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 IN OPPOSITION TO PLAINTIFF'S OBJECTIONS TO DISCOVERY ORDER ENTERED BY MAGISTRATE JUDGE MARK LANE

James Tinley, in his official capacity as the Executive Director of the Texas Ethics Commission, along with the Commissioners who have been sued in their representative capacities (the "Commission"), submit this response to Plaintiff's objections to the discovery order entered by the Hon. Mark Lane (Dkt. 69) (the "Appeal").

INTRODUCTION

The Court should deny IFS's objections to Judge Lane's order. IFS seeks extraordinary relief by asking this Court to modify or set aside as clearly erroneous or contrary to law a routine (and much-needed) discovery order. Dkt. 71. The objections also carry forward IFS's mischaracterizations of the mandate in the partial remand of the case from the Fifth Circuit; misapprehension of the law-of-the-case doctrine; and the attempted use of IFS's own refusal to cooperate in discovery as a basis for set aside an order compelling production. Finally, the appeal from Judge Lane's order completely disregards the Court's order, entered after Judge Lane's order at issue in IFS's objections, that denied IFS's motion for summary judgment without prejudice to refiling following the conclusion of the discovery about which IFS takes an appeal. Text Order

Denying IFS's Motion for Summary Judgment (Dkt. 57) without prejudice subject to refiling after discovery, Dec. 9, 2025.

Under Federal Rule of Civil Procedure 72(a), a magistrate judge's discovery order may be modified or set aside only if it is "clearly erroneous or contrary to law." That demanding standard is not met here. Magistrate Judge Lane correctly concluded that the Fifth Circuit's mandate in its limited remand did not foreclose discovery; that Defendants are entitled to discovery relevant to IFS's claims for relief on the merits; and that IFS's procedural objections did not justify refusing to comply.

BACKGROUND

On July 28, 2025, the Fifth Circuit affirmed this Court's decisions in part but reversed the 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 (the "Fifth Circuit Opinion"). Dkt. 44-1; *Institute for Free Speech v. J.R. Johnson*, 148 F.4th 318 (5th Cir. 2025). This Court is now reviewing this case in the first instance. Dkt. 44-1 at n.6.

In light of the Fifth Circuit Opinion, the Commission sought targeted, proportionate discovery relevant to the claims raised by the Institute for Free Speech ("IFS") and defenses to those claims. The discovery propounded by the Commission has been directed both to IFS as plaintiff and to the two "potential clients" of IFS at issue in IFS's claims. *See* Dkt. 1 ¶¶ 3, 49.

On September 29, 2025, the Commission served requests for production on IFS. *See* Dkt. 55-2. IFS indicated to the Commission on October 24, 2025 that it did not intend to respond to any of the requests, and in fact did not respond or object to individual requests for production. *See* Dkt. 55-3.

On September 29, 2025, Defendant served subpoenas duces tecum on the "potential clients" Chris Woolsey ("Woolsey") and Cary Cheshire ("Cheshire") for depositions and production of discrete categories of documents. *See* Dkt. 55-4; *see also* Dkt. 55-5. Cheshire and Woolsey responded and objected to the subpoenas duces tecum on October 10, 2025. *See* Dkt. 55-6; *see also* Dkt. 55-7. One of the same attorneys who represents IFS served the Woolsey and Cheshire objections. For its part, IFS also objected to the Commission's discovery to Woolsey and Cheshire. *See* Dkt. 55-7.

Following a hearing on the Commission's motion to compel compliance with the discovery served on the Commission, Woolsey, and Cheshire, conducted in compliance with this District's rules on referral of such matters to a United States magistrate judge, Judge Lane entered an order that requires IFS and the non-parties Woolsey and Cheshire to provide documents responsive to the Commission's discovery requests. Dkt. 69.

IFS and the non-parties have since provided some documentation following Judge Lane's order, which the Commission will review and determine required follow-up on compliance with Judge Lane's order. In the meantime, however, IFS (but not Woolsey or Cheshire) have filed objections to Judge Lane's order.

ARGUMENT

I. Standard of Review.

The objected-to order regarding pre-trial discovery is obviously non-dispositive. *McLane Co., Inc. v. ASG Techs. Group, Inc.*, No. 6:17-CV-00166-ADA, 2019 WL 609767, at *1 (W.D. Tex. 2019) (citing *Castillo v. Frank*, 70 F.3d 382, 385 (5th Cir. 1995). A district court affirms a magistrate judge's order on such a non-dispositive discovery issue unless the order is "clearly erroneous or contrary to law." FED. R. CIV. P. 72(a); 28 U.S.C. § 636(b)(1)(A). Discovery rulings are entitled to great deference and are reversed only upon a "definite and firm conviction that a

mistake has been committed." *McLane Co., Inc.*, 2019 WL 609767, at *1 (W.D. Tex. 2019) (quoting *Gomez v. Ford Motor Co.*, 2017 WL 5201797, at *2 (W.D. Tex. April 27, 2017) (internal quotations omitted). Thus, even a difference of opinion between a magistrate judge and a district judge—which does not exist here, as readily apparent as discussed below from *another* order entered by the Court—would not alone lead to the setting aside or modification of an order compelling discovery. *See id.*

II. The Fifth Circuit Opinion Does Not Preclude Discovery.

As Judge Lane correctly found, nothing in the Fifth Circuit's opinion related to Rule 12 issues prohibits discovery, and the case was explicitly remanded so the case could be heard by this Court on the merits (or lack thereof) in the first instance. Dkt. 69. IFS has continued to quote, selectively, the following language from the Fifth Circuit's opinion on partial remand: "no further factual questions require resolution of [IFS's] claims." *Institute for Free Speech v. J.R. Johnson*, 148 F.4th 318, 335 (5th Cir. 2025). IFS continues to ignore that this statement in the Fifth Circuit opinion is with respect to IFS's jurisdictional pleadings "[a]s alleged in its complaint." *Id.* at 327–29. The Fifth Circuit did not conclude, nor could it have in the context of considering an appeal from dismissal under FED. R. CIV. P. 12, that *no discovery* would or could *ever* be taken in this case following partial reversal and remand. *See id.* IFS continues to disregard not only the context of the Fifth Circuit's opinion—issued under Rule 12 standards, which require the assumption that well-pled matters are true—but also the sentence of the Fifth Circuit opinion that immediately precedes the language IFS cites: "IFS's complaint sufficiently alleges that IFS has an intent to engage in a prohibited course of conduct that is affected by a constitutional interest, and that if it so engages, it will face enforcement under Texas law." *Id*. at 335. The Fifth Circuit did not review, much less issue any opinion on, IFS's summary judgment motion related to the *merits* of IFS's claims. *Id*. at 335 n.6.

Thus, the IFS objections are not only wrong, but also tone-deaf. The Court has already told IFS, in a separate order, that IFS will not be able to proceed with any motion for summary judgment until it complies with discovery as ordered by Judge Lane. Text Order Denying IFS's Motion for Summary Judgment (Dkt. 57) without prejudice subject to refiling after discovery, Dec. 9, 2025. What part of this subject matter and procedure with respect to the orderly adjudication of IFS's claims has the Court not made clear? Judge Lane's decision on the non-dispositive issue of discovery is not only not clearly erroneous or contrary to law; it is completely consistent with what the Court has already ordered. The Court has been clear: Discovery will occur first, as it normally does, before the Court addresses the merits of IFS's claims.

III. IFS is Required to Prove Standing at Each Stage of Litigation.

To the extent necessary, the Commission reurges its positions on the discovery at issue. Dkt. 55; Dkt. 62; Dkt. 66. In short, the discovery goes not only to the issue of standing to bring claims but also the merits, or lack thereof, of IFS's claims.

On the standing front, Plaintiffs who bring claims must satisfy the standards of proof to show standing according to the evidentiary requirements at ***each stage of the litigation***. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (emphasis added) ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element 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."). This matter is in a "successive stage" of litigation past the Rule 12 issues previously addressed by this Court and the Fifth Circuit. Any suggestion that the Fifth Circuit in its opinion remanding part of the case for further proceedings somehow abrogated a core principle of how litigants must establish standing, as set forth by the United States Supreme Court and

followed in this District, wholly lacks merit. *E.g.*, *Morales v. Specialized Loan Servicing, LLC*, 2022 WL 16549151, at *2 (W.D. Tex. 2022) (noting that each element for standing must be supported with the appropriate level of evidence for each successive stage of litigation).

IFS itself has indicated in filings with the Court that proof of facts is indeed required to substantiate its claims. IFS attached four declarations containing factual assertions by Woolsey, Cheshire, David Keating, and Jacob Huebert. *See* Dkt. 57-2 at 3–5, 6–8, 9–17, 57–59. IFS cannot appropriately ask this Court to accept its version of events as outlined in the declarations, without submitting to discovery regarding those events and matters relating to IFS's claims and defenses to those claims. 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, IFS cannot shield those witnesses from being questioned. *See Wells v. City of Austin*, No. 1:19-CV-1140-RP, 2020 WL 5366111, at *2 (W.D. Tex. 2020) (holding that summary judgment was premature before depositions completed).

Moreover, as IFS is aware, what is required to address an as-applied constitutional challenge to a law differs 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). Since IFS pled an as-applied challenge, the parties must develop through discovery, and not just IFS's allegations, a factual record regarding the as-applied challenge. *See id.* In fact, courts use "[p]articularized facts … to issue a narrowly tailored and circumscribed remedy." *Id.* (citations omitted). IFS wants this Court to only review its fact-heavy declarations to its motion for summary judgment but does not want the Commission to be able to test those facts, or develop others that relate to IFS's claims and

defenses to those claims. As the Court has already determined in denying IFS's amended and renewed motion for summary judgment, the Commission is entitled to test IFS's allegations through discovery to determine whether the statements in the declarations are true and/or whether affirmative defenses preclude recovery based on such allegations.

IV. The Non-Dispositive Order Does Not Violate Rule 26(d).

In yet more tone-deaf conduct, IFS continues to argue that the Commission sent discovery prior to any Rule 26(f) conference, while at the same time admitting that IFS refused to participate in any Rule 26(f) conference or otherwise confer regarding discovery until this Court required it to do so. Having declined the opportunity to meet and confer, IFS cannot continue to rely on the absence of a Rule 26(f) conference as a basis to challenge discovery it actively obstructed and claim procedural unfairness.

This disconnect in IFS's arguments was fully explored in the hearing on the Commission's motion before Judge Lane. Here, the record reflects that the Commission sought to move discovery forward and that IFS declined to engage in a Rule 26 conference, and then used the absence of a Rule 26 conference as a claimed bar to discovery. Dkt. 55; Dkt. 62; Dkt. 66.

CONCLUSION

Judge Lane's order compelling discovery not only was correct, but it is also in line with the Court's own rulings denying IFS's efforts to avoid discovery in this matter through preemptive filing of a motion for summary judgment and refusal to engage in a Rule 26 conference or to respond to discovery. Because the order (Dkt. 69) is neither clearly erroneous nor contrary to law, the Court should deny IFS's objections in their entirety. The Commission also requests any other relief on this non-dispositive discovery issue to which it may show itself to be entitled.

Respectfully submitted,

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By: */s/ Eric J.R. Nichols*

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 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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