UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CITY OF EL CENIZO, et.al.	§	Civil Action No. 5:17-CV-00404-OLG
	§	(Lead Case)
EL PASO COUNTY; RICHARD WILES,	§	Case No. 5:17-CV-00459-OLG
SHERIFF OF EL PASO COUNTY in his official	§	Consolidated
capacity; and the TEXAS ORGANIZING	§	
PROJECT EDUCATION FUND,	§	
Plaintiffs,	§	
	§	
TEXAS ASSOCIATION OF HISPANIC	§	
COUNTY JUDGES AND COUNTY	§	
COMMISSIONERS,	§	
Proposed Plaintiff/Intervenor	§	
	§	
V.	§	
STATE OF TEXAS	§	
Defendants,	§	

PLAINTIFF-INTERVENORS TEXAS ASSOCIATION OF HISPANIC COUNTY JUDGES AND COUNTY COMMISSIONERS RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR TRANSFER COMPLAINT IN INTERVENTION [DKT. 162]

Plaintiff-Intervenors Texas Association of Hispanic County Judges and County Commissioners (Hereafter "HJ&C") hereby file their Response in Opposition to Defendants' Motion to Dismiss or Transfer Complaint in Intervention of HJ&C [Dkt. 162] For the reasons set forth below, Defendants' Motions should be denied.

I. SUMMARY OF ARGUMENT

Defendants seek to dismiss or transfer HJ&C Complaint in Intervention [Dkt. 142] from San Antonio, where HJ&C Plaintiff- Intervenors properly filed their Complaint in Intervention, into the State's preemptive, advisory opinion action in the Austin Division. This Court should not entertain Defendants' motion. San Antonio is a proper venue. As this action was properly]

brought in San Antonio, dismissal or transfer pursuant to Rule 12(b)(3) and 28 U.S.C. § 1404 and 1406 is inappropriate.

Moreover, the first-to-file rule is inapplicable here. It appears that the State filed their suit in the Austin Division of the Western District to in an attempt to take advantage of the "First to File" rule, thereby provoking a "disorderly race to the courthouse" by parties interested in Senate Bill 4 ("SB 4"). Such action in (1:17-CV-00425-SS) by the State is neither supported by the Fifth Circuit nor the Supreme Court. *909 Corp. v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292-93 (S.D. Tex. 1990), *citing Amerada Petroleum Corp., v. Marshall*, 381 F. 2d 661, 663 (5th Cir. 1967), cert. denied 389 U.S. 1029 (1968); *see also, Cunningham Brothers, Inc. v. Bail*, 407 F. 2d 1165, 1167-69 (7th Cir. 1969), cert. denied, 395 U.S. 959 89 S.Ct. 2100, 23 L.Ed.2d 745 (1969) (holding that it is improper use of the Declaratory Judgment Act to permit an alleged tortfeasor to sue prospective plaintiffs in the forum and at the time of the alleged tortfeasor's choosing). The State's lawsuit in Austin is merely an improper request for an advisory opinion.

Finally, Defendants have offered no serious argument that the Austin Division is a more convenient venue warranting transfer under 28 U.S.C. § 1404. For these reasons, and as detailed below, the Court should refuse the Defendant's improper request and keep this action in San Antonio.

II. PROCEDURAL BACKGROUND AND STATE'S ALLEGATIONS

On May 7, 2017, the State filed a Complaint for Declaratory Judgment against Travis County and Sheriff Sally Hernandez, the City of Austin and its mayor, councilmembers, and certain employees ("City of Austin"), and the Mexican American Legal Defense and Education Fund ("MALDEF") in the Western District, Austin Division. [Dkt. 1 of 1:17-cv-00425-SS] In its Complaint, the State requested that the Austin Court declare the State's own statute, SB 4, constitutional. The State filed its Complaint within hours after SB 4 was signed by Governor]

Abbott, but well prior to its effective date[1]. One day later, the City of El Cenizo, LULAC, and several elected public officials in Maverick County filed the instant case in the San Antonio Division. [Dkt. 1] El Paso County also filed suit in the San Antonio Division[2], as did MALDEF, on behalf of the City of San Antonio and other plaintiffs[3]. The three lawsuits were consolidated on June 6, 2017, with the *El Cenizo* case designated as the lead case. [Dkt. 27] The HJ&C Plaintiff-Intervenors filed their Motion to Intervene and Complaint in Intervention, which was granted. [Dkt. 80, 141, & 142]

On the concurrent litigation track pending before this Court, the State is the defendant in the (consolidated) *El Cenizo* Case. On June 26, 2017, all parties participated in a preliminary injunction hearing in the consolidated San Antonio matter.

III. ARGUMENT

A. The Court Should Deny Defendants' Motion

As a preliminary matter, Defendants have 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); *In re Volkswagen of America, Inc.*, 545 F.3d 304, 314 n. 10 (5th Cir. 2008). Defendants have not—and indeed cannot—meet this burden; therefore, their motion should be denied.

[1] *See*, State's Complaint for Declaratory Judgment in Civil Action No. 1:17-cv-00425-SS; In the United States District Court for the Western District of Texas; Austin Division. [Dkt. 1]

[2] *See*, El Paso County, *et al.* v. State of Texas, *et al.*, Civil Action No. 5:17-cv-00459-OG; in the United States District Court for the Western District of Texas; San Antonio Division. [Dkt. 1]

[3] *See*, City of San Antonio, *et al.* v. State of Texas, *et al.*, Civil Action No. 5:17-cv-00459-OG; in the United States]

B. Dismissal Under 28 U.S.C. § 1406 Is Inapplicable Because San Antonio Is a Proper Venue Under 28 U.S.C. § 1391(b).

Defendants are correct that under Rule 12(b)(3) and 28 U.S.C. § 1391(b), a District Court may dismiss or transfer a case that was filed in the "wrong" venue. *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 577 (2013). In the instant case, however, Plaintiffs filed in a proper venue.

1. Venue is proper in any division of the Western District of Texas.

Whether a plaintiff's choice of venue is proper is determined by 28 U.S.C. § 1391. This venue statute relates to judicial districts, not judicial divisions. See *Galvan v. Rathmann & O'Brien, LLC*, DR-08-CV-035-AML-VRG, 2008 WL 11334138, at *4 (W.D. Tex. Dec. 3, 2008), report and recommendation adopted as modified sub nom. *Galvan v. Rathmann & O'Brien, L.L.C.*, DR-08-CV-035-AML/VRG, 2009 WL 10669598 (W.D. Tex. Mar. 31, 2009). All defendants reside in the Western District, Senate Bill 4 ("SB 4") was enacted in the Western District, and San Antonio—where a substantial part of the events giving rise to Plaintiffs' claims occurred—is located within the Western District; therefore, any division in the Western District of Texas is proper for venue purposes under 28 U.S.C. § 1391(b).

Federal civil cases need not be filed in a particular division of a judicial district. See *In re Gibson*, 423 F. App'x 385, 388 (5th Cir. 2011); 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3809 (4th ed. 2017). This question was further discussed in *Graciela Galindo, et al. v. Reeves County, et al.*, No. EP-10-CV-454-DB, 2011 WL 13175764, at *2 (W.D. Tex. Apr. 12, 2011). There, the court reiterated that venue was proper in any division of the Western District because a substantial part of the events giving rise to the claim occurred in the Western District. Id. at *3–*5. Defendants do not cite any authority that stands for the

proposition that Plaintiffs are required to file in one particular division within an undeniably proper district.

The fact that the San Antonio Division is the proper venue for this action under § 1391—and it cannot be dismissed or transferred under § 1406—is further supported by one of the cases Defendants cite, *Chapman v. Dell, Inc.*, No. EP-09-CV-7-KC, 2009 LEXIS 50654 (W.D. Tex. April 15, 2009). *Chapman*, a Title VII dispute, refers to another case, *Says v. M/V David C. Devall*, 161 F. Supp. 2d 752 (S.D. Tex. 2001), which provides that, "when [a] venue statute refers to districts rather than divisions, venue is proper in all divisions of [a] proper district." *Chapman*, 2009 LEXIS 50654, at *2. In *Chapman*, the defendant sought a § 1406 transfer from the El Paso Division to the Austin Division. *Id*. The defendant argued that the El Paso Division was improper under Title VII's venue provision1[4] —which (as with § 1391) refers only to "judicial districts"—because the pertinent facts and records were associated with Austin, not El Paso. *Id*. The *Chapman* court held that the El Paso Division was a proper venue because it was part of the Western District, and under Title VII's venue provision, the Western District was a proper venue. *Id*. The El Paso Division was proper; therefore, § 1406 was not applicable. *Id*. at *3.

2. Venue is proper in the San Antonio Division under 28 U.S.C. § 1391(b).

Defendants insist that San Antonio is not a proper venue because none of the Defendants reside in San Antonio and events giving rise to these events did not occur within this division. [Dkt. 32-1 p. 2] Defendants assert that Plaintiff's choice of forum holds less weight when

[4] "[An action under Title VII] may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful practice[.]" *Chapman*, 2009 LEXIS 50654, at *2 (citing 42 U.S.C. § 2000e- 5(f)(3)).

Plaintiff does not reside in the chosen forum. [Dkt. 32-1 p.3][5] Here, several Plaintiffs reside in San Antonio for venue purposes, and their choice of forum holds due weight.

For venue purposes, an entity resides in the judicial district where it maintains its principal place of business. 28 U.S.C. § 1391(c)(2). In this instance, most, if not all, of the Plaintiffs reside in the Western District of Texas.

Events giving rise to this litigation have and will continue to occur in San Antonio; therefore, the San Antonio Division is a proper venue under 28 U.S.C. § 1391(b).

C. Austin Is Not the Only Proper Division for Lawsuits Against Public Officials.

Defendants also argue, incorrectly, that Plaintiffs may only sue Texas officials in the division of the district where the officials perform their official duties. [Dkt. 32-1 p. 5] Venue does not lie only in the division or even the district where officials perform their duties. In fact, this is illustrated by the very case that Texas cites to support its argument. See *Florida Nursing Home Ass'n v. Page*, 616 F.2d 1355 (5th Cir. 1980), rev'd sub nom. *Florida Dep't of Health & Rehab. Servs. v. Florida Nursing Home Ass'n*, 450 U.S. 147 (1981) (finding that "the residence of the defendants does not provide the only basis for venue. Venue is also proper in the district where the claim arose.").

If Defendants' assertion were correct, all litigation against Austin-based state officials would necessarily take place in the Austin Division. In reality, litigation against state officials routinely takes place outside of Austin, including in the San Antonio Division. Because San Antonio is a proper venue for this case, 28 U.S.C. § 1406 is inapplicable.

[5] Defendants misleadingly quote the following language as if it were contained in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981)): "the weight given to a plaintiff's choice of forum is diminished when the plaintiff does not reside in his chosen forum and no operative facts occurred within the forum." Defendant's Mot. at 3. In fact, this quote is contained in the unpublished Candela Corp. v. Palomar Med. Techs., Inc., No. 9:06-cv-277, 2007 WL 738615 at *3 (E.D. Tex. Feb. 22, 2007). Piper Aircraft is a seminal case on the doctrine of forum non conveniens which is inapplicable here.

D. The First-To-File Rule Does Not Mandate Dismissal or Transfer of This Case to the Austin Division.

"Courts in the Fifth Circuit generally follow the 'first-filed rule' in deciding which Court should maintain jurisdiction over claims that arise out of the same subject matter but are pressed in different suits." *Igloo Products Corp. v. Mounties, Inc.*, 735 F.Supp. 214, 217 (S.D.Tex.1990) (quoting *West Gulf Maritime Association v. ILA Deep Sea Local 24*, 751 F.2d 721, 730 (5th Cir.1985)). However, courts have recognized that a compelling circumstance may exist to dismiss a case and avoid the operation of the first filed rule. *Id.* at 217; *see also*, *Mission Insurance Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 601 (5th Cir. 1983) and *909 Corporation v. Village of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292-1293 (S.D. Tex. 1990).

Accordingly, "courts have held that a declaratory claim should be dismissed if it was filed for the purpose of anticipating a trial of the same issues in a court of coordinate jurisdiction." *See Mission Insurance*, 706 F.2d at 602; *Amerada Petroleum Corp.*, 381 F.2d at 663); *E.F. Hutton & Co. v. Cook*, 292 F.Supp. 409, 410 (S.D.Tex. 1968). "The 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." *See, e.g., Hanes Corp. v. Millard*, 531 F.2d 585, 592–93 (D.C.Cir. 1976) (anticipation of defenses is ordinarily not a proper use of the declaratory judgment act as it "provokes a disorderly race to the courthouse"); *Cunningham Brothers, Inc.*, 407 F.2d at 1167-69).

On May 7, 2017, immediately after Governor Abbott signed SB 4[6], the State rushed to the courthouse to file its Complaint for Declaratory Judgment in the Austin case and named local governments, elected officials and a non-profit advocacy group as defendants. [Dkt. 1 of 1:17-

[6] Senate Bill 4 does not become effective until September 1, 2017.

cv-00425-SS] In the Austin case, the State is requesting that the Court declare the State's own statute, Senate Bill 4, constitutional, even though SB 4 is already presumed to be constitutional under Texas law. *Burlington Northern & Santa Fe Ry. Co. v. Poole Chemical Co*., 419 F. 3d 355, 361 (5th Cir. 2005) citing *Enron Corp. v. Spring Indep. Sch. Dist*., 922 S.W. 2d 931, 934 (Tex. 1996).

In an effort to establish a strawman defendant, the State relies on two incorrect assertions to establish jurisdiction in the Austin case. The State asserts, falsely, that SB 4 is "law as of May 7, 2017" [Dkt. 23 p. 22 of 1:17-cv-00425-SS] even though it will not become effective until September 1, 2017. Clearly, the race to the courthouse by the State moments after the Governor signed Senate Bill 4 was not to remedy some actual injury or to assert a justiciable claim, but rather an inappropriate attempt to "secure a forum." The State admitted as much when it pled that the Austin case was "quickly filed in anticipation of litigation." [Dkt. 17-1 p. 5 of 1:17-cv-00425- SS].

1. The Austin Court lacks jurisdiction so the First-to-File rule should not apply.

The State's Complaint for Declaratory Judgment has not triggered the Austin Court's jurisdiction and should be dismissed. The State's failure to trigger the Austin Court's jurisdiction is a compelling reason for this Court to deny this Motion to Dismiss or Transfer Complaint in Intervention of HJ&C, or for the Austin Court to grant the Motions to Dismiss filed in that matter and moot the State's Motion to Dismiss or Transfer Travis County's Complaint in Intervention to the Austin Court.

2. The State is not, and never will be, the proper plaintiff; thus, lacks standing.

While a federal court would have jurisdiction to determine whether or not SB 4 complies with various aspects of the United States Constitution, the State is not, and never can be, the proper plaintiff to request such a determination: not now and not after SB 4 goes into effect on

September 1. As a plaintiff requesting a judicial affirmation of its own statute, a statute that is already presumed constitutional, the State does not have standing to pursue such a declaration by a federal court.

The jurisdiction of the Federal Court is both "defined and limited by Article III of the Constitution." *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014). Further, the Court's power is restricted to "cases and controversies." *Id.* The doctrine of standing gives meaning to which disputes are appropriately resolved through the judicial process. *Id.* In making a determination on standing for Article III purposes, courts must make two inquiries: (1) is the party who is attempting to invoke federal court jurisdiction a proper party to bring the claim; and (2) what is the claim sought to be adjudicated. *Flast v. Cohen,* 392 U.S. 83, 99-102 (1968); *see also, Warth v. Seldon,* 422 U.S. 490 (1975). To determine whether a party has standing, courts must discern, the "nexus between the status asserted by the litigant and the claim he presents to insure that [the litigant] is a proper and appropriate party to invoke federal jurisdiction." *Flast,* 392 U.S. at 102.

Regarding part one of the standing inquiry, "the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Id at* 99-100. The Supreme Court continues, "A proper party is demanded so that federal courts will not be asked to decide 'ill-defined controversies over constitutional issues.'" *Id., citing United Public Workers of America v. Mitchell,* 330 U.S. at 90. The Supreme Court likens the "proper party" aspect of the standing inquiry to the rule that the federal courts will not entertain friendly lawsuits. *Flast,* 392 U.S. at 100.

As for part two of the standing inquiry, i.e., the dispute in question, the inquiry is as follows: "whether the dispute touches upon 'the legal relation of parties having adverse legal interests.'" *Id.*, quoting *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 27, 240-241 (1937).

When applying part one of the standing analysis to the instant case, it is evident that the State will never be a proper plaintiff for seeking a declaration on the constitutionality of its own

statute. This is because the statute is presumed constitutional and any opinion rendered in favor of the State would just be further affirmation of the statute's constitutionality, and thereby advisory in nature. (See discussion, *infra*). In seeking this affirmation by the Court, the State is like a party in a friendly lawsuit, seeking a court to "sign off" on something that under Texas state law is already presumed true, i.e., the alleged constitutionality of SB 4.

As to the second part of the inquiry, i.e., the claim sought to be adjudicated, the constitutionality of SB 4 could, appropriately, be called into question, but that cause must be asserted by parties who are *challenging* the constitutionality of S.B 4, and therefore, have legal interests that are *adverse* to those of the State. *Flast*, 392 U.S. at 101-102. Such a party would be a proper party to challenge the constitutionality of SB 4. *Id.* at 99-101. For these reasons, the motion to dismiss should be granted, and the State's motion to consolidate should be denied.

E. The State Is Seeking an Advisory Opinion Contrary to Article III of the U.S. Constitution.

In essence, the State is seeking an advisory opinion from the Austin Court, and such a request is not justiciable. *Id.* at 95-96. In quoting a well-known treatise, the Supreme Court asserts that 'the oldest and most consistent thread in federal law of justiciability is that federal courts will not give advisory opinions.'" *Id.* at 96, quoting C. Wright, Federal Courts 34 (1963). Regarding advisory opinions, the Supreme Court cautions, "[w]hen a court is asked to provide an opinion on actions of the legislative branch, without a dispute that could be resolved through the judicial process, such opinion would be contrary to the separation of powers prescribed by the Constitution under Article III, and thereby, such court would lack jurisdiction over the issue." *Id*. The State's First Amended Complaint [Dkt. 23 of 1:17-cv-00425-SS] requesting that the Austin Court declare as constitutional a statute that is already presumed constitutional under Texas law, lacks a concrete dispute that can be resolved through the judicial process. Any opinion rendered by the Austin Court on the validity of the State's Complaint would be advisory in nature. For this reason, the State's Motion to Dismiss or Transfer Travis County's Complaint

in Intervention should be denied, or the Austin case should be dismissed for lack of jurisdiction, and the State's Motion to Dismiss or Transfer should be dismissed as moot.

F. The State Does Not Meet the Requirements of the Declaratory Judgment Act.

In the alternative, and in addition to the preceding arguments, HJ&C assert an additional reason for dismissal of the suit filed in Austin: the State does not meet the requirements of the Declaratory Judgment Act. Despite the hypothetical nature of the State's claims, it chose to sue in Travis County pursuant to the Declaratory Judgment Act. The Declaratory Judgment Act limits a court to deciding an "actual controversy within its jurisdiction." 28 U.S.C. 2201. Also see, *Golden v. Zwickler*, 394 U.S. 103, 109-110 (1969). For a court to adjudicate constitutional issues, those issues must be "concrete legal issues, presented in actual cases, not abstractions." *Id.* at 108, quoting *United Public Workers of American v. Mitchell*, 330 U.S. 75, 89 (1947). As the Supreme Court holds, "No federal court whether this court or district court, has 'jurisdiction to pronounce any statute, either of a state or of the United States, void, because it is irreconcilable with the constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies.' The express limitation of the Declaratory Judgment Act to cases of actual controversy is an explicit recognition of this principle." *Golden*, 394 U.S. at 110, quoting *Liverpool, N.Y. & P.S.S. Co. v. Commissioners*, 113 U.S. 22, 39 (1885). (Emphasis added).

G. The First-To-File Rule Does Not Apply in a Declaratory Action Where the Subsequently Filed Suit Is an Injunctive Action.

The decision to dismiss or transfer under the first-to-file rule "is committed to the court's discretion." *Harris Cty., Tex. v. CarMax Auto Superstores Inc*., 177 F.3d 306, 319 (5th Cir. 1999); see also *Permian Basin Petroleum Ass'n*, No. MO-14-CV-050, 2015 WL 11622492 at *1 (W.D. Tex. Feb. 26, 2015); *Alltrade, Inc. v. Uniweld Prod., Inc*., 946 F.2d 622, 628 (9th Cir.

1991) ("district court judges can, in the exercise of their discretion, dispense with the first-filed principle for reasons of equity."). Even when cases are substantially similar, "compelling circumstances" can counter the first-to-file rule. See *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971). Further, when a "suit [is] brought purely in anticipation of another [suit], [the first suit] is subject to dismissal under the compelling circumstance exception." *Stack v. Whitney Nat'l Bank*, 789 F. Supp. 753, 754 (S.D. Miss. 1991) (citing Corp. v. *Vill. Of Bolingbrook Police Pension Fund*, 741 F. Supp. 1290, 1292 (S.D. Tex. 1990)).

In fact, courts widely recognize that following the first-to-file rule in anticipatory declaratory lawsuits is inappropriate. *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir. 1983); see, e.g., *Serco Servs. Co., L.P. v. Kelley Co.*, No. CA 3:93-C V- 1885-R, 1994 WL 715913, at *1 (N.D. Tex. May 24, 1994), aff'd, 51 F.3d 1037 (Fed. Cir. 1995) (first-filed suit dismissed because "the filing of an anticipatory suit trumps the 'first-filed' rule); see also *Gemmy Industries Corp. v. Blue Ridge Designers, Inc.*, 3:99-cv-0008, 1999 WL 58785 (N.D. Tex. Feb 1, 1999) (first-filed declaratory judgment action constituted a "preemptive strike" and should be dismissed). Here, following the first-to-file rule would likewise be inappropriate because it would indulge the Defendants' attempt to inappropriately control the venue in which this lawsuit is heard by preemptively filing a declaratory suit in anticipation of other litigation.

H. The State's Currently Pending Lawsuit Does Not Necessitate the Transfer of This Case to the Austin Division.

The State requests this Court to transfer this litigation to Austin because of its first-filed lawsuit. The State's first-filed lawsuit, however, constitutes an improper attempt at forum-shopping. [Dkt. 1 of 1:17-cv-00425-SS] This Court should resist Defendants' improper invitation to transfer a legitimate case for injunctive relief to a forum where they filed an improper declaratory suit that may be dismissed. "Anticipatory suits are disfavored because"

they constitute "forum shopping." *Mission Ins. Co.*, 706 F.2d at 601, n.3. In civil cases, the plaintiff typically is afforded the opportunity to choose the forum in which the case will be heard. Courts in the Western District have held that permitting the "alleged wrongdoer to proceed with a declaratory judgment action divests the true plaintiff of this right." *Pennsylvania Gen. Ins. Co. v. Caremark PCS*, No. Civ. A. 3:05-CV-0844-G, 2005 WL 2041969, at *7 (N.D. Tex. Aug. 24, 2005). Defendants anticipated that the law would face challenges to its constitutionality, and in a move to silence the opposition and to obtain their preferred forum, they 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. This is clearly an attempt by the Defendants to shoehorn themselves into their preferred forum by filing the suit for declaratory judgment before any substantive challenges to SB 4 could be made.

I. 28 U.S.C. § 1404 Does Not Require Transfer to the Austin Division.

Defendants also argue that this Court should use its discretion to transfer this case to Austin in the interest of justice under 28 U.S.C. § 1404(a). They, however, offer no meaningful analysis of the factors required for transfer. Under those factors, Austin is not a more convenient venue than San Antonio.

A court may transfer an action to any different proper judicial district "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). When venue would also be proper in the alternate location, "the moving party bears the burden of demonstrating that good cause exists to transfer the case for convenience purposes." *Graciela Galindo*, 2011 WL 13175764 at *2 (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (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 315). 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 315). Defendants do not and cannot meet this burden.

When deciding whether to transfer venue, a court balances the private interests of the litigants and the public 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). Together, the public and private factors demonstrate that Austin is not a more favorable venue in which to litigate these claims.

1. The Private Factors do not favor transfer.

Defendants fail to discuss each of the delineated private factors. The private interest factors include: (1) ease of access to sources of proof; (2) 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*. First, Defendants present no facts or arguments that Austin provides easier access to sources of proof than San Antonio. HJ&C adopt the arguments and authorities advanced by the San Antonio Plaintiffs articulating the appropriateness of the San Antonio Division of the Western District venue. Although Defendants have filed this Motion specifically to dismiss and transfer the claims brought by the HJ&C, it is important to remember that the State is seeking to dismiss all of the individual plaintiffs' claims in San Antonio and have all plaintiffs' claims consolidated with the suit filed in Austin. After suits were filed in San Antonio, the State filed suit in Austin against most of the Plaintiffs suing the State in the San Antonio case.

Defendants do not address the second private factor: Compulsory process is no more available to secure witnesses in Austin than it is in San Antonio. Defendants do not address the cost of witness attendance, and there is no evidence that the cost of witness attendance would be lower in Austin.

Finally, Defendants argue that because Texas currently maintains a lawsuit against some

of the Plaintiffs in Austin, the consolidated cases should also be transferred. As discussed above, Defendants' Austin lawsuit is an improper request for an advisory opinion and is a thinly veiled attempt at depriving Plaintiffs of their chosen venue. In fact, the large number of the consolidated Plaintiffs in San Antonio makes San Antonio a superior venue to Austin. The private factors do not favor transfer to Austin.

2. The Public Factors do not favor transfer.

Similarly, Defendants fail to discuss each of the public factors. The public interest factors include: (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. *Volkswagen of Am.*, 545 F.3d at 315 (quoting *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)).

Defendants do not allege any administrative difficulties flowing from court congestion in San Antonio. The San Antonio Court held an evidentiary hearing with a full day of testimony. Exhibits were admitted into evidence, and there has been substantial briefing by the parties pursuant to a scheduling order for such briefing. The status of the Austin case, where a series of Motions to Dismiss the State's claims remain pending, pales by comparison. Defendants do not argue that there are any issues regarding familiarity of this court with the applicable law. The Austin division is no more capable of handling these claims than the San Antonio division.

Multiple consolidated Plaintiffs reside in San Antonio, and they maintain an interest in having these issues resolved in San Antonio. Instead of addressing the individualized public factors, Defendants rely on an argument that Austin is a proper venue where Defendants conduct their official duties. The mere existence of another proper venue is not sufficient to show that such venue is clearly superior to the venue chosen by Plaintiffs. HJ&C's interests are clearly aligned with the plaintiffs in the San Antonio case, and to maintain a separate case in Austin is duplicative and wastes the Courts' time. All of the parties had an opportunity to participate in the

preliminary injunction hearing held in San Antonio. The public factors do not favor transfer to the Austin division.

IV. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss or Transfer HJ&C's Complaint in Intervention should be denied.

DATED: July 17, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all the parties to this Cause have been notified of this Response in Opposition to Defendants' Motion to Dismiss or Transfer Complaint in Intervention through the electronic filing system used by the federal courts.

/s/ ***Rolando L. Rios***
Rolando L. Rios