charter, § 206; Sacramento County Charter, § 7; San Bernardino County Charter, Art. I, § 7; San Diego County Charter, § 401.4; San Mateo County Charter, § 203; Tehama County Charter, Art. II, § 7.

[12] See, e.g., Alameda County Charter § 20; Butte County Charter Art. IV § 9; El Dorado County Charter Art. IV § 406; Los Angeles County Charter § 16; Placer County Charter Art. IV § 404; Sacramento County Charter Art. VIII § 31; San Bernardino County Charter Art. II § 7; Alameda County Charter § 20; San Diego County Charter § 500.2; San Mateo County Charter Art. IV § 415; Santa Clara County Charter Art. V § 501. The City and County of San Francisco's charter also authorizes its mayor to fill vacancies in elected offices, including the board of supervisors, by appointment. vacancies by appointment. City and County of San Francisco Charter, § 13.101.5.

required to fill vacancies in the vast majority of elected offices (excepting only superior court judges and supervisors). (Gov. Code, § 25304.) At the city level, vacancies in elected office in general law cities are filled by appointment (*see* Gov. Code § 36512), and vacancies in elected office in charter cities (which may include mayor and city attorney as well as city council) are often filled by appointment as well. Moreover, appointments to the governing bodies of numerous county and city boards and commissions—including police commissions, planning commissions, personnel commissions, and housing authorities—are subject to the Brown Act's open meeting requirements.

Thus, if the ruling below is allowed to stand, a party would be able to evade the safeguards provided by a quo warranto proceeding and directly challenge the title of myriad appointed public officials in mandamus simply by basing that challenge on alleged technical flaws in the appointment process. Such challenges not only impugn the authority of these high-level public officials, but also cast a pall over the multitude of decisions for which they are responsible. As described in Part I, *supra*, permitting private parties to throw officeholders' title into question—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. (*Lamb*, *supra*, 151 Cal. at pp. 454-56.)

Thus, the lawfulness of these many appointments should be judicially determined only when the Attorney General deems it in the public interest to do so because the People's interests in a properly functioning government are ultimately at stake when title to public office is contested. Local governments must be empowered to function without concern that the legitimacy of their appointments can be subject to challenges at any time and tied up in privately motivated disputes without proper process.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully urges this Court to reverse the judgment below and hold that I.E. United may not bring this action in mandamus and should instead have brought an action in quo warranto to challenge Supervisor Rowe's title to office.

Dated: October 15, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

Pursuant to Rule of Court 8.520(c), I certify that the foregoing Brief of Amicus Curiae California State Association of Counties in Support of Appellants contains 7,604 words, including footnotes, but not including the Table of Contents, Table of Authorities, this Certificate, the caption page, or signature blocks.

Dated: October 15, 2020 Respectfully submitted,

By: /s/ *Karun Tilak*
Karun Tilak
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SUPREME COURT OF THE STATE OF CALIFORNIA

PROOF OF SERVICE

Daly, et al. v. Board of Supervisors of San Bernardino County, et al. *Case No. S260209*

I, Maria D. Rodriguez, say:

I am employed in the County of Santa Clara, State of California. I am over the age of 18, and not a party to the within action. My business address is 70 West Hedding Street, East Wing, 9th Floor, San Jose, California 95110-1770. On the date shown below, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED AMICUS BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF APPELLANTS BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, ET AL.

On the interested parties in this action in the manner described below:

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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, and that this declaration was executed on **October 15, 2020**, at San Jose, California.

/s/ Maria Rodriguez
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