

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

INSTITUTE FOR FREE SPEECH,

Plaintiff,

v.

J.R. JOHNSON, in his official and
individual capacities as Executive Director
of the Texas Ethics Commission, et al.,

Defendants.

§
§
§
§
§
§
§
§
§
§
§

Case No. 4:23-CV-00808-P

DEFENDANTS' BRIEF IN SUPPORT OF TRANSFER OF VENUE

In response to the Court's recent order (Dkt. 27), Defendants hereby file this brief in support of a transfer of this case to the Western District of Texas, Austin Division.¹

Under 28 U.S.C. § 1404(a), "a district court may transfer any civil action to any other district or division where it might have been brought" for "the convenience of parties and witnesses, in the interest of justice." The Supreme Court has held that because § 1404(a) concerns only the transfer of cases, a "lesser showing of inconvenience" is needed than in cases involving potential dismissal. *Norwood v. Kirkpatrick*, 349 U.S. 544, 546 (1955); *see also In re Volkswagen of America, Inc.*, 545 F.3d 304, 314 (5th Cir. 2008) (en banc). This case indisputably could have been brought in the Western District of Texas, Austin Division. 28 U.S.C. § 1391 states that a civil action may be brought in a "judicial district in which any defendant resides" and "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred."

Plaintiff filed the case in the Northern District based on the following venue allegations:

¹Following the Court's order, Defendants file this response as a motion to transfer pursuant to 28 U.S.C. § 1404(a).

2. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b). The TEC's Executive Director and Commissioners perform their official duties throughout Texas, including in this district. 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.

Dkt. 1 at 3-4.

These allegations are inadequate to hold venue in this district under 28 U.S.C. § 1404(a). Plaintiff's allegations about its alleged inability to work for clients who reside in the Northern District is a non-starter for venue purposes. Plaintiff does not genuinely allege any impact on it (as a Washington, D.C.-based entity) in the Northern District—as opposed to a claimed impact on “potential clients” allegedly residing in the District. Even if Plaintiff *did* allege an impact on it in the Northern District, “the fact that a plaintiff residing in a given judicial district feels the effects of a defendant's conduct in that district does not mean that the events or omissions occurred in that district.” *Bigham v. Envirocare of Utah, Inc.*, 123 F.Supp.2d 1046, 1048 (S.D. Tex. 2000) (citing *Woodke v. Dahm*, 70 F.3d 983, 985–86 (8th Cir.1995)). Furthermore, the bare allegation that any commissioner performs “official duties” in the Northern District is belied by that fact that the only official acts at issue in this case occurred in the Western District.

The indisputable relevant venue facts militate towards transfer of venue. The Texas Ethics Commission (the “Commission”) is a state agency located in Austin. If there were any merit to Plaintiff's claims—which Defendants deny—the appropriate defendant to be sued in a case over

actions by the Commission, or to seek injunctive relief against the Commission, is the Executive Director of the Commission in his official capacity. *E.g., Valentine v. Collier*, 993 F.3d 270, 280 (5th Cir. 2021). There is no allegation—nor could there be—that any individual commissioner would ever have the power or authority to take any hypothetical action, much less against Plaintiff, on her or his own. The Commission’s Executive Director, Defendant J.R. Johnson, is a full-time employee of the agency who lives and works in the Western District of Texas, and the event giving rise to this lawsuit was a decision by the Commission to approve an advisory opinion at a public meeting that occurred in Austin.² This case should be transferred to the Western District of Texas, Austin Division, for the convenience of parties and witnesses and in the interest of justice.

I. Private-Interest Factors

Private-interest factors that courts consider 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.” *In re Volkswagen*, 545 F.3d at 315.

Relative Ease of Access to Sources of Proof. The Commission’s documents and records are maintained at its offices in Austin, where its full-time employees work, including its executive director Defendant J.R. Johnson. Public meetings of the Commission at which votes are taken on matters requiring a vote of the Commissioners are held in Austin, including the one at which the advisory opinion that gave rise to this lawsuit was approved. Any hypothetical future actions taken by the Commission would occur in Austin. Thus, transfer of venue to the Western District of

²Defendants ask the Court to take judicial notice of the following facts: (1) that the Texas Ethics Commission is located in Austin; and (2) that the December 14, 2022, public meeting of the Texas Ethics Commission occurred in Austin, Texas, as reflected by the minutes posted on the agency’s website (https://www.ethics.state.tx.us/data/meetings/minutes/2022/12-14-2022_Minutes_PublicMtg.pdf).

Texas, Austin Division, would improve ease of access to evidence concerning the past or potential future actions of Defendants. Plaintiff IFS is located outside of Texas and accessibility to evidence in its custody would likely be unaffected by a venue transfer.³

The Availability of Compulsory Process to Secure the Attendance of Witnesses. To the extent compulsory process may be needed to secure the attendance of non-party employees of the Commission and other individuals who live and work in the Greater Austin metropolitan area, transfer of venue to the Western District of Texas, Austin Division, would improve the availability of compulsory process to secure the attendance of witnesses.

The Cost of Attendance for Willing Witnesses. The only ties between the Northern District of Texas and any of the Defendants—links that are so slim that they are not even mentioned in Plaintiffs’ complaint—are that two of the commissioners named in the case live within the jurisdictional bounds of the Northern District of Texas. Defendants Steven Wolens and Chad Craycraft live in the Northern District of Texas, but regularly travel to Austin for public meetings of the Commission to vote on matters requiring a vote by the commissioners.⁴ Defendants Wolens and Craycraft join along with all of the Defendants in this request to have the matter transferred to the Western District of Texas. To the extent their attendance, the attendance of other

³To the extent that IFS points to the location of “potential clients” in the Northern District of Texas, the Commission confirms that any discovery of non-parties will be conducted in the locality where representatives of such “potential clients” can be found.

⁴To the extent these two Defendants are sued in their official capacities, their official functions have and will continue to occur at public meetings of the Commission in Austin. Though IFS has named these two Defendants improperly in their individual capacities, IFS does not allege any conduct by either commissioner that occurred outside of the votes each took in his official capacities at a public meeting of the Commission in Austin. As has been fully briefed to this Court, IFS has failed to state claims against them in their individual capacities, and in any event, those claims are barred by qualified immunity, as further elaborated upon in Defendants’ brief and reply in support of their motion to dismiss. Dkt. 19, 26.

commissioners, or the attendance of employees of the Commission is required, transfer of venue to the Western District of Texas, Austin Division, would decrease the overall cost to the defense of the case.

Other Practical Concerns That Make Trial Easy, Expeditious, and Inexpensive. Defendants' litigation counsel and the Commission's in-house legal team maintain their law practices in Austin. Plaintiffs' counsel Courtney Corbello and Tony McDonald maintain their law practices in the Greater Austin metropolitan area in the Western District of Texas. Plaintiffs' lead counsel Endel Kolde practices outside of Texas, and travel from D.C. to Austin is as easy as travel from D.C. to Dallas. On the whole, transfer of venue to the Western District of Texas, Austin Division, would reduce attorneys' fees and travel costs for counsel on both sides of this case.

II. Public-Interest Factors

Public-interest factors that courts consider 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 in] the application of foreign law." *In re Volkswagen*, 545 F.3d at 315.

Administrative Considerations. According to statistics from the federal courts collected during the twelve-month period ending June 30, 2023, the average time from filing to disposition for civil cases is 8 months in the Northern District of Texas and 7.4 months in the Western District of Texas.⁵ The average time from filing to trial for civil cases is 26.7 months in the Northern

⁵https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distcomparison0630.2023.pdf

District of Texas and 26.4 months in the Western District of Texas.⁶ This factor weighs slightly in favor of transfer to the Western District of Texas.

Local Interest. This case involves an out-of-state plaintiff challenging the official actions of government officials in Austin. As an Austin-based dispute involving mostly Austin-based attorneys, there is a local interest in having this dispute resolved in the Western District of Texas, Austin Division.

The Familiarity of the Forum with the Law That Will Govern. This factor in the analysis is neutral, as both the Northern District of Texas and Western District of Texas have experience with constitutional challenges to Texas laws.

Avoidance of Conflict of Laws or the Application of Foreign Law. This factor is inapplicable.

* * *

For the foregoing reasons, the relevant factors indicate that transfer to the Western District of Texas, Austin Division, would serve the convenience of parties and witnesses and would be in the interest of justice. Following the Court's advisory and request for positions on the issue of venue, Defendants respectfully request that the Court transfer this matter to that District under 28 U.S.C. § 1404(a).

⁶*Id.*

Respectfully submitted,

BUTLER SNOW LLP

By: /s/ Eric J.R. Nichols

Eric J.R. Nichols
Texas Bar No. 14994900
eric.nichols@butlersnow.com
Cory R. Liu
Texas Bar No. 24098003
cory.liu@butlersnow.com
1400 Lavaca Street, Suite 1000
Austin, Texas 78701
Tel: (737) 802-1800
Fax: (737) 802-1801

Jose M. Luzarraga
Texas Bar No. 00791149
jose.luzarraga@butlersnow.com
2911 Turtle Creek Blvd., Suite 1400
Dallas, Texas 75219
Tel: (469) 680-5500
Fax: (469) 680-5501

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2023, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

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