IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm, Plaintiff, v. JAMES TINLEY, in his official capacity as Executive Director of the Texas Ethics Commission; CHRIS FLOOD, RICHARD SCHMIDT, RANDALL ERBEN, PATRICK MIZELL, JOSEPH SLOVACEK, and SEAN GORMAN, GEANIE MORRISON, MARK STRAMA, in their official capacities as commissioners of the Texas Ethics Commission; Defendants.	No. 1:23-cv-01370-DAE

PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO SET BRIEFING SCHEDULE

Reply Argument

I. The Fifth Circuit's holding precludes discovery

Defendants' assertion that they are entitled to extensive jurisdictional discovery, see Dkt. 52 at 2, 5-6, before this Court rule on the pending motion for summary judgment flatly contradicts the Fifth Circuit's decision, which is the binding law of this case. The Fifth Circuit explicitly held in remanding this case that "[n]o further factual questions require resolution for adjudication of [IFS's] claims." Dkt. 44-1 at 21. The Circuit remanded this case only so that this Court could rule on the merits of summary judgment. Because the Circuit itself had declined to address "the merits of [IFS's] First Amendment claims," it directed this Court to explore "IFS's First Amendment claims . . . in the first instance." Dkt. 44-1 at 22 n.6.

Law of the case doctrine "prohibits a district court on remand from reexamining an issue of law or fact previously decided on appeal and not resubmitted to the trial court on remand." *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006). District courts must "proceed within the letter and spirit of the mandate by taking into account the appeals court's opinion and the circumstances it embraces." *Lion Elastomers, L.L.C. v. NLRB*, 108 F.4th 252, 259 (5th Cir. 2024) (citation omitted). Even "relitigation of issues . . . impliedly decided" is foreclosed. *United States v. Hoffman*, 70 F.4th 805, 812 (5th Cir. 2023) (citation omitted).

Defendants' opposition completely ignores the Circuit's explicit holding that no factual questions remain, see Dkt. 52, and never responds to Plaintiff's repeated argument that the Fifth Circuit has foreclosed discovery, see Dkt. 46 at 3, 5. By

failing to respond, Defendants have conceded IFS's argument, *see Brown v. McLane*, 807 F. App'x 410, 411 & n.3 (5th Cir. 2020), and if Defendants continue to refuse to timely respond on the merits, this Court should grant summary judgment.

II. The Fifth Circuit held that IFS had carried its burden of proving jurisdiction, not merely that IFS's allegations were sufficient

Defendants misread the Fifth Circuit's opinion as limited to IFS's allegations in its pleadings, see Dkt. 52 at 5, and thus insist that IFS still needs to show standing *again* at the summary judgment stage. Indeed, Defendants signal that they intend to fish through the private documents of non-parties via discovery with the goal of filing a *second* motion to dismiss on subject-matter jurisdiction. *See* Dkt. 52 at 2. But the Fifth Circuit already held that IFS "has carried its burden to show a pre-enforcement injury" and that "IFS has Article III standing." Dkt. 44-1 at 8, 13, 15. Those issues are now settled.

The Circuit's decision was not merely about pleading standards. The case was on appeal on a motion for summary judgment, as well as a motion to dismiss, and the Circuit had "considerable briefing" and evidence before it. See Dkt. 44-1 at 6, 22 n.6. Thus, the Circuit stressed that it could determine jurisdiction based on "the complaint supplemented by undisputed facts evidenced in the *record*." Dkt. 44-1 at 6 (citation omitted) (emphasis added). The decision repeatedly cited record evidence, including a witness declaration, in support of its holdings. *See, e.g.*, Dkt. 44-1 at 11, 15, 17.

The Defendants' fanciful assertion that the Circuit's decision only concerns pleading allegations is belied by the actual contents of the decision. IFS "has carried its burden to show" that it "has Article III standing." Dkt. 44-1 at 15. That holding binds the parties and this Court.

III. The TEC is already in possession of the information it needs to file a response brief on the merits

Even if the Fifth Circuit had not foreclosed discovery, the TEC's officials have not satisfied their burden of showing that they need discovery to respond to IFS's summary judgment motion—as IFS explained at length in its earlier brief, see Dkt. 28 at 3-9. After all, IFS brought a pre-enforcement challenge to the TEC's regulatory regime, offering legal arguments that do not depend on contested facts. *See* Dkt., ¶¶ 58, 62, 68, 75; Dkt. 21, at 9-29.

"Motions made under Rule 56(d) . . . may not simply rely on vague assertions that additional discovery will produce needed, but unspecified, facts." *Renfroe v. Parker*, 974 F.3d 594, 600-01 (5th Cir. 2020) (internal quotation marks and citation omitted). Instead, "a request to stay summary judgment under Rule 56(d) must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* at 601 (cleaned up). A "list of items *sought*" is not sufficient unless it shows what material facts expect to be developed. *January v. City of Huntsville*, 74 F.4th 646, 651 (5th Cir. 2023).

Defendants have not contested IFS's arguments on the merits; they have merely presented a wish list for investigating and relitigating jurisdictional issues that have already been resolved. Instead, Defendants must now bring forward arguments and evidence engaging with the merits of IFS's claims—that is, establishing a compelling government interest and narrow tailoring for applying the corporate-contribution ban to IFS's proposed activity. It is not for IFS or third parties to tell the TEC how to articulate the rationale for its own regulatory regime. The TEC's officials already possess this information.

IV. Rule 26(d)(1) precludes early discovery absent agreement or order of the court

In blatant contravention of the Fed. R. Civ. P., Defendants have proceeded to attempt to serve jurisdictional discovery on IFS and third parties. Dkt. 52-1. But Rule 26(d)(1) precludes seeking discovery "from any source" prior to the parties' Rule 26(f) conference. If Defendants wanted to seek early discovery without IFS's agreement, they should have first filed a motion establishing good cause and obtained a favorable ruling. Seeking disproportionate and burdensome jurisdictional discovery on issues already decided by the Fifth Circuit is not good cause.

V. The TEC Commissioners remain official-capacity Defendants in this case

Defendants have also unilaterally removed the TEC commissioners as parties in their official capacities from their imagined case caption, and written their brief as if Executive Director Tinley is the only remaining Defendant. *See* Dkt. 52 at 1 &

n.1; *see also* Dkt. 49 (notice listing only Tinley). But this Court dismissed the TEC Commissioners in their *individual* capacities (for nominal damages) only, which was affirmed by the Fifth Circuit. *See* Dkt. 44-1 at 21; Dkt. 40 at 29. Likewise, the Fifth Circuit squarely held that "IFS's claims against the Commissioners in their official capacity *may proceed.*" Dkt. 44-1 at 19 (emphasis added). And this makes sense, because the commissioners may vote to enforce Texas's corporate-contribution ban against IFS. Thus, all parties sued in their official capacities remain defendants in this case.

While IFS has no objection to allowing automatic substitution of successors in public office under Rule 25(d) for both the executive director and the new commissioners, it is inappropriate for Defendants to attempt to use the substitution process to unilaterally dismiss parties from the case, without obtaining a ruling on the merits.[1] The officials' names may change, but the enforcement officials sued as parties stay the same.

Conclusion

This Court should grant IFS's motion to set a briefing schedule for Defendants' response on the merits to the pending motion for summary judgment.

[1] *See also, Epie v. Owens*, No. 3:09-CV-1681-D, 2010 U.S. Dist. LEXIS 74422, at *8 (N.D. Tex. Apr. 2, 2010) (no substitution of agency for official-capacity defendants in caption).

Respectfully submitted,

Dated: October 2, 2025

s/Endel Kolde
Endel Kolde
Washington Bar No. 25155
Nathan J Ristuccia[2]
Virginia Bar No. 98372
INSTITUTE FOR FREE SPEECH
1150 Connecticut Ave., NW
Suite 801
Washington, D.C. 20036
Tel: (202) 301-1664
Fax: (202) 301-3399
dkolde@ifs.org
nristuccia@ifs.org

Attorneys for IFS

s/Tony McDonald
Tony McDonald
Texas Bar No. 24083477
Connor Ellington
Texas Bar No. 24128529
LAW OFFICES OF TONY MCDONALD
1308 Ranchers Legacy Trl
Fort Worth, TX 76126
Tel: (512) 200-3608
Fax: (815) 550-1292
tony@tonymcdonald.com
connor@tonymcdonald.com

[2] Not a D.C. Bar Member but providing legal services in the District of Columbia exclusively before federal courts, as authorized by D.C. Ct. App. R. 49(c)(3).