

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

**EXHIBITS TO MOTION TO AUGMENT RECORD ON
REVIEW VOLUME ~~1~~ II OF II, PAGES 1 - ~~281~~ 282 OF 367**

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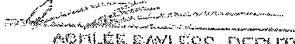
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EXHIBIT C

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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN BERNARDINO
SAN BERNARDINO CIVIL DIVISION

MAY 03 2019

BY 
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ROBERT A. LOVINGOOD, JANICE RUTHERFORD, CURT HAGMAN,
13 JOSIE GONZALES, and DAWN ROWE

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**

15 **COUNTY OF SAN BERNARDINO**

16 MICHAEL GOMEZ DALY and INLAND
EMPIRE UNITED,

Case No. CIVDS1833846

17 Petitioners,

**COUNTY RESPONDENTS' AND REAL
PARTY IN INTEREST'S NOTICE OF
DEMURRER TO PETITIONERS' FIRST
AMENDED PETITION FOR WRIT OF
MANDATE**

18 v.

Date: May 29, 2019
Time: 8:30 a.m.
Dept: S29

19 BOARD OF SUPERVISORS OF SAN
20 BERNARDINO COUNTY; ROBERT A.
LOVINGOOD, as First District Supervisor
and Chair of the Board of Supervisors;
21 JANICE RUTHERFORD, as Second District
Supervisor and Vice Chair of the Board;
22 CURT HAGMAN, as Fourth District
Supervisor of the Board; and JOSIE
23 GONZALES, as Fifth District Supervisor of
24 the Board,

Assigned for All Purposes to:
Hon. Janet M. Frangie

Action Filed: December 31, 2018
Trial Date: None Set

25 Respondents.

26 DAWN ROWE,

27 Real Party in Interest.
28

1

COUNTY RESPONDENTS' AND REAL PARTY IN INTEREST'S NOTICE OF DEMURRER AND DEMURRER
TO FIRST AMENDED PETITION FOR WRIT OF MANDATE

1 TO: PETITIONERS, MICHAEL GOMEZ DALY and INLAND EMPIRE UNITED,
2 AND YOUR COUNSEL OF RECORD:

3 PLEASE TAKE NOTICE that on **May 29, 2019, at 8:30 a.m.**, or as soon thereafter as
4 the matter may be heard in Department S29 of the Superior Court for the County of
5 San Bernardino located at 247 West Third Street, San Bernardino, California 92415, Respondents
6 BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY; ROBERT A. LOVINGOOD,
7 as First District Supervisor and Chair of the Board of Supervisors; JANICE RUTHERFORD, as
8 Second District Supervisor and Vice Chair of the Board; CURT HAGMAN, as Fourth District
9 Supervisor of the Board; and JOSIE GONZALES, as Fifth District Supervisor of the Board, and
10 Real Party in Interest, DAWN ROWE, (collectively "County Respondents") will and hereby do
11 demurrer to the First Amended Petition for Writ of Mandate of Petitioners MICHAEL GOMEZ
12 DALY and INLAND EMPIRE UNITED (collectively "Petitioners").

13 This demurrer is brought pursuant to Code of Civil Procedure § 430.10(e) against
14 Petitioners' sole cause of action for writ of mandate on the grounds that Petitioners fail to state a
15 cause of action for nullification under Government Code § 54960.1 of the unanimous appointment
16 of Real Party in Interest Dawn Rowe as Third District Supervisor on December 18, 2018 and the
17 defects are incapable of cure by amendment. Specifically, Respondents contend that Petitioners
18 further fail to state a cause of action because the facts pled and subject to judicial notice establish,
19 among other things, that:

- 20 1. Petitioners' failed to send the statutorily required notice to cure after the December
21 18, 2018 public meeting at which Supervisor Rowe was unanimously appointed
22 (Gov. Code § 54960.1(b));
- 23 2. The County Respondents cured the alleged December 10, 2018 Brown Act
24 violation, prior to Supervisor Rowe's appointment (Gov. Code § 54960.1(e));
- 25 3. Petitioners fail to plead a Brown Act violation for the unanimous appointment of
26 Supervisor Dawn Rowe on December 18, 2018;
- 27 4. Petitioners fail to plead a Brown Act violation for the December 10, 2018 process
28 for inviting applicants to interview on December 10, 2018; and

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5. Petitioners' writ action fails as a matter of law because *quo warranto* is the exclusive remedy. (See Code of Civil Procedure § 803.)


This demurrer is based upon this Notice of Demurrer, the accompanying Memorandum of Points and Authorities, the Declaration of T. Steven Burke, Jr., filed in support thereof, the Request for Judicial Notice filed herewith, on all other pleadings and papers in this action, and on any oral argument entertained by the Court during the hearing on this Demurrer.

MEET AND CONFER NOTICE

As set forth in the accompanying declaration of T. Steven Burke, Jr., County Respondents' counsel met and conferred with Petitioners' counsel more than five (5) days before this demurrer was due to be filed as required by Code of Civil Procedure § 430.41.

DATED: May 3, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 
DEBORAH J. FOX
T. STEVEN BURKE, JR.
Attorneys for Respondents/Real Party In Interest
BOARD OF SUPERVISORS OF SAN
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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 San Diego, State of California. My business address is 101 West Broadway, Suite 1105, San Diego, CA 92101.

On May 3, 2019, I served true copies of the following document(s) described as **RESPONDENTS' AND REAL PARTY IN INTEREST'S NOTICE OF DEMURRER TO PETITIONERS' FIRST AMENDED PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

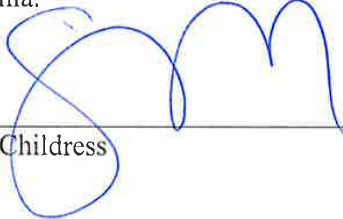
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a *courtesy* copy of the document(s) to be sent from e-mail address schildress@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on May 3, 2019, at San Diego, California.



Sylvia Childress

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SERVICE LIST

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CIVDS1833846**

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In Pro Per

(Ruth Musser-Lopez v Board of Supervisors
of San Bernardino County, et al.
San Bernardino Superior Case No.:
CIVDS1901773)

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SUPERIOR COURT OF CALIFORNIA
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16 MICHAEL GOMEZ DALY and INLAND
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Hon. Janet M. Frangie

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Action Filed: December 31, 2018
Trial Date: None Set

26 DAWN ROWE,

27 Real Party in Interest.
28

POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENTS' AND REAL PARTY IN INTEREST'S
DEMURRER TO FIRST AMENDED PETITION FOR WRIT OF MANDATE

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1 **I. INTRODUCTION**

2 Under the guise of a purported Brown Act violation, Petitioners bring this mandate action
3 for the express purpose of setting aside the December 18, 2018 unanimous appointment of Third
4 District Supervisor Dawn Rowe and for the less obvious purpose of having the Governor appoint
5 someone more to their liking in her place. Petitioners attempt to unseat Supervisor Rowe by
6 claiming that the tailored process employed by the San Bernardino County Board of Supervisors
7 to schedule applicants' public interviews violated the Brown Act. It did not.

8 The County Charter vests the Board with the authority to appoint a replacement supervisor
9 and to select a process to arrive at that appointment. The Board's selection of a manageable
10 process to have some applicants publicly interviewed was entirely proper. The Board never held
11 any interview in private; never held a private meeting nor deliberated in private. The only process
12 at issue here is the culling down of the slate of applicants to interview. That occurred by each
13 Supervisor independently providing a list of up to ten names of applicants who they would like to
14 interview to the Clerk of the Board. Petitioners contend that process of slimming down the
15 interview pool violated the Brown Act and assert that the only cure was for all forty-three (43)
16 applicants to be publicly interviewed for equal amounts of time. Neither the Brown Act, the
17 County Charter or any other law, requires such.

18 Most importantly, Petitioners' failure to send the statutorily required notice challenging the
19 December 18, 2018 appointment of Supervisor Rowe is a fatal procedural flaw. Petitioners admit
20 this error but try to avoid this procedural case stopper by asserting that further notice to cure was
21 unnecessary here. They are wrong as the statute demands more. Indeed, the Government Code
22 mandates specificity as to the alleged action for which nullification is sought. The failure to send
23 a notice to cure directly challenging the Board's unanimous appointment of Supervisor Rowe at
24 the duly noticed December 18, 2018 public meeting is fatal. But there is more, the Board's
25 rescission of the of the prior interview lists and the re-opening of the applicant pool for
26 consideration on December 18, 2018 cured any alleged Brown Act issue. Nothing more was
27 required.

28 ///

1 Even assuming arguendo that Petitioners could establish a Brown Act violation (which
2 they cannot), it would not warrant the drastic nullification remedy demanded. To reach such a
3 result, Petitioners creatively assert that the “taint” of the alleged violation extended through
4 multiple public meetings and the unanimous appointment of Supervisor Rowe like the fruit of the
5 poisonous tree. But this is not a Fourth Amendment analysis and the fact that the interview list
6 was whittled down to a more manageable level does not rise to a Brown Act violation, much less
7 one that extends through several public meetings. Nor can Petitioners demand a process where all
8 applicants are publicly interviewed. That was entirely within the Board’s discretion and
9 Petitioners cannot rewrite the County Charter to call out their preferred interview process. There
10 was simply no Brown Act violation here. Accordingly, as discussed more fully below the
11 Respondents’ demurrer should be sustained without leave to amend.¹

12 **II. PROCEDURAL BACKGROUND**

13 On March 27, 2019, this Court sustained, in part, the County Respondent’s demurrer to the
14 original writ petition on the grounds that:

15 Petitioners fail to allege sufficient facts to support a cause of action
16 for violation of the Ralph M. Brown Act . . .

17 Petitioners concede that the Board of Supervisors took
18 curative/corrective action on the conduct of December 10-11, 2018
19 alleged to be actionable and [Petitioners] have failed to allege:

20 (1) any action taken by respondents that supports a violation
21 of the Ralph M. Brown Act; and

22 (2) compliance with the written notice requirements of
23 Government Code section 54960.1(b-c) as to any action taken by
24 respondents thereafter, that has not been alleged to have been cured
25 and/or corrected.

26 (See March 28, 2019 Notice of Ruling, Ex. 1, Request for Judicial
27 Notice (“RJN”) 1.)

28 ¹ The Amended Petition also re-opens the quo warranto issue on demurrer. (See *Carlton v. Dr. Pepper Snapple Group, Inc.* (4th Dist. Div. 2, 2014) 228 Cal.App.4th 1200, 1211.) Respondents respectfully again submit that Petitioners’ entire action fails as a matter of law because quo warranto is the exclusive means to challenge the title to office vested in Supervisor Dawn Rowe by virtue of her unanimous appointment on December 18, 2018. (See Code Civ. Proc. § 803.)

1 The Amended Petition offers nothing that should change this result. The Amended
2 Petition merely extends the arguments made by Petitioners in the original petition without adding
3 new material facts that address the Court’s primary concern of lack of notice to cure the December
4 18, 2018 action. While the Amended Petition adds additional color and calls out statements made
5 by Supervisors and interviewees at public meetings, these noted public statements merely confirm
6 that the Board’s actions in interviewing applicants, deliberating, and appointing Dawn Rowe as
7 Third District Supervisor occurred in public view and in conformance with the Brown Act’s open
8 government policies. Despite Petitioners’ protestations, it remains undisputed that:

- 9 1. The County Board of Supervisors (“the Board”) had the express authority
10 under the San Bernardino County Charter (“County Charter”) to appoint a
 replacement supervisor by majority vote;
- 11 2. The County Charter did not demand, or even provide, a certain process for
12 appointing a replacement – that was left to the Board’s discretion;
- 13 3. On December 18, 2018 the Board rescinded its establishment of interview
14 list of December 10 and finalist list of December 11, 2018;
- 15 4. The Board adopted a new process for appointing a replacement supervisor
16 at the December 18, 2018 meeting;
- 17 5. The Board was not required to interview all candidates;
- 18 6. All applicant interviews were conducted in public;
- 19 7. All comments and deliberations on applicants were made in public;
- 20 8. The public was allowed to comment on the applicants and the process at
21 each meeting where the Board took action.
- 22 9. The Board unanimously appointed Dawn Rowe as supervisor on December
 18, 2018; and
10. Petitioners did not send a written notice to cure after the Board’s December
 18, 2018 actions.

23 **III. FACTUAL BACKGROUND**

24 **A. Dawn Rowe was Unanimously Appointed to the Office of Third District**
25 **Supervisor on December 18, 2018.**

26 The County of San Bernardino is a charter county. (See Charter - Foreword - RJN 2; see
27 also Amended Petition at ¶11.) The County’s legislative and governing body is the Board.
28 (Charter, Art. 1, sec. 1, RJN 2; see also Amended Petition ¶11.) The Board consists of five

1 members, one from each of the five supervisorial districts in the County. (*Id.*) When a vacancy
2 arises on the Board, the Charter specifically provides that it “will be filled by appointment by
3 majority vote of the remaining members of the Board from amongst the qualified electors of the
4 supervisorial district in which such vacancy exists.” (Charter, Art. 1, sec. 7, RJN 2; see also
5 Amended Petition ¶23 and Exh. C thereto.) The Charter does not mandate any process for the
6 appointment nor does it provide any guidelines with respect to a process. (*Id.*)

7 On December 3, 2018, then Third District Supervisor James Ramos took the oath of office
8 for the California State Assembly, creating a vacancy in the office of Third District Supervisor.
9 (Amended Petition ¶25) The Board had thirty (30) days from December 3, 2018 to appoint a
10 replacement Third District Supervisor by majority vote, to wit by: January 2, 2019. (See Charter,
11 Art. 1, sec. 7, RJN 2; Amended Petition ¶22.) On December 18, 2018, the Board voted
12 unanimously to appoint Dawn Rowe as Third District Supervisor. (Fair Statement Dec. 18, 2018
13 Regular Meeting, RJN 13; Amended Petition ¶53.) Rowe was sworn in as Supervisor for the
14 Third District at that same December 18, 2018 meeting. (*Id.*)

15 **B. The Board Undertook a Public Process for the Appointment of the Vacant**
16 **Third District Supervisorial Seat.**

17 Following Supervisor Ramos’ election to the California State Assembly, the Board held a
18 special meeting on November 13, 2018 to approve a process for selection of an appointee and
19 scheduled a Special Meeting for December 11, 2018 for conducting public interviews of
20 applicants qualified for appointment as Third District Supervisor. (Agenda Nov. 13, 2018 Special
21 Meeting, RJN 3; Fair Statement of Proceedings (“Fair Statement” aka “Action Minutes”) Nov.
22 13, 2018 Special Meeting, RJN 4; Amended Petition ¶24 and Exh. D thereto.) The application
23 process was opened and the Board received fifty-two (52) individual applications, of which forty-
24 eight (48) were determined to be eligible for consideration. (Amended Petition ¶26.)

25 On December 4, 2018, the Clerk advised the Board about the unexpectedly large number
26 of applications received for the open Third District seat and the Board reconsidered “the process
27 for selection of the Third District Member of the Board of Supervisors approved on November 13,
28 2018”. (Agenda Dec. 4, 2018 Regular Meeting, RJN 5; Amended Petition Exh. F.) The

1 companion staff report noted: “**Based upon the number of applications received** and the
2 extremely short timeline to make a selection in order to avoid invoking the Charter provision that
3 would hand the process to the Governor, the Board may wish to **reconsider, and modify, the**
4 **selection process at this time.**” (Staff Report Dec. 4, 2018, RJN 6; emphasis added.) Following
5 discussion of the same in open session, the now four (4) member Board voted 3-1 to modify the
6 November 13, 2018 appointment process to allow for each sitting Board member to offer up to
7 ten (10) names of persons to interview to the Clerk on or before December 10, 2018. Specifically,
8 the new process was called out as follows:

9 The Board directs the Clerk of the Board to send a Supplemental
10 Questionnaire to all qualified candidates [now at 48 applicants] and
11 requests that answers be returned by 12:00 noon on Friday,
12 December 7, 2018 and that all responses will be sent to the Board of
13 Supervisors by 5:00 P.M. that day.

14 The Board further directs that each Board member submit up to 10
15 applicant names to the Clerk by Monday, December 10, 2018 at
16 10:00 A.M., and that applicants that receive at least two
17 acknowledgements from Supervisors be notified by the Clerk that
18 they will be scheduled for an interview on December 11, 2018.

19 (Fair Statement Dec. 4, 2018 Regular Meeting, RJN 7; Amended
20 Petition ¶26, and Exh. E thereto.)

21 In furtherance of the Board’s publicly adopted direction, the Clerk sent questionnaires to
22 the qualified applicants; forty-three (43) applicants timely returned the questionnaires. (Staff
23 Report Dec. 11, 2018 Special Meeting, RJN 8; Amended Petition Exh. G.) Then, on or about
24 December 10, 2018, each Supervisor verbally, independently notified the Clerk of the individuals
25 that he or she would like to interview and the Clerk in turn invited those persons who had received
26 two or more acknowledgments, totaling thirteen (13) applicants, to interview at the public Board
27 meeting held on December 11, 2018. (Id.; Amended Petition ¶28.) The verbal communication of
28 the list of candidates to the Clerk is the purported Brown Act violation alleged by Petitioners.

 At the December 11, 2018 Special Meeting the Board conducted public interviews of the
applicants who received two or more acknowledgments in accordance with the modified
procedure publicly adopted on December 4, 2018. (Agenda Dec. 11, 2018 Special Meeting, RJN
9.) Following the interviews and public comment, the Board unanimously identified five (5)

1 candidates for further interview at a Special Meeting to be held on December 13, 2018. (Fair
2 Statement Dec. 11, 2018 Special Meeting, RJN 10.)

3 The Board adjourned the December 13, 2018 Special Meeting without taking any further
4 action. (Fair Statement Dec. 13, 2018 Special Meeting, RJN 11; Amended Petition ¶36.) The
5 next regular meeting of the Board of Supervisors was noticed for December 18, 2018, with the
6 following relevant agenda items:

- 7 1. Rescind the December 10, 2018, establishment of an interview list of
8 thirteen candidates for Third District Member of the Board of Supervisors.
- 9 2. Rescind the December 11, 2018, establishment of a finalist list of five
10 candidates for Third District Member of the Board of Supervisors.
- 11 3. Amend the process for selection of the Third District Member of the Board
12 of Supervisors approved on November 13, 2018, as revised on December 4,
13 2018.
- 14 4. Conduct deliberations in open session.
- 15 5. Select the Third District Member of the Board of Supervisors.

16 (Agenda Dec. 18, 2018 Regular Meeting, RJN 12; Amended Petition Exh. K.)

17 The morning of December 18, 2018 at 6:28 a.m., a mere hours before the meeting was
18 scheduled to begin, Petitioners sent an email correspondence alleging a Brown Act violation on
19 December 10 and 11, specifically the process of scheduling interviews from the pool of applicants.
20 Petitioners demanded that all 43 applicants be interviewed. (Amended Petition ¶37 and Exh. A
21 thereto.) At the regularly scheduled public meeting that same day, the Board unanimously
22 rescinded its prior actions, effectively making the entire field of applicants potentially eligible for
23 appointment. (Fair Statement Dec. 18, 2018 Regular Meeting, RJN 13; Amended Petition ¶41.)
24 The Board then unanimously adopted a modified procedure allowing each supervisor to submit
25 three names from the list of qualified applicants to the Clerk and followed with an open session
26 interview of the six nominees: Chris Carrillo, Rhodes Rigsby, William Emmerson, Sean Flynn,
27 William Jahn, and Dawn Rowe. (*Id.*; also Amended Petition ¶¶43, 46.) The Board listened to
28 public comments from twenty-one (21) individuals. (*Id.*) The Board then voted unanimously to
appoint Dawn Rowe as Third District Supervisor. (*Id.*; also Amended Petition ¶53.) Rowe was
sworn in as Supervisor for the Third District at the December 18, 2018 meeting. (*Id.*)

1 Just two days (December 20, 2018) later County Counsel sent written notice of
2 curative/corrective actions to Petitioners. (Amended Petition ¶20 and Exh. B thereto.) This writ
3 action was filed by Petitioners eleven days later on December 31, 2018. Notably, petitioners never
4 submitted a notice to cure the December 18, 2018 unanimous appointment of Supervisor Dawn
5 Rowe based on an alleged Brown Act violation.

6 **IV. DEMURRER STANDARD**

7 A party may demur to a petition for mandate on the grounds that the petition does not
8 state facts sufficient to show a right to relief when that ground for objection appears on the face of
9 the petition or from any matter of which the court is required to or may take judicial notice. (Code
10 Civ. Proc. §§ 430.10(e), 430.30(a) and 1109; see also *May v. City of Milpitas* (2013) 217
11 Cal.App.4th 1307, 1323.) For purposes of a demurrer, the court assumes the alleged facts true, but
12 does not assume the truth of contentions, deductions, or conclusions of fact or law.² (*Blank v.*
13 *Kirwan* (1985) 39 Cal.3d 311, 318.) The Court may also disregard allegations which are contrary
14 to law or to judicially noticed facts. (*Wolfe v. State Farm Fire & Casualty Ins. Co.* (1996) 46
15 Cal.App.4th 554, 559-560; Code Civ. Proc. § 430.30(a).) Where no amendment will cure a defect
16 in a pleading, leave to amend is not warranted. (*City of Chula Vista v. County of San Diego*
17 (1994) 23 Cal.App.4th 1713, 1719.)

18 **V. PETITIONERS FAIL TO STATE A CAUSE OF ACTION UNDER THE BROWN**
19 **ACT FOR NULLIFICATION OF THE UNANIMOUS APPOINTMENT OF**
20 **SUPERVISOR ROWE**

21 **A. Failure to Send Notice to Cure After the Board’s December 18, 2018 is Fatal.**

22 Where a challenge is made asserting that a legislative body has taken action in violation of
23 “Section 54953, 54954.2, 54954.5, 54954.6, 54956, or 54956.5,” the person is required to demand
24 a cure, and the person cannot succeed in an action based on the alleged violation if the legislative
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26 ² Respondents do not admit facts for all purposes in this mandate proceeding and reserve the right
27 to raise issues of fact in the event issues of law raised by this demurrer are determined adversely.
28 (See e.g. *Private Investors v. Homestake Mining Co.* (1936) 16 Cal.App.2d 1.)

1 body cures the violation. (Govt. Code, § 54960.1.) Before pursuing judicial determination that an
2 action in violation of the open meetings law is null and void, an interested party must first demand
3 the legislative body cure or correct its mistake. (*Bell v. Vista Unified School Dist.* (App. 4 Dist.
4 2000) 82 Cal.App.4th 672, rehearing denied, review denied.) Failure to provide such notice is
5 fatal to a claim for invalidation.

6 Here, as was pointed out by this Court in ruling on the original writ petition, Petitioners
7 failed to serve a notice to cure for the Board’s December 18, 2018 publicly taken action of
8 unanimously appointing Supervisor Rowe. This is fatal to the claims presented here and
9 Petitioners attempts to plead around this deficiency by claiming preemptive notice and some
10 irretrievable taint in the Board’s appointment process are without merit as set forth below. On this
11 basis alone the Petition should be dismissed with prejudice.

12 **B. The Board’s December 18, 2018 Cure Forecloses This Requested Relief.**

13 In addition to the failure of notice, Petitioners’ writ action is foreclosed by Respondents’
14 December 18, 2018 cure of the alleged Brown Act violation. Where a local agency cures or
15 corrects the alleged Brown Act violation, any nullification action shall be dismissed with
16 prejudice. (Govt. Code § 54960.1(e); *Bell, supra*, 82 Cal.App.4th at 684–685.) The fact that
17 curative action was taken is not evidence of a violation as a decision to cure raises no inference the
18 disputed action was unlawful. (Govt. Code § 54960.1 (f).)

19 Here, the alleged “action taken” in violation of the Brown Act was each Supervisor
20 communicating the names of the applicants that he or she was interested in interviewing to the
21 Clerk on December 10, 2018. (Amended Petition ¶37 and Exh. A thereto.) However, Petitioners’
22 own pleadings establish the curative action on December 18, 2018 when the Board unanimously
23 voted to rescind the interview lists that had been established and modified the appointment process
24 – effectively re-opening the entire pool of applicants for consideration. (Amended Petition Exh.
25 B.) Here, though under no obligation to do so, the Board cured the alleged December 10, 2018
26 Brown Act violation by rescinding its interview list, amending the appointment process, and re-
27 opening the pool of applicants for consideration. Nothing more was needed. Dismissal is
28 statutorily required.

1 In an attempt to plead around this fatal result, Petitioners contend that Board’s curative
2 actions were ineffective because the Board did not at that point interview all forty (40) plus
3 applicants for the vacant office. There is no authority for the proposition that the cure for an
4 alleged Brown Act violation mandates interviewing all applicants. The Brown Act itself does not
5 require this. In attempting to dictate the appointment process and outcome, Petitioners again
6 overlook the Board’s authority to make the vacancy appointment and the complete absence of any
7 legal requirement for the cure that they demand – interviews of all applicants. Importantly,
8 Petitioners’ logic is not only contrary to the language and intent of the Brown Act, it would
9 effectively prevent any legislative body from ever effectively curing an alleged Brown Act
10 violation as the alleged “taint” could never be purged from the deliberative process even where all
11 deliberations were conducted at publicly noticed meetings. This is an absurd result. So long as
12 the cure satisfies the Brown Act’s openness objectives, it is sufficient. The fact that the Board
13 took action on December 18, 2018 to cure or correct the alleged Brown Act violation by
14 rescinding the allegedly offending conduct and re-opening the applicant pool for consideration is
15 dispositive here. On that basis alone the Petition fails as a matter of law.

16 **C. The December 18, 2018 Appointment of Supervisor Rowe Was Not a Brown**
17 **Act Violation.**

18 As well, the Amended Petition fails to state a Brown Act cause of action for nullification
19 of the December 18, 2018 unanimous appointment of Supervisor Rowe under Government Code
20 §54960.1. The unanimous appointment of Supervisor Rowe on December 18, 2018 was not itself
21 a Brown Act violation, nor is it alleged to have been. The Board had the discretion and authority
22 under the County Charter to appoint any qualified person to fill the vacant supervisor seat.
23 (Charter, Art. 1, sec. 7, RJN 2.) The Board also had the discretion and authority to determine the
24 process for such appointment. (*Id.*) That Petitioners take issue how the Board streamlined the
25 process is insufficient as a matter of law to state a cause of action for the nullification of the
26 subsequent publicly taken action of appointing Supervisor Rowe. This is true here because the
27 Board had the absolute right to select any process it wanted, or even no process at all.

28 ///

1 An action that is alleged to have been a Brown Act violation shall not be determined to be
2 null and void if taken in substantial compliance with the statutory requirements. (Govt. Code §
3 54960.1(d)(1).) The courts have held that “substantial compliance” means actual compliance in
4 respect to the substance essential to every reasonable objective of the statute. (*Castaic Lake Water*
5 *Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1205.) Under this
6 standard, strict compliance is not required, and reviewing courts are to reject “hyper technical”
7 arguments that “elevate form over substance.” (*Id.* at p. 1207.) There is no Brown Act violation
8 where the agency has made “reasonably effective efforts” to comply. (*Id.* at p. 1206.) Courts
9 adopt a flexible reading of the Brown Act where doing so is generally consistent with the purposes
10 of the Brown Act. (See *Travis v. Board of Trustees* (2008) 161 Cal.App.4th 335, 346.)

11 Here, there is no dispute that all applicant interviews were conducted in public and the
12 Board’s selection was made after an extensive public process of soliciting applicants, reviewing
13 applicant questionnaires, interviewing applicants, accepting public comment, and deliberating in
14 public. These details are laid out in Section III above. To invalidate that entire public process
15 based on the allegation that the applicant pool was improperly narrowed and that all applicants
16 should have been interviewed is insufficient to state a nullification claim as a matter of law. The
17 law simply does not require all applicants to be interviewed. For these reasons, the unanimous
18 appointment of Supervisor Rowe at a public meeting, following public interviews and public
19 deliberation, was not itself a Brown Act violation and Petitioners’ demand for nullification of her
20 appointment fails.

21 **D. The December 10, 2018 Communication of Interview Lists from Individual**
22 **Supervisors to the Clerk Was Not A Brown Act Violation.**

23 Petitioners’ allegations related to the December 10, 2018 notification process to narrow the
24 candidate interview list also does not support a Brown Act violation. The verbal communication
25 of interview lists to the Clerk were neither a serial meeting nor a secret ballot as alleged. A “
26 ‘meeting’ means any congregation of a majority of the members of a legislative body at the same
27 time and location, ... to hear, discuss, deliberate, or take action on any item that is within the
28 subject matter jurisdiction of the legislative body”. (Govt. Code § 54952.2 (a).) Respondents do

1 not dispute that a majority of the members of a legislative body cannot, outside a meeting
2 authorized by this chapter, use a series of communications of any kind, directly or through
3 intermediaries, to discuss, deliberate, or take action on any item of business that is within the
4 subject matter jurisdiction of the legislative body. (Govt. Code § 54952.2 (b)(1).) But this does
5 not apply to individual contacts or conversations between a member of a legislative body and any
6 other person that do not violate subdivision (b). (Govt. Code § 54952.2 (c)(1).) An action to
7 invalidate fails to state a cause of action against the agency even when the body is found to have
8 deliberated if the legislative body did not take an action. (*Boyle v. City of Redondo Beach* (1999)
9 70 Cal.App.4th 1109, 1116-17, 1118.)

10 As is clear from these authorities - discussion, deliberation, or action taken are the
11 predicate of any meeting. Here, contrary to Petitioners' conclusory characterizations of events, the
12 record shows that there was no such collective deliberation or fact gathering that constituted a
13 meeting on December 10, 2018; there was no acquisition and exchange of facts preliminary to the
14 ultimate decision as each Supervisor separately and independently indicated to the Clerk which
15 applicants he or she would like to invite to interview on December 11, 2018.³ The only question
16 is whether there was "action taken" by a majority of the Board on December 10, 2018. "Action
17 taken" means a collective decision made by a majority of the members of a legislative body, a
18 collective commitment or promise by a majority of the members of a legislative body to make a
19 positive or a negative decision, or an actual vote by a majority of the members of a legislative
20 body when sitting as a body or entity, upon a motion, proposal, resolution, order or ordinance.
21 (Govt. Code § 54952.6; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875, 882.) By
22 this clear definition and on the face of the pleadings, no action was taken on December 10, 2018.
23 Only two acknowledgments were necessary for any of the 43 applicants to be called to interview,
24 there was no majority vote called for or taken, and more importantly no collective commitment
25 was made to make a positive or negative decision regarding the supervisor appointment. These

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27 ³ In fact, the County of Santa Clara uses a similar process for filing its Board vacancies. (See
28 County of Santa Clara Board Policy 2.2, RJN 14.)

1 facts do not establish a cause of action to invalidate the December 10, 2018 communication of
2 interview lists, much less to declare the subsequent public interviews illegal and invalidate the
3 unanimous appointment of Supervisor Rowe.

4 But even if the December 10, 2018 communications were a nominal Brown Act violation
5 (they were not), the mere fact that a Brown Act violation occurred with respect to a matter will not
6 support invalidation of action properly taken in a meeting noticed consistently with the Act. (See
7 e.g. *Centinela Hospital Association v. City of Inglewood* (1990) 225 Cal.App.3d 1586.) As
8 applied here, that would mean that even if the manner in which interviews were scheduled from
9 the larger applicant pool is found to have been improper, that does not support invalidation of the
10 subsequent unanimous appointment of Supervisor Rowe on December 18, 2018. For example, in
11 *Centinela Hospital Association* a hospital challenged land use entitlements granted to a competing
12 psychiatric facility on the ground that the City Attorney had allegedly held illegal discussions with
13 a majority of the Council before the Council conducted a public hearing and voted to authorize the
14 land use. In light of the procedural posture of the case, the court accepted the allegation of
15 improper out-of-meeting discussions, but found no basis to invalidate the entitlement because the
16 allegedly improper discussions did not lead to an “action taken” and the action challenged was
17 admittedly taken in a properly noticed meeting. (*Id.* at pp. 1598–1599.) This is a corollary of the
18 requirement that the challenger must show prejudice as a result of the alleged violation to prevail
19 on a Brown Act claim for nullification. (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th
20 547, 556, 561; see also *San Lorenzo Valley Community Advocates for Responsible Educ. v. San*
21 *Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1410; see also *Galbiso v. Orosi*
22 *Public Utility Dist.* (2010) 107 Cal.Rptr.3d 36, 182 Cal.App.4th 652, review denied.) Were there
23 a nominal Brown Act violation in the way the applicants were scheduled for interview (again there
24 was not), the same outcome would be mandated here because the unanimous appointment of
25 Supervisor Rowe was taken at a properly noticed public meeting at the end of a lengthy public
26 process and within the Board’s clear authority under the Charter to make such an appointment by
27 any process it selected.

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1 **VI. QUO WARRANTO IS THE EXCLUSIVE MEANS TO CHALLENGE THE**
2 **APPOINTMENT OF SITTING SUPERVISOR DAWN ROWE**

3 Respondents respectfully submit that quo warranto remains the exclusive remedy available
4 here. Title to the office of Third District Supervisor is not merely incidental to Petitioners'
5 mandate petition, it is the heart of the matter. *Nicolopoulos v. City of Lawndale* (2001) 91
6 Cal.App.4th 1221 and *Klose v. Superior Court in & for San Mateo Cty.*, (1950) 96 Cal.App.2d 913
7 are controlling demand such a result on the facts here at play. A ruling by this Court that quo
8 warranto is the exclusive remedy will not deprive Petitioners' of any relief but rather, these
9 Brown Act questions are appropriately determined within the quo warranto proceeding. (See
10 Op.Atty.Gen. 13-1103 (March 21, 2014), 2014 WL 1239576.)⁴

11 It must not be ignored that Petitioners unequivocal goal is to have the December 18, 2018
12 appointment of Supervisor Dawn Rowe declared null and void and the office declared vacant. The
13 essence of Petitioners' claims are that, by virtue of the alleged December 10, 2018 Brown Act
14 violation, Supervisor Rowe wrongfully holds title to public office. This is made clear repeatedly
15 on the face of the Amended Petition, where Petitioners demand a judicial determination that the
16 appointment of Supervisor Rowe is "null and void" pursuant to Government Code § 54960.1.
17 (Amended Petition ¶¶ 63, 69.) As well, Petitioners specifically pray that the Court order
18 respondents to "rescind the appointment of Dawn Rowe as Third District Member of the San
19 Bernardino County Board of Supervisors" and declare that the 30 day period has expired so that
20 Governor Newsom must make the appointment of the Third District Member. (Amended Petition
21 ¶¶ 70, 71.) Clearer still on this point is the Petitioners writ brief which concludes by asking for
22 the invalidation of the appointment of Supervisor Rowe and a declaration that the Third District
23 Supervisor seat was never lawfully filled. (See Points and Authorities in Support of Peremptory

24
25 ⁴ While cognizant of the Court's prior ruling on this issue, Respondents reassert this argument
26 because the Amended Petition makes clear that Supervisor Rowe's title to office is not merely
27 incidental to Petitioners' claims and to ensure that the issue is properly preserved. Additionally,
28 on April 19, 2019 the Attorney General issued Opinion No. 18-202 in a proposed action alleging
unlawful election procedures stated that "[t]o sue in quo warranto, there is no requirement that the
defendant's allegedly invalid title deprived the relator of office."

1 Writ at Pg 18 lines 15-18.) By seeking to have the Board’s unanimous appointment of Supervisor
2 Rowe declared null and void, Petitioners are expressly challenging her right to hold the seat.

3 It has long been the law of the state of California that title to an office cannot be tried by
4 mandamus, injunction, writ of certiorari, or petition for declaratory relief. (*Nicolopoulos, supra*,)
5 91 Cal.App.4th at 1225-26 – citing *People v. Olds* (1853) 3 Cal. 167, 175, 177 and Cal. Atty. Gen.
6 Opinion Unit, Quo Warranto Applications, third page.) Quo warranto, not mandamus, is the
7 specific action by which one challenges “any person who usurps, intrudes into, or unlawfully
8 **holds or exercises** any public office.” (Code Civ. Proc. § 803 – emphasis added.) To “try title” to
9 public office is to evaluate whether a person has the right to hold a particular office by virtue of
10 eligibility requirements, **valid election procedures**, the absence of disqualifying factors, etc. (96
11 Ops.Cal.Atty.Gen. 36, 39 (2013) – emphasis added.)⁵ By alleging that her appointment was
12 unlawful under the Brown Act, Petitioners are contending that Real Party in Interest Dawn Rowe
13 unlawfully holds public office.

14 Where, as here, a petitioner alleges that an office is vacant notwithstanding a *de facto*
15 occupant, and asks that the proper authority be forced to fill the seat which they contend is vacant,
16 the courts have held mandate an improper remedy. (*Klose, supra*, 96 Cal.App.2d at 924.) In
17 *Klose*, a case involving a dispute over whether a vacancy existed on the City Council of
18 San Carlos, the Court of Appeal directly addressed the question of whether mandamus was the
19 appropriate proceeding. After a thorough review of the relevant case law, including whether title
20 was “incidental”, the Court then summarized and reconciled the rulings on this matter, stating:

21 (1) that it is the general rule that mandamus cannot be used for this
22 purpose unless the fact of vacancy is not disputed;

23 (2) that where the circumstances justify a departure from the rule,
24 the courts have done so, usually only where there are conflicting
25 claimants to the office; and

26 ⁵ “Attorney General opinions are entitled to considerable weight.” (*Lexin v. Superior Court*
27 (2010) 47 Cal.4th 1050, 1087, fn. 17; see also *California Assn. of Psychology Providers v. Rank*
28 (1990) 51 Cal.3d 1, 17 [“ ‘Opinions of the Attorney General, while not binding, are entitled to
great weight’ ”].)

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(3) 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, mandamus must be denied.

(*Klose, supra*, 96 Cal.App.2d at 925.)

“[W]here 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, **mandamus must be denied.**” (*Klose, supra*, 96 Cal.App.2d at 925 - emphasis added.) This is exactly the situation we find here. The action is not brought by a conflicting claimant to the office. The Respondents dispute that the office is or should be declared vacant. While Supervisor Rowe is an incumbent claiming the office and who has been representing the Third District for over four (4) months. By this well established measure, title is not merely incidental and mandamus must be denied in favor of the exclusive quo warranto remedy. This defect is incurable by amendment as it requires a series of acts that Petitioners have not undertaken.

Additionally, as previously briefed, there are strong public policy reasons supporting the quo warranto exclusive remedy over Petitioners’ requested mandamus relief. Declaring the appointment of a county supervisor null and void *ab initio* as demanded by Petitioners would potentially render all of the Board’s actions during the last four months in which the *de facto* supervisor participated vulnerable to uncertainty and challenge. As yet again acknowledged by the Attorney General in its April 19, 2019 opinion, quo warranto solves this problem because it is not retroactive, meaning that it does not and cannot invalidate the actions of a *de facto* public official made prior to entry of judgment. (See Op.Atty.Gen. 18-202 (April 19, 2019) fn 56 citing *In re Redevelopment Plan for Bunker Hill Urban Renewal Project 1B* (1964) 61 Cal.2d 21, 42 and *McPhee v. Reclamation Dist. No. 765* (1911) 161 Cal. 566, 572.) By pleading mandate instead of the exclusive judicial remedy of quo warranto Petitioners are circumventing important public policy protections inherent in the statute.

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1 **VII. CONCLUSION**

2 In short, Petitioners' remedy for a disagreement with the Board's unanimous decision is
3 quo warranto or the ballot box, not the drastic mandamus relief demanded here. These defects
4 discussed above are not curable by amendment. For all these reasons Respondents' demurrer
5 should be sustained without leave to amend.

6 DATED: May 3, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

7

8

By: 

DEBORAH J. FOX

T. STEVEN BURKE, JR.

Attorneys for Respondents/Real Party in Interest

BOARD OF SUPERVISORS OF SAN

BERNARDINO COUNTY, et al.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN DIEGO

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 San Diego, State of California. My business address is 101 West Broadway, Suite 1105, San Diego, CA 92101.

On May 3, 2019, I served true copies of the following document(s) described as **COUNTY RESPONDENTS' AND REAL PARTY IN INTEREST'S POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER TO PETITIONERS' FIRST AMENDED PETITION FOR WRIT OF MANDATE** on the interested parties in this action as follows:

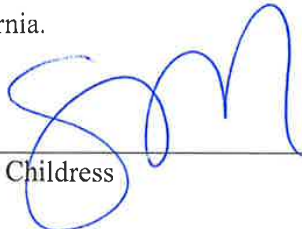
SEE ATTACHED SERVICE LIST

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a *courtesy* copy of the document(s) to be sent from e-mail address schildress@meyersnave.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on May 3, 2019, at San Diego, California.



Sylvia Childress

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SERVICE LIST

**Michael Gomez Daly, et al. v. Board of Supervisors of San Bernardino County, et al.
CIVDS1833846**

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In Pro Per

(Ruth Musser-Lopez v Board of Supervisors
of San Bernardino County, et al.
San Bernardino Superior Case No.:
CIVDS1901773)

EXHIBIT E



Minute Orders

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Case Type: ▼

Case Number:

Case CIVDS1833846 - DALY -V- BOARD OF SUPERVISORS, ET AL

Action: ▼

**MOTION RE: DEMURRER TO FIRST AMENDED COMPLAINT FILED BY DEFENDANT BOARD OF SUPERVISORS OF SAN BERNARDINO
05/29/2019 - 8:30 AM DEPT. S29**

JANET M FRANGIE, JUDGE
 CLERK: AMIE ARROYO
 COURT REPORTER LINDA BALDWIN 12453
 COURT ATTENDANT D ZWIERLEIN

-
 APPEARANCES:
 ATTORNEY MEGAN WACHSPRESS PRESENT FOR PLAINTIFF/PETITIONER.
 ATTORNEY GLENN ROTHNER PRESENT FOR PLAINTIFF/PETITIONER.
 ATTORNEY JOHYUNG LEE PRESENT FOR PLAINTIFF/PETITIONER.
 ATTORNEY DEBORAH FOX PRESENT FOR DEFENDANT/RESPONDENT.

-
 PROCEEDINGS:
 PREDISPOSITION HEARING HELD

-
 MOTION
 BOARD OF SUPERVISORS OF SAN BERNARDINO'S MOTION DEMURRER TO FIRST AMENDED COMPLAINT IS HEARD.
 ARGUED BY COUNSEL AND SUBMITTED.
 COUNSEL SUBMITS ON PLEADINGS.
 AFTER TESTIMONY AND DUE CONSIDERATION BY THE COURT :

-
 COURT FINDS:
 DEMURRER IS OVERRULED
 THE COURT TAKES JUDICIAL NOTICE OF EXHIBITS1-13 ATTACHED TO RESPONDENTS REQUEST FOR JUDICIAL
 NOTICE AND JUDICIAL NOTICE OF EXHIBITS 1-12 ATTACHED TO PETITIONERS MICHAEL GOMEZ DALY AND
 INLAND EMPIRE UNITEDS (PETITIONERS) REQUEST FOR JUDICIAL NOTICE WITH THE CAVEAT THAT THE COURT
 IS NOT JUDICIAL NOTICING THE TRUTH OF THE MATTERS ASSERTED IN THE EXHIBITS.

-

THE OVERRULES THE DEMURRER ON THE GROUNDS THAT QUO WARRANTO IS THE EXCLUSIVE REMEDY OF PETITIONERS. THE COURT DOES NOT SEE ANY REASON TO DEVIATE FROM ITS PRIOR RULING ON THE DEMURRER TO THE ORIGINAL PETITION AND CONSTRUES RESPONDENTS RENEWED ARGUMENT AS AN IMPROPER REQUEST FOR RECONSIDERATION.

-

THE COURT OVERRULES RESPONDENTS DEMURRER TO PETITIONERS VERIFIED AMENDED PETITION FOR WRIT OF MANDATE ON THE GROUNDS THAT PETITIONERS FAIL TO ALLEGE SUFFICIENT FACTS TO SUPPORT A CAUSE OF ACTION FOR VIOLATION OF THE RALPH M. BROWN ACT. PETITIONERS ALLEGE IN THE AMENDED PETITION THAT THE BOARD DID NOT CURE ITS INITIAL VIOLATION BUT INSTEAD NOMINALLY RESCINDED ITS PRIOR ACTIONS AND CONTINUED ON ESSENTIALLY THE SAME COURSE, INVOKING A "CEREMONIAL" CURE. THE ALLEGED CURE WAS TAINTED BY THE PRIOR VIOLATION AND NOT EFFECTIVE. RESPONDENTS DISAGREE AND AVER THAT THE ACTIONS TAKEN ON DECEMBER 18 WERE CURATIVE AND HENCE, A NEW NOTICE WAS REQUIRED. TAKING THE PLEADINGS AS TRUE, THERE ARE TOO MANY FACTUAL DISPUTES BETWEEN THE PARTIES TO DETERMINE THE ISSUES ARGUED ON DEMURRER. THIS WOULD AMOUNT TO A HEARING ON THE MERITS. THEREFORE THE DEMURRER IS OVERRULED.

-

COUNSEL FOR PLAINTIFF TO GIVE NOTICE.
ACTION - COMPLETE
=== MINUTE ORDER END ===

EXHIBIT F

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13 BOARD OF SUPERVISORS OF SAN BERNARDINO COUNTY;
ROBERT A. LOVINGOOD; JANICE RUTHERFORD;
14 CURT HAGMAN; JOSIE GONZALES; DAWN ROWE

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **COUNTY OF SAN BERNARDINO**

17 MICHAEL GOMEZ DALY and INLAND
EMPIRE UNITED,
18
19 Petitioners,
20
21 v.

Case No. CIVDS1833846
**COUNTY RESPONDENTS'/REAL
PARTY IN INTEREST'S OPPOSITION
TO PETITIONERS' PEREMPTORY
WRIT OF MANDATE**

21 BOARD OF SUPERVISORS OF SAN
BERNARDINO COUNTY; ROBERT A.
LOVINGOOD, as First District Supervisor
22 and Chair of the Board of Supervisors;
JANICE RUTHERFORD, as Second District
23 Supervisor and Vice Chair of the Board;
CURT HAGMAN, as Fourth District
24 Supervisor of the Board; and JOSIE
GONZALES, as Fifth District Supervisor of
25 the Board,

Date: June 28, 2019
Time: 1:30 p.m.
Dept.: S29

Assigned for All Purposes to:
Hon. Janet M. Frangie, Dept. S29

Action Filed: December 31, 2018
Trial Date: June 28, 2019

26 Respondents.
27 DAWN ROWE,
28 Real Party in Interest.

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1 **I. INTRODUCTION**

2 Following several public meetings and more than seven (7) hours of public comment and
3 public interviews of applicants, on December 18, 2018, Real Party in Interest Dawn Rowe was
4 unanimously appointed to the then-vacant office of Third District Supervisor for the San
5 Bernardino County Board of Supervisors (“the Board”). Now, under the guise of a purported
6 Ralph M. Brown Act violation (Govt. Code § 54950 et seq.; “the Brown Act”), Petitioners Inland
7 Empire United and Michael Gomez Daly (“the Petitioners”) bring this mandate action for the
8 express purpose of invalidating the unanimous appointment of Supervisor Rowe and having the
9 Governor appoint someone more to their liking in her place. Petitioners attempt to unseat
10 Supervisor Rowe by claiming the process employed by the Board to schedule applicants for public
11 interviews violated the Brown Act and tainted the entire public process that followed. It did not.

12 To reach the drastic nullification remedy demanded, Petitioners elevate form over
13 substance to unwind the discretionary act this legislative body reached – not from back room or
14 secret negotiations – but from a process that played out across several public meetings. The San
15 Bernardino County Charter (“the County Charter”) vests the Board with the authority to appoint a
16 replacement supervisor in the event of a vacancy and the sole discretion to select a process to
17 arrive at that appointment. Here, the Board held all interviews, discussions, and deliberations in
18 public. The disputed issue is how, on December 10, 2018, the Board invited some applicants to be
19 publicly interviewed by each Supervisor independently identifying up to ten applicants to the
20 Clerk of the Board (“the Board Clerk”). Petitioners contend that this notification process violated
21 the Brown Act and the only cure was for all forty-three (43) applicants to be publicly interviewed
22 for equal amounts of time. Neither the Brown Act, the County Charter, nor any other law requires
23 such.

24 Petitioners writ should be denied because:

- 25 1. Petitioners failed to send the statutorily required notice challenging the Board’s
26 adoption of a new interview process and the appointment of Supervisor Rowe on December 18,
27 2018 (Govt. Code § 54960.1(b));

28 ///

1 2. The Board’s rescission of the prior interview lists, re-opening of the applicant pool
2 for consideration, and holding further public interviews on December 18, 2018 cured any alleged
3 Brown Act issue (Govt. Code § 54960.1(e));

4 3. There was no Brown Act violation with the December 10, 2018 process for inviting
5 applicants to interview (Govt. Code § 54960.1(d)(1));

6 4. There was no Brown Act violation in the unanimous appointment of Supervisor
7 Rowe on December 18, 2018 (Govt. Code § 54960.1(d)(1)); and

8 5. Petitioners were not prejudiced by the Board’s decision not to interview all forty-
9 three (43) applicants for Third District Supervisor (See *Olson v. Hornbrook Community Services*
10 *Dist.* (2019) 33 Cal.App.5th 502, 517).

11 Simply put, the Board properly complied with the Brown Act and this writ petition should
12 be denied on the merits.

13 **II. FACTUAL AND PROCEDURAL BACKGROUND**

14 **A. Dawn Rowe Was Unanimously Appointed To The Office Of Third District**
15 **Supervisor On December 18, 2018.**

16 On December 3, 2018, then Third District Supervisor James Ramos vacated the office of
17 Third District Supervisor. (Exh. 10 ROP 031.) This meant that pursuant to the County Charter,
18 the Board had thirty (30) days to appoint a replacement to the Third District seat and needed to do
19 so by January 2, 2019. (Exh. 1 ROP 009.) On December 18, 2018, the Board voted unanimously
20 to appoint Dawn Rowe as Third District Supervisor. (Exh. 25 ROP 169-170.) Supervisor Rowe
21 was sworn in at that same meeting. (*Id.*)

22 **B. The Board Utilized A Valid Public Process For The Appointment Of The**
23 **Vacant Third District Supervisorial Seat.**

24 The County of San Bernardino is a charter county. (Exh. 1 ROP 001-005.) The County’s
25 legislative and governing body is the Board. (Exh. 1 ROP 007-008.) When a vacancy arises on
26 the Board, the County Charter specifically provides that it “will be filled by appointment by
27 majority vote of the remaining members of the Board from amongst the qualified electors of the
28 supervisorial district in which such vacancy exists.” (Exh. 1 ROP 009.) The County Charter does

1 not mandate any process for the appointment, leaving that decision to the Board's discretion
2 subject only to the requirement that the Board complete any such process within thirty (30) days.
3 (*Id.*) Ramos' resignation on December 3, 2018 left the Board only thirty (30) calendar days to
4 manage this process while accounting for the limitations of the impending holidays and new year.

5 In an effort to manage this expedited timeline, and even before receipt of Supervisor
6 Ramos' resignation letter, the Board held a special meeting after the November 6, 2018 election,
7 on November 13, 2018, to set up a process for selection of an appointee. (Exh. 2 ROP 011.) As
8 well, the Board set up a schedule and set a Special Meeting for December 11, 2018 to conduct the
9 public interviews of qualified applicants. (Exh. 2 ROP 011; Exh. 4 ROP 015-016.) The
10 application process was opened and the Board Clerk published applications in the various
11 newspapers and at libraries throughout the County. (See Exhs. 5-9 ROP 026-030.) The Board
12 received fifty-two (52) individual applications, of which forty-eight (48) were determined to be
13 eligible for consideration. (Exh. 13 ROP 079.)

14 At the public meeting on December 4, 2018, the Board Clerk advised the Board about the
15 unexpectedly large number of applications received for the open Third District seat and the Board
16 reconsidered "the process for selection of the Third District Member of the Board of Supervisors
17 approved on November 13, 2018". (Exh. 13 ROP 079.) The companion staff report noted:
18 "[b]ased upon the number of applications received and the extremely short timeline to make a
19 selection in order to avoid invoking the Charter provision that would hand the process to the
20 Governor, the Board may wish to reconsider, and modify, the selection process at this time."
21 (Exh. 12 ROP 052.) This modified process was discussed in open session. (Exh. 28 ROP 230-
22 265.) Supervisor Gonzales explained that she "thought we were originally looking at 15
23 [applicants], but then when we got the 48 applications, it just became overwhelming." (*Id.* at ROP
24 243 lns 14:23-25.) Following the open session discussion, the Board modified the appointment
25 process as follows:

26 The Board directs the Clerk of the Board to send a Supplemental
27 Questionnaire to all qualified candidates [now at 48 applicants] and
28 requests that answers be returned by 12:00 noon on Friday,
December 7, 2018 and that all responses will be sent to the Board of
Supervisors by 5:00 P.M. that day.

1 The Board further directs that each Board member submit up to 10
2 applicant names to the Clerk by Monday, December 10, 2018 at
3 10:00 A.M., and that applicants that receive at least two
4 acknowledgements from Supervisors be notified by the Clerk that
5 they will be scheduled for an interview on December 11, 2018.

6 (Exh. 13 ROP 079.)

7 In furtherance of the Board's publicly adopted direction, the Board Clerk sent
8 questionnaires to the qualified applicants; forty-three (43) applicants timely returned the
9 questionnaires. (Exh. 15 ROP 084.) Then, on December 10, 2018, each Supervisor verbally and
10 independently notified the Board Clerk of the individuals that he or she would like to interview.
11 (*Id.*) The Board Clerk invited those persons who had received at least two acknowledgments,
12 totaling thirteen (13) applicants, to interview at the duly noticed special meeting held on
13 December 11, 2018. (*Id.*)

14 At the December 11, 2018 Special Meeting the Board invited public comment both at the
15 County Government Center and from a remote video connection at the Joshua Tree video
16 conference center within the Third District. (Exh. 29 ROP 270-296.) The Board then conducted
17 public interviews of the applicants who received two or more acknowledgments in accordance
18 with the modified procedure publicly adopted on December 4, 2018. (Exh. 14 ROP 081; Exh. 29
19 ROP 296-496.) The public comment and public interviews at this meeting lasted more than five
20 (5) hours. (Decl. of Board Clerk Laura Welch, ¶7.) Following the public comment and
21 interviews, the Board unanimously publically called out five (5) applicants for further interview at
22 a Special Meeting to be held on December 13, 2018. (Exh. 29 ROP 510-511.) An objection to the
23 Board's process was received on December 12, 2018 from Ruth Musser Lopez. (Exh. 17 ROP
24 089-091.) The December 13, 2018 Special Meeting was adjourned without taking any further
25 action. (Exh. 22 ROP 107.)

26 **C. The Board Rescinded The Interview Lists And Adopted a New Interview**
27 **Process On December 18, 2018.**

28 The morning of December 18, 2018 at 6:28 a.m., mere hours before the meeting was
scheduled to begin, Petitioners sent an email correspondence alleging a Brown Act violation on
December 10, specifically the process of scheduling interviews from the applicant pool.

1 Petitioners demanded that all forty-three (43) applicants be interviewed for equal amounts of time.
2 (Exh. 26 ROP 172-174.) At the regularly scheduled public meeting that same day, the Board:

3 1. Rescinded the December 10, 2018 establishment of an interview list of thirteen
4 candidates;

5 2. Rescinded the December 11, 2018 establishment of a finalist list of five candidates.
6 (Exh. 25 ROP 169-170.)

7 The Board went on to take new action which included: (1) adopting a modified procedure
8 allowing each supervisor to submit three names to the Board Clerk from the entire list of forty-
9 three (43) qualified applicants (Exh. 25 ROP 169-170) and (2) conducting an open session
10 interview of the six nominees: Chris Carrillo, Rhodes Rigsby, William Emmerson, Sean Flynn,
11 William Jahn, and Dawn Rowe. (*Id.*; also Exh. 31 ROP 552-667.) The Board listened to public
12 comments from twenty-one (21) individuals, both on site and from the Joshua Tree location before
13 it took any action on December 18, 2018. (*Id.*) This process took nearly two and one-half (2 ½)
14 hours. (Decl. of Board Clerk Welch, ¶7.) The Board then publicly deliberated and voted
15 unanimously to appoint Dawn Rowe as Third District Supervisor. (Exh. 25 ROP 170.) Rowe was
16 sworn in shortly thereafter. (*Id.*)

17 On December 20, 2018, County Counsel sent written notice of the Board's
18 curative/corrective actions to Petitioners pursuant to Govt. Code § 54960.1(c)(2). (Exh. 26 ROP
19 171.) This writ action was filed eleven days later on December 31, 2018. Notably, Petitioners
20 never submitted a notice to cure the Board's December 18, 2018 action of setting up a new
21 interview process nor a notice to cure the unanimous appointment of Supervisor Dawn Rowe.

22 In summary, the foregoing facts establish that:

23 1. The Board had the express authority under the County Charter to appoint a
24 replacement supervisor by majority vote;

25 2. The County Charter did not designate a process for appointing a replacement – that
26 was left to the Board's discretion;

27 3. On December 18, 2018, the Board rescinded its interview list of December 10 and
28 finalist list of December 11, 2018;

1 4. On December 18, 2018, the Board adopted a new process for appointing a
2 replacement supervisor;

3 5. All applicant interviews were conducted in public;

4 6. All comments and deliberations on applicants were made in public;

5 7. The public was allowed to comment on the applicants and the process at each
6 meeting where the Board took action;

7 8. The Board unanimously appointed Dawn Rowe as supervisor on December 18,
8 2018; and

9 9. Petitioners did not send a written notice to cure after the Board's December 18,
10 2018 actions.

11 **III. PETITIONERS' CLAIM FOR THE NULLIFICATION OF THE UNANIMOUS**
12 **APPOINTMENT OF SUPERVISOR ROWE FAILS**

13 **A. Petitioners Must Prevail On Every Question In Order To Obtain Relief.**

14 Distilled, the mandate petition requires the Court to answer the following questions:

15 1. Did Petitioners provide notice to cure for each Board action alleged to have been
16 taken in violation of the Brown Act? (Govt. Code § 54960.1(b).)

17 2. Did the Board cure the alleged December 10, 2018 Brown Act violation on
18 December 18, 2018? (Govt. Code § 54960.1(e).)

19 3. Did the Board substantially comply with the Brown Act in appointing Supervisor
20 Rowe? (Govt. Code § 54960.1(d)(1).)

21 4. Did the Petitioners suffer sufficient prejudice to invalidate – not only the alleged
22 violation itself – but also the subsequent unanimous appointment of Dawn Rowe on December 18,
23 2018? (See *Olson, supra*, 33 Cal.App.5th at 517.)

24 Only if Petitioners prevail on **each** of these questions - which they cannot - can a writ issue.

25 **B. Petitioners' Failure To Provide Notice To Cure The New Actions Taken At**
26 **The December 18, 2018 Board Meeting Is Fatal.**

27 Before seeking court intervention and seeking to have a judicial determination that an
28 action violated the Brown Act and declaring the Board's action null and void, an interested party

1 must first demand the legislative body cure or correct its mistake. (Govt. Code, § 54960.1(b); *Bell*
2 *v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, rehearing denied, review denied.) The
3 notice to cure must be directed to the “action alleged to have been taken” and must “clearly
4 describe the challenged action”. (Govt. Code, § 54960.1(b).) The use of past tense by the
5 Legislature clearly contemplates notice to cure after the Board has acted. Failure to provide such
6 notice is fatal to a claim for invalidation.

7 Here, as was determined by this Court’s first demurrer ruling, Petitioners failed to serve a
8 notice to cure for the Board’s December 18, 2018 new actions in setting up a new interview
9 process and in appointing Supervisor Rowe. The only notice to cure was sent on the morning of
10 December 18, 2018, before any action was taken on December 18, 2018, and referred only to the
11 prior December 10, 2018 alleged violation. This is fatal to the claim for nullification of
12 Supervisor Rowe’s appointment. Petitioners cannot avoid this deficiency by claiming preemptive
13 notice or extension of prior notice to a subsequent action; the statute is clear.

14 Petitioners may continue to rely on *Hernandez v. Town of Apple Valley* (2017) 7
15 Cal.App.5th 194 for their prior assertion that notice after the December 18, 2018 appointment of
16 Supervisor Rowe was not required. They are wrong and extend the argument too far. The
17 approval of the Memorandum of Understanding (“MOU”) and the calling of the special election
18 were actions taken at the same meeting by the Apple Valley Council. (*Id.* at 196-197.) Only the
19 election itself took place at a later date. There was no cure or subsequent action by the town’s
20 legislative board to interrupt the causal chain of events arising from the improper action on the
21 MOU, nor any argument that such a cure was at issue. *Town of Apple Valley* does not excuse
22 Petitioners’ failure to provide statutory notice under Govt. Code § 54960.1(b) that the appointment
23 of Supervisor Rowe was being challenged as an alleged Brown Act violation.

24 **C. The Petition Fails Because The Board Cured The Alleged December 10, 2018**
25 **Brown Act Violation.**

26 The fact that a legislative body takes a subsequent action to cure or correct an alleged
27 violation shall **not** be construed or admissible as evidence of such violation. (Govt. Code
28 § 54960.1(f); emphasis added.) And where a local agency cures or corrects the alleged Brown Act

1 violation, any nullification action shall be dismissed with prejudice. (Govt. Code § 54960.1(e);
2 *Boyle v. City of Redondo Beach* (1999) 70 Cal.App.4th 1109, 1118.) Translated, this requires that
3 Petitioners' writ be dismissed because it is foreclosed by the County's December 18, 2018
4 curative actions communicated to Petitioners on December 20, 2018. (Exh. 26 ROP 171.)

5 Petitioners claim that when each Supervisor communicated the names of the applicants
6 that the Supervisor was interested in interviewing to the Board Clerk on December 10, 2018 – this
7 was a Brown Act violation. (Exh. 26 ROP 172-174.) Though under no obligation to do so, the
8 Board cured this alleged Brown Act violation by rescinding its interview list, amending the
9 appointment process, re-opening the entire pool of applicants for consideration, and publicly
10 interviewing applicants – including one not previously considered. (Exh. 25 ROP 169-170.) The
11 Board then publicly deliberated and unanimously appointed Supervisor Dawn Rowe. (*Id.*)
12 Nothing more was needed. Dismissal is statutorily required.

13 Recognizing the fatal impact of the Board's December 18, 2018 curative actions,
14 Petitioners malign the sufficiency of the cure as “merely ceremonial and disingenuous”. (Moving
15 Papers, p. 11 lns 16-18.) In pressing this argument, Petitioners contend the cure was ineffective
16 because the Board was required to erase from their minds the substance of the prior public
17 interviews and interview all applicants for equal amounts of time. But there is simply no authority
18 for the proposition that the cure for the alleged Brown Act violation mandated interviewing each
19 of the forty-three (43) applicants for twenty (20) minutes; that alone would take more than
20 fourteen (14) hours, not including breaks, administrative time, public comment, or deliberation.

21 Petitioners attempt to support their position by arguing that *Morrison v. Housing Authority*
22 *of the City of Los Angeles (HACLA)* (2003) 107 Cal.App.4th 860 and *Page v. MiraCosta*
23 *Community College Dist.* (2009) 180 Cal.App.4th 471 mandate the drastic remedy they urge. Not
24 so. *HACLA and MiraCosta College* involved closed door fact finding, deliberation, and action.
25 The same is not true here where there was no fact finding outside the public view, no deliberation
26 behind closed doors, no serial meeting with the goal of determining a final action. In the
27 *MiraCosta College* case, the Board met in closed session to discuss a proposed settlement in an
28 employment dispute for more than eleven (11) hours. (*MiraCosta College, supra*, 180

1 Cal.App.4th at 501.) During this time several of the Board members left the closed session and
2 discussed settlement with a third-party mediator. (*Id.*) The Board then decided to settle the case
3 on terms negotiated at this meeting. (*Id.* at 481, 482.) This lengthy meeting included
4 investigation, deliberation, and action taken by the Board and a deficient cure attempt of issuing
5 minutes stating the Board had reconsidered and approved the prior action. (*Id.* at 505.) *HACLA*
6 similarly involved lengthy fact-finding and deliberation in an improper closed session relating to a
7 personnel determination that could not be cured by simply repeating the process in open session.
8 (*HACLA, supra*, 107 Cal.App.4th at 872.)

9 The Board's action of December 18, 2018 curing the alleged Brown Act violation by
10 rescinding the allegedly offending interview lists and re-opening the applicant pool to all forty-
11 three (43) applicants is dispositive. On this basis alone the Petition fails and dismissal is required.
12 Nothing required the Board to rescind the prior public interviews or disavow any information
13 gained during same. The simple fact of the matter is that Petitioners attempt to dictate the
14 appointment process and outcome. Petitioners disregard the Board's authority to make the
15 vacancy appointment and the complete absence of any legal requirement for the cure they demand
16 – interviews of all applicants for equal amounts of time. The Board actions on December 18, 2018
17 rescinding the applicant lists, re-opening the applicant pool, and then adopting a new interview
18 process, conducting interviews, and then appointing Supervisor Rowe were legally sufficient.

19 **D. The Petition Fails Because The Board Complied Fully With The Brown Act In**
20 **Appointing Supervisor Dawn Rowe.**

21 There is no dispute here that all applicant interviews were conducted in public and the
22 Board's selection was made after an extensive public process of soliciting applicants, reviewing
23 applicant questionnaires, interviewing applicants, accepting public comment, and deliberating in
24 public. (*See* ROP Vols. 1 and 2 generally.) The only dispute is whether the December 10, 2018
25 process for inviting applicants to publicly interview was a Brown Act violation sufficient to
26 invalidate the entire public process. It was not. (Govt. Code § 54960.1(d)(1); see also *Castaic*
27 *Lake Water Agency v. Newhall County Water District* (2015) 238 Cal.App.4th 1196, 1205 [finding
28 substantial compliance means actual compliance in respect to the substance essential to every

1 reasonable objective of the statute]¹.) Courts adopt a flexible reading of the Brown Act where
2 doing so is generally consistent with the purposes of the Brown Act. (See *Travis v. Board of*
3 *Trustees* (2008) 161 Cal.App.4th 335, 346.)

4 The process undertaken by the Board was open and public. The Board had the discretion
5 and authority under the County Charter to appoint any qualified person to fill the vacant
6 supervisor seat. (Exh. 1 ROP 007.) The Board also had the discretion and authority to determine
7 the process for such appointment. (*Id.*) The Board widely encouraged applicants (Exhs. 5-9 ROP
8 017-030), reviewed all of the applicants' questionnaires (Exh. 31 ROP 593-596), conducted all
9 interviews and deliberations in public (Exh. 16 ROP 087; Exh. 25 ROP 169-170), set up remote
10 locations for video participation and allowed significant public comment periods. (Exh. 29 ROP
11 270-296; Exh. 31 ROP 552-592.)

12 Hoping to avoid the weight of this public process, Petitioners claim that the County held a
13 serial meeting and/or secret ballot on December 10, 2018. This is incorrect and elevates form over
14 substance. The verbal communication of interview lists to the Board Clerk was neither a serial
15 meeting nor a secret ballot as there was no discussion, deliberation, or action taken by a majority
16 of the Board as part of that process.

17 Discussion, deliberation, or action taken are the predicate of any meeting and action taken
18 is an essential element to an alleged secret ballot. (Govt. Code § 54952.2(a) [“ ‘meeting’ means
19 any congregation of a majority of the members of a legislative body at the same time and location,
20 ... to hear, **discuss, deliberate, or take action...**”- emphasis added]; Govt. Code § 54953(c)(1)
21 [“[n]o legislative body shall **take action** by secret ballot, whether preliminary or final.” –
22 emphasis added].) And while a series of communications can also constitute a meeting, it is only

23 ///

24 ///

25

26 ¹ No violation where agency made “reasonably effective efforts” to comply. (*Castaic Lake Water*
27 *Agency, supra*, 238 Cal.App.4th. at 1206.) Strict compliance not required; reviewing courts are to
28 reject “hypertechnical” arguments that “elevate[] form over substance.” (*Id.* at 1207.)

1 where there is discussion, deliberation, or action taken. (Govt. Code § 54952.2 (b)(1).) Moreover,
2 this does not apply to individual contacts or conversations between a member of a legislative body
3 and any other person that do not violate subdivision (b). (Govt. Code § 54952.2 (c)(1).)

4 Here, contrary to Petitioners' conclusory characterizations of events, the record shows that
5 there was no such collective deliberation or fact gathering that constituted a meeting on December
6 10, 2018; there was no acquisition and exchange of facts preliminary to the ultimate decision as
7 each Supervisor separately and independently indicated to the Board Clerk which applicants he or
8 she would like to invite to interview on December 11, 2018. Significantly, an action to invalidate
9 requires both deliberation and action taken by the legislative body. (*Boyle, supra*, 70 Cal.App.4th
10 at 1116-17, 1118.) As there was no deliberation on December 10, 2018, the only question is
11 whether there was "action taken" by a majority of the Board. There was not.

12 "Action taken" means a collective decision made by a majority of the members of a
13 legislative body, a collective commitment or promise by a majority of the members of a legislative
14 body to make a positive or a negative decision, or an actual vote by a majority of the members of a
15 legislative body when sitting as a body or entity, upon a motion, proposal, resolution, order or
16 ordinance. (Govt. Code § 54952.6; *Henderson v. Board of Education* (1978) 78 Cal.App.3d 875,
17 882.) No action was taken on December 10, 2018 because just two acknowledgments were
18 necessary for any of the applicants to be called to interview, there was no majority vote called for
19 or taken, and more importantly no collective commitment was made to make a preliminary or final
20 decision regarding the supervisor appointment. (Exh. 15 ROP 083-084.) The tally was used to
21 efficiently manage the interview notifications. Nothing more. Thus, no meeting or vote took
22 place under the Brown Act. These facts are insufficient to invalidate the December 10, 2018
23 communications to the Board Clerk as demanded, much less to declare the subsequent public
24 interviews illegal and invalidate Supervisor Rowe's unanimous appointment.

25 In urging that an improper meeting occurred on December 10, 2018, Petitioners rely
26 heavily on *Stockton Newspapers, Inc. v. Members of Redevelopment Agency* (1985) 171
27 Cal.App.3d 95. This reliance is unavailing. Importantly, *Stockton* was not an invalidation action
28 under Government Code § 54960.1 – the remedies sought there were for a declaration that past

1 action constituted a Brown Act violation and injunctive relief to prevent future similar conduct.
2 Nor did *Stockton* address whether there had been “action taken”, an essential question at play here.
3 Instead *Stockton* addressed whether a series of one-to-one telephone calls between
4 councilmembers and the city attorney conducted for the “commonly agreed purpose of collectively
5 deciding to approve the transfer of ownership in redevelopment project property” were a
6 “meeting” and therefore subject to the Brown Act’s notice and open meeting requirements.
7 (*Stockton, supra*, 171 Cal.App. 3d at 98-99.)

8 Here there were not any one-on-one telephone conversations or other communications for
9 the purpose of obtaining a collective commitment or promise by the Board to take action and fill
10 the vacant seat. Rather, the facts here show an agreed upon process for managing the large
11 applicant pool and inviting some applicants to be publicly interviewed. (Exh. 13 ROP 079.)
12 There was no deliberation or discussion amongst the Board members on December 10, 2018,
13 either directly or indirectly through an intermediary, to determine the replacement supervisor. Nor
14 was there any action taken. *Stockton* does not mandate the result advocated by Petitioners.

15 **E. The Petition Fails For Want Of Prejudice.**

16 “Even where a plaintiff has satisfied the threshold procedural requirements to set aside an
17 agency’s action, Brown Act violations will not necessarily ‘invalidate a decision. [Citation.]
18 [Plaintiffs] must show prejudice.’ ” (*Olson, supra*, 33 Cal.App.5th at 517 citing *San Lorenzo*
19 *Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School*
20 *Dist.* (2006) 139 Cal.App.4th 1356, 1378, 44 Cal.Rptr.3d 128.) Petitioners allege prejudice from
21 the narrowing of the applicant field because the Board never interviewed most of the applicants
22 and continued to rely upon the publicly conducted interviews of those applicants. Petitioners also
23 contend that they did not have the ability to observe or influence the selection process. Neither
24 assertion holds against the weight of the record and the applicable law. Again, nothing required
25 the Board to interview all applicants and the inefficiencies inherent in such a process border on the
26 absurd. Thus, there is no prejudice to Petitioners in the absence of all applicants being interviewed
27 for equal amounts of time. As well, there is no requirement that information obtained at public
28 interviews of applicants be disregarded. Moreover, the record shows the public had substantial

1 access during the application process, both before and after interviews were scheduled. (Exh. 27
2 ROP 180-223; Exh. 29 ROP 270-296; Exh. 31 ROP 552-592.) The Board acknowledged the
3 public input, rescinded the applicant list, and conducted further interviews to include one applicant
4 many of the public commenters supported, Chris Carillo. (Exh. 25 ROP 169-170.) That
5 Petitioners demand a different outcome does not equate with prejudice and cannot support
6 invalidation of the entire public process and nullification of the unanimous appointment of
7 Supervisor Rowe.

8 **IV. USURPING THE BOARD'S LEGISLATIVE DISCRETION TO MAKE AN**
9 **APPOINTMENT UNDER THE COUNTY CHARTER IS AN IMPROPER**
10 **REMEDY**

11 Here the Petitioners demand nothing less than the retroactive and punitive removal of
12 Supervisor Rowe along with the wholesale forfeiture of the Board's legislative discretion under
13 the Charter to appoint the Third District Supervisor. Petitioners are not asking to start the
14 interview process anew but rather, to have Supervisor Rowe ousted from her Third District seat
15 and instead, have Governor Newsom make the appointment so they can lobby for their preferred
16 Democratic applicant. Quo warranto is the exclusive remedy for challenging title to a seat and
17 precludes Petitioners' ask to remove Supervisor Rowe. (See *Nicolopoulos v. City of Lawndale*
18 (2001) 91 Cal.App.4th 122 [title to office cannot be tried by mandamus]; and *Klose v. Superior*
19 *Court In And For San Mateo Cty.*, (1950) 96 Cal.App.2d 913 [finding mandamus is not proper
20 when the vacancy of the seat is disputed].) Quo warranto is a show stopper for the remedy urged
21 here by Petitioners.

22 Moreover, case law precludes the drastic remedy petitioners demand based on assertions of
23 earlier Board Brown Act violations that were in fact cured. (See *Centinela Hospital Association v.*
24 *City of Inglewood* (1990) 225 Cal App. 3d 1586, 1598-99 [no basis to invalidate action taken at a
25 duly noticed public meeting based on allegations of earlier Brown Act violation]; see also *Daily*
26 *Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1555 [court will not
27 compel the exercise of discretion in a particular manner or to reach a particular result].) The
28 appointment of Supervisor Rowe came after the Board's cure of the alleged Brown Act violations

1 and at a duly noticed public meeting at the end of an extensive public process. Usurping the
2 Board's discretion to now compel a different preferred outcome, more to the political liking of the
3 Petitioners, is not warranted and is legally precluded.

4 To reach their desired outcome, Petitioners argue an irretrievable taint permeated the
5 proceedings. Such is simply not the case. Petitioners urge that *Town of Apple Valley, supra*, 7
6 Cal.App.5th at 194, supports their bold claim because they contend that even ratification by the
7 electorate can be invalidated. But such is not the lesson or holding of *Town of Apple Valley*,
8 where the Brown Act violation at issue was unequivocally "action taken" without proper notice.
9 Specifically, Apple Valley approved an MOU for private financing of a special election by the
10 proponent of a ballot initiative for a Wal-Mart superstore but failed to disclose the MOU on the
11 agenda or include same in the agenda packet. (*Town of Apple Valley, supra*, 7 Cal.App.5th at 208-
12 209.) The determination that this failure was a Brown Act violation was not made until after the
13 special election had been held; thus nullification of the approval of the MOU had the companion
14 effect of invalidating the outcome of the special election. (*Id.*) Petitioners assert this is a clear
15 indication that later public actions that are not Brown Act violations can be invalidated if they
16 directly relate to the underlying violation. This line of reasoning does not hold and does not
17 support Petitioners' claim that inviting applicants to interview at a public hearing should
18 necessarily invalidate those publicly conducted interviews and later unanimous appointment of a
19 County supervisor after several intervening public hearings. There was no cure or subsequent
20 action by the Town of Apple Valley, nor any argument that such a cure was at issue. *Town of*
21 *Apple Valley* does not demand the result pressed by Petitioners.

22 Petitioners also contend that if the Court determines the appointment of Supervisor Rowe
23 was null and void, the necessary result is the Board has forfeited its right under the County Charter
24 to appoint a replacement supervisor. Petitioners rely on *Leshar Communications, Inc. v. City of*
25 *Walnut Creek* (1990) 52 Cal.3d 531, 544 for the proposition that a void enactment "cannot be
26 given effect" to contend the Third District Supervisor seat would never have been lawfully
27 occupied. But that is not the language used by the Supreme Court in *Leshar*. In addressing a
28 conflict between a general plan and zoning ordinance, the Supreme Court recognized that a zoning

1 ordinance that conflicts with a general plan is invalid at the time it is passed and that “[a] void
2 statute or ordinance cannot be given effect.” (*Id.*) Such is not the case here, where we are not
3 dealing with a conflicting statute or ordinance void at its inception. Rather, we have an appointed
4 public official who has been acting as the duly appointed Supervisor for the Third District for the
5 last six (6) months.

6 Declaring the appointment of a county supervisor null and void *ab initio* in the manner
7 demanded by Petitioners would potentially render all of the Board’s actions in which Supervisor
8 Rowe participated vulnerable to uncertainty and challenge. Public policy favors certainty over
9 uncertainty in the actions of public bodies and officials. The Court should craft a remedy which
10 does not call into jeopardy the prior actions over the last six months of the County Board of
11 Supervisors. (See *Bray v. Payne* (1930) 210 Cal. 465.) And, in fact restarting the process was just
12 the remedy adopted by the Court in *Morrison*. (*Morrison, supra*, 107 Cal.App.4th at 877.) Should
13 this Court find the appointment of Supervisor Rowe invalid, this Court should determine that a
14 vacancy exists as of the date of the Court’s judgment and allow the Board to select a replacement
15 pursuant to the County Charter.

16 **V. CONCLUSION**

17 County Respondents respectfully request that the writ petition be denied on the merits.

18
19 DATED: June 5, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

20
21
22 By: 

DEBORAH J. FOX

T. STEVEN BURKE, JR.

Attorneys for Respondents/Real Party in Interest

BOARD OF SUPERVISORS OF

SAN BERNARDINO COUNTY, et al.

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28

EXHIBIT G

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17 *Attorneys for Petitioners*

18 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
19 **FOR THE COUNTY OF SAN BERNARDINO**

20 MICHAEL GOMEZ DALY and INLAND
21 EMPIRE UNITED,

22 Petitioners,

23 v.

24 BOARD OF SUPERVISORS OF SAN
25 BERNARDINO COUNTY; ROBERT A.
26 LOVINGOOD, as First District Supervisor
27 and Chair of the Board of Supervisors;
28 JANICE RUTHERFORD, as Second
District Supervisor and Vice Chair of the
Board; CURT HAGMAN, as Fourth
District Supervisor of the Board; and JOSIE
GONZALES, as Fifth District Supervisor
of the Board,

Respondents.

DAWN ROWE,

Real Party in Interest.

Case No. CIVDS1833846

**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;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: January 10, 2020
Time: 8:30 a.m.
Dept.: S29
Judge: Hon. Janet M. Frangie

Action Filed: December 31, 2018

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on January 10, 2020, at 8:30 a.m., or as soon thereafter
3 as counsel and the parties may be heard in Department S29 of this Court, located at 247 West
4 Third Street in San Bernardino, California 92415, Petitioners Michael Gomez Daly and Inland
5 Empire United will, and hereby do, apply ex parte for an order enforcing this Court’s November
6 8, 2019 judgment and peremptory writ of mandate, including but not limited to ordering that (1)
7 the Court’s November 8, 2019 judgment and peremptory writ of mandate declaring the
8 appointment of Real Party in Interest Dawn Rowe to the Board of Supervisors of San Bernardino
9 County null and void is presently in effect; (2) Real Party in Interest Dawn Rowe no longer
10 serves as Third District Supervisor of San Bernardino County; and (3) Respondents and
11 Respondents’ instruments, agents, servants, employees, attorneys, and each of them, and all other
12 persons acting in concert or participation with them, are prohibited from representing to
13 members of the public that Real Party in Interest Dawn Rowe currently serves as Third District
14 Supervisor of San Bernardino County, including by but not limited to including but not limited to
15 by identifying her as the incumbent for that position on any public document, website, election
16 ballot, voter guide, or other publication. In the alternative, Petitioners will, and hereby do, apply
17 ex parte for an order requiring Respondents and Real Party in Interest to show cause why they
18 should not be held in contempt of this Court’s November 8, 2019 judgment and peremptory writ
19 of mandate. This application is based on the attached memorandum of points and authorities,
20 declarations, and exhibits, as well as all other filings in this case.

21 As set out more fully in the memorandum of points and authorities, Petitioners seek the
22 aforementioned relief because Respondents and Real Party in Interest continue to represent to
23 members of the public that Real Party in Interest presently serves as the incumbent Third District
24 Supervisor of San Bernardino County, including by but not limited to describing Real Party in
25 Interest as the incumbent Third District Supervisor on the Board of Supervisors’ website, Real
26 Party in Interest’s website, and on the ballots for the March 3, 2020 supervisorial election.
27 Petitioners’ alternative request for relief made pursuant to Code of Civil Procedure section 1211
28 on the ground that Respondents and Real Party in Interest have violated this Court’s judgment

1 and peremptory writ of mandate by continuing to characterize Real Party in Interest as an
2 incumbent member of the Board of Supervisors, both on official and personal websites and on
3 print-ready copy of soon to be printed ballots submitted to the printer contracted by the County
4 for the upcoming election for the Third District supervisory seat.

5 Petitioners have provided Respondents and Real Party in Interest with sufficient notice
6 under California Rule of Court 3.1203. (See Declaration of Glenn Rothner, ¶ 6 (Rothner Decl.);
7 *id.*, Exh. E at p. 1.) Respondents and Real Party in Interest have not yet indicated whether they
8 intend to appear to oppose Petitioners' application. (Rothner Decl. at ¶ 7.)

9
10 DATED: January 9, 2020

STACEY M. LEYTON
ALTSHULER BERZON LLP

11
12 GLENN ROTHNER
JUHYUNG HAROLD LEE
ROTHNER, SEGALL & GREENSTONE

13
14 By  _____
GLENN ROTHNER

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16 *Attorneys for Petitioners*

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 On January 8, 2020, the Court of Appeal issued an order summarily denying
3 Respondents’ petition for a writ of supersedeas and lifting the temporary stay issued by the Court
4 of Appeal on November 26, 2019, as to this Court’s November 8, 2019 judgment and
5 peremptory writ of mandate. (See Declaration of Glenn Rothner, Exh. A (Rothner Decl.).)
6 Specifically, the Court of Appeal denied Respondent’s “request for a writ of supersedeas as of
7 right . . . because, upon a finding that the appellant Board of Supervisor[s]’ appointment of real
8 party Dawn Rowe was null and void as arising out of a violation of the Brown Act [citation], the
9 seemingly mandatory acts required in the superior court’s injunction and writ of mandate are
10 merely incidental to that finding and the injunction and writ of mandate are prohibitory in
11 nature.” (*Id.* at p. 1.) The Court of Appeal further denied Respondents’ “alternative request for a
12 discretionary writ of supersedeas . . . because any injury to appellants is not ‘irreparable’ and the
13 potential injury to respondents becomes disproportionate relative to appellants,” and because
14 Respondents “have not facially demonstrated the merits of the issues they present for the purpose
15 of a discretionary writ of supersedeas.” (*Id.* at pp. 1–2.)

16 As a result of the order by the Court of Appeal, this Court’s November 8, 2019 judgment
17 and peremptory writ of mandate—which declared null and void the appointment of Real Party in
18 Interest Dawn Rowe as Third District Supervisor of San Bernardino County—is presently in
19 effect, and Rowe no longer occupies the position of Third District Supervisor. Nevertheless,
20 Respondents and Real Party in Interest continue to represent to members of the public that Rowe
21 is the current Third District Supervisor, including by but not limited to describing Rowe as the
22 incumbent Third District Supervisor on the website of the Board of Supervisors (see Rothner
23 Decl., Exh. B; *id.*, Exh. C), and on the website for Rowe’s campaign for Third District
24 Supervisor in the upcoming March 3, 2020 supervisorial election (see *id.*, Exh. D). Further, the
25 Registrar of Voters of San Bernardino County—an instrument of the San Bernardino County
26 Board of Supervisors—intends to print but has not yet printed ballots of the March 3, 2020
27 election stating that Rowe is the incumbent Third District Supervisor. (See Rothner Decl., Exh.
28 E; Declaration of Michael Gomez Daly, ¶ 2.)

EXHIBIT H

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN BERNARDINO

3 DEPARTMENT NO. S-29

HON. JANET M. FANGIE, JUDGE

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5 MICHAEL DALY)

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CASE NO. CIVDS1833846

-vs-

BOARD OF SUPERVISORS, ET AL

Respondent.

REPORTER'S TRANSCRIPT OF HEARING

Monday, January 13, 2020

APPEARANCES:

For Petitioner:

BY:

JUHYUNG H. LEE
Attorney at Law
AND
GLENN ROTHERNER
Attorney at Law
ROTHNER, SEGAL, AND GREENSTONE
510 S. Marengo, Ave.
Pasadena, CA. 91101-3115

For Respondent:

BY:

DEBORAH J. FOX.
Attorney at Law
STEVEN BURKE
Attorney at Law
WILLIAM P. DONOVAN
Attorney at Law
MEYERS/NAVE
707 Wilshire Blvd. 24th Floor
Los Angeles, CA. 90017

REPORTED BY: VIVIAN TRISTAN C.S.R. 14244
PRO TEMPORE REPORTER

VIVIAN TRISTAN C.S.R. 14244

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN BERNARDINO

3 DEPARTMENT NO. S-29

HON. JANET M. FRANGIE, JUDGE

4 APPEARANCES:

5 THE PETITIONER, MICHAEL DALY, REPRESENTED BY
6 COUNSEL, JUHYUNG H. LEE, ATTORNEY AT LAW, ALONG WITH
7 COUNSEL, GLENN ROTHNER, ATTORNEY AT LAW; THE
8 RESPONDENT, BOARD OF SUPERVISORS OF SAN BERNARDINO,
9 ET AL, REPRESENTED BY COUNSEL, DEBORAH J. FOX,
10 ATTORNEY AT LAW, ALONG WITH, STEVEN BURKE, ATTORNEY AT
11 LAW, AS WELL AS, WILLIAM P. DONOVAN, ATTORNEY AT LAW.

12 (REPORTED BY: VIVIAN TRISTAN, C.S.R.,

13 PRO TEMPORE REPORTER C-14244.)

14 --o0o--

15
16 THE COURT: Okay. Ex parte. Michael Daly versus
17 Board of supervisors, et al.

18 MR. LEE: Good morning, your Honor. Harold Lee,
19 Juhyung on behalf of the petitioners.

20 MR. ROTHNER: Glenn Rothner. Rothner, Segal and
21 Greenstone.

22 MS. FOX: Good morning, your Honor. Deborah Fox
23 Meyers/Nave for the county respondents and real party in
24 interest.

25 MR. BURKE: Steven Burke also Meyers/Nave. Also
26 counter response.

VIVIAN TRISTAN C.S.R. 14244

1 MR. DONOVAN: Bill Donovan for real party and
2 interest.

3 THE COURT: Okay. This is an ex parte application
4 for an order enforcing the November 8th judgment and
5 peremptory writ or in the alternative an OSC Re: Contempt.
6 I assume each party has received the papers? I have papers.
7 Yes?

8 MS. FOX: Yes, your Honor.

9 MR. BURKE: Correct, your Honor.

10 THE COURT: Okay. I read everything. I don't
11 think I can rule ex parte on any of this, except maybe to
12 set an OSC Re: Contempt. The Board of Supervisors raises
13 some interesting issues on the election issue. I agree with
14 Ms. Fox. Ms. Fox's position insofar as it says I don't have
15 any jurisdiction over the registrar. I'm not sure I need
16 that for purposes of enforcing my judgment.

17 The Court's judgment against Ms. Rowe, as I have
18 stated before, I have a serious concern about Ms. Rowe
19 making representations that could allegedly violate the
20 judgment. There was a stay in effect which stayed the
21 Court's enforcement of the judgment. There is no longer a
22 stay as far as I am aware. It appears that Ms. Rowe is
23 still proceeding as a supervisor in name and in conduct.
24 That's troubling to the Court.

25 MR. DONOVAN: Your Honor, Ms. Rowe is not acting
26 as an official capacity of supervisor.

1 THE COURT: I don't have any knowledge. I don't
2 have any personal knowledge one way or the other, but based
3 on the paperwork I've seen and in terms of the election
4 materials and the website, I guess I'm warning your client.
5 I haven't made any findings of any kind or anything, but
6 just looking at it, I would be concerned if I were her about
7 her knowledge. In looking at the Court's judgment and then
8 her behavior, I have no idea what's going on, you know. I'm
9 not involved in any of that.

10 Looking at the paperwork, I mean, if she says
11 she's not incumbent supervisor and that's what's reported on
12 the election despite that people can claim -- it's one thing
13 for the process for the People or anybody to complain about
14 somebody's designation on a ballot. That's not before the
15 Court. If she's representing that she's something she's
16 not, that might be a problem.

17 MR. DONOVAN: Your Honor, I hear what you're
18 saying. I think Ms. Rowe is in compliance with the five
19 paragraphs in your judgment. I am not her election counsel.
20 I agree with, your Honor's, instincts that this should not
21 be dealt with ex parte. We want to be responsive to, your
22 Honor, but we've got very little notice. There is very
23 little authority with the brief they filed, but we proceed
24 on a calendar that, your Honor, seems appropriate to address
25 these issues. We take, your Honor's, judgment seriously.

26 THE COURT: I hope so. What I would do is I think

1 I would grant in the order of shortening time. It looks
2 like the matter is pretty well briefed except for a reply by
3 the petitioners. You have a date coming up on the 24th.
4 Perhaps we should set it for the 24th. Then we can fair
5 through what can be done and what can't be done. I can tell
6 the petitioners right now that I can't make orders against
7 the registrar unless you bring them before the Court. I
8 think the board raises a very valid point. I don't know how
9 I can say? It sounds like my orders can be against the
10 board and against Ms. Rowe. I don't think I can make orders
11 against the registrar. I really want to stress to
12 Ms. Rowe's attorney what potentially could be in the future
13 if the judgment isn't abided by. I'm not saying it hasn't
14 been. I haven't made any findings. There's been no
15 evidentiary hearing. I'm open to everybody's input on this.

16 Like I said, I think the board raises some very
17 valid points procedurally. Ms. Fox, you wanted to say
18 something?

19 MS. FOX: Thank you, your Honor. I'm not clear on
20 what the board is setting out for hearing.

21 THE COURT: I'm not either.

22 MS. FOX: There is no motion that was requested
23 here. The only thing that was requested is only OSC Re:
24 Contempt based on a two-paragraph declaration of Mr. Gomez
25 that relates to the ballots. That's precisely the item
26 which the Court has said you don't have jurisdiction over

1 the registrar voters. We talked about the process of the
2 18,000 printing faces that is moving forward at the federal
3 statute that applies to get ballots to the military
4 overseas. I'm not sure, but we want all the time. We don't
5 believe that on less than 24 hours' notice, and the brief
6 that was offered here, we have anything for the Court to act
7 on.

8 THE COURT: Well, you're talking about the merits.
9 I'm not talking about the merits. Their paperwork might be
10 defective. It might be. It might not be. The caption is
11 ex parte application for order enforcing judgment and writ,
12 or, in the alternative, OSC Re: Contempt. That's what
13 they're requesting. I would set a hearing on those
14 requests. It doesn't negate any of the arguments you made
15 in your paperwork. It just gives everybody more time, and
16 me more time to research all of the points and authorities,
17 and the issues raised in both or either pleadings.

18 I'm just not prepared to rule on any of this
19 ex parte after I've seen it this morning. I was gone. You
20 don't want me to make any, do you? You don't want me to
21 make orders. I want wouldn't want me to make orders of this
22 significance on a morning reading of both papers.

23 What you're arguing about is the merits. They
24 have a right to bring a defective, and I'm not saying it's
25 defective, but they have a right to bring it. I see enough
26 of an emergency. I do see an emergency here because of the

1 allegations on this paper. What I've known from the prior
2 allegations in the prior proceedings about Ms. Rowe, what
3 she's doing or what she's not doing. Whether this paperwork
4 is sufficient is not something I'm ruling on. I'm ruling on
5 an order showing in time. On the Court's own motion, I'm
6 giving an order shortening time so that we can get to this
7 sooner or later. It appears to me your paperwork is very
8 well briefed. I don't have anything from Ms. Rowe. I
9 entertain something from Ms. Rowe unless you joined in their
10 paperwork, which is fine.

11 When we come back on the 24th, I will be better
12 prepared to make or not make rulings about what's before me.
13 That's where we're at. If you're not clear, then I can't
14 give you anymore guidance except to refer you to their
15 paperwork which I received this morning. What else can I
16 do?

17 MS. FOX: You clarified. As I said at the
18 beginning, I was concerned about what we were setting the
19 order on shortening time. Thank you for that clarification.
20 Yes, I agree they shouldn't be ruled on in an ex parte
21 basis. I would also offer to the court that the opposition
22 was actually joint with --

23 THE COURT: Oh, okay.

24 MS. FOX: -- both counsel and Ms. Rowe.

25 THE COURT: I read it this morning very fast, and
26 I haven't looked at one case.

1 MS. FOX: On behalf of the county, we have been
2 working very hard, but with a lot of deadlines in play. We
3 would certainly want much time. We would prefer code to
4 oppose this.

5 THE COURT: Well, I see enough of an issue to have
6 it heard sooner than later. Again, I'm concerned about
7 Ms. Rowe and the Court's judgment. Again, I don't really
8 know. I have no personal knowledge of what's going on. I
9 see what I see in the papers and what was before me before
10 she had representation. I don't know.

11 I would like to also know what other looking for
12 in terms of enforcement. You don't need me to enforce the
13 judgment. You just enforce it.

14 MR. LEE: Well, your Honor, unfortunately we do
15 need you to enforce a judgment because respondents have made
16 it clear they do not view or presently to be null and void.
17 Even though that's the order and the judgment clearly
18 established. They continue to represent that she is serving
19 as third district supervisor until the board takes action to
20 remove her from the board. Your Honor, we're not asking --

21 THE COURT: Well, I got to know they're going to
22 tell me on the 24th and what action they have taken. Just
23 let me interrupt you. I'm sorry, but when you got old you
24 have to really speak ahead of time or you forget things.

25 I recall a newspaper clipping where somebody for
26 the board said, "Oh, she's going to continue until the

1 matter is appealed." You should be aware of this. I don't
2 know if they have shared that with you. I don't know
3 whether that's true or not. Papers don't also get it right,
4 but if that's true, that can be an issue.

5 MR. DONOVAN: Your Honor, I'm not aware the
6 article. We intend to comply with, your Honor's, judgment.

7 THE COURT: I think it was in the prior pleading.
8 You might want to look. They're saying the position of the
9 board is that until the appeal is final that the judgment
10 has no effect. Something to that effect. She will
11 continue. That's a problem with this court. I'll tell you
12 right now, that's not how I view the law. It's a very
13 unique situation. It may call for unique orders, but I can
14 tell you that I don't really know what you want the Court to
15 enforce. It looks like you want me to make orders against
16 the registrar. I can't.

17 I already have orders against. The judgment
18 already speaks to the board and Ms. Rowe. So far those are
19 the only parties it covers. I don't know that you need
20 orders against the electorate, because if they do not abide
21 by the judgment, nothing can happen against them, but
22 certainly an action can be taken against the board and
23 Ms. Rowe, who I have jurisdiction over.

24 MR. LEE: Your Honor, if I may briefly respond?

25 THE COURT: Sure.

26 MR. LEE: One, we would like as part of any order

1 today is an order confirming that her appointment is
2 presently null and void.

3 THE COURT: I don't have to make that judgment.
4 Whatever is in the judgment is the judgment is the judgment.
5 I don't have to say, "Yeah. That's my judgment." I will
6 say it, that's the judgment. That's the Court's judgment.
7 It's not stayed. It's in full force and effect. You all
8 have notice of it. That's it. I don't have to make another
9 order to says, "Yeah. It's a judgment. It's enforced." We
10 all know that.

11 MR. LEE: Thank you, your Honor. I wish that were
12 the case. It doesn't seem like that's the case.

13 THE COURT: If parties are not abiding by the
14 order or the judgment, you have remedies. It likes like you
15 tried to pursue those. I can't do it ex parte.

16 On the 24th, I will be considering whether to
17 issue an OSC Re: Contempt because that's before the Court.
18 What also is before the Court is an order to enforce the
19 judgment. I don't know what they have in mind. I don't
20 know what else I can say except that's the judgment. If you
21 want enforcement against third parties, you need to bring
22 them before the Court.

23 MR. ROTHNER: Could I just speak to those two
24 things?

25 THE COURT: Sure.

26 MR. ROTHNER: First, we've been through this

1 before. Not in this case. The initiating pleading
2 regarding contempt of court is the one that we filed. All
3 that does is give the Court the opportunity to say, "Yes or
4 no. I'm going to set contempt trial."

5 THE COURT: No. That's not how it goes. It goes,
6 if I granted your ex parte, I would issue an OSC Re:
7 Contempt.

8 MR. ROTHNER: Yes. And that date --

9 THE COURT: You need to tell me. I'm not sure
10 it's in here. Again, I haven't read this comprehensively,
11 but you need to give me you counts and what you're seeking
12 contempt of. Briefly looking at this, I don't know if it's
13 in here or not. Not saying it is. Not saying it isn't.
14 They're alleging it's defective. I don't know that because,
15 again, I'm not prepared.

16 MR. ROTHNER: I understand.

17 THE COURT: That's how it works. We don't go
18 right to the trial and then they get served with the OSC.
19 Wherever you're trying to issue the OSC Re: Contempt
20 against. Then they can not respond or not. Then they come
21 in for arraignment. Then I read them their rights. Then we
22 have a trial. That's how I view the contempt process. You
23 have to tell me whether you want it to be civil or criminal.

24 MR. ROTHNER: It's clearly civil in this case.

25 THE COURT: Okay. That's helpful.

26 MR. ROTHNER: I have initiated contempt

1 proceedings before on the strength of a declaration which
2 outlines the conduct in violation of the Court's order.
3 That's what we did here.

4 THE COURT: I'm not saying you have or you
5 haven't. I'm just saying that's my view of the process.

6 MR. ROTHNER: Yeah.

7 THE COURT: Then I need to know how many counts
8 there are. They need to know how many counts there are. If
9 I agree with you, then I issue an OSC Re: Contempt which is
10 a straight order that gets served on them.

11 MR. ROTHNER: Right.

12 THE COURT: I set an arraignment date.

13 MR. ROTHNER: Okay.

14 THE COURT: If that's wrong, then you need to give
15 me some briefing on that.

16 MR. ROTHNER: Okay. We will. I just want to
17 speak briefly to the question of the registrar. In court
18 has not presented to the Court. We have made it clear that
19 our position is the county registrar reports to the board of
20 supervisors. We've asked them to give direction to the
21 county registrar. We've sued every one of the board member
22 supervisors including one who was appointed improperly to
23 not proceed with the printing of ballots. To direct the
24 printer not to proceed with printing of ballots that contain
25 reference to Dawn Rowe as an incumbent in any fashion. They
26 represent in the papers that they gave you this morning that

1 by federal law they have to send ballots to military
2 personnel by January 18. If we're not here, again, until
3 January 24th, then they're going to go ahead with the
4 printing of ballots that show her as an incumbent
5 supervisor.

6 If there's any possibility that we can get in
7 later this week, we would appreciate it. Otherwise, you
8 know they're going to have to correct the ballots perhaps
9 after.

10 THE COURT: Or they take the risk if the registrar
11 is an agent of the board of supervisors. I have no idea if
12 that's correct or not. Then that's going to be an issue for
13 them on any OSC Re Contempt.

14 MS. FOX: Your Honor, if I might?

15 THE COURT: Were you done, Mr. Rotherner?

16 MR. ROTHNER: Yes. We've been trying to help the
17 board of supervisors do is avoid mucking up the election
18 process.

19 THE COURT: That might muck it up.

20 MR. ROTHNER: And the possibility of having to
21 reprint thousands of ballot. Perhaps hundreds of thousands.
22 I don't know.

23 THE COURT: Can you reach a compromise? Like
24 prior supervisor? I'm not saying any of this is sufficient,
25 but there might be a way to do it, because she has sat. She
26 has the experience even if it was voided. Maybe there's a

1 way to fix it so that you can communicate both the reality
2 of what's going on now, and what has occurred in the past.
3 I mean, whether you like it or not, she has experience. She
4 was in that seat.

5 Again, I'm making no representation or finding on
6 what would be sufficient or not sufficient, but hopefully
7 I'm communicating sufficiently to the board and Ms. Rowe
8 about my judgment. There is a judgment and it should be
9 followed. There is no stay in effect.

10 I don't know. Why do I have a pink thing on the
11 17th?

12 THE JUDICIAL ASSISTANT: Oh, the red thing on the
13 17th. You're overseeing Judge Cohn's department.

14 THE COURT: Oh, but I have pink on the 20th
15 because I'm not here.

16 THE JUDICIAL ASSISTANT: The 20th nobody is here.

17 THE COURT: Can we go off the record?

18 (A conversation was held off the record.)

19 THE COURT: Back on the record. Let's do a
20 hypothetical. Let's assume they put incumbent on there and
21 the Court then finds, and you send them out to the military.
22 I don't know if that's true or not. You send them out to
23 the general electorate. That's cast in stone. Let's assume
24 the Court later finds that's contempt. You can't undo that.
25 I don't know if it is or it isn't, but certainly -- I mean,
26 actions are going to be taken that are going to be set in

1 stone one way or another in terms of the election.

2 It's unfortunate that we have a March election and
3 not a June election. I don't know why they set it up in
4 March. Oh, I know. I understand now.

5 I don't know what to say. This is a unique case.
6 It seems to me there could be a way that Ms. Rowe could
7 communicate her position as a candidate without violating
8 the Court's judgment.

9 MR. DONOVAN: I want to thank, your Honor, for
10 being creative. I don't know if it'll work. Again, I'm not
11 her electionist lawyer.

12 THE COURT: Maybe you should talk to the elections
13 lawyer.

14 MR. DONOVAN: Yes. I'm willing to have
15 communication and probably have that person confer with
16 petitioner's counsel if there's progress they can make.
17 Terrific.

18 MS. FOX: Your Honor, I would add that this issue
19 is much bigger than Supervisor Rowe and the third district.
20 We put forth on an ex parte basis in the papers. I don't
21 control the registrar.

22 THE COURT: Are they an agent of the board?

23 MS. FOX: They are not. They are independent
24 separate entities not before this Court. There's
25 18,000 ballots. It isn't like we can just stop and insert a
26 new item. They are working around the clock on these

1 ballots and the proofing.

2 THE COURT: That's what I'm saying. There's a
3 risk. I don't know how big of a risk or not. I don't know
4 all the information, but to say later on, "I'm not in
5 contempt because I had no control over what the registrar
6 did." Well, you gave the information. Someone had to give
7 the information to the registrar. I don't know all of that.
8 I'm totally novice. I'm not involved in any of that. I
9 don't know any of it. I don't know any of the people. I
10 don't have any interest one way or another, except for the
11 people to comply with my judgment. That's all I care about.

12 MS. FOX: I understand that. We as well, the
13 county respondent, take the judgment seriously. We
14 understand the judgment is in full force and effect. The
15 writ is in full force. There is no stay. We are clear on
16 that. As the Court notes, none these issues about the
17 election are before this court. Nor do I --

18 THE COURT: That's a really broad statement. I
19 wouldn't say that's true. I would say there are limits to
20 what the Court can do to nonparties.

21 MS. FOX: I would also ask the Court, when it has
22 a chance to go back and look at our papers, we talk about
23 the fact that when we were last here on an ex parte, the
24 petitioners knew very well that there was expedited
25 statutory guideline for an election challenge. They could
26 have and should have filed a protective action then. They

1 have come to this --

2 THE COURT: Well, what they have had to with a
3 judgment in hand? Maybe not. I don't know.

4 MS. FOX: Yes. They could have and should have
5 done so.

6 THE COURT: The fact that they have another
7 remedy, does that excuse somebody with complying with the
8 judgment? These are all things that are scrolling around in
9 my head, but I don't know the answer to any of them.

10 Again, I think you raise very good points in your
11 paperwork, but I can't analyze them on the fly.

12 MS. FOX: I agree, your Honor. I'm just trying to
13 give the Court a little bit of context for when the Court
14 gets there.

15 THE COURT: What you say is really broad. It
16 could be really broad. You're right, I don't have any
17 authority jurisdiction over this point over third parties
18 who are not parties, but then the issue is are they agents?
19 Are they affiliates? Is there some control? Not
20 withstanding that they may have five other remedies, is
21 somebody violating the judgment by doing what they're doing?
22 Those are two different issues. The fact that they could
23 have brought another action doesn't excuse noncompliance
24 with the judgment.

25 MS. FOX: We are complying with the judgment.

26 THE COURT: Okay.

1 MR. LEE: Your Honor, we could not have brought
2 another action. They sought a stay of your judgment
3 precisely to have this effect. Also, to note that the order
4 does not require anything of any third parties. It says
5 expressly respondents and respondent's instruments, agents,
6 servant's, employees, and attorneys. It does not seek
7 specific relief against the county registrar.

8 Only states that the respondents were properly
9 served and part of this action must comply with this action.
10 Perhaps this is a good time to go through this issue. They
11 have represented to the public that Dawn Rowe continues to
12 serve as supervisor until they rescind her appointment on
13 January 28th, 2020. They have not taken mediate action as
14 required by the judgment. They are not representing in
15 court that they understand the Court's judgment and believe
16 that's in effect. That's simply inconsistent with what they
17 represented elsewhere.

18 THE COURT: Well, that's something I'm going to
19 decide in whether or not to continue an OSC. They have
20 every right to being an application for a stay.

21 MR. LEE: I don't want to be at fault for doing
22 what I couldn't do.

23 THE COURT: Well, that's true. Well, it depends I
24 guess. You could have brought another action against an
25 agent of the county, or the board, when there's a stay in
26 effect. Another good issue. Another good question. I

1 don't have the answer to it. I am not an expert on
2 San Bernardino County. I don't come from San Bernardino
3 County. I don't know anything about the history of it or
4 it's present makeups. As my contract Professor would say
5 "It's out of my ocean." I don't know. You have to educate
6 me on all of that. I can't do it on an ex parte basis, but
7 your statement that they did something deliberately to do
8 something deliberately. They had every right to bring an
9 application for the stay here, as well as in the Court of
10 Appeal. Fortunate for them, it was denied. We're back to
11 my judgment. When I say "my", I mean the court. It's not
12 my personal judgment.

13 Now, we're dealing with what the ramifications
14 are. You raised a good point. Could you have brought any
15 action if their an agent of the board when there's a stay in
16 effect? To me, it's irrelevant. It doesn't matter whether
17 you had that remedy or not. The judgment is the judgment is
18 the judgment. However it reads should be abided by or, you
19 know, the Court gets a little upset.

20 MR. LEE: We agree, your Honor.

21 THE COURT: Whether or not they abided by it, I
22 haven't decided. It's not before me. That's what you're
23 trying to do, but I don't need to give you any order to
24 enforce it. It's enforceable. Unless it's unclear as to
25 what it covers, that might be something that the Court can
26 do.

1 MR. LEE: That's what the order was trying to do
2 was clarify that she's not presently on the board of
3 supervisors, and they can not represent to the public that
4 she is on the board of supervisors.

5 THE COURT: The judgment says the appointment is
6 void. Void means it doesn't exist.

7 MR. ROTHNER: I think the more --

8 THE COURT: Let me hear from Mr. Donovan.

9 MALE SPEAKER: Your Honor, I appreciate your
10 effort attempt to deal with these issues on the fly. I
11 think, your Honor, is clear you need more information from
12 petitioner and more evidence from us. Their briefing was so
13 short, and we didn't have a lot of time to respond. I think
14 in terms of what you have us back, I would want to make sure
15 the petitioners file what they're going to file. We can
16 file some sort of response and we give, your Honor,
17 sufficient time to review the materials.

18 THE COURT: I can't do it on the 17th. Whatever
19 comes out in the wash after the 17th, if something is
20 printed in the voter ballot and it ends up being wrong or in
21 violation of the judgment, they're going to be responsible
22 for it. If that they triggers something else on the
23 election, then that's something you have a remedy on. It's
24 going to blow up more and more.

25 I would encourage all of you to try to work
26 something out that does both of what I said previously. I

1 don't think it's a violation of the judgment for Ms. Rowe to
2 talk about her experience, even though she's no longer a
3 supervisor of the board. By the same token, maybe the
4 things that she represents or the board represents may be in
5 violation of the judgment. I don't know. We're not here to
6 discuss that today.

7 Whatever action you take, if the 18th is the due
8 date, it's going to be set in stone one way or another and
9 that's a risk. If I'm an attorney, I try to get my clients
10 to avoid risk. You don't know how it's going to turn out.
11 It could be. It could not be. I don't know. That's all
12 I'm saying. I can't hear it on the 17th. I'm sorry.

13 MR. ROTHNER: We're back on the 24th?

14 THE COURT: We're back on the 24th. I'm going to
15 give you an opportunity to do further briefing. Then I'm
16 going to give respondents an opportunity to do further
17 briefing, but I need it ASAP. It seems you guys are really
18 good about the paperwork. Both sides. I applaud the
19 attorneys. They're very competent and very good.

20 MR. BURKE: We just happen to disagree.

21 THE COURT: Well, we have, but this is what a
22 judge does. Neither side can agree? Make a decision. It
23 might be right or wrong, but I'm calling it. I don't take
24 it personally. I hope you don't.

25 MR. BURKE: Not at all.

26 THE COURT: This is the job. I just want to say,

1 I think you've all been very professional. Very good
2 pleadings. Excellent pleadings on both sides. I appreciate
3 that. It's hard when there's not that because then I have
4 an extra burden. I love the paperwork. I'm learning
5 things. Am I always right? No. Someones got to make the
6 call; right?

7 When you want to be a judge and you become a
8 judge, you'll see. You make the call. Like I said, I have
9 no interest either way. Even though I'm a voter in
10 San Bernardino County, I have no interest.

11 Okay. January 24th. Let's make it at
12 10:00 o'clock. Even if we have a trial we'll make it at
13 10:00 o'clock. We'll figure something out.

14 THE JUDICIAL ASSISTANT: OSC Re: Compliance?

15 THE COURT: I'm keeping that. We'll put that at
16 10:00 o'clock too.

17 Further briefing by the petitioners. I need that
18 by the 16th at noon. Hand delivered and filed in the
19 department. Do not fax file. I won't get it. You may fax,
20 email, or hand deliver to the respondents. Then the
21 respondent's additional reply or response will be due the
22 21st.

23 MR. BURKE: The 20th is a court and federal
24 holiday.

25 THE COURT: Right. You'll be working.

26 MS. FOX: That's a common thing in this case, your

1 Honor.

2 THE COURT: I have to get it. I have to look at
3 it. I got to my research too. They're a second head. The
4 21st by noon. Again, hand delivered in the department, but
5 you may fax, email or hand deliver to the petitioners.
6 Anything else you want to reply, you have to bring.

7 MR. ROTHNER: I want to be clear. We will submit
8 further briefing. We may have hand the declaration?

9 THE COURT: Whatever you do, you do. I can't tell
10 you what to do and what not to do.

11 MR. DONOVAN: Thank you very much, your Honor.

12 THE COURT: Notice is waived?

13 MS. FOX: Notice waived.

14 MR. LEE: Notice waived.

15 THE COURT: Thank you.

16
17 **(The foregoing proceedings were concluded**
18 **for the day.)**

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 FOR THE COUNTY OF SAN BERNARDINO

3 DEPARTMENT NO. S-29

HON. JANET M. FRANGIE, JUDGE

4
5 MICHAEL DALY)

6)
7)
8 Plaintiff,)

Case No. CIVDS1833846

9 -vs-)

Reporter's Certificate

10 BOARD OF SUPERVISORS)

11)
12 Defendant.)
-----)

13 STATE OF CALIFORNIA)

14 COUNTY OF SAN BERNARDINO)

§

15
16 I, Vivian Tristan, Pro Tempore Reporter of the
17 Superior Court of the State of California, for the County of
18 San Bernardino, to the best of my knowledge do hereby
19 certify that the foregoing pages, 1 through 22, comprise a
20 full, true and correct computer-aided transcript of the
21 proceedings held in the above-entitled matter on JANUARY
22 13th, 2020.

23 Dated this 14th day of January, 2020.

24
25 *Vivian Tristan*

26 PRO TEM REPORTER, C-14244

VIVIAN TRISTAN C.S.R. 14244

STATE OF CALIFORNIA
Supreme Court of California

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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)

Meyers, Nave, Riback, Silver & Wilson

Law Firm