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**United States Court of Appeals
for the Fifth Circuit**

No. 21-10323

REYNALDO ANTONIO DE LOS SANTOS; RICARDO DE LOS
SANTOS,

Plaintiffs—Appellants,

versus

WILLIAM BOSWORTH, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; JOHN NEILL, *in the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell, Texas*; SYDNEY HEWLETT, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; WAYNE BRIDEWELL, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; ROBERT MAYFIELD, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; STEVE MCCLURE, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; ROGER HARMON, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; RICK BAILEY, *In the Official Capacity as Employee and/or Administrator*

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and/or Policymaker and/or Official of Johnson County, Texas; KENNY HOWELL, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; JERRY STRINGER, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; LARRY WOOLLEY, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; DANNY CHAMBERS, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; LARRY HULSEY, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; DWAYNE JOHNSON, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; KENNETH WOOD, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; WADE BUSCH, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; DAVID EVANS, In the Official Capacity as Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas; JOHNSON COUNTY, TEXAS; SOMERVELL COUNTY, TEXAS,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:20-CV-461

(Filed Mar. 11, 2022)

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Before SMITH, COSTA, and WILSON, *Circuit Judges*.

PER CURIAM:*

In Texas, the counties of Johnson and Somervell keep lists of lawyers from which local judges may choose counsel for the indigent. Any local district judge may remove or suspend a lawyer from the lists.

When Reynaldo and Ricardo De Los Santos were removed from the appointment lists in both counties, they sued the counties, twelve county officials, and five state judges under 42 U.S.C. §§ 1981 and 1983.¹ Representing themselves, they assert three constitutional injuries:

- *First*, they claim that they were removed without explanation, which violated their due-process rights.
- *Second*, the plaintiffs allege First Amendment retaliation. They say that their removal occurred shortly after the North Texas Progressive Democrats moved into an office next door, and the officials our plaintiffs have sued are not Democrats.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

¹ The plaintiffs' complaint also appears to assert conspiracy claims under 42 U.S.C. §§ 1983, 1985, and 1986. But because the plaintiffs do not press those claims here, they have forfeited them. *See Rollins v. Home Depot USA*, 8 F.4th 393, 397 (5th Cir. 2021).

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- *Third*, the plaintiffs allege racial discrimination, because they were the “only two [H]ispanic attorneys” on the appointment lists.

The plaintiffs also allege sundry violations of state and local law. They seek damages and prospective equitable relief.

The district court dismissed all claims against all defendants. We affirm.

I.

The plaintiffs’ federal claims must be dismissed.

A.

The district court dismissed for want of subject-matter jurisdiction and for failure to state a claim. FED. R. CIV. P. 12(b)(1), (6). We review that judgment *de novo*.

When a defendant questions subject-matter jurisdiction, “the plaintiff bears the burden of establishing jurisdiction.” *Kaswatuka v. U.S. Dep’t of Homeland Sec.*, 7 F.4th 327, 329 (5th Cir. 2021). Because a claim of sovereign immunity challenges our jurisdiction, we must consider that claim before reaching nonjurisdictional claims or defenses. *De Sanchez v. Banco Cent. de Nicar.*, 770 F.2d 1385, 1389 (5th Cir. 1985).

“To withstand a motion to dismiss” for failure to state a claim, “a complaint must present enough facts

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to state a plausible claim to relief.” *Mandawala v. Ne. Baptist Hosp.*, 16 F.4th 1144, 1150 (5th Cir. 2021). “[T]he pleaded facts must allow a reasonable inference that the plaintiff should prevail.” *Id.* “Facts that only *conceivably* give rise to relief don’t suffice.” *Id.* “Though we generally take as true what a complaint alleges, we do not credit a complaint’s legal conclusions or threadbare recitals of the elements of a cause of action.” *Id.* (cleaned up).

B.

Two of the claims are not properly before us. Because the plaintiffs inadequately briefed their race-discrimination and First Amendment claims, they have forfeited them.

We require the appellant to state his “contentions and the reasons for them, with citations to the authorities and parts of the record on which [he] relies.” FED. R. APP. P. 28(a)(8)(A). Failure to follow that rule results in forfeiture. *Rollins*, 8 F.4th at 397. An appellant forfeits an argument on appeal when his briefing does not “offer any supporting argument or citation to authority,” does not “identify relevant legal standards” or circuit caselaw, or does not “address the district court’s analysis and explain how it erred.” *Id.* at 397 n.1 (cleaned up).

The plaintiffs forfeited their race-discrimination claim. In sixty-plus pages of initial briefing, the plaintiffs cite no caselaw to support it. Instead, they contend that “the removal of the only two [H]ispanic attorneys

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in Johnson County” proves their claim. That bare assertion cannot preserve their claim for our review.²

The First Amendment claim is forfeited for the same reason. Again citing no caselaw or other authority, the plaintiffs insist over and over that the “record is clear” that they should prevail. But mere insistence, without legal argument, cannot preserve that claim for review.

C.

Even if those claims weren’t forfeited, none could proceed against the state judges. Because they are sued in their official capacities, we must treat the claims against them as claims against the State of Texas. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 70-71 (1989). For that reason, the judges enjoy sovereign immunity.³

² Cf. *JTB Tools & Oilfield Servs., L.L.C. v. United States*, 831 F.3d 597, 601 (5th Cir. 2016) (“[The appellant] offers only repeat conclusory assertions that OSHA violated its rights . . . , failing to offer any supporting argument or citation to authority. . . . [W]e hold those claims inadequately briefed and therefore waived.”).

³ See *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (“[T]he only immunities available to the defendant in an official-capacity action are those that the governmental entity possesses.”); see also *Turner v. Houma Mun. Fire & Police Civ. Serv. Bd.*, 229 F.3d 478, 483 (5th Cir. 2000) (“Accordingly, a § 1983 suit naming defendants only in their ‘official capacity’ does not involve personal liability to the individual defendant. Concomitantly, defenses such as absolute quasi-judicial immunity, that only protect defendants in their individual capacities, are unavailable in official-capacity suits.”).

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The judges are immune from any claim for damages. Those claims are, in fact, against the State of Texas, which would have to pay any damages. *Warnock v. Pecos Cnty.*, 88 F.3d 341, 343 (5th Cir. 1996). Thus, sovereign immunity bars those claims. *See id.*

Sovereign immunity does not shield state officials from prospective injunctive relief against ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123, 155-56 (1908). But our plaintiffs may not claim that exception because they have not adequately pleaded *any* breach of federal law.

Recall that the plaintiffs alleged three constitutional violations: a due-process violation, First Amendment retaliation, and racial discrimination. All three claims are groundless.

The due process claim fails. The Fourteenth Amendment requires that due process precede a deprivation of property. But discretionary benefits are not property, so no process is due when they are denied. *See, e.g., Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005). Inclusion on the appointment lists is committed to the discretion of state judges. Thus, no

The plaintiffs contend that they may avoid sovereign immunity because the state judges were acting as county policymakers. That claim lacks merit. “[T]he act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments” is a “judicial act under Texas law.” *Davis v. Tarrant Cnty.*, 565 F.3d 214, 227 (5th Cir. 2009). Removing attorneys from such a list is no less judicial, and the plaintiffs don’t explain why we should conclude otherwise.

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process is due, under the Constitution, when inclusion is denied.⁴

Were it not forfeited, the First Amendment claim would fail. Such a claim requires proof that the plaintiff's "constitutionally protected activity . . . substantially motivated" the defendant's "adverse actions." *Cass v. City of Abilene*, 814 F.3d 721, 729 (5th Cir. 2016). Our plaintiffs haven't shown that. They say that they were removed from the lists because the North Texas Progressive Democrats moved into an office next door. But even if that notion could be believed,⁵ the plaintiffs never explain how, or allege that, the judges knew that the organization had moved in.

The plaintiffs could not repair that defect by pointing to the temporal proximity between the move-in and

⁴ The plaintiffs resist that conclusion by pointing out that the word "discretion" does not appear in the appointment plans. That's true. But the word "discretion" is not the only way to authorize free choice. Under the appointment plans, an attorney may be removed "by request of a Judge." That's plenty clear; the judges have discretion.

⁵ The plaintiffs did not advance this theory at *any* of their hearings seeking reinstatement. Then, they instead attributed their removal to the malice of one state district judge, whom they accused of retaliating against them for actions they took during legal proceedings. At the plaintiffs' first hearing, that judge offered several reasons for their removal, including their incompetence and their questionable billing practices. At no time did any judge evince awareness that the plaintiffs officed next to a political group. And when the plaintiffs were finally removed from the lists, the judges pointed again to their practice of filing "false or incorrect pay sheet[s]." The plaintiffs replied by asserting their privilege against self-incrimination and accusing the panel of "trial by ambush."

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their removal from the lists, *see Cripps v. La. Dep't of Agric. & Forestry*, 819 F.3d 221, 230 (5th Cir. 2016), because there is none. True, the plaintiffs were removed shortly after the organization moved in, but they were reinstated a few weeks later. The plaintiffs were not finally excluded from the lists until *six months after* their new neighbor arrived. That period, absent other evidence of retaliatory intent, is much too long to suggest any causal link between the plaintiffs' protected conduct (whatever that was) and their exclusion.

Were it not forfeited, the race-discrimination claim would fail. That claim cannot survive dismissal unless the plaintiffs plead discriminatory intent. *Fennell v. Marion Indep. Sch. Dist.*, 804 F.3d 398, 412 (5th Cir. 2015). To do that, they must establish that the defendants treated them worse than “similarly situated individuals” *because of* their race. *Id.* (citation omitted). Our plaintiffs do none of that. All they say is that they are Hispanic and were removed from the appointment lists. That comes nowhere close to pleading discriminatory intent.

D.

The plaintiffs sue the counties of Johnson and Somervell, along with a dozen officials from those counties. But all those claims are against the counties themselves because the plaintiffs sue the county officials in their official capacities. *See Ashe v. Corley*, 992 F.2d 540, 541 n.1 (5th Cir. 1993). We affirm the dismissal of all claims against the counties and their officials.

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To establish municipal liability under § 1983,⁶ a plaintiff generally must identify, among other things, an official policy or custom that caused constitutional injury. *Peterson v. City of Fort Worth*, 588 F.3d 838, 847-48 (5th Cir. 2009).

These facts do not show an unconstitutional policy. The plaintiffs say that the counties enforced a “policy” of removing attorneys from the indigent defense lists without reason or explanation. But even if that were true,⁷ that policy would pose no due-process problem. As we’ve said, the plaintiffs have no property interest in a discretionary appointment, so no process is due, under the Fourteenth Amendment, before that appointment is withheld or denied. For that reason, the plaintiffs cannot show that the counties are liable.

We affirm the dismissal of all federal claims against all defendants.

II.

That leaves the claims under state and local law. The district judge declined to hear them because they

⁶ The plaintiffs also sue under 42 U.S.C. § 1981. But they have forfeited that claim; their briefing neither mentions the statute nor explains why it entitles the plaintiffs to relief. Even if not forfeited, that claim would fail because the plaintiffs have not shown intentional race discrimination, which the statute requires. *Arguello v. Conoco, Inc.*, 330 F.3d 355, 358 (5th Cir. 2003).

⁷ It’s not. The appointment plans entitle “[a]ny attorney so removed” to seek a “hearing before the Board of Judges.” The plaintiffs concede that they received a hearing after their removal.

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posed no federal question. *See* 28 U.S.C. § 1367(c)(3). We agree with that ruling, which was no abuse of discretion. *See Enochs v. Lampasas Cnty.*, 641 F.3d 155, 158 (5th Cir. 2011).

We add only that sovereign immunity would bar the district court from hearing the nonfederal claims against the state-judge defendants. *Ex parte Young* creates a “narrow exception” to state sovereignty to vindicate *federal* rights, not rights under state law. *Whole Woman’s Health v. Jackson*, 142 S. Ct. 522, 532 (2021). We cannot “grant . . . relief against state officials on the basis of state law” absent a waiver of sovereign immunity, *Pennhurst v. State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), and there’s no waiver here.

* * * * *

The plaintiffs inadequately briefed two of their three federal claims. Sovereign immunity precludes relief against the state judges, and the claims against the counties and their officials are inadequately pleaded. The non-federal claims should not proceed in federal court. Dismissal was proper.

AFFIRMED.

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**United States Court of Appeals
for the Fifth Circuit**

No. 21-10323

REYNALDO ANTONIO DE LOS SANTOS; RICARDO DE LOS
SANTOS,

Plaintiffs—Appellants,

versus

WILLIAM BOSWORTH, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; JOHN NEILL, *in the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell, Texas*; SYDNEY HEWLETT, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; WAYNE BRIDEWELL, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; ROBERT MAYFIELD, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas*; STEVE MCCLURE, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; ROGER HARMON, *In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas*; RICK BAILEY, *In the Official Capacity as Employee and/or Administrator*

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and/or Policymaker and/or Official of Johnson County, Texas; KENNY HOWELL, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; JERRY STRINGER, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; LARRY WOOLLEY, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Johnson County, Texas; DANNY CHAMBERS, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; LARRY HULSEY, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; DWAYNE JOHNSON, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; KENNETH WOOD, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; WADE BUSCH, In the Official Capacity as Employee and/or Administrator and/or Policymaker and/or Official of Somervell County, Texas; DAVID EVANS, In the Official Capacity as Policymaker and/or Official of Johnson County, Texas and Somervell County, Texas; JOHNSON COUNTY, TEXAS; SOMERVELL COUNTY, TEXAS,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-461

(Filed Mar. 11, 2022)

App. 14

Before SMITH, COSTA, and WILSON, *Circuit Judges*.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

IT IS FURTHER ORDERED that Appellants pay to Appellees the costs on appeal to be taxed by the Clerk of this Court.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICARDO DE LOS SANTOS and)	
REYNALDO A. DE LOS SANTOS,)	
Plaintiffs,)	
v.)	
HON. WILLIAM BOSWORTH,)	
<i>in Official Capacity as Employee</i>)	
<i>and/or Administrator and/or</i>)	
<i>Policymaker and/or official of</i>)	
<i>Johnson County, Texas, Et Al.,</i>)	Civil Action No.
Defendants.)	3:20-CV-0461-C

RULE 54(b) JUDGMENT

(Filed Mar. 8, 2021)

In accordance with the Court's Order of even date granting Defendants William Bosworth, Wayne Bridewell, Sydney Hewlett, David Evans, and John Neill's Rule 12(b)(1) Motion to Dismiss Plaintiffs' Second Amended Complaint, and the Court finding no just cause for delay in entering a final judgment and that final judgment should be entered pursuant to Federal Rule of Civil Procedure 54(b),

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs' claims brought against Defendants William Bosworth, Wayne Bridewell, Sydney Hewlett, David Evans, and John Neill be **DISMISSED WITH PREJUDICE** pursuant to

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Federal Rule of Civil Procedure 12(b)(1) based upon said Defendants' entitlement to immunity and Plaintiffs' lack of standing.

Signed this 8th day of March, 2021.

/s/ Sam R. Cummings

SAM R. CUMMINGS
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RICARDO DE LOS SANTOS and)	
REYNALDO A. DE LOS SANTOS,)	
)	
Plaintiffs,)	
)	
v.)	
)	
HON. WILLIAM BOSWORTH,)	
<i>in Official Capacity as Employee</i>)	
<i>and/or Administrator and/or</i>)	
<i>Policymaker and/or official of</i>)	
<i>Johnson County, Texas, Et Al.,</i>)	
)	Civil Action No.
Defendants.)	3:20-CV-0461-C

ORDER

(Filed Mar. 8, 2021)

On this day, the Court considered Defendants Johnson County, Texas, Somervell County, Texas, Robert Mayfield, Steve McClure, Roger Harmon, Rick Bailey, Kenny Howell, Jerry Stringer, Larry Wooley, Danny Chambers, Larry Hulsey, Dwayne Johnson, Kenneth Wood, and Wade Busch's ("County Defendants") Motion to Dismiss Plaintiffs' Second Amended Complaint and Brief in Support, along with Plaintiffs' Response thereto.

I. BACKGROUND

This lawsuit arises following Plaintiffs' removal from the indigent defense appointment lists in 2018 in

Johnson and Somervell Counties. The County Defendants are/were two Johnson County Court at Law Judges, a Johnson County Judge, a Somervell County Judge, and other Johnson and Somervell County officials.¹ Defendants assert that the removals were in accordance with the Counties' plans submitted to the Texas Indigent Defense Commission (pursuant to Texas Government Code § 79.036), which govern the addition, removal, and reinstatement of attorneys to and from the appointment lists in those two Counties. In short, the plans commit the addition, removal, or reinstatement of any attorney to the lists to the official discretion of the judges in each of those Counties.² The plans create no property right or interest for any attorney to be included or reinstated on the appointment lists.

In their Second Amended Complaint, Plaintiffs bring a myriad of claims under both state and federal law against the County Defendants. Those include claims asserted pursuant to 42 U.S.C. § 1983 for alleged violations of their constitutional rights under the First, Fifth, and Fourteenth Amendments, as well as

¹ The individually named Defendants have been sued only in their official capacities and not in their individual capacities. Thus, Plaintiffs' claims are considered to be against the government entity that employs the individually named Defendants. *Monell v. Dep't of Soc. Services*, 436 U.S. 658, 690 n. 55 (1978).

² Plaintiffs attended *de novo* hearings before the Johnson County Board of Judges on April 5, 2018, and the Somervell County Board of Judges on August 3, 2018, after they sought reinstatement to the lists. They have not been reinstated to any of the lists.

claims pursuant to 42 U.S.C. §§ 1981, 1985, and 1986. Plaintiffs' lengthy Second Amended Complaint (approximately 500 pages in length) also asserts claims for alleged violations of the Texas Open Meetings Act.

II. STANDARDS

Rule 12(b)(1) Subject Matter Jurisdiction

Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case. FED. R. CIV. P. 12(b)(1). Lack of subject matter jurisdiction may be found in any one of three instances: (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. *Barrera-Montenegro v. United States*, 74 F.3d 657, 659 (5th Cir. 1996).

The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction. *McDaniel v. United States*, 899 F. Supp. 305, 307 (E.D. Tex. 1995). Accordingly, the plaintiff constantly bears the burden of proof that jurisdiction does in fact exist. *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits. *Hitt v. City of Pasadena*,

561 F.2d 606, 608 (5th Cir. 1977) (per curiam). This requirement prevents a court without jurisdiction from prematurely dismissing a case with prejudice. *Id.* The court's dismissal of a plaintiff's case because the court lacks subject matter jurisdiction is not a determination on the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction. *Id.*

In examining a Rule 12(b)(1) motion, the district court is empowered to consider matters of fact which may be in dispute. *Williamson v. Tucker*, 645 F.2d 404, 413 (1981). Ultimately, a motion to dismiss for lack of subject matter jurisdiction should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle plaintiff to relief. *Home Builders Ass'n of Miss., Inc. v. City of Madison, Miss.*, 143 F.3d 1006, 1010 (5th Cir. 1998).

Motion to Dismiss Under Rule 12(b)(6)

In order for a complainant to state a claim for relief, the complainant must plead a short, plain statement of the claim showing entitlement to such relief. *See* Fed. R. Civ. P. 8. To survive a motion to dismiss for failure to state a claim, a complaint must contain sufficient factual matter that, if accepted as true, "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable

inference that the defendant is liable for the misconduct alleged.” *Id.* It follows that “where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 679 (quoting Fed. R. Civ. P. 8(a)(2)). While this standard does not require the complainant to make detailed factual allegations, it does demand more than a complainant’s bare assertions or legal conclusions. *Id.* at 681. Hence, formulaic recitations of the elements of a cause of action supported by mere conclusory statements do not satisfy Rule 8. *Id.*

III. DISCUSSION

Defendants contend that Plaintiffs’ claims are not legally actionable and not supported by adequate factual allegations in Plaintiffs’ Second Amended Complaint. Defendants further argue that Plaintiffs lack standing to pursue certain claims.

As to Plaintiffs’ claims asserted under 42 U.S.C. § 1983, the Court agrees with Defendants’ argument that Plaintiffs cannot establish such a claim because said claims are not based upon an unconstitutional policy or custom. Plaintiffs have failed to plead any facts to infer an unconstitutional policy or custom that was adopted with objective deliberate indifference by Johnson or Somervell Counties. *See Canton v. Harris*, 489 U.S. 378, 385 (1989); *Scott v. Moore*, 114 F.3d 51, 54 (5th Cir. 1997). Likewise, Plaintiffs have failed to

allege any facts to suggest there have been any persistent, repeated, and constant violations of constitutional rights by the two Counties that would give rise to Section 1983 liability. Instead, Plaintiffs' pleadings complain of judicial acts, which do not support liability under § 1983. As aptly argued by the Defendants in their Motion, the United States Court of Appeals for the Fifth Circuit has previously stated: "[T]he act of selecting applicants for inclusion on a rotating list of attorneys eligible for court appointments is inextricably linked to and cannot be separated from the act of appointing counsel in a particular case, which is clearly a judicial act under Texas law." *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 227 (5th Cir. 2009). When a plaintiff sues a governmental entity based on the acts of judges taken in their judicial capacity, these actions are not considered the institution of governmental policy such that the acts can be attributable to a governmental entity for § 1983 liability. *See, e.g., Mackey v. Helfrich*, 442 Fed. Appx. 948, 950 (5th Cir. 2011).

Regarding Plaintiffs' allegations of due process violations, the Plaintiffs did not have a property interest or other legally protected right to judicial appointments. Plaintiffs clearly had no entitlement to appointments and any inclusion on the appointment lists was not a property right—rather an inclusion was only a privilege, at most. *See Graham v. Tygrett*, No. 3:12-CV-5037-L, 2012 WL 6146750, *4 (N.D. Tex. Dec. 11, 2012). The lack of any property right in an attorney's inclusion on an appointment list precludes Plaintiffs' due process claims. *Roth v. King*, 449 F.3d 1272, 1276 (D.C.

Cir. 2006) (attorney inclusion on appointment list is an expectation rather than an entitlement). Moreover, the Parties have included copies of the Counties' appointment plans in their pleadings, which themselves show no legally protected interest, express or implied, to be included or remain on the appointment lists. Without a legally protected property right to inclusion on the appointment lists, Plaintiffs cannot state a claim based upon a violation of their due process rights.³

Plaintiffs' claims for alleged First Amendment violations are not supported by the pleadings. Plaintiffs failed to allege sufficient facts to support any plausible inference of a retaliatory connection between their removal from the appointment lists and any exercise of free speech rights.

Likewise, Plaintiffs' equal protection claims (under both 42 U.S.C. §§ 1981 and 1983) fair no better for similar lack of sufficient pleadings. Plaintiffs' pleadings fail to provide any factual allegations that would support an inference of a policy or custom of discrimination. Nor have they alleged facts that others who are similarly situated were treated more favorably or that the County Defendants acted with a discriminatory purpose. The mere fact that Plaintiffs are Hispanic and were removed from the lists does not constitute actionable discrimination. Plaintiffs have failed to allege

³ To the extent Plaintiffs' allegations assert violations of state law and/or local laws and policies, a claim asserted under § 1983 must seek vindication of rights, privileges, or immunities secured by the Constitution and laws of the United States. *Imbler v. Pachtman*, 424 U.S. 409, 417 (1976).

facts to support a plausible inference of any discriminatory motive, policy, custom or other conduct by the Defendants that would give rise to a claim for discrimination.

Finally, Plaintiffs' pleadings do not support their conspiracy claims brought pursuant to 42 U.S.C. §§ 1985(3) and 1986 against the Defendants. Plaintiffs' pleadings lack any facts to support a plausible inference of a plausible racially based conspiracy.

The Court, having found that no federal question claim is viable, declines to exercise its jurisdiction over Plaintiffs' state law claims based upon alleged violations of the Texas Open Meetings Act. *See Enochs v. Lampasas County*, 641 F.3d 155 (5th Cir. 2011) (state law claims were more properly heard in the state courts after federal claims were found to be without merit); *Richards v. City of Weatherford*, 145 F. Supp. 2d 786, 793 (N.D. Tex. 2001) (declining to exercise supplemental jurisdiction over state law claims after determining that the plaintiff had failed to state any federal law claim).

Plaintiffs have failed to state a claim under the Federal Declaratory Judgment Act in that the Court has found that all federal question causes of action should be dismissed and the Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims. *Lowe v. Ingalls Shipbuilding*, 723 F.2d 1173, 1179 (5th Cir. 1984) (Federal Declaratory Judgment Act does not create a substantive claim or confer federal subject-matter jurisdiction); *see Collin County v.*

Homeowners Ass'n for Values Essential to Neighborhoods, 915 F.2d 167, 170 (5th Cir. 1990) (a declaratory judgment action is merely a vehicle and a claim must arise under other substantive law). Additionally, Plaintiffs lack standing to pursue any injunctive relief in this Court and have failed to allege the elements required for injunctive relief—Plaintiffs' alleged damages arise solely from alleged past conduct of the County Defendants. *See Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 312 (5th Cir. 1997).

IV. CONCLUSION

For the reasons aptly argued by the Defendants in their Brief, the Court hereby **ORDERS** that Defendants' Motion to Dismiss be **GRANTED**.

Accordingly, it is hereby **ORDERED** that Plaintiffs' claims brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985(3), and 1986 against Defendants Johnson County, Texas, Somervell County, Texas, Robert Mayfield, Steve McClure, Roger Harmon, Rick Bailey, Kenny Howell, Jerry Stringer, Larry Wooley, Danny Chambers, Larry Hulsey, Dwayne Johnson, Kenneth Wood, and Wade Busch be **DISMISSED WITH PREJUDICE**. Plaintiffs' claims for declaratory and injunctive relief premised upon the federal question claims are also **DISMISSED WITH PREJUDICE**. Plaintiffs' state law claims are **DISMISSED WITHOUT PREJUDICE** pursuant to Federal Rule of Civil

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Procedure 12(b)(1). All other pending motions are **DE-
NIED AS MOOT**.⁴

SO ORDERED this 8th day of March, 2021.

/s/ Sam R. Cummings
SAM R. CUMMINGS
SENIOR UNITED STATES
DISTRICT JUDGE

⁴ Specifically, Plaintiffs' Partial Motion to Strike Insufficient Defenses Regarding Texas Open Meetings Act Violations is denied as moot.

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[LOGO]

BLAIES & HIGHTOWER, L.L.P.

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April 6, 2020

**VIA ELECTRONIC SERVICE (RICHARD@DLS-ASSOCIATES.NET
AND REY@DLS-ASSOCIATES.NET)**

Mr. Ricardo De Los Santos
Mr. Reynaldo De Los Santos
LAW OFFICE OF RICARDO DE LOS SANTOS, P.C.
202 S. Main Street
Cleburne, Texas 76033

Re: Public Information Request to Johnson County,
Texas Officials Received on March 23, 2020

Dear Mr. De Los Santos and Mr. De Los Santos:

This law firm has been retained to represent Johnson County in connection with the above-referenced matter. On Monday, March 23, 2020, Johnson County received the public information request you sent to the following officials: Johnson County Judge Roger Harmon, Johnson County Clerk Becky Ivey, Johnson County Commissioner Rick Bailey, Johnson County Commissioner Kenny Howell, Johnson County Commissioner Jerry Stringer, and Johnson County

Commissioner Larry Woolley. The following are specific responses regarding the request:

1. Request providing: "Please provide a copy of all records or recordings, applicable for any scheduled open session discussion for any Johnson County, Texas Commissioners Court meeting after February 26, 2018, regarding potential or existing litigation between Attorney Ricardo (Richard) De Los Santos and Attorney Reynaldo (Rey) A. De Los Santos versus Johnson County or any Johnson County employee, that show the following:

- a. **Records that contain:** All public notices which were posted as a Meeting Agenda under website <http://www.johnsoncountytexas.org/commissioners-court/publicinformation/meeting-agendas> or any other Johnson County website;

Response: There are no documents responsive to this request.

- b. **Records that contain:** The Johnson County website locations where any public notices from Request # (1a) above are located;

Response: There are no documents responsive to this request.

- c. **Records that contain:** All public notices which were not posted on any Johnson County website.

Response: There are no documents responsive to this request.

- d. **Records that contain:** Meeting Minutes or Recordings from these discussions which were posted as Commissioners Court Minutes under website <http://apps.johnsoncountytexas.org/minutes/index.asp> or any other Johnson County website;

Response: There are no documents responsive to this request.

- e. **Records that contain:** The Johnson County website locations where any Meeting Minutes or Recordings from Request # (1d) above are located;

Response: There are no documents responsive to this request.

- f. **Records that contain:** Meeting Minutes or Recordings from these Commissioners Court discussions which were not posted on any Johnson County website;

Response: There are no documents responsive to this request.

- g. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were posted under website <http://apps.johnsoncountytexas.org> or any other Johnson County website;

Response: There are no documents responsive to this request.

- h. **Records that contain:** The Johnson County website locations where each vote, order, decision, or other action taken by the Commissioners Court per Request # (1g) above are located; and

Response: There are no documents responsive to this request.

- i. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were not posted on any Johnson County website.

Response: There are no documents responsive to this request.

- 2. Request providing: "Please provide a copy of all records or recordings, applicable for any scheduled closed session discussion or scheduled Executive Session discussion for any Johnson County, Texas Commissioners Court meeting after February 26, 2018, regarding potential or existing litigation between Attorney Ricardo (Richard) De Los Santos and Attorney Reynaldo (Rey) A. De Los Santos versus Johnson County or any Johnson County employee, that show the following:

- a. **Records that contain:** All public notices which were posted as a Meeting Agenda under website <http://www.johnsoncountytexas.org/commissioners-court/public-information/meeting-agendas> or any other Johnson County website;

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Response: There are no documents responsive to this request.

- b. **Records that contain:** The Johnson County website location where any public notices from Request # (2a) above are located;

Response: There are no documents responsive to this request.

- c. **Records that contain:** All public notices which were not posted on any Johnson County website;

Response: There are no documents responsive to this request.

- d. **Records that contain:** Any announcements by the presiding officer which provide the date and time when an agenda or a recording of the proceedings from the closed sessions had started and were completed;

Response: There are no documents responsive to this request.

- e. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these closed session discussions which were posted under website <http://apps.johnsoncountytexas.org/minutes/index.asp> or any other Johnson County website;

Response: There are no documents responsive to this request.

- f. **Records that contain:** The Johnson County website locations where each vote, order, decision, or other action taken by the Commissioners Court per Request # (2e) above are located; and

Response: There are no documents responsive to this request.

- g. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were not posted on any Johnson County website.

Response: There are no documents responsive to this request.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/ Grant D. Blaies

Grant D. Blaies

GDB/TAC-0152

[LOGO]

This law firm has been retained to represent Somervell County in connection with the above-referenced matter. On Monday, March 23, 2020, Somervell County received the public information request you sent to the following officials: Somervell County Judge Danny L. Chambers, Somervell County Clerk Michelle Reynolds, Somervell County Commissioner Larry Hulsey, Somervell County Commissioner Dwayne Johnson,

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Somervell County Commissioner Kenneth Wood, and Somervell County Commissioner Wade Busch. The following are specific responses regarding the request:

1. Request providing: "Please provide a copy of all records or recordings, applicable for any scheduled open session discussion for any Somervell County,, Texas Commissioners Court meeting after February 26, 2018, regarding potential or existing litigation between Attorney Ricardo (Richard) De Los Santos and Attorney Reynaldo (Rey) A. De Los Santos versus Somervell County or any Somervell County employee, that show the following:

- a. **Records that contain:** All public notices which were posted as a Meeting Agenda under website <http://somervellcountytexas.com/Citizens/Calendar.aspx> or any other Somervell County website;

Response: There are no documents responsive to this request.

- b. **Records that contain:** The Somervell County website locations where any public notices from Request # (1a) above are located;

Response: There are no documents responsive to this request.

- c. **Records that contain:** All public notices which were not posted on any Somervell County website.

Response: There are no documents responsive to this request.

- d. **Records that contain:** Meeting Minutes or Recordings from these discussions which were posted as Commissioners Court Minutes under website <http://somervellcountytx.iqm2.com/Citizens/Calendar.aspx> or any other Somervell County website;

Response: There are no documents responsive to this request.

- e. **Records that contain:** The Somervell County website locations where any Meeting Minutes or Recordings from Request # (1d) above are located;

Response: There are no documents responsive to this request.

- f. **Records that contain:** Meeting Minutes or Recordings from these Commissioners Court discussions which were not posted on any Somervell County website;

Response: There are no documents responsive to this request.

- g. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were posted under website <http://somervellcountytx.iqm2.com/Citizens/Calendar.aspx> or any other Somervell County website;

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Response: There are no documents responsive to this request.

- h. **Records that contain:** The Somervell County website locations where each vote, order, decision, or other action taken by the Commissioners Court per Request # (1g) above are located; and

Response: There are no documents responsive to this request.

- i. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were not posted on any Somervell County website.

Response: There are no documents responsive to this request.

- 2. Request providing: "Please provide a copy of all records or recordings, applicable for any scheduled closed session discussion or scheduled Executive Session discussion for any Somervell County, Texas Commissioners Court meeting after February 26, 2018, regarding potential or existing litigation between Attorney Ricardo (Richard) De Los Santos and Attorney Reynaldo (Rey) A. De Los Santos versus Somervell County or any Somervell County employee, that show the following:

- a. **Records that contain:** All public notices which were posted as a Meeting Agenda under website <http://somervellcountytx>.

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iqm2.com/Citizens/Calendar.aspx or any other Somervell County website;

Response: There are no documents responsive to this request.

- b. **Records that contain:** The Somervell County website location where any public notices from Request # (2a) above are located;

Response: There are no documents responsive to this request.

- c. **Records that contain:** All public notices which were not posted on any Somervell County website;

Response: There are no documents responsive to this request.

- d. **Records that contain:** Any announcements by the presiding officer which provide the date and time when an agenda or a recording of the proceedings from the closed sessions had started and were completed;

Response: There are no documents responsive to this request.

- e. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these closed session discussions which were posted under website <http://somervellcountytx.iqm2.com/Citizens/Calendar.aspx> or any other Somervell County website;

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Response: There are no documents responsive to this request.

- f. **Records that contain:** The Somervell County website locations where each vote, order, decision, or other action taken by the Commissioners Court per Request # (2e) above are located; and

Response: There are no documents responsive to this request.

- g. **Records that contain:** Each vote, order, decision, or other action taken by the Commissioners Court following these open session discussions which were not posted on any Somervell County website.

Response: There are no documents responsive to this request.

If you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

/s/ Grant D. Blaies

Grant D. Blaies

GDB/TAC-0150
