United States Court of Appeals
for the Fifth Circuit

No. 19-11327

DIANE SCOTT HADDOCK,

Plaintiff—Appellant,

versus

TARRANT COUNTY, TEXAS; PATRICIA BACA-BENNETT; KENNETH EARL NEWELL; JESUS NEVAREZ; JR.; HONORABLE JUDITH WELLS; JEROME S. HENNIGAN; JAMES B. MUNFORD; ALEX KIM,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CV-817

Before CLEMENT, HO, and DUNCAN, *Circuit Judges*.

JUDGMENT

(Filed May 18, 2021)

This cause was considered on the record on appeal and was argued by counsel.

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

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

REVISED

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versus

TARRANT COUNTY, TEXAS; PATRICIA BACA-BENNETT; KENNETH EARL NEWELL; JESUS NEVAREZ; JR.; HONORABLE JUDITH WELLS; JEROME S. HENNIGAN; JAMES B. MUNFORD; ALEX KIM,

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EDITH BROWN CLEMENT, *Circuit Judge*:*

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* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

We withdraw our prior opinion in this case and substitute this revision. Appellant Diane Haddock sued the seven district judges of Tarrant County's family law courts (the "District Judges") in their official capacities, District Judge Patricia Baca-Bennett in her personal capacity, and the County under 42 U.S.C. § 1983, alleging that she was fired for refusing to support a political candidate and for her husband's political activity. Holding that Haddock was both a policymaking and confidential employee lawfully subject to patronage termination, the district court dismissed her suit. We AFFIRM.[1]

I. Facts and Proceedings

Tarrant County family courts are presided over by seven elected district judges, who, in turn, are assisted by seven appointed associate judges. Haddock was an associate judge for nearly twenty years. Because they serve more than one district judge, Texas law requires Tarrant County associate judges be appointed with the unanimous approval of the district judges; they can be removed, however, by a majority vote. Tex. Fam. Code §§ 201.001(d), 204(b).

In 2016, Haddock and fellow associate judge James Munford indicated interest in running for a district judge position. It was believed they would run against one another for the 322nd district seat. Around the same time, the grandparents of a child who died while in her mother's custody—after Haddock had

[1] Judge Ho concurs in the judgment.

signed the order giving the mother custody—circulated claims that Haddock had mishandled the case, going so far as to allege that she had taken a bribe.[2] Munford's wife allegedly repeated these harsh allegations publicly, presumably to gain political advantage for her husband. Haddock decided not to run, but she and her husband do not appear to have reconciled with Munford and his wife.

During the campaign, although Haddock herself allegedly did not engage in any overt political activity, her husband campaigned against Munford. Mr. Haddock and a political group with which he was associated accused Munford of being a "RINO" (Republican In Name Only), violating the Second Amendment by signing protective orders requiring litigants to surrender their firearms on inadequate evidence, physically abusing and sexually assaulting his first wife, and terrifying his current wife by threatening her and a male friend of hers with a gun.

District Judge Patricia Baca-Bennett, who supported Munford's candidacy, allegedly sought to put a stop to Mr. Haddock's opposition by demanding that Haddock publicly support Munford and "get her husband under control." Haddock refused to do either. Baca-Bennett allegedly subjected Haddock to "badgering, threats, back-biting, undermining and maligning, and a campaign to orchestrate the termination of [Haddock's] employment." She also allegedly sought to

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[2] We are aware of no evidence whatsoever that supports this allegation.

intimidate Haddock's husband by reminding him "who Diane works for" and spread rumors about Haddock resigning that "undermined [Haddock's] authority as a judge."[3]

During the campaign, Haddock also learned that the district judge for her own District 233 was retiring. Kenneth Newell won the Republican primary (he then ran unopposed, meaning he knew then that he would become District 233's district judge), so he spoke with Haddock about her future as the District 233 associate judge. He indicated that he was concerned about the political situation and had "not made a decision about what to do with" Haddock.

Following unsuccessful complaints to Tarrant County's human resources department, Haddock eventually sued Baca-Bennett and Tarrant County for subjecting her to a hostile work environment in retaliation for her husband's political activity and her own refusal to support Munford. Fewer than ninety days later, she was terminated by a majority of the seven district judges, including Newell. She amended her complaint to address her termination, add the District Judges in their official capacities as defendants, and demand reinstatement or front pay in lieu thereof.

The district court dismissed Haddock's claims for money damages against the District Judges in their

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[3] We express no opinion whether these allegations against Baca-Bennett, if true, violate Texas's Code of Judicial Conduct. *See* TEX. GOV'T CODE ANN., tit. 2 subtit. G app., Canons 2B, 3C(1), 5(2).

official capacity under Rule 12(b)(1), holding that the suit is barred by the Eleventh Amendment because the District Judges are state officials, meaning "the state was the real, substantial party in interest," and the state has not waived sovereign immunity. *See Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011) (cleaned up). Haddock does not appeal this ruling.

The district court also dismissed Haddock's claim for injunctive relief against the District Judges under Rule 12(b)(6). The First Amendment generally prohibits adverse employment actions against government employees based on political affiliation, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), but, where "an employee's private political beliefs would interfere with the discharge of [her] public duties, [her] First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency," *Branti v. Finkel*, 445 U.S. 507, 517 (1980). Sometimes called the *Elrod/Branti* exception, this maxim most often applies to employees in policymaking or confidential positions.

Finding that Haddock's position involved both policymaking and confidential relationships with the District Judges and, "[t]herefore, an associate judge's political ideology, associations, and activities may rationally influence a district judge's assessment of the individual's suitability for a position as an associate judge," the district court held that she had failed to state a claim on which relief could be granted against the District Judges and dismissed Haddock's demands for injunctive relief under Rule 12(b)(6). *Haddock P.*

Tarrant Cnty., No. 4:18-cv-00817-O, 2019 WL 7944073, at *7–8 (N.D. Tex. Sept. 11, 2019).

The district court dismissed all claims against Tarrant County under Rule 12(b)(6), both because Haddock had failed to allege an underlying constitutional violation and because she had failed to allege a county policy or policymaker that caused the alleged violation. Finally, the district court dismissed all claims against Baca-Bennett under Rule 12(b)(6) on the basis of qualified immunity. Haddock timely appealed.

II. Standard of Review

We review a dismissal on the pleadings under Rules 12(b)(1) or 12(b)(6) de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Wolcott P. Sebelius*, 635 F.3d 757, 762–63 (5th Cir. 2011) (citation omitted). "Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id*. at 763 (cleaned up).

III. Discussion

A.

Haddock argues on appeal that the district court erred in applying the *Elrod/Branti* exception to her First Amendment claims because she claims that she is neither a policymaker nor a confidential employee.

She also argues that her intimate association claim (allegedly, Baca-Bennett retaliated against Haddock for *her husband's* speech, not her own) is—categorically—not subject to the *Elrod/Branti* exception. We disagree.

Haddock also argues that the Supreme Court's balancing test in *Pickering v. Board of Education*, 391 U.S. 563 (1968), would be more appropriate than an *Elrod/Branti* analysis. We need not analyze this argument in any great depth; where the Government's interest in political loyalty is weighed against an employee's First Amendment interests, the tests frequently merge. *See Maldonado v. Rodriguez*, 932 F.3d 388, 392 (5th Cir. 2019) ("This court's decisions have melded the Supreme Court's discussion of these principles in *Branti v. Finkel* with the broader but similar *Pickering–Connick* test."). Generally speaking—and applicable here—if the *Elrod/Branti* exception applies, the *Pickering* analysis is also concluded.

We also note that the test, strictly speaking, is not about whether an employer is a policymaker or confidential employee. "[R]ather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. That said, "where a public employee . . . occupies a confidential or policymaking role, the employer's interests more easily outweigh the employee's First Amendment rights." *Maldonado*, 932 F.3d at 392 (alteration in original) (quoting *Gentry v. Lowndes Cnty.*, 337 F.3d 481, 486 (5th Cir. 2003)).

(1)

Haddock was a confidential employee. "A government employee may be 'confidential' 'if he or she stands in a confidential relationship to the policymaking process, e.g., as an advisor to a policymaker, or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations, e.g., as a private secretary to a policymaker.'" *Garza P. Escobar*, 972 F.3d 721, 729 (5th Cir. 2020) (quoting *Maldonado*, 932 F.3d at 393). If a superior official would be unable to carry out her duties as efficiently or to delegate sensitive tasks when she did not feel she could trust an employee to keep her confidences, that is likely a confidential employee.

Associate judges are "privy to confidential"—and, given the nature of family law matters, often extremely sensitive—"litigation materials and internal court communications in the discharge of [their] duties, and further maintain[] a personal confidential relationship with the judge(s) which [they] serve[]." *Mumford P. Basinski*, 105 F.3d 264, 272 (6th Cir. 1997). Whether in private conversation with district judges or in writing when they "resolve[] a dispute in the court's name or recommend[] a disposition to a judge," the associate judges serve as advisors and confidants to the district judges, aiding them in the execution of their duties. *Id*.

Haddock argues that she cannot be a confidential employee because seven associate judges working for seven district judges results in "forty-nine independently developing working relationships"—too

many relationships, she argues, to implicate the sort of close, personal relationships characteristic of confidential employees. First, Haddock's math is misguided—this case has nothing to do with her relationships with the other associate judges. Only seven working relationships are relevant—between Haddock and her superiors, the district judges. We suspect all of our twenty-five colleagues on this court would agree that judges can reasonably be expected to maintain at least seven close, yet professional working relationships.

Second, this numerical argument is firmly foreclosed by precedent. *See, e.g.*, *Gentry*, 337 F.3d at 486 ("[I]f a public employee's loyalty is owed to a [five-]member governing board, he cannot choose political favorites or enemies among the board because shifting coalitions or electoral victories may too easily render the employee's decisions, made in accord with personal preference, at odds with the board majority view."); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996 (5th Cir. 1992) (en banc) (school superintendent's loyalty may be required by a *seven-member* school board).

Further, Haddock's pled facts—which at this stage, we must presume to be true—make clear that the associate judges and district judges developed close, personal relationships that involved the exchange of confidences, including on politically sensitive and policy-oriented topics. Haddock discussed electoral politics and her own prospective campaign with District Judge William Harris—her supervising District 233 judge prior to Newell's election. She ultimately decided not to run for office based, in part, on his advice.

We also know that Newell replaced Haddock with a close associate (the friend who "emceed" his investiture).

Our colleagues on the Seventh Circuit note that, where personal interactions are an important part of the work environment, "[p]olitical animosity . . . can in practice create a hostile work environment where face to face contact and cooperation are essential," in some cases harming the efficiency of the office. *See Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985). This is precisely what happened here. Haddock alleges that she accused Baca-Bennett of unethical judicial conduct—specifically, "violat[ing] the canons governing active judges"—by openly campaigning for Munford. The Haddocks and Munfords lobbed vitriolic campaign rhetoric at each other that might have made the Hatfields and McCoys blush—the allegations ranged from sexual assault and other domestic violence to taking bribes and leaving a child to die in an unsafe home.

Although Haddock alleged that "all seven associate judges serve all seven district judges," it's difficult to imagine a healthy working relationship between Haddock and at least two of the judges, which, all else being equal, makes her a less effective employee than an associate judge who can work amicably with all seven. Haddock also alleges that Baca-Bennett's role in the dispute "undermine[d] respect for [Haddock's] judicial authority," which presumably impacted Haddock's effectiveness on the bench, even when serving the remaining five judges.

Ultimately, although Haddock alleges she believed Newell otherwise wished to retain her, she was left with the impression that he felt "she would be difficult to keep despite her qualifications due to the political situation." In short, Haddock was a confidential employee to all seven district judges due to the close and personal working relationships associate judges have with the district judges. The district judges were free to terminate Haddock's employment in connection with a political dispute that disrupted Tarrant County family court operations. *See Simasko P. Cnty. of St. Clair*, 417 F.3d 559, 562–63 (6th Cir. 2005) (holding that a confidential employee may lawfully be terminated for remaining neutral in his supervisor's campaign and refusing to try to curtail his brother's public support for his supervisor's opponent "however misguided and vindictive that action may" be). The *Elrod/Branti* exception is not about labels like "policymaker" or "confidential," but about preventing precisely this type of disruption.

Thus, we hold that Haddock was a confidential employee under *Elrod/Branti*.[4]

(2)

Next, Haddock argues that some of the specific First Amendment rights upon which she bases her claims cannot be subject to *Elrod/Branti* analysis.

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[4] We need not address whether Haddock was also a policymaker under the *Elrod/Branti* exception because we hold that she was a confidential employee.

Specifically, she argues that *Elrod/Branti* may apply to reprisals for an employee who actively campaigns against her superior, but—because the speech at issue was her husband's, not her own (she, allegedly, refused to campaign for or against anyone)—she is being punished for her association with her spouse and for refusing to campaign. In other words, Haddock argues that the First Amendment rights of intimate association and freedom from compelled speech should not be subject to the *Elrod/Branti* exception.

Our precedent firmly establishes that *Elrod/Branti* applies to refusal to speak. *See, e.g.*, *Stegmaier v. Trammell*, 597 F.2d 1027, 1040 (5th Cir. 1979), (holding confidential employee could be discharged for failing to support elected officeholder's candidacy under *Elrod*). We also join the unanimous opinion of our sister Circuits in holding that intimate association claims can be subjected to *Elrod/Branti* analysis, *see, e.g.*, *Simasko v. Cnty. of St. Clair*, 417 F.3d 559 (6th Cir. 2005); *McCabe v. Sharrett*, 12 F.3d 1558, 1572 (11th Cir. 1994); *Soderbeck v. Burnett Cnty.*, 752 F.2d 285 (7th Cir. 1985) (Posner, J.), and extend our own precedent holding that a confidential employee may be terminated for personal and political associations, *see Soderstrum v. Town of Grand Isle*, 925 F.2d 135 (5th Cir. 1991), to the intimate association context.

We must address two key distinctions between the present case and *Soderstrum*. First, in *Soderstrum* the plaintiff had "unambiguously expressed her lack of confidence in the incoming official and her unwillingness to work in the new administration." 925 F.2d at

141. Here, at least per Haddock's allegations, Haddock had expressed no such unwillingness or opposition. This distinction, while interesting, is not crucial. The dispositive fact in *Soderstrum* was that the plaintiff "served in a position of confidence requiring complete loyalty to the police chief," and that the newly elected chief doubted her loyalty—that she had explicitly given him reason to doubt her loyalty (beyond her association with the outgoing police chief) merely reinforced the point that the defendant's doubts were reasonable. *Id*. at 140.

Second, the association at issue in *Soderstrum* was a personal and political relationship. Here, Haddock alleges that she was fired for intimate association with her spouse, which she argues should be a more carefully protected relationship. We need not decide the quantum of difference, if any, between the protections afforded different types of relationships because we join every other Circuit to have considered the issue in holding that *Elrod/Branti* also applies to intimate association claims. The Eleventh Circuit's opinion in *McCabe v. Sherrett* is instructive.

The *McCabe* court held that an elected police chief could demote his confidential secretary to a non-confidential position because she was married to one of his officers. *McCabe* did not involve *any* allegations that the plaintiff had campaigned against the new police chief or had *ever* violated his trust. To the contrary, "[e]vidence produced by both parties demonstrate[d]" that the plaintiff "actually breached no confidences during the brief period she served as" the defendant's

secretary, there was no reason to believe she had ever breached the prior chief's confidences, and the odds of her ever doing so "may not have been overwhelming." *McCabe*, 12 F.3d at 1572–73 & n.17. Nonetheless, her job required her to have access to the chief's confidential communications, including communications about personnel complaints and officer discipline. If there were a complaint against her husband or one of his colleagues, she would see it first. The *McCabe* court reasoned that "[i]t is a matter of common experience that spouses tend to possess a higher degree of loyalty to their marital partners than to their superiors, and often discuss workplace matters with one another, even matters that a superior has designated as confidential." *Id*. at 1572. The elected official was uncomfortable "having the wife of an officer under [his] command function[ ] as [his] confidential Executive Secretary," for fear (based on nothing more than the fact of her marriage to her husband) that her loyalty would be elsewhere, so he was constitutionally permitted to demote her. *Id*.

Similarly, there is no evidence that Haddock had ever breached the District Judges' confidence or prioritized her loyalty to her husband over her duty of confidentiality as an associate judge. We engage in no presumption that she was likely to do so. *See* TEX. GOV'T CODE ANN., tit. 2, subtit. G app., Canon 2B ("A judge shall not allow any relationship to influence judicial conduct or judgment."). However, we recognize that, as "a matter of common experience," *McCabe*, 12 F.3d at 1572, it was not unreasonable for

the District Judges to worry that spousal loyalty might interfere with their ability to "expect, without question, undivided loyalty" from their confidential employee, *Stegmaier*, 597 F.2d at 1040. Combined with the fact that "we do not require employers to wait until their office is disrupted before taking action," that the District Judges lost confidence in Haddock's undivided loyalty—even in the absence of any breach of trust by Haddock—is sufficient for them constitutionally to terminate her employment. *Garza*, 972 F.3d at 732.

By the nature of the spousal relationship, an elected official may reasonably worry that they will not receive the undivided loyalty to which they are entitled from their confidential employees, so we recognize that the *Elrod/Branti* exception may extend to intimate association claims. Haddock was in a confidential role, and, under the *Elrod/Branti* exception, could constitutionally be discharged for the exercise of rights that would otherwise by protected by the First Amendment.[5]

B.

Haddock alleges that the district court erred by dismissing her claims against Tarrant County. Although Tarrant County, as a municipal entity, can be

[5] To the extent we have not explicitly addressed any of Haddock's claims, such as her freedom of petition claim based on filing this suit, our holding that she is a confidential employee suffices to affirm dismissal of *all* Haddock's First Amendment claims.

held liable under § 1983 when an "action pursuant to official municipal policy of some nature caused a constitutional tort," it "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). For municipal liability to attach, a plaintiff must prove "three elements: a policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 166 (5th Cir. 2010) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001)).

As explained above, because the *Elrod*/*Branti* exception applies to Haddock's claims, she has failed to plead a constitutional violation. We therefore do not need to examine whether she has pled a county policymaker or official policy. The district court correctly dismissed Haddock's claims against Tarrant County.

C.

Haddock also takes issue with the district court's holding that Baca-Bennett has qualified immunity. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (cleaned up). These questions can be answered in either order. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

As explained above, Baca-Bennett did not violate Haddock's constitutional rights; this is enough for Baca-Bennett to be entitled to qualified immunity. Even if Haddock's rights *had* been violated, however, Baca-Bennett certainly did not have "fair warning that [her] conduct violate[d] a constitutional right." *Clarkston P. White*, 943 F.3d 988, 993 (5th Cir. 2019) (quoting *Delaughter P. Woodall*, 909 F.3d 130, 140 (5th Cir. 2018)). Closely on-point authority from our sister Circuits indicated that the *Elrod/Branti* exception applies to positions very much like Haddock's. *See, e.g.*, *Mumford*, 105 F.3d 264. Baca-Bennett is entitled to qualified immunity.

IV. CONCLUSION

The district court correctly held that Haddock, as a confidential employee, was subject to the *Elrod/Branti* exception, and had therefore failed to allege a constitutional violation.

AFFIRMED.

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TARRANT COUNTY, TEXAS; PATRICIA BACA-BENNETT; KENNETH EARL NEWELL; JESUS NEVAREZ; JR.; HONORABLE JUDITH WELLS; JEROME S. HENNIGAN; JAMES B. MUNFORD; ALEX KIM,

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EDITH BROWN CLEMENT, *Circuit Judge*:

Appellant Diane Haddock sued the seven district judges of Tarrant County's family law courts (the "District Judges") in their official capacities, District Judge Patricia Baca-Bennett in her personal capacity, and the County under 42 U.S.C. § 1983, alleging that she

was fired for refusing to support a political candidate and for her husband's political activity. Holding that Haddock was both a policymaking and confidential employee lawfully subject to patronage termination, the district court dismissed her suit. We AFFIRM.

I. Facts and Proceedings

Tarrant County family courts are presided over by seven elected district judges, who, in turn, are assisted by seven appointed associate judges. Haddock was an associate judge for nearly twenty years. Because they serve more than one district judge, Texas law requires Tarrant County associate judges be appointed with the unanimous approval of the district judges; they can be removed, however, by a majority vote. Tex. Fam. Code §§ 201.001(d), 204(b).

In 2016, Haddock and fellow associate judge James Munford indicated interest in running for a district judge position. It was believed they would run against one another for the 322nd district seat. Around the same time, the grandparents of a child who died while in her mother's custody—after Haddock had signed the order giving the mother custody—circulated claims that Haddock had mishandled the case, going so far as to allege that she had taken a bribe.[1] Munford's wife allegedly repeated these harsh allegations publicly, presumably to gain political advantage for her husband. Haddock decided not to run, but she

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and her husband do not appear to have reconciled with Munford and his wife.

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become District 233's district judge), so he spoke with Haddock about her future as the District 233 associate judge. He indicated that he was concerned about the political situation and had "not made a decision about what to do with" Haddock.

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II. Standard of Review

We review a dismissal on the pleadings under Rules 12(b)(1) or 12(b)(6) de novo, "accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiffs." *Wolcott v. Sebelius*, 635 F.3d 757, 762–63 (5th Cir. 2011) (citation omitted). "Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* at 763 (cleaned up).

III. Discussion

A.

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We also note that the test, strictly speaking, is not about whether an employer is a policymaker or confidential employee. "[R]ather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. That said, "where a public employee . . . occupies a confidential or policymaking role, the employer's interests more easily outweigh the employee's First Amendment rights." *Maldonado*, 932 F.3d at 392 (alteration in original) (quoting *Gentry v. Lowndes Cnty.*, 337 F.3d 481, 486 (5th Cir. 2003)).

(1)

Haddock's pleadings, combined with Texas law, make clear that she is a policymaker subject to the *Elrod/Branti* exception, and political affiliation is relevant to her qualification for the associate judge position.

The reason the *Elrod/Branti* exception typically applies to policymakers is that such employees are uniquely positioned to frustrate the policy agendas of the elected officials for whom they work. As our colleagues on the Seventh Circuit have explained, "it

would undermine the democratic process to hold that the winners at the polls may not employ those committed to implementing their political agenda." *Kurowski v. Krajewski*, 848 F.2d 767, 770 (7th Cir. 1988).

"Policymakers are 'public employees whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors.'" *Garza v. Escobar*, 972 F.3d 721, 729 (5th Cir. 2020) (quoting *Aucoin v. Haney*, 306 F.3d 268, 273 (5th Cir. 2002)). "An employee with responsibilities that are not well defined or are of broad scope more likely functions in a policymaking position." *Stegmaier v. Trammell*, 597 F.2d 1027, 1033 (5th Cir. 1979).

Haddock argues that judges, categorically, cannot be policymakers because they merely apply the law to the facts of a case. Although we appreciate this aspirational view of the judiciary generally, both the structure of the judiciary in Texas and Haddock's pleadings refute this argument.

Haddock relies heavily on a case recently reversed by the Supreme Court, in which the Third Circuit held that "a judicial officer, whether appointed or elected, is not a policymaker." *See Adams v. Governor of Del.*, 922 F.3d 166 (3d Cir. 2019), *rev'd sub. nom. Carney v. Adams*, 141 S. Ct. 493 (2020) (reversing on standing grounds without comment on whether judges are

policymakers). *Adams* is unpersuasive for reasons beyond its reversal.

First, the categorical pronouncement was mere dicta; the context of the case was Delaware's constitutional structure, which *required* consideration of political party when appointing judges. This structure itself, the Third Circuit reasoned, demonstrated "that political loyalty is not an appropriate job requirement for Delaware judges" because it required the Governor to occasionally "nominate judges who belong to a different political party." *Id.* at 179. In contrast, the Texas constitution leaves the selection of judges to the electorate, with no requirement or expectation that voters ever knowingly select a judge with whom they disagree.

Second, we are guided by the unanimous opinion of our colleagues on other Circuits that judicial officers can be (and often are) policymakers. *See*, *e.g.*, *Mumford v. Basinski*, 105 F.3d 264, 272 (6th Cir. 1997) (family law referee's "political ideology, associations, and activities may rationally influence a judge's assessment of an individual's suitability for a position as his referee"); *Kurowski*, 848 F.2d at 770 ("A judge both makes and implements governmental policy. A judge may be suspicious of police or sympathetic to them, stern or lenient in sentencing, and political debates rage about such questions."); *cf. Hawkins v. Steingut*, 829 F.2d 317, 318 (2d Cir. 1987) (granting qualified immunity for dismissal of Workers' Compensation referee "referred to by the Board as 'Workers' Compensation Law judges' "). Particularly where, as here, judges are

elected based on both personal and political qualifications, we see no reason why they or their appointees should be categorically excluded as policymakers. In Texas, as "[i]n most states[,] judges are elected, implying that the office has a political component." *Kurowski*, 848 F.2d at 770.

Finally, the specific facts of this case illustrate that the associate judge position was a policymaking role. The Sixth Circuit's opinion in *Mumford* is particularly illuminating. Mumford was a Domestic Relations Court referee, with authority to "conduct [] hearings on the matters referred to him, [] issu[e] [] subpoenas, [] swear[] and examin[e] [] witnesses, . . . promulgat[e] [] evidentiary rulings and . . . [enter] certain pretrial, discovery, temporary restraining, and other orders necessary to regulate the proceedings, all without judicial ratification." *Mumford*, 105 F.3d at 272.

Similarly, once a case is referred to a Tarrant County associate judge, they can hear "any aspect of a suit over which the court has jurisdiction . . . including any matter ancillary to the suit."[2] TEX. FAM. CODE

[2] This includes the authority to: conduct hearings, hear and rule on admissibility of evidence, compel production of relevant evidence, issue a summons for the appearance of a witness, examine a witness, swear a witness for a hearing, make findings of fact, formulate conclusions of law, recommend an order, regulate all proceedings in a hearing before them, order the attachment of a witness or party who fails to obey a subpoena, order detention of a witness or party found guilty of contempt, and render and sign a final order agreed to in writing by the parties, a final default order, a temporary order, or a final order in a case in which the parties have waived hearing. TEX. FAM. CODE § 201.007.

§ 201.005(a). Most of an associate judge's decisions are subject to de novo review by the presiding district judge, but associate judges can also issue final orders in cases in which the parties have waived the right to a de novo hearing. TEX. FAM. CODE § 201.007. Even where a party requests de novo review, an associate judge's orders remain in full effect unless and until they are reversed. TEX. FAM. CODE § 201.013. Like the referees in *Mumford*, Tarrant County associate judges "effectively make[] policy for, or suggest[] policy to, the court on each occasion that [they] resolve[] a dispute in the court's name or recommend[] a disposition to a judge." 105 F.3d at 272. There can be no question that Haddock was entrusted with the type of broad discretion that paradigmatically characterizes a policymaker.

More crucially, Haddock's complaint shows that the policymaking functions of an associate judge were directly relevant during judicial elections. Munford's performance as an associate judge—including degree of party fealty (whether he was a "RINO") and attitude toward political hot-button topics like gun rights—were key campaign issues. Haddock, by her own allegations, was fired at least in part (if not entirely) because of her husband's speech on those specific topics. Haddock herself had planned to run for a district judgeship until controversy over her own decision-making as an associate judge led her to drop out of the race.

As the Sixth Circuit explained, "judges are policymakers because their political beliefs influence and

dictate their decisions on important jurisprudential matters." *Newman v. Voinovich*, 986 F.2d 159, 163 (6th Cir. 1993). Judicial temperament (for example, willingness to issue protective orders) is directly relevant to the job of Tarrant County family court associate judges and is an important aspect of the political qualifications—and electoral fortunes—of the district judges they represent. Haddock herself notes the importance of associate judges understanding and respecting what she terms district judge's "preferences." For example, one "district judge will nearly always order a batterer's intervention course. Another will almost never order a social study in child custody cases."

The voters of Tarrant County should not have to wonder whether the district judges they elect will be able to carry out the will of the electorate without constant oversight of their associate judges. Instead, district judges are entitled to select associate judges they trust to carry out their policy preferences. Haddock was a policymaker, so, to the extent that her claims are premised on perceived political disloyalty—whether because she refused to support Munford, was believed to agree with her husband's anti-Munford advocacy, or for whatever other reason—her termination was constitutional under the *Elrod/Branti* doctrine.

(2)

Haddock was also a confidential employee. "A government employee may be 'confidential' 'if he or she stands in a confidential relationship to the

policymaking process, e.g., as an advisor to a policymaker, or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations, e.g., as a private secretary to a policymaker.' " *Garza*, 972 F.3d at 729 (quoting *Maldonado*, 932 F.3d at 393). If a superior official would be unable to carry out her duties as efficiently or to delegate sensitive tasks when she did not feel she could trust an employee to keep her confidences, that is likely a confidential employee.

Associate judges are "privy to confidential"—and, given the nature of family law matters, often extremely sensitive—"litigation materials and internal court communications in the discharge of [their] duties, and further maintain[ ] a personal confidential relationship with the judge(s) which [they] serve[ ]." *Mumford*, 105 F.3d at 272. Whether in private conversation with district judges or in writing when they "resolve[ ] a dispute in the court's name or recommend[ ] a disposition to a judge," the associate judges serve as advisors and confidants to the district judges, aiding them in the execution of their duties. *Id.*

Haddock argues that she cannot be a confidential employee because seven associate judges working for seven district judges results in "forty-nine independently developing working relationships"—too many relationships, she argues, to implicate the sort of close, personal relationships characteristic of confidential employees. First, Haddock's math is misguided—this case has nothing to do with her relationships with the other associate judges. Only seven working

relationships are relevant—between Haddock and her superiors, the district judges. We suspect all of our twenty-five colleagues on this court would agree that judges can reasonably be expected to maintain at least seven close, yet professional working relationships.

Second, this numerical argument is firmly foreclosed by precedent. *See*, *e.g.*, *Gentry*, 337 F.3d at 486 ("[I]f a public employee's loyalty is owed to a [five-]member governing board, he cannot choose political favorites or enemies among the board because shifting coalitions or electoral victories may too easily render the employee's decisions, made in accord with personal preference, at odds with the board majority view."); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996 (5th Cir. 1992) (en banc) (school superintendent's loyalty may be required by a *seven-member* school board).

Further, Haddock's pled facts—which at this stage, we must presume to be true—make clear that the associate judges and district judges developed close, personal relationships that involved the exchange of confidences, including on politically sensitive and policy-oriented topics. Haddock discussed electoral politics and her own prospective campaign with District Judge William Harris—her supervising District 233 judge prior to Newell's election. She ultimately decided not to run for office based, in part, on his advice. We also know that Newell replaced Haddock with a close associate (the friend who "emceed" his investiture).

Our colleagues on the Seventh Circuit note that, where personal interactions are an important part of the work environment, "[p]olitical animosity . . . can in practice create a hostile work environment where face to face contact and cooperation are essential," in some cases harming the efficiency of the office. *See Meeks v. Grimes*, 779 F.2d 417, 423 (7th Cir. 1985). This is precisely what happened here. Haddock alleges that she accused Baca-Bennett of unethical judicial conduct—specifically, "violat[ing] the canons governing active judges"—by openly campaigning for Munford. The Haddocks and Munfords lobbed vitriolic campaign rhetoric at each other that might have made the Hatfields and McCoys blush—the allegations ranged from sexual assault and other domestic violence to taking bribes and leaving a child to die in an unsafe home.

Although Haddock alleged that "all seven associate judges serve all seven district judges," it's difficult to imagine a healthy working relationship between Haddock and at least two of the judges, which, all else being equal, makes her a less effective employee than an associate judge who can work amicably with all seven. Haddock also alleges that Baca-Bennett's role in the dispute "undermine[d] respect for [Haddock's] judicial authority," which presumably impacted Haddock's effectiveness on the bench, even when serving the remaining five judges.

Ultimately, although Haddock alleges she believed Newell otherwise wished to retain her, she was left with the impression that he felt "she would be difficult to keep despite her qualifications due to the political

situation." In short, the political dispute disrupted Tarrant County family court operations, caused several of the elected district judges to lose faith in Haddock's ability to do her job, impeded Haddock's ability to assert her authority in court, and compromised her trustworthiness as an employee in the eyes of at least two of the seven district judges she was duty-bound to serve. The *Elrod*/*Branti* exception is not about labels like "policymaker" or "confidential," but about preventing precisely this type of disruption.

(3)

Finally, Haddock argues that some of the specific First Amendment rights upon which she bases her claims cannot be subject to *Elrod*/*Branti* analysis. Specifically, she argues that *Elrod*/*Branti* may apply to reprisals for an employee who actively campaigns against her superior, but—because the speech at issue was her husband's, not her own (she, allegedly, refused to campaign for or against anyone)—she is being punished for her association with her spouse and for refusing to campaign. In other words, Haddock argues that the First Amendment rights of intimate association and freedom from compelled speech should not be subject to the *Elrod*/*Branti* exception.

Our precedent firmly establishes that *Elrod*/*Branti* applies to refusal to speak. *See*, *e.g.*, *Stegmaier*, 597 F.2d at 1030, 1040 (holding confidential employee could be discharged for failing to support elected officeholder's candidacy under *Elrod*). A policymaker who

refuses to endorse a winning candidate may be discharged as readily as one who endorses a loser.

We also join the unanimous opinion of our sister Circuits in holding that intimate association claims can be subjected to *Elrod/Branti* analysis. *See*, *e.g.*, *Simasko v. Cnty. of St. Clair*, 417 F.3d 559 (6th Cir. 2005); *McCabe v. Sharrett*, 12 F.3d 1558, 1572 (11th Cir. 1994); *Soderbeck v. Burnett Cnty.*, 752 F.2d 285 (7th Cir. 1985) (Posner, J.). There may be reason to doubt the effectiveness of either policymaking or confidential employees when they are intimately associated with an elected official's political opponents.

Haddock refused to endorse Munford and indicated that she would take *no* action to curtail her husband's campaigning. Her husband spent (or was believed by Baca-Bennett to have spent) between $30,000 and $300,000 campaigning against Munford. Haddock's husband appears to have campaigned against Munford, at least in part, as a form of retaliation for Munford's wife's campaign against Haddock. When a policymaker refuses to endorse a candidate, her spouse spends or is believed to have spent a large sum of money opposing the candidate, and there is reason to believe the policymaker shares her spouse's animosity based on personal history, it is reasonable for an elected official to doubt the policymaker's political loyalty. *See Soderbeck*, 752 F.2d at 288 ("Mrs. Soderbeck was the political enemy of her husband's political enemy."). As a policymaker, Haddock could be terminated, under these circumstances, for her husband's political activity because the District Judges had

reason to doubt that she was committed to their policy agendas or judicial philosophies—that is, the agendas and philosophies chosen by the voters.

The case is even stronger that a confidential employee may be discharged for intimate associations that cause an elected official to question the employee's loyalty. In *McCabe*, the Eleventh Circuit held that an elected police chief could demote his confidential secretary to a non-confidential position because she was married to one of his officers. *McCabe* did not involve any allegations that the plaintiff had campaigned against the new police chief or had ever violated his trust. To the contrary, "[e]vidence produced by both parties demonstrate[d]" that the plaintiff "actually breached no confidences during the brief period she served as" the defendant's secretary, there was no reason to believe she had ever breached the prior chief's confidences, and the odds her ever doing so "may not have been overwhelming." *McCabe*, 12 F.3d at 1572–73 & n.17. Nonetheless, her job required her to have access to the chief's confidential communications, including communications about personnel complaints and officer discipline. If there were a complaint against her husband or one of his colleagues, she would see it first. The *McCabe* court reasoned that "[i]t is a matter of common experience that spouses tend to possess a higher degree of loyalty to their marital partners than to their superiors, and often discuss workplace matters with one another, even matters that a superior has designated as confidential." *Id.* at 1572. The elected official was uncomfortable "having the wife of an officer under

[his] command function[ ] as [his] confidential Executive Secretary," for fear (based on nothing more than the fact of her marriage to her husband) that her loyalty would be elsewhere, so he was constitutionally permitted to demote her. *Id.*

Similarly, here, as a matter of common experience and the loyalty that spouses (hopefully) feel toward one another, there is reason to believe that Haddock's loyalty would be to her husband first and to the District Judges second. So long as this created no conflict, it was fine; when Haddock's husband became several judges' fierce political enemy, it became a problem.

Consider, for example, the campaign allegation that Munford did not adequately respect gun rights. Assume, hypothetically, that it's true. Judges have a great deal of discretion with respect to protective orders. The voters chose Munford—and his judicial preferences. If, however, Munford wished to circulate a memo to the associate judges indicating his preference that, when he delegates a case to them, they exercise their discretion broadly in favor of protective orders requiring litigants to surrender their firearms, he would have to ask himself first whether he wanted to risk the memo ending up in a campaign ad against him during the next election cycle. He would have to consider that one of the associate judges was married to his political enemy, and any preferences he expressed, in confidence, might be repeated to someone who was looking for ammunition to use against him in the next election. A reasonable person in Munford's position would question whether he could confidentially discuss, develop,

or express policy, philosophy, or jurisprudential preferences to Haddock without undue personal risk.

The District Judges—Baca-Bennett and Munford especially—had reason to doubt that they could trust Haddock with confidential policy-related materials or conversations. They had reason to doubt that she agreed with their policy preferences, because her husband had campaigned against Munford, in part, on policy grounds, and she had refused to attempt to curtail his campaigning or take a position herself. That Haddock alleges she had not violated any confidences or knowingly gone against any district judge's policy preferences is of no moment "because we do not require employers to wait until their office is disrupted before taking action." *Garza*, 972 F.3d at 732. Haddock was in a policymaking and confidential role, and, under the *Elrod/Branti* exception, could constitutionally be discharged for the exercise of rights that would otherwise by protected by the First Amendment.

B.

Haddock alleges that the district court erred by dismissing her claims against Tarrant County. Although Tarrant County, as a municipal entity, can be held liable under § 1983 when an "action pursuant to official municipal policy of some nature caused a constitutional tort," it "cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978). For municipal liability to attach, a plaintiff must prove "three elements: a

policymaker; an official policy; and a violation of constitutional rights whose moving force is the policy or custom." *Zarnow v. City of Wichita Falls*, 614 F.3d 161, 166 (5th Cir. 2010) (quoting *Piotrowski v. City of Hous.*, 237 F.3d 567, 578 (5th Cir. 2001)).

As explained above, because the *Elrod/Branti* exception applies to Haddock's claims, she has failed to plead a constitutional violation. We therefore do not need to examine whether she has pled a county policymaker or official policy. The district court correctly dismissed Haddock's claims against Tarrant County.

C.

Haddock also takes issue with the district court's holding that Baca-Bennett has qualified immunity. "Qualified immunity shields federal and state officials from money damages unless a plaintiff pleads facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011) (cleaned up). These questions can be answered in either order. *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

As explained above, Baca-Bennett did not violate Haddock's constitutional rights; this is enough for Baca-Bennett to be entitled to qualified immunity. Even if Haddock's rights *had* been violated, however, Baca-Bennett certainly did not have "fair warning that [her] conduct violate[d] a constitutional right." *Clarkston v. White*, 943 F.3d 988, 993 (5th Cir. 2019) (quoting

Delaughter v. Woodall, 909 F.3d 130, 140 (5th Cir. 2018)). Closely on-point authority from our sister Circuits indicated that the *Elrod/Branti* exception applies to positions very much like Haddock's. *See*, *e.g.*, *Mumford*, 105 F.3d 264. The case that Haddock primarily relies on for the proposition that judges are categorically not policymakers was (1) decided in another Circuit (2) after Haddock's termination and (3) was reversed by the Supreme Court. *See Adams*, 141 S. Ct. 493. Baca-Bennett is entitled to qualified immunity.

IV. CONCLUSION

The district court correctly held that Haddock, as both a policymaker and a confidential employee, was subject to the *Elrod/Branti* exception, and had therefore failed to allege a constitutional violation.

AFFIRMED.

JAMES C. HO, *Circuit Judge*, concurring in the judgment:

I concur in the judgment and agree with much of what Judge Clement writes in her typically thoughtful opinion. I write separately to make just one observation. As Judge Clement explains, the plaintiff in this case should be afforded the same constitutional status as those that our court and other courts have previously regarded as "confidential employees" under the First Amendment. *See*, *e.g.*, *Garza v. Escobar*, 972 F.3d

721, 731 (5th Cir. 2020) (holding that a Crime Victims Unit Coordinator was a confidential employee); *Gentry v. Lowndes Cnty.*, 337 F.3d 481, 488 (5th Cir. 2003) (holding that a road manager and county administrator occupied confidential positions because the county board of supervisors "must be assured of the trust and loyalty of the road manager and administrator and must be able to assume the confidentiality, when necessary, of their mutual dealings"); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988, 996 (5th Cir. 1992) (holding that a school superintendent "occupied a confidential relationship" with the school board because he was the custodian of the school's confidential records and advised the board on confidential matters); *Soderstrum v. Town of Grand Isle*, 925 F.2d 135, 141 (5th Cir. 1991) (holding that a police chief's secretary was a confidential employee); *Stegmaier v. Trammell*, 597 F.2d 1027, 1040 (5th Cir. 1979) (holding that a deputy circuit clerk was a confidential employee). *See also*, *e.g.*, *Mumford v. Basinski*, 105 F.3d 264, 272 (6th Cir. 1997) ("Unquestionably, the inherent duties of an Ohio domestic relations court referee entail a relationship of confidence between the referee and the judge(s) which he serves."). It is on that basis that I would affirm. Accordingly, I concur in the judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

DIANE SCOTT HADDOCK,	§	
Plaintiff,	§	
	§	
v.	§	**Civil Action No. 4:18-cv-00817-O**
TARRANT COUNTY, TEXAS, PATRICIA BACA-BENNETT, KENNETH EARL NEWELL, JESUS NEVAREZ, JR., HONORABLE JUDITH WELLS, JEROME S HENNIGAN, JAMES B MUNFORD, and ALEX KIM,	§	
Defendants.	§	

ORDER

(Filed Nov. 11, 2019)

Before the Court are Defendant Tarrant County's ("County") Motion to Dismiss Plaintiff's Second Amended Complaint (ECF No. 36) pursuant to Rule 12(b)(6) filed May 6, 2019, and Defendants Patricia Baca-Bennett, Jerome S. Hennigan, Alex Kim, James B. Munford, Jesus Nevarez, Jr., Kenneth Earl Newell, and Judith Wells' (collectively "Defendant Judges") Motion to Dismiss for Failure to State a Claim and for Lack of Jurisdiction (ECF No. 38) pursuant to Rule

12(b)(6) and Rule 12(b)(1) filed May 10, 2019.[1] Having considered the motions, responses, replies, pleadings, and applicable law, the Court: **GRANTS** Defendant Judges' motion to dismiss pursuant to Rule 12(b)(1) in part, **GRANTS** Defendant Judges' motion to dismiss pursuant to Rule 12(b)(6), and **GRANTS** Defendant Baca-Bennett motion to dismiss based on qualified immunity. Finally, the Court **GRANTS** the County's motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim.

I. FACTUAL BACKGROUND

The following facts are drawn from Plaintiff's Second Amended Complaint, which is the live pleading. *See* ECF No. 34, Sec. Am. Compl.

A. The Parties

Plaintiff Diane Scott Haddock was a family court associate judge in Tarrant County, Texas and filed this lawsuit on October 3, 2018 against Tarrant County, a local governmental entity organized under the Texas Constitution, and Defendant Judge Patricia Baca-Bennett ("Baca-Bennett"), individually and in her official capacity as a district judge. Plaintiff also sues Judge Kenneth Earl Newell ("Newell"), Judge Jesus Nevarez, Jr. ("Nevarez"), Judge Judith Wells ("Wells"), Judge Jerome S. Hennigan ("Hennigan"), Judge James B.

[1] Defendant Baca-Bennett individually also moves for judgment on the basis of qualified immunity.

Munford ("Munford"), and Judge Alex Kim ("Kim") all in their official capacities as district judges (collectively the district judges, including Patricia Baca-Bennett, "Defendant Judges"). She alleges all of the defendants fired her in violation of her constitutional rights and are therefore liable to her pursuant to 42 U.S.C. § 1983.

B. Facts

Plaintiff served as an appointed associate judge from January 1999 to January of 2019. Sec. Am. Compl. 7. Plaintiff served all seven family district court judges who supervised her. *Id.* at 35. Tarrant County paid Plaintiff's salary; offered her health and life insurance; originally provided her with employee orientation, employee handbook, and a Tarrant County E-mail address; and provided facilities, technology, equipment, and security to Plaintiff. *Id.* at 28. An associate judge in Texas has the power to "conduct hearings, compel production of relevant evidence, rule on the admissibility of evidence, issue summonses, examine witnesses, make findings of fact, formulate conclusions of law, and enter final orders, and—at times—even try cases on the merits." *Id.* at 30. As an associate judge, Plaintiff had no employees, no budget, no authority over when others work or do not work or how any other person's time off is characterized. *Id.* at 30.

Throughout 2018, Plaintiff was allegedly subjected to "badgering, threats, back-biting, undermining and maligning" for (1) her refusal to patronize a

judicial candidate that Defendant Judge Baca-Bennett endorsed and supported, (2) her refusal to stop her husband from supporting said judicial candidate's opponent, and (3) her refusal to stop her husband from engaging in political speech advocating for the Second Amendment. *Id.* at 6; *see id.* at 7–23. Plaintiff first called Ms. Tina Glenn, Tarrant County's Director of Human Resources, who instructed Plaintiff that if anything else happened, to let HR know. *Id*. at 41. The behavior continued, so Plaintiff filed a written complaint, and followed up by phone with Ms. Glenn who told Plaintiff that she "can't make people be nice." *Id.* Subsequently, Judge Glen Whitley called Plaintiff and left a message. *Id.* Neither Ms. Glenn nor Judge Whitley indicated that Plaintiff's position was exempt from First Amendment protection. *Id.* On or about May 18, 2018, Plaintiff delivered a letter to Judge Glen Whitley and to Tarrant County's HR Director detailing the conduct that had taken place. *Id.* Tarrant County took no action in response to the previously stated notifications. *Id.* at 43. On October 3, 2018, Plaintiff filed this lawsuit asserting her First Amendment rights had been violated, and on January 7, 2019, Plaintiff's employment was terminated. *Id.* at 23. Plaintiff was notified of her termination by Judge Newell and was given no reason for the termination, but Plaintiff received an Order of Termination which was signed by a majority of the seven Tarrant County Family Court District Judges the previous Friday, January 4, 2019. *Id.*

II. LEGAL STANDARDS

A. Federal Rules of Civil Procedure 8(a)

Federal Rule of Civil Procedure 8(a) requires a plaintiff's pleading to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). If a plaintiff fails to satisfy Rule 8(a), the defendant may file a motion to dismiss the plaintiff's claims under Federal Rule of Civil Procedure 12(b)(6) for "failure to state a claim upon which relief may be granted." Fed. R. Civ. P. 12(b)(6).

B. Federal Rule of Civil Procedure 12(b)(6)

To defeat a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. "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." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id*. (quoting *Twombly*, 550 U.S.

at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

In reviewing a Rule 12(b)(6) motion, courts must accept all well-pleaded facts in the complaint as true and view them in the light most favorable to the plaintiff. *Sonnier v. State Farm Mut. Auto. Ins. Co.*, 509 F.3d 673, 675 (5th Cir. 2007). Courts are not bound to accept legal conclusions as true, and only a complaint that states a plausible claim for relief survives a motion to dismiss. *Iqbal*, 556 U.S. at 678. When there are well-pleaded factual allegations, courts assume their veracity and then determines whether they plausibly give rise to an entitlement to relief. *Id.* at 679. However, they do not accept as true "conclusory allegations, unwarranted deductions, or legal conclusions." *Southland Secs. Corp. v. INSpire Ins. Sols, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

"Generally, a court ruling on a 12(b)(6) motion may rely on the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011) (citations and internal quotation marks omitted). Likewise, a court may consider documents that a defendant attaches to a motion to dismiss if they are referred to in the plaintiff's complaint and are central to the plaintiff's claims. *Collins v. Morgan*

Stanley Dead Witter, 224 F.3d 496, 498–99 (5th Cir. 2000).

C. Federal Rule of Civil Procedure 12(b)(1)

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure challenges a federal court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction; without jurisdiction conferred by statute, they lack the power to adjudicate claims. *See Stockman v. Fed. Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). "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." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001) (citing *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977) (per curiam)). Considering Rule 12(b)(1) motions first "prevents a court without jurisdiction from prematurely dismissing a case with prejudice." *Id*. When the court dismisses for lack of subject matter jurisdiction, that dismissal "is not a determination of the merits and does not prevent the plaintiff from pursuing a claim in a court that does have proper jurisdiction." *Id*.

The Fifth Circuit recognizes a distinction between a "facial attack" and a "factual attack" upon a complaint's subject matter jurisdiction. *Rodriguez v. Tex. Comm'n on the Arts*, 992 F. Supp. 876, 878 (N.D. Tex. 1998), *aff'd*, 199 F.3d 279 (5th Cir. 2000). "A facial attack requires the court merely to decide if the plaintiff

has correctly alleged a basis for subject matter jurisdiction" by examining the allegations in the complaint, which are presumed to be true. *Id.* (citation omitted). If the defendant supports the motion with evidence, however, then the attack is "factual" and "no presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981). Regardless of the attack, "[t]he plaintiff constantly bears the burden of proof that jurisdiction does exist." *Rodriguez*, 992 F. Supp. at 879 ("The burden of proof for a Rule 12(b)(1) motion to dismiss is on the party asserting jurisdiction.") (citations omitted).

D. Section 1983 Claims

Section 1983 "provides a federal cause of action for the deprivation, under color of law, of a citizen's 'rights, privileges, or immunities secured by the Constitution and laws' of the United States." *Livadas v. Bradshaw*, 512 U.S. 107, 132 (1994). It "afford[s] redress for violations of federal statutes, as well as of constitutional norms." *Id*. To state a claim under § 1983, a plaintiff must allege facts that show: (1) Plaintiff has been deprived of a right secured by the Constitution and the laws of the United States; and (2) the deprivation occurred under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Whitley v. Hanna*, 726 F.3d 631, 638 (5th Cir. 2013); *Cornish v. Corr. Servs. Corp.*, 402 F.3d 545, 549 (5th Cir. 2005).

In their individual capacity, Government officials "are entitled to qualified immunity under § 1983 unless (1) they violated a federal statutory or constitutional right, and (2) the unlawfulness of their conduct was clearly established at the time." *District of Columbia v. Wesby*, ___ U.S. ___, 138 S. Ct. 577, 589 (2018) (internal quotation marks omitted). Courts are "permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). "The plaintiff has the burden to point out the clearly established law." *Clarkston v. White*, ___ F.3d ___, 2019 WL 5485558 (5th Cir. 2019) (citing *Delaughter v. Woodall*, 909 F.3d 130, 139 (5th Cir. 2018)). "Clearly established law is determined by controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." *Id.* (internal quotation marks omitted). "This means the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right, although it is not necessary for controlling precedent to have held that the official's exact act was unlawful." *Id.* (citing *Delaughter*, 909 F.3d at 139–40) (internal quotation marks omitted). Ultimately, the "central concern is whether the official has fair warning that his conduct violates a constitutional right." *Id.* (citing *Delaughter*, 909 F.3d at 140) (internal quotation marks omitted).

III. ANALYSIS

The County and Defendant Judges have moved to dismiss Plaintiff's § 1983 claim.[2] The Court first considers whether Judge Baca-Bennett, sued in her individual capacity, is entitled to qualified immunity.

A. Judge Baca-Bennett and Qualified Immunity

Judge Baca-Bennett is entitled to qualified immunity because at the time of her termination, Plaintiff has failed to show that clearly established law prevented terminating the employment of an associate judge for patronage reasons.

No Fifth Circuit decision has decided whether a Texas associate judge was subject to a patronage dismissal. While Plaintiff is not required to identify a case precisely on point, she must show the law has adequately defined the contours of the right such that policy makers were sufficiently on notice. *Zulema Longoria v. San Benito Indep. Sch. Dist. et al*, ___ F.3d ___ No. 18-41060 2019 WL 5687512, at *3 (5th Cir. 2019) (citing *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 618 (5th Cir. 2004); *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). "If, at the time of the events

[2] To the extent that Plaintiff is suing the Defendant Judges in their official capacities, an official capacity claim is merely another way of pleading an action against the entity of which the individual defendant is an agent. *See Kentucky v. Graham*, 473 U.S. 159, 165 (1985). Thus, Plaintiff's allegations against Defendant Judges in their official capacities are claims against Tarrant County. *See id.*

underlying the litigation, insufficient precedent existed to provide [defendants] with fair warning that the defendants' conduct violated the First Amendment, the defendants are entitled to qualified immunity." *Zulema Longoria*, 2019 WL 5687512, at *3 (quoting *Jackson v. Ladner*, 626 F. App'x 80, 88 (5th Cir. 2015) (internal quotations omitted).

The Fifth Circuit has held assistant district attorneys, county road managers, and school superintendents are subject to patronage dismissals. *See generally Gentry v. Lowndes County*, 337 F.3d 481 (5th Cir. 2003) (county road manager); *Aucoin v. Haney*, 306 F.3d 268 (5th Cir. 2002) (assistant district attorney); *Kinsey v. Salado Indep. Sch. Dist.*, 950 F.2d 988 (5th Cir. 1992) (school superintendent). And the Sixth Circuit has held a court referee, whose job description is similar to that of an associate judge, is subject to patronage dismissal. *Mumford v. Basinski*, 105 F.3d 264, 273 (6th Cir. 2997). While no case is on point, the court referee position comes close to the associate judge position and it provides authority to terminate Plaintiff in this context. But in any event, no case is close to providing that the position of an associate judge is different than these such that it was clearly established that an associate judge could not be terminated on this basis. Accordingly, Judge Baca-Bennett is entitled to qualified immunity and Plaintiff's claims against Judge Baca-Bennett in her individual capacity are hereby **DISMISSED** with prejudice.

B. Judges in Their Official Capacity

The Court next considers the motion to dismiss filed by the Defendant Judges in their official capacity. They have moved to dismiss Plaintiff's claims for lack of subject matter jurisdiction under the Eleventh Amendment and because she has failed to state a claim under Rule 12(b)(6). They do not support their subject matter jurisdiction motion with evidence and thus present a facial attack. *See generally* Defs.' Mot. to Dismiss, ECF No. 38. The Court therefore presumes Plaintiff's allegations in her complaint against Defendant Judges to be true and must decide whether she has correctly alleged a basis for subject matter jurisdiction. *Rodriguez*, 992 F. Supp. at 878.

1. Eleventh Amendment

The Eleventh Amendment to the United States Constitution bars private suits in federal court against states—including state agencies—unless the state has waived, or Congress has abrogated, the state's sovereign immunity. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54 (1996); *see also* U.S. Const. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."). Section 5 of the Fourteenth Amendment to the United State Constitution "authorizes Congress to create a cause of action through which the citizen may vindicate his Fourteenth Amendment

rights." *United States v. Georgia*, 546 U.S. 151, 158 (2006) (citation omitted). "This enforcement power includes the power to abrogate state sovereign immunity by authorizing private suits for damages against the States." *Id*. at 158–59.

An exception to immunity exists when a plaintiff simply seeks to prohibit a state official from violating federal law. The *Ex parte Young* exception to sovereign immunity provides that "when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes. The doctrine is limited to that precise situation, and does not apply when the state is the real, substantial party in interest." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011); *see also Ex parte Young*, 209 U.S. 123 (1908). According to Virginia Office, "[i]n determining whether the doctrine of *Ex parte Young* avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 563 U.S. at 256 (citing *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636 (2002) (internal quotations omitted)).

If the Defendant Judges are employees of the State, it appears Plaintiff concedes she is not entitled to recover damages against them because of sovereign immunity as she does not contest this proposition in her briefing. *See* Pl.'s Resp. to Def.'s Mot. to Dismiss 3, ECF No. 41 (asserting she is entitled to recover

equitable reinstatement). And the Defendant Judges do not appear to contest that she may, consistent with the Eleventh Amendment, be entitled to equitable reinstatement, as they do not respond to it in their Reply. *See generally* Def. Judges' Reply, ECF No. 43. The County's Motion is **GRANTED** because, as discussed in response to the County's motion below, the Defendant Judges are State officials so that Plaintiff may not recover money damages pursuant to the Eleventh Amendment. And, for the reasons that will be addressed next, Plaintiff has also failed to state a claim for retaliatory discharge as required by Rule 12(b)(6).

2. Failure to State a Claim

The Defendant Judges argue that Plaintiff's claim for retaliatory discharge fails because she could be removed at will as a patronage and confidential employee. "It is well settled that the Constitution prohibits a government employer from discharging or demoting an employee because the employee supports a particular political candidate. . . ." *Griggs v. Chickasaw County*, 930 F.3d 696, 703 (5th Cir. 2019) (quoting *Moss v. Harris County. Constable Precinct On*e, 851 F.3d 413, 421 (5th Cir. 2017)) (internal quotations omitted). An exception exists however for employees who hold policy making or confidential positions. *See Branti v. Finkel*, 445 U.S. 507, 517–18 (1980).

"To establish a § 1983 claim for employment retaliation related to speech, a plaintiff-employee must show: (1) she suffered an adverse employment action;

(2) she spoke as a citizen on a matter of public concern; (3) her interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action." *Id.* (citing Moss, 851 F.3d at 420–21 (quoting *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016))). The failure to establish each element dooms Plaintiff's claim. *See Moss*, 851 F.3d 420–21 (affirming a finding that speech was not protected because the plaintiff failed to satisfy the second element); *Wilson v. Tregre*, 787 F.3d 322, 325–326 (5th Cir. 2015) (holding that speech was not protected because the plaintiff failed to satisfy the third element) *Nixon v. City of Houston*, 511 F.3d 494, 499, 501 (5th Cir. 2007) (finding that the speech was not protected because the plaintiff failed to satisfy the third element). In this case, all defendants contend Plaintiff's claim fails at the third element: the balance between the government's interests and Plaintiff's interests.

Courts apply a case-by-case balancing test and "compare 'an employee's interest in commenting upon matters of public concern' and 'the interest of the State in promoting the efficient delivery of public services.'" *Id.* (citing *Wiggins v. Lowndes County.*, 363 F.3d 387, 390 (5th Cir. 2004)). "The key factor in the balancing test is whether political allegiance is an appropriate requirement for the effective performance of the public office involved." *Id.* (citing *Wiggins*, 363 F.3d at 390) (internal quotations omitted). The "court more readily finds that the government's interests outweigh the employee's interests where the employee is a policymaker

for purposes of the First Amendment." *Id.* (citing *Wiggins*, 363 F.3d at 390) (internal quotations omitted).

A policymaker is "an employee whose responsibilities require more than simple ministerial competence, whose decisions create or implement policy, and whose discretion in performing duties or in selecting duties to perform is not severely limited by statute, regulation, or policy determinations made by supervisors." *Wiggins*, 363 F.3d at 390. The court should also consider "whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Id*. (citing *Elrod v. Burns*, 427 U.S. 347, 368 (1976)). Additionally, "[a]n employee is confidential if he or she stands in a confidential relationship to the policymaking process, e.g., as an advisor to a policymaker, or if he or she has access to confidential documents or other materials that embody policymaking deliberations and determinations," or if he or she is in a position to subject an elected official to personal liability. *Id*. (citing *Stegmaier v. Trammell*, 597 F.2d 1027, 1040 (5th Cir. 1979)).

In this case, the Defendant Judges contend that Plaintiff held a policymaking and confidential position as an associate judge for which their trust in the associate judge's loyalty was required. While the Fifth Circuit's decisions have not dealt with the status of an associate judge, it has opined on other positions and described the general parameters of such high-level policymaking and confidential employment.

In *Aucoin v. Haney*, the Fifth Circuit held that the assistant district attorney position required political loyalty and was subject to patronage dismissal, reasoning that an assistant district attorney was vested "with broad discretionary powers." 306 F.3d at 275 (relying on the state constitution, which stated the assistant district attorney had the same responsibilities as the district attorney, that assistant district attorneys were appointed by the district attorney and served at the pleasure of the district attorney, and that the actions of an assistant district attorney could bind the state). Two other cases illustrate contrasting positions that were held to require or not require political loyalty, with the result that the political officials could or could not terminate employees for their political activity, respectively. *Compare Gentry*, 337 F.3d at 487–88 (holding that a county road manager, the second highest non-elected county management position, may be fired for political opposition), *with Wiggins*, 363 F.3d at 391–92 (holding that a county road foreman merely implemented policy and may not be terminated for political reasons). Other circuits have addressed this balancing test and held various positions required political loyalty and were not protected from political dismissals under the First Amendment.[3]

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[3] *Aucoin*, 306 F.3d at 275 ("*See*, *e.g.*, *Butler v. New York State Dept. of Law*, 211 F.3d 739, 741 (2d Cir. 2000) (Deputy Bureau Chief of the Litigation Department at the New York State Department of Law); *Biggs v. Best, Best & Krieger*, 189 F.3d 989 (9th Cir. 1999) (attorney with private law firm that performed services of city attorney); *Bavaro v. Pataki*, 130 F.3d 46, 47 (2d Cir. 1997) (associate counsel and assistant counsel in the New York State

Moreover, the Court finds persuasive the Sixth Circuit's decision in *Mumford v. Basinski*, which concluded that a court referee was an inherently political position not protected from political patronage termination by the First Amendment. 105 F.3d at 273. The court referee's powers included "the conduct of hearings on the matters referred to him, the issuance of subpoenas, the swearing and examination of witnesses, and (unless otherwise specified in the order of reference) the promulgation of evidentiary rulings and the entry of certain pretrial, discovery, temporary restraining, and other orders necessary to regulate the proceedings," all without ratification of the supervisory judge. *Id.* at 272 (citing Ohio R. Civ. P. 53(C)(2) & (3)). The court further stated that the referee's decisions were otherwise "mere recommendations which [became] effective only upon adoption by the court." *Id.* (citing Ohio R. Civ. P. 53(E)(4)(a)).

Department of Health, Division of Legal Affairs, Bureau of Professional Medical Misconduct); *Fazio v. City & County of San Francisco*, 125 F.3d 1328 (9th Cir. 1997) (assistant district attorney); *Gordon v. County of Rockland*, 110 F.3d 886, 890-892 (2d Cir.) (assistant county attorneys), *cert. denied*, 522 U.S. 820 . . . (1997); *Monks v. Marlinga*, 923 F.2d 423 (6th Cir. 1991) (assistant prosecuting attorneys); *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990) (city attorney); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983) (assistant state attorney to a public prosecutor); *Mammau v. Ranck*, 687 F.2d 9 (3d Cir. 1982) (assistant district attorney); *Ness v. Marshall*, 660 F.2d 517 (3d Cir. 1981) (city solicitor and assistant city solicitor); *Newcomb v. Brennan*, 558 F.2d 825 (7th Cir.) (deputy city attorney), *cert. denied*, 434 U.S. 968 . . . (1977); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986) (staff legal assistant in office of clerk of circuit court), *cert. denied*, 481 U.S. 1038 . . . (1987).").

The court in *Mumford* reasoned that the inherent duties of a court referee entailed a relationship of confidence between the referee and the judges he served, and it pointed out that the "referee [was] privy to confidential litigation materials and internal court communications in the discharge of his duties, and further maintain[ed] a personal confidential relationship with the judge(s) which he serve[d]." *Id.* (citing *Blair v. Meade*, 76 F.3d 97, 101 (6th Cir. 1996) and *Balogh v. Charron*, 855 F.2d 356, 356 (6th Cir. 1988)). Further, the court stated that the "referee effectively ma[d]e policy for, or suggest[ed] policy to, the court on each occasion that he resolve[d] a dispute in the court's name or recommend[ed] a disposition to a judge." *Id.* Concluding that a supervising judge needed to be confident in the referee's judgment capabilities, and that the confidentiality of the relationships arising as a result of judicial discussions was unquestionable, the court found that the referee's political ideology, associations, and activities could influence a judge's assessment of a person's suitability for the position as his referee. *Id.*

In this case, the duties for an associate judge can be found in the Texas Family Code, which provides:[4]

> **Cases That May Be Referred**. (a) . . . a judge of a court may refer to an associate

[4] Because the duties of an associate judge are set out in the Texas Family Code, the Court looks to the statute for the relevant job description.

judge any aspect of a suit over which the court has jurisdiction under this title . . .

Powers of Associate Judge. (a) Except as limited by an order of referral, an associate judge may: (1) conduct a hearing; (2) hear evidence; (3) compel production of relevant evidence; (4) rule on the admissibility of evidence; (5) issue a summons . . . (6) examine a witness; (7) swear a witness for a hearing; (8) make findings of fact on evidence; (9) formulate conclusions of law; (10) recommend an order to be rendered in a case; (11) regulate all proceedings in a hearing before the associate judge; (12) order the attachment of a witness or party who fails to obey a subpoena; (13) order the detention of a witness or party found guilty of contempt, pending approval by the referring court . . . (14) without prejudice to the right to a de novo hearing before the referring court . . . render and sign: (A) a final order agreed to in writing as to both form and substance by all parties; (B) a final default order; (C) a temporary order; or (D) a final order in a case in which a party files an unrevoked waiver . . . that waives notice to the party of the final hearing or waives the party's appearance at the final hearing; (15) take action as necessary and proper for the efficient performance of the associate judge's duties; and (16) render and sign a final order if the parties waive the right to a de novo hearing before the referring court . . . in writing before the start of a hearing conducted by the associate judge.

Tex. Fam. Code. §§ 201.005; 201.007. The job duties of the referee in *Mumford* are very similar to those of a Texas associate judge. While Plaintiff argues that her case is distinguishable from *Mumford* in that she served all seven district judges rather than just one, that is insufficient to distinguish the Sixth Circuit's reasoning. A court referee served at the pleasure of the appointing judge; and in this case, an associate judge does the same, and if she serves multiple courts, she serves at the pleasure of those courts she serves.[5] Just as in *Mumford*, the associate judge's inherent duties, listed above, show a relationship of confidence between the associate and district judges. *See* Tex. Fam. Code § 201.007. Implicit to these statutory job duties, an associate judge is privy to both confidential litigation materials and internal court communications regarding cases. Necessarily, an associate judge suggests policy to the district judge on each occasion that she recommends an order to be rendered in a case, and she effectively makes policy when she renders and signs a final order. As a consequence, the district judges that supervise the associate judges must "be convinced that the judgment capabilities of the [associate judge], and the confidential relationships that arise as a result of the

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[5] TEX. FAM. CODE §§ 201.001(d) ("Appointment. . . . if an associate judge serves more than one court, the associate judge's appointment must be made with the unanimous approval of all the judges under whom the associate judge serves."); 201.004(b) ("Termination of Associate Judge. . . . The employment of an associate judge who serves more than two courts may only be terminated by a majority vote of all the judges of the courts which the associate judge serves.").

intimate judicial and quasi-judicial discussion, are unquestionable." *Id.* at 272. Therefore, an associate judge's political ideology, associations, and activities may rationally influence a district judge's assessment of the individual's suitability for a position as an associate judge. Accordingly, Plaintiff's previous position as an associate judge was subject to patronage dismissal.

The Defendant Judge's motions to dismiss for failure to state a claim is therefore **GRANTED**, and Plaintiff's § 1983 claims against Defendant Judges are **DISMISSED**.

C. Defendant Tarrant County

The County moves to dismiss Plaintiff's § 1983 claims arguing that Plaintiff failed to state a constitutional deprivation under the First Amendment because she was a policymaker and held a position of confidence. The County's motion on this basis is granted for the same reasons set out above pursuant to the Defendant Judges' Rule 12(b)(6) Motion. The County also argues that as a matter of law Defendant Judges were not acting as county policymakers, and Plaintiff is impermissibly seeking to hold the County vicariously liable for the District Judges' actions.

Section 1983 does not allow a municipality to be held vicariously liable based on a theory of respondeat superior. 42 U.S.C. § 1983; *see Bd. of Cty. Commis of Bryan Cty. v. Brown*, 520 U.S. 397, 403 (1997). Rather, a municipality may be liable under § 1983 if the execution of one of its customs or policies deprives a plaintiff

of her constitutional rights. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690–91 (1978). The Fifth Circuit has consistently held that three elements must be proven to establish liability against a municipality under *Monell*: "(1) an official policy (2) promulgated by the municipal policymaker (3) was the moving force behind the violation of a constitutional right." *Hicks-Fields v. Harris County*, 860 F.3d 803, 808 (5th Cir. 2017) (citing *Peterson v. City of Fort Worth*, 588 F.3d 838, 847 (5th Cir. 2009) (citing *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001))); *see also Bowden v. Jefferson County*, 676 F. App'x. 251, 253 (5th Cir. 2017).

Plaintiff summarizes her allegations relating to First Amendment violations in response to the Defendant County's motion to dismiss, as follows:

> Throughout 2018, Defendant Tarrant County—[Plaintiff] Diane's primary employer—consciously and repeatedly refused to protect Diane from First Amendment retaliation. Tarrant County refused to protect Diane even though [Defendant Judge] Baca-Bennett's retaliatory activity was overt and public. It refused despite reports from Diane that it was occurring, illegal, and debilitating, and despite Diane's plea for Tarrant County's intervention. Tarrant County's policymakers refused to enforce Tarrant County's own written policy, which promises to protect all Tarrant County employees from First Amendment retaliation by elected officials or persons who regularly do business

> with Tarrant County.[ ] Alternatively, Tarrant County has an unwritten policy and custom of excluding its associate judge-employees from First Amendment protection.
>
> On October 3, 2018, Diane filed this lawsuit asserting her First Amendment rights. Baca-Bennett and Tarrant County were served with process on October 10, 2018 and October 11, 2018. Less than ninety (90) days later, Diane's employment was terminated by a bare majority of the family court district judges. Diane's Second Amended Complaint alleges her termination was a further violation of her First Amendment rights, either because Baca-Bennett's campaign to get Diane fired was ultimately successful, or because the district judges—with Tarrant County's acquiescence and support—retaliated against Diane for filing this lawsuit. Tarrant County agreed with and shared the judges' unlawful motives and unconstitutional actions.

Pl.'s Resp. to County Def.'s Mot. to Dismiss 6–7, ECF No. 40 (internal citation omitted).

In support of their motion to dismiss, Defendant Tarrant County argues:

> "On *Monell's* policymaker element, the County cannot be held liable for the acts of independently-elected state district judges. On the [policy or custom] *Monell* element, Diane has not identified a plausible County policy or custom at issue, and Diane has not and cannot state a plausible claim based on the County

> failing to protect Diane from state district judges—persons who the County does not control. [On the third *Monell* element], Diane has not pleaded—and cannot plead—a viable First Amendment violation because associate judges fall within the exceptional class of public servants of whom political allegiance may be demanded, such that Diane was subject to a patronage dismissal. Diane's conspiracy claim is, likewise, not viable."

Def. County's Reply 12, ECF No. 42.

Having carefully considered the 50-page Second Amended Complaint, the parties' legal briefs, and the governing law, and even assuming that Plaintiffs have alleged an underlying constitutional violation, the Court finds that Plaintiff has failed to adequately allege that the County had a custom or policy, promulgated by a *county* policymaker, that resulted in a deprivation of Plaintiff's constitutional rights under the First Amendment.

Who qualifies as a policymaking official is a question of state law. *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997); *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988) (plurality opinion)); *Pembaur*, 475 U.S. at 483. "[T]he specific identity of the policymaker is a legal question" and need not be pled.[6] The

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[6] *Zulema*, 2019 WL 5687512, at *8 (stating that "plaintiffs can state a claim for municipal liability as long as they plead sufficient facts to allow the court to reasonably infer that the [municipality] either adopted a policy that caused [plaintiff's] injury

identification of those "officials or governmental bodies who speak with final policymaking authority for the local governmental actor [whose] action alleged to have caused" the constitutional violation is not a question of fact and must be resolved by the court by reviewing "relevant legal materials, including state and local positive law, as well as 'custom or usage having the force of law.'" *Jett*, 491 U.S. at 737; *Praprotnik*, 485 U.S. at 124. It is not dispositive that the state labels a position as a policymaker, but the court's "understanding of the actual function of a governmental official, in a particular area, will [depend] on the definition of the official's function under relevant state law." *McMillian*, 520 U.S. at 786 (citing *Regents of Univ. of Cal. v. Doe*, 519 U.S. 425, 429, n.5 (1997). The Court must determine whether the policymaker acts for the state or the county by identifying the government officials who have the power to make official policy in a particular area, or on a particular issue. *McMillian*, 520 U.S. at 785 (citing *Jett*, 491 U.S. at 738).

In Plaintiff's Second Amended Complaint, Plaintiff alleges the County had a policy that effectively delegated its policymaking authority to the district judges "regarding the work environment Tarrant County employees must endure, including any hostile, intimidating or offensive work environment arising out of the

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or delegated to a subordinate officer the authority to adopt such a policy," (citing *Groden v. City of Dallas*, 826 F.3d 280, 284, 286 (5th Cir. 2016)) further stating that "[a] municipality can be held liable only when it delegates policymaking authority, not when it delegates *decisionmaking* authority" (citing *Pembaur*, 475 U.S. at 480–81) (emphasis in original)).

requirement[,] that [the] associate judge[ ] refus[ed,] to participate in political service or related activity," concluding that this made the district judges county policymakers. Sec. Am. Compl. 40, ECF No. 34 (internal quotations omitted). Further, in response to Defendant County's motion to dismiss, Plaintiff points to paragraphs 57–59 of the Second Amended Complaint as sufficient allegations of "decisions by [Plaintiff's] employer and its policymakers" that resulted in a violation of her constitutional rights. Pl.'s Resp. to County Def. Mot. to Dismiss 20, ECF No. 40. In support of their motion to dismiss, the County alleges, that "none of the elected state district court judges is a *Monell* ***county***-level policymaker, and, therefore, Tarrant County cannot be liable for the district judges' appointment or termination decisions or judicial conduct toward their political appointees." Def. County's Mot. to Dismiss 24, ECF No. 36 (internal citations omitted) (emphasis in original). The County further argues that "whether one is a *Monell* policymaker is a question of law, and Diane's allegations of who is a County policymaker need not be taken as true." Def. County's Reply 7, ECF No. 42.

To determine whether one is a final policymaker, the focus is not on whether the official is a policymaker in general, but rather if the official is the final policymaker with respect to the specific action at issue. *Brady v. Fort Bend County*, 145 F.3d 691, 699 (5th Cir. 1998). The appropriate inquiries in this case are, first, whether the Defendant Judges are the final policymakers with respect to the specific action at issue

here—terminating an associate judge—and second, if Defendant Judges were the final policymakers, whether they were acting as county or state policymakers with respect to the termination of an associate judge.

Beginning with the first question, the Texas Family Code governs the termination of an associate judge through § 201.004, which states in relevant part that "[t]he employment of an associate judge who serves more than two courts may only be terminated by a majority vote of all the judges of the courts which the associate judge serves." Tex. Fam. Code § 201.004. Additional legislation can be found in Texas Local Government Code § 151.004 which states that "[t]he commissioners court . . . may not attempt to influence the appointment of any person to an employee position authorized by the court under this subchapter." Tex. Loc. Gov't Code. § 151.004. The statutory authority to appoint or terminate an associate judge is therefore vested solely in the judges of the courts in which the associate judge serves, and the Local Government Code expressly prohibits even an attempt by the county to interfere with the appointment/termination process. Similar to the facts of Brady, the Texas district judges must apply to the County Commissioners Court for authorization to appoint an associate judge, and the County Commissioners Court is prohibited from interfering with who holds that appointment. Applying the Fifth Circuit's reasoning in finding the sheriff a final policymaker in *Brady v. Fort Bend County*, this Court

finds that Defendant Judges were the final policymakers for this particular issue.[7]

Turning to the question of which entity they are policymakers for, the Supreme Court in *McMillian* held that the defendant there represented the state, rather than the county, regarding the actions taken against plaintiff in that case. 520 U.S. at 791. The Supreme Court explained that although the county "ha[d] no direct control over how the [defendant sheriff] fulfill[ed] his law enforcement duty, the Governor and the attorney general [did] have this kind of control." *Id.* Accordingly, it affirmed the dismissal of McMillian's § 1983 claims against the county because the defendant sheriff was not acting as a county policymaker, but as a state policymaker. *Id.* at 793, 796. In coming to this determination, the Supreme Court looked to the state constitution and the state courts' interpretation of the relevant provisions under state law and concluded that the defendant sheriff represented the state when acting in a law enforcement capacity. *Id.* at 787–91. Under state law, the county had no law enforcement authority; so tort claims brought against the defendant sheriffs, based on their official acts,

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[7] *Brady* is not instructive on whether the actor is a state or county policymaker because in *Brady* the county did not raise the argument that the defendant sheriff was acting as a state policymaker rather than a county policymaker, so the court did not address that issue. 145 F.3d at 702 n.4. In this case however, the County raises the issue. To resolve this issue, the Court looks to the decision in *McMillian*, 520 U.S. 781.

constituted suits against the state and not against the county. *Id.* at 789.

Following the guidance in McMillian, this Court begins with the Texas Constitution. As Defendant Tarrant County correctly states in its motion to dismiss, under the Texas Constitution, the legislative and executive branches of the Texas government are separate. Tex. Const. art. II, § 1. District courts are vested with judicial power through Article V and are comprised of "district judges, who are undeniable elected state officials." *Clark v. Tarrant County*, 798 F.2d 736, 744 (5th Cir. 1986) (internal citation omitted); Tex. Const. art. V, § 7. Through Article V, the Texas Constitution further vests authority to supervise the district courts in the Texas Supreme Court, making it responsible for the "efficient administration of the judicial branch," specifically for promulgating rules of administration and enforcing the Code of Judicial Conduct. Tex. Const. art. V, §§ 1-a (regarding discipline and removal of state judges for violation of rules promulgated by the Supreme Court of Texas and the Code of Judicial Conduct; State Commission on Judicial Conduct), 31(a) (vesting responsibility for the efficient administration of the judicial branch in the Supreme Court of Texas).[8]

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[8] TEX. CODE JUD. CONDUCT, reprinted in TEX. GOV'T CODE, tit. 2, subtit. G, app. B; TEX. R. JUD. ADMIN., reprinted in TEX. GOV'T CODE, tit. 2, subtit. F app.; *In re Slaughter*, 480 S.W.3d 842 (Tex. Spec. Ct. Rev. 2015) (involving complaint of improper social media comments); *In re Hecht*, 213 S.W.3d 547 (Tex. Spec. Ct. Rev. 2006) (involving complaint of wrongful endorsement of federal judicial nominee); *In re Barr*, 13 S.W.3d 525 (Tex. Spec. Ct. Rev.

The district courts themselves have "appellate jurisdiction and general supervisory control over the County Commissioners Court," with some exceptions. Tex. Const. art. V, § 8. On the other hand, the County Commissioners Court may not even attempt to influence the appointment of any person to an associate judge. *Garcia v. Reeves County*, 32 F.3d 200, 203 (5th Cir. 1994) (citing Texas Local Government Code § 151.004 when finding that "[i]n Texas, employees of any elected official serve at the pleasure of the elected official").

Just as in *McMillian*, the control over the particular action at issue is vested somewhere other than the County, and under Texas law, the County had no authority over how Defendant Judges exercised their appointment powers and conduct. Thus, claims brought against Defendant Judges for these acts, constitute suits against the state and not against the county. *See McMillian*, 520 U.S. at 789. While the County has no direct control over how the Defendant Judges exercise their appointment powers and conduct with regard to their associate judges, the Supreme Court of Texas does. To this, Plaintiff counters that the County, through its "power of the purse," could influence district judges' treatment of their employees. Pl.'s Resp. to Def.'s Mot. to Dismiss 22–23, ECF No. 40. But this would violate the local government code. *See* Tex. Loc. Gov't. Code § 151.004. The Texas Supreme Court has stated that, were the County to attempt to influence

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1998) (involving complaint of inappropriate sexual harassment of and conduct toward attorneys and litigants).

the district judges' appointment, the district judges could seek to exercise their supervisory authority over the County Commissioners Court. *Henry v. Cox*, 520 S.W.3d 28, 36 (Tex. 2017) (citing TEX. CONST. art V, § 8).

In her response to the County's motion to dismiss, Plaintiff alleges only in a conclusory manner that the Defendant Judges were "Tarrant County's policymakers." However, when alleging actions taken by people she labeled as "policymakers," she does not allege any law that would indicate that the Defendant Judges were in fact acting as county policymakers. This Court finds that Defendant Judges were acting as state, rather than county, final policymakers regarding their conduct and appointment powers over the associate judges. Accordingly, after considering the Second Amended Complaint, the parties' legal briefs, and the governing law, the Court finds that the County cannot be held liable for the Defendant Judges' actions regarding the conduct and appointment powers over Plaintiff such that her claim against the County are **DISMISSED** with prejudice for failure to state a claim.

IV. AMENDED COMPLAINT

Finally, Plaintiff states that she is willing to amend and address any pleading deficiencies. A party should be granted leave to amend to cure pleading deficiencies following the granting of a motion to dismiss when she can sufficiently show with particularity how she would cure any deficiency. A bare boned request is insufficient. *See Douglas v. DePhillips*, 740 Fed. Appx

403. And when a proposed amendment would be futile, denial of a request to amend is permitted. *See Villarreal v. Wells Fargo Bank, N.A.*, 814 F. 3d 763, 766 (5th Cir. 2016). Here, Texas law sets out Plaintiff's job duties, provides the Defendant Judges are state actors, and no case provides notice that Defendant Bennett-Baca was prohibited from terminating Plaintiff. Plaintiff has been given an opportunity to present her best case. *See Schiller v. Physicians Resource Group Inc.*, 342 F. 3d 563, 567 (5th Cir. 2003) ("At some point, a court must decide that a plaintiff has had a fair opportunity to make his case; if, after that time, a cause of action has not been established, the court should finally dismiss the suit."); *see also* Order, ECF No. 33 ("[Plaintiff] has submitted three versions of the complaint, and while the Court will grant leave so that the second amended complaint serves as the live pleading, the Court finds it is time to resolve the Rule 12 challenges."). Accordingly, her request for leave to amend is **DENIED**.

V. CONCLUSION

Based on the foregoing, the Court **GRANTS** Defendant Judges' motion to dismiss without prejudice pursuant to Rule 12(b)(1), in part, and further **GRANTS** Defendant Judges' motion to dismiss pursuant to Rule 12(b)(6) with prejudice. Additionally, the Court **GRANTS** the County's motion to dismiss pursuant to Rule 12(b)(6) for failure to state a claim with prejudice. Finally, Plaintiff's § 1983 claim against Judge Baca-Bennett in her individual capacity is

hereby **DISMISSED** with prejudice based on qualified immunity.

SO ORDERED this **11th** day of **November, 2019**.

/s/ Reed O'Connor
Reed O'Connor
UNITED STATES
DISTRICT JUDGE

United States Court of Appeals
for the Fifth Circuit

No. 19-11327

DIANE SCOTT HADDOCK,

Plaintiff—Appellant,

versus

TARRANT COUNTY, TEXAS; PATRICIA BACA-BENNETT; KENNETH EARL NEWELL; JESUS NEVAREZ; JR.; HONORABLE JUDITH WELLS; JEROME S. HENNIGAN; JAMES B. MUNFORD; ALEX KIM,

Defendants—Appellees.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:18-CV-817

ON PETITION FOR REHEARING
AND REHEARING EN BANC

(Filed May 26, 2021)

Before CLEMENT, HO, and DUNCAN, *Circuit Judges*.

PER CURIAM:

The Petition for Rehearing is GRANTED, the panel has reconsidered its opinion without oral argument, and the panel has withdrawn and replaced its

opinion with the revised opinion issued May 18, 2021. No member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is DENIED.