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7
8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF KERN**

10
11 JENNIFER ESTRADA,
12 Petitioner/Contestant
13 v.
14 MERCY PEÑA
15 Respondent/Defendant

Case No.: BCV-24-104155
Hon. Bernard C. Barmann, Jr.

**RESPONDENT/DEFENDANT MERCY
PEÑA'S NOTICE OF MOTION AND
MOTION FOR ATTORNEYS' FEES;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: June 2, 2025
Time: 8:30 a.m.
Dept.: H

16
17 JENNIFER ESTRADA and GREENFIELD
18 UNION SCHOOL DISTRICT,
19 Petitioner
20 v.
21 KERN COUNTY ELECTIONS DIVISION,
22 Respondent

23 RICARDO HERRERA,
24 Real Party In Interest.
25

26
27 **PLEASE TAKE NOTICE** that on June 2, 2025, at 8:30 a.m., or as soon thereafter as the
28 matter may be heard, before the Honorable Bernard C. Barmann, Jr., in Department H of the above-



1 entitled court located at 1215 Truxtun Avenue, Bakersfield, California 9330, Respondent/Defendant
2 Mercy Peña (“Defendant”) will move the Court for an order for payment of Defendant’s attorneys’
3 fees incurred in connection with the Amended Notice of Entry of Judgment dated February 14, 2025,
4 in the sum of sum of \$44,165.00.

5 This motion is supported by this Notice of Motion, the attached Memorandum of Points and
6 Authorities, the Declarations of Mercy Peña and Robert H. Tyler filed herewith, the records and
7 files in this action and upon such further evidence and argument as may be presented prior to or at
8 the time of hearing on the motion.

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DATED: April 15, 2025

ADVOCATES FOR FAITH & FREEDOM

By: Robert H. Tyler, Esq.
Julianne Fleischer

Attorneys for Respondent/Defendant **Mercy Peña**





1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendant brings the present motion seeking attorneys’ fees on two bases. First, Petitioners’
3 claims were frivolous because to bring a suit challenging an election in which illegal votes are cast,
4 the plain language of the statute and caselaw clearly require *some* evidence that the illegal votes
5 were cast in a manner that determined the election—in other words that the number of illegal votes
6 counted favored the winning candidate. However, Petitioners failed to provide *any* evidence that the
7 illegal votes were cast for Ms. Peña and omitted relevant statutes and applicable case law in the
8 briefing. Petitioners’ claims are frivolous because they contradicted the plain language of the statute
9 and case law on the matter and did not suggest that it was arguing for a change in law.

11 Second, Ms. Peña was required to defend against the suit to keep her position on the Board.
12 Accordingly, her defense of the suit was done within the scope of her employment, and the school
13 should indemnify her costs for having to defend against the suit. While typically, an employee must
14 first request the District provide a defense, because the District was a Petitioner in the suit against
15 her, such a request would have been futile.

17 **I. FACTUAL BACKGROUND**

18 This case arises out of Mercy Peña’s election to the Greenfield Unified School District
19 (GUSD) Board of Trustees (Board) following the November 5, 2024, general election. Ms. Peña
20 won the election and was certified as the winner on December 5, 2024.¹ On December 18, 2024, she
21 was seated as a member of the Board. (*See* Petitioner’s Supp. Br., Declaration of Superintendent
22 Hendrix.)

23 While Petitioners, including GUSD for which Ms. Peña was elected a board member,
24 initially filed an *ex parte* application for stay and a First Amended Complaint on or around January
25 8, 2025, neither of these named Ms. Peña as a party. Petitioners’ motions did not allege any
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28 ¹ Final results were also posted on the Kern County Website on December 5, 2024. (*See* <https://electionsapps.kerncounty.com/ElectionInformation/Results?ID=126>.)



1 wrongdoing on the part of Ms. Peña, rather, they alleged that the Kern County Elections Division
2 failed to properly conduct the election by sending ballots to ineligible voters in the “Area C” election
3 (for which Ms. Peña was a candidate) and, subsequently counting the returned ineligible ballots.
4 (See Pet. Supp. Br., p. 5-6.) Petitioners subsequently filed a Second Amended Petition and
5 Supplemental Brief on December 20, 2024, and January 11, 2025, respectively. Each of these
6 pleadings named Ms. Peña as a party.

7 Judgment was entered in Ms. Peña’s favor, upholding her election as the duly elected Board
8 Member for “Area C” on February 14, 2024. (See Declaration of Robert Tyler, Exhibit A [Tyler
9 Decl.].) The Court relied on clearly established precedent and the plain statutory language that when
10 there are illegal votes, and it cannot be determined for who those votes were cast, the election results
11 must stand unless the challenging party provides sufficient evidence showing that the votes were
12 cast for the winning candidate such that, had they not been cast, the election result would have been
13 different. (See *id.*, Exhibit B, Order at ¶ 24). The Court held that Petitioners had failed to provide
14 any evidence of how the illegal voters had cast their vote. (*Id.*)

15 Ms. Peña brings the present motion seeking reasonable attorneys’ fees.

16 II. LAW & ARGUMENT

17 A. Ms. Peña Is Entitled To Attorneys’ Fees From Petitioners As Their Claims Were 18 Frivolous.

19 A trial court may order a party, the party’s attorney, or both, to pay reasonable attorneys’
20 fees arising from frivolous acts. (Cal. Civ. Proc. Code, § 128.5.) “Frivolous” is defined as “totally
21 and completely without merit.” (*Id.*, § 128.5(b)(3).) In the present matter, the frivolousness of
22 Petitioner’s claims is demonstrated by several facts that alone, or taken together, demonstrate there
23 was no legitimate basis for their claims and the claims were without merit.

24 Petitioners did not have a statutory basis for claiming that the election should be vacated.
25 Petitioners relied on Election Code section 16100 in their second amended brief which only gives
26 the *general* rule that an election may be overturned when there are illegal votes. However, the
27 *standard* for overturning an election when there are illegal votes where it is not possible to determine
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1 who the votes were for is laid forth in Election Code section 16203—which is what was alleged by
2 Petitioner.

3 However, Petitioners’ Second Amended Complaint does not reference Election Code
4 section 16203 once, despite the statute controlling their claim. Petitioners did not mention it because,
5 by its plain language, a claim for relief under § 16203 is frivolous if the Petitioners do not provide
6 any evidence, circumstantial or direct, showing that the illegal votes were likely cast in a manner
7 that favored the Defendant and caused the Defendant to win the election. (Cal. Elec. Code, § 16203;
8 *Russel v. McDowell* (1890) 83 Cal. 70; *Singletary v. Kelley* (1966) 242 Cal.App.2d 611.)
9 Specifically, § 16203 states that there is *no basis* for setting aside an election on account of illegal
10 votes “unless *it appears* that a number of illegal votes has been given to the person whose right to
11 the office is contested . . . which if taken from him, would reduce the number of his legal votes
12 below the number of votes given to some other person for the same office.” (Cal. Elec. Code,
13 § 16203 [emphasis added].) The plain reading of this text requires that a Petitioner provide evidence
14 to demonstrate that the illegal votes were cast in a manner that, had they not been cast, the election
15 result would have been different. But Petitioner never tried to make that showing. (*See* Pet. Supp.
16 Br., at 4.) Instead, they admitted that they did not have any evidence that the illegal votes were more
17 likely cast for Ms. Peña than her opponent, accordingly, there was no statutory basis for bringing
18 the claim.

19 The frivolousness of the claim is compounded by the fact that there is also caselaw that is
20 directly on point, which was also not mentioned in Petitioner’s Second Amended Complaint. The
21 caselaw is dispositive to the present matter. (*Compare Russel v. McDowell* (1890) 83 Cal. 70
22 [holding that the plain reading of the statute “bars the presumption that all illegal votes favored the
23 winning side]; *and Singletary v. Kelley* (1966) 242 Cal.App.2d 611 [holding that in the absence of
24 evidence of who the illegal votes were cast for, illegal votes should be deducted *pro rata* from each
25 side] *with Canales v. City of Alviso* (1970) 3 Cal.3d 118, 127 [overturing the results of an election
26 because there was circumstantial evidence that enough illegal votes were cast for the winner to have
27 determined the election]; *and Gooch v. Hendricks* (1993) 5 Cal.4th 266 [same].) The caselaw
28 requires that a petitioner provide *some* evidence that the illegal votes appear more likely to have



1 been cast for the elected official—such that the illegal votes having been counted gives rise to the
2 appearance that they changed the outcome of the election.

3 In *Russel v. McDowell*, 231 illegal votes were cast, and the elected official won by a margin
4 of 170 votes. ((1890) 83 Cal. 70.) Because there was no evidence to show for whom the illegal votes
5 were cast, the court deducted the illegal votes from the candidate’s *pro rata*. (*Id.* at pp. 72–73.) The
6 case was directly on point because Petitioner also admitted they had *no evidence* that showed a
7 sufficient number of illegal votes were cast in Ms. Peña’s favor. (*See* Pet. Supp. Br., p. 5.)
8 Accordingly, Petitioners claims were frivolous as they admitted they had no evidence regarding how
9 the illegal votes were cast.

10 *Russel* is not the only case on point. In *Singletary v. Kelley*, ((1966) 242 Cal.App.2d 611)
11 the Court again affirmed that a plain reading of “our statute *bars the presumption* that all illegal
12 votes favored the winning side.” (*Id.* at p. 683 [emphasis added].) The court held that in the absence
13 of evidence of who the illegal votes were cast for, illegal votes should be deducted *pro rata* from
14 each side. (*Id.* at 682.) However, neither of these cases, although directly on point, were mentioned
15 in Petitioner’s Second Amended Complaint.

16 Instead, Petitioners attempted to rely on the materially different case *Gooch v. Hendricks*,
17 (1993) 5 Cal.4th 266. However, as this Court noted in its argument, *Gooch* requires there be
18 circumstantial proof that the illegal votes were cast for the winning candidate. It is merely the other
19 side of the coin to *Russel* and *Singletary*—demonstrating how to analyze a claim when evidence of
20 how the illegal votes were cast is provided. There was no good faith basis for relying on this
21 materially different case while omitting the cases that were directly on point. Petitioners admitted
22 from the beginning that they had no evidence that the illegal votes were cast for Ms. Peña such that
23 *Gooch* would have any relevance to the determination of the present matter.

24 Furthermore, Petitioners’ remaining causes of action seeking mandamus were likewise
25 baseless. After the election was certified, there were no ministerial acts that any of the Defendants
26 could take to provide Petitioners’ relief. (*AIDS Healthcare Foundation v. Los Angeles County Dept.*
27 *of Public Health* (2011) 197 Cal. App. 4th 693, 700 [The petitioner must demonstrate the public
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1 official or entity had a ministerial duty to perform, and the petitioner had a clear and beneficial right
2 to performance”].)

3 Accordingly, from their inception, Petitioners’ claims were frivolous because (a) a plain
4 reading of the statute foreclosed Petitioners’ requested relief; (b) binding caselaw confirmed
5 Petitioners’ had no claims but those cases were not acknowledged; (c) Petitioners misled the Court
6 by arguing that *Gooch* applied even though they had not provided any proof of how votes were cast;
7 and (d) Petitioner’s provided no legal support for their remaining claims. As a final matter, Petitioner
8 GUSD brought the claims even though they represented a clear conflict of interest. Having been
9 sworn-in, Ms. Peña was a member of the Board. GUSD’s decision to seek to overturn the election
10 of one of its own board members underlines the lack of merit in its claim.

11 **B. Ms. Peña Is Entitled to Attorneys’ Fees From GUSD As A Board Member.**

12 Because Ms. Peña had been certified as the winner of the election for Area C, was sworn in
13 as a board member, and defended her role and authority as a school official, GUSD should be
14 responsible for paying the reasonable fees for the defense of her claims, including attorneys’ fees.

15 Ms. Peña was certified as the winner of the election and sworn in as a board member before
16 she was named as a defendant in the present matter. Upon being sworn in, Ms. Peña immediately
17 assumed the responsibility of a school board member with fiduciary responsibilities to carry out the
18 official duties of her office. She was burdened with numerous responsibilities of a public official
19 concerning school district oversight, voting as a holder of that office, legal liabilities of a school
20 district official, and political disclosures, among many other responsibilities and liabilities affiliated
21 with the office of a school board member. (*See, e.g.*, Cal. Educ. Code, § 4462.) Ms. Peña’s defense
22 of her office occurred while she was a GUSD official and was the direct result of her official role at
23 GUSD. The defense of the case was necessary for her official duties to be affirmed.

24 GUSD has subjected Ms. Peña to costly and time-consuming litigation that she has been
25 required to respond to because of her certification and taking the oath of office. As such, Ms. Peña
26 should not be punished for having successfully run her campaign, been elected, having the election
27 certified, and being sued by the same school district that swore her into office.

28



1 Under California Government Code, § 995, upon request of an employee, a public entity
2 shall provide for the defense of any civil action or proceeding brought against the employee in the
3 employee’s official or individual capacity or both on account of an act or omission in the scope of
4 the employee’s employment. The term “Employee” is not defined in the relevant section, Part 4
5 “Actions Against Public Entities,” but it is defined in other parts of the division. For instance, Cal.
6 Gov. Code, § 810.2 defines “Employee” to include “an officer, judicial officer as defined in Section
7 327 of the Elections Code, employee, or servant, whether or not compensated, but does not include
8 an independent contractor.” Ms. Peña fits the definition of an employee as she is an officer of the
9 school and receives a stipend, is required to fill out a W-2, receives health benefits, and the District
10 takes out taxes from her check. (*See* Declaration of Mercy Peña.)

11 California Government Code, §§ 995 and 996.4 specifically allows public employees to seek
12 reimbursement of reasonable attorneys’ fees, costs, and expenses necessarily incurred in defending
13 actual civil judicial proceedings upon request. (*Thorton v. California Unemployment Ins. Appeals*
14 *Bd.* (2012) 204 Cal. App. 4th 1403.) And, under § 996.4, if after a request, the public entity fails or
15 refuses to provide the employee with a defense against a civil action, the employee may retain his
16 own counsel to defend that action and is entitled to recover from the public entity reasonable
17 attorney’s fees, costs, and expenses as were necessarily incurred in defending the action when the
18 action arose out of an act or omission that occurred within the scope of his employment with the
19 public entity. (Cal. Gov. Code, § 996.4.)

20 Here, while Ms. Peña admits she did not request that GUSD defend her, such request would
21 have been futile because it was GUSD who was suing her. GUSD could not reasonably be
22 considered unbiased such that it could provide a defense for Ms. Peña. While counsel has not found
23 any caselaw applying the futility doctrine to the present circumstances, it defies common sense that
24 Ms. Peña should be required to demand that GUSD provide her with counsel to defend her against
25 claims made by GUSD. The futility doctrine allows for a narrow exception to having to fulfill a
26 requirement when pursuing the requirement would be futile. (*See, e.g., Olson v. Manhattan Beach*
27 *Unified School Dist.* (2017) 17 Cal. App. 5th 1052, 1063.) Furthermore, it would have been an
28 ethical conflict of interests for GUSD to provide a defense for Ms. Peña, so there was no benefit in



1 requiring her to ask. Accordingly, Ms. Peña was justified in seeking her own counsel and, now that
2 she has successfully defended her case against GUSD, seeks attorneys’ fees against GUSD.

3 Furthermore, Cal. Gov. Code, § 995.2 states, “If an actual and specific conflict of interest
4 becomes apparent subsequent to the 20-day period following the employee's written request for
5 defense, nothing herein shall prevent the public entity from refusing to provide further defense to
6 the employee.” Here, the conflict of interest was apparent immediately because Ms. Peña was being
7 sued by the District. Ms. Peña’s rights could not reasonably be defended by the District from the
8 claims the District made against her interests. (*See* Prof. Conduct, Rule 1.7; *see also Sharp v. Next*
9 *Entertainment, Inc.*, 163 Cal. App. 4th 410 (2008) [noting [W]hen a third party pays for a lawyer's
10 service to a client ... there is [a] danger that the lawyer will tailor his [or her] representation to please
11 the payor rather than the client”.) Accordingly, even if the District had agreed to provide Ms. Peña
12 a defense, such an arrangement would have violated Ms. Peña’s rights to have independent counsel.

13 **C. The Attorneys’ Fees Requested Are Reasonable Given The Facts Of The Case.**

14 Accordingly, in assessing attorneys’ fees, courts first determine a “touchstone” figure based
15 on a “careful compilation of the time spent and reasonable hourly compensation for each attorney .
16 . . involved in the presentation of the case.” (*Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) This
17 calculation is the reasonable attorneys’ fees. (*Id.*)

18 In establishing the reasonable hourly rate, the court may consider several factors in addition
19 to the rate prevailing in the community for similar work: (1) the novelty and complexity of the
20 issues; (2) the special skill and experience of counsel; (3) the quality of representation; and (4) the
21 results obtained. (*See Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 579 [Graham]; *see*
22 *also Blum v. Stenson* (1984) 465 U.S. 886, 898-900.) Other factors that can be considered are: (1)
23 the time and labor required; (2) time limitations imposed by the client or circumstances; (3) the
24 amount involved, and the results obtained; (4) the “undesirability” of the case; and (5) awards in
25 similar cases. (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 430 n.3.) “The experienced trial judge is
26 the best judge of the value of professional services rendered in his court[.]” (*Graham, supra*, 34
27 Cal.4th at p. 579.)

28

1 Defendant is requesting \$44,165.00 which reflects the total number of hours spent in relation
2 to defending the case multiplied by the lawyer's reasonable hourly rate. (See Tyler Decl., ¶¶ 19-23.)

3 ATTORNEY	RATE	HOURS	TOTAL
4 Robert Tyler	\$550.00	29.1	\$16,005.00
5 Julianne Fleischer	\$350.00	8.1	\$2,835.00
6 Emma Plotnik	\$350.00	1.3	\$455.00
7 Samuel Kane	\$350.00	64.2	\$22,470.00
8 Susan Kenny	\$200.00	12	\$2,400.00

9
10 Advocates' attorneys' fees were "reasonably necessary to the conduct of the litigation,"
11 particularly considering the ramifications of cutting any corners which could have resulted in Ms.
12 Peña's election being overturned. (*Robertson v. Fleetwood Travel Trailers of Cal., Inc.* (2006) 144
13 Cal.App.4th 785, 818; see also *Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112
14 [overturning fee reduction by the trial court: "It would . . . be the highly atypical civil rights case
15 where Petitioner's lawyer engages in churning. By and large, the court should defer to the winning
16 lawyer's professional judgment as to how much time he was required to spend on the case: after all,
17 he won, and might not have, had he been more of a slacker"].)

18 Further, Ms. Peña's attorneys undertook this case on a pro bono basis. (Tyler Decl., ¶ 6). It
19 is well established that a lodestar rate can even be enhanced to account for such risk. (*See Serrano*
20 *v. Priest* (1977) 20 Cal.3d 25, 49.) Courts have held that pro bono representation like that
21 undertaken here is analogous to contingency representation (*Cruz v. Ayrontloo* (2007) 155
22 Cal.App.4th 1270, 1279 & n.23) and "[a] contingent fee must be higher than a fee for the same legal
23 services paid as they are performed. The contingent fee compensates the lawyer not only for the
24 legal services he renders but for the loan of those services." (*Ketchum v. Moses, supra*, 17 P.3d at
25 p. 742.)

26 Legal services provided on a contingent or pro bono basis also inherently involve a delay in
27 payment, further justifying a lodestar enhancement. (*See Graham, supra*, 34 Cal.4th at p. 579).
28 Courts have additionally noted that, "an enhancement of the lodestar amount to reflect the





1 contingency risk is 'one of the most common fee enhancers.'" (*Bernardi v. County of Monterey*
2 (2008) 167 Cal.App.4th 1379, 1399). More recently, the California Court of Appeals affirmed the
3 application of a multiplier of 1.5 based solely on the contingent risk. (*See Center for Biological*
4 *Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 897).

5 Finally, Ms. Peña's attorneys' fees are reasonable considering the fees recovered in
6 comparable cases. In determining the reasonable rate for an attorney, the court should be guided by
7 the prevailing rate in the community for an attorney of similar experience and skill. (*See Blum v.*
8 *Stenson* (1984) 465 U.S. 886, 895 n.11.)

9 The case was led by Advocates for Faith & Freedom founder Robert Tyler with the help of
10 his associates Julianne Fleischer, Emma Plotnik, and Samuel Kane. Fees are requested in the amount
11 of \$44,165.00. (*See Tyler Decl., Exhibit C.*) The time entries were contemporaneously kept, billing
12 judgment was exercised, and the fees are reasonable in light of the work performed and results
13 achieved.

14 **III. CONCLUSION**

15 For the reasons stated above, Ms. Peña requests:

- 16 1. The Court awards her attorneys' fees for having to defend against this frivolous
17 lawsuit;
- 18 2. Alternatively, the Court order GUSD indemnify her the reasonable costs of
19 attorneys' fees.
- 20 3. Provide whatever other remedy the Court determines to be just.

21
22 DATED: April 15, 2025

ADVOCATES FOR FAITH & FREEDOM

23
24 By: 
25 Robert H. Tyler, Esq.
Julianne Fleischer

26 Attorneys for Respondent/Defendant **Mercy Peña**

1 **PROOF OF SERVICE**

2 I am an employee in the County of Riverside. I am over the age of 18 years and not a party
3 to the within entitled action; my business address is 25026 Las Brisas Road, Murrieta, California
4 92562.

5 On April 15, 2025, I served a copy of the following document(s) described as
6 **RESPONDENT/DEFENDANT MERCY PEÑA’S NOTICE OF MOTION AND MOTION**
7 **FOR ATTORNEYS’ FEES; MEMORANDUM OF POINTS AND AUTHORITIES** on the
8 interested party(ies) in this action as follows:

9 **SEE ATTACHED SERVICE LIST**

10 **BY E-MAIL OR ELECTRONIC TRANSMISSION.** Based on a court order or an
11 agreement of the parties to accept service by e-mail or electronic transmission, I transmitted
12 copies of the above-referenced document(s) on the interested parties in this action by
electronic transmission. Said electronic transmission reported as complete and without
error.

13 **BY FACSIMILE TRANSMISSION.** Pursuant to agreement and written confirmation of
14 the parties to accept service by facsimile transmission, I transmitted copies of the above-
15 referenced document(s) on the interested parties in this action by facsimile transmission from
(951) 600-4996. A transmission report issued as complete and without error.

16 **BY UNITED STATES POSTAL SERVICE.** I am readily familiar with the practice for
17 collection and processing of correspondence for mailing and deposit on the same day in the
ordinary course of business with the United States Postal Service. Pursuant to that practice,
18 I sealed in an envelope, with postage prepaid and deposited in the ordinary course of business
with the United States Postal Service in Murrieta, California, the above-referenced
document(s).

19 **BY OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an
20 envelope or package provided by an overnight delivery carrier and addressed as above. I
placed the envelope or package for collection and overnight delivery at an office or a
regularly utilized drop box of the overnight delivery carrier.

21 **BY PERSONAL SERVICE.** I caused copies of the above-referenced documents to the
22 addressee(s) noted above served by process server.

23 I declare under penalty of perjury under the laws of the United States of America that the
24 foregoing is true and correct and that I am an employee in the office of a member of the bar of this
Court who directed this service.

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27 _____
Susan Y. Kenney



SERVICE LIST

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