UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

INSTITUTE FOR FREE SPEECH, *Plaintiff*, v. J.R. JOHNSON, in his official and individual capacities as Executive Director of the Texas Ethics Commission, et al., *Defendants.*	§ § § § § § § § § § §	Case No. 4:23-CV-00808-P

DEFENDANTS' INITIAL RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REQUEST FOR DEFERRAL OF MOTION UNDER FED. R. CIV. P. 56(d)

Defendants hereby file this initial response to the motion for summary judgment (Dkt. 21) filed by Plaintiff Institute for Free Speech ("Plaintiff") and request that the Court defer full briefing and consideration of Plaintiff's motion for summary judgment until the Court resolves Defendants' pending motion to dismiss the case (Dkt. 19). The Defendants' pending motion to dismiss raises several threshold issues of immunity and jurisdiction that can and should be resolved before the parties engage in discovery, much less the merits (or lack thereof) of Plaintiff's claims. Plaintiff's efforts to put the cart before the horse disregard the core Article III principle that before litigants can put matters before a federal court for decision, a federal court should decide whether it has jurisdiction. Furthermore, even if the case were to move forward to the merits of Plaintiff's claims—which Defendants respectfully contend it should not—Defendants would need to conduct discovery on the factual assertions underlying Plaintiff's claims.

This initial response is made pursuant to FED. R. CIV. P. 56(d), which authorizes deferral of a motion for summary judgment under circumstances like these.

PROCEDURAL BACKGROUND

Plaintiff filed its claims on August 3, 2023. On September 15, 2023, Defendants filed their motion to dismiss, raising among other arguments, sovereign immunity, qualified immunity, lack of standing, and lack of ripeness. Dkt. 19. On September 27, 2023, Plaintiff filed its summary-judgment motion. Dkt. 21. And on October 6, 2023, Plaintiff filed its response to Defendants' motion to dismiss. Dkt. 23.

Under this Court's Local Rule 7.1, Defendants' response to Plaintiff's summary judgment motion is due on October 18, 2023, and Defendants' reply in support of its motion to dismiss is due on October 20, 2023. 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.

ARGUMENT

I. The Motion for Summary Judgment Is Premature Given Defendants' Pending Motion to Dismiss, Which Raises Threshold Issues of Immunity and Jurisdiction.

Defendants' pending motion to dismiss raises the threshold issues of state sovereign immunity and qualified immunity, which the Supreme Court has made clear are immunities from suit rather than mere defenses to liability. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993). Furthermore, a defendant denied state sovereign immunity or qualified immunity at the motion-to-dismiss stage is entitled to an immediate interlocutory appeal. *See Behrens v. Pelletier*, 516 U.S. 299, 305-13 (1996) (holding that a defendant may pursue an interlocutory appeal from the denial of qualified immunity at both the motion-to-dismiss and summary-judgment stage); *Planned Parenthood Gulf Coast, Inc. v. Phillips*, 24 F.4th 442, 450 & n.13 (5th Cir. 2022) (exercising jurisdiction over an interlocutory appeal of a denial of sovereign immunity at the motion-to-dismiss stage).

The question of jurisdiction must be decided first, before any effort to discover and ultimately reach the merits (or lack thereof) of the claims at issue.

> Justice Ginsburg succinctly restated the applicable principles in *Sinochem International v. Malaysia International Shipping*, 549 U.S. 422, 430–31, 127 S. Ct. 1184, 1191, 167 L. Ed.2d 15 (2007). To paraphrase her writing, a federal court may not rule on the merits of a case without first determining its jurisdiction, but there is no mandatory "sequencing of jurisdictional issues," and a federal court has leeway "to choose among threshold grounds for denying audience to a case on the merits." *Id.* at 431, 127 S. Ct. at 1191 (quoting *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585, 119 S. Ct. 1563, 1570, 143 L. Ed.2d 760 (1999)).

Daves v. Dallas County, 64 F.4th 616, 623 (5th Cir. 2023) (en banc) (Jones, J.). On the motion to dismiss, the Court will have the opportunity to consider the applicability of state sovereign immunity and qualified immunity to Plaintiff's claims. These jurisdictional questions come first not only because of the bedrock Article III principle that federal courts are courts of limited jurisdiction, but also because the purpose of these doctrines is to prevent government officials from being subjected to the potentially unnecessary burdens of litigation when they are immune from suit. *See Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009) ("The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'"); *Phillips*, 24 F.4th at 449 (noting that the value of state sovereign immunity is lost if litigation is allowed to proceed because the "potential injury is being wrongly 'haled into court'"). As the Supreme Court stated in *Ashcroft v. Iqbal*:

> There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

556 U.S. at 685.

Defendants' pending motion to dismiss also raises the threshold jurisdictional issues of standing and ripeness, which also must be resolved prior to a decision on the merits. In *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83 (1998), the Supreme Court held that a federal court may not rule on the merits of a cause of action without first deciding whether the court has Article III jurisdiction. "Article III jurisdiction is always first." *A & R Eng'g & Testing, Inc. v. Scott*, 72 F.4th 685, 689 (5th Cir. 2023); *see also, e.g.*, *In re Gee*, 941 F.3d 153, 165 (5th Cir. 2019) (per curiam) ("We recognize that analyzing standing . . . can be tedious . . . . But it's what Article III requires."); *Midcap Media Finance, L.L.C. v. Pathway Data, Inc.*, 929 F.3d 310, 313 (5th Cir. 2019) ("Notwithstanding the parties' agreement, we have an independent obligation to assess our own jurisdiction before exercising the judicial power of the United States.").

II. The Motion for Summary Judgment Is Premature Because Even if the Matter Could Ever Proceed to the Merits, Defendant Would Be Entitled to Conduct Discovery on Plaintiff's Claims.

Plaintiff's motion for summary judgment fails to cite the applicable legal standard, which is "that there is no genuine dispute as to any material fact" and that "the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The committee notes for the 2010 amendment to Rule 56 state: "Although the rule allows a motion for summary judgment to be filed at the commencement of an action, in many cases the motion will be premature until the nonmovant has had time to file a responsive pleading or other pretrial proceedings have been had. Scheduling orders or other pretrial orders can regulate timing to fit the needs of the case."[1]

Plaintiff did not confer with Defendants before filing its summary judgment motion to determine what facts may or may not be in dispute. Instead, Plaintiff filed an appendix (Dkt. 22)

[1]In line with the federal rule, if the matter ever proceeded past the threshold jurisdictional issues, Defendants would be requesting a docket control and briefing schedule that would govern discovery and the ultimate briefing on the constitutionality of the statute at issue. The ban on corporate campaign contributions challenged by Plaintiff has been Texas law since 1987.

containing three declarations from witnesses as "evidence relied upon" for the motion. These declarations include averments on the following factual subjects, among others:

- Averments on residency of an individual and a claimed general purpose political committee ("GPAC") Plaintiff claims it wants to represent.
- Averments on the intent of the individual to run for office and the GPAC to run a campaign, including averments about spend money in a certain fashion and advertise in a certain way.
- Averments on the feelings of this individual and GPAC about a requirement under state law regarding political campaign signage.
- Averments that the individual and the GPAC cannot afford to pay lawyers.
- Averments that the individuals and the GPAC believe they would be subject to liability under state law.
- Averments about Plaintiff not having offered to represent the individual or the GPAC.
- Averments about the non-profit nature and residency of the Plaintiff.
- Averments about the funding sources to the Plaintiff.
- Averments about the activities of Plaintiff in "tak[ing] on legal cases that impact free political speech rights."
- Averments about the pro bono nature of legal services that Plaintiff allegedly provides.
- Averments about concerns Plaintiff (or its apparently non-lawyer representative) has about providing claimed pro bono services in light of Texas law restricting corporate contributions to political campaigns.
- Averments about claimed "opportunities" for representation that Plaintiff has allegedly passed on given the claimed concerns.
- Averments about an advisory opinion from the Commission "resolving" the concerns allegedly held by Plaintiff.
- Averments about an advisory opinion from the Commission giving rise to concerns by Plaintiff (or its representative) about a "considerable risk of prosecution or civil liability."
- Averments about Plaintiff (or its representative) believing it cannot provide pro bono legal services to people or entities it wants to represent.

- Averments about Plaintiff's claimed rights "hav[ing] been chilled" as a result of issuance by the Commission of an advisory opinion.
- Averments about Plaintiffs' claimed rights having been burdened in Texas counties.
- Averments about other organizations that Plaintiff (or its representative) claims cannot provide pro bono legal services to people or entities they want to represent.
- Averments about the claimed benefits of the Commission's advisory opinion benefitting the Commission itself or incumbent officeholders in Texas.

In short, Plaintiff's "evidence" offered in support of its motion is replete with issues that (if they could be reached in this case) would be the subject of fulsome discovery. Defendants would want to conduct this discovery, should the matter not be fully resolved on jurisdictional issues. **Exhibit A** (Declaration of J.R. Johnson).

Of course, discovery in a case that seeks to invalidate a Texas law covers more than testing and contesting the allegations of a plaintiff. For example, discovery beyond Plaintiff's paper averments in pleadings and declarations could yield additional grounds for dismissing Plaintiff's claims for lack of subject-matter jurisdiction. The Fifth Circuit recently reaffirmed that an organization such as Plaintiff suffers a cognizable injury for purposes of standing only when the organization's ability to carry out its purpose has been concretely and perceptibly impaired. *See La. Fair Housing Action Ctr., Inc. v. Azalea Garden Properties, LLC*, 82 F.4th 345 (5th Cir. 2023). In addition, for IFS to be able to bring causes of action on behalf of Chris Woolsey and the Texas Anti-Communist League PAC for which those parties would have standing, they would have to show not just that the defendant "*might* enforce" a challenged provision of law, but that there is an "actual or threatened" enforcement of law against them. *A & R Eng'g & Testing*, *Inc.*, 72 F.4th at 690.

"If subject matter jurisdiction turns on a disputed fact, parties can conduct jurisdictional discovery so that they can present their arguments and evidence to the Court." *Exxon Mobil Corp.*

v. Healey, 215 F. Supp. 3d 520, 522 (N.D. Tex. 2016); *see also, e.g.*, *New Leaf Serv. Contracts, Inc. v. Gerhard's Inc.*, No. 3:22-CV-1145-G, 2022 WL 18588061, at *1 (N.D. Tex. July 19, 2022) (granting discovery on standing); *Hunter v. Branch Banking & Tr. Co.*, No. 3:12-CV-2437-D, 2012 WL 5845426, at *1 (N.D. Tex. Nov. 19, 2012) ("District courts have permitted jurisdictional discovery to determine whether the court has subject matter jurisdiction."); *Div. 80, LLC v. Garland*, No. 3:22-CV-148, 2022 WL 3648454, at *1 (S.D. Tex. Aug. 23, 2022) (noting that the court granted the defense jurisdictional discovery).

Absent an agreement by the parties to forego discovery, any civil-rights case seeking to invalidate a provision of state law on constitutional grounds inevitably involves discovery—if the case overcomes the jurisdictional threshold—over the competing individual and state interests at play. *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. Dec. 9, 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. May 30, 2013) (ruling on cross-motions for summary judgment in challenge to campaign-finance laws after allowing the parties to complete discovery).

In short, Plaintiff's motion is a premature request for a generalized advisory opinion on the constitutionality of Texas law, based on the facts as Plaintiff apparently sees them. This approach wholly disregards what needs to come first: consideration of sovereign immunity, qualified immunity, and standing to bring the request in the first place. These threshold issues include important matters to sift through: (1) whether Plaintiff can bring claims against any of the Defendants, much less the commissioners named as defendants; (2) whether Plaintiff can bring

claims for individual liability against commissioners who voted for the advisory opinion at issue; (3) the different factual and legal requirements for an individual-capacity claim as opposed to an official-capacity claim; and (4) the different factual and legal requirement for retrospective relief as opposed to prospective relief. *Cf. Moore v. LaSalle Mgmt. Co., LLC*, 41 F.4th 493, 503 (5th Cir. 2022) ("The Supreme Court has told us to read § 1983's causation requirement 'against the background of tort liability that makes a man responsible for the natural consequences of his actions.'"); *Burleson v. Tex. Dep't of Criminal Justice*, 393 F.3d 577, 590 (5th Cir. 2004) ("Without proof of causation, [Plaintiff] cannot met his constitutional burden.").

CONCLUSION

Defendants respectfully requests that this Court defer any consideration of Plaintiff's motion for summary judgment until after the Court resolves Defendants' pending motion to dismiss. That motion can and should resolve the entire litigation. Furthermore, any request for the Court to consider the merits of Plaintiff's claims—based on uncontested declarations—falls of its own weight. If Plaintiff could ever establish jurisdiction for its claims—which it cannot—Plaintiff's claims would be subject to proper discovery, which Defendants would conduct. *See* FED. R. CIV. P. 56(d). For these reasons, the Court should defer consideration of Plaintiff's motion. A proposed form of order granting this relief will be submitted in accordance with the Local Rules of this Court.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF CONFERENCE

I hereby certify that on October 9, 2023, counsel for Defendants conferred via e-mail with Plaintiff's counsel about the request to defer the Court's consideration of the motion, and Plaintiff's counsel stated that Plaintiff would opposed the request.

/s/ Eric J.R. Nichols
Eric J.R. Nichols

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2023, 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
Eric J.R. Nichols