

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

INSTITUTE FOR FREE SPEECH, a nonprofit
corporation and public interest
law firm,

Plaintiff,

v.

Cause No. 4:23-cv-00808-P

J.R. JOHNSON, in his official and individual
capacities as Executive Director of the Texas
Ethics Commission; MARY KENNEDY, CHRIS
FLOOD, and RICHARD SCHMIDT in their
official capacities as commissioners of the Texas
Ethics Commission; and RANDALL ERBEN,
CHAD CRAYCRAFT, PATRICK MIZELL,
JOSEPH SLOVACEK, and STEVEN WOLENS,
in their individual and official capacities as
commissioners of the Texas Ethics Commission;

Defendants.

PLAINTIFF'S SUPPLEMENTAL BRIEF OPPOSING TRANSFER OF VENUE

Introduction

The Institute for Free Speech (“IFS” or “Plaintiff”) opposes transfer because: (1) venue is proper in the Northern District of Texas (“NDTX”) – Fort Worth Division, (2) convenience factors do not clearly outweigh Plaintiff’s choice of a proper venue, and (3) the Western District of Texas (“WDTX”)-Austin Division is currently far more congested than is this Court. If this Court nevertheless feels compelled to transfer venue, IFS asks that it transfer venue to the NDTX-Dallas Division, which is closer for witnesses Cary Cheshire and Chris Woolsey, and is less congested than the WDTX-Austin Division.

Facts

The operative facts are set forth in Plaintiff’s Brief in Support of Its Motion for Summary Judgment (ECF No. 21 at 11-18) and Plaintiff’s supporting appendix (ECF No. 22). As explained in those filings, IFS challenges the constitutionality of the Defendants’ regulatory regime as unduly burdening IFS right to associate, speak, and petition through pro bono litigation, and also as preempted by 42 U.S.C. § 1983. ECF No. 21 at 18-34.

Plaintiff IFS’s main office is in Washington D.C. (App. 8), but it asserts that Defendants’ regime prevents it from associating with putative clients who are both located within the NDTX. Cary Cheshire is the principal and treasurer of the Texas Anti-Communist League PAC and resides in Tarrant County. App. 4. The League also has a Tarrant County mailing address. App. 5. Chris Woolsey resides and holds office in Navarro County. App. 1. Accordingly, IFS asserts that its right

to associate with these putative clients is burdened in those respective counties and that IFS is experiencing the effects of the Defendants' unconstitutional regime within those counties. App. 14; *see also* ECF No. 1 at 3-4 (“But for the Commission’s regulatory regime, IFS would legally represent potential clients located in Tarrant County and Navarro County, both of which are counties within this district. IFS’s associational, petition, and speech rights are burdened within this district and the effects of the Commission’s regulatory regime are experienced within this district, including in Tarrant County”).

It is undisputed that the Texas Ethics Commission (“TEC”) enjoys statewide enforcement powers. A minority of the Defendants reside in Travis County, with the Texas State Directory listing the TEC’s commissioners’ hometowns as: two in Dallas, four in Houston, one in Corpus Christi, and one in Austin. TEC Members Hometown/Term Ends, <https://perma.cc/SWZ5-P87V> (last visited Nov. 2, 2023).

IFS does not seek any discovery from Defendants, but Defendants have belatedly asked this Court for “jurisdictional discovery” (ECF No. 24) which, if allowed, would be directed at IFS and its putative clients, located in Tarrant and Navarro Counties. No one has requested any discovery from sources located in Travis County or any other county in the WDTX.

Further facts pertinent to venue are discussed in the body of the brief.

Argument

I. Venue is presumptively proper in the NDTX-Fort Worth Division

Proper venue may exist in multiple locations. “A plaintiff is not obligated to file an action in the most convenient forum, only in a proper forum.” *17 Moore’s Federal Practice - Civil § 110.01* (2022). Here IFS filed its case in the NDTX-Fort Worth Division because one of its putative clients resides in Tarrant County so its right to associate, speak, and petition is burdened there. ECF No. 1 at 3.

Defendants waived any argument that venue is improper by failing to raise that defense in their pre-answer motion to dismiss. *Compare* FED. R. CIV. P. 12(b)(3) (improper venue), 12(h)(1) (when some Rule 12 defenses are waived) and *Burstein v. State Bar of Cal.*, 693 F.2d 511, 513 n.2 (5th Cir. 1982) (Rule 12(b)(3) venue challenge waived when party brought only Rule 12(b)(2) motion); *with* ECF No. 19 (Defendants’ motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2)). In addition, 28 U.S.C. § 1406(b) provides that nothing impairs this Court’s jurisdiction where, as here, a party fails to interpose a timely objection to venue.

Defendants did not contest venue in their pre-answer motion, so venue is presumptively proper. This Court may not, *sua sponte*, undo the presumption of proper venue, but it may consider a transfer, for convenience, to another proper venue under 28 U.S.C. § 1404(a). *Allen v. United States Dep’t of Homeland Sec.*, 514 F. App’x 421, 421-22 (5th Cir. 2013) (transfer under Section 1404(a) need not be raised in a pre-answer motion); *see also Trahan v. Rach*, No. 22-454-SDD-SDJ, 2023 U.S. Dist. LEXIS 74153, at *4 (M.D. La. Apr. 27, 2023) (“it would be inappropriate

for the trial court to dispose of the case sua sponte on an objection to the complaint which would be waived if not raised by the defendants in a timely manner”) (cleaned up). The baseline, however, is that venue is proper in this Court.

II. Convenience factors do not overcome the presumption of proper venue

A party seeking transfer under 28 U.S.C. § 1404(a) must show good cause by clearly demonstrating that witness convenience and the interest of justice require transfer. *Def. Distributed v. Bruck*, 30 F.4th 414, 433 (5th Cir. 2022) (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc)). “When the transferee venue is not clearly more convenient than the venue chosen by the Plaintiff, the Plaintiff’s choice should be respected.” *Def. Distributed*, 30 F.4th at 433; *see also 17 Moore’s Federal Practice - Civil* § 111.13 (2022) (Plaintiff’s choice of forum should not be overturned unless convenience or justice factors strongly favor transfer).

Courts must assess four private-interest factors and four public-interest factors. *Def. Distributed*, 30 F.4th at 433; *In re Volkswagen*, 545 F.3d at 315. The private interest factors are: (1) ease of access to sources of proof; (2) availability of compulsory process for witnesses; (3) the cost of witness attendance; and (4) all other practical factors that might make a trial more expeditious and inexpensive. *Id.*

The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the interest in having localized interests decided at home; (3) the familiarity of the forum with the applicable law; and (4) the avoidance of conflict-of-laws or foreign-law problems. *Def. Distributed*, 30 F.4th at 435; *In re Volkswagen*, 545 F.3d at 315.

Overall, both sets of factors favor keeping this case in the NDTX-Fort Worth Division.

A. The private factors favor keeping venue in the NDTX-Fort Worth Division

1. If any discovery is allowed, it would mostly occur in the NDTX

Plaintiff IFS has brought a classic pre-enforcement challenge to the TEC's corporate-contribution ban, recently filing a motion for summary judgment that raises purely legal questions. ECF No. 21 at 18-37; *see also* ECF No. 28 at 4-8. While the TEC and its records are in Austin, IFS is not seeking any discovery from the TEC. As far as Plaintiff is concerned, this case is ready for the Court to adjudicate on the merits.

Belatedly, Defendants have filed a half-hearted Rule 56(d) request to conduct jurisdictional discovery, listing averments they supposedly wish to test. ECF No. 24 at 5-6. Defendants state they want discovery from "the individual to run for office" (Chris Woolsey), "the GPAC" (the League and its principal Cary Chesire), IFS, and IFS's "non-lawyer representative" (IFS's president, David Keating). *Id.*

IFS opposes that discovery as unnecessary (ECF No. 28), but if this Court allows such discovery, Chesire and Woolsey are both third-party witnesses residing in the NDTX. Moreover, both Benbrook and Corsicana are further than 100 miles from Austin, so Fort Worth is more convenient for those witnesses and they would be subject to subpoena for a deposition there, but not in Austin.

IFS's president, David Keating, is based near Washington DC, but if he were compelled to attend a deposition in Texas, Ft. Worth (DFW-DCA) is a little closer to DC than Austin (AUS-DCA) is to DC; and DCA and DFW are both American Airlines hubs, offering good access to non-stop flights. At the very least, Keating's location does not cut against the current venue.

As a result, the first two private factors—location of evidence and compulsory process for witnesses—cut in favor of keeping this case in the NDTX.

2. Transferring venue to Austin would exceed the 100-mile rule

The Fifth Circuit uses a 100-mile threshold to assess the third private factor: cost of attendance for willing witnesses. *In re TikTok, Inc.*, No. 23-50575, 2023 U.S. App. LEXIS 28880, at *13-14 (5th Cir. Oct. 31, 2023) (citing *Volkswagen*, 545 F.3d at 315). When the proposed venue is more than 100 miles away from the existing venue, the factor of inconvenience to witnesses increases proportionate to the distance. *TikTok*, at *13-14. Austin is more than 100 miles from Fort Worth and also more than 100 miles from both Benbrook (where Cary Cheshire resides) and Corsicana (where Chris Woolsey resides). *See id.* at *3 n.2 (permitting “judicial notice of the distance between” addresses and the federal courthouse, “a clear adjudicative fact”) (cleaned up). Both Benbrook and Corsicana are of course much closer to Fort Worth. There is presently no reason for any of the Defendants to testify and, even if any did, “it is axiomatic that shifting expenses from one party to another does not weigh in favor of transferring a case without some evidence that shifting those expenses would serve the interests of justice.” *Am. Airlines, Inc. v. Red Ventures*

LLC, No. 4:22-cv-0044-P, 2022 U.S. Dist. LEXIS 90942, at *18-19 (N.D. Tex. May 20, 2022) (cleaned up). This factor favors keeping this case in the NDTX.

3. The trial-practicality factor is at most neutral

From IFS's perspective, this case presents purely legal questions which can be resolved on summary judgment, making a trial unnecessary. But if there were a trial, there is no strong reason to favor Austin over Fort Worth. The case concerns a politician holding office in the NDTX and a political committee registered there. As set forth above, non-party witnesses Woolsey and Cheshire reside closer to Fort Worth and IFS's president can fly into DFW for trial. Perhaps some of the Defendants might favor Austin for convenience, but only two of them are actually based there and they work for a state agency with statewide enforcement authority, including in the NDTX. The TEC is accustomed to litigating cases all over the state, as Texas law requires. *See* TEX. GOV. CODE, § 571.133. This factor is neutral or slightly favors Fort Worth.

B. The public factors favor keeping venue in the NDTX-Fort Worth Division

1. The WDTX-Austin Division is currently much more congested than the NDTX-Fort Worth Division

While this Court no doubt has a busy civil docket, the WDTX-Austin is perhaps the busiest in the country, with just one full-time judge. Maggie Thompson, *Austin's Sole Federal District Judge May Be the Most Overburdened in America*, THE AUSTIN CHRONICLE (Sept. 29, 2023), <https://perma.cc/E4EW-VETZ>. "Following Judge Lee Yeakel's retirement on May 1 this year,

[Robert] Pitman may be the most overburdened federal judge in U.S. history.” *Id.* Out of the thirty largest American cities, Austin has the most severe judge shortage, with 970,000 people per active federal judge, compared with 480,000 people per judge in Fort Worth, for example, 190,000 in Dallas, and 50,000 in Detroit. *Id.* Judge Yeakel retired partly because the “dockets are so big in Austin,” causing long waits for trials and leaving little time for him to write legally airtight opinions. *Id.*

Other data likewise support the proposition that the WDTX is more congested than the NDTX. “[T]he Fort Worth Division . . . provides a more efficient forum to hear this case than an average court in the Western District of Texas.” *Am. Airlines*, at *20 n.2 (noting that “internal statistics” reveal that the time from filing to trial is 54 days fewer in Fort Worth than in the WDTX).

As of June 30 of this year, 3,884 civil cases and 6,566 criminal cases were pending in the WDTX. STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, ADMIN. OFFICE OF THE U.S. COURTS, June 2023 Report, Tables C-1, D Cases (2023), available at: <https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2023>. In comparison, the NDTX had 4,018 civil and 1,375 criminal cases pending. *Id.* A judge—active or senior—in the WDTX has on average 653 pending cases, while a judge in the NDTX has only 338 pending cases. *See* JUDGES’ DIRECTORY & BIOGRAPHIES, <https://www.txwd.uscourts.gov/judges-information/judges-directory-biographies/> (last visited Nov. 2, 2023) (listing sixteen district judges); NORTHERN DISTRICT JUDGES, <https://www.txnd.uscourts.gov/northern-district-judges> (last visited Nov. 2, 2023) (listing sixteen district judges). Civil cases that go to trial take, on average, eight and a half

months longer in the WDTX than the NDTX. STATISTICAL TABLES FOR THE FEDERAL JUDICIARY, ADMIN. OFFICE OF THE U.S. COURTS, June 2023 Report, Table C-5 (2023), available at: <https://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2023> (stating median intervals of 29.9 months versus 21.4 months).

The backlog in Austin, moreover, is worse than elsewhere in the WDTX. As of July, the “only active judge in Austin” had “over 500 active civil cases.” *Yeti Coolers, LLC v. Love Deals Inc.*, No. 1:23-CV-79-RP, 2023 U.S. Dist. LEXIS 127794, at *18 (W.D. Tex. July 24, 2023); *see also* Thompson, *supra* (stating that this sole Austin judge is expected to hear more than a thousand cases in 2023). Transferring this case to the WDTX will increase the administrative difficulties flowing from court congestion, and delay IFS’s access to justice for a violation of its First Amendment rights, which is ongoing. This factor cuts strongly in favor of maintaining the current venue.

2. The other public factors are at most neutral

This case arises out of the unconstitutional regulatory regime that the TEC, a statewide enforcement agency, has imposed on the entire state of Texas. There are no localized interests, so the sixth factor is neutral. The final two public interest factors are also neutral, because this case involves no conflict-of-laws issues and both the NDTX and WDTX are familiar with the federal constitutional laws that apply.

III. The NDTX-Dallas Division would be more convenient than the WDTX-Austin Division

Although IFS opposes transfer, if this Court feels compelled to change venue, IFS asks that it transfer the case to the NDTX-Dallas Division. NDTX-Dallas is neutral or superior to the WDTX on all the private and public factors. As discussed above, IFS's associational, petition, and speech rights are also burdened in Navarro County, where one of its two putative clients resides. App. 1, 14. As a result, one of the non-party witnesses that Defendants want to depose is in Navarro County. The other potential non-party witness—Cary Cheshire—resides in Tarrant County, well within the 100 miles threshold of Dallas. *See* App. 4. And two of the Defendants themselves live in Dallas. *Supra*, <https://perma.cc/SWZ5-P87V>.

Moreover, as discussed, WDTX-Austin is busier than NDTX-Dallas, where ten judges currently sit. *See* NORTHERN DISTRICT JUDGES, <https://www.txnd.uscourts.gov/northern-district-judges> (last visited Nov. 2, 2023). The NDTX is both the venue chosen by the Plaintiff and clearly more convenient than the WDTX. However, the Dallas and Fort Worth Divisions of the NDTX are similarly convenient. Thus, if this Court transfers the case, it should select NDTX-Dallas.

Conclusion

Because venue is presumptively proper in the NDTX-Fort Worth Division and both the private and public factors disfavor transfer to the WDTX-Austin Division, this Court should maintain the status quo and hear IFS's motion for summary judgment.

Respectfully submitted,

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