

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.

Cause No. 1:23-cv-1370-DAE

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

Defendants.

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**PLAINTIFF’S CONTESTED MOTION TO SET BRIEFING SCHEDULE FOR PENDING  
MOTION FOR SUMMARY JUDGEMENT**

**RULE CV-7(G) STATEMENT**

Plaintiff's counsel conferred with defense counsel about this motion via email on September 12, 19, and 22 and Defendants would not agree to set a briefing schedule.

## **INTRODUCTION**

Plaintiff Institute for Free Speech requests that this Court set a briefing schedule for the Defendants, TEC Commissioners, to file a substantive response to IFS's long-pending motion for summary judgment on the merits of its First Amendment claims. *See* Dkt. 20. This Court previously dismissed IFS's claims for lack of standing and ripeness (Dkt. 40), mooted its motion for summary judgment (Text order). IFS has now prevailed on appeal (Dkt. 44, Dkt. 44-1) and the Fifth Circuit has asked this Court to consider IFS's claims on the merits, holding that no further factual development is required.

IFS requests that this Court order Defendants to file their brief responding to the merits of IFS's motion for summary judgment by no later than October 20, 2025, with IFS's reply brief due one week after filing of that response. Failure to timely respond on the merits should be considered waiver or forfeiture of a response and a concession that the TEC's regulatory regime is unconstitutional as applied to IFS and its proposed activity.

## **FACTS AND PROCEDURAL HISTORY**

Plaintiff IFS originally filed its complaint on August 3, 2023 in the U.S. District Court for the Northern District of Texas, alleging claims mostly arising under the

First Amendment, related to the application of Texas' corporate-contribution ban to IFS's proposed provision of pro bono legal services to Texas candidates or political committees. Dkt. 1. On September 15, 2023, the defendant TEC Commissioners and its Executive Director filed a motion to dismiss. Dkt. 18. Twelve days later, IFS filed its motion for summary judgment, on the merits of its claims. Dkt. 20. On October 18, 2023, Defendants filed an "initial response" to IFS's motion for summary judgment, and requested a deferral of Plaintiff's motion until Defendants performed jurisdictional discovery. Dkt. 24. Specifically, the TEC defendants asserted that the "parties have not yet had any opportunity to conduct discovery, should discovery be needed given the jurisdictional issues raised in the motion to dismiss." Dkt. 24 at 2.

On November 8, 2023, the district court for the NDTX transferred venue to the WDTX-Austin Division, over the objections of IFS and without having ruled on the pending motions to dismiss and for summary judgment. Dkt. 31. After IFS filed an unsuccessful petition for mandamus regarding the sua sponte change of venue, this case was assigned to this Court on December 7, 2023. Dkt. 36.

There was no further activity in this case until August 30, 2024, when this Court granted Defendants' motion to dismiss, without prejudice, based on lack of standing and ripeness. Dkt. 40. The Court further held that the individual-capacity claims for nominal damages are barred by qualified immunity. Dkt. 40 at 25-29. The Court

also entered a separate text order “MOOTING [20] Motion for Summary Judgment in light of Order Granting Motion to Dismiss [40] Without Prejudice.”

IFS appealed these orders (Dkt. 41). On July 28, 2025, the Fifth Circuit reversed in part, affirmed in part, and remanded for further proceedings consistent with its opinion. Dkt. 44-1. Specifically, the Fifth Circuit held that IFS did have pre-enforcement standing (Dkt. 44-1 at 15) and that its claims were ripe (Dkt. 44-1 at 18). The Fifth Circuit further held that “IFS’s claims against the Commissioners in their official capacities may proceed” (Dkt. 44-1 at 19), but it affirmed this Court’s dismissal of the nominal damages claims based on qualified immunity (Dkt. 44-1 at 21).

The Fifth Circuit declined to consider IFS’s motion for summary judgment in the first instance and remanded those claims for further consideration by this Court. Dkt. 44-1 at 22 & n.6. Importantly, the Fifth Circuit also held that “No further factual questions require resolution for adjudication of its claims.” Dkt. 44-1 at 21.

On August 18, 2025, the Fifth Circuit Clerk transmitted the Fifth Circuit’s judgment issued as the mandate to the WDTX Clerk. Dkt. 42-2.

On September 12, 2025, Plaintiff’s counsel emailed defense counsel to set a briefing schedule on the pending motion for summary judgment. After several

follow-up emails, Defendants would not agree to set a briefing schedule and indicated that they planned to serve discovery.

### **ARGUMENT**

Two years ago, IFS filed its motion for summary judgment, asserting that the TEC's corporate contribution ban, as applied to IFS's proposed provision of pro bono legal services to Texas candidates or committees, violated IFS First Amendment rights to speak, associate, and petition in the form of litigation against the state. Dkt. 20; Dkt. 21. IFS's claims squarely present the issue of whether the Texas corporate contribution ban, as applied to IFS's proposed activities, can survive strict scrutiny. Dkt. 21 at 18-27.

Throughout this litigation, the TEC has sought to avoid engaging with the merits of IFS's claims. Not once—not even during oral argument before the Fifth Circuit—have Defendants provided 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 having to respond on the merits.

IFS properly propounded its motion for summary judgment in accordance with Federal Rule of Civil Procedure 56. *See* Dkt. 20; Dkt. 21. IFS has now prevailed on

appeal and the time for the TEC's delaying tactics has passed. IFS's motion has been on file for two years and IFS's proposed deadline for Defendants response brief on the merits is October 20, 2025, which provides the TEC commissioners with ample time to respond.

One issue bears further emphasis. The Fifth Circuit held that "*No further factual questions require resolution* for the adjudication of its [IFS's] claims." Dkt. 44-1 at 21 (emphasis added). That holding is binding on the parties and this Court. As a result, any request for discovery is a non-starter. Should Defendants fail to timely respond to IFS motion for summary judgment on the merits, this Court should grant summary judgment to IFS.

#### CONCLUSION

For the foregoing reasons, this Court should grant IFS's motion to set a briefing schedule for Defendants to respond to IFS's motion for summary judgment on the merits of that motion.

Respectfully submitted,

Dated: September 23, 2025

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