

PRENTICE, LONG & EPPERSON, PC

MARGARET LONG, SBN 227176

1716 Court Street, Suite B

Redding, California 96001

Telephone: (530) 691-0800

Facsimile: (530) 691-0700

Attorneys for Shanna S. White

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF CALIFORNIA

THOMAS FOX,

Plaintiff,

v.

COUNTY OF TRINITY,  
SHANNA S. WHITE, County  
Clerk/Recorder/Assessor,  
MARGARET E. LONG, County Counsel,  
And does 1-99,

Defendants.

Civil Action No. 16cv01422 KJM-  
CMK

**NOTICE OF MOTION AND  
MOTION TO DISMISS FOR LACK  
OF SUBJECT MATTER  
JURISDICTION AND FAILURE  
TO STATE A CLAIM UPON  
WHICH RELIEF CAN BE  
GRANTED  
(FRCP 12(b)(1), (6))**

**Date: August 31, 2016  
Time: 10:00 a.m.  
Courtroom: 304, Redding Branch**

TO PLAINTIFF AND HIS ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on August 31, 2016, or as soon thereafter as the matter may be heard in the above-entitled Court, Defendant Shanna S. White will move the Court to dismiss the action pursuant to FRCP 12(b)(1) and 12(b)(6) because, respectively, Plaintiff's petition fails to demonstrate that this Court has subject matter jurisdiction to issue a writ of mandamus, and because Plaintiff fails to state a claim upon which relief can be granted since the Court lacks subject matter jurisdiction.

The motion will be based on this Notice of Motion and Motion, the Memorandum of Points and Authorities filed herewith, and the pleadings and papers filed herein.

Dated: July 22, 2016

PRENTICE, LONG & EPPERSON

  
MARGARET LONG,  
Attorneys for Defendant

**PROOF OF SERVICE**

I, Michelle Fletcher, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 1716 Court Street, Suite B, Redding, CA 96001. On July 22, 2016, I served the within document(s):

**NOTICE OF MOTION AND MOTION TO DISMISS FOR LACK OF SUBJECT  
MATTER JURISDICTION AND FAILURE TO STATE A CLAIM UPON WHICH  
RELIEF CAN BE GRANTED  
(FRCP 12(b)(1), (6))**



by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.



by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Redding, California, addressed as set forth below.

Thomas J. Fox  
P.O. Box 2595  
501 Masonic Lane  
Weaverville, CA 96093

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2016, at Redding, California.



Michelle Fletcher

1 **PRENTICE, LONG & EPPERSON, PC**  
2 **MARGARET LONG, SBN 227176**  
3 **1716 Court Street, Suite B**  
4 **Redding, California 96001**  
5 **Telephone: (530) 691-0800**  
6 **Facsimile: (530) 691-0700**

7 Attorneys for Shanna S. White

8 **UNITED STATES DISTRICT COURT**  
9 **EASTERN DISTRICT OF CALIFORNIA**

10 **THOMAS FOX,**

11 Plaintiff,

12 v.

13 **COUNTY OF TRINITY,**  
14 **SHANNA S. WHITE, County**  
15 **Clerk/Recorder/Assessor,**  
16 **MARGARET E. LONG, County Counsel,**  
17 **And does 1-99,**

18 Defendants.

Civil Action No.

19 **MEMORANDUM OF POINTS AND**  
20 **AUTHORITIES SUPPORTING**  
21 **DEFENDANT'S MOTION TO**  
22 **DISMISS FOR LACK OF**  
23 **SUBJECT MATTER**  
24 **JURISDICTION AND FAILURE**  
25 **TO STATE A CLAIM UPON**  
26 **WHICH RELIEF CAN BE**  
27 **GRANTED**  
28 **(FRCP 12(b)(1), (6))**

**Date: August 31, 2016**  
**Time: 10:00 a.m.**  
**Courtroom: 304, Redding Branch**

**I.**

**INTRODUCTION**

Plaintiff Thomas Fox served an unverified and unsigned copy of his In Re Petition for Writ of Mandamus on Defendant Shanna S. White, Clerk/Recorder/Assessor of the County of Trinity. No specific cause of action is stated but Plaintiff's Prayer for Relief asks this Court to issue a writ of mandamus, explained in further detail below. Defendant Shanna S. White now brings this motion to dismiss based on lack of subject matter jurisdiction and failure to state a cause of action. This motion to dismiss is brought under Federal Rule of Civil Procedure 12(b)(1) and (6). As of the date of this filing, Defendant Shanna S. White is the only defendant who has been served with said Petition.

1 **II.**

2 **ARGUMENT**

3 **A. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO ISSUE A**  
 4 **WRIT OF MANDAMUS COMMANDING AN ACTION BY A STATE OR ITS**  
 5 **AGENCIES**

6 Federal Rule of Civil Procedure 12(b)(1) permits this Defendant to bring, and this  
 7 Court to grant, a motion to dismiss for lack of subject matter jurisdiction.

8 Under 28 U.S.C. § 1651(a), federal courts may issue writs “in aid of their respective  
 9 jurisdictions...,” and have original jurisdiction to issue writs of mandamus under 28 U.S.C. §  
 10 1361. However, this jurisdiction reaches only to writs of mandamus to “compel an officer or  
 11 employee of the United States or any agency of the thereof to perform a duty....” 28 U.S.C. §  
 12 1361. Further, Federal Rule of Civil Procedure 81(b) states, “The writs of scire facias and  
 13 mandamus are abolished.” Therefore, Federal Court procedure no longer recognizes the writ  
 14 of mandamus if directed to non-federal officials. *Findley v. Chandler* 377 F.2d 548 (9<sup>th</sup> Cir.  
 15 1967), cert. denied 389 U.S. 869 [Court lacked jurisdiction due to FRCP 81(b) to compel  
 16 attorney via writ of mandamus to turn over transcript to former client because attorney was not  
 17 a federal official]. While there are certain exceptions to Rule 81(b), a federal court cannot  
 18 issue a writ of mandamus to command an action be taken by a state or its agencies. *See, e.g.,*  
 19 *Demos v. U.S. Court for Eastern Dist. Wash.*, 925 F.2d 1160 (9<sup>th</sup> Cir. 1991).

20 In the instant matter, commanding a state agency to do something is precisely what  
 21 Plaintiff seeks from this Court. For instance, Plaintiff demands at paragraph 30 of his Petition,  
 22 “The Plaintiffs pray this Honorable Court *issue an order* to Grant the Voters and Candidates of  
 23 this County *an Order to The Trinity County Elections Official* for a Hand count of all ballots by  
 24 the Election Integrity Project Trained Observers....” [*Sic* throughout; emphasis added.]

25 This demand for a writ is directed only at “The Trinity County Elections Official,” not  
 26 at a federal agency or official. There should be no concern that Petitioner mistakenly omitted a  
 27 federal official’s name. Petitioner never alleges any wrongdoing or action by a federal official.  
 28 Instead, Petitioner alleges that “Shanna S. White and Deanna Bradford have continuously



1 failed to allow observers and representatives of candidates and organizations to adequately  
 2 observe..." elections procedures. (Petition, para. 10.) Nowhere does the Petition allege that  
 3 said defendants are federal officials or actors. Consequently, Petitioner is asking this Court to  
 4 issue an order compelling an action by officials of a California entity, an action prohibited by  
 5 the holding in, among others, *Demos, supra*.

6 Rule 81(b) makes clear that the Court may not issue a writ of mandamus. This is  
 7 especially true because the defendants are officials of the State of California or its county  
 8 agencies, and not federal officials. The entire Petition regards a request for a writ of  
 9 mandamus. Consequently, the Court lacks subject matter jurisdiction and Defendant's motion  
 10 to dismiss should be granted under Rule 12(b)(1).

11 **B. DISMISSAL UNDER RULE 12(b)(6) IS PROPER BECAUSE PETITIONER**  
 12 **HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

13 A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal  
 14 sufficiency of the complaint. *Kost v. Kozakiewicz*, 1 F.3d 176, 183. To survive a motion to  
 15 dismiss, a complaint must state a claim that is "plausible on its face," and that gives more than  
 16 merely a formulaic recitation of a claim's elements that amount to mere labels and conclusions.  
 17 *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.  
 18 544, 555-556 (2007).)

19 **1. Petitioner Has Not Stated a Claim for Relief Because Petitioner Seeks Only**  
 20 **a Writ of Mandamus and Therefore Lacks Statutory Standing.**

21 A defendant may bring a successful motion to dismiss under FRCP 12(b)(6) where a  
 22 plaintiff fails to state a claim upon which relief may be granted. A motion to dismiss for lack  
 23 of statutory standing should be brought under Rule 12(b)(6), not Rule 12(b)(1). *Vaughn v. Bay*  
 24 *Environmental Mgmt., Inc.* 567 F.3d 1021, 1024 (9<sup>th</sup> Cir. 2009). While Defendant believes this  
 25 motion to dismiss is properly brought under Rule 12(b)(1) for lack of subject matter  
 26 jurisdiction, if the Court finds that there is subject matter jurisdiction, then the result should be  
 27 the same under Rule 12(b)(6) because Petitioner lacks statutory standing.  
 28

1 To reiterate, Petitioner seeks a writ of mandamus which (1) is prohibited by FRCP  
2 81(b), and (2) may not be issued to command an action by a state or its agencies (in this case,  
3 officials of the County of Trinity).

4 A writ of mandamus is not permitted under Rule 81(b). The Petitioner, consequently,  
5 lacks statutory standing to bring this action and seek this relief. Therefore, the Petition should  
6 be dismissed under FRCP 12(b)(6) because it is not “plausible on its face” to provide the relief  
7 demanded. *Ashcroft, supra*. There is no remedy that Petitioner has available, and Petitioner  
8 cannot plead any contradictory facts.

9 **2. Petitioner’s Implied Cause of Action Under 42 U.S.C. § 1983 Fails to**  
10 **Request Relief this Court Can Grant.**

11 The legal authority cited above applies here, as well. Paragraph 4 of the Petition  
12 alleges a “Violation of Rights Under Color of law” and states that it seeks “relief under Title 42  
13 U.S.C. § 1983....”

14 While the Petition is vague and confusing, Petitioner appears to argue that the  
15 defendants violated § 1983 under color of authority by performing certain duties arising from  
16 an election held June 7, 2016. However, the remedy sought by Petitioner is not distinguishable  
17 from the writ of mandamus discussed above. Specifically, Petitioner states, “[t]he relief sought  
18 is the duty of the Defendants to immediately correct the blatant disregard for the Rights of the  
19 Voters....” (Petitioner, para. 5.) Further, “[a]nd grant relief to the Plaintiffs and Voters of  
20 Trinity County By [sic] ordering and [sic] immediate cease and desist order to stop the  
21 canvas...and for this Honorable Court to order a hand count of all ballots based on California  
22 Elections Code....” (Petition, para. 7.) “The Plaintiffs [sic] also asks the Court to grant relief  
23 to the [sic] all voter’s [sic] whose ballots have been denied to be counted.” (Petition, para. 8.)  
24 In other words, Petitioner asks this Court to issue a writ of mandate.

25 For the same reasons as described above (and incorporated here), a writ of mandate  
26 may not issue. Although the Petition is somewhat unclear, if Petitioner is alleging a cause of  
27 action under § 1983, then the remedy is still a writ directed toward county officials and  
28

1 commanding those officials to perform certain acts. Dismissal under Rule 12(b)(6) is proper  
2 because Petitioner has requested relief that cannot be granted.

3 **C. PETITIONER SHOULD BE DENIED THE OPPORTUNITY TO AMEND HIS**  
4 **PETITION**

5 There is a strong policy in favor of permitting amendments in order to allow matters to  
6 be heard on the merits. (FRCP 15(a)(2).) “The court should freely give leave [to amend] when  
7 justice so requires.” (*Id.*)

8 In this case, however, it is clear that there is no amendment Petitioner could make  
9 which would bring the matter under the Court’s jurisdiction. Petitioner cannot plead any facts  
10 that would grant the Court authority to issue a writ of mandamus. If Petitioner is granted leave  
11 to amend, the most likely result is that the parties will end up back in front of this Court under  
12 identical circumstances. Consequently, amendment would be a futile attempt to state a cause  
13 of action and request relief. Although leave to amend should usually be given liberally, it  
14 should not be given automatically. (*See., e.g., In re Western States Wholesale Natural Gas*  
15 *Antitrust Litig.* (9<sup>th</sup> Cir. 2013) 715 F.3d 716, 738. [District Court did not abuse discretion in  
16 denying leave to amend where prior amendments had been made and party knew all relevant  
17 facts from inception of lawsuit.]) While it is true that this would be Petitioner’s first  
18 amendment, it is also true that Petitioner has sought relief that this Court cannot grant  
19 regardless of whether the Petition is amended to include new facts.


20 **III.**

21 **CONCLUSION**

22 Based on the above, Defendant Shanna S. White respectfully requests that the Court  
23 grant her motion to dismiss the Petition without leave to amend.

24 Dated: July 22, 2016

PRENTICE, LONG & EPPERSON

25   
26 MARGARET LONG,  
27 Attorneys for Defendant  
28

**PROOF OF SERVICE**

I, Michelle Fletcher, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is 1716 Court Street, Suite B, Redding, CA 96001. On July 22, 2016, I served the within document(s):

**MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT'S  
MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND  
FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED  
(FRCP 12(b)(1), (6))**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date.
- ☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Redding, California, addressed as set forth below.

Thomas J. Fox  
P.O. Box 2595  
501 Masonic Lane  
Weaverville, CA 96093

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 22, 2016, at Redding, California.

  
Michelle Fletcher