IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

City of El Cenizo, Texas, Mayor Raul L. Reyes of City of El Cenizo, Maverick County, Maverick County Sheriff Tom Schmerber, Maverick County Constable Pct. 3-1 Mario A. Hernandez, and League of United Latin American Citizens,	§	Civil Case No. 5:17-cv-404-OG
Plaintiffs,	§	
vs.	§	
State of Texas, Governor Greg Abbott (In His Official Capacity), and Texas Attorney General Ken Paxton (In His Official Capacity),	§	
Defendants.	§	

AMICUS BRIEF OPPOSING DEFENDANTS' OPPOSED MOTION TO DISMISS OR TRANSFER

INTRODUCTION

The Mexican American Legal Defense and Education Fund ("MALDEF"), a civil rights law firm which was sued by the State of Texas (the "State") in an unprecedented move to silence opposition to Senate Bill 4 ("S.B. 4"), submits this brief to support Plaintiffs' Opposition to Defendants' Opposed Motion to Dismiss or Transfer.

S.B. 4 is a controversial law that the State knew would be met with public outcry. The State anticipated that the law would face challenges to its constitutionality, and in a move to silence the opposition and to obtain its preferred forum, the State filed an anticipatory, declaratory lawsuit in the Austin Division of this District. *Texas v. Travis County, Texas, et al.*, No. 1:17-cv-00425-SS ("*Travis County*"). The State filed the suit against individuals and jurisdictions who had criticized S.B. 4 while it was under consideration in the State house and

Senate. The *Travis County* defendants include jurisdictions, employees of those jurisdictions, and even MALDEF – a public interest civil rights law firm.

The State's lawsuit is premature, improper, and chills the First Amendment Rights of jurisdictions, public interest groups, and private individuals. For the reasons discussed below, this Court should deny Defendants' Opposed Motion to Dismiss or Transfer (the "State's Motion") or, in the alternative, stay proceedings in this case until the *Travis County* court rules on the motions to dismiss and motion to consolidate presently before it.

BACKGROUND

S.B. 4 was signed into law on May 7, 2017. It prohibits local entities from adopting, enforcing, or endorsing a policy that prohibits or materially limits the enforcement of "immigration laws," and is one of the most restrictive and prohibitive anti-immigrant state laws in the United States. On May 7, 2017, the same day that S.B. 4 was signed into law, the State sued Travis County, Texas, the City of Austin, Texas, and officials from Travis County and Austin (collectively, "Jurisdictional Defendants"), and MALDEF seeking a declaratory judgment that S.B. 4 is valid under the Fourth and Fourteenth Amendments to the United States Constitution and is not preempted by federal law. S.B. 4 does not go into effect until September 1, 2017.

On May 8, 2014, the City of El Cenizo, Texas, Maverick County, officials from El Cenizo and Maverick County, and League of United Latin American Citizens filed this action challenging the constitutionality of S.B. 4. On May 22, 2017, in the San Antonio Division of this District, El Paso County, Richard Wiles, Sheriff of El Paso County, and the Texas Organizing Project Education Fund brought a related action against the State and several State officials similarly challenging S.B. 4. *El Paso County, et al. v. Texas, et. al.,* No. 5:17-cv-00459-OLG.

On May 24, 2017, the State filed an Opposed Motion to Consolidate in *Travis County* seeking consolidation of the *Travis County* and this action in the Austin Division. On the same day, the State filed a similar motion in this Court, the State's Motion.

On May 24, 2017, and May 26, 2017, the Jurisdictional Defendants in *Travis County* filed motions to dismiss and requested expedited rulings for the same. Additionally, MALDEF may shortly ask the State to withdraw its pleading against MALDEF pursuant to Rule 11.

ARGUMENT

I. The Court Should Deny the State's Motion

The State has the burden to show that this case should be dismissed or transferred. *Time, Inc. v. Manning*, 366 F.2d 690, 698 (5th Cir. 1966); *see also Healthpoint, Ltd. v. Derma Scis., Inc.*, 939 F. Supp. 2d 680, 684 (W.D. Tex. 2013). "Defendants must demonstrate good cause for the transfer." *Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *5 (W.D. Tex. Feb. 26, 2015). The State cannot meet this burden and its motion should be denied.

a. The First-Filed Rule Does Not Mandate Dismissal or Transfer

The State anticipated challenges to a controversial law, S.B. 4, and filed an anticipatory, declaratory suit in the Austin Division in order to obtain its preferred forum. This Court should not, and need not, countenance such legal gamesmanship, which would chill the First Amendment rights of many Texans. Instead, this Court should exercise its discretion and reject the State's attempt to use improper legal machinations to invoke the first-filed rule. *See Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 319 (5th Cir. 1999) ("*CarMax*") (stating that dismissal of an action when duplicative litigation is pending in another jurisdiction "is committed to the district court's discretion"); *see also 909 Corp. v. Vill. of Bolingbrook*

Police Pension Fund, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990) (dismissing the first-filed suit and stating that "[t]he Court cannot allow a party to secure a more favorable forum by filing an action for declaratory judgment when it has notice that the other party intends to file suit involving the same issues in a different forum.").

The court has broad discretion to decide whether to keep, transfer, stay, or dismiss a case when similar litigation is pending in another jurisdiction. *See CarMax*, 177 F.3d at 319; *see also Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *5 (W.D. Tex. Feb. 26, 2015) (noting that the court "has broad discretion in deciding whether to transfer venue."). The first-filed rule does not trump such discretion. *See Carmax*, 177 F.3d at 319; *see also Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 628 (9th Cir. 1991) (stating that "district court judges can, in the exercise of their discretion, dispense with the first-filed principle for reasons of equity."). Even where a court determines that the first-filed rule applies, the second-filed court may in its discretion deny a motion to transfer to the first-filed venue where the court determines that defendants fail to show good cause to transfer the case. *See Permian Basin Petroleum Ass'n v. Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *5 (W.D. Tex. Feb. 26, 2015). Although a rigid application of the "first-to-file rule would have the virtue of certainty, 'the cost – a rule which will encourage an unseemly race to the courthouse and quite likely numerous unnecessary suits – is simply too high.'" *Texas Instruments Inc. v. Micron Semiconductor, Inc.*, 815 F. Supp. 994, 998 (E.D. Tex. 1993) (quoting *Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 750 (7th Cir. 1987)); *see also Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) ("Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems."). "The

circumstances under which an exception to the first-to-file rule typically will be made include bad faith, anticipatory suit, and forum shopping." *Alltrade, Inc.*, 946 F.2d at 628 (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir. 1983)) (internal citations omitted). The conduct by the State in this case warrants an exception to the first-filed rule.

First, anticipatory suits such as *Travis County* are frequently found to warrant an exception to the first-filed rule. *See, e.g., Serco Servs. Co., L.P. v. Kelley Co.*, No. CA 3:93-CV-1885-R, 1994 WL 715913, at *1 (N.D. Tex. May 24, 1994), *aff'd*, 51 F.3d 1037 (Fed. Cir. 1995) (dismissing the first-filed suit after finding that "the filing of an anticipatory suit trumps the 'first-filed' rule); *see also Gemmy Industries Corp. v. Blue Ridge Designes, Inc.*, 3:99-cv-0008, 1999 WL 58785 (N.D. Tex. Feb 1, 1999) (stating that the first-filed declaratory judgment action was a "preemptive strike" and dismissing). As the Fifth Circuit has observed, "[a]nticipatory suits are disfavored because they are an aspect of forum-shopping." *Mission Ins. Co.*, 706 F.2d at 601 n.3. Because "the alleged victim is typically given the right to choose the forum where its case will be heard," "[s]everal courts in this circuit have found that allowing an alleged wrongdoer to proceed with a declaratory judgment action divests the true plaintiff this right." *Pennsylvania Gen. Ins. Co. v. CaremarkPCS*, No. CIV.A.3:05-CV-0844-G, 2005 WL 2041969, at *7 (N.D. Tex. Aug. 24, 2005). The State has attempted to gain the advantage of its preferred forum by filing the suit for declaratory judgment before any challenges to S.B. 4 could be made and the law goes into effect. Such anticipatory suit and forum shopping by the State cannot be permitted.

Second, and as a result of the State's gamesmanship, *Travis County* will likely be dismissed against all defendants for lack of jurisdiction and lack of standing. Therefore, this Court should not transfer this case to that forum. In *Travis County*, the City of Austin and Travis

County have already filed motions to dismiss, and MALDEF will be filing its own motion in due course, on the grounds that the State's suit is devoid of any case or controversy and reflects an improper attempt to obtain an "advisory opinion." *See Life Partners, Inc. v. Life Ins. Co. of N. Am.*, 203 F.3d 324, 325 (5th Cir. 1999) ("Federal courts do not render advisory opinions."). Both Article III of the U.S. Constitution and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) require an actual controversy. *See Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014); *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000); *Golden v. Zwickler*, 394 U.S. 103, 110 (1969). The State's complaint does not, and cannot, allege as to any of the *Travis County* defendants, including MALDEF, a justiciable controversy that "can presently be litigated and decided" and is "not hypothetical, conjectural, conditional, or based upon the possibility of a factual situation that may never develop." *Rowan Cos., Inc. v. Griffin*, 876 F.2d 26, 28 (5th Cir. 1989) (internal quotations omitted).

One Northern District of Texas case is particularly instructive: There, a city attempted to obtain a declaratory judgment that its ordinance was constitutional. *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 880, 884 (N.D. Tex. 2008). The court declined to issue any such judgment. Importantly, the court found that plaintiffs' counsel's publicly stated intention to challenge the ordinance was not sufficient to create a controversy, as "no lawsuit has been filed on behalf of any individual or entity to enjoin the New Ordinance or to challenge its constitutionality." *Id.*; *see also Hillwood Dev. Co. v. Related Cos., Inc.*, No. 3:04-CV-1100-L, 2006 WL 1140472, at *6 (N.D. Tex. Apr. 28, 2006) ("Although there is a hypothetical possibility that a lawsuit will be filed, such possibility is not sufficiently immediate and real to constitute a justiciable controversy.").

As applied to MALDEF, the *Travis County* suit is particularly frivolous and reflects an improper attempt to chill MALDEF's representation of future clients. MALDEF is a civil rights law firm which has no members and files suits *on behalf of its clients*. Suing MALDEF in the first instance is the equivalent of suing a private law firm for declaratory relief, on the ground that they were soliciting clients for a new products liability suit. Such tactics are patently abusive and intended for an improper purpose, including forum shopping and to chill civil rights organizations from speaking out against laws under pain of being forced into an anticipatory lawsuit, whether the organization has an actual client prepared to sue or not.

For these reasons, the *Travis County* lawsuit will likely be dismissed. This Court, therefore, should not transfer this case and, instead, should deny the State's Motion.

b. **Venue is Proper in the San Antonio Division Under 28 U.S.C. § 1391(b) and 28 U.S.C. § 1406 Does Not Apply**

The San Antonio division is a proper venue for this action. Venue is proper in a judicial district "in which any defendant resides, if all defendants are residents of the State in which the district is located" or "in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b). Here, all defendants reside in the Western District. Texas also enacted S.B. 4 in the Western District. Venue is therefore appropriate anywhere in the Western District of Texas under 28 U.S.C. § 1391(b).

There is no requirement that federal civil cases be filed in a particular division of a judicial district. *See In re Gibson*, 423 F. App'x 385, 388 (5th Cir. 2011) ("Prior to its repeal in 1988, the divisional venue statute, 28 U.S.C. § 1393, had limited plaintiffs in multi-divisional districts to filing suit in the division where the defendant resided. After that statute was repealed, plaintiffs were free to file suit in any division in a district."); 14D Charles Alan Wright et al.,

Fed. Prac. & Proc. Juris. § 3809 (4th ed. 2017) ("Fortunately, Congress repealed Section 1393 in 1988. Accordingly, there is no longer any statutory requirement that venue in federal civil cases be laid in a particular division within a district.").

In a recent Western District case, a court analyzed this question and concluded that "venue is permissible *anywhere* in the WDT" because a substantial part of the events or omissions giving rise to the action occurred in the Western District. *Graciela Galindo, et al. v. Reeves County Texas, et al.*, No. EP-10-CV-454-DB, 2011 WL 13175764, at *2 (W.D. Tex. Apr. 12, 2011) (emphasis original). The court disagreed that venue was not proper in the El Paso division because no events giving rise to the action occurred there. *Id.* The court noted that the defendant's "only basis for transfer pursuant to § 1406(a) is the conclusory statement that '[t]his suit is filed in the wrong division.'" *Id.* at *1 n.3.

The State makes the same conclusory arguments here. The State fails to cite any authority that requires a plaintiff to file in a specific division. The cases it does cite are irrelevant. The State's primary citation discusses whether Washington, D.C. or Vermont is the appropriate venue for a lawsuit against a federal official. *Butterworth v. Hill*, 114 U.S. 128 (1885). The case says nothing about divisions of a federal district. *Id.* None of the other case law the State cites discusses divisions of a federal district either. Instead, the case law it cites show that this action is appropriate in any division in the Western District, including San Antonio. *See, e.g., Florida Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1361 (5th Cir. 1980), *rev'd on other grounds, Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147 (1981) ("This is not to suggest that only a single district can satisfy the statutory standard with respect to any given claim. Often, the factors deemed determinative might well indicate the suitability of several forums.") (citations omitted).

Because venue is appropriate in this action, 28 U.S.C. § 1406 does not apply. A district court may only dismiss or transfer a case under 28 U.S.C. § 1406 "when venue is 'wrong' or 'improper' in the forum in which it was brought. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 577 (2013). To transfer this case to another venue, the State must meet the burden to transfer under 28 U.S.C. § 1404. It does not meet that burden, as discussed below.

c. The State Fails to Meet Its Burden to Show That Austin is "Clearly More Convenient" than San Antonio as Required Under 28 U.S.C. § 1404

The State fails to meet its burden to show that the Austin division is "clearly more convenient" than the San Antonio division. The State offers no evidence that any of the public or private factors "clearly point towards hearing the case in the alternative forum."

Under 28 U.S.C. § 1404(a), a court may transfer an action to any other proper judicial district "[f]or the convenience of the parties and witnesses, in the interest of justice." "If venue is proper in the destination venue, the moving party bears the burden of demonstrating that good cause exists to transfer the case for convenience purposes." *Graciela Galindo*, N2011 WL 13175764 at *2 (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc)). "A court will respect a plaintiff s choice of venue, however, 'when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff ....'" *Id.* (quoting *Volkswagen of Am.*, 545 F.3d at 311). The moving party bears the burden of showing that the destination forum is "clearly more convenient." *Id.* (citing *Volkswagen of Am.*, 545 F.3d at 311).

When deciding whether to transfer venue, a court balances the private interests of the litigants and the public's interest in the fair and efficient administration of justice. *Zurich Am. Ins. Co. v. Tejas Concrete & Materials Inc.*, 982 F. Supp. 2d 714, 720 (W.D. Tex. 2013). The

private interest factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 721 (citing *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)). The public interest factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Id.* (citing *Volkswagen AG*, 371 F.3d at 203). None of the factors are dispositive. *Id.* (citing *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004)).

"[A] plaintiff's choice of forum is highly esteemed and may only be overcome when the private and public factors clearly point towards hearing the case in the alternative forum." *Cortez v. Brad Drake Constr., LLC*, No. EP-15-CV-346-KC, 2016 WL 1312636, at *2 (W.D. Tex. Apr. 4, 2016) (citing *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665, 672 (5th Cir. 2003); *Schexnider v. McDermott Int'l, Inc.*, 817 F.2d 1159, 1163 (5th Cir. 1987)). "The clearly more convenient standard "places a significant burden on [Defendant] to show good cause for transfer." *Auto-Dril, Inc. v. Nat'l Oilwell Varco*, L.P., No. 6:15-CV-00091, 2016 WL 6909479, at *3 (W.D. Tex. Jan. 28, 2016) (citation omitted).

i. The Public Factors Do Not "Clearly Point Towards Hearing the Case in the Alternative Forum"

The State fails to show that the public factors "clearly point towards hearing the case in the alternative forum." As an initial matter, because *Travis County* is likely to be dismissed,

there is no reason to believe any cases other than the ones filed in San Antonio will go forward and involve issues of access to proof, convenience to witnesses, etc.

1. Relative Ease to Access to Sources of Proof

The State argues that the sources of proof are in Austin. That is not true. Most of the sources of proof can be accessed anywhere. S.B. 4 and its legislative history are public documents and electronic discovery is common in modern legal practice. Few, if any, physical paper copies will likely be produced in discovery. Moreover, the State has not shown that Austin would be more convenient for the State's witnesses than San Antonio. Witness depositions can be taken anywhere and the Texas Legislature has adjourned *sine die*. This factor does not favor transfer.

2. Availability of Compulsory Process to Secure the Attendance of Witnesses

The State failed to provide any evidence regarding this factor. We see no substantial difference between the San Antonio and Austin divisions regarding compulsory process. This factor does not favor transfer.

3. Cost of Attendance for Willing Witnesses

The State failed to provide any evidence regarding this factor except for a conclusory statement that "transferring the case to Austin will actually reduce the overall costs of the two cases for all the parties involved." We see no substantial difference in costs for a willing witness in a case litigated in either San Antonio or Austin. They are within 100 miles of each other and both have major airports. This factor does not favor transfer.

4. Other Practical Problems That Make Trial of a Case Easy, Expeditious and Inexpensive

The State failed to provide any evidence regarding this factor except for the reference to a pending action in Austin. While consolidation of multiple cases may decrease costs, this is not a motion to consolidate, but a motion to transfer or dismiss. Moreover, there is also no reason to prefer consolidation in Austin over San Antonio. This factor does not favor transfer.

ii. The Private Factors Do Not "Clearly Point Towards Hearing the Case in the Alternative Forum"

The State also fails to show that the private factors "clearly point towards hearing the case in the alternative forum."

1. *Administrative Difficulties Flowing from Court Congestion*

The State failed to provide any evidence regarding this factor. This factor does not favor transfer.

2. Local Interest in Having Localized Interests Decided at Home

The State failed to provide any evidence regarding this factor. We see no difference in the localized interest of the residents of San Antonio and Austin. S.B. 4 affects all residents of Texas, not just those in the Texas capital. This factor does not favor transfer.

3. Familiarity of the Forum with the Law that will Govern the Case

The State failed to provide any evidence regarding this factor. Both the San Antonio and Austin divisions are familiar with the applicable law. This factor does not favor transfer.

4. Avoidance of Unnecessary Problems of Conflict of Laws or in the Application of Foreign Law

The State failed to provide any evidence regarding this factor. We are not aware of problems regarding the conflict of laws or the application of foreign law. This factor does not favor transfer.

The State failed to meet its burden to show that the Austin division is "clearly more convenient" than the San Antonio division. The State failed to provide any evidence that any of the public or private factors "clearly point towards hearing the case in the alternative forum." We, therefore, respectfully ask the Court to deny Defendants' motion to transfer.

II. In the Alternative, the State's Motion Should Be Stayed

In the alternative, the Court should stay the State's motion pending resolution of the motions to dismiss in *Travis County*. When the jurisdiction of the first-filed court is uncertain, it is appropriate for the second-filed court to stay the case pending determination of the first-filed court's jurisdiction. *See Burger v. Am. Mar. Officers Union*, 170 F.3d 184 (5th Cir. 1999); *see also W. Gulf Mar. Ass'n v. ILA Deep Sea Local 24, S. Atl. & Gulf Coast Dist. of ILA, AFL-CIO*, 751 F.2d 721, 729 n. 1 (5th Cir. 1985) ("A stay may, for example, be appropriate to permit the court of first filing to rule on a motion to transfer"). Moreover, "where the first-filed action presents a likelihood of dismissal, the second-filed suit should be stayed, rather than dismissed." *Alltrade, Inc. v. Uniweld Prod., Inc.*, 946 F.2d 622, 629 (9th Cir. 1991); *see also Bean v. Alcorta,* No. 5:14-CV-604-DAE, 2016 WL 6242346, at *1 (W.D. Tex. Oct. 25, 2016) ("A stay of a pending matter is "within the trial court's wide discretion to control the course of litigation." (quoting *In re Ramu Corp.*, 903 F.2d 312, 318 (5th Cir. 1990))).

As discussed above, *Travis County* is likely to be dismissed – either voluntarily or by the court – for any number of reasons. Therefore, MALDEF respectfully requests that if this Court does not deny the State's Motion, then, in the alternative, this Court stay this case pending resolution of the motions to dismiss and motion to transfer in *Travis County*.

CONCLUSION

For the reasons discussed above, MALDEF respectfully requests that the Court deny the State's Motion or, in the alternative, stay proceedings pending resolution of the motions in *Travis County*.

DATED: May 31, 2017

Respectfully submitted,

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