No. __-_____

# In the United States Court of Appeals for the Fifth Circuit

IN RE INSTITUTE FOR FREE SPEECH,

Plaintiff-Petitioner.

On Petition for Writ of Mandamus from the
United States District Court for the Western District of Texas
Vacant Austin District Judge Docket II
(Dist. Ct. No. 1:23-cv-01370-DII)

## PETITION FOR WRIT OF MANDAMUS

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November 20, 2023

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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Respectfully submitted,

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## ISSUE PRESENTED

Where venue was proper in the Northern District of Texas ("NDTX"), did the district court abuse its discretion by sua sponte transferring this case from the NDTX-Fort Worth Division to the Western District of Texas ("WDTX")-Austin Division, even though the transferee court is much more congested, and the Respondents, who had waived any venue challenge, claim to want discovery from witnesses located exclusively in the NDTX?

## INTRODUCTION

A district court cannot override a plaintiff's proper venue choice because it believes it is too busy. Exercising a plaintiff's traditional right to select any proper forum, the Institute for Free Speech ("IFS" or "Petitioner") filed a pre-enforcement First Amendment challenge to the Texas Ethics Commission's ("TEC" or "Respondents") corporate-contribution ban, arising out of IFS's inability to associate, speak, and petition on behalf of putative clients residing in the NDTX.

IFS filed an early summary judgment motion on purely legal grounds and without the need for any discovery. Respondents filed a motion to dismiss and subsequently asked to conduct limited jurisdictional discovery in the NDTX. They did not raise, and thus waived, any objection to IFS's forum selection.

But rather than address either motion, the district court decided to second-guess IFS's selection of a proper forum and invite briefing on the propriety of a transfer to the WDTX, asserting that the court had

"concerns whether the Northern District is the appropriate venue for this action."

Offering only cursory analysis, the district court then agreed with its own suggestion to grant a convenience-based transfer under 28 U.S.C. § 1404(a) to the WDTX-Austin Division, even though that division is down to one full-time judge and is far busier than the NDTX-Fort Worth Division.

In doing so, the district court prioritized its own sense of convenience over IFS's prerogative to select a proper forum, in the absence of any apparent convenience benefits. The effect of this transfer is to place IFS's straightforward First Amendment claims on the slow track in what is perhaps the most overburdened jurisdiction in the nation, thereby magnifying the constitutional injury.

This unasked-for transfer was an abuse of discretion. 28 U.S.C. § 1404(a) is not a docket-management tool for district courts that wish to off-load cases on their (even busier) neighbors. And Petitioner has no

adequate appellate remedy to correct the district court's trimming of its own caseload at the expense of both IFS and the WDTX. This petition presents an opportunity for this Court to pare back the practice of district courts manipulating venue for their own convenience, instead of respecting a plaintiff's choice of a proper venue.

The Court should grant a writ of mandamus and order the WDTX-Austin Division to transfer this case back to NDTX-Fort Worth Division or, alternatively, to the NDTX-Dallas Division.

## FACTUAL BACKGROUND

Texas law makes it a felony for corporations to make political contributions—including in-kind contributions of services—to candidates and political committees. TEX. ELEC. CODE § 251.001(21), § 253.094. Accordingly, Petitioner IFS, a nonprofit corporation, has refrained from providing pro bono legal services to candidates and political committees in Texas for fear that it could be prosecuted. App. 172-76. In January 2022, IFS requested an advisory opinion from the

TEC, the state agency responsible for enforcing the Texas Election Code, TEX. GOV. CODE § 571.061, § 571.171, to resolve whether the corporate contribution ban bars corporations from representing candidates or political committees in pro bono challenges to Texas laws or regulations. App. 179-86.

IFS and two other nonprofit corporations, the Institute for Justice and the American Civil Liberties Union of Texas ("ACLU"), warned Respondents that they would violate the First Amendment if they maintained a regulatory regime that criminalized legal advocacy against civil rights abuses. App. 173-74, 191-204. IFS's president, David Keating, and an ACLU representative also advocated for a narrow interpretation of the corporate-contribution ban before meetings of the TEC. App. 174-75. However, on December 14, 2022, the TEC voted 5-3 to adopt an advisory opinion declaring that IFS would commit a felony if it carried out its plan to provide pro bono legal services. App. 175, 209-12, 215.

On August 2, 2023, IFS sued the TEC's executive director, J.R. Johnson, and its eight commissioners in NDTX-Fort Worth Division. App. 040, 059. IFS bought a purely legal pre-enforcement challenge, arguing that Respondents' regulatory regime unconstitutionally burdens IFS's right to associate, speak, and petition through pro bono litigation, and that 42 U.S.C. § 1983 pre-empts the regime. App. 055-57, 141-58.

IFS filed the complaint in the NDTX because Respondents' regime forbids IFS from associating with two putative clients—Corsicana-city-council-member Chris Woolsey and the Texas Anti-Communist League PAC—who would like to engage IFS for political-speech suits, and both reside in the NDTX. Moreover, the lawsuit that IFS would bring on behalf of its putative clients would be venued in the NDTX, as the regulations that the clients would seek to enjoin, compelling speech as part of political advertising, regulate their speech in that district. *See* App. 164-69, 171, 176-77; *see also* App. 042-43 ("But for the

Commission's regulatory regime, IFS would legally represent potential clients located in Tarrant County and Navarro County . . . the effects of the Commission's regulatory regime are experienced within this district").

By mid-October, both parties filed and briefed dispositive motions that they contend should resolve the case without the need for additional proceedings. *See* App. 284, 291 ("Defendants' pending motion . . . can and should resolve the entire litigation" without requiring that "parties engage in discovery"); *see also* App. 026 ("IFS is not seeking any discovery . . . this case is ready for the Court to adjudicate on the merits."). Respondents, evidently recognizing that venue was proper, raised no Rule 12(b)(3) concerns in their motion to dismiss. *See* App. 060.

Nonetheless, on October 26, 2023, the district judge in the NDTX-Fort Worth Division sua sponte ordered the parties to file supplemental briefing on a possible transfer to the WDTX. App. 020. Two weeks

later—instead of ruling on either of the briefed motions pending—the district judge transferred the case, over Petitioner's objections, to the WDTX-Austin Division. App. 013, 018. This lawsuit is presently assigned to vacant "Judge Docket II – Austin"—with no Article III judge assigned. *See* App. 008.

## ARGUMENT

### I. IFS'S CHOICE OF A PROPER FORUM CANNOT BE OVERRIDDEN WHERE CONVENIENCE FACTORS DO NOT CLEARLY FAVOR TRANSFER

"The well-established principle that the plaintiff is the master of his complaint" entails "the plaintiff's traditional prerogative to select the forum." *Durbois v. Deutsche Bank Nat'l Tr. Co.*, 37 F.4th 1053, 1060 (5th Cir. 2022)) (cleaned up); *see also In re TikTok, Inc.*, 85 F.4th 352, 2023 U.S. App. LEXIS 28880, at *4 (5th Cir. 2023) ("Plaintiffs are permitted to engage in a certain amount of forum-shopping"). IFS exercised this right when it filed in NDTX-Fort Worth.

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); *see also Umeugo v. Barden Corp.*, 307 F. App'x 514, 517 (2d Cir. 2009) ("a plaintiff has the right to file potentially meritorious lawsuits in the form that it chooses. Their only obligation is to file in a proper forum") (cleaned up).

Federal courts, in contrast, have a virtually unflagging duty to hear and decide any case within their jurisdiction. *Daves v. Dall. Cnty.*, 64 F.4th 616, 637 (5th Cir. 2023). Unless disqualified, a judge "should hear and decide matters assigned" because the "duties of judicial office take precedence over all other activities." U.S. CODE JUD. CONDUCT, CANON 3.

IFS chose the NDTX-Fort Worth Division in part because Cary Cheshire—the principal and treasurer of the Texas Anti-Communist League PAC and one of IFS's putative clients—resides in Tarrant County. App. 042; *see also* App. 167-68 (noting that the League's

mailing address is also in Tarrant County). Moreover, the lawsuit that IFS would file if it prevailed in this case would be brought in the NDTX. App. 164-69. As the district judge found, "the effects of the Commission's regulatory regime are experienced within [the NDTX]." App. 018; *see also* 28 U.S.C. § 1391(b)(2) ("A civil action may be brought" in any district "in which a substantial part of the events or omissions giving rise to the claim occurred"). Petitioner's right to associate, speak, and petition is burdened in Tarrant and Navarro Counties, because it has experienced and continues to experience the effects of the Respondents' unconstitutional regime there. App. 177.

No party suggested that NDTX-Fort Worth Division is improper, and the district judge implicitly recognized that NDTX is a proper venue by transferring the case for convenience under 28 U.S.C. § 1404(a), rather than for impropriety under 28 U.S.C. § 1406(a). *See* App. 014; *see also* *Franco v. Mabe Trucking Co.*, 3 F.4th 788, 793 (5th Cir. 2021) (contrasting § 1404(a) "which authorize[s] a discretionary transfer when

venue was proper but another venue was more convenient" with § 1406(a) "which require[s] a transfer when venue was improper").

Likewise, Respondents 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* App. 036 (Respondents' motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(2)). Indeed, 28 U.S.C. § 1406(b) provides that nothing impairs a district court's jurisdiction when, as here, a party fails to timely object to venue. Some of the Respondents even reside in the NDTX. App. 036; *see also* 28 U.S.C. § 1391(b)(1) ("A civil action may be brought" in any district "in which any defendant resides, if all defendants are residents of [one] State").

The district court and the parties all agree that venue is proper in the NDTX-Fort Worth Division. Accordingly, as master of its complaint, Petitioner's chosen forum should not be altered unless Respondents can meet their burden of "clearly demonstrate[ing]" that the new venue is "clearly more convenient" than Petitioner's original choice. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc); *cf. Durbois*, 37 F.4th at 1060. Otherwise, "the plaintiff's choice of venue is entitled" to "appropriate deference." *Volkswagen*, 545 F.3d at 315. In this case, the Respondents did not timely object to venue and only sought transfer after the district court invited it.

The WDTX-Austin Division is not clearly more convenient than NDTX-Fort Worth. Austin is far more congested, sits further from the non-party witnesses, lacks absolute subpoena power, and has a slower docket. Petitioner's choice should have been respected.

## II. IFS HAS NO ADEQUATE APPELLATE REMEDY FOR THE IMPROPER TRANSFER

When a district court wrongly transfers a case to a venue not "clearly more convenient," a writ of mandamus is the correct remedy. *See Def. Distributed v. Bruck*, 30 F.4th 414, 426, 433 (5th Cir. 2022). Federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). Courts grant mandamus relief when: (1) the petitioner has no other adequate means of obtaining its desired relief; (2) the writ is appropriate under the circumstances; and (3) the petitioner has a clear and indisputable right to the writ. *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 629 (5th Cir. 2022).

The first element is always satisfied in the motion-to-transfer context, because later appeal from a final judgment never constitutes adequate remedy for an erroneous transfer. *See In re Radmax, Ltd.*, 720 F.3d 285, 287 n.2 (5th Cir. 2013). "The harm—inconvenience to witnesses, parties and others—will already have been done by the time

the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle." *Id.* (cleaned up). Additionally, when final judgment is adverse, plaintiffs have trouble proving the transfer was not harmless error—that they would have won but for the transfer—and when final judgment is favorable, plaintiffs cannot appeal at all. *See Volkswagen*, 545 F.3d at 319. Accordingly, a writ of mandamus is the only adequate remedy for the district court's erroneous transfer of this case to the WDTX-Austin Division.

## III. MANDAMUS IS NECESSARY BECAUSE THE ISSUES OF THIS CASE HAVE WIDESPREAD IMPORTANCE

### A. Mandamus relief is appropriate here because IFS's case raises issues with broad import for the judicial system.

"[W]rits of mandamus are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." *Volkswagen*, 545 F.3d at 319. Simply put, district courts have no business overriding a plaintiff's choice of a proper venue absent clear-cut convenience benefits. Excessive deference to district

courts invites gaming of the convenience-transfer process. IFS's case affects the judicial system widely.

In the fifteen years since the Fifth Circuit's foundational precedent in *Volkswagen*, district courts within the circuit ruled on convenient venue in over 2,000 cases. *TikTok*, 2023 U.S. App. LEXIS 28880, at *27. These transfer decisions are rarely reviewed and often yield inconsistent outcomes. *Id.* (noting that the Fifth Circuit reviews fewer than one transfer a year).

The handful of Fifth Circuit opinions that have appeared almost all examined district court decisions denying transfer. *See, e.g.*, *Planned Parenthood*, 52 F.4th at 629; *Radmax*, 720 F.3d at 290; *Volkswagen*, 545 F.3d at 319. Only one published Fifth Circuit decision in the last fifteen years reversed a district court's grant of transfer. *See Def. Distributed*, 30 F.4th at 422-23. But that case featured unusual facts and ended with a district judge ignoring the Circuit's opinion and refusing to transfer the case back. *See Def. Distributed v. Platkin*, 55 F.4th 486, 489 (5th

Cir. 2022). The overwhelming majority of convenience transfers take place without appellate review.

Recently, the Fifth Circuit stressed that district courts need further instruction on "when transfer is not warranted in response to a § 1404(a) motion." *TikTok*, 2023 U.S. App. LEXIS 28880, at *27 (cleaned up) (supplying guidance on when transfer *is* warranted). But instruction is impossible without precedential decisions reversing erroneous transfers.

This case presents this Court with just such an opportunity, especially considering the district judge's emerging pattern and practice of issuing sua sponte orders addressing his feeling that his division has "one of the busiest dockets in the country." App. 017. Recently, the judge sua sponte sanctioned two "lazy lawyers in glass towers" who allegedly wasted the judge's time despite his "limited resources and large docket." *Gipson v. Weatherford Coll.*, No. 4:22-cv-0730-P, 2023 U.S. Dist. LEXIS 100575, at *2, *5 (N.D. Tex. June 9, 2023) (Pittman,

J.). This Court reversed these sanctions as clear abuse of discretion. *Gipson v. Weatherford Coll.*, No. 23-10397, 2023 U.S. App. LEXIS 29535, at *2, *4 (5th Cir. Nov. 6, 2023).

But this district judge has also developed a curious practice over the past year of transferring his cases to other courts: often to notoriously congested districts (sometimes sua sponte, sometimes at the request of a party). *See, e.g., First Call Int'l, Inc. v. S&B Glob., Inc.*, No. 4:23-cv-00199-P, 2023 U.S. Dist. LEXIS 200516 (N.D. Tex. Nov. 8, 2023) (Pittman, J.) (sua sponte transfer to C.D. Cal.); *BNSF Ry. Co. v. Float Alaska IP, LLC*, No. 4:22-cv-0950-P, 2023 U.S. Dist. LEXIS 88750 (N.D. Tex. May 22, 2023) (Pittman, J.) (transfer to C.D. Cal.); *Career Colls. & Sch. of Tex. v. United States Dep't of Educ.*, No. 4:23-CV-0206-P, 2023 U.S. Dist. LEXIS 66487 (N.D. Tex. Apr. 17, 2023) (Pittman, J.) (transfer to WDTX-Austin); *Progressive Cnty. Mut. Ins. Co. v. Keechi Transp., LLC*, No. 4:22-CV-00533-P, 2022 U.S. Dist. LEXIS 210285 (N.D. Tex. Nov. 21, 2022) (sua sponte transfer to M.D. Fla).

If this practice is incompatible with the orderly distribution of cases pursuant to established rules governing venue—and it is—then a writ of mandate is necessary to protect the entire judiciary before the practice catches on.

### B. The public is harmed when improper transfers delay resolution of First Amendment claims

A mandamus petition "easily satisfies" the appropriateness prong when its issues "implicate not only the parties' interests but those of the judicial system itself." *Def. Distributed*, 30 F.4th at 426. "Preeminent" among such judiciary-wide issues are "questions about the abridgement of the Plaintiffs' first amendment rights" and about "abusive manipulation of federal court procedures in order to delay or altogether avoid meaningful merits consideration of Plaintiffs' claims." *Id.* at 426-27; *see also A.H. v. French*, 999 F.3d 98, 106, 108 (2d Cir. 2021) (mandamus appropriate to remedy restraints on speech because delayed review would result in continuing impairment of First Amendment freedoms); *In re Murphy-Brown, LLC*, 907 F.3d 788, 801 (4th Cir. 2018)

("Mandamus relief is 'appropriate under the circumstances'" because invalid court order was per se irreparable injury of "the First Amendment interests in an open and public civil justice system"). The erroneous transfer in this case presents just such an abusive manipulation of federal court procedures with the practical result that IFS's opportunity to vindicate the harm to its First Amendment rights will languish under further delays.

IFS's rights to speak, associate, and petition for redress through the judicial system are all infringed by Respondents' unconstitutional regulatory regime. The TEC insulates its actions from constitutional scrutiny by threatening public-interest firms with financial liability or criminal prosecution if they challenge its regime in almost the only way they can: by bringing suits with standing dependent on their client's status as a candidate or political committee.

As discussed below, transfer to the WDTX-Austin Division will inevitably delay this case, prolonging IFS's already irreparable injury.

And until its speech rights are restored, IFS cannot litigate in defense of the rights of other Americans harmed by the TEC's regime. Mandamus relief will dissuade district courts from manipulating procedures to lighten their own caseloads while delaying access to substantive decisions on important civil rights.

## IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY PRIORITIZING ITS OWN CONVENIENCE OVER THE PLAINTIFF'S CHOICE OF VENUE AND THE WITNESSES' CONVENIENCE

"A district court by definition abuses its discretion when it makes an error of law." *Def. Distributed*, 30 F.4th at 427 (citation omitted). The district court not only applied the wrong legal standards but also misunderstood uncontested facts. And the court failed even to mention Petitioner's alternative request for a transfer to the NDTX-Dallas Division.

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. *Planned Parenthood*, 52 F.4th at

629. "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 strongly favors transfer).

Courts must assess four private-interest factors and four public-interest factors. *Planned Parenthood*, 52 F.4th at 630; *Volkswagen*, 545 F.3d at 315. The private interest factors are: (1) relative ease of access to sources of proof; (2) availability of compulsory process to secure attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that might make trial easy, expeditious, and inexpensive. *Id.*

The public interest factors 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 governing law; and (4) the avoidance of conflict-of-laws or foreign-law

problems. *Planned Parenthood*, 52 F.4th at 630; *Volkswagen*, 545 F.3d at 315. No factor is dispositive weight, and courts can find abuse of discretion even when most factors are neutral. *Tiktok*, 2023 U.S. App. LEXIS 28880, at *7.

The district court wrongly held that all the private factors and one of the public factors favored transferring to the WDTX-Austin Division (with one public factor supporting Fort Worth and two neutral). *See* App. 016-18. In truth, both sets of factors favor keeping this case in the NDTX-Fort Worth Division.

### A. The district court clearly erred by weighing the location of unidentified individuals and records that have no relevance to the case

#### *1. The TEC's records are irrelevant to this case*

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. App. 141-60, 297-301. While the TEC and its records are in Austin, *see* App. 016, IFS is not

seeking any discovery from the TEC. Nor have the Defendants or the district court identified specific records or witnesses that are in Austin and material to the parties' pending motions. Speculation about unidentified evidence or witnesses does not establish a basis for a convenience transfer.

The TEC's Austin records do not contain any information relevant to the purely legal question of whether a statute and a published advisory opinion violate the Constitution facially or as-applied to IFS and its putative clients.

As far as Petitioner is concerned, this case is ready for adjudication on the merits. Tellingly, Respondents also insist that this case can be fully resolved without discovery or trial. *See* App. 284, 291 ("Defendants' pending motion . . . can and should resolve the entire litigation" without requiring that "parties engage in discovery"). No one has requested discovery of records or documents located in Travis County or any other county in the WDTX.

Moreover, Respondents have not met their burden—as the party belatedly seeking transfer—of making "an actual showing of the existence of relevant sources of proof, not merely an expression that some sources likely exist in the prospective forum." *Def. Distributed*, 30 F.4th at 434. Respondents offer only conclusory allegations that relevant evidence is in Austin. *See* App. 035-36 (mentioning unidentified "documents and records" that supposedly must be accessed).

The TEC's documents and records are not relevant to IFS's claims, and in the unlikely event that they are relevant to the TEC's own case, the TEC's in-house legal team (who work in Austin) and its litigation counsel (who work in Austin) already have access to them, no matter the venue. *See* App. 037.

The district court "erred by uncritically accepting [Respondents'] conclusory assertions that the sources of proof relevant to these issues (including any non-party witnesses) are all in" WDTX-Austin. *Def.*

*Distributed*, 30 F.4th at 434; *see also* App. 016 (accepting Respondents' conclusory statements). The first private factor is neutral, contrary to the district court's holding.

*2. If any jurisdictional discovery of witnesses is allowed, it would occur in the NDTX*

Again, IFS is not seeking any discovery from the TEC. In contrast, Respondents belatedly filed a half-hearted Rule 56(d) request to conduct jurisdictional discovery, listing averments they supposedly wish to test. App. 288-89. Respondents 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). App. 288-89; *see also* App. 036 (maintaining that the TEC wants access "to evidence in [IFS's] custody" "located outside of Texas"). Respondents have not requested merits discovery, nor articulated why it would be needed to respond to IFS's purely legal arguments.

IFS opposes jurisdictional discovery as unnecessary. App. 296-301. But if the district court allows such discovery, Keating is based near Washington DC, so his location does not cut against the NDTX as a venue. Cheshire and Woolsey are third-party witnesses residing in the NDTX, and they may refuse to testify without a subpoena. Both Benbrook and Corsicana are further than 100 miles from Austin, so Fort Worth is more convenient for those witnesses and they are subject to subpoena for a deposition there, but not in Austin.

The district judge accepted Respondents' assertion that Austin is the better venue so that the court can subpoena "employees of the Commission and other individuals who live and work in and around Austin" as witnesses. App. 016 (quoting App. 036). But Petitioner is not seeking to depose any of these unidentified employees or individuals.

Moreover, "compulsory process for *non-party* witnesses is the gravamen of the second private interest factor." *Def. Distributed*, at 434 (emphasis added); *see also Seagen Inc. v. Daiichi Sankyo Co.*, 546 F.

Supp. 3d 515, 531 (E.D. Tex. 2021) ("As party witnesses almost invariably attend trial at the behest of their employers, i.e., willingly, this factor is directed towards *unwilling third-party* witnesses.") (cleaned up and emphasis added). Respondents do not need a subpoena to order their own employees to speak to their own lawyers.

As for the illusory "other individuals" working around Austin, Respondents did not even bother to name them, let alone explain to the court what information they have or why their testimony is relevant. The party requesting § 1404(a) transfer has the burden "to identify any non-party witnesses who are unwilling to testify." *TikTok*, 2023 U.S. App. LEXIS 28880, at *12. Parties contesting venue often submit witness lists or affidavits. *See Volkswagen*, 545 F.3d at 317 (describing successful movant's list and affidavits); *see also Smilde v. Snow*, 73 F. App'x 24, 25 (5th Cir. 2003) (noting that unsuccessful movant failed to file witness list). Respondents here offered no evidence that any unnamed Austin-area witnesses even exist. The district court abused its

discretion by treating Respondents' conjecture about unidentified witnesses as sufficient.

The only third-party witnesses identified in this case—Chesire and Woolsey—both reside in the NDTX; they can be subpoenaed in the NDTX (but not in the WDTX-Austin); and Respondents will need to depose them there. Thus, the second private factor—compulsory process for witnesses—favors keeping this case in the NDTX.

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

This Court uses a 100-mile threshold to assess the third private factor: cost of attendance for willing witnesses. *TikTok*, 2023 U.S. App. LEXIS 28880, at *13-14 (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*, 2023 U.S. App. LEXIS 28880, 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 much closer to Fort Worth.

There is presently no reason for any of the Respondents to testify because this case can and should be resolved on Petitioner's motion for summary judgment. Even if any did, "[w]hen a defendant is haled into court, some inconvenience is expected and acceptable," so "the fact that litigating would be more convenient for the defendant elsewhere is not enough to justify transfer." *Def. Distributed,* 30 F.4th at 433.

Respondents assert that venue in the WDTX-Austin Division will "decrease the overall cost to the defense of the case," but they supply no evidence of this assertion, as their burden demands. *See* App. 037. Indeed, two of the Respondents live in the NDTX. App. 016. Five more Respondents live outside either district and—like IFS's president David Keating—would need to travel over 100 miles no matter where the

venue. *See* TEC Members Hometown/Term Ends, https://perma.cc/SWZ5-P87V (last visited Nov. 16, 2023) (listing the commissioners' hometowns as: two in Dallas, four in Houston, one in Corpus Christi, and one in Austin).

Even if Respondents could show increased cost owing to the Fort Worth venue, "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) (Pittman, J.) (cleaned up). Transferring to WDTX-Austin transforms speculative expenses that Respondents supposedly might incur—although no one has asked them to testify—into real expenses that non-party witnesses Chesire and Woolsey must incur. The third factor favors keeping this case in the NDTX.

*4. The trial-practicality factor is at most neutral*

The final private factor looks at "practical problems that make *trial* of a case easy, expeditious and inexpensive." *Planned Parenthood*, 52 F.4th at 630 (emphasis added). The district court erroneously treated this factor as focused on "reduc[ing] attorneys' fees and travel costs for counsel" in general and counted the salaries of TEC's non-litigation in-house legal team. App. 016; *see also* App. 037 (distinguishing TEC's litigation counsel from its in-house team). Under the district court's mistaken interpretation, whichever party hires more lawyers and more expensive lawyers will prevail.

This case presents purely legal questions, resolvable on the pending motions. Trial is unnecessary, as the parties seem to agree. *See* App. 026, 284, 291. But, in the unlikely event of a trial, there is no reason to prefer Austin. Non-party witnesses Woolsey and Cheshire reside closer to Fort Worth. Only two Respondents are based in Austin, and they work for a statewide enforcement agency, accustomed to litigating all

over the state—as Texas law requires. *See* TEX. GOV. CODE, § 571.133; *see also, e.g.*, *Empower Texans, Inc. v. Tex. Ethics Comm'n*, 657 S.W.3d 737 n.1 (Tex. App. 2022) (litigation transferred to El Paso, due to congested Austin docket); *Tex. Ethics Comm'n v. Goodman*, No. 2-09-094-CV, 2010 Tex. App. LEXIS 607, at *7 (Tex. App. Jan. 28, 2010) (litigation in Fort Worth).

Moreover, delay weighs heavily in this fourth factor, if that delay is greater than the "garden-variety delay" associated with any transfer. *Radmax*, 720 F.3d at 289. Transfer to the WDTX-Austin Division brings far more than garden-variety delay.

The Austin Division has perhaps the most overburdened docket in the country, and civil cases that go to trial take, on average, eight and a half months longer in the WDTX than in 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). As of the date of this filing, IFS's case sits on a vacant docket, with no district judge assigned. *See* App. 008.

Transferring to WDTX-Austin is the opposite of making trial easy and expeditious. This fourth factor favors Fort Worth or, alternatively, is neutral.

### B. The district court clearly erred by transferring to a forum that it admitted was less convenient

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

While NDTX-Fort Worth judges may have a busy 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 supports the proposition that the WDTX-Austin Division is more congested than the NDTX-Fort Worth Division. The district court even acknowledged that the administrative burden factor favored Petitioner's original venue. *See* App. 017 ("Austin is particularly busy" but "Austin's docket notwithstanding, the Court finds that other factors [out]weigh" the congestion factor). Elsewhere, the district judge concluded that "the Fort Worth Division . . . provides a more efficient forum to hear this case than an average court in the Western District of Texas" because "internal statistics" reveal that the time from filing to

trial is 54 days shorter in Fort Worth than in the WDTX. *Am. Airlines*, at *20 n.2 (Pittman, J.).

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* App. 017 (noting that the NDTX and WDTX have the same number of district judges: sixteen).

The backlog in Austin, moreover, is worse than in the other WDTX divisions. 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). The Austin Division is so overwhelmed that at present, Petitioner's case is not assigned to any district judge—active, senior, or visiting—but only to "the Honorable Docket II – Austin": a vacant docket. App. 008.

Transferring to the WDTX will increase the administrative difficulties flowing from court congestion, and further delay IFS's access to justice for an on-going violation of its First Amendment rights. This factor cuts strongly in favor of the NDTX-Fort Worth Division as venue, as the district judge partially recognized.

*2. The other public factors are neutral*

Out of the final three public interest factors, two are neutral, as the district judge rightly held. *See* App. 018. This case involves no conflict-of-laws problems, and both the NDTX and the WDTX are familiar with the federal constitutional laws that apply.

The district judge, however, held that Austin has localized interests in deciding the case. App. 017-18. But this case arises out of the unconstitutional regulatory regime that the TEC, a statewide enforcement agency, has imposed on the entire state of Texas. Indeed, the district court acknowledged that "effects of the Commission's regulatory regime" are felt "across the state." App. 018.

The "location of the injury, witnesses, and the Plaintiff's residence" are all "important considerations" for the sixth factor. *Def. Distributed*, 30 F.4th at 435. Here, "the defendants and the witnesses are located across the state." *Planned Parenthood*, 52 F.4th at 632. This case concerns "government officials in Austin." App. 017. But it also concerns a politician holding office in the NDTX and a political committee registered there. It concerns agency commissioners residing in Dallas, Houston, and Corpus Christi.

Most of all, it concerns a public-interest law firm that "[s]ince at least 2021" has repeatedly "passed on opportunities to represent" new Texas

clients because of Respondents' unconstitutional regulatory regime. App. 172, 176. This is not a future injury that hypothetically might occur in the NDTX. It is an ongoing injury already happening there. *See Speech First, Inc. v. Fenves,* 979 F.3d 319, 330-31 (5th Cir. 2020) (chilling speech is constitutional harm in the pre-enforcement context); *see also Jackson v. Wright*, 82 F.4th 362, 369 (5th Cir. 2023) (professor alleged a continuing injury when university administration banned him from involvement with academic journal). Under binding circuit precedent, IFS's self-censorship is a concrete, ongoing harm and is not, as the district court incorrectly held, a merely "hypothetical" future event. App. 017. Moreover, the loss of First Amendment rights is not some trifling matter but a per se irreparable harm. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (per curiam) (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)).

The district court compared Austin to a "center of gravity." App. 016. But Austin is not the sun, with all the rest of Texas orbiting around it.

Capital cities do not monopolize all interests in good governance. "Austin citizens had no more interest in having this case [on government mismanagement] decided at home than any other Texan." *Planned Parenthood*, 52 F.4th at 631-32. Citizens all over Texas have their First Amendment rights chilled by the TEC and cannot engage IFS, the ACLU, and similar nonprofit corporations to protect their rights. As long as the venue is in Texas, there are no localized interests. The sixth factor is neutral.

### C. The district court ignored its duty to consider Petitioner's alternative transfer request to the NDTX-Dallas Division

IFS's chosen venue, NDTX-Fort Worth Division, is more convenient than WDTX-Austin Division. But as the district judge feels that his division has "one of the busiest dockets in the country," App. 017, IFS suggested below that—if the judge's perception of his own busy docket compels him to change the venue—he should transfer the case to the

NDTX-Dallas Division, whose convenience is similar to that offered by the NDTX-Fort Worth Division. App. 031.

NDTX-Dallas is neutral or superior to WDTX-Austin on all the private and public factors. IFS's associational, petition, and speech rights are also burdened in Navarro County, where a putative client resides. App. 164, 177. One of the non-party witnesses that Respondents want to depose is in Navarro County. The other potential non-party witness—Cary Cheshire—resides in Tarrant County, within the Dallas Division's 100-mile threshold. *See* App. 167. And two Respondents live in Dallas. Moreover, 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. 16, 2023). The NDTX is both the venue chosen by Petitioner and clearly more convenient than the WDTX.

The district judge, however, did not acknowledge Petitioner's alternative request or even mention the Dallas Division in his opinion.

*See* App. 013-19. Thus, the judge abused his discretion by failing to address a major argument in the case. *See, e.g.*, *Rajet Aeroservicios S.A. de C.V. v. Cervantes*, 801 F. App'x 239, 244 (5th Cir. 2020) (abuse of discretion as "[a] district court's findings and conclusions [on venue], therefore, must be complete, detailed, and explicit; and it must identify and explain its resolution of any conflicts") (cleaned up); *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290 (5th Cir. 2015) (abuse of discretion when district court decided on convenient forum without written or oral explanation); *Berry v. Roberts*, No. 95-60542, 1996 U.S. App. LEXIS 42588, at *2 (5th Cir. May 3, 1996) (abuse of discretion when district court failed to address potentially meritorious argument). The district court's ruling was flawed and has led to patently erroneous results.

## CONCLUSION

The district court abused its discretion by sua sponte ordering transfer of this properly venued case to a more-congested district, owing

to the district court's sense of convenience, but without the support of any established "convenience" factors. This Court should issue a writ of mandamus directing the district court to transfer this case either back to the NDTX's Fort Worth Division, or to the NDTX's Dallas Division.

Respectfully submitted,

Dated: November 20, 2023

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing Petition for Writ of Mandamus complies with the requirements set out in Federal Rules of Appellate Procedure 21 and 32. This petition complies with the typeface requirements of Rule 32(a)(5) and the typestyle requirements of Rule 32(a)(6) because it was prepared in 14-point New Century Schoolbook, a proportionally spaced typeface, using Microsoft Word. This petition complies with the type-volume limitation of Rule 21(d)(1) because it contains 6501 words, as counted by Microsoft Word, excluding the parts exempted by Rule 32(f).

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## CERTIFICATE OF SERVICE

I certify that on November 20, 2023, a true and correct copy of the foregoing petition was served via CM/ECF to the counsel of record of all parties to trial court proceeding. Copies were also provided via email and FedEx to the Hon. Mark T. Pittman, at 501 West 10th Street, Room 401, Fort Worth, TX 76102, and to Vacant Austin District Judge – Docket II, at 501 West 5th Street, Suite 7300 Austin, TX 78701, in accordance with Federal Rule of Appellate Procedure 21(a)(1).

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