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

CITY OF EL CENIZO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-404-OG [Lead Case]
EL PASO COUNTY, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-459-OG [Consolidated Case]
CITY OF SAN ANTONIO, et al., *Plaintiffs*, v. STATE OF TEXAS, et al., *Defendants*.	No. 5:17-cv-489-OG [Consolidated Case] **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS OR TRANSFER THE CONSOLIDATED CASES**

Plaintiffs El Paso County et al. (ECF No. 43) and El Cenizo et al. (ECF No. 44) contend that venue is proper in San Antonio and improper in Austin. But Plaintiffs ignore that the sole residence of Texas officials is Austin, do not show how their pre-enforcement challenge to SB 4 bears relevant or legitimate contacts to San Antonio, and fail to demonstrate that the first-to-file rule should not apply. The Court should grant Texas's motion to dismiss or transfer.[1]

I. Austin Is the Only Proper Venue.

A. State Officials Have Only One Residence.

"The general rule in suits against public officials is that a defendant's residence for venue purpose[s] is the district where he performs his official duties." *Fla. Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1360 (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). Thus, Austin is the appropriate venue for challenges to SB 4 regardless of the outcome of other pending litigation in the Austin Division.

This residence principle is *not* limited to federal officials as there are "no persuasive arguments for treating state officials differently from their federal counterparts." *See Procario v. Ambach*, 466 F. Supp. 452, 454 (S.D.N.Y. 1979). Indeed, 28 U.S.C. § 1391 cannot simultaneously possess two conflicting interpretations. Whether a suit is against federal officials or state officials, section 1391 applies. Thus, suits against state officials must be brought in the state capital. *See*, *e.g.*, *Procario*, 466 F. Supp. at 454.

Cases interpreting section 1391 find only one official residence, *see* 14D

[1] On June 20, 2017, the Court held Texas's Motion to Dismiss or Transfer the Consolidated Cases in abeyance pending a decision on subject matter jurisdiction in the Austin Division case. ECF No. 66. Texas is aware of the Court's order but files this reply for the Court's review when it resolves this issue. Moreover, Texas asserts that this case should be dismissed or transferred regardless of the outcome of the Austin Division case.

Charles Alan Wright et al., Federal Practice and Procedure § 3815 (4th ed. 2017). Many involve federal officials.[2] But the rule of *Butterworth v. Hill*, 114 U.S. 128 (1885), applies to state officials, too. *See Stanton-Negley Drug Co. v. Pa. Dep't of Pub. Welfare*, No. 07-1309, 2008 WL 1881894 (W.D. Pa. 2008) ("It is well established that, for purposes of venue a state official's residence is located at the state capitol, even where branch offices of the state official's department are maintained in other parts of the state." (quotation marks omitted)).

In *O'Neill v. Battisti*, for example, the court held that a case against the Ohio Supreme Court must be maintained in Columbus. 472 F.2d 789, 791 (6th Cir. 1972). *See also Republican Party of N.C. v. Martin*, 682 F. Supp. 834, 836 (M.D.N.C. 1988); *Birnbaum v. Blum*, 546 F. Supp. 1363, 1366 (S.D.N.Y. 1982). Likewise, in *Harris v. Kasich*, venue for a lawsuit presenting "important questions of Constitutional law (specifically Due Process) and § 1983 violations of rights under the color of state law" was appropriate in the state capital. No. 1:11CV311, 2011 WL 646748, at *3–4 (N.D. Ohio Feb. 15, 2011). *See also Smith v. Hoffner*, 15-CV-10349, 2015 WL 401012, at *1 (E.D. Mich. Jan. 28, 2015).

In *Oneida Nation of N.Y. v. Paterson*, 6:10-CV-1071, 2010 WL 4053080 (N.D.N.Y. Oct. 14, 2010), *vacated on other grounds sub nom.*, *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154 (2d Cir. 2011), though the New York official "maintains offices [outside the capital] and conducts significant business there," *id.*, at *3, the litigation belonged at the seat of New York government—Albany. *Id.* at *5. *See also Coffey v. Coffey*, 2:14-CV-2912-SHL-DKV, 2015 WL 686246, at *3 (W.D. Tenn. Feb. 18, 2015) (transferring to the district where the government defendants were headquartered);

[2] *See, e.g.*, *Davis v. Trigo Bros. Packing Corp.*, 266 F.2d 174 (1st Cir. 1959); *Stroud v. Benson*, 254 F.2d 448 (4th Cir. 1958); *Ernst v. Sec'y of the Interior*, 244 F.2d 344 (9th Cir. 1957); *Trueman Fertilizer Co. v. Larson*, 196 F.2d 910 (5th Cir. 1952).

Partisan Def. Comm. v. Ryan, 94 C 260, 1994 WL 13764, at *1 (N.D. Ill. Jan. 14, 1994) (rejecting claim that the Illinois Secretary of State resided at a satellite office).

Were the extant dispute in Rhode Island, Connecticut, or another geographically small jurisdiction, the practical challenges of venue between divisions is not that complicated. But here, though Plaintiffs prefer San Antonio, the argument they make demands more. Indeed, Plaintiffs are asking the Court to rule that, in the posture of this litigation—a pre-enforcement challenge to a brand new law—they could sue wherever they desire (El Paso, Brownsville, or Amarillo)—merely because the theory of Texas government exists throughout the state. What Plaintiffs demand is unsupportable, both by the law and the practical realities that flow therefrom.

B. Austin Is Where All Claims in This Litigation Arose.

In addition to Austin being the residence of the Texas officials who have been sued, the new law was enacted and signed in Austin. The Austin Division is required, not only because of the requirement of 28 U.S.C. § 1391(c)(2), but "because the operative facts have significant connection to this [division]."

Significant to venue is where "a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b)(2). In that SB 4 is Texas law, the only events that give rise to this facial dispute are those that surround the lawmaking process, all of which occurred in Austin. *See*, *e.g.*, *Fla. Hometown Democracy, Inc. v. Browning*, 08-CV-80636-CIV, 2008 WL 3540607, at *4 (S.D. Fla. Aug. 12, 2008); *N. Ky. Welfare Rights Ass'n v. Wilkinson*, No. 90-6268, 1991 WL 86267, at *5 (6th Cir. 1991) (unpublished decision) ("venue in this case was proper only in [the capital]. That is where all of the [government officials] have their official residences; it is the district most convenient to the [government officials]; and it is the district which has the weightiest contacts with the plaintiffs' claim.").

The entire basis of Plaintiffs' arguments—that they *will* face harm in San Antonio at some point in the future—is purely speculative, given that SB 4 has not

yet taken effect. And regardless, any argument that venue can lie in a "place of injury," which Plaintiffs could allege is in any part of Texas, "is contrary to the venue statute and the weight of jurisprudence." *Gray Cas. & Sur. Co. v. Lebas*, No. CIV.A. 12-2709, 2013 WL 74351, at *2 (E.D. La. Jan. 7, 2013). Accordingly, even if the Court could focus on the "place of injury," as Plaintiffs urge, instead of the acts or omissions of Texas officials, venue is still improper in the San Antonio Division.

Finally, Plaintiffs assert that the venue statute speaks in terms of districts, rather than divisions. ECF No. 43 at 3–4. But 28 U.S.C. § 1406 expressly addresses venue in improper divisions, and, as discussed above, this is the wrong division to resolve the constitutionality of SB 4. *See* 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the *wrong division* or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." (emphasis added)). There is no cognizable connection to the San Antonio Division for venue purposes that would warrant this Court's exercise of jurisdiction to resolve these Plaintiffs' claims.

II. There Is No Justification For Deviating From the First-to-File Rule.

"The rule of thumb in the Fifth Circuit is that the court initially seized of a controversy should be the one to decide whether it will try the case." *Superior Sav. Ass'n v. Bank of Dall.*, 705 F. Supp. 326, 330 (N.D. Tex. 1989). Plaintiffs' argument against application of the first-to-file rule hinges on the purported impropriety of Texas's declaratory judgment action in the Austin Division.

Plaintiffs, however, do not acknowledge, much less address, the precedent authorizing Texas's lawsuit.[3] Contrary to El Paso Plaintiffs' assertions, the cases they cite, including *Mission Insurance Company v. Puritan Fashions Corporation*, 706

[3] *See Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383 (5th Cir. 2003); *St. Paul Ins. Co. v. Trejo*, 39 F.3d 585 (5th Cir. 1994); *Travelers Ins. Co. v. La. Farm Bureau Fed'n, Inc.*, 996 F.2d 774 (5th Cir. 1993).

F.2d 599 (5th Cir. 1983) do not invalidate Texas's Austin lawsuit. The Fifth Circuit, in fact, subsequently addressed *Mission* in *Sherwin-Williams*, *St. Paul*, and *Travelers*. In *Sherwin-Williams*, for example, the Fifth Circuit explained the rare circumstances where the rule announced in *Mission* applies. *Mission* involved "'procedural fencing' undermining 'the wholesome purposes' of declaratory actions." *Sherwin-Williams*, 343 F.3d at 397 (citing *Mission*, 706 F.2d at 602 n.3). Here, Texas's lawsuit does not undermine the genuine purpose of declaratory actions. Rather, Texas sought "to avoid a multiplicity of suits in various forums" "so that the one pertinent issue . . . could be resolved consistently in one, rather than multiple, forums." *Travelers*, 996 F.2d at 777. "[Texas's] goal, unlike that of changing forums or subverting the real plaintiff's advantage in state court, is entirely consistent with the purposes of the Declaratory Judgment Act." *Id.* Plaintiffs thus cannot point to any proper justifications for avoidance of the first-to-file rule.

A. Even If There Are Multiple Proper Venues, the First-Filed Venue Controls.

Though Plaintiffs argue that venue in Austin is not mandatory, they do not argue that Austin is improper. ECF No. 43 at 3. Texas's first-filed declaratory judgment action takes precedence over Plaintiffs' subsequent suits and intervention efforts. *See, e.g.*, *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599, 606 (5th Cir. 1999).

CONCLUSION

These consolidated cases should be dismissed, or, at minimum, transferred to the Austin Division for consolidation with *Texas v. Travis County*, No. 1:17-cv-425-SS (W.D. Tex.).

Respectfully submitted this the 22nd day of June, 2017.

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CERTIFICATE OF SERVICE

I, Darren McCarty, hereby certify that on this the 22nd day of June, 2017, a true and correct copy of the foregoing document was transmitted using the CM/ECF system, which automatically sends notice and a copy of the filing to all counsel of record.

/s/ Darren McCarty
DARREN MCCARTY