

No. 21-1563

**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 REHEARING

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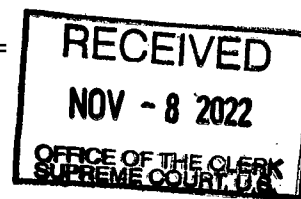


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**PETITION FOR REHEARING DUE TO
FEDERAL DISTRICT COURT'S LACK OF
JURISDICTION AS A MATTER OF LAW DUE
TO RESPONDENTS' LACK OF COMPLIANCE
WITH MANDATORY STATE PREREQUISITES**

Petitioners Rey De Los Santos and Ricardo De Los Santos petition for rehearing of this Court's October 3, 2022, Order denying Petitioners' Writ of Certiorari.

REASONS FOR GRANTING THE REHEARING

- I. The Federal District Court lacked jurisdiction to rule on Respondents' 12(b) Motions to Dismiss that were not legally filed as a matter of law.**

Factual & Procedural Background

Petitioners were local criminal defense attorneys on the rotational wheel for indigent defense appointments in both Johnson County, Texas and Somervell County, Texas. Both Petitioners were simultaneously removed off the court-appointed rotational wheels with no bases being provided for such removals. Petitioners eventually brought suit for injuries sustained from such removals.

Respondents ultimately retained counsel who filed Rule 12(b) Motions to Dismiss which were granted by the Federal District Court. Petitioners complained that such dismissals were improper in that the Federal District Court had no jurisdiction to rule on such motions due to Respondents' non-compliance with the Texas

Government Code's State statutory mandates (Texas Open Meetings Act) and other case law all requiring that public notice be provided when a local county retains counsel for litigation purposes and that to do otherwise makes all subsequent actions void.

Additionally, as reflected by the record, Petitioners provided numerous pre and post lawsuit written notifications advising Respondents of such deficiencies and the need to cure such deficiencies. Even with this Respondents took no actions to cure.

Over objections, the Federal District Court granted Respondents' Rule 12(b) Motions to Dismiss likewise denying Petitioners' requests for Injunctions. Tex. Govt. Code § 551.142 (an interested person . . . may bring an action by mandamus or injunction to stop, prevent, or reverse a violation or threatened violation . . . by members of a governmental body). Petitioners appealed to the Fifth Circuit Court of Appeals addressing Respondents' non-compliances with the mandated public notifications not only within Petitioners' Brief but also **via a Rule 28(j) Letter**. The Fifth Circuit Court of Appeals dismissed Petitioners' appeal without addressing such issue.

Petitioners then sought a Writ of Certiorari before this Court with the above issue being one of two. This Court dismissed this Writ without opinion thus necessitating this Petition for Rehearing.

Respondents' Lack of Public Notice Voids all Subsequent Actions

Texas counties must comply with Chapter 551 of the Texas Government Code also known as the Texas Open Meetings Act. The Texas Government Code and the Supreme Court of Texas mandate that a Texas county **shall** provide the public with advance notice of subjects it will consider which includes the retainment of counsel for litigation purposes. Tex. Govt. Code §§ 551.003; 551.041; 551.143; 551.144; 551.145 (rules adopted to “prohibit secret meetings”; a governmental body shall give written notice of the date, hour, place, and subject of each meeting . . . ; dictating criminal and civil penalties for any governmental member’s violation of these requirements); *Cox Enterprises Inc. v. Board of Trustees of Austin Independent School District*, 706 S.W.2d 956, 958 (Tex. 1986); Texas A.G. Opinion No. JM-824 at *1 (a Texas county may disburse public funds to employ private counsel to represent county officials who have been sued in their official capacities . . .). This public notification mandate includes any Texas county vote, order, decision, or other action taken by that county which must be conducted via a quorum. Tex. Govt. Code § 551.001(6). A Texas county may not deliberate or take action on an item that has not been publicly posted. Tex. Govt. Code § 551.042; Tex. Govt. Code § 551.041 (an action taken by a governmental body in violation of this chapter is voidable); *Cox Enterprises Inc. v. Board of Trustees of Austin Independent School District*, 706 S.W.2d 956, 958 (Tex. 1986) (the Texas Open Meetings Act . . . never permits a body to meet without posting the subject matter to be discussed.”)

Again, Texas counties are required to literally comply with the Texas Open Meetings Act otherwise making such governmental body actions associated with such violations to be void. Tex. Gov. Code § 551.141 (An action taken by a governmental body in violation of this chapter is voidable); *Sikes v. Global Marine, Inc.* 881 F.2d 176, 178 (5th Cir. 1987) (although void and voidable both deal with transactions or occurrences that were not valid when they occurred, the distinction between them is that if the transaction is absolutely void it can never become valid. . . . The important point is that both words deal with events that were invalid when they occurred.). *Matter of Gober*, 100 F.3d 1195, 1202 (5th Cir. 1996) *citing Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) (commenting that Texas' use of the term "void" and "voidable" is a term of procedure in that a judgment that is void is subject to both direct and collateral attack while the judgment that is voidable is subject only to direct attack and must be corrected through ordinary appellate or other direct procedures"); *In re Pierce*, 272 B.R. 198, 203 (Bankr. S.D. Tex. 2001) (the argument over void or voidable is largely academic as a substantive matter because "both federal and state law hold that an action taken in violation . . . is without effect . . . "). It is important to remember that even with Petitioners' numerous formal advisements of such violations, the Respondents made no efforts to cure or ask for relief from the Federal District Court in order to make a cure.

Respondents' continual and intentional violations of the public notification requirements resulted in all of Respondents' actions taken regarding the current

litigation to be void as a matter of law including the retainment of counsel along with said counsels' court filings. *Smith Cnty. v. Thornton*, 726 S.W.2d 2, 3 (Tex. 1987) (holding that a county's failure to comply with the Texas Open Meetings Act regarding public notification results in that county's subsequent actions to be void); *Borne v. River Parishes Hospital, L.L.C.*, 548 F. App'x 954, 957 (5th Cir. 2013) (commenting that "a void judgment is one which, from its inception, was a complete nullity and without legal effect").

Again, both Respondent Texas counties failed to comply with the above public notice mandates including the retainment of counsel even after being placed on formal notice about such deficiencies. Respondents continued to refuse to cure such violations. Respondents' failures to comply resulted in Respondents' actions of obtaining legal counsel including the actions of such legal counsel to be unquestionably void as a matter of law. With this said, it is clear that all Federal District Court filings made by Respondents' retained counsel were likewise as a matter of law void thus preventing jurisdiction by the Federal District Court to rule on Respondents' Rule 12(b) Motions to Dismiss.

Federal District Court Lacked Jurisdiction to Rule on 12(b) Motions

As records reflect, Respondents' intentional, knowing, and continual disregard of the mandatory public notification requirements resulted in all of Respondents' legal actions including those legal actions taken

by Respondents' counsel to be void as a matter of law thus preventing the Federal District Court from acquiring jurisdiction to rule on Respondents' Rule 12(b) Motions to Dismiss let alone any other Court filings. An untimely or unacceptable answer is a nullity without legal effect. *Directv, Inc. v. Young*, 195 F. App'x 212, 215 (5th Cir. 2006) (It is well established that the Court has the power to strike an untimely answer). The Federal District Court could only rule on a motion that was before it. However, if such motion does not exist as a matter of law, then that Court has no jurisdiction before it. *Egle v. Egle*, 679 F.2d 380 (5th Cir. 1982) (Appellate Court questioning its own jurisdiction since the District Court having venue over the Panama Canal no longer existed); *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987) (The Court must examine the basis of its jurisdiction when considering a filing); *U.S. v. Key*, 205 F.3d 773 (5th Cir. 2000) ("However, in the present context, we have no jurisdiction to review the Respondent's motion on the merits as the District Court was without power to rule on it."); *Hernandez v. Siemens Corp.*, Civ. SA-16-CV-539-XR (W.D. Tex. Oct. 17, 2016) ("The Court cannot grant or deny a motion that it does not have"). State procedural requirements can prevent Federal District Courts from obtaining jurisdiction over a certain matter. *Villegas v. Johnson*, 184 F.3d 467 (5th Cir. 1999) (Federal Courts routinely defer to state procedural requirements . . .); *Matthews v. Davis*, 665 F. App'x 315 (5th Cir. 2016) ("ordinarily, such a failure to satisfy state procedural requirements would have resulted in a procedural default of his federal claim as well"); *Stewart v. Entergy Corp.*, 35 F.4th

930, 936 (5th Cir. 2022) (holding that state requirements bar federal jurisdiction over claims).

Finally, it is important to note that the issue of jurisdiction cannot be waived. *In re Gee*, 941 F.3d 153 (5th Cir. 2019) (a District Court is obligated to consider a challenge to its jurisdiction and thus is non-discretionary).

Again, Respondents' retainment of counsel was void as a matter of law therefore making all actions of said counsel likewise void thereby not vesting jurisdiction with the Federal District Court to consider such filings including Respondents' Rule 12(b) Motions to Dismiss. *United States v. Early*, 27 F.3d 140, 141-42 (5th Cir. 1994); *United States v. Dickson*, 403 F. App'x 931 (5th Cir. 2010) (the filing of a motion for which relief was not possible as a matter of law made such filing a "meaningless, un-authorized motion" that is properly denied by a District Court).



CONCLUSION

For the foregoing reasons, the Petition for Rehearing should be granted.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Pursuant to Rule 44.2, Counsel certifies that the Petition is restricted to the grounds specified in the Rule with substantial grounds not previously presented. Counsel certifies that this Petition is presented in good faith and not for delay.

/s/

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