Case No. S260209

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MICHAEL GOMEZ DALY et al.,

Petitioners and Respondents,

v.

BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY, et al.,

Respondents, Real Party in Interest, and Appellants,

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

On Appeal from the San Bernardino Superior Court
The Honorable Janet M. Frangie
Case No. CIVDS1833846

APPLICATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF FIRST AMENDMENT COALITION IN SUPPORT OF PLAINTIFFS AND RESPONDENTS

David Snyder (SBN 262001)
Glen Smith (SBN 106341)
FIRST AMENDMENT COALITION
534 Fourth Street, Ste. B
San Rafael, CA 94901
Telephone: (415) 460-5060
dsnyder@firstamendmentcoalition.org
gsmith@firstamendmentcoalition.org

*Thomas R. Burke (SBN 141940)
DAVIS WRIGHT TREMAINE LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
Telephone: (415) 276-6500
Facsimile: (415) 276-6599
thomasburke@dwt.com

Attorneys for Amicus Curiae First Amendment Coalition

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TO THE HONORABLE TANI G. CANTIL-SAKAUYE, CHIEF JUSTICE OF THE STATE OF CALIFORNIA, AND TO THE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Amicus Curiae First Amendment Coalition ("FAC") respectfully submits this Amicus Curiae Brief in Support of Plaintiffs and Respondents Michael Gomez Daly and Inland Empire United (collectively "Respondents").

For the reasons discussed below, FAC urges this Court to affirm the Court of Appeal's order in this action and to do so in a manner that upholds the core transparency provisions of California's Brown Act, which the trial court and the Court of Appeal found were violated by Appellants' actions. More specifically, FAC asks this Court to recognize the Legislative amendment made to the Brown Act in 1986 to give "teeth" to the Act is inconsistent with Appellants' argument that the trial court's order should have been automatically stayed upon the filing of a notice of appeal.

APPLICATION TO SUBMIT AMICUS CURIAE BRIEF

Pursuant to California Rule of Court 8.520(f), FAC respectfully requests this Court's permission to submit the attached Amicus Curiae Brief. FAC is a non-profit advocacy organization based in San Rafael, California, that is dedicated to freedom of speech and government transparency and accountability. FAC's members include news media outlets, both national and California-based, traditional media and digital, together with law firms, journalists, community activists and ordinary citizens.

FAC submits this brief to highlight the importance of California's Brown Act (Gov't Code § 54950 et seq.) in providing transparency to local legislative activities in every community across the state. In this case, both the trial court and the Court of Appeal found that the Brown Act was violated by Appellants Board of Supervisors of San Bernardino County, Robert A. Lovingood, Janice Rutherford, Curt Hagman, Josie Gonzales and Dawn Rowe (collectively "Appellants") when Dawn Rowe was appointed and this action was "null and void." Order Denying Writ of Supersedeas, *Daly v. San Bernardino Cnty. Bd. of Supervisors*, No. E073730, at 1.

For decades, as a public advocacy organization, FAC has advised and trained citizens, government officials and public interest groups on the open meeting requirements of the Brown Act – procedures that ensure that citizens are able to provide meaningful oversight of decisions made by their local legislative bodies. FAC believes that its Amicus Brief will be of assistance to this Court as it resolves this novel action, which appears to be the first time that litigation has arisen from a local legislative body's violation of the Brown Act while filling the vacant seat of a board member ahead of an election. FAC urges this Court to reject Appellants' diminished view of the independent importance of the Brown Act and its

transparency requirements that ensure citizens' participation in the democratic process.

Every day in California, citizens use and depend on the transparency protections enshrined in the Brown Act to exercise their constitutional right to petition their local government officials. Because FAC has a strong interest in ensuring that the Brown Act remains vibrant – and that violations of the Brown Act do not go unchecked— FAC respectfully requests that this Court grant its Application and consider the attached Amicus Brief.[1]

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

AMICUS CURIAE BRIEF

INTRODUCTION

In deciding this case, FAC urges this Court to uphold the transparency values enshrined within California's Ralph M. Brown Act (Gov't Code, § 54950 et seq.), which mandates specific open meeting measures for all local government legislative proceedings. Every day throughout California, the requirements of the Brown Act help ensure that public meetings are open to the public and that citizens are able to monitor and influence the decisions made by their locally elected legislative bodies.

The Brown Act provides an efficient process in which alleged transparency violations can be quickly raised and "cured" by the local legislative body and in the rare situation where litigation is required, a violation can be rendered null and void by a court. In FAC's considerable experience, the Brown Act works well if local legislative bodies are committed to following it and correcting their mistakes when their violations are challenged. However, in 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.

In 1986, California's Legislature amended the Brown Act to unequivocally provide that courts can declare actions taken in violation of the Act "null and void," so that the actions have no force or effect and matters revert back to the way they were before the violation —the "status quo." Indeed, authorizing this nullification remedy was the primary purpose of the legislation. In 2004, by enacting Proposition 59, California voters again sent a clear message in favor of the principles that underlie the Brown Act.

If an order that nullifies an illegal vote can be automatically stayed upon the filing of a notice of appeal, the Brown Act will lose the "teeth" the Legislature added in 1986—the ability to nullify unlawful actions. To hold otherwise would allow a legislative body to violate the Brown Act but continue with business as usual while the case winds its way through the appellate process. The Court should acknowledge the lower court's order as *prohibiting* the illegal state of things after the Brown Act violation, and make clear that the status quo is the state of things *before* the Brown Act was violated.

FAC takes no position on who should be a member of the San Bernardino County Board of Supervisors—or a member of any other legislative body in California. However, in a representative democracy, there can be no greater moment for transparency than when there is a vacancy to be filled on a publicly elected legislative body. Simply ignoring the Brown Act violation that occurred here – recognized by both the trial court and the Court of Appeal – will subvert the meaning and intent of the 1986 amendment and drain the Brown Act of its effectiveness going forward. FAC urges this Court to render a decision in this matter that respects and upholds the core transparency protections that the Brown Act ensures for public participation in local legislative matters.

FACTUAL BACKGROUND

FAC hereby incorporates the factual background and procedural history of the Answer Brief on the Merits submitted to this Court by Respondents Michael Gomez Daly and Inland Empire United. However, FAC wishes to emphasize several key facts:

On September 18, 2019, the San Bernardino County Superior Court ruled that the county's Board of Supervisors violated the Brown Act, and that "[t]he appointment of Dawn Rowe as Third District Supervisor is ***null and void***." (Emphasis added.) Statement of Decision, *Daly v. San*

Bernardino Cnty. Bd. of Supervisors, No. CIVDS1833846, at 27. On January 8, 2020, the Fourth District Court of Appeal also determined that "the appellant Board of Supervisor's appointment of real party Dawn Rowe was ***null and void*** as arising out of a violation of the Brown Act [citation]." (Emphasis added.) Order Denying Writ of Supersedeas, *Daly v. San Bernardino Cnty. Bd. of Supervisors*, No. E073730, at 1.

Board members defied both courts' decisions, leaving Rowe in the seat and ignoring a provision in their own county charter mandating that after 30 days, the governor must fill the seat. San Bernardino Cnty. Charter art. I, § 7. Instead, board members sought numerous stays until the March 3 election, when they could—and did—improperly present Rowe to voters as the incumbent. Answer to Pet. for Review, at 6-7. In an attempt to justify their delay, board members have sought to portray the status quo as Supervisor Rowe's remaining in the Board seat. Pet. for Review, at 8.

ARGUMENT

A. California's Ralph M. Brown Act Ensures Local Legislative Transparency Across California

Enacted in 1953, the Ralph M. Brown Act, is intended "to ensure the public's right to attend the meetings of public agencies." *Freedom Newspapers, Inc. v. Orange Cnty. Emps. Retirement Sys.*, 6 Cal. 4th 821, 825 (1993), *superceded by statute on other grounds*, Gov't Code 54952 (amended 1993). After all, "[o]pen government is a constructive value in our democratic society." *Roberts v. City of Palmdale*, 5 Cal. 4th 363, 380 (1993). The Brown Act thus facilitates not only attendance but the opportunity for "public participation in all phases of local government decisionmaking . . . to curb misuse of the democratic process by secret legislation of public bodies." *Int'l Longshoremen's & Warehousemen's Union v. Los Angeles Export Terminal, Inc.*, 69 Cal. App. 4th 287, 293 (1999), *as modified on denial of reh'g* (Feb. 10, 1999).

The Brown Act's statement of intent is unambiguous:

> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

Gov't Code § 54950. "[A]s a remedial statute, the Brown Act should be construed liberally in favor of openness so as to accomplish its purpose and suppress the mischief at which it is directed." *Int'l Longshoremen's & Warehousemen's Union*, 69 Cal. App. 4th at 294; *Nat'l Lawyer Guild, San Francisco Bay Area Chapter v. City of Hayward*, 9 Cal. 5th 488, 507 (2020) (recognizing "California's Constitutional directive to 'broadly construe[ ]' a statute 'if it furthers the people's right of access'").

B. Following the 1986 Amendment to the Brown Act, the "Status Quo" is the State of Things *Before* a Violation of the Act

The Board of Supervisors contends that the order nullifying the improper vote is "mandatory" in nature because it changes the status quo, meaning the filing of the Notice of Appeal stays the order. This is inconsistent with the letter and spirit of the Brown Act. In 1986, Section 54960.1 was added to the Brown Act. It provides in part: "[A]ny interested person may 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 Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5 is ***null and void*** under this section." (Emphasis added.) The parties appear in agreement that the plain language of Section 54960.1 is unambiguous.

Supporters of the 1986 amendment argued that the Brown Act needed "teeth" because local agencies were easily able to skirt the law:

"[E]ven when there has been a noted violation of the Brown Act, the act that was the subject of the violation stands. [The amendment] would render these action[s] null and void, thus putting 'teeth' into the Brown Act." *Amendment to the Brown Act: Hearing on AB 2674 Before the Assembly Committee on Local Government,* 1986 Leg. Sess. at 2 (Cal. 1986).

Before this amendment, even if a legislative body violated the Brown Act, the action taken in violation of the Act remained valid. *Santa Clara Fed'n of Teachers v. Governing Bd.*, 116 Cal. App. 3d 831, 846 (1981); *Stribling v. Mailliard III*, 6 Cal. App. 3d 470, 474-75 (1970). The drawbacks to this approach were clear: As an editorial in the *Los Angeles Times* on March 3, 1986, put it: "[A]n action that violates the law can remain valid and secrecy is rarely, if ever, penalized." The legislative history confirms that the Brown Act amendment's creators intended that actions taken in violation of the Brown Act be rescinded and that matters be restored to the status quo before the violation, in the belief that this would increase the effectiveness of the Act.

The amendment passed easily, fueled by public outrage over a Los Angeles City Council meeting in which council members voted for an unexplained item that turned out to be a large pay increase for themselves. Statement of Intended Decision, *Green v. City of Los Angeles*, No. C554145 (Los Angeles Sup. Ct., Nov. 4, 1985), at 1-2.

C. Consistent with the 1986 Amendment, the Order Appointing Supervisor Rowe Ceased to Exist and thus the Order Was Prohibitory in Nature

Here, imposing the remedy specified at Section 54960.1(a), the trial court ruled that the San Bernardino Board of Supervisors appointed Rowe in violation of the Brown Act and declared her appointment null and void. The Court of Appeal affirmed. Consistent with the few cases that have interpreted the Brown Act after the 1986 amendment illustrate the

obvious—that those who violate the Act are not rewarded during the pendency of an appeal.

In *International Longshoremen's & Warehousemen's Union*, 69 Cal. App. 4th 287, the trial court ruled that a legislative body's actions in violation of the Brown Act were null and void under 54960.1(a). Although the legislative body appealed, its improper actions did not regain validity while the appeal was pending and up to the time the nullification was affirmed. *Id.* at 292.

Similarly, in *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904 (2002), an injunction to compel the council to comply with its Brown Act duties was expressly termed a "prohibitory injunction"—not mandating affirmative behavior, but forbidding wrongful behavior. *Id.* at 906, 910. In circumstances that echo this case, the court said that the council's insistence on the correctness of its past wrongful practices—its refusal to acknowledge them as violations of the Brown Act—presented a clear enough prospect of repetition to justify the injunction. *Id.* at 917.

Separate from the Brown Act, for more than a century, this Court has consistently interpreted making an object "null and void" as meaning the object lacks force and validity, essentially eliminating the existence of the object and returning affairs back to the state before the object existed. *See Martin v. Morgan*, 87 Cal. 203, 207-09 (1890) ("null and void" means contract ceases to exist); *McCormack v. McCormack*, 175 Cal. 292, 292 (1917) ("null and void" means couple was not married and therefore cannot get divorced); *Kabran v. Sharp Mem'l Hosp.*, 2 Cal. 5th 330, 339 (2017) ("null and void" means any decisions by a court lacking jurisdiction are invalid).

Similarly, this Court has interpreted the "status quo," in the context of trying to correct an undesirable act, as returning affairs back to the state before the undesirable act. *See People v. Rodriguez*, 1 Cal. 5th 676, 696

(2016) (noting that in the context of plea bargain breach, "status quo" was before defendant submitted guilty plea) (Corrigan, J., concurring and discussing *People v. Arbuckle*, 22 Cal. 3d 749 (1978)); *Harry Carian Sales v. Agric. Labor Relations Bd.*, 39 Cal. 3d 209, 232 (1985) (in the context of an employer's unfairly preventing unionization, "status quo" was unionization); *Runyan v. Pac. Air Indus., Inc.*, 2 Cal. 3d 304, 316, n.15 (1970) (in the context of contract rescission, "status quo" was returning a party to the party's previous economic position).

FAC offers this additional authority for the Court's consideration and also concurs with the arguments and authorities detailed in Respondents' Reply brief at 45-48. Appellants' self-serving insistence that a decision made in violation of the Brown Act can nevertheless be the rightful status quo vitiates the public's right to ensure meetings are open and to rectify matters if decisions are made in secret, as happened here. Their suggested approach encourages and rewards Brown Act violations.

D. Appellants' Insistence on Quo Warranto as the Exclusive Remedy Does Not Withstand Scrutiny

Although Appellants insist that quo warranto is the exclusive remedy available in this situation, they concede that quo warranto is not the only remedy when "statutory regulations provid[e] otherwise." (Reply at 10.) Appellants offer little explanation why the Brown Act doesn't satisfy this exception.[2] In an effort to have it both ways, but again offering little analysis or explanation, Appellants insist that quo warranto and the Brown Act can co-exist (e.g., "[q]uo warranto therefore still gives effect to Section

[2] Appellants arbitrarily insist that "nothing in the [Brown] Act or its legislative history suggests that mandamus may be used to challenge title when quo warranto is available" (Reply at 9), but nothing in the Brown Act *limits* the availability of the Brown Act, when, in violation of its provisions, a publicly-elected body acts in secret to fill a vacant seat.

54960.1's substantive aspect" (Reply at 20; *see also id.* at 24, 30)), and that any Brown Act violation can be addressed through the *procedures* of quo warranto. (Reply at 20.) Yet the serious violations of the Brown Act by Appellants immediately diminished the public's confidence. If Appellants' interpretation of the "status quo" prevails and Brown Act violations are not automatically stayed during any appeal, quo warranto will do little to quickly remedy this ongoing transparency violation for the thousands of citizens who feel disenfranchised by the secretive actions of the San Bernardino Board of Supervisors. 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.

Insisting that that quo warranto "serves a democratic function" by preventing "private quarrels." (Reply at 30), Appellants add insult to injury. Appellants certainly avoided a "public quarrel" – but they did so by subverting the democratic process through their crudely "private" method for installing their preferred replacement for the vacant board seat.

E. Ignoring Appellants' Brown Act Violations Will Gut the Brown Act

The 1986 amendment to the Brown Act gave the public a way to fight secrecy in government and counteract its effects. If an order nullifying an action taken in violation of the Act is automatically stayed pending appeal, not only will the plain language of the statute be ignored, it will become impossible for aggrieved members of the public to quickly remedy the effect of open meeting violations.

Here, the San Bernardino Board of Supervisors had two legal options to fill the empty supervisor's seat. It could have corrected the violation, as the overwhelming majority of agencies who receive notices of

Brown Act violations do, by redoing the vote in compliance with the Act.[3] Alternatively, following the Charter, the vacant board seat should have been filled through an appointment by the Governor if the seat remained unfilled after 30 days. Rather than chose either legal option, instead, the Board chose the unlawful option of delay and continuing to reap the benefit of its violation in defiance of the Brown Act.

In deciding this case, this Court should acknowledge that the Appellants' action violated the Brown Act and not reward them for choosing the illegal option. Otherwise, at least two bad outcomes are likely to occur.

First, unless this Court makes clear that the meaning of "status quo" cannot mean the "status after Supervisor Rowe has been appointed, but before Respondents filed their lawsuit", as Appellants insist (Reply at 41), the 1986 Amendment to the Brown Act will be rendered meaningless during which time the Board will enjoy the benefit of its unlawful action. Just as the Brown Act operated before 1986, the Act will no longer have the "teeth" that Legislature intentionally enacted so that violators did not benefit from their conduct. Courts presume that municipalities will continue similar practices when they refuse to admit Brown Act violations. *Shapiro*, 96 Cal. App. 4th at 917; *see also Common Cause v. Stirling*, 147 Cal. App. 3d 518, 524 (1983).

Second, because the Brown Act violation in this case arose when transparency is needed most – filling a vacant board seat ordinarily chosen by voters through an election – if Appellants' conduct is condoned, legislative bodies will have no incentive to comply with the Brown Act in situations with far less on the line. Indeed, they will have a blueprint for

[3] The Board here did not wipe the slate clean or interview all candidates – it continued the same tainted process that the lower courts found violated the Brown Act.

misconduct. For decades, the Brown Act has set clear transparency requirements for local legislative bodies to follow as they conduct the public's business. To protect and further citizens' constitutional right of petition, the Act requires meeting agendas to be prepared with sufficient time for the public to give their opinions about contemplated actions by the legislative body and adopts safeguards against misconduct by the legislative body. In multiple ways, the Act ensures that local elected bodies carry out business in the open so that the public can be aware of and influence all substantive decisions. If the Brown Act violation that the lower courts found in this case is ignored, public agencies otherwise inclined to act secretly will be emboldened. The 1986 amendment will be nullified at least during the pendency of appeal and the Brown Act will become toothless once again, to the detriment of the public and the democratic process. FAC urges this Court to prevent this outcome.

CONCLUSION

For the foregoing reasons, the Court of Appeal's order should be affirmed.

Dated: October 14, 2020

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke

By: */s/ Thomas R. Burke*
Thomas R. Burke

Attorneys for Amicus Curiae
First Amendment Coalition

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) or 8.360(b)(1) of the California Rules of Court, the enclosed brief in support of First Amendment Coalition's Application to File Amicus Curiae Brief and Amicus Curiae Brief in Support of Petitioners and Respondents 13-point Roman type including footnotes and contains approximately 3,566 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: October 14, 2020

DAVIS WRIGHT TREMAINE LLP
Thomas R. Burke

By: */s/ Thomas R. Burke*
Thomas R. Burke

Attorneys for Amicus Curiae
First Amendment Coalition

PROOF OF SERVICE

Daly, et. v. Board of Supervisors of San Bernardino County, et al.
Fourth Appellate District, No. E073730
San Bernardino County Superior Court, No. CIVDS1833846

I declare under penalty of perjury under the laws of the State of California that the following is true and correct:

I am employed in the City and County of San Francisco, State of California, in the office of a member of the bar of this court, at whose direction the service was made. I am over the age of eighteen (18) years, and not a party to or interested in the within-entitled action. I am an employee of DAVIS WRIGHT TREMAINE LLP, and my business address is 505 Montgomery Street, Suite 800 San Francisco, California 94111.

I caused to be served the following document(s):

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I caused the above document(s) to be served on the person(s) listed below by the following means and as indicated on the attached Service List:

☑ I enclosed a true and correct copy of said document in an envelope and placed it for collection and mailing with the United States Post Office on October 14, 2020, following the ordinary business practice. *(Indicated on the attached address list by a* [M] *next to the address.)*

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I am readily familiar with my firm's practice for collection and processing of correspondence for delivery in the manner indicated above, to wit, that correspondence will be deposited for collection in the above-described manner this same day in the ordinary course of business.

Executed on October 14, 2020, at Oakland, California.

/s/ Aysha D. Lewis
Aysha D. Lewis

SERVICE LIST

[E]	Stacey Leyton, Esq. Altshuler Berzon, LLP 177 Post Street, Suite 300 San Francisco, CA 94108 E-mail: sleyton@altshulerberzon.com	*Plaintiffs and Respondents Michael Gomez Daly and Inland Empire United*
[E]	Glenn Rothner, Esq. Juhyung Harold Lee, Esq. Rothner, Segall & Greenstone 510 South Marengo Avenue Pasadena, CA 91101 Email: grothner@rsglabor.com hlee@rsglabor.com	*Plaintiffs and Respondents Michael Gomez Daly and Inland Empire United*
[E]	Deborah J. Fox, Esq. T. Steven Burke, Jr., Esq. Matthew D. Nazareth, Esq. Meyers, Nave, Riback, Silver & Wilson 707 Wilshire Boulevard, 24th Floor Los Angeles, CA 90017 E-mail dfox@meyersnave.com tsburke@meyersnave.com mnazareth@meyersnave.com	*Attorneys for Defendants and Appellants Board of Supervisors of San Bernardino County, Dawn Rowe, Josie Gonzales, Curt Hagman, Janice Rutherford, and Robert A. Lovingood*
[E]	William P. Donovan, Jr., Esq. Jason D. Strabo, Esq. McDermott Will & Emery LLP 2049 Century Park East, Suite 3200 Los Angeles, CA 90067 E-mail: wdonovan@mwe.com jstrabo@mwe.com	*Attorneys for Defendants and Appellants Board of Supervisors of San Bernardino County, Dawn Rowe, Josie Gonzales, Curt Hagman, Janice Rutherford, and Robert A. Lovingood*
[E]	Michelle D. Blakemore, Esq. Penelope Alexander-Kelley, Esq. Office of the County Counsel 385 North Arrowhead Avenue, 4th Floor San Bernardino, CA 92415 E-mail: mblakemore@cc.sbcounty.gov palexander-kelley@cc.sbcounty.gov	*Attorneys for Defendants and Appellants Board of Supervisors of San Bernardino County, Dawn Rowe, Josie Gonzales, Curt Hagman, Janice Rutherford, and Robert A. Lovingood*

[M] Clerk of the Court
4th District Court of Appeals
Division Two
3389 12th Street
Riverside, CA 92501

[M] Clerk of the Court
San Bernardino County Superior Court
San Bernardino District – Civil Division
247 West Third Street
San Bernardino, CA 92415