IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

INSTITUTE FOR FREE SPEECH, a nonprofit corporation and public interest law firm, Plaintiff, v. 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.	Cause No. 4:23-cv-00808-P

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Reply Argument

I. This Court should consider the parties' motions concurrently

This Court can and should rule on IFS's motion at the same time as it considers defendants' motion to dismiss. Federal courts may not presume jurisdiction before assessing the merits of a case. *Sinochem Int'l Co. v. Malay. Int'l Shipping* Corp., 549 U.S. 422, 430-31 (2007). Accordingly, every summary judgment on the merits necessarily includes a decision on jurisdiction. *See Texas v. Rettig*, 987 F.3d 518, 527 (5th Cir. 2021). Motions for summary judgment require courts examine jurisdiction in greater depth than most motions to dismiss. Motions to dismiss are often facial attacks—that is, they ask the court to determine if the allegations in the complaint, taken as true, are sufficient to establish subject matter jurisdiction. *See Cell Sci. Sys. Corp. v. La. Health Serv*., 804 F. App'x 260, 263 (5th Cir. 2020). In contrast, summary judgment always looks to the evidence introduced, and neither party can rest upon the pleadings. *See Moody v. Farrell*, 868 F.3d 348, 352 (5th Cir. 2017).

Defendants' motion to dismiss is a facial attack. *See* ECF No. 19, at 4 (stating that the Court can decide the motion "by reviewing IFS's complaint" and the relevant Texas laws); *see also Superior MRI Servs. v. All. HealthCare Servs*., 778 F.3d 502, 504 (5th Cir. 2015) (categorizing a motion as facial if the movant does not submit "affidavits, testimony, and other evidentiary material" in support). Article III does not require that courts limit themselves to resolving facial attacks before considering the fuller jurisdictional questions that a motion for summary judgment entails, and Defendants cite no legal authorities suggesting otherwise. Indeed, courts in the Fifth Circuit frequently decide motions to dismiss and motions for summary judgment at the same time. *See, e.g.*, *Tex. Workforce Comm'n v. United States Dep't of Educ*., 354 F. Supp. 3d 722, 730 (W.D. Tex. 2018) ("Instead of first considering the Motion to Dismiss under the Rule 12(b)(6) standard,

it is in the interest of judicial efficiency to resolve this matter by applying the summary judgment standard to the entirety of this dispute."); *La. Coll. v. Sebelius*, 38 F. Supp. 3d 766, 768 (W.D. La. 2014) (considering motion to dismiss and cross-motions for summary judgment together and granting summary judgment); *Fanos v. Maersk Line, Ltd.*, 246 F. Supp. 2d 676, 678 (S.D. Tex. 2003) (granting motion of summary judgment disposing entire case, without reaching concurrent motion to dismiss).

Moreover, separating and sequencing the parties' respective motions to dismiss and motion for summary judgment would not promote judicial efficiency. Potentially, there would be two oral arguments, two opinions, and even two interlocutory appeals. For Defendants can raise the same immunity defenses at each successive stage in the litigation and seek immediate interlocutory appeal whenever these defenses are denied. *See Planned Parenthood Gulf Coast, Inc. v. Phillips*, 24 F.4th 442, 449-50 (5th Cir. 2022) (interlocutory appeal for sovereign immunity); *Joseph v. Bartlett*, 981 F.3d 319, 330-31 (5th Cir. 2020) (interlocutory appeal for qualified immunity). Deciding the motions together avoids the inefficiency of two appeals in the same case on the same issue only a few months apart. Because this case is a civil rights challenge under § 1983, state taxpayers risk paying both sides' fees and expenses. *See* 42 U.S.C. § 1988; *see also In re Gee*, 941 F.3d 153, 169 (5th Cir. 2019) (finding a procedure "inadequate" because it failed to address the "federalism consideration" inherent in the danger that taxpayers might bear "astronomical" fees). Both sides benefit from advancing the case rapidly and with minimal costs. *See also* Fed. R. Civ. P. 1 ("[Civil Rules] should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.").

II. Defendants are not entitled to jurisdictional discovery because IFS brings a purely legal pre-enforcement challenge

A. Defendants bear the burden of showing that the Court should delay summary judgment

Defendants have not carried their burden of demonstrating that this Court should delay ruling on IFS's motion for summary judgment by specifying what material facts they hope to ascertain from discovery. IFS has brought a pre-enforcement challenge, contending that, as a matter of law, the TEC's regulatory regime violates the U.S. Constitution. *See* ECF No. 1, ¶¶ 58, 62, 68, 75. IFS's summary judgment motion does not depend on contested facts, but rather offers purely legal arguments for the unconstitutionality of TEC's regime. *See* ECF No. 21, at 9-29. Indeed, Defendants have not contested *any* of IFS's evidence. They merely offer a wish-list for a fishing expedition, without suggesting what it is they hope to uncover that might make any difference in this case.

"Rule 56 does not require that any discovery take place before summary judgment can be granted." *Dominick v. United States Dep't of Homeland Sec.*, 52 F.4th 992, 995 (5th Cir. 2022). Civil rights cases against unconstitutional government actions do not always involve discovery. Courts in the Fifth Circuit routinely grant summary judgment before any discovery occurs. *See, e.g.*, *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1284, 1288 (5th Cir. 1990) (affirming district court's summary judgment prior to discovery); *Monumental Task Comm., Inc. v. Foxx*, 259 F. Supp. 3d 494, 497, 505, 508 (E.D. La. 2017) (granting summary judgment on civil-rights claims before parties "conduct[ed] any discovery whatsoever"); *Bishop v. City of Galves*ton, 1 F. Supp. 3d 623, 633, 638 (S.D. Tex. 2014) (granting summary judgment prior to discovery in § 1983 suit about allegedly unconstitutional government program); *D.A. v. Hous. Indep. Sch. Dist.*, 716 F. Supp. 2d

603, 625-26 & n.7 (S.D. Tex. 2009) (granting summary judgment on § 1983 claim despite non-movant's Rule 56 request for further discovery).

Once a motion for summary judgment is filed, a court may not defer considering that motion or allow time for further discovery, unless the non-moving party "shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." FED. R. CIV. P. 56(d). The party seeking relief under Rule 56(d) bears the burden of making two showings: it "must demonstrate that additional discovery will create a genuine issue of material fact," *Bailey v. KS Mgmt. Servs., L.L.C.*, 35 F.4th 397, 401 (5th Cir. 2022), and it "must also have diligently pursued discovery" prior to the filing of the motion for summary judgment, *January v. City of Huntsville*, 74 F.4th 646, 651 (5th Cir. 2023) (citation omitted).

"Motions made under Rule 56(d) . . . 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) (internal quotation marks and citation omitted). "Rather, a request to stay summary judgment under Rule 56(d) must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion." *Id.* at 601 (cleaned up); *see also January*, 74 F.4th at 651-52 (stressing that a "list of items sought" is "not enough" to show "that discovery will create a genuine issue of material fact" because listing "isn't the same as identifying the facts those items will support").

In answer to IFS's motion, Defendants filed a declaration and an "initial response to plaintiff's motion for summary judgment and request for deferral of motion under FED. R. CIV. P. 56(d)." ECF No. 24, at 1, 6. Assuming, *arguendo,* that the TEC's "initial response" can be construed as sufficient to assert its rights under Rule 56(d), Defendants have not explained what material

evidence they hope to uncover through discovery. *See, e.g., Mdk Sociedad De Responsabilidad Limitada v. Proplant Inc.*, 25 F.4th 360, 367 (5th Cir. 2022) ("assuming arguendo that [plaintiff's] response to [defendant's] summary judgment motion qualifies as a Rule 56(d) request for additional discovery, the court did not abuse its discretion by implicitly denying the request"); *Hampton v. Methodist Healthcare Sys. of San Antonio*, 490 F. App'x 640, 641 (5th Cir. 2012) ("Even if [plaintiff's] oppositions could be construed as a motion pursuant to Federal Rule of Civil Procedure 56(d) for a continuance, [its] speculative and conclusional assertions were insufficient to satisfy the requirements of that rule.").

B. Defendants have not shown that discovery will uncover material evidence

Because IFS's brought a purely legal pre-enforcement challenge to TEC's regulatory regime, this case requires no merits discovery. Defendants effectively concede this by seeking only jurisdictional discovery. The TEC lists nineteen jurisdictional subjects for which it wants discovery, such as information about the residency of IFS and other entities, about IFS's nonprofit corporate status, and about the chilling effect of TEC's advisory opinion. ECF No. 24, at 5-6. Later, Defendants similarly state that they are seeking "jurisdictional discovery." *Id.* at 6-7. But they do not explain why they expect this discovery to make any difference.

Absent from Defendants' filings is any attempt to explain how the subjects about which they want discovery are "essential" for them to oppose the motion for summary judgment. *See* FED. R. CIV. P. 56(d); *compare* ECF No. 24-1 at 2-3; ECF No. 24 at 5. For example, the registration status and Tarrant County addresses for the Texas Anti-Communist League PAC are a matter of public record—indeed they are listed in the TEC's own records. GPAC Campaign Finance Report for Texas Anit-Communist League PAC, https://perma.cc/QX6N-72UD (last visited Oct. 30, 2023). The fact that Chris Woolsey is an elected city councilmember for Corsicana, Texas is also listed

on a government website. Corsicana City Council, https://www.cityofcorsicana.com/258/City-Council (last visited Oct. 30, 2023) (listing Woolsey as councilmember).

Does Defendant Johnson expect Mr. Woolsey and Mr. Cheshire to disavow their stated future intentions as set forth in their declarations? If not, then what is the point?

So too with the Johnson's averments about IFS's mission, corporate status, and litigation history, which are all readily ascertainable from its website—www.ifs.org—or through a search on PACER, Westlaw, Lexis, or other reliable sources. IFS's website includes over a decade of financial disclosures and annual reports under the "About Us" section, as well as case pages describing its many years of litigation against government entities, with links to its court filings. *Id.; see also* Virginia State Corporation Commission Clerk's Information System business entity search for IFS, https://perma.cc/449D-LMRH (last visited Oct. 31, 2023) (listing IFS's corporate status). Is Defendant Johnson asserting that IFS made this all up? Or that Chris Woolsey will turn out to be independently wealthy and therefore fibbing about wanting free legal services? Who wouldn't prefer free legal services? In any event, the presence of jurisdiction to challenge the constitutionality of a state statute is not dependent on one's wealth.

And to the extent Defendants wished to assert qualified immunity or a governmental interest in regulating the provision of pro bono legal services to Texas candidates or political committees, they do not need discovery from IFS or its putative clients to do so. Noticeably missing from Johnson's declaration is any effort to carry his burden to articulate the interests served by the challenged regulation or to explain how its methods accomplish its goals. The TEC's witnesses could have supplied that evidence in the form of declarations. Discovery from IFS or its witnesses cannot.

Defendants have the burden of showing that specific material facts exist which it currently cannot present, that it can gather these facts within a reasonable time frame, and that these facts will influence the motion's outcome. *See Renfroe*, 974 F.3d at 600-01. Defendants, however, only speculate. *See* ECF No. 24, at 6 ("discovery . . . *could* yield additional grounds for dismissing Plaintiff's claims for lack of subject-matter jurisdiction") (emphasis added). Defendants merely offer a "list of items sought"—insufficient as a matter of law to meet its burden. *See January*, 74 F.4th at 652; *see also Benoit v. Lee*, Civil Action No. H-22-4202, 2023 U.S. Dist. LEXIS 185672, at *9 (S.D. Tex. Sep. 7, 2023) (denying a 56(d) motion because party provided listing of items sought rather than setting forth how facts would influence outcome). Wishful thinking is not enough. Defendants' vague assertions do not satisfy their burden under Rule 56(d).

C. The TEC is seeking jurisdictional discovery only as an afterthought

If Defendants thought they needed jurisdictional discovery, they should have said so in their motion to dismiss. Instead, they were dilatory. Jurisdictional discovery is not automatic. *See Dougherty v. United States Dep't of Homeland Sec.*, No. 22-40665, 2023 U.S. App. LEXIS 24807, at *16 (5th Cir. Sep. 19, 2023). A party requesting jurisdictional discovery "bears the burden of demonstrating the necessity of discovery," and courts should deny jurisdictional discovery if "the requested discovery is not likely to produce the facts needed to withstand a motion." *Monkton Ins. Servs. v. Ritter*, 768 F.3d 429, 434 (5th Cir. 2014) (cleaned up). Because courts cannot authorize "a jurisdictional fishing expedition" based on "general averments," parties must state clearly what "specific facts" they expect to find. *Johnson v. TheHuffingtonpost.com, Inc.*, 21 F.4th 314, 326 (5th Cir. 2021) (citations omitted); *see also Ann v. Lone Star Fund IV United States, L.P.*, Civil Action No. 3:22-CV-01734-N-BH, 2023 U.S. Dist. LEXIS 157338, at *28 (N.D. Tex. Aug. 22,

2023) (discovery an undue burden because party never articulated how discovery would advance argument and supported its request "by conjecture, speculation, or suggestion") (citations omitted).

Defendants themselves raised their jurisdictional arguments in a non-evidentiary motion without suggesting that they required discovery evidence to make these arguments. *See* ECF No. 19, at 4. If such evidence were necessary, Defendants would have sought discovery *before* filing their motion. Only after IFS sought summary judgment, did Defendants belatedly assert that it needed jurisdictional discovery. Moreover, Defendants' request is a paradigmatic fishing expedition, lacking specific facts and conjecturing on general averments that grounds for dismissing IFS's claim might exist. *See* ECF No. 24, at 5-7.

Defendants have not diligently pursued discovery and are therefore not entitled to delay this Court's decision on summary judgment. *See, e.g.*, *Moore v. Burlington N. Santa Fe Ry. Co*., No. 21-20103, 2022 U.S. App. LEXIS 31357, at *7 (5th Cir. Nov. 11, 2022) (no diligent pursuit when party never explained how desired discovery related to motion and stated in brief that he already possessed enough evidence to make dispositive argument); *Jacked Up, LLC v. Sara Lee Corp.*, 854 F.3d 797, 816 (5th Cir. 2017) (no diligent pursuit when party never sought aid in obtaining additional discovery prior to its response to a motion for summary judgment); *Wells Fargo Bank, N.A. v. Malloy*, No. 3:19-cv-9-S-BN, 2020 U.S. Dist. LEXIS 224622, at *8 (N.D. Tex. Oct. 7, 2020) (no diligent pursuit when party did not describe any efforts to obtain discovery supposedly needed to respond). Defendants' own actions and speculative assertions reveal that they did not diligently pursue discovery and only began clamoring for discovery to delay IFS's motion.

III. Defendants' failure to substantially engage with IFS's arguments is a concession that their regulatory regime is unconstitutional

By failing to respond to the substance of IFS's motion for summary judgment, Defendants have effectively conceded liability. IFS advances multiple legal arguments on the merits for the unconstitutionality of the TEC's regulatory regime. *See* ECF No. 21, at 9-29. Defendants, however, do not address these merits arguments in their response, which focuses exclusively on jurisdictional issues. *See* ECF No. 24, *passim*.

Defendants style their brief as an "initial response" as if they will later file a second response. *Id.* at 1. But this is presumptuous. The federal rules do not provide for multiple responses to a single motion for summary judgment, without first seeking the permission of the presiding judge. *See* N.D. TEX. CIV. R. 56.4(a), 56.7; *see also* FED. R. CIV. P. 56(f). Therefore, Defendants conceded that IFS's merits arguments are valid and that they can only object to IFS's claims on jurisdictional grounds.

"A party may implicitly concede an argument by not responding to it." *Varsity Spirit LLC v. Varsity Tutors, LLC*, Civil Action No. 3:21-CV-0432-D, 2021 U.S. Dist. LEXIS 217376, at *10 (N.D. Tex. Sep. 17, 2021). Accordingly, the Fifth Circuit has held that a party's failure to dispute an argument qualifies as an implicit concession, binding for the sake of the case. *See, e.g.*, *United States v. Juarez-Martinez*, 738 F. App'x 823, 825 (5th Cir. 2018) (government's failure to dispute opponent's interpretation of state law made that interpretation operative even if court did not consider it "the best or only interpretation"); *United States ex rel. Bias v. Tangipahoa Par. Sch. Bd.*, 816 F.3d 315, 321 (5th Cir. 2016) (failure to address argument in § 1983 suit concedes argument's truth); *see also Behnken v. Luminant Mining Co., LLC,* 997 F. Supp. 2d 511, 519 (N.D. Tex. 2014) (defendant's failure to contest issue in response brief as implicit concession); *Authentic*

Bevs. Co. v. Tex. Alcoholic Bev. Comm'n, 835 F. Supp. 2d 227, 247 (W.D. Tex. 2011) (defendant's failure to submit evidence or respond to arguments obligated court to grant summary judgment in favor of plaintiff's First Amendment challenges). The Court should treat Defendants' half-response as an implicit concession that the TEC's regulatory regime violates the Constitution.

For over sixty years, the U.S. Supreme Court has recognized, in *NAACP v. Button*, 371 U.S. 415 (1963) and its progeny, that the First Amendment freedoms of speech and association protect pro bono litigation against the government. ECF No. 21, at 9-13. Therefore, at a minimum, the TEC's ban on corporate in-kind contributions—as-applied to pro bono civil-rights litigation—violates the First Amendment and cannot survive strict scrutiny. *Id.* at 13-23. The TEC's ban on corporate contributions is also facial overbroad and preempted by 42 U.S.C. § 1983. *Id.* at 23-26. Defendants do not dispute IFS's substantive arguments, thereby tacitly conceding the unconstitutionality of their regime.

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 on all its claims.

Respectfully submitted,

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