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 REPLY IN SUPPORT OF SECOND MOTION FOR SUMMARY JUDGMENT

REPLY ARGUMENT

I. The Fifth Circuit already held that IFS had standing at the time of filing and that its claims are ready for adjudication

The Fifth Circuit already held that "[n]o further factual questions require resolution for adjudication of [IFS's] claims." Dkt. 44-1 at 21. Indeed, the Circuit reviewed both record evidence and the pleadings, *see, e.g.*, *id.* at 6, 12 n.4, 15, 17, and concluded that "IFS has Article III standing" having "carried its burden to show that it has sustained a pre-enforcement injury." *Id.* at 15. IFS is injured because it would be committing a felony if it provided pro bono services to Texas candidates or political committees. *Id.* at 3, 10-13.[1]

Yet the TEC demands jurisdictional discovery to reexamine issues decided on appeal, including standing. Dkt. 66 at 5-7. "As with all questions of subject matter jurisdiction except mootness, **standing is determined as of the date of the filing of the complaint."** *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) (cleaned up) (emphasis added). IFS filed its operative complaint (Dkt. 1) over two years ago, and the Circuit later held that "IFS has Article III standing." Dkt. 44-1 at 15. The TEC's claim that it may continue to litigate standing is frivolous and violates binding law of the case.[2]

The Fifth Circuit already held that IFS's claims are ready for adjudication. Dkt. 44-1 at 21. The TEC's proposed discovery thus contradicts the letter and spirit of

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[1] Contrary to the TEC's claims, Dkt. 66 at 8, IFS need not show threats and harassment. The TEC's "regulatory regime," Dkt. 40 at 17, injures IFS by prohibiting it from litigating pro bono against the government. *See, e.g.*, Dkt. 44-1 at 10-11; Dkt. 57-1 at 10, 14; Dkt. 40 at 15.

[2] The TEC has not asserted mootness. Even if it did, the TEC, as "the party asserting mootness," would bear "the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again." *Perez v. City of San Antonio*, 150 F.4th 430, 439 (5th Cir. 2025) (cleaned up). Here, there is an active legal controversy, because the TEC has not disclaimed enforcing its corporate-contribution ban against IFS on account of pro bono litigation—and it continues to defend the legality of its ban. Dkt. 66 at 8-17; Dkt. 44-1 at 11-12.

the circuit's mandate. *See Lion Elastomers, L.L.C. v. NLRB*, 108 F.4th 252, 259 (5th Cir. 2024); *United States v. Pineiro*, 470 F.3d 200, 205 (5th Cir. 2006).

II. The TEC has failed to show it seeks necessary merits discovery

"Rule 56 does not require that any discovery take place." *Dominick v. United States Dep't of Homeland Sec.*, 52 F.4th 992, 995 (5th Cir. 2022). Thus, the TEC bears the burden of "showing by affidavit or declaration that, for specified reasons, it cannot present facts *essential* to justify its opposition." FED. R. CIV. P. 56(d) (emphasis added). Although the TEC asserts that it also seeks merits discovery, *see* Dkt. 66 at 3, 7, the TEC's discovery requests to-date *see* Dkt. 55-2 at 8-12; Dkt. 55-4 at 2, 12-13; Dkt. 55-5 at 2, 12-13, only address resolved jurisdictional issues.

IFS's motion for summary judgment squarely put at issue whether the TEC's ban on the corporate provision of pro bono legal services can survive strict scrutiny. Dkt. 57-1 at 11-24. The TEC must now show a compelling governmental interest and narrow tailoring for its restriction. *See id.* at 15-22; Dkt. 44-1 at 20-22. The TEC has failed to logically connect its proposed discovery with this inquiry.

A party opposing summary judgment "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) (cleaned up). Rather, the party must show that discovery will plausibly adduce timely facts that, "will influence the outcome." *Id.* at 601 (cleaned up); *see also January v. City of Huntsville*, 74 F.4th 646, 651-52 (5th Cir. 2023) ("list of items *sought* isn't the same as identifying the *facts* those items will support" and does not suffice).

The TEC's sole declaration, Dkt. 66-1 at 2-3, offers merely a vague wish list of "averments," without showing how those would influence the merits. *See, e.g., Mdk Sociedad De Responsabilidad Limitada v. Proplant Inc.*, 25 F.4th 360, 366-67 (5th Cir. 2022) (denying discovery when party failed to identify specific facts altering

outcome); *Hampton v. Methodist Healthcare Sys. of San Antonio*, 490 F. App'x 640, 641 (5th Cir. 2012) (speculative assertions insufficient). Most of its demands are aimed at two non-parties (Woolsey and the League) with no connection to this case apart from the resolved issue of standing. *See* Dkt. 66 at 5; Dkt. 66-1 at 2-3; Dkt. 55-2 at 8-12; Dkt. 44-1 at 15. The TEC fails to explain how the discovery is "essential," FED. R. CIV. P. 56(d), and would reveal specific facts impacting the outcome.

Because IFS brought a purely legal pre-enforcement challenge, this case requires no merits discovery. IFS argues that, as a matter of law not dependent on contested facts, TEC's regulatory regime violates the First Amendment. *See, e.g.*, Dkt. 1, ¶¶ 58, 62, 68, 75; Dkt. 57-1, at 11-25. IFS asked this Court to hold that the TEC's regime "is constitutionally void and unenforceable as-applied to a corporation's provision of pro bono legal services and is also facially overbroad." Dkt. 1 at 3. Even IFS's as-applied claims do not depend upon IFS's own actions and policies—let alone the actions of non-party prospective clients. Rather, IFS seeks relief declaring the TEC's ban "unenforceable as-applied to any corporation's provision" and enjoining its enforcement "against IFS, or any other corporate legal-service provider, for providing pro bono legal services to . . . any other Texas candidate or political committee." *Id.* at 19.

As the Fifth Circuit found, any nonprofit corporation would be committing a felony if it provided pro bono services to any Texas candidates or committees. Dkt. 44-1 at 3, 10-11. The law bars many nonprofit firms, such as the Institute for Justice, the ACLU of Texas, and the Liberty and Justice Center, from offering these pro bono services. *See* Dkt. 44-1 at 4; Dkt. 1-2; Dkt. 1-3; Dkt. 57-1 at 57-59. The TEC does not dispute that IFS's intended conduct is illegal, *see, e.g.*, Dkt. 40 at 15, Dkt. 66 at 12-13, and the TEC has refused to disclaim enforcement against nonprofit firms like IFS, *see* Dkt. 44-1 at 11. Defendants supply no reason for thinking that

discovery into the TEC's own "advisory opinion," for example, or Woolsey's "dealings with printing companies" would affect the as-applied challenge. *See* Dkt. 66-1 at 3.

The only theoretically underdeveloped facts are those concerning the TEC's state interest for its regime and that regime's narrow tailoring. *See* Dkt. 57-1 at 15-19; Dkt. 21 at 23-27; *cf. Willey v. Harris Cty. DA*, 27 F.4th 1125, 1129-30 (5th Cir. 2022) (strict scrutiny applied to law restricting attorney's ability to solicit legal work). But the TEC cannot learn its regime's rationale and tailoring from others. Defendants possess that information. Indeed, the TEC's brief contends (wrongly) that it has shown a compelling interest and narrow tailoring. *See* Dkt. 66 at 8-16. If the TEC has already proven its case, it cannot maintain that discovery is essential.

III. The TEC's regime must satisfy strict scrutiny

As the circuit held in *Willey*, binding precedent "establish[es] three principles." *Willey*, 27 F.4th at 1130 (citing *In re Primus*, 436 U.S. 412 (1978) and *NAACP v. Button*, 371 U.S. 415 (1963)). First, "non-commercial attorney solicitation" for "religious [or] political reasons" is "constitutionally protected speech and association." *Id.* at 1129-30. Second, restrictions on such solicitations "are strictly scrutinized." *Id.* at 1130. Finally, restrictions are permissible if the government proves a restriction is "carefully tailored to prevent substantive evils that a state proves are present in a particular case." *Id.* "Strict scrutiny—which requires a restriction to be the least restrictive means of achieving a compelling governmental interest—is the most demanding test known to constitutional law." *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 484 (2025) (cleaned up).

Although *Willey* concerned an anti-barratry statute, nothing in its reasoning or the cases it cited limited their holdings to anti-barratry. Indeed, *Willey* held that the state's interest in "promoting election integrity" through "free and fair elections" is comparable to anti-barratry laws. 27 F.4th at 1131 & n.11, 1133. The TEC's

regulatory regime burdens the same fundamental rights to speak, associate, and petition as anti-barratry laws. The TEC's regime does not merely burden IFS's associational freedom.[3] It burdens IFS's ability to "carr[y] out its mission" of speaking and petitioning through "strategic litigation" on behalf of First Amendment rights, *see* Dkt. 44-1 at 1 (internal quotation marks omitted). For civil rights organizations, "litigation is . . . a form of political expression." *Primus*, 436 U.S. at 428 (cleaned up). Thus, strict scrutiny applies.

Strict scrutiny also applies because the TEC's regime is content based (indeed, viewpoint based). *See Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015). The TEC bans IFS from speaking and petitioning on one subject—pro bono legal challenges to Texas election law—while allowing IFS to bring pro bono suits (even ones representing the same clients) on any other legal subject. The only way the TEC can know if a lawsuit by IFS or another nonprofit corporation is or is not a felony is by looking at the words of the lawsuit itself. Thus, the TEC's regime "singles out specific subject matter for differential treatment." *Id.* at 169. "[A] content-based law that restricted the political speech of all corporations would not become content neutral just because it singled out corporations as a class of speakers." *Id.* at 170. Moreover, the TEC is effectively regulating non-campaign speech, because IFS's proposed course of conduct is litigation, not campaigning.

Even if this Court accepted Defendants' claim that exacting scrutiny—rather than strict scrutiny—applies, *see* Dkt. 66 at 14, that still mandates narrow tailoring. "While exacting scrutiny does not require" that governments employ "the least restrictive means of achieving their ends, it does require that they be narrowly

[3] The TEC implies this case is just about "associational rights." Dkt. 66 at 8, 14. But this case concerns the broader right "to associate, speak, and petition in the form of pro bono litigation." Dkt. 44-1 at 20 (internal quotation marks omitted).

tailored to the government's asserted interest." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 608 (2021). It has not met that burden under either standard.

IV. The TEC's restriction does not prevent corruption

The Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of quid pro quo corruption or its appearance. *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 305 (2022) (cleaned up). The TEC invokes these magic words, *see* Dkt. 66 at 9, 15; Dkt. 66-1 at 1, but offers no support for its claim that banning nonprofit corporations like IFS from providing pro bono legal services to Texas candidates or committees actually prevents corruption or its appearance.

Where the government "is defending a restriction on speech as necessary to prevent an anticipated harm, it must do more than simply posit the existence of the disease sought to be cured." *Cruz,* 596 U.S. at 307 (cleaned up). "It must instead point to record evidence or legislative findings demonstrating the need to address a special problem." *Id.* (cleaned up). Mere conjecture is inadequate. *Id.* The TEC is "unable to identify a single case of *quid pro quo* corruption in this context[.]" *Id.* Indeed, the TEC does not even bring forward the types of anecdotes or journalistic reports that the Supreme Court found inadequate to "illustrate the special risks associated with" allowing nonprofit corporations to provide legal services to candidates or committees. *See id.* at 307-308. The TEC's showing is even weaker than the inadequate showing the FEC attempted in *Cruz*. *See id.* at 310. Thus, the TEC's speech restriction lacks a "legitimate objective" at the outset. *See id.* at 305.[4]

Applying such a ban to nonprofit civil rights organizations is not a compelling state interest. When IFS and other pro bono corporate firms provide pro bono services to a Texas candidate or committee, there is no quid pro quo corruption nor

[4] This failure at the inception showed that the FEC's regime was unconstitutional under either strict *or* "closely drawn" scrutiny. *Cruz,* 596 U.S. at 305.

any appearance of such corruption. IFS is not a for-profit that may seek secret political favors for its business. It is "a nonprofit corporation whose mission is to promote and defend the political rights to free speech, press, assembly, and petition guaranteed by the First Amendment"—a mission it advances through pro bono "strategic litigation." Dkt. 44-1 at 1 (internal quotation marks omitted); Dkt. 66 at 2 (quoting IFS's website soliciting clients). No reasonable observer believes that IFS wishes to challenge Texas' campaign signage law to win hidden favors.

The TEC has not explained what favors a Corsicana city councilman or a committee based in Fort Worth, Dkt. 44-1 at 3, could provide IFS, a DC-based entity with no physical office in Texas. What is the quid exchanged for IFS's supposed quo? IFS and other nonprofit corporations regularly offer pro bono representation to candidates and committees (outside Texas) and disclose these litigation activities to the IRS without issue, *see, e.g.*, Dkt. 44-1 at 4, 9, 14-15; Dkt. 1-2; Dkt. 1-3. And federal election law—unlike Texas law—does not treat pro bono litigation as an illegal contribution.[5] Yet that has not led to corruption.

V. The TEC's restriction is not narrowly tailored

The TEC's blanket prohibition of corporate in-kind contributions—as-applied to pro bono civil-rights litigation—cannot survive either strict scrutiny *or* exacting scrutiny. It is not a narrowly tailored means (let alone the least restrictive means) of preventing corruption or the appearance of corruption, because it is fatally overinclusive and underinclusive.

It is overinclusive because it is a blanket ban. The TEC does not attempt to show any specific harm or that any observer ever actually perceived corruption. *Cf.*

[5] The FEC does not consider pro bono legal services to candidate or committees to be a campaign contribution. *See* FEC, *First General Counsel's Report*, https://www.fec.gov/files/legal/murs/7024/17044420354.pdf; *see also* FEC, *MUR #7024*, https://www.fec.gov/data/legal/matter-under-review/7024/.

Willey, 27 F.4th at 1130 (requiring the state to prove its restrictions are "carefully tailored to prevent substantive evils . . . present in a *particular* case.") (emphasis added). Nonprofit corporations (no matter how mission-driven and nonpartisan) cannot perform pro bono legal services for any Texas candidate or political committee (no matter how insignificant that candidate's or committee's influence). The TEC treats pro bono litigation by a nonprofit corporation as per se corruptive, whenever that litigation challenges a Texas election law. Protecting Defendants' regime from legal challenge, not preventing corruption, is the TEC's real interest.

It is underinclusive because the TEC does not in fact prohibit pro bono legal services to Texas candidates or political committees. Attorneys and law firms can donate whatever amount of legal services they wish, if they are sole proprietorship, partnerships, or limited liability companies.[6] Many powerful Texas firms are limited liability partnerships or limited liability companies—including the TEC's own outside counsel, Butler Snow LLP. *See* Dkt. 66 at 20.[7]

The TEC claims to be concerned about the "war-chest corruption," Dkt. 66 at 9, that supposedly occurs when special advantages enable corporations to amass wealth and "obtain an unfair advantage in the political marketplace," *FEC v. Beaumont*, 539 U.S. 146, 154 (2003) (cleaned up). But why would permitting a small

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[6] The TEC even allows for-profit corporations to provide free legal services, if those services are on a contingency basis. *Ethics Advisory Opinion 533*, https://www.ethics.state.tx.us/opinions/partV/533.html.

[7] Since 2015, Butler Snow LLP, has contributed $46,000 to Texas candidates, including the Lt. Governor, the former House Speaker, and numerous Tex. Supreme Court Justices of the Texas Supreme Court. TRANSPARENCY USA, *Texas contributions Butler Snow cycle 2015 to now* (last visited Nov. 23, 2025), https://www.transparencyusa.org/tx/contributor/butler-snow-llp?cycle=2015-to-now or https://perma.cc/PS94-5U27. The TEC expects this Court to believe that pro bono services to a local-government candidate and a small Forth Worth committee create an unacceptable risk of corruption or its appearance, but direct contributions by a for-profit firm to prominent politicians and judges do not.

nonprofit to provide pro bono services be or appear more corrupting than allowing a large for-profit law firm to do so. Both possess the advantage of limited liability. This "[u]nderinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 802 (2011) (citations omitted).

VI. IFS is a 501(c)(3), not an "advocacy corporation"

In seeking to prop up its speech restrictions, the TEC mischaracterizes IFS as a "non-profit advocacy corporation" (Dkt. 66 at 10)—but IFS is a materially different form of nonprofit. The corporation in *Beaumont*—North Carolina Right to Life, Inc.—was organized "to provide counseling to pregnant women and to urge alternatives to abortion, and *as a nonprofit advocacy corporation* it is exempted from federal taxation by *§ 501(c)(4)* of the Internal Revenue Code[.]" *Beaumont,* 539 U.S. at 150 (emphasis added).[8] In contrast, IFS is a 501(c)(3). Dkt. 57-2 at 10.

Unlike 501(c)(4)'s such as North Carolina Right to Life, 501(c)(3)'s such as IFS are *not* allowed to have a substantial part of their activities consist of lobbying or to participate in any political campaigning for or against a candidate. 26 U.S.C. § 501(c)(3); Dkt. 44-1 at 14 (similar). But 501(c)(3)'s are allowed to "defend human rights and civil rights secured by law" through litigation. 26 C.F.R. § 1.501_c_3_-1 (Lexis Advance through November 18, 2025) ((i)(2) Charitable defined); Dkt. 57-2 at 10 (discussing IFS mission and litigation activities). Accordingly, the Fifth Circuit has already held—consistent with its 501(c)(3) status—that while IFS's pro bono

[8] Likewise, the plaintiff in *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 418 (5th Cir. 2014) was "a 501(c)(4) nonprofit corporation whose 'mission primarily is to evangelize and to educate the Catholic community[.]'" It wanted to donate its email list to its own general-purpose committee in support of its independent expenditures. *Id.* at 419. IFS is a 501(c)(3) and is prohibited from making independent expenditures or campaigning, so *Reisman* is inapplicable here.

"legal representation may facilitate a campaign, IFS does not propose to participate 'in' the campaign *qua* campaign or directly endorse a candidate." Dkt. 44-1 at 14. *Beaumont* is thus inapplicable because IFS does not seek to campaign; it seeks to litigate against the TEC with putative clients who enjoy standing.

Beaumont also rests on faulty premises, because it relies on an antidistortion rationale that the Supreme Court has since repudiated. *Compare Beaumont,* 539 U.S. at 154 (discussing the interest in restricting corporate influence through substantial aggregations of wealth amassed by corporate advantages) *with Cruz,* 596 U.S. at 305-06 ("We have denied attempts to reduce the amount of money in politics, to level electoral opportunities by equalizing candidate resources and to limit the general influence a contributor may have") (cleaned up) (collecting cases) *and Citizens United v. FEC*, 558 U.S. 310, 349-356 (2010) (rejecting antidistortion rationale as incompatible with First Amendment). The First Amendment is not a redistributive mechanism for equalizing speech—its protections belong to everyone, whether wealthy or poor, or whether an out-of-state nonprofit corporation or a local law firm. Even if *Beaumont* applied, the Supreme Court has hollowed out its rationale, leaving the TEC's position with inadequate legal support.

CONCLUSION

This Court should deny Defendants' request for a deferral under FED. R. CIV. P. 56(d), declare TEC's regulatory regime unconstitutional, enjoin its enforcement, and grant summary judgment to IFS.

Respectfully submitted,

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