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 REPLY BRIEF IN SUPPORT OF
MOTION TO COMPEL COMPLIANCE WITH DISCOVERY OBLIGATIONS

James Tinley, in his official capacity as the Executive Director of the Texas Ethics Commission (the "Commission"), submits this reply in support of the Commission's motion to compel.

SUMMARY

Plaintiff Institute for Free Speech ("IFS") cannot contest the following:

IFS has filed claims to invalidate a long-standing Texas statute prohibiting corporate campaign contributions, raising both facial and as-applied constitutional challenges.

IFS has filed a motion for summary judgment regarding the merits of its claims to which it has attached, among other things, four witness declarations that contain assertions of fact.

The discovery issued by the Commission to IFS and to the non-party "potential clients" at issue goes not just to the issue of whether IFS has standing to bring its claims, but also to the merits of those claims.

The law, which this Court applies in many cases, is that a plaintiff needs not just plead standing but prove it, according to the standard of proof at each stage of the case.

The Commission's counsel has repeatedly asked IFS counsel to participate in a Rule 26 conference, but IFS counsel has refused to do so.

Notwithstanding the above, IFS (and the non-parties) continue to stonewall the discovery propounded by the Commission. Court intervention is required to (1) break the stonewall and (2) address objections that IFS and the non-parties have either raised or waived. The Commission requests that the Court conduct a hearing on the motion and allow this case to get on a track towards full and fair discovery and ultimate resolution.

ARGUMENT

I. IFS does not have a basis to argue that the Commission cannot seek discovery based on the testimony IFS offered to this Court.

IFS's position that the Commission may not depose individuals whose sworn statements it has submitted in support of summary judgment is inconsistent with the Federal Rules. IFS cannot properly request that the Court accept the unchallenged version of events in declarations. Under Federal Rules of Civil Procedure 26(b)(1) and 45, a party is entitled to obtain discovery regarding any nonprivileged matter relevant to any claim or defense, including through depositions of fact witnesses. Having affirmatively submitted four declarations as alleged evidentiary support for summary judgment, Plaintiff cannot shield those witnesses from examination. *See Wells v. City of Austin*, No. 1:19-CV-1140-RP, 2020 WL 5366111, at *2 (W.D. Tex. 2020) (summary judgment premature before depositions completed).

Moreover, Plaintiff's attempt to foreclose such discovery while pressing its motion for summary judgment would deny Defendant the procedural fairness guaranteed by the Rules. Discovery is allowed prior to a motion for summary judgment. FED. R. CIV. P. Rule 56(d) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2)

allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order."). The committee notes for the 2010 amendment make clear that many motions for summary judgment will be premature. *Id.* at Committee Notes. "Summary judgment should not … ordinarily be granted before discovery has been completed." *Alabama Farm Bureau Mut. Cas. Co., Inc. v. Am. Fid. Life Ins. Co.*, 606 F.2d 602 (5th Cir. 1979).

Furthermore, as the Court is well aware, what is required to address an as-applied constitutional challenge to a law may well differ from what is required to assess a facial challenge to a law. *See generally Justice v. Hosemann*, 771 F.3d 285, 292 (5th Cir. 2014) (discussing what the requirements for an as-applied challenge and distinction with a facial challenge). A developed factual record is essential to an as-applied challenge. *Id.* "Particularized facts are what allow a court to issue a narrowly tailored and circumscribed remedy." *Id.* (citations omitted). This is undoubtedly part of the reason why IFS attached fact-laden declarations to its motion for summary judgment. Dkt. 57-2 at 3–5, 6–8, 9–17, 57–59. The Commission needs access to the results of the requested discovery to assess the validity of IFS's factual assertions and positions on its claims. **Exhibit A** (Declaration of James Tinley). The discovery requests are directed to the fact issues raised by IFS's claims. *Id.* For example, in a case such as this, the Commission does not have access through public information on the type of activities and "intent" of political candidates and political action committees at issue. *Id.*

II. Discovery sought goes beyond jurisdictional questions and addresses the merits of IFS's claims.

The Commission's discovery seeks information central to the factual predicates of IFS's claims, including the conduct to which IFS seeks to raise its as-applied challenge. In partially remanding this case, the Fifth Circuit sent the matter to this Court "for further proceedings" on IFS's First Amendment claims, leaving those issues to this Court to "explore in the first instance."

Dkt. 44 at 2, 22 n.6. That remand, from disposition of a Rule 12 motion focused on IFS's pleadings, does not insulate IFS from the evidentiary burdens that attend a *decision on the merits*, through summary judgment or otherwise. *E.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

IFS's contention that discovery is "foreclosed" by the Fifth Circuit opinion misreads the opinion and reflects a fundamental misapprehension of the posture of the case. The Fifth Circuit panel resolved questions of pleading sufficiency, not the ultimate evidentiary truth of factual allegations upon which IFS seeks summary judgment. Furthermore, because the subject matter of this case is a civil rights issue attempting to challenge a law, discovery is inevitable to determine the competing 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).

III. The Commission continues to offer times for a Rule 26(f) conference.

The Commission has requested the non-parties and IFS's availability to no avail. On November 5, 2025, counsel for the Commission again reached out to set up a Rule 26(f) conference. **Exhibit B**. So IFS's Catch-22 argument is as follows: you cannot do discovery until we have a Rule 26 conference, and we refuse to participate in a Rule 26 conference.

IV. This Court should conduct a hearing on whether IFS has waived objections to the discovery sought.

Plaintiff failed to respond to the Commission's requests for production beyond boilerplate objections and instead served generalized "prematurity" objection without addressing any individual request. This blanket objection does not preserve specific objections and constitutes a waiver. *E.g., Luckenbach Tex., Inc. v. Skloss*, No. 1:21-CV-00871-RP, 2023 WL 2229266, at *1 (W.D. Tex. 2023). The Commission requests that the Court grant the motion to compel and require compliance with the discovery requests. This discovery likely could have been completed by now if IFS had just cooperated with it.

V. Any issues of scope will be resolved with non-parties Woolsey and Cheshire.

The Commission's subpoenas to non-parties Woolsey and Cheshire comply with Rule 45 and seek narrowly tailored, nonprivileged information relevant to the issues Plaintiff itself placed at the center of this litigation. To the extent that Woolsey or Cheshire continue to raise specific privilege concerns, those may be addressed as discovery proceeds. But the non-parties are currently refusing to even *start* complying with discovery based on IFS's position that the Commission is foreclosed from conducting *any* discovery in this matter.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that the Court enter an order granting the Commission's Motion to Compel Responses to Discovery, and grant 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 November 10, 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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