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

CITY OF EL CENIZO, TEXAS, ***et al.,*** ***Plaintiffs,*** **v.**	§ § § § § §	**C.A. No. 5:17-CV-00404-OLG** **(Lead Case)**
THE CITY OF HOUSTON, **TEXAS,** ***Intervenor*** **v.**	§ § § § § §	**C.A. No. 5:17-CV-00459-OLG** **(Consolidated Case)**
THE STATE OF TEXAS, ***et. al.*** ***Defendants.***	§ §	**C.A. No. 5:17-CV-00489-OLG** **(Consolidated Case)**

CITY OF HOUSTON'S OPPOSITION TO DEFENDANT THE STATE OF TEXAS'S MOTION TO DISMISS OR TRANSFER VENUE

Plaintiff/Intervenor, the CITY OF HOUSTON ("Houston"), files this its Opposition to Defendant the State of Texas's ("the State") Motion to Dismiss or Transfer Venue [Dkt. 161, "State's Motion"]. In support thereof, Houston would show as follows:

INTRODUCTION

Plaintiff/Intervenor Houston has joined twenty-one other plaintiffs, including Texas cities, counties, their elected and appointed officials, as well as various organizations and associations, in this consolidated action challenging the validity and/or constitutionality of Senate Bill 4.

Using the same generic motion it filed against all other plaintiffs and intervenors, the State seeks to dismiss or transfer Houston's claims to another division *within this same judicial district* and to consolidate Houston's claims with the State's own in Case No. 1:17-cv-425-SS, pending in the Western District's Austin Division. [Dkt. 161, State's Motion]. By its motion then, the State judicially admits that venue for Houston's claims is proper in the Western District of Texas, which, as demonstrated below, is the relevant situs for venue purposes. As a result, the State asserts no legal basis for dismissing Houston's claims on venue grounds. Instead, what the State actually seeks is an *intra-district transfer* to another division within the same judicial district. Such transfers for convenience are left to this Court's sound discretion. Because the State offers only the most superficial argument for transferring Houston's claims to another division within the Western District of Texas and venue is proper in the San Antonio Division, however, this Court should exercise its discretion to deny the State's Motion.

STANDARD OF REVIEW

This Court has discretion to grant a motion to dismiss a claim for improper venue under 28 U.S.C. § 1406(a). Under Fed. R. Civ. P. 12(b)(3), once the State raises the issue of improper venue, Houston would ordinarily have the burden to prove that venue in the Western District of Texas is proper. *Zurich Am. Ins. Co. v. Tejas Concrete & Materials, Inc.*, 982 F. Supp. 2d 714, 719 (W.D. Tex. 2013). Here, however, the State judicially admits and advocates for the idea that venue of Houston's claims is proper in the Western District of Texas because they seek to transfer Houston's claims [and those of every other plaintiff] to the Western District's Austin Division. [Dkt. 161, State's Motion, at 2, incorporating by reference Dkt. 32-1, State's Memorandum of Law, at 1). For that reason, the State has failed properly to raise the venue issue under § 1406(a) and shift the burden to Houston. There is simply nothing for Houston to prove here.

This Court, however, has discretion to transfer venue *within* this judicial district under 28 U.S.C. § 1404 or 1406, "[f]or the convenience of parties and witnesses, or in the interest of justice ...." 28 U.S.C. § 1404(a) (2011). That determination "will not be reversed on appeal absent an abuse of discretion." *Pateet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989) (citing *Marbury-Patitillo Constr. Co. v. Bayside Warehouse Co.*, 490 F.2d 155, 158 (5th Cir. 1974)).

Section 1406(a), however, provides for transfers from one division to another within the same judicial district only if venue in the chosen division is improper. "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." 28 U.S.C. § 1406(a) (1996) (emphasis supplied). The State has not, however, met *its* burden to show that Houston's claim was filed in the wrong division or that the interests of justice will be served by a transfer. Its motion to transfer should, therefore, be denied.

ARGUMENTS AND AUTHORITIES

I. EVEN THE STATE ADMITS THAT VENUE OF HOUSTON'S CLAIMS IS PROPER IN THE WESTERN DISTRICT OF TEXAS UNDER 28 U.S.C. § 1391

A. Venue of Houston's Claims is Proper in the Western District Because Venue is Determined at the *District*, Not the *Division* Level

The State's request to dismiss Houston's claims on venue grounds is groundless and based on the State's fundamental misapprehension of applicable federal venue law. Federal venues statutes are clear: proper venue is determined at the *district* level, not at the *division* level. 28 U.S.C. § 1391 (2011). Because the State contends that venue of Houston's claims lies in the Austin Division of the Western *District* of Texas, the State necessarily concedes that the Western District of Texas is a proper forum for such claims under 28 U.S.C. § 1391. [Dkt. 161, State's Motion, at 2, incorporating by reference Dkt. 32-1, State's Memorandum of Law, at 1]. Indeed, this Court held, in *Tapia v. Dugger*, No. SA-06-CA-0147-XR, 2006 WL 2620530, at *2 (W.D. Tex. Sept. 7, 2006), that venue was proper in the Western District of Texas, San Antonio division, because the movant, like the State here, argued that the plaintiff's claim occurred in the Western District's Del Rio Division, and thus conceded that the action arose in the Western District of Texas.

B. Venue of Houston's Claims is Also Proper in the Western District Because the State "Resides" There

Houston originally sued only the State of Texas (the "State"). [Dkt. 139, Houston's Complaint]. The State is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. § 1391(c); *see, e.g.*, *Icon Indus. Controls Corp. v. Cimitrex, Inc.*, 921 F. Supp. 375, 382 (W.D. La. 1996). Its residency is determined under § 1391(c)(2), which provides that "an entity with the capacity to sue and be sued … shall be deemed to reside, if a defendant, in any judicial *district* in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question …." 28 U.S.C. § 1391(c)(2) (emphasis supplied). The State has sued Austin and other plaintiffs here in the Western District of Texas (and, therefore, submitted itself to personal jurisdiction there) and urges that Houston should have sued it in the Western District of Texas. Venue is, therefore, also proper in the Western District of Texas, San Antonio Division, because the State of Texas is deemed to reside in the Western District.

Although not currently relevant to Houston's claims, the State also admits that all defendants, sued by other plaintiffs here, are residents of Texas who reside in the Western District. [Dkt. 32-1, State's Memorandum of Law, at 4] ("[T]he Defendants sued in their individual capacities reside in Austin."). The string cite of cases on which the State relies all recognize that venue based on residence of public officials is *at the district level*, not the *division* level. *Id.* at 5. Alternatively, this Court would have jurisdiction over and venue would be proper as to *all defendants* sued by every plaintiff in these consolidated cases

because at least one defendant, the State, resides in the forum. 28 U.S.C. § 1391(b); *Zurich Am. Ins. Co.*, 982 F. Supp. 2d at 722; *In re Triton Ltd. Sec. Litig.*, 70 F. Supp. 2d 678, 683-84 (E.D. Tex. 1999).

C. The Fact that Venue is Proper in More Than One Judicial District Does Not Render Venue Improper in the Western District

It makes no difference to the determination of proper venue for Houston's claims that Austin may also be a proper venue for *other plaintiffs'* claims against defendants *other than the State of Texas*. "Courts have recognized that 'venue may be properly laid in more than one district …." *Zurich Am. Ins. Co.*, 982 F. Supp. 2d at 722-23 (citing *VP, LLC v. Newmar Corp.*, No. 11-2813, 2012 WL 6201828, at *9 (E.D. La. Dec. 12, 2012)). Thus, the argument that the Austin Division is a proper venue based on the residence of two defendants does not mean that the San Antonio Division is *not* proper.

D. Because Venue Is Proper as to Multiple Plaintiffs' Claims in The Western District and in This Division, Discretionary Venue Under 28 U.S.C. § 1391(b)(2) Is Also Proper for Houston's Claims as Plaintiff/ Intervenor

Houston was granted permission to intervene in this suit. [Dkt . 138, Order]. Thus, venue is proper for Houston's claim because "venue is proper as to all plaintiffs if suit is brought in a district where one or more of the plaintiffs resides." *E. Tex. Baptist Univ. v. Sebelius*, No. H-12-3009, 2013 WL 4678016, at *7 (S.D. Tex. Aug. 30, 2013) (quoting *Crane v. Napolitano*, 920 F. Supp. 2d 724, 733 (N.D. Tex. 2013)). The analysis of the *Sebelius* court is apt here—the same considerations of consolidating multiple plaintiffs

into one action favors discretionary venue for all plaintiffs if any one of them has proper venue in the forum.

Two plaintiffs are located in the San Antonio Division of the Western District of Texas: the City of San Antonio and its City Council Member, Rey Saldana. One of the original plaintiffs in this case, LULAC, also has members located in San Antonio for venue purposes [Dkt. 21, at 3, n. 5], and Texas LULAC "has its corporate headquarters and principle office in San Antonio" [Dkt. 21, at 1].

Another plaintiff, TOPEF, is a resident of San Antonio who will suffer harm in San Antonio. [Dkt. 43, at 1]. TOPEF is "an education organization that promotes social, racial, and economic justice for all Texans by conducting strategic, year round community organizing in San Antonio, Houston, and Dallas." [Dkt. 51, at 6]. MOVE San Antonio, another plaintiff "operating exclusively within San Antonio," is also adversely impacted by SB4 in San Antonio [Dkt. 51, at 3]. A substantial number of the events and omissions giving rise to their claims occurred in the Western District of Texas, and, in particular, in the San Antonio Division. *Id.*

Finally, some of the remedies sought by these plaintiffs would be enjoyed in the San Antonio Division. LULAC seeks injunctive relief to prevent harm or injury to its members in San Antonio, and other places. [Dkt. 21, at 3].

The San Antonio Division does not have "to be the place where the most relevant events took place" for venue to be proper there, *Zurich Am. Ins. Co.*, 982 F. Supp. 2d at 722 (citing *McClintock v. Sch. Bd. E. Feliciana Par.*, 299 Fed. App'x 363, 365 (5th Cir.

2008)). The presence of co-plaintiffs and intervenors there is sufficient for venue of Houston's claims under 28 U.S.C. § 1391(b)(2).

E. This Court Also Has Pendent Venue of Houston's Claims

Even if this Court could ignore the State's admissions as to venue here, this Court should still retain Houston's claims in the consolidated cases to facilitate the joinder of closely-related claims and to avoid piecemeal litigation. The pendent venue principle is well recognized, although not often invoked. Its exercise is a discretionary determination permitting a claim to be joined if the claims arise out of a common nucleus of operative facts. "Whether to apply pendent venue is a discretionary decision, based on considerations of judicial economy, convenience to the parties and the court, avoidance of piecemeal litigation, and fairness to the litigants." *Murangi v. Touro Infirmary*, No. 6:11–cv–0411, 2011 WL 3206859, at *4 (W.D. La. June 29, 2011); *see also City of Waco v. Schouten*, 385 F. Supp. 2d 595, 599 (W.D. Tex. 2005) (court applied pendent venue to retain all claims in a single action); *Elmalky v. Upchurch*, No. 3:06-CV-2359-B, 2007 WL 944330, at * 7 (N.D. Tex. Mar. 28, 2007) (court found pendent venue over claim that arose from "a common nucleus of operative facts" and because "judicial economy is best served by adjudicating those claims in a single forum.").

Houston's claims and those of the other plaintiffs in these consolidated cases clearly arise out of a common nucleus of operative facts: the injuries that Senate Bill 4 will inflict upon all cities in Texas and their officials and residents and the unconstitutionality of that statute. Conversely, it would make no sense for Houston's

claims to be tried alone in another district. The doctrine of pendent jurisdiction was devised to handle cases just like this. This Court should utilize it here.

II. THE STATE HAS FAILED TO DEMONSTRATE THAT THE BALANCE OF CONVENIENCE WEIGHS SUBSTANTIALLY IN FAVOR OF TRANSFER OF HOUSTON'S CLAIM TO ANOTHER DIVISION WITHIN THE WESTERN DISTRICT

A. The Balance of Factors Considered for Discretionary Venue Transfers Weighs Heavily in Favor of This Court Retaining Jurisdiction in the San Antonio Division

The State seeks, in the alternative, to transfer Houston's claim (and the entire case) to the Austin division of the Western District of Texas. While 28 U.S.C. § 1404(a) permits transfer of an action to another division, that transfer is *discretionary*, not mandatory. "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought …." 28 U.S.C. § 1404(a). "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system; in such cases, Congress has replaced the traditional remedy of outright dismissal with transfer." *Atl. Marine Constr. Co., Inc. v. U.S. Dist. Ct.*, 134 S. Ct. 568, 580 (2013). The *movant*, here the State of Texas, bears the burden of demonstrating why the claim should be transferred. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989), *cert. denied*, 493 U.S. 935 (1989). "To prevail, the movant must demonstrate the balance of convenience and justice weighs *substantially* in favor of transfer." *E.E.O.C. v. Mustang Mobile Homes, Inc.*, 88 F. Supp. 2d 722, 725 (W.D. Tex.

1999) (citing *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163, 1165 (S.D. Tex. 1994)) (emphasis supplied).

Section 1404(a) "speaks to the issue of the 'convenience of the parties and witnesses' and to the issue of 'in the interest of justice.'" *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) ("*Volkswagen I*"). The factors are laid out as follows:

> The determination of 'convenience' turns on a number of private and public interest factors, none of which [is] given dispositive weight. The private concerns include; (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. The public concerns 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 or the application of foreign law.

Id.

Although a court must consider "[a]ll relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum," the State has utterly failed to address in any meaningful way each of these factors. *Peteet*, 868 F.2d 1428 at 1436. For that reason alone, its motion for discretionary transfer should be denied.

1. The State Has Failed To Demonstrate that Private Factors Weigh in Favor of Transfer

In its Memorandum and Motion, the State provides nothing more than a passing reference to private factors, except for conclusory statements that they "should bear little on the outcome" but, "[t]o the extent they weigh into the Court's analysis, they somehow

favor the Austin Division." [Dkt. 32-1, State's Memorandum of Law, at 10]. That is insufficient to demonstrate a substantial need to transfer Houston's claims.

2. The State Has Failed to Demonstrate that the Convenience of the Witnesses Does Not Favor a Transfer

"'The availability and convenience of witnesses is arguably the most important of the factors'" in the § 1404 analysis. *Billiot v. W-Industries Inc.*, No. G-06-269, 2006 WL 2022899, at *1 (S.D. Tex. July 13, 2006) (citing *LeBouef v. Gulf Operators, Inc.*, 20 F. Supp. 2d 1057, 1060 (S.D. Tex. 1998). Yet the State makes no effort to identify any witnesses who would be inconvenienced or unavailable, much less provide descriptions of any witness's testimony so that the Court might assess the relative importance of the witnesses. The State's position is further weakened by the multiple witnesses who were present in the courtroom to testify on behalf of the plaintiffs at the Court's temporary injunction hearing in June 2017. Not one complained that the venue was inconvenient, including the State.

Instead of offering concrete facts to explain how Austin is a more convenient forum than San Antonio is for witnesses, the State argues that "it would make little practical difference to Plaintiffs like El Paso County, City of El Cenizo, and the many other public-interest organizations that this case be transferred to Austin." [Dkt. 32-1, State's Memorandum of Law, at 11]. Even if true, that is not proof that the San Antonio forum is *improper*. More important, this key factor of convenience to the witnesses, "often recognized as the most important factor in the transfer analysis," is addressed only by the State's supposition and guesses as to their convenience. *See Aspen Specialty Ins. Co. v. Tech.*

Ind., Inc., No. H-12-1903, 2012 WL 12930997, at *3 (S.D. Tex. Aug. 30, 2012). Without identifying any particular witnesses or describing their potential testimony, the State has not met its burden to support transfer of Houston's claims to Austin. *See Gaytan v. City of Rockdale Police Dep't*, No. A-07-CA-884 LY, 2008 WL 2937743, at *4-5 (W.D. Tex. July 22, 2005) (denying motion to transfer when movant failed to identify witnesses or describe their anticipated testimony).

The State also fails to attempt to demonstrate any practical problems that would result from the case's proceeding in the San Antonio Division instead of the Austin Division, a mere 80 miles apart. To the contrary, the State argues that the geographic distance would "make little practical difference" to some of the plaintiffs. The same could be said of the State. Trying this case in San Antonio can be no more than a minor inconvenience to the State. It is not as if the case is "consigned to the wastelands of Siberia or some remote, distant area of the Continental United States." *Jarvis Christian Coll. v. Exxon Corp.*, 845 F.2d 523 (5th Cir. 1988) (noting the distance of 203 miles from one venue to the other was not sufficient to constitute an abuse of discretion in transferring a case). Transfer is not appropriate when "the only practical effect is to shift inconvenience from the moving party to the non-moving party." *Gayton v. City of Rockdale Police Dep't*, No. A-07-CA-884 LY, 2008 WL 2937743, at *3 (W.D. Tex. July 22, 2005) (quoting *Goodman Co., L.P. v. A & H Supply Co.*, 396 F. Supp. 2d 766, 776 (S.D. Tex. 2005)).

The State likewise offers no facts to show the relative ease of access to sources of proof in Austin versus San Antonio. If anything, the State's recitation of the home bases

of various plaintiffs outside of either San Antonio or Austin serves to emphasize that the Austin venue gives no advantage to that factor. If this factor is neutral, the State has failed to meet its burden to show a substantial need for a discretionary transfer.

The State is also silent as to the availability of compulsory process to secure the attendance of witnesses. The State does not identify any witnesses who could not be compelled to testify in the Western District of Texas, San Antonio Division, or why the subpoena range of 100 miles under Rule 45(c) would be more advantageous in Austin than in San Antonio. Likewise, the State makes no argument that it would be more costly for willing witnesses to travel to San Antonio than to Austin. Thus, both of these factors are, at best, neutral and provide the State with no reason to transfer Houston's claims.

The State also fails to analyze the factors in relation to Houston or any other specific plaintiff. In short, the State fails to show that the Austin division of the Western District is "clearly more convenient" than the San Antonio Division *for Houston's claims*. *Frito-Lay N. Am., Inc. v. Medallion Foods, Inc.*, 867 F. Supp. 2d 859, 865 (E.D. Tex. 2012) (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc)).

3. The State Has Failed To Demonstrate that Public Factors Weigh in Favor of Transfer

Although the State also claims that public factors favor transfer, it fails to prove any analysis or facts on any of those public factors. [Dkt. 32-1, State's Memorandum of Law, at 11-12]. The State has, therefore, entirely failed to meet its burden to show that the public interest factors substantially weigh in favor of transfer to the Austin Division.

4. The State Does Not Address Any Administrative Difficulties Flowing from Venue in the San Antonio Division

The State does not even attempt to argue that the Austin Division has a less crowded docket or that cases tend to proceed to trial faster in Austin than in San Antonio. The State offers no statistics as to the average length of time from case filing to disposition. *See, e.g.*, *ExpressJet Airlines, Inc. v. RBC Capital Mkts. Corp.*, No. H-09-992, 2009 WL 2244468, at *12 (S.D. Tex. July 27, 2009) (comparing statistical case load data for courts). As a result, it has failed to meet its heavy burden to show that transfer to Austin is wise or necessary.

5. The State Has Failed to Show that the Local Interest in Having Localized Interests Decided at Home Somehow Favors Transfer to the Austin Division

The State has also failed to meet its burden to show that Austin's localized interests somehow weigh in favor of transfer. SB4 is intended to impact persons, cities, and counties all across Texas. San Antonio, in particular, with its large Hispanic population, has demonstrated in its complaint and evidence at the Court's June 26, 2017, hearing that the localized interests of venue in San Antonio are quite significant. This factor thus weighs heavily against transfer to Austin.

6. The State Has Failed to Show that the Austin Division Courts are More Familiar with the Law that Will Govern the Case Than Those in San Antonio

The State makes no argument that this Court is less familiar than those in the Austin Division with the law that will govern this case. Indeed, this Court has recently

decided a case involving immigration detainers. *See, e.g.*, *Santoyo v. United States*, No. 5:16-CV-855-OLG, 2017 WL 2896021, at *1 (W.D. Tex. June 5, 2017). As a result, this Court is very familiar with the law applicable in this case. This factor then weighs heavily in favor of San Antonio venue.

7. The Avoidance of Unnecessary Problems of Conflicts of Laws or the Application of Foreign Law

The State does not argue this factor, it is not applicable here.

III. THE STATE HAS FAILED TO MEET ITS BURDEN TO DEMONSTRATE THAT THIS COURT SHOULD EXERCISE ITS DISCRETION TO TRANSFER HOUSTON'S CLAIMS TO AUSTIN

Maintaining Houston's claim in this Court serves the interests of judicial economy and avoids duplicative and piecemeal litigation. [Dkt. 27, Order Consolidating Civil Action Nos. 5:17-CV-459-OG and 489-OG into this proceeding]. In the event that this Court determines that Houston's claim should be transferred to another court, however, then the appropriate court would be the Southern District of Texas, for the convenience of Houston's witnesses.

The State's only argument for transfer to Austin is that the State filed a declaratory judgment action in Austin first, the purpose of which was to prevent other suits challenging its constitutionality in other venues. Houston is not a party to that suit, and other plaintiffs have submitted briefs demonstrating why the State's choice of forum should not be given any weight. Moreover, a motion to dismiss the State's unprecedented lawsuit is pending. The State's rush to the courthouse to seek a stamp of approval for its legislative act signed into law mere hours earlier should be seen for what it was—an

attempt to manufacture a claim so that it could forum shop. Its scheme should not provide any grounds for depriving proper plaintiffs, such as Houston, of their choice of forum.

PRAYER FOR RELIEF

The City of Houston respectfully requests that the Court deny the State's Motion to Dismiss or, in the Alternative, Motion to Transfer Venue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 28th, 2017, I served the following attorneys with a true and correct copy of the foregoing document in accordance with *Rule 5(b) of the Federal Rules of Civil Procedure*.

s/ Collyn Peddie
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