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, *et al.*; Defendants.	No. 1:23-cv-01370-DAE-ML

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO COMPEL

INTRODUCTION

The defendant Texas Ethics Commission (TEC) officials' motion to compel discovery asks this Court to ignore both the Fifth Circuit's mandate and the civil rules. A district court is obligated to effect both the letter and the spirit of an appellate court's mandate on remand, and it cannot reexamine an issue of fact or law that the appellate court decided either explicitly or implicitly. Yet the TEC asks this Court to disregard the Fifth Circuit's mandate and permit burdensome discovery on both merits and jurisdictional issues with the goal of relitigating issues that the Circuit already decided.

There is no need for discovery in this pre-enforcement challenge because IFS filed for summary judgment on purely legal grounds. More importantly, the Fifth Circuit concluded that "IFS has Article III standing" because "IFS has carried its burden to show that it has sustained a pre-enforcement injury, which both is traceable . . . and redressable here." Dkt. 44-1 at 15. The Circuit also held that "[n]o further factual questions require resolution for the adjudication of [IFS's] claims." *Id.* at 21. The Circuit has already decided that IFS has standing and that no discovery is necessary—rulings binding on the district court and the parties alike.

Given the Circuit's decision, discovery is both irrelevant to the parties' claims and defenses and disproportional to the needs of the case. Nonetheless, the TEC not only insists that it has a right to discovery, but also asserts that IFS has an obligation to respond to void discovery requests that were made prematurely before the mandatory Rule 26(f) conference occurred. This Court should deny the TEC's motion to compel and proceed to the merits of the case.

STATEMENT OF FACTS

IFS, a nonprofit corporation, has often represented non-Texas candidates or political committees in constitutional challenges to state election laws and wishes to

do this in Texas as well. Dkt. 44-1 at 3-4, 9; Dkt. 57-2 at 10-16. But the TEC—the agency responsible for enforcing the Texas Election Code—considers it a felony for nonprofit firms to provide *pro bono* legal services to Texas candidates or political committees. Dkt. 44-1 at 3-5; Dkt. 57-2 at 12-14; *see also* TEX. ELEC. CODE § 251.001(21), § 253.094. In August 2023, IFS bought a purely legal pre-enforcement challenge, arguing that TEC's regulatory regime unconstitutionally burdens IFS's right to associate, speak, and petition through *pro bono* litigation and that 42 U.S.C. § 1983 pre-empts the regime. Dkt. 1.

On August 30, 2024, IFS's suit was dismissed on standing and mootness grounds. Dkt. 40. But after IFS appealed, the Fifth Circuit reversed in part, holding that "IFS has Article III standing" because it had "carried its burden to show that it has sustained a pre-enforcement injury, which both is traceable to the Commissioners' potential enforcement of Section 253.094 and redressable here." Dkt. 44-1 at 15. The Circuit also held that "[n]o further factual questions require resolution for the adjudication of [IFS's] claims." *Id.* at 21. As a result, the Circuit remanded the case, with instructions for this Court to "explore in the first instance" "the merits of [IFS's] First Amendment claims." *Id.* at 22 & n.6.

On remand, IFS filed a second motion for summary judgment on the merits of the case. *See* Dkt. 57; Dkt. 57-1. The TEC, in contrast, noticed depositions and served lengthy requests for documentary production to both IFS and two non-parties. Dkt. 55-2; Dkt. 55-4; Dkt. 55-5. IFS and the non-parties both objected to these discovery requests as violating the Fifth Circuit's mandate, disproportionate, and premature—because no 26(f) conference has yet occurred. Dkt. 55-3; Dkt. 55-6; Dkt. 55-7. In response, the TEC moved to compel. Dkt. 55.

ARGUMENT

I. The Fifth Circuit expressly foreclosed discovery

The TEC flouts the Circuit's mandate, by seeking discovery into both merits and jurisdiction. *See* Dkt. 55-2 at 8-12; Dkt. 55-4 at 2, 12-13; Dkt. 55-5 at 2, 12-13. But the Circuit held that "[n]o further factual questions require resolution for adjudication of [IFS's] claims." *Id.* at 21. The Circuit remanded because it had declined to address "the merits of [IFS's] First Amendment claims" and thus directed the district court explore "IFS's First Amendment claims . . . in the first instance." *Id.* at 22 & n.6.

"The mandate rule, which is a corollary or specific application of the 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) (citations omitted). The district court must "effect our mandate and [] do nothing else." *Deutsche Bank Nat'l Tr. Co. v. Burke*, 902 F.3d 548, 551 (5th Cir. 2018) (cleaned up). Even "relitigation of issues . . . impliedly decided" is prohibited. *United States v. Hoffman*, 70 F.4th 805, 812 (5th Cir. 2023) (citation omitted). Instead, 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).

The Circuit's opinion is unambiguous: No facts remain needing resolution. The TEC tries to invent ambiguity by reading a phrase appearing thirteen pages earlier—"[a]s alleged in its complaint"—into the Circuit's language. *Compare* Dkt. 44-1 at 8 with Dkt. 55 at 3. This is nonsensical. Allegations in a pleading are not "factual questions" nor are they capable of "resolution." The Circuit's holding about facts was just that: a holding about facts, not allegations.

II. The Fifth Circuit held that IFS had carried its burden of proving jurisdiction, not merely that IFS's allegations met a pleading requirement

The Circuit's holding, moreover, that "[n]o further factual questions requir[ing] resolution" remain, *Id.* at 21, is not an "isolated statement regarding Plaintiff's jurisdictional pleadings," *contra* Dkt. 55 at 3. The Defendants' fanciful assertion that the Circuit's decision only concerns pleading standards is belied by the actual contents of the decision. The Fifth Circuit's decision was not limited to IFS's allegations in the pleadings. The case was on appeal on a motion for summary judgment, as well as a 12(b)(1) motion, and the Circuit had "considerable briefing" and evidence before it. Dkt. 44-1 at 6, 22 n.6.

Indeed, the Circuit spoke of "resolution" once before in its opinion, when it explained that the Circuit, when reviewing a Rule 12(b)(1) dismissal, could assess jurisdiction based on "undisputed facts evidenced in the *record*" and "the court's *resolution* of disputed facts"—not just on the complaint alone. Dkt. 44-1 at 6. (citation omitted) (emphasis added). The Circuit, that is, stated that it could rely both on allegations and on facts. The Circuit then proceeded, in the course of its opinion, to cite repeatedly both allegations *and* record evidence (including a witness declaration) and to resolve underlying material facts. *See, e.g.*, *id.* at 12 n.4, 15, 17.[1] It remanded so the district court could apply those facts to law in the first instance. *Id.* at 22 n.6.

[1] The TEC asserts, for instance, that it is entitled to use discovery to challenge certain statements in non-party Chris Woolsey's declaration, concerning that Woolsey's status as a "candidate" under Texas law and his intention to run for re-election. *See* Dkt. 55 at 6. But the Fifth Circuit found that "Woolsey is a candidate" and cited his declaration as credible. Dkt. 44-1 at 17. The TEC expressly seeks to attack the Circuit's binding resolution of facts.

Importantly, in addition to foreclosing discovery, the Circuit also held that "IFS has Article III standing" because IFS already "carried its burden to *show* a pre-enforcement injury" —not merely to plead it. *Id.* at 8, 13, 15 (emphasis added). Defendants ignore this holding in their brief, *see* Dkt. 55 at 4, and seek discovery into jurisdictional issues that the Circuit already decided, *see, e.g.*, Dkt. 55-2 at 8-12. Indeed, the defendants signal that they intend to use discovery as a fishing expedition through the documents of IFS and two non-parties with the goal of filing a *second* motion to dismiss on subject-matter jurisdiction. *See, e.g.*, Dkt. 55 at 4; Dkt. 52 at 2. The mandate rule exists to safeguard "the orderly administration of justice" by "preventing obstinate litigants from repeatedly reasserting the same arguments." *Pineiro*, 470 F.3d at 205. Evidently, Defendants plan to act exactly in the way that the mandate rule forbids.

Defendants pretend that the Circuit's straightforward holding "IFS *has* Article III standing," Dkt. 44-1 at 15 (emphasis added), actually should be reinterpreted to mean "IFS offers allegations in its complaint, which if taken as true, are sufficient to plead Article III standing." Both the letter and the spirit of the Circuit's opinion refute this. That IFS has proved standing is the binding law of the case. Defendants cannot be permitted to relitigate the Circuit's resolution of these issues of fact and law.

III. Discovery is both irrelevant and disproportionate, because the TEC already possesses all the information it needs to respond 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. After all, IFS brought a classic pre-enforcement challenge to the TEC's corporate-contribution ban, contending that, as a matter of

law, not dependent on contested facts, TEC's regulatory regime violates the U.S. Constitution. *See*, *e.g.*, Dkt. 1, ¶¶ 58, 62, 68, 75; Dkt. 57-1, at 11-25. Under *Willey v. Harris Cty. DA*, 27 F.4th 1125 (5th Cir. 2022), the TEC officials must show that their regime meets strict scrutiny, that is that it is supported by a compelling state interest and is narrowly tailored to achieve that interest. *See* Dkt. 57-1 at 15-19; Dkt. 21 at 23-27. While IFS asserts that the TEC cannot meet this standard, the information Defendants need to articulate the rationale for their regime is already in their possession. They will not learn it from IFS or third parties like Cary Cheshire or Chris Woolsey.

"Rule 56 does not require that any discovery take place before summary judgment can be granted." *Dominick v. United States Dep't of Homeland Sec.*, 52 F.4th 992, 995 (5th Cir. 2022). Once a motion for summary judgment is filed, a court may not defer for further discovery, unless the non-moving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." FED. R. CIV. P. 56(d). Additionally, a party requesting jurisdictional discovery—as Defendants seek here—"bear[s] the burden of demonstrating the necessity of discovery," and courts should deny jurisdictional discovery if "the requested discovery is not likely to produce the facts needed to withstand a motion." *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014) (cleaned up).

Courts cannot authorize "a jurisdictional fishing expedition" based on "general averments." *Johnson v. TheHuffingtonpost.com, Inc.*, 21 F.4th 314, 326 (5th Cir. 2021) (citations omitted). 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). Yet Defendants have offered nothing except a vague list of general requests: for instance, "any and all documents and communications relating to Plaintiff's decision to forego representing Woolsey or the League" or even "any

and all documents that support, refer to, or evidence any allegation, claim, or defense." Dkt. 55-2 at 8, 11. None of these requests touch upon merits, and they primarily seek documents about two third-parties whose sole relevance to this case concerns previously decided jurisdictional issues. *See* Dkt. 55-2 at 8-12.

IFS first moved for summary judgment over two years ago, arguing that the TEC's corporate contribution ban violated IFS's First Amendment rights and squarely presenting the issue of whether the Texas corporate contribution ban, as applied to IFS's proposed activities, can survive strict scrutiny. *See* Dkt. 21 at 18-34; *cf.* Dkt. 57-1, at 11-25. Throughout this litigation, the TEC has avoided engaging with the merits of IFS's claims. Not once—not even during oral argument—have Defendants offered a compelling government interest for preventing IFS from providing pro bono legal services, nor have Defendants explained how their regime is narrowly tailored. They know they cannot meet strict scrutiny, so they seek to avoid responding on the merits.

Discovery is irrelevant and disproportional to the needs of the case. *Cf.* FED. R. CIV. P. 26(b)(1). No factual questions requiring resolution remain. Dkt. 44-1 at 21 n.6. Moreover, 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—which is all they need to respond to Plaintiff's claims on the merits. Instead of defending their regime using the facts they currently know, Defendants have merely presented a wish list for investigating and relitigating jurisdictional issues that this Court already resolved. This Court should not permit this irrelevant and disproportionate discovery.

IV. The TEC's discovery requests are premature and void, because no 26(f) conference has occurred

IFS has not failed to timely object to the specific requests in TEC's discovery documents because the Federal Rules of Civil Procedure explicitly prohibit discovery until a planning conference has taken place, absent stipulation or court order. IFS's objections are not yet due. Indeed, the time period that IFS has to object to the TEC's specific requests has not even begun because IFS has not been served with discovery requests authorized by the civil rules.

The rules are explicit on this point: "A party may *not* seek discovery from *any source* before the parties have conferred as required by Rule 26(f)." Fed. R. Civ. P. 26(d) (emphasis added). Thus, subpoenas and discovery requests made before parties have conferred to develop a discovery plan are "invalid." *Crutcher v. Fid. Nat'l Ins. Co.*, No. 06-5273, 2007 U.S. Dist. LEXIS 8208, at *5, *8 (E.D. La. Feb. 5, 2007); *see also Does v. Kappa Alpha Theta Fraternity Inc.*, Civil Action No. 3:22-cv-1782, 2022 U.S. Dist. LEXIS 237820, at *1 (N.D. Tex. Aug. 19, 2022) (quashing a subpoena that violated Rule 26(d)(1)).

Although parties are allowed to send document requests made prior to the parties' discovery conference, these early requests are "considered to have been served at the first Rule 26(f) conference." Fed. R. Civ. P. 26(d)(2)(B). "Requests prior to a Rule 26(f) conference" are "designed to facilitate focused discussion during the 26(f) conference" because that discussion could even "produce changes in the requests." *Cook v. Craus*, No. 19-835-JWD-RLB, 2020 U.S. Dist. LEXIS 46926, at *3 (M.D. La. Mar. 18, 2020) (citing Advisory Committee Notes to the 2015 Amendment). Parties cannot use early Rule 34 requests as "merely a box to check prior to filing a motion to compel." *Id.*

As Defendants concede, parties have not conducted a Rule 26(f) discovery conference. *See* Dkt. 55 at 8; Dkt. 55-3 at 1. Rather, the TEC sent discovery requests to IFS on September 29, Dkt. 55-2 at 3, and moved to compel exactly 30 days later, on October 28, *see* Dkt. 55 at 9, without waiting for a 26(f) conference.

IFS has not refused to hold a 26(f) conference. Instead, IFS has consistently stated, *see* Dkt. 55-3 at 2; Dkt. 55-8 at 3, that it will participate in such a conference if this Court determines sometime in the future that the Circuit's mandate permits discovery on some unresolved factual question, and subject to IFS's right to appeal such a decision or file a mandamus petition.

Defendants cannot unilaterally declare that holding a 26(f) conference is "futile" and thus disregard the federal rules. If the TEC believes that it is entitled to a conference immediately (despite the Circuit's mandate), the proper remedy was to ask this Court to compel Plaintiff to participate in a 26(f) conference. *See, e.g.*, *Valadez v. Fed. Express Corp.*, No. 5:25-CV-0354-JKP, 2025 U.S. Dist. LEXIS 104753, at *4 (W.D. Tex. June 2, 2025) (resolving a motion to compel participation in a 26(f) conference); *Jana v. Walmart, Inc.*, No. 4:24-CV-00698-SDJ-BD, 2025 U.S. Dist. LEXIS 40138, at *3 (E.D. Tex. Mar. 6, 2025) (similar); *Int'l Turbine Servs. v. Puerto Quetzal Power*, LLC, No. 1:21-CV-1154 (RP), 2022 U.S. Dist. LEXIS 227449, at *6 (W.D. Tex. Aug. 4, 2022) (similar). But Defendants did not file such a motion, nor would such a motion—if granted—mean that the discovery requests TEC sent prematurely are already due.

The discovery requests that TEC sent on September 29 are invalid and have not yet been served on IFS. If and when they are ever properly served at parties' Rule 26(f) conference, IFS will respond to them and raise any timely objections according to the normal time tables set forth in the federal rules.

CONCLUSION

This Court should deny Defendants' motion to compel.

Respectfully submitted,

Dated: November 3, 2025

s/Endel Kolde
Endel Kolde
D.C. Bar No. 1782129
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).