

CASE No. S260209

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

MICHAEL GOMEZ DALY et al.,

Petitioners (in superior court) and Respondents (on appeal),

v.

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

Respondents and Real Party in Interest (in superior court) and Appellants,

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

MOTION TO AUGMENT RECORD ON REVIEW

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TABLE OF CONTENTS

	<u>Page</u>
DECLARATION OF DEBORAH J. FOX.....	8
I. INTRODUCTION.....	11
II. ARGUMENT	12
A. There is Good Cause to Augment the Record with the Exhibits In Order to Conform to the Truth of the Case	12
B. Augmenting the Record Will Not Prejudice I.E. United	15
III. CONCLUSION	16

TABLE OF AUTHORITIES

Page(s)

Cases

In re A.B.
(2008) 164 Cal.App.4th 832 15

Lipka v. Lipka
(1963) 60 Cal.2d 472 12

People v. Brooks
(1980) 26 Cal.3d 471 12

Stephenson v. Phoenix Wood Coal Co.
(1945) 71 Cal.App.2d 788 12

Other Authorities

California Rules of Court Rules

Rule 8.155, subd. (a)(1)..... 5, 12

Rule 8.54 5

MOTION TO AUGMENT RECORD ON APPEAL

Appellants the Board of Supervisors of San Bernardino County, and Supervisors Robert A. Lovingood, Janice Rutherford, Curt Hagman, Josie Gonzales, and Dawn Rowe (collectively, appellants) bring this Motion to Augment the Record pursuant to Rules 8.54 and 8.155(a) of the California Rules of Court. Appellants request that the record before this Court be augmented with the following exhibits:

1. Fair Statement of Proceedings for the Special Meeting of the San Bernardino County Board of Supervisors Dated December 11, 2018, concurrently filed herewith as Exhibit A in support of the Motion to Augment. This document was lodged in the superior court in the Record of Proceedings and is the Clerk of the Board's minutes of official actions from that date.

2. Video Transcription of the San Bernardino County Board of Supervisors Special Meeting of December 11, 2018, Agenda Item 1 with Public Comments, concurrently filed herewith as Exhibit B in support of the Motion to Augment. This document was lodged in the superior court in the Record of Proceedings, which is a certified transcript of a video recording of the proceedings maintained by the Clerk of the Board.

3. Notice of Demurrer to First Amended Petition for Peremptory Writ of Mandate and Points and Authorities in Support of the Demurrer both dated May 3, 2019, concurrently filed herewith as Exhibits C and D,

respectively, in support of the Motion to Augment. These documents were filed in the case in the superior court.

4. Minute Order re Demurrer to the First Amended Petition for Writ of Mandate, dated May 29, 2019, concurrently filed herewith as Exhibit E in support of the Motion to Augment. This document was filed in the case in the superior court.

5. Respondents' Opposition to the Peremptory Writ of Mandate, dated June 5, 2019, concurrently filed herewith as Exhibit F in support of the Motion to Augment. This document was filed in the case in the superior court.

6. Petitioners' Ex Parte Application For Order Enforcing November 8, 2019 Judgment and Peremptory Writ of Mandate or, in the Alternative, Order to Show Cause re Contempt dated January 9, 2020, concurrently filed herewith as Exhibit G in support of the Motion to Augment. This document was filed in the case in the superior court.

7. Certified Reporter's Transcript of Oral Proceedings for hearing on January 13, 2020, concurrently filed herewith as Exhibit H in support of the Motion to Augment. This certified transcript was not designated under rule 8.130 because it was not available at the time of the designation.

For the reasons stated in the accompanying Memorandum of Points and Authorities, good cause exists for augmenting the record to include

DECLARATION OF DEBORAH J. FOX

I, Deborah J. Fox, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am a principal of Meyers, Nave, Riback, Silver & Wilson, attorneys of record for appellants. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. On June 5, 2019, my office lodged the Record of Proceedings in the superior court for this matter. Included at Tab 16 was the Fair Statement of Proceedings for the Special Meeting of the San Bernardino County Board of Supervisors Dated December 11, 2018. The Fair Statement serves as the Minutes that records the official actions taken from the official Board of Supervisors meeting. Concurrently filed herewith as Exhibit A in support of the Motion to Augment is a true and correct copy of the Fair Statement as lodged with the superior court, admitted into evidence without objection, and which will be part of the record on appeal once such has been prepared.

3. Also included in the Record of Proceedings at Tab 29 was the Video Transcription of the San Bernardino County Board of Supervisors Special Meeting of December 11, 2018, Agenda Item 1 with Public

Comments. Concurrently filed herewith as Exhibit B in support of the Motion to Augment is a true and correct copy of the transcript as lodged with the superior court, admitted into evidence without objection, and which will be part of the record on appeal once such has been prepared.

4. On May 3, 2019, appellants filed a Notice of Demurrer to First Amended Petition for Peremptory Writ of Mandate and Points and Authorities in Support of the Demurrer both dated May 3, 2019. Concurrently filed herewith as Exhibits C and D, respectively, in support of the Motion to Augment are true and correct copies of the Demurrer and supporting Points and Authorities.

5. On May 29, 2019, the superior court issued a minute order overruling appellants' Demurrer to the First Amended Petition for Peremptory Writ of Mandate. Concurrently filed herewith as Exhibit E in support of the Motion to Augment is a true and correct copy of the Minute Order.

6. On June 5, 2019, appellants filed an Opposition to the Peremptory Writ of Mandate. Concurrently filed herewith as Exhibit F in support of the Motion to Augment is a true and correct copy of the Opposition.

7. On January 9, 2020, petitioners in the superior court Michael Gomez Daly and I.E. United ("I.E. United") filed an Ex Parte Application For Order Enforcing November 8, 2019 Judgment and Peremptory Writ of

Mandate or, in the Alternative, Order to Show Cause re Contempt.

Concurrently filed herewith as Exhibit G in support of the Motion to Augment is a true and correct copy of the ex parte application.

8. On January 13, 2020, I attended a hearing in the superior court for I.E. United's ex parte application. Counsel for I.E. United, Juhyung Harold Lee and Glenn Rothner, were also present. Concurrently filed herewith as Exhibit H in support of the Motion to Augment is a true and correct copy of the Certified Reporter's Transcript of Oral Proceedings for the hearing on January 13, 2020.

9. Exhibits A–H are consecutively numbered and total 367 pages, including indices.

10. The current record before this Court includes the exhibits prepared in support of appellants' Petition for Writ of Supersedeas filed in the Court of Appeal. The record contains a total of 579 pages, including indices.

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

Executed on this 4th day of May, 2020, at Redondo Beach, California.



Deborah J. Fox

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Appellants bring this Motion to Augment the record to include:

- (a) appellants' Demurrer to the First Amended Petition for Writ of Mandate and order thereon;
- (b) appellants' Opposition to the Peremptory Writ of Mandate;
- (c) a Fair Statement and transcript from the December 11, 2018 Special Meeting of the County of San Bernardino Board of Supervisors;
- (d) an ex parte application filed by I.E. United in the superior court related to post-Judgment enforcement actions; and
- (e) a certified transcript of oral proceedings from the hearing on the ex parte application (collectively, the Exhibits).

Each of these Exhibits is relevant to this Court's review because they provide further context and confirmation that I.E. United's Petition for Writ of Mandate sought to, and did, directly challenge Supervisor Rowe's right and title to the public office of Third District Supervisor as well as demonstrate the public process leading to Supervisor Rowe's appointment. These Exhibits will further demonstrate appellants' repeated attempts to raise the quo warranto issues in the superior court. These Exhibits are not already included in the record before this Court because, while they relate to the merits issue of whether quo warranto was I.E. United's exclusive remedy in this case, the record before this Court was prepared in support of

appellants' Petition for Writ of Supersedeas focused on the issue of whether an automatic stay on appeal is in place. As well, Exhibits G and H were not available at the time the Petition for Writ of Supersedeas was filed as they relate to the post-Judgment proceedings.

II. ARGUMENT

At any time on motion of a party, a reviewing court may order the record augmented to include “any document filed or lodged in the case in superior court; or [a] certified transcript . . . of oral proceedings not designated under rule 8.130.” (Cal. Rules Ct., rule 8.155, subd. (a)(1).) “The function of the augmentation procedure is to supplement an incomplete but existing record, and the rule is to be construed liberally.” (*People v. Brooks* (1980) 26 Cal.3d 471, 484, citations omitted.) The reasoning behind the motion to augment is for the record to “conform to the truth.” (*Lipka v. Lipka* (1963) 60 Cal.2d 472, 480; see also *Stephenson v. Phoenix Wood Coal Co.* (1945) 71 Cal.App.2d 788, 790 [“It is the policy of this court, where possible, to have a sufficient record before it for the consideration of all material questions.”].)

A. There is Good Cause to Augment the Record with the Exhibits In Order to Conform to the Truth of the Case

There is good cause to augment the record because the Exhibits will provide this Court with additional information that conforms to the truth of the case. Specifically, Exhibits G and H—I.E. United’s January 9, 2020 ex

parte application and the transcript from the hearing on same—provide additional information that demonstrates that the remedy at issue in this case has always been about a challenge to Supervisor Rowe’s right and title to the office of San Bernardino County Third District Supervisor.

As appellants show in their concurrently-filed Opening Brief, this case is and has always been an action to try Supervisor Rowe’s title to the office of Third District Supervisor. And while that was clear from the outset of the case, the post-Judgment proceedings reflected in Exhibits G and H have underscored this reality. Specifically, I.E. United’s attempts to enforce the Judgment reflect that the sole focus of this case has always been whether Supervisor Rowe was appropriately holding title to public office.

For example, Exhibit G—I.E. United’s January 9, 2020, Ex Parte Application—reflects that I.E. United sought to immediately enforce the Judgment, asking the superior court to issue an order that Supervisor Rowe “no longer serves as Third District Supervisor of San Bernardino County” and that Appellants and their agents “are prohibited from representing to members of the public that Real Party in Interest Dawn Rowe currently serves as Third District Supervisor of San Bernardino County, including by [] identifying her as the incumbent for that position on any public document, website, election ballot, voter guide, or other publication.” (See Exh. G at p. 339.) Although Supervisor Rowe’s designation on a ballot had never been raised by I.E. United in the writ petition, nor during the course

of the entire writ proceeding, nor was it addressed in the Judgment, I.E. United's focus on the issue as part of its enforcement efforts demonstrates that the primary focus of the case, including the remedy ultimately ordered by the superior court, was to challenge Supervisor Rowe's right to the Board seat both prospectively and retrospectively.

Further, Exhibits G and H demonstrate the difficulties that arose from the superior court's failure to recognize the exclusivity of quo warranto. As this Court's role as an "institutional overseer" of the state courts, appellants understand that this Court is guided, in part, by public policy concerns. (See Eisenberg, et al., Cal. Prac. Guide: Civ. Appeals & Writs (TRG 2018), § 13:1) As appellants have argued in their Opening Brief, there are strong public policy grounds for maintaining quo warranto's exclusivity, including that it promotes certainty and continuity in local government. Exhibits G and H provide the Court with evidence of the kind of confusion that arose from abandoning quo warranto's exclusivity for trying title to public office in this case.

Exhibits C–F demonstrate appellants' forceful and continuous opposition to the superior court proceeding via writ of mandate and urging that the challenge to Supervisor Rowe's right to office could only proceed through a quo warranto action. Appellants raised the issue twice on demurrer, (see Exhs. C, D; Petition for Writ of Supersedeas, Exh. 4), which the superior court overruled (see Exh. E; Petition for Writ of Supersedeas,

Exh. 8), and again in opposition to the Peremptory Writ of Mandate. (Exh. F.) Thus, Exhibits C–F conform to the truth of the proceedings in the superior court over the quo warranto issue on review with this Court.

Likewise, Exhibits A and B provide further context for the public nature of the now-disputed appointment process undertaken by the Board. The appointment process occurred over several meetings, the records of which are several hundreds of pages in the Record of Proceedings lodged with the superior court and which will become part of the record on appeal if necessary. Exhibits A and B provide this Court with an example of the kind of public proceedings involved in the appointment process, including extensive public interviews and public comments, as well as supporting the fact that I.E. United’s action, though framed as a Brown Act challenge, is at its core directed at the right and title to office of Third District Supervisor. Accordingly, Exhibits A and B will conform the record to the truth of the background context giving rise to this dispute.

B. Augmenting the Record Will Not Prejudice I.E. United

Granting this Motion to Augment the Record will not prejudice I.E. United. This Motion is filed concurrently with appellants’ Opening Brief, so I.E. United will have ample time to review and consider the Exhibits before filing their Responding Brief, incorporating any or all of the Exhibits into its brief. (See *In re A.B.* (2008) 164 Cal.App.4th 832, 840 [granting respondents’ motion to augment the record filed concurrently with

respondents' brief because there was no prejudice to appellants where they had time to address the additional documents in their reply brief].)

Further, I.E. United is already familiar with the Exhibits, as they are prior documents lodged with the superior court, briefs filed by the parties and an order from the superior court, and a transcript from a hearing that I.E. United's counsel argued and personally attended. Accordingly, the time needed for I.E. United to review the Exhibits is minimal.

Finally, the addition of the Exhibits would result in a record that is still modest. The record as it currently stands is only 579 pages in two volumes. (Fox Decl. ¶ 7.) Augmenting the record with the Exhibits would add only 367 pages, for a total record of 946 pages. (*Id.* at ¶ 9.) A four-volume record is modest and would not prejudice I.E. United, which will have adequate time to review and address the record before submitting its Responding Brief.

III. CONCLUSION

Appellants seek to augment the record to conform to the truth of the superior court record and post-Judgment proceedings initiated by I.E. United to enforce the Judgment. These Exhibits will demonstrate how Supervisor Rowe's right and title to the Third District seat is the central issue in this case, as well as demonstrate exactly the kind of inefficiencies, confusion, and public ills that the quo warranto remedy is designed to protect against. Appellants therefore respectfully request that the Court

DECLARATION OF SERVICE
Daly, et al. v. Board of Supervisors of San Bernardino County, et al.
California Supreme Court No. S260209
California Court of Appeal, Fourth Appellate Distr.,
Div. 2, Case No E07370
County of San Bernardino Superior Court, Case No. CIVDS1833846

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, #1500, Oakland, CA 94607.

On May 4, 2020, I served true copies of the following document(s) described as:

- **Appellants' Opening Brief On The Merits**
- **Motion to Augment Record on Review with Declaration of Deborah J. Fox**
- **Exhibits to Motion to Augment, Vol. I**
- **Exhibits to Motion to Augment, Vol. II**

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STATE OF CALIFORNIA
Supreme Court of California

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Supreme Court of California

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Case Number: **S260209**

Lower Court Case Number: **E073730**

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Title(s) of papers e-served:

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MOTION	Motion to Augment Record 5-4-20
ADDITIONAL DOCUMENTS	Vol. I Exhibits with Page Numbers 1-281
ADDITIONAL DOCUMENTS	Vol. II Exhibits with Page Numbers 285-367
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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.

5/4/2020

Date

/s/Deborah Fox

Signature

Fox, Deborah (110929)

Last Name, First Name (PNum)

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Law Firm