UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR FREE SPEECH, *Plaintiff*, v. JAMES TINLEY, in his official capacity as Executive Director of the Texas Ethics Commission, *Defendant.*	§ § § § § § § § § § §	No. 1:23-cv-01370-DAE

DEFENDANT'S RESPONSE TO PLAINTIFF'S CONTESTED MOTION TO SET BRIEFING SCHEDULE FOR PENDING MOTION FOR SUMMARY JUDGMENT

James Tinley, in his official capacity as the Executive Director of the Texas Ethics Commission (the "Commission"), submits this response to Plaintiff's Motion to Set Briefing Schedule for Pending Motion for Summary Judgment (the "Motion").[1]

INTRODUCTION

Plaintiff Institute for Free Speech ("IFS") filed its Motion requesting that the Court impose a deadline for the Defendant to file a response to IFS's summary judgment motion by October 20, 2025, and to consider any failure to do so a waiver of the Commission's ability to respond. This "rush to judgment" approach on IFS's efforts to invalidate a long-standing Texas state law prohibiting corporate campaign contributions is meritless. IFS's claims should be treated like any others. Discovery is needed on IFS's claims. IFS has brought claims that require it to establish

[1]Since this lawsuit was filed, the Executive Director has changed from Mr. J.R. Johnson to Mr. James Tinley, and several of the Commissioners have been substituted. The Commission is contemporaneously filing a notice of automatic substitution regarding the current Executive Director. Dkt. 49-50. In addition, as all of the individual-capacity claims against the Commission's commissioners have been dismissed by the Court (a decision affirmed by the Fifth Circuit), the only necessary official-capacity party is the Executive Director.

standing by the standards of proof required by the stage of proceedings, and the parties are no longer at the pleadings stage. IFS has brought as-applied challenges (as well as a facial challenge) to the Texas statute, thus raising factual issues about how the law is or could apply to IFS. The existence of factual issues is exemplified by the fact that IFS's own summary judgment motion depends on declarations of supposed facts.

The Commission has served discovery requests, both to IFS and the purported "potential clients" on whom IFS pins its theory of standing to challenge the corporate campaign ban law. **Exhibit A** (copies of currently pending discovery requests). The Commission is entitled to conduct discovery on the factual assertions underlying IFS's claims before being required to substantively respond to IFS's summary judgment motion. In addition, the unilaterally suggested deadline of October 20 does not provide sufficient time to conduct that discovery, especially in light of the fact that IFS appears primed to oppose that discovery.[2]

In fact, despite taking the position that no discovery is needed before the summary judgment motion is decided, IFS has initially opposed the discovery on grounds that no Rule 26 discovery process has occurred. Despite the obvious contradiction in positions, the Commission has offered three dates in October after its counsel returns to the country for that purpose. **Exhibit B**. In the meantime, the Commission requests that the Court deny IFS's motion to set a briefing schedule and defer submission of IFS's motion for summary judgment until these matters can be addressed between the parties, and the Commission can have an adequate opportunity to conduct discovery and prepare a summary judgment response and potentially its own summary judgment motion, which could be considered at the same time as that filed by IFS.

[2]In addition, as counsel for the Commission has told counsel for IFS, the Defendants' lead counsel is out of the country until October 10, 2025. This is another reason why IFS's unilaterally suggested date for a response to its motion for summary judgment of October 20, 2025 is untenable.

PROCEDURAL HISTORY

In January 2022, IFS requested an advisory opinion from the Commission on whether IFS could provide pro bono legal services to political candidates without violating the prohibition on corporate political contributions. Dkt.1 at 17; *see also* TEX. ELEC. CODE § 253.094. In December 2022, the Commission adopted Ethics Advisory Opinion No. 580 ("EAO No. 580"), which provided that pro bono legal services fall under the definition of an in-kind corporate contribution under the Texas Election Code. Dkt. 1 at 25-28. IFS disagreed with EAO No. 580, and filed this lawsuit asserting claims against the Commission and its commissioners.

On September 15, 2023, the Commission and its commissioners filed a motion to dismiss based on Federal Rules of Civil Procedure 12(b)(1), 12(b)(3), and 12(b)(6). Dkt. 19. IFS responded to this motion on October 6, 2023. Dkt. 23.

IFS filed a motion for summary judgment on September 27, 2023. Dkt. 21. The Commission and its commissioners filed an initial response to this motion on October 18, 2023, requesting the motion be deferred under Federal Rule of Civil Procedure 56(d) so that discovery could be conducted. Dkt. 24.

That discovery has not occurred. The Court granted the motion to dismiss on August 30, 2024. Dkt. 36 and 40. The Court concluded that (1) IFS had not adequately pled a justiciable injury, (2) qualified immunity barred the individual-capacity claims, and (3) IFS's motion for summary judgment was moot. Dkt. 40 and text order.

IFS then appealed this Court's order to the Fifth Circuit. On July 28, 2025, the Fifth Circuit affirmed this Court's decision in part but reversed this Court's decision that IFS had not set forth sufficient pleadings that, if true, would support standing to bring claims against the Commission and its commissioners in their official capacities. Dkt 44-1 at 21. The Fifth Circuit affirmed this Court's dismissal of all claims pled against the Commission's Executive Director and

commissioners in their individual capacities based on qualified immunity. *Id.* The Fifth Circuit found "no error in the district court's decision to moot [IFS's] motion for summary judgment following its order on the Defendants' motion to dismiss." *Id*. at n.6. Thus, the Fifth Circuit "decline[d] to address IFS's First Amendment claims and [left] them for the district court to explore in the first instance" on remand. *Id*.

The Commission is now seeking discovery on those claims to be "explored in the first instance." *Id*.

ARGUMENT

Discovery is necessary before the Court can adjudicate this matter on summary judgment or otherwise. Federal Rule of Civil Procedure 56(d) ensures that nonmovants have an adequate opportunity to obtain discovery and present materials in support of their claims. *Cameron v. Christian*, No. SA-06-CA-325-FB, 2006 WL 8434160, at *2 (W.D. Tex. 2006) (concluding there was not adequate time to conduct discovery when the discovery deadline expired seven months after the movant filed its motion for summary judgment). The purpose of Rule 56(d) is to keep open the doors of discovery to adequately fight a summary judgment motion. *Id.*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) ("In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, **after adequate time for discovery** and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.") (emphasis added)).

Here, IFS filed its Complaint in August 2023, followed by a motion for summary judgment in September 2023 attaching three declarations from IFS witnesses as purported evidence. Dkt. 22. This "evidence" contains supposed facts that are subject to fulsome discovery. However, IFS has not afforded the Commission any opportunity to conduct discovery and instead urges this Court to proceed directly to a decision on the merits. The Commission seeks discovery that goes

to the factual averments made in IFS's own summary judgment evidence, among other things, including into IFS's and its allegedly potential clients' engagement in political acts that allegedly run afoul of the Texas Election Code. *See* Dkt. 24-1. Although the Fifth Circuit found that IFS sufficiently pled its claims, IFS must now prove those claims to this Court. *E.g.*, *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136-37 (1992) (holding at "each element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.") The Commission has not had an adequate opportunity to obtain discovery and must do so to properly test facts in dispute.

Further, the declarations IFS incorporated in its summary judgment motion include averments on the following factual subjects, among others, that Defendant should be permitted to explore further through the discovery process:

- Averments on residency of an individual and a claimed general purpose political committee ("GPAC") IFS claims it wants to represent.
- Averments on the intent of the individual to run for office and the GPAC to run a campaign, including averments about spend money in a certain fashion and advertise in a certain way.
- Averments on the feelings of this individual and GPAC about a requirement under state law regarding political campaign signage.
- Averments that the individual and the GPAC cannot afford to pay lawyers.
- Averments that the individuals and the GPAC believe they would be subject to liability under state law.
- Averments about Plaintiff not having offered to represent the individual or the GPAC.
- Averments about the non-profit nature and residency of IFS.
- Averments about the funding sources to IFS.
- Averments about the activities of IFS in "tak[ing] on legal cases that impact free political speech rights."

- Averments about the pro bono nature of legal services that IFS allegedly provides.
- Averments about concerns IFS (or its apparently non-lawyer representative) has about providing claimed pro bono services in light of Texas law restricting corporate contributions to political campaigns.
- Averments about claimed "opportunities" for representation that IFS has allegedly passed on given the claimed concerns.
- Averments about an advisory opinion from the Commission "resolving" the concerns allegedly held by IFS.
- Averments about an advisory opinion from the Commission giving rise to concerns by IFS (or its representative) about a "considerable risk of prosecution or civil liability."
- Averments about IFS (or its representative) believing it cannot provide pro bono legal services to people or entities it wants to represent.
- Averments about IFS's claimed rights "hav[ing] been chilled" as a result of issuance by the Commission of an advisory opinion.
- Averments about IFS's claimed rights having been burdened in Texas counties.
- Averments about other organizations that IFS (or its representative) claims cannot provide pro bono legal services to people or entities they want to represent.
- Averments about the claimed benefits of the Commission's advisory opinion benefitting the Commission itself or incumbent officeholders in Texas.

See Dkt.24-1.

Furthermore, the subject matter of this case, a civil rights case seeking to invalidate a provision of state law on constitutional grounds, inevitably involves discovery to help determine the competing individual and state interests at issue. *See, e.g.*, *Zimmerman v. City of Austin*, 861 F.3d 378 (5th Cir. 2018) (deciding a First Amendment challenge to campaign-finance laws after discovery and bench trial); *La Union Del Pueblo Entero v. Abbott*, No. 5:21-cv-00844, 2022 WL 17574079 (W.D. Tex. 2022) (ruling on motion to compel in election-law case involving First and Fourteenth Amendments); *Catholic Leadership Coalition of Tex. v. Reisman*, No. A-12-CA-566-SS, 2013 WL 2404066 (W.D. Tex. 2013) (ruling on cross-motions for summary judgment in

challenge to campaign-finance laws after allowing the parties to complete discovery). Therefore, the competing interests involved in this case are likely to be explored in discovery.

IFS contends that a Rule 26(f) conference must occur prior to discovery. **Exhibit B**. Yet, at the same time, IFS has put the cart before the horse and sought summary judgment prior to conducting any discovery. In light of this self-contradictory stance, counsel for the Commission has provided availability to IFS to set up a Rule 26(f) conference if such a conference would serve any meaningful purpose in the face of IFS's position that **no** discovery is needed. *Id.* In any event, IFS's insistence on a Rule 26(f) conference only indicates that more time is needed.

IFS's request for briefing and Court consideration of its motion for summary judgment is premature. This Court should deny the Motion.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court enter an order denying IFS's Motion, and granting such other relief to which the Commission may show itself to be entitled.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2025, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Eric J.R. Nichols
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