No. _____

In The
Supreme Court of the United States

REYNALDO A. DE LOS SANTOS;
RICARDO DE LOS SANTOS,

Petitioners,

v.

WILLIAM BOSWORTH, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

REY A. DE LOS SANTOS
LAW OFFICE OF
RICARDO DE LOS SANTOS
P.O. Box 760
Joshua, Texas 76058
(817) 614-9961

RICARDO DE LOS SANTOS
Counsel of Record
LAW OFFICE OF
RICARDO DE LOS SANTOS
P.O. Box 760
Joshua, Texas 76058
(817) 614-9961
abogado98@aol.com

QUESTIONS PRESENTED

Plaintiffs claimed and provided documented evidence showing that multiple Defendants as members of commissioners courts from two Texas counties failed to comply with both the Texas Open Meetings Act (the "Act") and the Chapter 551 of the Texas Government Code (the "Code"). The U.S. Court of Appeals for the Fifth Circuit chose not to address these violations.

Regarding the removal of counsel from a local indigent appointment list, state statutes specifically mandate that indigent appointments be managed in a fair, neutral, and non-discriminatory manner.

The questions presented are:

1. Whether conditions precedent that are specified in both the Act and in the Code must be met before county commissioners courts, when operating as governmental bodies, are authorized to expend public funds necessary to retain defensive legal counsel prior to filing responsive pleadings or motions under Federal Rule of Civil Procedure 12.

2. Whether the Fifth Circuit errored by failing to apply the facts of this case to the requirements from the Act, requirements from the Code, and to precedent in *Smith Cty. v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1987) (holding that a Commissioners Court's failure to comply with the Texas Open Meetings Act regarding initial general public notification requirements then resulted in subsequent related actions performed by that commissioners court to be void).

QUESTIONS PRESENTED—Continued

3. Whether the Circuit Court errored in holding that any due process property violation never occurred because Respondents had "discretion" on the removal of counsel from the various indigent court appointment lists even though the counties' local rules do not contain the term "discretion" and state statutes require that a fair, neutral, and non-discriminatory process be applied before removing counsel from such lists thus together signifying basic due process entitlements.

LIST OF INTERESTED PARTIES

The undersigned pro se Petitioners certify that this is a civil case and the persons having an interest in the outcome of this case are as follows:

1. Reynaldo A. De Los Santos; Petitioner-Appellant; Pro Se
2. Ricardo De Los Santos; Petitioner-Appellant; Pro Se
3. Hon. William Bosworth; Respondent-Appellee
4. Hon. John Neill; Respondent-Appellee
5. Hon. Sidney Hewlett; Respondent-Appellee
6. Hon. Wayne Bridewell; Respondent-Appellee
7. Hon. Robert Mayfield; Respondent-Appellee
8. Hon. Steve McClure; Respondent-Appellee
9. County Judge Roger Harmon; Respondent-Appellee
10. County Commissioner Rick Bailey; Respondent-Appellee
11. County Commissioner Kenny Howell; Respondent-Appellee
12. County Commissioner Jerry Stringer; Respondent-Appellee
13. County Commissioner Larry Woolley; Respondent-Appellee
14. County Judge Danny Chambers; Respondent-Appellee
15. Commissioner Larry Hulsey; Respondent-Appellee
16. Commissioner Dwayne Johnson; Respondent-Appellee

LIST OF INTERESTED PARTIES—Continued

17. Commissioner Kenneth Wood; Respondent-Appellee
18. Commissioner Wade Busch; Respondent-Appellee
19. Commissioner David Evans; Respondent-Appellee
20. Johnson County, Texas
21. Somervell County, Texas

RELATED CASES

- De Los Santos v. Bosworth, et al., No. 3:20-cv-00461-C, U.S. District Court for the Northern District of Texas, Dallas Division. Judgment entered March 8, 2021. *See* App. B.
- De Los Santos v. Bosworth, et al., No. 21-10323, U.S. Court of Appeals for the Fifth Circuit. Judgment entered March 11, 2022. *See* App. D.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

CODES

TABLE OF AUTHORITIES—Continued

RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

PETITION FOR WRIT OF CERTIORARI

Petitioners Reynaldo A. De Los Santos and Ricardo De Los Santos respectfully pray that a writ of certiorari issue to review the final decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (*see* App. C) is unreported under Reynaldo Antonio De Los Santos and Ricardo De Los Santos v. William Bosworth, et al., No. 21-10323 (5th Cir., March 11, 2022). The opinions of the District Court for the Northern District of Texas, Dallas Division, are reproduced at App. A and App. B.

JURISDICTION

Petitioners' appeal was dismissed by the Fifth Circuit on March 11, 2022. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be deprived of life, liberty or property without due process of law. . . .

U.S. CONST. Amend. V.

STATEMENTS OF THE CASE

A. Course of Proceedings and Disposition

On March 8, 2021, the Hon. District Court dismissed the matter subject to a Rule 12 Motion. Petitioners appealed. On March 11, 2022, the Fifth Circuit dismissed Petitioners' appeal thus resulting in the current Writ of Certiorari to this Court.

B. Statements of Facts

Petitioners Rey A. De Los Santos (Rey) and Ricardo (Ricardo) De Los Santos are attorneys at law previously practicing criminal and other law in both Johnson County, Texas and Somervell County, Texas since 1995 and 1999 and continue to practice in good standing.

In order to receive criminal indigent court appointments in both counties a qualifications-based application process was previously accomplished by Petitioners. Numerous yearly qualifications and submissions were also completed in order to remain on

both these "Local Indigent Appointment List." As evidenced by record, being and remaining on theses indigent appointment lists was also based upon an ongoing business, contractual, property, business, trade usage, mutual understandings and/or historical process type relationship(s) as permitted by Texas statutes, regulations, policies, rules, precedent, and other directives.

In February 2018 both Petitioners were simultaneously removed from all indigent appointment lists in both counties for still unknown and unprovided reasons. Appellants sought an administrative hearing as permitted by the "Local Indigent Appointment Plans" before each county's "Board of Judges" in order to determine if reinstatement of Petitioners to the "Indigent Appointment Lists" would occur. Prior to and at the conducted hearings no basis of removal was ever provided.

At the Johnson County, Texas administrative hearing one member of the "Board of Judges" failed to appear and another departed approximately mid-way through the hearing. At the conclusion of the hearing Petitioners were advised that a decision on reinstatement would be forthcoming yet none came forth even after numerous written requests by Petitioners. Eventually the Somervell County, Texas "Board of Judges" provided notification that reinstatement was denied.

Shortly after the above-described events the Johnson County, Texas "Board of Judges" issued a new Johnson County, Texas "Local Indigent Appointment Plan" that eliminated a removed counsel's right to an

administrative hearing; the right to being provided a basis of removal; the right to a decision on reinstatement, the removing of counsel's property interest in the continued receipt of indigent appointments in addition to other alterations. In order to continue receiving appointments all then currently listed counsel were required to execute an acknowledgement and acceptance of the new terms dictated under the revised Johnson County, Texas "Local Indigent Appointment Plan."

For purposes of judicial economy Petitioners hereby expand on certain background components as follows:

a. ***No Basis of Removal or Decision on Reinstatement Provided:*** Petitioners were never provided a basis of removal nor a final decision on reinstatement (by Johnson County) even after being provided with numerous written requests for such decision.

b. ***Petitioners Were Not Removed In Accordance with the "Local Indigent Appointment Plans":*** Petitioners were not removed in accordance with the "Local Indigent Appointment Plan" that governed such removals. Both plans provided for a post-removal hearing and thus Petitioners were at minimum entitled to notice of the basis of removal including a final decision on reinstatement.

c. ***Texas Statutes Require that Removal from a "Local Indigent Appointment List" be Made in a "Neutral, Fair & Non-Discriminatory Manner" and Must***

be Based on "Merit": Petitioners to this day (let alone at the reinstatement hearings) still do not know the basis of their simultaneous removals thus clearly in violation of Texas statutes that require that an attorney's removal from a "Local Indigent Appointment List" be made in a "neutral, fair and non-discriminatory manner" and that any removal must be based on "merit."

d. ***The Term "Discretion" Does Not Exists Within the Local Indigent Appointment Plans:*** The "Local Indigent Appointment Plans'" described processes of removing and/or reinstating an attorney does not possess the term "discretion."

e. ***The Admission v. Removal Process Described Within the "Local Indigent Appointment Plans" are Different and Distinct:*** Again, the term "discretion" is nowhere to be found in in the "Local Indigent Appointment Plans" in relation to an attorney's removal therefore clearly distinguishing between admission and removal. Unlike an attorney denied an initial admission an attorney who is in fact removed from an "Indigent Appointment List" is entitled to a post-removal hearing before the "Board of Judges" of that county thus providing basic due process.

f. ***"Local Indigent Appointment Plans" Require Certain Due Process for Removed Attorneys which Were Not Complied With:*** The "Local Indigent Appointment Plans" dictated certain due process requirements for a

> removed attorney being entitlement to a post-removal hearing before the "Board of Judges" thereby requiring reasonable notice as to the basis of such removal including a post hearing decision on such reinstatement which again was never provided in this matter even after numerous requests by Petitioners.

Additionally, there exists vast regulations controlling the removal of counsel from "Local Indigent Appointment Lists" which can be summarized as follows:

> a. ***The Johnson County, Texas Fourteenth Amended Johnson County Plan and Standing Rules and Orders for Procedures for Timely and Fair Appointment of Counsel:*** This local indigent defense plan (prior to amendment or change) covers indigent accused persons in felony and misdemeanor cases in Johnson County, Texas. Section III, D of this instrument provides rules for the removal of an attorney from the appointment list which states "An attorney may be removed or suspended, as appropriate, from one or more appointment list by request of a Judge serving Johnson County. Any attorney removed has 10 days to request a "De Novo Hearing before the Board of Judges." In sum, this instrument requires basic due process for an attorney's removal.
>
> b. ***The Texas Fair Defense Laws 2017-2019; Texas Code of Criminal Procedure Article 26.04(a) & (b)(6):*** States that Judges of the county shall develop written and published local rules that delineate the

countywide procedures for the timely and fair appointment of counsel for indigent defendants in that county. Tex. Code of Crim. Proc., Art. 26.04. It further states that these laws are to "ensure that appointments are allocated among qualified attorneys in a manner that is fair, neutral and nondiscriminatory."

c. ***Texas Administrative Code §§ 174.10(2); (14); (28):*** Defines aspects of a "Contract Defender Program" as utilized by Johnson County, Texas and Somervell County, Texas. A "Contract Defender Program" under the Texas Administrative Code is a system comprised of private attorneys acting as independent contractors. Tex. Admin. Code, Title 1, Part 8, § 174.10(2). This system is considered being a "contract for services." Tex. Admin. Code, Title 1, Part 8, § 174.14. Again, in selecting attorneys into a "Contract Defender Program" compliance is considered when appointments are conducted in a "fair, neutral and non-discriminatory manner" while such compliance is imposed upon the authorized official, financial officer, county judge, local administrative district judge, local administrative statutory county court judge and chair of the juvenile board. Tex. Admin. Code, Title 1, Part 8, § 174.28.

SUMMARY OF ARGUMENTS

Both Commissioners Courts from Johnson County, Texas and Somervell County, Texas failed to conform

with requirements from both the Texas Open Meetings Act (the "Act") and Chapter 551 of the Texas Government Code (the "Code") regarding the expenditure of public funds that were used to protect the public interest in a suit brought against multiple Defendants in their official capacity. This resulted in their failures, as two separate county quorums, to authorize payments for insurance deductibles which prevented them from obtaining legal counsel for this specific lawsuit. This resulted such counsel being unable to file any answers or responses on behalf of all the Defendants as was required under Federal Rule of Civil Procedure 12.

In addition, state sovereign immunity does not carry over to actors performing duties as a county policymaker or duties as a dual county and state policymaker **and there exists a Federal Circuit split in the due process property requirement needed to be provided counsel performing indigent defense**. *Mitchell v. Fishbein,* 377 F.3d 157 (2d Cir. 2004).

ARGUMENTS

I. Texas Open Meetings Act violations resulted in governing bodies failing to properly authorize the expenditures of public funds that were needed to obtain legal counsel.

1. The Commissioners Courts from both Johnson County, Texas and Somervell County, Texas operate as governing bodies for each of their respective counties because a county is a political subdivision of the State

and its commissioners court serves as a county's governing body. TEX. CONST. arts. V, § 18(b); XI, § 1; *see* TEX. GOV'T CODE §§ 551.001(3)(B), 552.003(1)(A)(ii). Commissioners courts must comply with Chapter 551 of the Texas Government Code which also requires compliance with the Texas Open Meetings Act (the "Act"). *See* Act of May 4, 1993, 73d Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 583–89 (explaining how the Act was codified without substantive change in 1993 as Government Code chapter 551.) This is substantiated by the Texas Government Code which specifies that a commissioners court operating as a governmental body must comply with all open meeting requirements as defined by chapter 551. TEX. GOV'T CODE § 551.002.

2. The Supreme Court of Texas has held that a governmental body shall provide the public with advance notice of the subjects it will consider in either an open session or in a closed executive session. TEX. GOV'T CODE § 551.041; *Cox Enterprises Inc. v. Board of Trustees of Austin Indep. School Dist*., 706 S.W.2d 956, 958 (Tex. 1986). If a commissioners court's minutes are kept, they must state the subject of each discussion, and record each vote, order, decision, or other action taken by that commissioners court. TEX. GOV'T CODE § 551.021. If minutes are kept instead of a recording, the minutes should record every action taken by the governmental body including a commissioners court. *See York v. Tex. Guaranteed Student Loan Corp*., 408 S.W.3d 677, 687 (Tex. App.—Austin 2013, no pet.) (defining "minutes" to refer "to the record or notes of a meeting or proceeding, whatever they may contain").

The authority vested in a governmental body, or a commissioners court, may be exercised only at a meeting of a quorum of its members where a "quorum" is a majority of the governing body. *See* TEX. GOV'T CODE § 551.001(6). Deliberation by a commissioners court may only be performed as "a verbal or written exchange between a quorum of a governmental body, or the commissioners court, or between a quorum of a governmental body and another person, concerning an issue within the jurisdiction of the governmental body." TEX. GOV'T CODE § 551.001(2). A commissioners court may not deliberate or take action on an item that is not posted. TEX. GOV'T CODE § 551.042. The Supreme Court of Texas has held that "While the [Open Meetings] Act permits executive [or closed] sessions in specific circumstances, it never permits a body to meet without posting the subject matter to be discussed." *Cox Enterprises Inc. v. Board of Trustees of Austin Indep. School Dist*., 706 S.W.2d 956, 958 (Tex. 1986). No vote or final action may be taken in a closed meeting. TEX. GOV'T CODE § 551.102. Finally, except in the case of a closed meeting held to receive legal advice, the executive session must be recorded or a certified agenda kept. TEX. GOV'T CODE § 551.103.

3. A county may expend public funds for the employment of a private attorney to represent county officials and employees who have been sued in their official capacities if the suit involves an action of the official or employee arguably within the scope of the official's or employee's authority in the performance of public duties and if the county commissioners believe

in good faith that the public interest is at stake. Opinion No. JM-824 at *1 (Ops. Tex. Atty. Gen. Nov. 23, 1987). The disbursement of public county funds is decided by a county's commissioners court. This applies directly to the Commissioners Courts from both Johnson County and Somervell County when public funds were expended to obtain legal counsel by making deductible payments as required by their Liability coverages through the Texas Association of Counties Risk Management Pool (TAC RMP).

4. Here, both Commissioners Courts from these counties failed to comply with the requirements of both the Texas Open Meetings Act ("the Act") and Chapter 551 of the Texas Government Code ("the Code") when decisions were made to expend public funds as deductible payments to obtain legal counsel to defend county employees in their official capacities associated with this specific lawsuit. Multiple violations of both the Act and the Code included failures to provide public notifications regarding such public funding expenditure considerations and omissions to act and decide as a quorum to expend payments for these insurance liability deductibles, to communicate with legal counsel, and to agreeing to retain defense counsel. *See* ROA.21-10323.3146-3188, No. 102-161. These are confirmed by April 6, 2020, responses to FOIA (Freedom of Information Act) requests from the Commissioners Courts for both Johnson County and Somervell County on March 23, 2020. *See* Appendix E; *see* Appendix F.

5. A Rule 28(j) Letter was submitted to the U.S. Court of Appeals for the Fifth Circuit on March 28,

2022, to address multiple violations of both the Act and the Code that were committed by the Commissioners Courts from both Johnson County and Somervell County. This Rule 28(j) Letter was never denied by the Fifth Circuit Court. This letter addressed a ruling made by the Supreme Court of Texas which required literal compliance of the Texas Open Meetings Act (the "Act") which had to be initially performed prior to a commissioners court being legally permitted to perform any valid subsequent actions. *See Smith Cty. v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1987) (holding that a commissioners court's failure to comply with the Texas Open Meetings Act regarding initial general public notification requirements resulted in subsequent actions performed by that commissioners court to be void). The holding from *Smith Cty*. applies directly to these Commissioners Courts' violations which resulted in their subsequent actions to obtain legal counsel for this lawsuit to potentially be void. This is because both Commissioners Courts were specifically required to conform to both the Act and the Code yet committed multiple omissions to act including:

> a. Failed to provide public notifications regarding their upcoming schedules to discuss expending public funds to pay insurance deductibles for this lawsuit which were necessary to hire legal defense counsels;
>
> b. Failed to provide public notifications of any scheduled meeting to discuss any issues regarding this lawsuit;

> c. Failed to perform any vote or to make any decision as a quorum regarding any issues associated with this lawsuit;
>
> d. Failed to deliberate as a quorum regarding any issues associated with this lawsuit;
>
> e. Failed to take any action regarding any issues associated with this lawsuit; and
>
> f. Failed to meet with any attorney to receive any legal advice regarding any issues associated with this lawsuit.

See Exhibit E; *see* Exhibit F. Therefore, all subsequent actions following actions that are found to be void include the inabilities of both Commissioners Courts to obtain legal representation for this lawsuit and the inabilities for such counsel to file any answers or responses on behalf of all Defendants in their official capacities. This is because the Supreme Court of Texas has held that any "acts of [a] single commissioner not authorized by law or by the commissioners court" do not bind the entire commissioners court. *Hill Farm v. Hill County*, 436 S.W.2d 320, 324 (Tex. 1969).

6. The U.S. Court of Appeals for the Fifth Circuit erred when declining to consider the violations of both the Texas Open Meetings Act (the "Act) and Chapter 551 of the Texas Government Code ("the Code") that were committed by the Commissioners Courts of both counties. *See* Petitioners' Br. 59-60. This includes the court's error to decline consideration of the requests for injunctive reliefs associated with these violations. Id.

It must be found that both Commissioners Courts failures to comply with both the Act and the Code are void when regarding this lawsuit thus resulting in void actions to obtain legal representation for this lawsuit prior to such counsel filing any answers or responses on behalf of all Defendants in their official capacities. It must also be found that the requested injunctive reliefs are valid and must be applied to the Commissioners Courts from both Johnson County, Texas and Somervell County, Texas.

II. The Circuit Court errored in holding that no due process property violation had occurred by claiming that Respondents had "discretion" on the removal of counsel from the Indigent Appointment List even when the Local Rules do not contain the term "discretion" and when State statutes require that a fair, neutral, and non-discriminatory process be provided to remove counsel thus signifying basic due process entitlement.

1. As dictated by the factual description above, the "Local Indigent Appointment Plans" make no reference to "discretion" let alone "official discretion" in relation to the removal of an attorney from such plan. For arguendo purposes, even if there did exist a certain degree of "discretion" said discretion was still subject to the due process, limitations and procedures described by the "Local Indigent Appointment Plans" as well as other Texas authority described below. Since removal was not only based on "discretion" it makes clear

there exists a viable property right thus requiring that due process be complied with.

2. Based on the described, attached, historical, practiced, written and routine process of issuing appointments demonstrate the clear existence of a property interest in the continued receipt of appointments. A property interest even exists when a party already possesses a professional license but is refused admission by simply one regulatory party. *Goldsmith v. Board of Tax Appeals*, 270 U.S. 117 (1926) (A state licensed and state practicing certified public accountant was denied admission to practice before the Board of Tax Appeals without reason with Supreme Court commenting that "the due process clause in the constitution entitled petitioner to be heard before an opportunity to make a living in his profession was taken away from him. A substantial right has been invaded by the respondents. . . .").

3. As reflected above, the Texas Administrative code further describes the relationship between appointed counsel and the courts as contractual in nature. Even so, there is still absolutely no need for the existence of an actual or traditional employment contract in order for a property interest to exist. *Connell v. Higginbotham*, 403 U.S. 207 (1971) (recently hired teacher without contract or tenure maintained a property interest based on the clearly implied promise of continued employment and thus was entitled to due process prior to termination). There clearly exists a clear implied agreement that routine and standardized receipt of indigent appointments would continue as long as Petitioners complied with their yearly

requirements subject to removal only as delineated via the "Local Indigent Appointment Plan." *Board of Regents v. Roth*, 408 U.S. 564 (1972) (A non-tenured professor had a "Formal Notice of Appointment" specifically for 1 year and made no mention of renewal nor was there the existence of rule or policy addressing continued employment and where the Supreme Court considered the "Notice of Appointment" to be the equivalent of an employment contract).

4. Here the contractual property interest is based not only by rule but by mutual understandings. *Alford v. City of Dallas*, 738 S.W.2d 312 (Tex. App. 1987) ("A property interest protected by procedural due process arises where an individual has a legitimate claim of entitlement that is created, supported or secured by rules or mutually explicit understandings").

5. Clearly, the "Local Indigent Appointment Plans"; the requirements for counsel to remain on the appointment list; the specifically described due process for removal; the routine and consistent receipt of appointments; and the many years of Petitioners providing indigent defense services clearly exhibit a promulgated and fostered de facto policy that entitled Petitioners to legitimate due process based on a legitimate property interest prior to termination of future appointments. Said another way, at minimum there exists a legitimate property interest via a "de facto" policy based on the official local rules and understandings that were promulgated and fostered throughout the everyday practice of indigent defense in both Johnson County and Somervell County. These factors

together create much more than mere subjective expectancy. *Wells v. Hico Independent School District*, 736 F.2d 243, 251 (5th Cir. 1984) (the Supreme Court has recognized that a state institution may, through its policies give rise to a state law implied contractual right based on mutually explicit understandings); *Transcontinental v. Texaco*, 35 S.W.3d 658 (Tex. App. 2001) ("A usage of trade is any practice or method of dealing having such regularity of observance in place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."); *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, Cause No. 17-0332 (Tex. June 28, 2019) ("stating that extrinsic evidence of prior negotiations, prior dealings, and trade usage may be admissible to give the words of a contract meaning consistent with generally accepted meaning, but cannot be used to vary or contradict the agreement" and "Further, under Texas strong policy favoring the freedom to contract, parties are free to contract around established industry custom and usage" citing *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 59 (Tex. 2016) & *Phila. Indem. Ins. v. White*, 490 S.W.3d 468, 471 (Tex. 2016); *City of Houston v. Williams*, 353 S.W.3d 128 (Tex. 2011) ("No particular words are required to create a contract" and contracts generally consist of "the time of performance, the price to be paid and the service to be rendered" and further "describes duties and responsibilities." Additionally, an existing service contract can be further supported by the fact that "relevant statutes can also form part of a contract.").

6. It is important to note that the specific procedures of entitlement to a fair notice of allegations, a hearing and decision on reinstatement regarding an attorney's removal created a specific legislatively required process thus creating a property interest that could not be removed without compliance with such process. *Blackburn v. City of Marshall*, 42 F.3d 925 (5th Cir. 1995) (involved a vehicle towing rotation scheme where no property interest was found as such rotation list was operated by a private association of tow companies and of which the government officials played no role & that there existed "no Texas or local statute, ordinance, or regulatory scheme governing the wrecker list."). It is clear that the present situation involved numerous state statutes, local statutes and regulatory schemes that specifically dictated how removal could occur thus limiting and curtailing the "Board of Judges" discretion. *Ky. Dept. of Corr. v. Thompson*, 490 U.S. 454, 463 (1989) ("in determining whether statutes and regulations limit official discretion. . . . we look for explicit. . . . directives to the decision maker. . . .). *Chavers v. Morrow*, 354 F. Appx. 938 (5th Cir. 2009) (involved towing company removal from a city/county towing list where the Circuit commented that there was no specific "mandatory" process required in keeping a tow company on that list other than being provided "written notification" of such removal and that Petitioners here failed since they were in fact provided the required "written notification."). The record is clear that in the present matter the mandatory required process of removal was not complied with. The then existing process was created to avoid arbitrary removal

by allowing a De Novo Hearing before the "Board of Judges" but a process that was so afflicted with constitutional violations is the equivalent of having no process at all.

7. Furthermore, the "Local Indigent Appointment Plans" also operated similar to an employee handbook. The "Local Indigent Appointment Plans" were reasonably equivalent to an employee handbook that creates a claim of entitlement to the full termination process based on that property interest. *Conley v. Board of Trustees of Grenada City Hospital*, 707 F.2d 175 (5th Cir. 1983) (Hospital nurses terminated without being provided basis for termination as required to be provided by the "Employee Guidebook" thus creating a "legitimate claim of entitlement to their employment status [property interest]" and were further entitled under due process to the "specific charges against them in advance of adverse employment action" and thus "Plaintiffs had the requisite express or implied right to continued employment . . . " and that the "guidebook is the prime candidate as the source of a legitimate claim of entitlement if it limits the hospital's right to terminate an employee . . . " and "In sum, we find no actual dispute but that the hospital's guidebook created a legitimate claim of entitlement to continued employment"). *Aiello v. United Air Lines, Inc*. 818 F.2d 1196 (5th Cir. 1987) (held that where an employer's manual or handbook contains detailed procedures for discipline and discharge and expressly recognizes an obligation to discharge only for good

cause, a contract modifying the at-will rule may be found.).

8. Finally, in 2004 the Second Circuit had the opportunity to address the removal of an attorney from the "appointment wheel" by a committee that was appointed by the local bar association with oversight, rulemaking, and additional authority by the local state courts. In this matter the committee and court removed an attorney from the "appointment wheel" with no explanation or reason for such removal by simply stating the following:

> "We regret to inform you that following a thorough and careful review of your recertification application, a decision has been made by the Central Screening Committee, to terminate your appointment to the Assigned Counsel Plan for felony and misdemeanor panels. The decision is final. On behalf of the Central Committee, we want to express our appreciation to you for your years of service to the indigent accused. You are expected to continue to handle to conclusion any assigned cases you now have and to submit a voucher for your work."

Mitchell v. Fishbein, 377 F.3d 157 (2d Cir. 2004).

9. Ultimately the Second Circuit reversed the District Court's dismissal of Mr. Mitchell's 1983 Due Process violations. Therefore, a Local Indigent Plan confers a benefit to attorney who are previously placed on the list of indigent defense counsel similar to the current circumstance. Ultimately, the Second Circuit concluded

the actions of removal were administrative and thus subject to constitutional claims while considering "the source of the entitlement to compensation. . . ." for panel attorneys. *Mitchell v. Fishbein*, 377 F.3d 157 (2nd Cir. 2004).

* * *

In sum, rulings by the Supreme Court of Texas have held that violations of the Texas Open Meetings Act (the "Act") which include violations of Chapter 551 from the Texas Government Code (the "Code") that were committed by a county's commissioners court have resulted in their subsequently related acts being void or voidable. This directly applies here when the Commissioners Courts from both counties failed to conform to requirements specified in both the Act and the Code regarding this specific lawsuit. These violations have resulted in all subsequent acts including the expenditures of public funds used to obtain defensive legal counsel for this lawsuit to be void or voidable. Any void filings as answers or responses for this lawsuit under Federal Rule of Civil Procedure 12 have resulted in their failures to timely file such answers or responses.

In addition, the defendants as District Court Judges and County Court at Law Judges for both counties failed to apply proper discretion when removing both Petitioners as defense attorneys from the various indigent court appointment lists. Their multiple discretion violations were clearly shown when they failed to follow their respective county's local rules and failed

to apply a fair, neutral, and non-discriminatory process when removing the Petitioners from the various indigent court appointment lists.

CONCLUSION

1. For the foregoing reasons, the judgment from the U.S. Court of Appeals for the Fifth Circuit should be vacated and remanded to determine if acts from both Commissioners Courts regarding failures to comply with Open Meetings Act requirements for this lawsuit are void including their abilities to retain legal counsel.

2. For additional foregoing reasons, the judgment from the U.S. Court of Appeals for the Fifth Circuit regarding its holding that a property due process violation did not occur during the act of removing an attorney from the indigent appointment list without providing any notices of allegations or decisions was acceptable as an act of discretion regardless of the failure to comply with the established removal requirements being singularity or totality in error should be reversed or vacated and remanded.

Respectfully submitted,

REY A. DE LOS SANTOS
LAW OFFICE OF
RICARDO DE LOS SANTOS
P.O. Box 760
Joshua, Texas 76058
(817) 614-9961

RICARDO DE LOS SANTOS
Counsel of Record
LAW OFFICE OF
RICARDO DE LOS SANTOS
P.O. Box 760
Joshua, Texas 76058
(817) 614-9961