UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

BEAUMONT CHAPTER OF THE NAACP and JESSICA DAYE	§	
VS.	§	**CASE NO. 1:22-CV-488**
JEFFERSON COUNTY, TEXAS ET AL	§	

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [DOC. 32] PURSUANT TO 12(B)(1) AND 12(B)(6)

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES **JEFFERSON COUNTY, TEXAS**, **JEFFERSON COUNTY COMMISSIONERS COURT, LAURIE LEISTER, in her official capacity as the Jefferson County Clerk and MARY BETH BOWLING, in her official capacity as Presiding Judge of the John Paul Davis Community Center** and files this FRCP 12(b)(1) and 12(b)(6) motion to dismiss and would respectfully show unto the Court the following:

I.

NATURE OF ACTION

1. The Jefferson County chapter of the NAACP and one individual Plaintiff have brought claims against Defendants Jefferson County, Texas, Jefferson County Commissioners' Court and Laurie Leister, in her official capacity as the Jefferson County Clerk, allowed white poll workers to intimidate black voters at the John Paul Davis Community Center polling location. *See* Doc. 32 at P. 14-24. Specifically, Plaintiffs claim voter intimidation in violation of 52 U.S.C. §10307(b) and allege that white poll workers 1) required black voters to loudly recite their address in front of others after voters already properly checked in, 2) following black voters around in the polling place, and 3) showing white voters how to scan their voted ballots but not black voters. *Id.* Plaintiffs seek to permanently enjoin these Defendants "from engaging in conduct intimidating

Plaintiffs and other voters at any polling place in Jefferson County moving forward. *Id.* at P. 28.

2. Plaintiffs bring suit against Defendants Jefferson County, Texas, Jefferson County Commissioners' Court, Laurie Leister, in her official capacity as the Jefferson County Clerk and Mary Beth Bowling as presiding judge of the John Paul Davis Community Center under 42 U.S.C. §1983 and the Fourteenth and Fifteenth Amendments. *Id*. at 26-27.

3. Defendants would show that Plaintiffs' claims fail to state a cause of action and all claims alleged by the Plaintiffs against Defendants should be dismissed per FRCP 12(b)(1) and 12(b)(6).

II.

ARGUMENT & AUTHORITY

A. Rule 12(b)(1) Lack of Subject Matter Jurisdiction: Standing and Mootness

4. 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). This challenge may take the form of either a facial or factual attack upon a plaintiff's complaint. *See Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir.1981). Under Rule 12(b)(1), a claim is properly dismissed for lack of subject matter jurisdiction when the court lacks statutory or constitutional authority to adjudicate the claim. *Home Builders Assoc. of Mississippi, Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the "jurisdictional attack before addressing any attack on the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). In ruling on a Rule 12(b)(1) motion, however, "the court is permitted to look at evidence in the record beyond simply those facts alleged in the complaint and its proper attachments." *Ambraco, Inc. v. Bossclip B. V.*, 570 F.3d 233, 238 (5th Cir.2009), *cert. denied*, 558 U.S. 1111, 130 S.Ct. 1054, 175 L.Ed.2d 883 (2010); *Ramming*, 281 F.3d at 161 (stating that a court ruling on a Rule

12(b)(1) motion may evaluate "(1) the complaint alone, (2) the complaint supplemented by undisputed facts evidenced in the record, or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.")

B. Jessica Daye Lacks Standing to bring suit

5. The Supreme Court has held that for a plaintiff to establish standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–561 (1992). If "the plaintiff does not claim to have suffered an injury that the defendant caused and the court can remedy, there is no case or controversy for the federal court to resolve." *TransUnion LLC v. Ramirez,* --U.S.--, 141 S.Ct. 2190, 2203, 210 L.Ed.2d 568 (2011)(citing *Casillas v. Madison Avenue Assocs., Inc.*, 926 F.3d 329, 333 (CA7 2019)). A court should assess whether plaintiff's injury is "concrete" or "real, and not abstract" by what harm has "traditionally" been recognized as providing a basis for a lawsuit in American courts. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

6. There are traditionally recognized categories of voter intimidation cases such as *U.S. v. Tan Duc Nguyen*, 673 F.3d 1259 (9th Cir. 2012) (concluding that the wide distribution of a letter among Latino immigrants warning "that if they voted in the upcoming election their personal information would be collected" and could be provided to anti-immigration organizations constitutes sufficient evidence to find unlawful intimidation under California law); *U.S. v. McLeod*, 385 F.2d 734, 740-41 (5th Cir. 1967) (holding that a pattern of baseless arrests of Black individuals attending a voter-registration meeting was intimidating and coercive conduct given its "chilling effect" on voter registration); *U.S. v. Bruce*, 353 F.2d 474, 476-77 (5th Cir. 1965) (holding that a landowner's restriction of an insurance collector's access to the landowner's

property due to the insurance collector's efforts to register voters constitutes unlawful intimidation); *U.S. v. Beaty*, 288 F.2d 653, 654-57 (6th Cir. 1961) (holding that the eviction of sharecroppers as punishment for voter registration constitutes unlawful intimidation). In all these cases, there was a distinct threat of potential harm or actual harm. In the instant case, there is no evidence or allegations of any threatened harm or actual harm by Defendants, and therefore, Daye lacks standing to bring this suit.

7. Here, Plaintiff Daye fails to state that she was subjected to actions by a state actor that caused a deprivation of her rights. Daye, who is the elected Democratic chair for precinct 19[1], filed a declaration in this matter stating that she witnessed a "white *male* poll worker" ask an elderly black woman, in an aggressive tone, to state her address. *See* Exhibit 3/Doc. 5 at P.2. Daye states she "was so alarmed and frustrated" at what she saw that she left the polling location. *Id.* No poll worker was speaking to Daye. In fact, the elderly woman in question was not even next to Daye, but was "at the front of the line". *Id.* According to her declaration, Daye was never subjected to any act by a state actor who is a Defendant in this case. In addition, Plaintiff has provided no authority that a poll worker cannot ask for a voter's address to prove residency pursuant to the Texas Election Code section 63.0011. Section 63.0010 specifically states,

> (a) Before a voter may be accepted for voting, an election officer shall ask the voter if the voter's residence address on the precinct list of registered voters is current and whether the voter has changed residence within the county...

There is no direction within the statute on how to ask a voter if their address has changed. Regardless, asking for the address as required by law, or witnessing the asking, does not rise to the level of a constitutional violation. Asking for a voter's address is a legal obligation by the poll worker. Bowling testified at the TRO hearing that state law requires them to verify the voter

[1] Daye is the elected Democratic precinct chair for precinct 19. The John Paul Davis Center is in precinct 4. See public information precinct maps found at https://jeffco.maps.arcgis.com/apps/webappviewer/index.html?id=3af399920c3343d39e272266fee2d49e.

address upon checking in a voter. *See* Exhibit 1 at P.56, L.9-P.57, L.16. Leister, as the County Clerk, testified that Texas law allows a poll worker to ask a voter their whole address. *Id*. at P.99, L.20-22. Therefore, Daye has not been deprived of a constitutional right. Daye being offended at how another person was allegedly treated does not rise to a §1983 cause of action for Daye. Therefore, Daye does not have standing to bring section 1983 claims against these Defendants.

8. Likewise, Daye lacks standing to bring a cause of action under section 11(b) of the Voting Rights Act for voter intimidation. Section 11(b) of the Voting Rights Act states that "no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote." 52 U.S.C. § 10307(b). As previously stated, the only act asserted by Daye is her witnessing a white male poll worker aggressively asking an elderly black woman at the front of the line her address. *See* Exhibit 3/Doc. 5. Daye has failed to show that a person acting under the color of law and a party to this suit intimidated or threatened her or coerced her to prevent her from voting. Daye also failed to show that she was denied the right to vote at any time and in fact voted on Election Day. *See* Exhibit 2.

C. <u>NAACP lacks standing to bring suit</u>

9. An organization has standing to sue on its own behalf if it meets the same standing test that applies to individuals. *See Havens Realty Corp. v. Coleman,* 455 U.S. 363, 378–79 (1982); *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C.Cir.1995). That standard, at its " 'irreducible constitutional minimum,' " requires that the plaintiff demonstrate that he or she "has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Fowler*, 178 F.3d 350, 356 (5th Cir. 1999) (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61,

112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). Thus, an alleged injury must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical" to pass constitutional muster. *Lujan*, 504 U.S. at 560–61.

10. Further, associational standing allows an organization to assert the standing of its members, insofar as their interests in the suit are "germane" to the organization's "purpose." *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). For associational standing, an organization must identify "a specific member" to assert standing on his behalf. *City of Kyle*, 626 F.3d at 237; *see also Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009) ("[T]he Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm ...."). In other words the NAACP can have associational "standing to sue under Article III of the Constitution of the United States only if (1) at least one of its members would have standing to sue in his own right; (2) the interest it seeks to protect is germane to its purpose; and (3) neither the claim asserted nor the relief requested requires the member to participate in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n (Hunt*), 432 U.S. 333, 343 (1977). In the instant case, the organization fails to specifically identify any member who has suffered harm or would have standing to sue in their own right.

11. Here, Daye, who has filed a declaration and is identified as a co-plaintiff, lacks standing for the reasons stated above. Further, her declaration does not give the NAACP standing to bring this suit.

12. Additional declarations filed in this matter also show none of them have suffered harm. Specifically, Democrat alternate judge Benard[2], who was also a poll worker at the precinct in question, witnessed a white poll worker tell two elderly black voters that they may have to vote provisional ballot and, on another occasion, ask a black voter's identification. *See* Exhibit 4/Doc.

[2] Bowling was not the only lead judge at this facility during early voting. The Democratic party also had Benard as

6 at P.4. As Leister testified in the TRO hearing, provisional ballots are governed by Texas law and the poll worker has no discretion to determine whether a voter can vote standard or provisionally. *See* Exhibit 1 at P.92, L.1- P.93, L.22. In addition, Bowling testified that it was Democrat lead judge Benard that typically handled the provisional ballots. *Id.* at P.43, L.10-15. Therefore, the complaints against Bowling would apply equally to Benard. Democrat alternate judge Benard allegedly witnessed these acts but did not suffer any harm as no act was directed to her to prevent her from voting and therefore, would not have standing to sue in her own right. Further, her declaration does not give the NAACP standing to bring this suit.

13. Campbell, a black poll worker at the Community Center, also filed a declaration where she claims she witnessed white poll workers ask black voters to recite their address. *See* Exhibit 5/Doc. 7 at P.2. As stated above, requesting this information is required by Texas law. She also claims white poll workers watching black voters with one black voter stating "all those white people standing there" watching made her uncomfortable. *Id.* at P.4. Texas law changed this year under Senate Bill 1 regarding poll watchers. As Leister testified, poll watchers are not part of the County Clerk's office and are appointed by a political party or candidate and cannot be denied access to anything occurring in the voting location. *See* Exhibit 1 at P.70, L.12- P.71, L.14. Having white people, or white poll watchers, at the Community Center did not stop anyone from voting. Campbell is merely a witness to these alleged acts but did not suffer any harm as no act was directed to her to prevent her from voting and therefore, would not have standing to sue in her own right. Further, her declaration does not give the NAACP standing to bring this suit.

14. Cooper, and now Schedrick Evans, was/is the president of the Beaumont Chapter of the NAACP but neither has personal knowledge of alleged voter intimidation at the John Paul Davis Community Center. *See*, Doc. 32 P. 5, and Exhibit 8/Doc. 8. Further, Cooper's declaration does

their alternate judge at this facility. Bowling claims she and Benard were equals. *See* also Exhibit 1 at P.43, L.10-20.

not give the NAACP standing to bring this suit.

15. Lowe, a black poll worker, also filed a declaration. However, Lowe was working at the Theodore Johns Library, not the John Paul Davis location. *See* Exhibit 9/Doc. 9 at P.2. Lowe claims a voter came into the Theodore Johns Library claiming he was unable to vote at the John Paul Davis location. *Id.* Lowe fails to state why they couldn't vote or what they were told and if told by a white or black poll worker. She also claims white poll workers loudly read black voter addresses at the Theodore Johns Library. *Id*. Again, Lowe is a witness to these alleged acts but did not suffer any harm as no act was directed to her to prevent her from voting and therefore, would not have standing to sue in her own right. Further, her declaration does not give the NAACP standing to bring this suit.

16. Reynolds also filed a declaration. He claims that he had gotten complaints from his church members about their voting experience at the John Paul Davis Community Center. *See*, Exhibit 6/Doc. 10 at P.2. He also heard from Campbell on October 27 about a white poll worker "requiring Black voters to recite, out loud and publicly, various pieces of information…" *Id.* at P.3. He went to the polling location to talk with poll workers. *Id.* Reynolds went back to the polling location on October 31 and voted but claimed white poll workers were "looking at me suspiciously." *Id*. at P.6. Again, Reynolds was told of certain alleged acts by unknown members of the community but did not suffer any harm as no act was directed to him to prevent him from voting. Looking "suspiciously" at someone does not rise to a level of harm and therefore, he would not have standing to sue in his own right. Further, his declaration does not give the NAACP standing to bring this suit.

17. Roper also filed a declaration in this matter. Roper states that she was a voter assistant at the John Paul Davis polling center for early voting. *See* Exhibit 7/Doc. 11 at P.2. She claims she witnessed white poll workers aggressively asking black voters to recite their address. *Id.*

As stated above, this is required by law. She also claims she was followed by white poll workers as she assisted black voters. *Id*. at P.3. While Roper does not identify this individual, Defendants assume she is referring to a poll watcher. A poll watcher "is entitled to observe any activity conducted at the location at which the watcher is serving." *See* Tex. Elec. Code Sec. 33.056. A watcher is also "entitled to be present at the voting station when a voter is being assisted by an election officer, and the watcher is entitled to examine the ballot before it is deposited in the ballot box to determine whether it is prepared in accordance with the voter's wishes." *Id*. at Sec. 33.057. Obstructing a poll watcher is a criminal offense. *Id*. at Sec. 33.061. Therefore, this is not a violation of any law. Roper further states that she witnessed white poll workers not assisting black voters with their ballots and the scanning machine. *Id.* Again, Roper is a witness to these alleged acts but did not suffer any harm as no act was directed to her to prevent her from voting and therefore, would not have standing to sue in her own right. Further, her declaration does not give the NAACP standing to bring this suit.

18. The NAACP has not shown that any of their members suffered an injury. Nowhere in their complaint does the NAACP state that asking a person their address is an injury or a violation of law. In fact, Texas law requires the poll worker to ask the voter if the voter's residence address on the precinct list of registered voters is current and whether the voter has changed residence within the county. Tex. Elec. Code §63.0011(a). Nowhere in section 63.0011 does it specify how the poll worker is to ask a voter if their address on the voter list is current and Plaintiffs point to no law that states a voter cannot be asked to recite part of all of their street address when registering at a polling location. A person's address is not private or confidential. In fact, a copy of the list of voters, with their address, must be furnished "to any person requesting it." Tex. Elec. Code §18.005 and 18.008. Therefore, the NAACP has failed to show that one of its members would have standing to sue in his/her own right. The NAACP has failed

to show it or a member has suffered "an injury in fact". For the reasons stated above, the NAACP lacks standing to bring this suit.

D. Plaintiffs' claims are Moot

19. "[M]ootness is a threshold jurisdictional inquiry." *Louisiana Env't Action Network v. U.S. EPA*, 382 F.3d 575, 580 (5th Cir. 2004). A case is moot "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012). "Generally, any set of circumstances that eliminates actual controversy after the commencement of a lawsuit renders that action moot." *Center for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006). In the instant case, Plaintiffs are seeking a permanent injunction against Defendants enjoining them "from engaging in conduct intimidating Plaintiffs and other voters at any polling place in Jefferson County moving forward." *See* Doc. 1 at P.17. The complaint itself is specific to alleged voter intimidation at one polling location in Jefferson County, the John Paul Davis Community Center, and one named poll worker. *Id*. at P.5. The election in question occurred on November 8, 2022. Defendants would show that the alleged controversy between one poll worker at one polling location is now over and moot making it impossible for this court to grant any sort of effectual relief for future possible harm.

20. To prevail on a claim for prospective equitable relief, a plaintiff must demonstrate continuing harm or a "real and immediate threat of repeated injury in the future." *Society of Separationists, Inc. v. Herman*, 959 F.2d 1283, 1285 (5th Cir. 1992). The threat of future harm must be "certainly impending"; mere "[a]llegations of possible future injury" do not suffice. *Clapper*, 568 U.S. at 409. "[C]ourts may not decide cases that since have become moot because there is no longer a live case or controversy." *Texas v. Equal Emp. Opportunity Comm'n*, 933 F.3d 433, 449 (5th Cir. 2019). At this time all complaints Plaintiffs had of poll workers is moot.

There is no case in controversy since there are no poll workers and no active election. In addition, there is no evidence that Defendant Bowling or any of the poll workers will work another election or that Bowling or the other poll workers will work at the John Paul Davis Community Center and to argue such to this court is speculation and conjecture of "possible future injury" which is hypothetical and is not sufficient for prospective equitable relief. *See Lujan*, 504 U.S. at 560. Because the election is over, Plaintiffs' claims are based on hypothetical scenarios and relief cannot be granted by this court because any order issued by this court will be advisory only. *See St. Pierre v. United States*, 319 U.S. 41, 42 (1943).

III.

ARGUMENT & AUTHORITY

A. Rule 12(b)(6) Failure To State a Claim

21. A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests a complaint's legal sufficiency. "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The *Iqbal* Court explained, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In deciding whether a plaintiff has set forth a plausible claim, the Court must construe the complaint in the light most favorable to the plaintiff and accept as true all well-pleaded factual allegations. *Id.* But "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice," *Iqba*l, 556 U.S. at 678, and the Court has no duty to create a claim not spelled out in the pleadings, *Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC*, 484 F.3d 865, 871 n.4 (6th Cir. 2007). "Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the

allegations in the complaint are true." *Twombly*, 550 U.S. at 555-56.

22. "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.* Ultimately, the "[f]actual allegations [in the complaint] must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. Conclusory allegations "disentitle[ ] them to the presumption of truth." *Iqbal*, 566 U.S. at 681. It follows that the court, in reviewing the plaintiff's complaint, may neither "accept conclusory allegations" nor "strain to find inferences favorable to the plaintiffs." *Southland Sec. Corp. v. INSpire Ins. Sols., Inc.*, 365 F.3d 353, 361 (5th Cir. 2004).

B. 42 U.S.C. §1983

i. Laurie Leister, in her official capacity as the Jefferson County Clerk and Mary Beth Bowling, as presiding judge of the John Paul Davis Community Center

23. If a plaintiff is attempting to prevail under §1983 against a defendant in her official capacity, then the plaintiff must satisfy the *Monell* test. *Duvall v. Dallas Cnty, Tex.*, 631 F.3d 203, 209 (5th Cir. 2011) (citing *Monell v. New York City Dept. of Social Serv.*, 436 U.S. 658, 694 (1978)). Under *Monell*, claims against government agents or officers in their official capacities are, in essence, claims against the governmental entity itself. *Monell*, 436 U.S. at 694. A plaintiff may hold a municipality liable under §1983 "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury[.]" *Id.* Therefore, Leister and Bowling will be combined in the analysis for Jefferson County, Texas as stated below.

ii. Jefferson County, Texas and Jefferson County Commissioners' Court

24. Jefferson County can only act through its governing body, the Jefferson County Commissioners' Court. TEX. CONST. art. V, §18. A commissioners' court's primary function is to administer its county's business affairs. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22

(Tex.2003) citing *Avery v. Midland County*, 406 S.W.2d 422, 426 (Tex.1966), *vacated on other grounds*, 390 U.S. 474, 485–86 (1968). Under this authority, the commissioners' court has the power to determine the county budget and appropriate funds. Tex. Const. art. V, § 18(b). This duty is nondelegable. Therefore, Jefferson County, Texas, through the Jefferson County Commissioners' Court, can only act in approving purchasing of the voting equipment and setting the Jefferson County Clerk's budget.

25. Under the law of the Supreme Court and Fifth Circuit, liability against Jefferson County, Texas "under section 1983 requires proof of three elements: a policymaker, an official policy, and a violation of constitutional rights whose 'moving force' is the policy or custom." *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001) (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)). "The description of a policy or custom, and its relationship to the underlying constitutional violation, moreover, cannot be conclusory; it must contain specific facts." *Henrise v. Horvath*, 94 F. Supp. 2d 768, 770 (N.D. Tex. 2000) (citing *Spiller v. City of Texas City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997)). Section 1983 does not allow a municipality to be held vicariously liable for its officers' actions on a theory of *respondeat superior*. 42 U.S.C. § 1983; *see Bd. of Cnty. Comm'rs of Bryan Cnty. 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 his constitutional rights. *Monell*, 436 U.S. at 690–91.

26. A plaintiff must identify the policy, connect the policy to the governmental entity itself, and show that his injury was incurred because of the application of that specific provision. *See Bennett v. City of Slidell*, 728 F.2d 762, 767 (5th Cir.1984). A plaintiff must establish that a governmental entity through its deliberate conduct was "the moving force behind the injury alleged," and must establish a direct causal link between the governmental action and the

deprivation of a federally protected right. *See Bryan Cnty.*, 520 U.S. at 404. Liability must rest on official policy, not the policy of an individual officer. *Bennett*, 728 F.2d at 769.

27. "When the challenged conduct relates to a custom or behavior among non-policymaking employees, which may be contrary to official policy, a plaintiff cannot rely on a single instance of unconstitutional conduct, but must demonstrate at least a pattern of similar incidents in which citizens were injured ... to establish the official policy requisite to municipal liability under section 1983." *Duvall v. Dallas County*, 2008 WL 4561563, at *8 (N.D.Tex. Oct. 10, 2008) (Lindsay, J.); *see also Bennett*, 728 F.2d at 768 n. 3 ("Isolated violations are not the persistent, often repeated, constant violations, that constitute custom and policy as required for municipal section 1983 liability."). In other words, if a plaintiff attempts to use the actions of a municipalities' employees to prove a "custom," the employees' actions "must have occurred for so long or so frequently that the course of conduct warrants attribution to the governing body of knowledge that the objectionable conduct is the expected, accepted practice of [district] employees." *G.M. v. Shelton*, 595 F. App'x 262, 265 (5th Cir. 2014) (citing *Webster v. City of Hous.*, 735 F.2d 838, 841); *Smith v. Houston Indep. Sch. Dist.*, No. CV H-18-2938, 2018 WL 5776936, at *2 (S.D. Tex. Nov. 2, 2018). However, there are no such allegations in Plaintiffs' pleadings.

28. Here, Plaintiffs do not identify a policymaker, nor have Plaintiffs specifically identified a policy or custom and how such policy or custom caused the plaintiffs' alleged constitutional violation. Plaintiffs generally allege that

> "Defendants have engaged in a pattern and practice of intimidating voters at the Community Center and Theodore Johns Branch Library with a specific intent to do so by asking voters to recite their addresses out loud once voters have already been checked in, by closely following voters and their assistants around the polling place, by hovering over Black voters and their assistants as they selected candidates, and by neglecting to assist black voters in feeding their ballots into the ballot scanning

machine and/or allowing this conduct to happen unabated after knowing it is happening." *See* Doc. 32 at ¶79.

29. A municipality "cannot be liable for an unwritten custom unless '[a]ctual or constructive knowledge of such custom' is attributable to a city policymaker." *Pena v. City of Rio Grande City*, 879 F.3d 613, 623 (5th Cir. 2018) (citing *Hicks–Fields v. Harris Cty.*, 860 F.3d 803, 808 (5th Cir. 2017)). To establish municipal liability under § 1983 based on an alleged "persistent widespread practice or custom that is so common it could be said to represent municipal policy, actual or constructive knowledge of such practice or custom must be shown." *Malone v. City of Fort Worth*, 297 F. Supp. 3d 645, 654 (N.D. Tex. 2018) (citing *Hicks–Fields*, 860 F.3d at 808). In the Fifth Circuit, "[a]ctual knowledge may be shown by such means as discussion at council meetings or receipt of written information." *Hicks–Fields*, 860 F.3d at 808 (quoting *Bennett v. City of Slidell*, 728 F.2d 762, 768 (5th Cir. 1984)). "Constructive knowledge may be attributed to the governing body on the ground that it would have known of the violations if it had properly exercised its responsibilities, as, for example, where the violations were so persistent and widespread that they were the subject of prolonged public discussion or a high degree of publicity." *Id.*

30. Here, Plaintiffs fails to state that Jefferson County, Texas, through the Jefferson County Commissioners' Court, had any policy, practice or custom of voter intimidation that was a "persistent widespread practice." In fact, Plaintiff's only complain of two polling locations in Jefferson County, Texas during the early voting for the November 2022 election and Plaintiffs' declarations filed seem to complain of only one person and two specific dates.

31. Here, Plaintiffs' only allegation against Jefferson County, Texas and the Jefferson County Commissioners' Court is that "it is liable for the acts and omissions of its officials, acting on behalf of the County, to conduct elections." *See* Doc. 32 at ¶21-22. The allegations by Plaintiffs against the two individual Defendants are based on *respondeat superior*. Section 1983

does not allow a municipality to be held vicariously liable for its officers' actions on a theory of *respondeat superior*. *See Brown*, 520 U.S. at 403. Rather, Jefferson County can only be liable under §1983 if the execution of one of its customs or policies deprives a plaintiff of his/her constitutional rights. *Monell*, 436 U.S. at 690–91.

32. Document 3 of Plaintiffs' pleadings state that "Jefferson County has injured plaintiffs by failing to ensure a safe voting environment for the Black community in Beaumont. *See*, Exhibit 10/Doc. 3. The Commissioners' Court was made aware of the problems unfolding at the Community Center and failed to act." *See* Exhibit 10/Doc. 3 at P.13. Plaintiffs' allegations against Leister is that she failed to remove poll worker Bowling or take "other remedial action." *Id*. Plaintiffs' allegations against Bowling is that she had black voters recite their addresses out loud. *Id*. at P.15. None of these allegations rise to the level of a constitutional violation. In fact, Plaintiffs don't dispute that Commissioners' Court has no involvement in elections other than paying the bills. Plaintiffs' allegations are limited to two polling location and for, at most, two days. This is not a widespread practice or custom that can be said to represent municipal policy. Plaintiffs have not alleged any act by Jefferson County, Texas through the Jefferson County Commissioners' Court that created or ratified any policy, practice or custom that would have been the moving force to any alleged constitutional injury. Therefore, the Plaintiffs have failed to state a claim against Defendants Laurie Leister, Mary Beth Bowling, Jefferson County, Texas and the Jefferson County Commissioners' Court.

C. Unclean Hands

33. "He who comes into equity must come with clean hands." *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 241 (1933). In *Keystone*, the Supreme Court described the doctrine of unclean hands as follows:

> "[Plaintiff] must come into court with clean hands. He must be frank and fair with the court, nothing about the case under consideration should be guarded, but

> everything that tends to a full and fair determination of the matters in controversy should be placed before the court ... It is a principle in chancery, that he who asks relief must have acted in good faith. The equitable powers of this court can never be exerted on behalf of [one] who has acted fraudulently, or who by deceit or any unfair means has gained an advantage. To aid a party in such a case would make this court the a better of iniquity. *Id.* at 244-45.

The unclean hands doctrine " 'closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant,' and requires that claimants 'have acted fairly and without fraud or deceit as to the controversy in issue.' " *Gilead Sciences, Inc. v. Merck & Co., Inc.*, 888 F.3d 1231, 1239 (Fed. Cir. 2018). "He who hath committed inequity, shall not have equity." Richard Francis, *Maxims of Equity* 5 (1727).

34. In the instant case, there were an equal number of Republican poll workers to Democrat poll workers at the John Paul Davis Community Center. Texas law requires political party chairs to submit a list of names for election precinct judges. *See* Tex. Elec. Code. Sec. 32.002. Here those chosen as precinct judges for this location were Bowling for the Republican party and Benard for the Democrat party. *See also* Doc. 6 at P. 1-2. According to Bowling, they were equals. *See* Doc. 1 at P.43, L.13-20. There would be an equal number of clerks for both sides as well as poll watchers. *See* Exhibit 1 at P.38, L.4-10 as well as Doc. 1 at P.10.

35. Plaintiffs have attached declarations that show that the following:

- Daye is a black female and a Jefferson County Democrat precinct chair;
- Benard is a black female and was the alternate judge at the John Paul Davis Community Center during early voting;
- Campbell is a black female who was a poll worker at the Community Center during early voting;
- Lowe is a black female who was a poll worker at the Theodore Johns Library.
- Roper is a black female who was a voter assistant at the Community Center during early voting.

36. Daye's declaration claims she witnessed an elderly black woman at the head of the line

being asked her address in an "aggressive" tone and Daye left the polling location because of this. *See* Exhibit 3/Doc. 5. As a Democrat precinct chair, Daye did not report this to Benard, the Democrat judge for the location, nor did she report this to Leister, the Election hotline or the Democrat party chair to address what she perceived as an issue.

37. Benard, as the alternate judge for this location, had a duty to report the alleged concerns as stated in her declaration to Bowling, Leister, the Election hotline or the Democrat party chair. Benard's declaration shows that she watched two elderly black voters leave without voting when Bowling advised them they may not want to vote provisionally. *See* Exhibit 4/Doc. 6. Benard did nothing to correct Bowling if she thought Bowling was wrong or did she attempt to stop the voters from leaving. Benard claims she saw Bowling standing over black poll workers and asking for addresses. *Id.* Again, as alternate judge, she did nothing to try and correct what she thought was incorrect.

38. Campbell was also black poll worker at the Community Center. In her declarations, she too failed to report any alleged misconduct such as asking for addresses, "white people standing" around or being watched to Bowling, Benard, Leister, the Election hotline or the Democrat party chair. *See* Exhibit 5/Doc. 7. Lowe, was a black poll worker at another location and was told by two voters that they did not receive their mail ballot in the mail and was told they could not vote provisionally at the John Paul Davis Community Center. *See* Exhibit 9/Doc. 9. Nowhere in her declaration does she state that she contacted Bowling, Benard, Leister, the Election hotline or the Democrat party chair if she thought something was done improper.

39. Roper was also a black poll worker at the Community Center. Her declaration also shows that she failed to report white workers asking black voters for addresses and on several occasions allegedly not helping black voters scan their ballots. *See* Exhibit 7/Doc. 11. Her declaration also fails to state why the white poll workers couldn't help on those occasion.

Were they busy? Were the black poll workers busy? Why were no black poll workers assisting these voters? Most importantly, why didn't Ms. Roper report this to Bowling, Benard, Leister, the Election hotline or the Democrat party chair if she thought something was done improper?

40. The only complaints received from Leister was from Reynolds who complained of the asking of addresses. Leister went to the Community Center and found no issues. She thought the issue was resolved. *See* Exhibit 1, P.85, L.18-25. Leister responded to the court in the TRO hearing that she did not find that Bowling had disobeyed the provisions of the election code. *Id.* at P.90, L.10-13. Other than Reynolds, no one else complained to her about being asked about addresses. *Id.* Leister received no complaints during early voting that a voter was not allowed to vote provisionally or that they were turned away. *Id.* at P. 93, L.19- P.94, L.1. As stated at the TRO hearing, it's interesting that all the people the Plaintiffs claim were personally affected, there are no affidavits or declarations from them.

41. No voter has come forward to claim they were denied the ability to vote because they were asked their address or that their vote didn't count because they were denied help with scanning their ballot. In short, Plaintiffs are complaining of matters that should have been addressed by the workers at the Community Center, through Bowling and/or Benard and persons with the same responsibilities at the Theodore Johns Library. If not resolved at those levels, they were obligated by their duties as election workers to have brought the complaint to Leister, the Election hotline or the political party chairs. None of that was done, instead they filed a federal lawsuit complaining of things that they themselves should have addressed through Bowling and/or Benard, Leister, the Election hotline and the Republican and Democrat party chairs. Plaintiffs should not receive equity when they themselves, who are precinct chairs, election judges and workers, failed to act in good faith by doing nothing to resolve these

matters.

IV.

ARGUMENT AND AUTHORITY

A. Voting Rights Act, 52 U.S.C. 10307

42. Plaintiffs bring a claim under 52 U.S.C 10307 section 11(b) also known as the Voting Rights Act. Section (b) states,

> no person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of title 42.

52 U.S.C. 10307 (b). While there are very few civil voter-intimidation claims some courts, including the Fifth Circuit, have dismissed these claims where plaintiffs could not identify specific individuals who were deterred from voting based on being intimidated, threatened or coerced. *See United States v. Edward*, 333 F.2d. 575, 579 (5th Cir. 1964)(finding that only one "isolated" incident occurred and plaintiffs failed to show that incident actually reduced the number of African Americans who registered to vote); *Brooks v. Nacrelli*, 331 F. Supp. 1350, 1353 (E.D. Pa. 1971) ("Plaintiffs have failed to show that the challenged activities have, in fact, had an intimidating effect upon the voters of the City of Chester.")

43. The definition of "intimidate" is to make another person fearful, especially to compel or deter by or as if by threats, in order to influence his or her conduct. "Intimidate." *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/intimidate. Accessed 23 Nov. 2022. To "threaten" is utter threats again or to give signs or warnings of. *Id.* at Threaten. To "coerce" is to compel another person's conduct using force. *Id.* at Coerce. The ordinary and natural meaning of these terms are

unambiguous. Here, Plaintiffs have failed to show any specifically identified voter that was deterred from voting based on being intimidated, threatened or coerced. Therefore, Defendants cannot show a claim under the Voting Rights Act.

V.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Defendants JEFFERSON COUNTY, TEXAS, JEFFERSON COUNTY COMMISSIONERS COURT, LAURIE LEISTER, in her official capacity, and MARY BETH BOWLING, in her official capacity pray that the Court grant this FRCP 12(b)(1) and 12(b)(6) motion and render judgment by dismissing plaintiffs' suit against them with prejudice and for any other and further relief, both in law and in equity, to which these Defendants may show themselves justly entitled.

Respectfully submitted

JEFFERSON COUNTY DISTRICT
ATTORNEY'S OFFICE

By: /s/ Kathleen M. Kennedy

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ATTORNEY FOR DEFENDANTS

Certificate of Service

I hereby certify that a true and correct copy of the foregoing *FRCP 12(b)(1) and 12(b)(6) Motion of Jefferson County, Texas, Jefferson County Commissioners' Court, Laurie Leister, in her official capacity and Mary Beth Bowling in her official capacity* has been forwarded to all counsel of record by E-FILE on this 20th day of December, 2022.

/s/ Kathleen M. Kennedy
KATHLEEN M. KENNEDY