No. 24-50712

In the United States Court of Appeals for the Fifth Circuit

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm,

Plaintiff-Appellant,

v.

J.R. JOHNSON, in his official and individual capacities as Executive Director of the Texas Ethics Commission; MARY KENNEDY, Commissioner in her official capacity; CHRIS FLOOD, Commissioner in his official capacity; RICHARD SCHMIDT, in their official capacity as commissioner of the Texas Ethics Commission; RANDALL ERBEN, Commissioner in his individual and official capacities; CHAD CRAYCRAFT, Commissioner in his individual and official capacities; PATRICK MIZELL, Commissioner in his individual and official capacities; JOSEPH SLOVACEK, Commissioner in his individual and official capacities; STEVE WOLENS, in their individual and official capacities as commissioner of the Texas Ethics Commission,

Defendants-Appellees.

Appeal from Orders of the United States District Court for the Western Dist. of Texas, The Hon. David A. Ezra (Dist. Ct. No. 1:23-cv-01370-DAE)

PLAINTIFF-APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

I. IFS'S CENTRAL THEORY FOR RELIEF RESTS ON THE PRO BONO LITIGATION RIGHTS RECOGNIZED IN *BUTTON* AND ITS PROGENY, NOT ON SOME BROADER RIGHT

IFS bases its as-applied challenge to the TEC's threatened enforcement of its blanket corporate contribution ban on the proposition that non-profit corporations have a First Amendment right to associate with Texas candidates and corporations, and speak and petition on their behalf, by engaging in pro bono litigation against the government. ROA.22-24; *see also* ROA.166-175 (MSJ arguments). IFS's theory rests on the seminal case of *NAACP v. Button,* 371 U.S. 415 (1963) and its progeny, such as *In re Primus*, 436 U.S. 412 (1978) and *Willey v. Harris Cty. DA*, 27 F.4th 1125 (5th Cir. 2022) (applying strict scrutiny to rights established in *Button),* cases that the TEC scarcely mentioned or ignored.[1]

Rather than engage with IFS's central argument, either by justifying the Commission's restrictions on pro bono litigation or explaining why *Button* and its progeny do not control, the TEC instead attempts to change the subject, claiming that IFS's as-applied challenge is foreclosed by *FEC v. Beaumont,* 539 U.S. 146 (2003) and *Catholic Leadership Coalition v. Reisman,* 764 F.3d 409 (5th Cir. 2014). Dkt. 33

[1] The TEC cited *Button* and *Primus* once, and *Willey* not at all. Dkt. 33 at 40.

at 40. But IFS is not proposing to donate money directly to a Texas candidate or political committee, nor give either a set of email mailing lists. And IFS does not claim that corporations have a generalized First Amendment right to donate directly to candidates or political committees. *Contra Beaumont,* 539 U.S. at 149; *Reisman,* 764 F.3d at 445 (upholding TEC's restriction as-applied to direct donations of email mailing lists).

Rather, IFS notes that its long-established First Amendment rights to associate, speak and petition in the form of pro bono litigation against the government take precedence over Texas's authority to regulate *other* corporate activities not covered by *Button.* It is telling that the TEC assiduously avoids engaging with IFS's main argument—implying an awareness that its enforcement regime cannot meet strict scrutiny. *See Willey,* 27 F.4th at 1129 (applying strict scrutiny). The TEC has not offered *any* compelling interest for its self-serving regime, which protects the Commission from pro bono litigation challenging the lawfulness of its actions; nor does the TEC endeavor to explain why its blanket ban is narrowly tailored. To engage on those questions is to concede defeat, because the TEC's regime does not pass strict scrutiny. Thus, the TEC can only change the subject.

II. The TEC's claim that the Internal Revenue Code forecloses IFS's proposed actions is unsupported by legal authority

The TEC's claim—raised for the first time on appeal—that federal law independently prohibits IFS from representing a Texas candidate or committee on a pro bono basis, is simply incorrect. 26 U.S.C. 501(c)(3) only precludes non-profits like IFS from intervening or participating in "(including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Nothing in the text of the statute prohibits pro bono legal representation and, in fact, the applicable treasury regulation defines actions taken "(iii) to defend human and civil rights secured by law" as "charitable" and therefore lawful for tax-exempt corporations. 26 C.F.R. § 1.501(c)(3)-1(d)(2); *see also* IRS, *Exempt Organizations Technical Guide, TG 3-3: Exempt Purposes – Charitable* (Rev. 2/1/2024) at 41-43, https://perma.cc/X5VW-AGMK (discussing defending civil rights as a charitable purpose, including "freedom of speech").

Indeed, IFS has historically represented non-Texas candidates and committees. *See, e.g., No on E v. Chiu,* 85 F.4th 493, 496-97 (9th Cir. 2023) (listing IFS as counsel of record for a political committee challenging a secondary-contributor disclosure requirement); *Mazo v. N.J. Sec'y of State*, 54 F.4th 124, 130-31, 133 (3d Cir. 2022) (listing IFS as counsel of record for two New Jersey party primary candidates challenging a ballot-slogan restriction); *Hetherington v. Madden,* 640 F.

Supp. 3d 1265, 1266-67, 1279 (N.D. Fla. 2022) (listing IFS as counsel of record in Florida candidate's First Amendment challenge to state law restricting candidate speech).[2] So do other tax-exempt organizations. *See, e.g., Ariz. Free Enter. Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (Institute for Justice and Goldwater Institute representing Arizona state candidates and PACs); *Smith v. Helzer*, 95 F.4th 1207 (9th Cir. 2024) (Liberty Justice Center representing Alaska PACs and donors).

IFS regularly discloses these litigation activities to the IRS on Form 990,[3] and yet it remains a tax-exempt corporation, in good standing. The TEC produced no evidence that IFS, or any comparable non-profit corporation, has ever paid a tax penalty or lost its tax-exempt status for providing such pro bono legal services; and IFS is unaware of any such occurrences. The TEC fancifully imagines that the IRS interprets the tax code in a way that would conflict with *Button* and its progeny, when in reality it is only the TEC that has created such an unconstitutional regime.

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[2] Likewise, the TEC's claim that its enforcement regime does not impair IFS's mission is contradicted by IFS's history of representing non-Texas candidates and committees. Obviously, it helps the TEC if IFS is not able to pursue that mission in Texas.

[3]For example, see IFS's 2021 Form 990 as filed with the IRS, listing specific litigation activities on Schedule O: https://apps.irs.gov/pub/epostcard/cor/203676886_202112_990_2023020620918263.pdf.

The TEC interpreted TEX. ELEC. CODE § 253.094 to apply to IFS's proposed First Amendment activity, thereby exposing IFS to potential civil and criminal penalties. TEX. ELEC. CODE § 253.094(a), § 253.133; ROA.50-51 ("Consequently, such pro bono legal services may not be provided to a candidate by a corporation"). The federal government does not have a problem with IFS's proposed (and past) activities; Texas's enforcement officials do.

III. IFS'S INDIVIDUAL CAPACITY CLAIMS FOR NOMINAL DAMAGES IN THE AMOUNT OF $17.91 ARE NEITHER OVER-THE-TOP NOR BARRED BY QUALIFIED IMMUNITY

The rights to associate, speak, and petition for the purposes of pro bono litigation against the government are as well established as any rights, and the individual-capacity defendants were fully aware that their vote to adopt EAO-580 would stifle the exercise of those rights. In adopting EAO-580, individual-capacity defendants didn't just adopt an interpretation of the law. They made clear that the TEC would enforce TEX. ELEC. CODE § 253.094 against First Amendment-protected activity.

The core of IFS's lawsuit is that Texas's blanket corporate contribution ban, as enforced by Defendants, is illegal as applied to the provision of pro bono legal services to Texas candidates or political committees—not that the ban is illegal in other situations or in all instances. Nor is IFS asking this Court to overturn *Beaumont, Reisman* or *King Street Patriots v. Tex. Democratic Party,* 521 S.W.3d 729 (Tex.

2017), because none of those cases specifically addressed the provision of pro bono legal services against the government.

IFS's claim instead rests on the rights to associate, speak, and petition that were recognized in *Button* and its progeny. And as this Court re-affirmed over a year prior to IFS's filing of this lawsuit, the work IFS "allegedly wishes to do is constitutionally protected speech and association" and "restrictions on that conduct are *strictly scrutinized." Willey,* 27 F.4th at 1130 (emphasis added). This Court's *Willey* decision had already been on the books for over nine months, when the individual-capacity defendants voted to adopt EAO No. 580 (ROA.48, 240), which perhaps explains why the TEC fails to discuss that case.

The practical—and likely intended—effect of the TEC's adopting EAO-580 is to prevent IFS from exercising these constitutional rights, even in the absence of any proffered compelling government interest or narrow tailoring. And it is not as if IFS (and two other public law firms in corporate form: the ACLU-Texas and the Institute for Justice) did not warn the individual-capacity defendants that their plan to enforce TEX. ELEC. CODE § 253.094 against the provision of pro-bono representation would be unconstitutional. They were on notice.

Indeed, contrary to the commissioners' rhetoric—IFS's claims for $17.91 each in nominal damages are not "over-the-top and unnecessary" (Dkt. 33 at 25). The amounts in question should not leave the

commissioners either quaking in their boots or fearing bankruptcy. Nominal damages serve both to compensate for past harms *and* to make it much harder for state officials to attempt to manipulate jurisdiction by mooting equitable relief. *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 802 (2021) ("Because every violation of a right imports damage, nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.") (cleaned up); *Duarte v. City of Lewisville*, 759 F.3d 514, 521 (5th Cir. 2014) (presence of monetary claims, including nominal damages, are sufficient to defeat mootness). Absent nominal damages claims, the individual-capacity defendants could just wait-and-see how the litigation progresses with the option to modify or withdraw the problematic EAO-580 in an attempt to prematurely end the litigation and thwart an adverse injunction, declaration, or other legal relief, before it is obtained.

IV. THE TEC'S COMMISSIONERS ARE NOT ENTITLED TO QUASI-JUDICIAL IMMUNITY BECAUSE THEY ENFORCE THE REGIME IN QUESTION

The TEC asserts, for the first time on appeal, that its commissioners are entitled to quasi-judicial immunity for the individual capacity claims against them. Dkt. 33 at 51-52. In contrast, before the district court, the TEC stated that quasi-judicial immunity would apply, at most, only "'[i]f the Defendants had initiated an administrative enforcement proceeding against IFS"—something that all parties agree never occurred. ROA.368. The TEC now alters its position and asserts

quasi-judicial immunity applies without any enforcement proceeding. Defendants' failure to brief the issue of quasi-judicial immunity below constitutes forfeiture of that issue on appeal. *See Rollins v. Home Depot USA, Inc.*, 8 F.4th 393, 397 (5th Cir. 2021); *Black v. Bennett*, No. 97-50955, 1998 U.S. App. LEXIS 39218, at *1-2 (5th Cir. Dec. 7, 1998).

Even if this issue were not forfeited, quasi-judicial immunity does not apply because the TEC's commissioners did not perform a judicial function when they issued advisory opinion EAO-580. Rather, they provided compliance guidance in their combined legislative and executive function as the maker and enforcer of election regulations.

Government officials are cloaked with immunity when they "perform adjudicatory roles which are functionally substantially equivalent to those of judges." *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir. 1989). Courts scrutinize "the nature of the function performed, not the identity or title of the actor who performed it," *Beck v. Tex. State Bd. of Dental Exam'rs*, 204 F.3d 629, 634 (5th Cir. 2000), for even Article III judges perform some duties that are not judicial in nature, *Mylett v. Mullican*, 992 F.2d 1347, 1352 (5th Cir. 1993). Defendants bear the burden of showing that quasi-judicial immunity applies to the agency function at issue. *See Wearry v. Foster*, 33 F.4th 260, 269 (5th Cir. 2022).

The TEC makes rules, investigates complaints, and monitors compliance with election regulations as much as it adjudicates. *Cf. Beck*, 204 F.3d at 637 (distinguishing immune adjudicative functions

from non-immune investigative functions). Although the TEC has adjudicatory functions, many of its duties are non-adjudicatory, including its authority to issue advisory opinions. Among other tasks, the TEC must "uniformly interpret[] its laws, rules, and regulations," "make the initial investigation, review, and decision involving the matters it is designed to address," and "identify if there has been a violation of its own rules, procedures, [or] reporting requirements." *In re Charette*, Nos. PD-0522-21, PD-0523-21, PD-0524-21, PD-0525-21, 2024 Tex. Crim. App. LEXIS 690, at *29-30 (Crim. App. Sep. 11, 2024). These are more akin to enforcement functions. Indeed, Texas courts have held that the TEC is a legislative or executive body—or perhaps a hybrid of both branches—rather than a judicial body. *See, e.g., Empower Texans, Inc. v. Tex. Ethics Comm'n*, 657 S.W.3d 737, 756 (Tex. App.—El Paso 2022, pet. denied); *Sullivan v. Tex. Ethics Comm'n*, 660 S.W.3d 225, 239 (Tex. App.—Austin 2022, pet. denied); *Tex. Ethics Comm'n v. Sullivan*, No. 02-15-00103-CV, 2015 Tex. App. LEXIS 11518, at *2 (Tex. App. Fort Worth, Nov. 5, 2015, pet. denied).

The "touchstone" for quasi-judicial immunity to apply is the official's "performance of the function of resolving disputes between parties, or of authoritatively adjudicating private rights." *Antoine v. Byers & Anderson*, 508 U.S. 429, 435-36 (1993). To be sure, there are other

factors.[4] But the absence of an adversarial process is significant and, IFS submits, determinative in this instance.

In this case, the TEC's commissioners issued an advisory opinion, interpreting the First Amendment and the language of Texas statutes, in response to a question IFS presented about a hypothetical future client representation. *See* Dkt. 33 at 20-22, 52. The advisory opinion process lacks the safeguards associated with adjudication—such as a ban on ex parte communications or insulation from the political branches. *See* Dkt. 33 at 15. Likewise, an advisory opinion does not affect the attorney general's own authority to issue opinions. Dkt. 33 at 16-17.

Moreover, an advisory opinion provides a defense to prosecution if it relates to "a fact situation . . . substantially similar to the fact situation in which the person is involved." TEX. GOV'T CODE § 571.097(a). On the contrary, when a requester asks for pre-clearance and is denied—as happened with IFS in this case—that puts the requester on notice that

[4] In assessing immunity, courts first determine in an official's duty is judicial in nature and then weigh the costs and benefits of granting or denying immunity. *Mylett,* 992 F.2d at 1352-53. Six factors are important: "(a) the need to assure that the individual defendant can perform his functions without harassment or intimidation; (b) the presence of safeguards that reduce the need for private damages as a means of controlling unconstitutional conduct; (c) insulation from political influence; (d) the importance of precedent; (e) the adversary nature of the process; (f) the correctability of error on appeal." *Id.* at 1353.

the TEC intends to enforce the statute against their proposed hypothetical factual scenario. *See* TEX. GOV'T CODE § 571.091.

A person, like IFS, subject to TEC enforcement of TEX. ELEC. CODE § 253.094, faces a daunting process. The TEC may initiate enforcement on its own motion. TEX. GOV'T CODE § 571.124(b). And it must accept jurisdiction over a complaint filed by a Texas resident if it meets the "form requirements" of TEX. GOV'T CODE § 571.122, even if the TEC itself would not have initiated an enforcement in that situation. Regardless of whether a complaint may give rise to a criminal referral under TEX. GOV'T CODE § 571.171, a respondent is required to file a written response and a response to written questions, 1 TEX. ADMIN. CODE § 12.21-22. Failure to do so may subject the respondent to a civil penalty for failure to file a response. *Id.* at § 12.21. A respondent is subject to sanctions for failure to comply with a TEC order during the enforcement proceedings. *Id.* at § 12.45(a)(3).

Although TEC's enforcement decisions can be appealed in court, *see* TEX. GOV'T CODE § 571.133, its advisory opinions cannot be. Judicial decisions, on the other hand, are ordinarily subject to appeal.

The advisory opinion process was not an adversarial proceeding, and it did not resolve a dispute between opposing parties, weigh specific facts (rather than hypotheticals), or permanently adjudicate private rights. Far from being "judicial," Article III forbids federal courts from issuing advisory opinions of this sort. *See Massachusetts v. EPA*, 549

U.S. 497, 516, (2007). The TEC commissioners are not immune for their actions regarding this non-judicial advisory opinion, particularly when it made clear that IFS was subject to the TEC's enforcement of TEX. ELEC. CODE § 253.094.

V. THE PROPOSITION THAT IFS'S OFFICIAL-CAPACITY CLAIMS ARE BARRED BY SOVEREIGN IMMUNITY IS FRIVOLOUS

As the district court correctly noted below, IFS's official capacity claims for injunctive and declaratory relief are not barred by sovereign immunity because "IFS points to specific grants of enforcement authority given to Defendants that warrant the application of the *Ex parte Young* exception." ROA.810-811. For that exception to apply, the state officials must have "some connection" with the enforcement of the challenged restriction. *City of Austin v. Paxton*, 943 F.3d 993, 997-98 (5th Cir. 2019).

Here, IFS challenges the TEC's enforcement regime preventing corporations from providing pro bono legal services to Texas candidates or political committees—and neither the TEC, nor its commissioners, dispute their intent to enforce TEX. ELEC. CODE § 253.094 against IFS if it were to proceed. Moreover, unlike the Attorney General in *Austin v. Paxton,* it is beyond dispute that the TEC has more than "some connection" in enforcing this regime. In fact, it is the primary state agency charged with enforcement of the Texas Election Code, with authority to initiate civil enforcement actions, make criminal referrals,

and impose civil penalties. TEX. GOV'T CODE §§ 571.171, .172, .173. Indeed, the TEC publicly holds itself out as charged with these duties: "Statutory duties of the Ethics Commission are in Chapter 571 of the Government Code. The agency is responsible for administering these laws: (1) Title 15, Election Code, concerning political contributions and expenditures, and political advertising . . .." TEXAS ETHICS COMMISSION, *About Us: A Brief Overview of the Texas Ethics Commission and its Duties (Trifold Brochure),* https://perma.cc/H65S-BTU2.

And no other state official can enforce the Texas Election Code without the TEC's approval. Because the TEC has "exclusive jurisdiction to make an initial determination with respect to [] alleged violations of election and campaign laws," Texas courts lack jurisdiction to even hear cases about election crimes unless the TEC has already voted to refer a violator for criminal charges. *In re Charette*, 2024 Tex. Crim. App. LEXIS 690, at *31, *39.

Of course, IFS cannot sue the TEC directly, so it must sue the individual commissioners, which is what it did. *Cf. City of Austin,* 943 F.3d at 1004 ("Here, the City clearly named only the 'Texas Workforce Commission,' a state agency immune to suit, and did not name any individual commissioners"). As a result, the commissioners' claim to sovereign immunity is frivolous.

VI. THE TEC HAS NOT OFFERED ANY MEANINGFUL BASIS TO DISTINGUISH IFS'S STANDING FROM THOSE OF THE PLAINTIFFS IN *DRIEHAUS* OR *SPEECH FIRST*

IFS's standing is at least as robust as that of the successful plaintiffs in the seminal cases of *Susan B. Anthony List v. Driehaus*, 573 U.S. 149 (2014) and *Speech First, Inc. v. Fenves*, 979 F.3d 319 (5th Cir. 2020). For example, both this case and *Driehaus* involve pre-enforcement challenges to state restrictions on political speech, where violators face civil and criminal liability. And both cases involve no more than *intended* speech activity that is proscribed by the enforcement regime in question. The district court erred in holding that IFS must take some unspecified additional step toward violating Texas law and the TEC's briefing fails to establish that either *Driehaus* or *Speech First* require more than IFS's declared intentions.

Likewise, the Second Circuit recently found standing in a case analogous to IFS's. *Cerame v. Slack*, No. 22-3106, 2024 U.S. App. LEXIS 31028, at *12, *20 (2d Cir. Dec. 9, 2024) (citing *Driehaus*). The Circuit reversed a 12(b)(6) dismissal, because the district court had failed to draw all reasonable inferences in the appellants' favor and wrongly treated as mere generalities the appellants' specific allegations about speech they intended to make if not chilled by the challenged law. *Id.* at *18-19. The fact that appellants had altered their speech out of fear that a misconduct complaint against them would be filed with a state agency was "more than enough at the pleading stage." *Id.* at *19.

This recent case demonstrates that *Driehaus,* and cases following it, establish standing for pre-enforcement challenges in circumstances such as IFS's. Contrary to the TEC's assertions, IFS need not take actions that risk triggering an investigation or enforcement action.

VII. THE DISTRICT COURT'S DENIAL OF SUMMARY JUDGMENT IS APPEALABLE BECAUSE IT DISMISSED IFS'S LAWSUIT WITHOUT LEAVE TO AMEND

On August 20, 2024, the district court granted Defendants' motion to dismiss without prejudice and without inviting IFS to file an amended complaint or setting a deadline to do so. ROA.816. Thus, the dismissal was not contingent on some further action or omission by IFS or anyone else. The order adjudicated all of IFS's legal claims and had the effect of ending the lawsuit. "An order for the involuntary dismissal of an action, with or without prejudice, is appealable if it ends the proceedings in district court." *19 Moore's Federal Practice - Civil § 202.11* (2024); *see also United States v. Wallace & Tiernan Co.,* 336 U.S. 793, 794 n.1 (1949) ("That the dismissal was without prejudice to filing another suit does not make the cause unappealable, for denial of relief and dismissal of the case ended this suit so far as the District Court was concerned").

Accordingly, shortly after granting the TEC's motion to dismiss, the district court denied IFS's motion for summary judgment as moot by way of a text order. ROA.8. Under these circumstances, where IFS's entire case was disposed of, the summary judgment denial was an

appealable final order. Indeed, had IFS not appealed the summary judgment denial, the TEC might well try to claim waiver. *See In re Ondova Ltd. Co. v. Sherman*, 914 F.3d 990, 994 (5th Cir. 2019) ("It is a well worn principle that the failure to raise an issue on appeal constitutes waiver of that argument.") (quoting *United States v. Griffith,* 522 F.3d 607, 610 (5th Cir. 2008)).

Conclusion

IFS respectfully requests that this Court reverse the district court's orders, and remand the case with instructions to grant IFS's motion for summary judgment or, in the alternative, with instructions to deny the TEC's Rule 56(d) motion and to order the TEC to file a response on the merits of IFS's claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with FED. R. APP. P. 32 and 5TH CIR. R. 32.3, that this brief is set in 14-point Century Schoolbook, a proportionately spaced serif font, and as calculated by Microsoft Word (from a continuously updated Office 365 subscription), considering the appropriate exclusions, contains 3,632 words.

Dated: December 16, 2024

s/Endel Kolde