NO. 23-50849

In the United States Court of Appeals for the Fifth Circuit

IN RE INSTITUTE FOR FREE SPEECH,

Plaintiff–Petitioner,

v.

J.R. JOHNSON, IN HIS OFFICIAL CAPACITY 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–Respondents.

On Petition for a Writ of Mandamus to the
United States District Court for the
Western District of Texas, Austin Division

Respondents' Answer to the Petition for a Writ of Mandamus

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel certifies that the following listed persons and entities have an interest in the outcome of this case. These representations are made so that this Court may evaluate possible disqualification or recusal.

1. Plaintiff-Petitioner, Institute for Free Speech (Endel Kolde, Courtney Corbello);

2. Law Offices of Tony McDonald, counsel for Plaintiff-Petitioner (Tony McDonald, Connor Ellington);

3. Defendant-Respondent J.R. Johnson, in his official and individual capacities as Executive Director of the Texas Ethics Commission;

4. Defendants-Respondents Mary Kennedy, Chris Flood, and Richard Schmidt, in their official capacities as commissioners of the Texas Ethics Commission;

5. Defendants-Respondents Randall Erben, Chad Craycraft, Patrick Mizell, Joseph Slovacek, and Steven Wolens, in their individual and official capacities as commissioners of the Texas Ethics Commission;

6. Butler Snow LLP, counsel for Defendants-Respondents (Eric J.R. Nichols, Cory R. Liu);

7. Hon. Mark Lane, United States Magistrate Judge for the Western District of Texas, Austin Division;

8. Hon. Robert Pitman, United States District Judge for the Western District of Texas, Austin Division;

9. Hon. Mark Pittman, United States District Judge for the Northern District of Texas, Fort Worth Division;

10. Texas Anti-Communist League PAC; and

11. Chris Woolsey, Corsicana City Council Member.

Dated December 1, 2023

/s/ Eric J.R. Nichols
Eric J.R. Nichols

Counsel for Respondents

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INTRODUCTION AND SUMMARY OF ARGUMENT

This is a lawsuit between a D.C.-based organization registered as a non-profit and a Texas state agency based in Austin. IFS seeks to challenge the constitutionality of an advisory opinion that the Texas Ethics Commission adopted at an open meeting in Austin on December 14, 2022. This is a pre-enforcement suit, and there is no ongoing Commission investigation of any actions taken by IFS. Pet. at 2. However, it is indisputable that the Commission undertakes investigations in Austin, where the Commission's employees are located.

The district court did not commit any abuse of discretion, much less a clear abuse of discretion, in concluding that transfer to the Western District of Texas serves the convenience of parties and witnesses and is in the interest of justice under 28 U.S.C. § 1404(a). The mandamus relief sought by IFS would undercut the "judicial housekeeping measure" created by the statute. *Van Dusen v. Barrack*, 376 U.S. 612, 636–37 (1964). IFS's positions not only lack merit but also incorrectly open the floodgates to a torrent of Fifth Circuit mandamus petitions challenging every district court order transferring a case.

ARGUMENT

An order transferring a case is not subject to interlocutory appeal. *See, e.g.*, *La. Ice Cream Distr., Inc. v. Carvel Corp.*, 821 F.2d 1031, 1033 (5th Cir. 1987); *Garner v. Wolfinbarger*, 433 F.2d 117, 120 (5th Cir. 1970). And the Fifth Circuit has held that as a general matter, the "Court of Appeals should not entertain motions for Writs of Mandamus to direct District Courts to enter or vacate orders of transfer under § 1404(a)." *Ex parte Chas. Pfizer & Co.*, 225 F.2d 720, 723 (5th Cir. 1955).

This Court only deviates from its general rule against entertaining such writs when a petitioner seeking mandamus relief satisfies three requirements. First, there must be no adequate means to attain the relief. *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 380–81 (2004). In the context of reviewing a motion to transfer, the Fifth Circuit has held that the first requirement is satisfied. *In re Radmax, Ltd.*, 720 F.3d 285, 287 n.2 (5th Cir. 2013). Second, the right to issuance of the writ must be "clear and indisputable." *Cheney,* 542 U.S. at 381. Third, "even if the first two prerequisites are met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the

circumstances." *Id.* The Court should find that the second and third requirements are not satisfied here and deny the petition.

I. IFS Does Not Have a Clear and Indisputable Right to Have This Case Returned to the Northern District of Texas

To establish a clear and indisputable right to relief in a mandamus petition seeking review of a venue-transfer order, the petitioner must show a "clear abuse of discretion" that produced a "patently erroneous result." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 308, 310 (5th Cir. 2008) (en banc).

28 U.S.C. § 1404(a) states that "a district court may transfer any civil action to any other district where it might have been brought" for "the convenience of parties and witnesses, in the interest of justice." In *Volkswagen*, the Court stated that transfer under section 1404(a) requires a "lesser showing of inconvenience" than is required for a dismissal based on *forum non conveniens* because "the remedy under the statute is simply a transfer of the case within the federal system to another federal venue." *Volkswagen*, 545 F.3d at 313 (quoting *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955)). The Court went on to identify four private-interest factors and four public-interest factors that it considers

in evaluating a district court's ordering transferring venue under section 1404(a). *Id.* at 315.

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.*

IFS has stated that it believes that this case can and should be decided without discovery based on motions for summary judgment a position with which the Defendants respectfully disagree. Pet. at 23.[1] IFS appears to argue based on its no-discovery-is-necessary position that this is a case in which the only convenience that matters is convenience to lawyers. Even if that were true—which it is not—the evidence about lawyers for the respective parties does not support IFS's efforts to meet

[1]IFS selectively and confusingly quotes snippets from the parties' filings in the district court to suggest that the Commission has taken the position that no discovery will ever be necessary in the case. This is wrong. The Defendants have filed a pending motion to dismiss all claims made against all Defendants for lack of subject-matter jurisdiction and failure to state claims by which IFS could ever obtain relief, under FED. R. CIV. P. 12. App. 60, 112. Of course, no discovery is necessary or warranted in order for a court to consider the Defendants' Rule 12 arguments. But the Defendants have made clear in the district court that should the case not be dismissed on those Rule 12 grounds, they fully intend to conduct discovery on the merits (or lack thereof) of IFS's claims. App. 284. The district court below understood this in applying the relevant § 1404(a) factors. App. 16.

its burden to show a clear abuse of discretion. Plaintiffs' lead counsel maintains his law practice in the District of Columbia, and two of the three other attorneys representing IFS maintain their law practices in the Greater Austin metropolitan area in the Western District of Texas. App. 17–18, 37. The Commission's in-house counsel and outside litigation counsel handling this case are likewise in Austin. App. 17, 37.

If this case is not just about the lawyers—which it is most certainly not—the relative convenience of the Western District of Texas becomes even more clear. The Texas Ethics Commission's offices, documents, and records are in Austin, where its public meetings are conducted. App. 16, 35. Defendant Randall Erben, the Commission's chairman who is sued in his individual and official capacities, lives in Austin. Pet. at 30. Defendant J.R. Johnson, the executive director of the Commission who is also sued in his individual and official capacities, lives and works for the Commission in Austin. App. 15, 35. The other commissioners named as Defendants live in various parts of the State but regularly attend to Commission business in Austin. App. 16, 36–37. The Commission's other full-time employees similarly work in the Western District of Texas. App. 16, 35. To the extent those employees would need to serve as witnesses,

either through compulsory process or as willing witnesses, having the court proceedings occur in the Western District of Texas would be more convenient. App. 16, 36–37.

On the other hand, IFS resides in the District of Columbia. This simple fact serves to undermine IFS's arguments about its venue choice somehow trumping the district court's exercise of discretion in making the section 1404(a) transfer.

> Generally, the plaintiff's venue choice is accorded deference, but "when [he] files suit outside [his] home forum, the weight accorded to the choice is diminished." *Sivertson v. Clinton*, No. 3:11-cv-0836, 2011 WL 4100958, at *4 (N.D. Tex. Sept. 14, 2011). "[C]lose scrutiny is given to plaintiff's choice of forum when the plaintiff does not live in the judicial district in which plaintiff has filed suit." *McCaskey v. Continental Airlines, Inc.*, 133 F. Supp. 2d 514, 529 (S.D. Tex. 2001).

Watson v. Fieldwood Energy Offshore, LLC, 181 F. Supp. 3d 402, 407 (S.D. Tex. 2016). Furthermore, a plaintiff's "choice of forum . . . is not an independent factor within . . . the section 1404(a) analysis." *In re Volkswagen of Am.,* 545 F.3d at 314 n.10.

It was not a clear abuse of discretion for the district court, after hearing from the parties on their differing perspectives, to conclude that the Western District of Texas, Austin Division, was the most convenient forum under section 1404(a). As IFS acknowledges, the only reed-slender

connection this case has to Fort Worth is that one potential non-party witness, Cary Cheshire, resides in Tarrant County. Pet. at 9.[2] However, the only party plaintiff is IFS—a Washington, D.C.-based entity—and IFS's own contention is that Cheshire's participation in this lawsuit is not necessary. Pet. at 23.[3] By contrast, various Defendants are sued in both their official and individual capacities—including Chairman Erben and Executive Director Johnson—and they have an interest in the most convenient forum, in which they live and perform the activities at issue. These grounds were sufficient for the district court to appropriately conclude that the Western District of Texas, Austin Division, was more convenient to the parties in its section 1404(a) analysis.[4]

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[2]IFS also points to another potential non-party witness Chris Woolsey, Pet. at 28–29, but Woolsey resides in Navarro County outside of the Fort Worth Division.

[3]IFS suggests at one point that the Commission only wants to take "limited jurisdictional discovery" in the Northern District of Texas. Pet. at 2. This is false. The Commission has made clear that if the case is not dismissed on preliminary motions, it would be necessary to take merits discovery from IFS as plaintiff and from other witnesses not located in the Northern District of Texas. App. 287–91.

[4]IFS also appears to argue, albeit somewhat obliquely, that the absence of a Rule 12 challenge to venue somehow undermines the district court's § 1404(a) transfer. Pet. at 11. If this is indeed IFS's argument, it is wrong. Rule 12 venue challenges and § 1404(a) transfers are wholly separate procedures that involve different considerations. *E.g.*, *Atl. Marine Constr. Co. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 59 (2013) ("Unlike § 1406(a), § 1404(a) does not condition transfer on the initial forum's being 'wrong.' And it permits transfer to any district where

The public-interest factors that this Court considers 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. *Volkswagen*, 545 F.3d at 313. The parties are in agreement with the district court that the third and fourth factors are neutral in this case, Pet. at 36, and in the procedural posture of this mandamus petition, that agreement militates in favor of denying the petition.

With respect to the first public-interest factor, the district court found (undeniably correctly) that both the Northern District of Texas, Fort Worth Division, and Western District of Texas, Austin Division, face heavy dockets. App. 17. The district court acknowledged IFS's argument that Austin was particularly busy but found that other factors weighed in

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venue is also proper (*i.e.,* 'where [the case] might have been brought') or to any other district to which the parties have agreed by contract or stipulation."); *Mohamed v. Mazda Motor Corp.*, 90 F. Supp. 2d 757, 759 (E.D. Tex. 2000) (noting that Rule 12 "speaks to *improper venue*—not *transfer of venue* for convenience of the parties and the witnesses under Title 28 U.S.C. § 1404(a)")). Section 1404(a) transfers—which are based not on a venue defect in a judicial district but instead on the convenience factors set out by statute—could never be "waived" by the absence of a Rule 12 challenge. *See Mohamed*, 90 F. Supp. 2d at 760 (noting that "a Section 1404(a) transfer can technically be made at *any* time").

favor of transfer. *Id.* IFS takes issue—on mandamus, no less—with this standard discretion-based weighing of competing factors. Pet. at 33–36.

There is no proper basis on which to suggest that the weighing of these factors in light of docket congestion was an abuse of discretion, much less a clear one. The Court is well aware that although United States District Judge Robert Pitman is presently the only active status district judge in the Austin Division, Senior United States District Judge David Ezra has and is presiding over cases filed in the Austin Division, and the Austin Division is supported by capable United States magistrate judges. There is no legitimate or documented showing of potential delay for resolution of a case like this in the Austin Division that is greater than in any other district, much less the Northern District.[5] In fact, this case can and should be disposed of in short order on the Defendants' motion to dismiss. Even if it is not, and the case were somehow required to go through a later form of disposition such as summary judgment or trial, the Defendants put before the district court

[5]IFS complains hyperbolically, without foundation or support, that "IFS's opportunity to vindicate the harm to its First Amendment rights will languish under further delays." Pet. at 19. The only demonstrable delay is that occasioned by IFS's decision to seek, improperly, mandamus relief. Delay in ultimate resolution of the case due to IFS's meritless challenge to the section 1404(a) transfer through this mandamus is hardly a basis on which to challenge the transfer itself.

statistics showing that the Western District was slightly quicker at disposing of civil disputes than the Northern District. App. 37 & n.5.[6]

Furthermore, IFS's arguments on incremental differences in dockets between districts and judges in those districts prove too much. It appears that IFS contends that a judge has no discretion to make a section 1404(a) transfer to a district that may have more cases but otherwise—for purposes of discovery, convenience to the parties, and other section 1404(a) factors—is on balance a better fit. This is not the law. *See, e.g.*, *Watson v. Fieldwood Energy Offshore, LLC*, 181 F. Supp. 3d 402, 412–13 (S.D. Tex. 2016) (transferring case to another district even though the "difference in disposition time" was "significant" and weighed "against transfer"); *Fujitsu Ltd. v. Tellabs, Inc.*, 639 F. Supp. 2d 761, 769 (E.D. Tex. 2009) (transferring case to another district even though "relative court congestion" weighed against transfer because that

[6]Defendants cited statistics showing that the average time from filing to disposition of a civil case was 8 months in the Northern District of Texas and 7.4 months in the Western District of Texas and that the average time from filing to trial in a civil case was 26.7 months in the Northern District of Texas and 26.4 months in the Western District of Texas. IFS responds by selectively citing statistics showing that for cases that resolve after trial has begun, the median time was longer in the Western District of Texas, even though IFS contends in this case that trial is not necessary.

"factor alone" did not "outweigh the majority of other factors favoring transfer").

With respect to the second public-interest factor, the district court correctly held that there was a public interest in having a lawsuit challenging the actions of government officials in Austin decided in the Western District of Texas, Austin Division. App. 17. Defendants agree with the district court's case-specific conclusion, which is in harmony with other rulings of district courts. *See, e.g.*, *Gen. Land Office v. U.S. Dep't of the Interior*, No. 6:22-cv-44, 2022 WL 19569587, at *3 (W.D. Tex. Oct. 21, 2022), *report and recommendation adopted*, No. 6:22-cv-44, 2022 WL 19569585 (W.D. Tex. Dec. 20, 2022) (finding that the "second public interest factor" weighed in favor of transferring a dispute involving the Texas General Land Office to Austin); *Houston Fed'n of Teachers v. Tex. Educ. Agency*, No. SA-20-CV-222-XR, 2020 WL 12584275, at *4 (W.D. Tex. May 28, 2020) ("However, the events underlying the suit occurred in Austin, the TEA is located in Austin, and the Texas Federation has its principal office in Austin, giving Austin somewhat of an interest in the matter even though it affects a school district in Houston."); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, No. 5:07-cv-191, 2008 WL

11450451, at *6 (E.D. Tex. July 28, 2008), *report and recommendation adopted*, 5:07-cv-191, 2008 WL 11450450 (E.D. Tex. Sept. 5, 2008) (finding a "local interest" in adjudicating a lawsuit against the Texas Medical Board in Austin). Even IFS does not argue that this factor favors the Northern District of Texas, Fort Worth Division. Pet. at 39. Instead, the factor fully supports the lower court's exercise of discretion in making the section 1404(a) transfer.

At the end of the day, there is no basis on which to claim an abuse of discretion—much less a clear one—in the district court's decision that this case should proceed in the Western District of Texas. This is an Austin-based dispute that IFS tried to bring in Fort Worth based on a tenuous connection to a non-party witness. IFS filed its request for an advisory opinion from the Commission in Austin, received a decision on its request from the Commission in Austin, and now sues the Commission through its executive director and all of its commissioners—including individual-capacity claims against the executive director and those commissioners who voted to adopt the advisory opinion in Austin. There is nothing to see, much less do, on this meritless petition. IFS has not

met its high burden of showing a "clear abuse of discretion" that produced a "patently erroneous result." *Volkswagen*, 545 F.3d at 310.

II. The Court Should Not Exercise Its Discretion to Issue the Writ

Even in the rare instance in which a petitioner on a section 1404(a) transfer—unlike IFS here—could show a potential right to relief, the Court may exercise its discretion not to issue the writ. *Cheney*, 542 U.S. at 381; *see also In re Gee*, 941 F.3d 153, 170 (5th Cir. 2019) (per curiam) ("We nonetheless exercise our discretion not to issue it at this time.").

This is precisely the sort of case that section 1404(a) was designed to allow district courts to transfer. The Supreme Court has described 28 U.S.C. § 1404(a) as a "federal judicial housekeeping measure . . . intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms." *Van Dusen v. Barrack*, 376 U.S. at 636–37. Citing *Van Dusen*, this Court explained that the "Supreme Court made clear that this grant of authority was intended to afford a powerful tool to bring forth efficient judicial case management." *In re Rolls Royce Corp.*, 775 F.3d 671, 677 (5th Cir. 2014). IFS's contention that section 1404(a) is "not a docket-management tool for district courts" is thus incorrect and contrary to precedent. Pet. at 3. For district courts that find themselves

the target of forum-shopping efforts, section 1404(a) provides an important tool for transferring cases that, in the court's proper exercise of discretion, are appropriately litigated in a different district or division.

IFS incorrectly suggests that the district court somehow acted unusually by using section 1404(a) in this manner. Pet. at 17.[7] This is hardly the case. Other courts have transferred cases involving a state agency to the Western District of Texas, Austin Division. *See, e.g.*, *Gen. Land Office v. U.S. Dep't of the Interior*, No. 6:22-cv-44, 2022 WL 19569587 (W.D. Tex. Oct. 21, 2022), *report and recommendation adopted*, No. 6:22-cv-44, 2022 WL 19569585 (W.D. Tex. Dec. 20, 2022); *Houston Fed'n of Teachers v. Tex. Educ. Agency*, No. SA-20-CV-222-XR, 2020 WL 12584275 (W.D. Tex. May 28, 2020); *Ass'n of Am. Physicians & Surgeons, Inc. v. Tex. Med. Bd.*, No. 5:07-cv-191, 2008 WL 11450451, at *6 (E.D. Tex. July 28, 2008), *report and recommendation adopted*, 5:07-cv-191, 2008 WL 11450450 (E.D. Tex. Sept. 5, 2008); *Simmang v. Tex. Bd. of Law Examiners*, No. Civ. 3:03-cv-0740, 2003 WL 22119511 (N.D. Tex. Sept.

[7]Respectfully, IFS's characterizations of the district court in its petition cross the line into unwarranted *ad hominem* comments. Pet. at 17.

10, 2003) (transferring a suit against the Texas Board of Law Examiners to the Western District of Texas, Austin Division).

District courts frequently raise venue issues sua sponte when it is in the interest of justice. Just a few months ago, the undersigned counsel represented the Harris County District Attorney in a lawsuit in which plaintiffs argued that a newly enacted Texas law unconstitutionally prohibited drag performances in the presence of minors. *VORTEX Repertory Co. v. Colmenero*, No. 1:23-cv-918 (W.D. Tex.). The lawsuit was filed in the Western District of Texas, Austin Division, but United States District Judge Robert Pitman sua sponte invited the parties to file a motion to transfer the case to the Southern District of Texas, Houston Division. The parties subsequently agreed to have the case transferred. *VORTEX Repertory Co. v. Colmenero*, 4:23-cv-2993 (S.D. Tex.). Though the plaintiffs undoubtedly chose their initial venue for strategic reasons and would have liked to proceed there, there was no question that the Southern District of Texas was an appropriate venue, and the parties recognized that the district court had the authority to transfer the case.

Similarly, in *Missouri v. Biden*, United States District Judge Drew Tipton sua sponte transferred a case that was filed in the Southern

District of Texas, Victoria Division, to the McAllen Division, after becoming aware of a similar lawsuit in Judge Micaela Alvarez's court. *See Tex. Gen. Land Office v. Biden*, No. 6:21-CV-52, 2021 WL 5588160, at *1 & n.7 (S.D. Tex. Nov. 29, 2021); *Missouri v. Biden*, No. 7:21-cv-420 (S.D. Tex. Nov. 2, 2021), ECF. No. 12.

It is true that federal law allows for "a certain amount of forum-shopping," but this Court has also recognized that section 1404(a) provides defendants with protections "from the most blatant forum-shopping." *See In re TikTok, Inc.*, 85 F.4th 352, 357 (5th Cir. 2023). Encountering a federal judge who properly transfers the case under section 1404(a) is one of the risks that a forum-shopping plaintiff faces when filing a case with a tenuous connection to the venue.

IFS in essence seeks a ruling on mandamus that would vitiate an important judicial housekeeping measure that Congress gave to district courts to manage their dockets. If IFS's position had merit—which it does not—it would permit any party disagreeing with a section 1404(a) transfer to seek mandamus challenging any district-court order transferring a case. IFS appears to acknowledge this. Pet. at 15 ("IFS's case affects the judicial system widely.") This is not an exceptional case

warranting the extraordinary remedy of mandamus relief. There is a reason why, as IFS acknowledges, "transfer decisions are rarely reviewed." Pet. at 15. This is because section 1404(a) transfers are committed to the discretion of courts who, as here, consider and apply the statutory factors. The Court should not exercise its discretion to issue the writ.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On December 1, 2023, this answer was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Microsoft Defender and is free of viruses.

/s/ Eric J.R. Nichols
Eric J.R. Nichols

CERTIFICATE OF COMPLIANCE

This filing complies with the type-volume limit of the Federal Rules of Appellate Procedure because it contains 3,802 non-exempted words.

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/s/ Eric J.R. Nichols
Eric J.R. Nichols