IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MINNESOTA

JEN HOBAN d/b/a MASTERPIECE VAPORS; THE PLUME ROOM LLC; J.H.T. VAPE LLC; LAKES VAPE SUPPLY LLC; and TOBACCO HARM REDUCTION 4 LIFE,

Plaintiffs,

v.

FOOD AND DRUG ADMINISTRATION; SCOTT GOTTLIEB, M.D., in his official capacity as Commissioner of Food and Drugs; and ALEX AZAR, in his official capacity as Secretary of Health and Human Services,

Defendants.

Case No. 0:18-cv-00269-JNE-LIB

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER

This is a lawsuit challenging the constitutionality of the FDA's "deeming rule" under both the Appointments Clause and the First Amendment of the U.S. Constitution. The deeming rule subjects "electronic nicotine delivery systems" to most of the regulations of the Tobacco Control Act, despite the fact that such products do not contain tobacco. Plaintiffs in this case are four Minnesota small businesses whose retail vaping shops are located in Minnesota and a nonprofit corporation active in Minnesota, the majority of

whose board members reside in Minnesota. The deeming rule's regulations have prevented, and will continue to prevent, the small business Plaintiffs from bringing new products to market, from servicing their customers' already purchased products, and from communicating truthful information to their customers. Its speech regulations have also had a chilling effect on the ability of the nonprofit Plaintiff to engage in advocacy on vaping-related issued.

Defendants have moved to transfer this case to the U.S. District Court for the District of Columbia pursuant to 28 U.S.C. § 1404(a). This transfer would be for the purpose of consolidating this case with another lawsuit—brought by entirely separate plaintiffs—challenging the deeming rule on the same constitutional theories. Defendants have also moved to transfer a third case—again raising the same legal arguments but by a separate plaintiff—from the Northern District of Texas to the District of Columbia, again for the purpose of consolidation. Defendants argue that transfer and consolidation will serve the interest of justice by preventing "the unnecessary expenditure of judicial and party resources" and avoiding the risk of inconsistent judgments.

This motion should be denied. The Plaintiffs here have chosen to challenge the deeming rule in their home state, a natural choice that is entitled to "presumptive weight." *Brockman v. Sun Valley Resorts, Inc.*, 923 F. Supp. 1176, 1179 (D. Minn. 1996) (citations omitted). With the Mandamus and Venue Act of 1962, Congress explicitly granted plaintiffs challenging illegal

rulemaking the right to make this choice, so that litigants who did not wish to file suit in Washington, D.C., would no longer be "faced with significant expense and inconvenience" by being forced to do so. *Stafford v. Briggs*, 444 U.S. 527, 534 (1980). Transfer against Plaintiffs' wishes would thwart this purpose and prevent Minnesotans harmed by the deeming rule from "holding the trial in their view and reach . . . ." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

Further, transfer and consolidation of these cases to a single court "would substantially thwart the development of important questions of law . . . ." *United States v. Mendoza*, 464 U.S. 154, 160 (1984). It would prevent the careful consideration of novel questions of law across multiple circuits that the U.S. appellate system is designed for. And it would do so for the benefit of very little gain in efficiency, since this case will require little—if any— review of the administrative record. This case will instead turn on the plain meaning of the Tobacco Control Act, the deeming rule, and a ten-page FDA Staff Manual Guide. For these reasons and others elaborated below, Plaintiffs respectfully ask this Court to deny the motion to transfer.

BACKGROUND

Plaintiffs accept the relevant background as provided in Defendants' motion to transfer as adequate for an understanding of the legal issue at stake in these motions. Although Plaintiffs disagree with Defendants'

characterization of both the purpose and operation of 21 U.S.C. § 387k, *see* Mem. in Supp. of Mtn. to Transfer [Dkt. No. 19] (Mem. in Supp.) at 5, this dispute goes to the merits of this case and not to the dispute over the motion to transfer.

The "Colorado non-profit" Plaintiff identified by Defendants is in the process of converting to a Minnesota corporation. *See* Declaration of Kevin Price, President of Tobacco Harm Reduction 4 Life.

STANDARD OF REVIEW

"For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought . . . ." 28 U.S.C. § 1404(a). Factors comprising the "interest of justice" include, but are not limited to,

> (1) judicial economy, (2) the plaintiff's choice of forum, (3) the comparative costs to the parties of litigating in each forum, (4) each party's ability to enforce a judgment, (5) obstacles to a fair trial, (6) conflict of law issues, and (7) the advantages of having a local court determine questions of local law.

Terra Int'l, Inc. v. Miss. Chem. Corp., 119 F.3d 688, 696 (8th Cir. 1997) (citation omitted). Determining whether transfer is appropriate "require[s] a case-by-case evaluation of the particular circumstances at hand and a consideration of all relevant factors." *Id.* at 691 (citations omitted).

As the Supreme Court noted in discussing the analogous doctrine of *forum non conveniens*, "unless the balance [of factors] is strongly in favor of the

defendant, the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil*, 330 U.S. at 508; *see also J.F. Pritchard & Co. v. Dow Chem. of Canada, Ltd.*, 462 F.2d 998, 1000 (8th Cir. 1972) (citing *Gulf Oil* with approval). This follows from the basic principle that "[s]ince venue is a procedural rule of convenience, the convenience of the aggrieved party should be first accommodated." *Gardner Eng'g Corp. v. Page Eng'g Co.*, 484 F.2d 27, 33 (8th Cir. 1973).

Thus, when evaluating motions to transfer under Section 1404(a), courts "begin the analysis by affording the plaintiff's choice of forum presumptive weight." *Brockman*, 923 F. Supp. at 1179 (citations omitted); *see also Graff v. Qwest Commc'ns Corp.*, 33 F. Supp. 2d 1117, 1121 (D. Minn. 1999) ("There is a 'normal presumption in favor of a plaintiff's choice of forums.'") (citation omitted). This principle of presumptive weight "is particularly true where the plaintiff resides in the district in which the lawsuit was filed." *Graff*, 33 F. Supp. 2d at 1121 (citation omitted).

Because of this presumption in favor of a plaintiff's choice of forum, courts "require a movant to show that the balancing of the other factors 'strongly favors' transfer." *Brockman*, 923 F. Supp. at 1179 (citations omitted); *see also Radisson Hotels Int'l, Inc. v. Westin Hotel Co.*, 931 F. Supp. 638, 641 (D. Minn. 1996) ("[T]he party seeking to transfer bears a 'heavy burden' of showing that 'the balance of factors *strongly* favors the movant.'") (emphasis in original) (citations omitted). The overarching principle is that Section 1404(a)

"provides for transfer to a *more* convenient forum, not simply one that is equally convenient (or inconvenient) to the one originally selected." *Eagle's Flight of Am., Inc. v. Play N Trade Franchise, Inc.*, No. 10-cv-1208 (RHK/JSM), 2011 WL 31726, at *4 (D. Minn. Jan. 5, 2011) (emphasis in original) (citation omitted). For that reason, "a transfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer." *Graff*, 33 F. Supp. 2d at 1121 (citing *Van Dusen v. Barrack*, 376 U.S. 612, 646 (1964)).

ARGUMENT

In evaluating Defendants' motion to transfer this case to the District of Columbia, this Court must ascertain first whether this suit "might have been brought" in that district, and second whether such transfer would be "[f]or the convenience of parties and witnesses" and "in the interest of justice." 28 U.S.C. § 1404(a). Plaintiffs agree that this suit might have been brought in the District of Columbia. But for the reasons explained below, such transfer would neither be in the interest of justice nor further the convenience of the parties. The motion to transfer should be denied.

I

TRANSFER TO THE DISTRICT OF COLUMBIA WOULD NOT FURTHER THE INTERESTS OF JUSTICE

A. Plaintiffs' Choice of Venue in Their Home State Is Entitled to Substantial Weight

When evaluating motions to transfer under Section 1404(a), courts "begin the analysis by affording the plaintiff's choice of forum presumptive weight." *Brockman*, 923 F. Supp. at 1179 (citations omitted). This "is particularly true where the plaintiff resides in the district in which the lawsuit was filed." *Graff*, 33 F. Supp. 2d at 1121 (citation omitted).

Yet Defendants argue that when plaintiffs challenge the legality of federal agency rules promulgated in or near Washington, D.C., neither of these presumptions applies. First, Defendants contend that Plaintiffs' claims in this case "arose in or near the District of Columbia" because "[t]he deeming rule that Plaintiffs challenge was drafted and promulgated in or near the District of Columbia." Mem. in Supp. at 15. Based on this characterization, Defendants argue that this Court should apply an exception which holds that a plaintiff's choice of venue "'garners less weight where . . . the claims alleged in the action do not arise in the forum state.'" *Id.* (quoting *Klatte v. Buckman, Buckman & Reid, Inc.*, 995 F. Supp. 2d 951, 957 (D. Minn. 2014)). But this mundane fact of a regulation's geographic origins will be true of nearly *every* rule promulgated by a federal agency. Thus, the implication of Defendants' argument is that a

plaintiff's choice to bring suit against *any* federal rule in the plaintiff's home state rather than the District of Columbia is not entitled to substantial weight.

This reasoning flies in the face of the Mandamus and Venue Act of 1962, which amended federal venue rules such that suits against federal agencies could be brought not just in the judicial district where the agency was located, but also "in any judicial district in which . . . the plaintiff resides" so long as the case does not involve real property. 28 U.S.C. § 1391(e). This amendment represented a very purposeful sea change in the law of venue. "[B]efore 1962," when plaintiffs sued federal agencies, "federal law provided for exclusive venue in the District of Columbia." Cass R. Sunstein, *Participation, Public Law, and Venue Reform*, 49 U. Chi. L. Rev. 976, 984 (1982) (citing 28 U.S.C. § 1391(b) (1958)). During this period, plaintiffs who sued government agencies "were faced with significant expense and inconvenience in bringing suits for enforcement of claimed rights." *Stafford*, 444 U.S. at 534.

Interpreting Section 1404(a) to support transfer away from a plaintiff's home venue and to the District of Columbia whenever a suit challenges a federal agency rule would undermine the purpose of this 1962 amendment. The House and Senate reports at the time made clear that Congress explicitly *rejected* the notion that challenges to agency rules should be litigated in Washington even when plaintiffs would prefer to litigate in their home districts: "'[W]here a citizen lives thousands of miles from Washington . . . to

require that the action be brought in Washington is to tailor our judicial processes to the convenience of the Government rather than to provide readily available, inexpensive judicial remedies for the citizen.'" Kate Huddleston, *Nationwide Injunctions: Venue Considerations*, 127 Yale L.J. Forum 242, 245 (2017) (quoting H.R. Rep. No. 87-536, at 3 (1961); S. Rep. No. 87-1992, at 3 (1961)).

There is further structural evidence in the U.S. Code that Congress does *not* intend agency challenges under Section 1391(e) to be routinely funneled to the District of Columbia against plaintiffs' wishes. When Congress believes that litigating in proximity to the relevant federal agency is relevant, it *explicitly* vests judicial review only in District of Columbia courts. *See, e.g.*, 42 U.S.C. § 7607(b)(1) (requiring petitions for review of certain EPA actions under the Clean Air Act to be filed in the Court of Appeals for the District of Columbia Circuit); *see also* 42 U.S.C. § 9613(a) (requiring petitions for review of any CERCLA regulation to be filed in the Court of Appeals for the District of Columbia Circuit); *see generally* Eric M. Fraser et al., *The Jurisdiction of the D.C. Circuit*, 23 Cornell J.L. & Pub. Pol'y 131, 154-55 (2013) (collecting every statute explicitly channeling administrative review to the D.C. Circuit).

Notably, the statute for review of orders made pursuant to the Tobacco Control Act does *not* consolidate such review in the District of Columbia. *See* 21 U.S.C. § 387*l*(a)(1).

> Any person adversely affected by [a] regulation or denial [made pursuant to the Tobacco Control Act] may file a petition for judicial review of such regulation or denial with the United States Court of Appeals for the District of Columbia *or for the circuit in which such person resides or has their principal place of business*.

(Emphasis added.) Therefore, although the FDA is located near Washington, D.C., Congress has rejected the premise that there are any advantages in directing litigation against the FDA to that area.

Finally, giving proper weight to Plaintiffs' choice to litigate in their own state furthers the interests of justice—not just for the Plaintiffs located in Minnesota, but also for the interested public at large. "In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only." *Gulf Oil*, 330 U.S. at 509.

For that reason, when evaluating whether the Minnesota vaping community should be able to bring suit in their home state, "[i]t is the rights and interests of the [state] citizens and the [state plaintiffs] that are at stake." *Wyoming Lodging & Rest. Ass'n v. U.S. Dep't of the Interior*, No. 04-cv-315-B, 2005 WL 8155466, at *4 (D. Wyo. Jan. 20, 2005). Because it is their lives and businesses *at home in Minnesota* that have been harmed by the deeming rule, "[c]ommon sense dictates that these citizens and parties should be able to actively engage in this litigation at a local forum and not be forced to learn about the status of the litigation through 'report only.'" *Id.* (quoting *Gulf Oil*,

330 U.S. at 509). *See also Wyoming v. U.S. Dep't of Interior*, Nos. 07-cv-319-B & 08-cv-004-B, 2008 WL 11335154, at *3 (D. Wyo. May 14, 2008) ("[C]itizens should always have the opportunity to hear and observe the proceedings of the Court. Obviously, they could not do so in this case, without great time and expense if the proceedings were in far off Washington, D.C."), *vacated as moot*, 587 F.3d 1245 (10th Cir. 2009).

B. Consolidation Would Prevent Two Important Questions of Constitutional Law from Percolating in Multiple Circuits

The Supreme Court has made clear that when multiple lawsuits against the government turn on the same unsettled question of law, such duplicity of litigation is not a harm to be avoided but rather a benefit to be encouraged. "Allowing only one final adjudication would deprive [the Supreme Court] of the benefit it receives from permitting several courts of appeals to explore a difficult question before [the] Court grants certiorari." *Mendoza*, 464 U.S. at 160 (citations omitted); *see also E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26 (1977) ("This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals."); *United States v. Stauffer Chem. Co.*, 464 U.S. 165, 177 (1984) (White, J., concurring in the result) ("Conflicts in the circuits are generally accepted and in some ways even welcomed. Indeed, were consistency a compelling concern as between circuits, the decision of one circuit would bind the others even in

litigation between two entirely different parties. That is not the route the federal courts have followed.").

For this reason, the Supreme Court has exempted the federal government from the normal rules of nonmutual collateral estoppel; the government is allowed to relitigate precisely the same questions of law in multiple forums. If not for this exception, only one lower court would be able to rule on any particular legal issue involving the government, which "would substantially thwart the development of important questions of law . . . ." *Mendoza*, 464 U.S. at 160. The Court has recognized that although multiple suits on the same question of law may appear inefficient, "what might otherwise be economy interests underlying a broad application of collateral estoppel are outweighed by the constraints which peculiarly affect the government." *Id*. at 163.

In the wake of *Mendoza*, it is commonplace for multiple lawsuits against the government, challenging the same agency rule on the same legal theory, to be brought by separate plaintiffs and proceed in separate courts. Indeed, "'[i]t is standard practice for an agency to litigate the same issue in more than one circuit . . . .'" *United States v. AMC Entm't, Inc.*, 549 F.3d 760, 772 (9th Cir. 2008) (quoting *Railway Labor Executives' Ass'n v. I.C.C.*, 784 F.2d 959, 964 (9th Cir. 1986)). *See, e.g.*, *In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340, 1341-42 (J.P.M.L. 2015) (noting the pendency of

nine separate lawsuits in nine separate district courts—including the District of Minnesota—challenging the EPA's "Clean Water Rule").

This suit is precisely the type of case that the Supreme Court had in mind in *Mendoza* and *E.I. du Pont* when it extolled the virtue of percolation. Plaintiffs here raise two constitutional questions of national importance that will only benefit from review in multiple courts.

The first legal issue concerns the *method* by which the deeming rule was promulgated. Rather than issuing the final rule himself, the FDA Commissioner chose to sub-delegate his authority to issue the deeming rule (along with all other FDA rules) to an FDA employee, Leslie Kux. Compl. ¶ 40. Ms. Kux then issued the rule. *Id.* The question presented is whether this unusual sub-delegation, which is not the norm in any other agency within the Department of Health and Human Services, violates the Appointments Clause as an exercise of "significant authority pursuant to the laws of the United States" by a mere employee. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

This is an important and novel legal question. The Supreme Court is currently considering an analogous Appointments Clause case relating to the *adjudicative* power and its exercise by non-officers. *See Raymond J. Lucia Cos., Inc. v. SEC*, No. 17-130 (U.S. argued Apr. 23, 2018). That case has already benefited from two extensive circuit court opinions, which reached opposite conclusions on the same legal question: whether the authority possessed by

SEC Administrative Law Judges (ALJs) may be exercised by non-officers. *Compare Raymond J. Lucia Cos., Inc. v. SEC*, 832 F.3d 277 (D.C. Cir. 2016) *cert. granted*, 138 S. Ct. 736, *with Bandimere v. SEC*, 844 F.3d 1168 (10th Cir. 2016). And a third circuit addressed a nearly identical issue. *See Burgess v. FDIC*, 871 F.3d 297 (5th Cir. 2017) (finding that the movant was likely to succeed on the merits of the claim that on FDIC order was invalid because it was issued by an FDIC ALJ who was not an officer).

This case has the potential to be the vehicle for a similar judicial inquiry into the proper limits of the *rulemaking* power as exercised by non-officers. The deeming rule is probably the most significant and consequential rule issued by Ms. Kux, meaning that litigation over this highly questionable sub-delegation is most likely to occur in the context of a challenge to the deeming rule. Consolidating every Appointments Clause challenge to the deeming rule in the same district would thus severely curtail the development of constitutional law on the question of the Appointments Clause and its relation to agency rulemaking.

The second issue in this suit is whether the procedures put in place by the deeming rule for the approval of modified risk statements violate the First Amendment. The deeming rule, by applying the Tobacco Control Act's restrictions to vaping devices, places the burden on manufacturers to prove that their truthful speech is beneficial. Compl. ¶¶ 28-32. The question

presented is whether the government's alleged public health concerns can justify such a substantial constraint on would-be speakers, a constraint which conflicts with the Supreme Court's admonishment that "'[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" *Edenfield v. Fane*, 507 U.S. 761, 770 (1993) (quoting *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 n.20 (1983)). As Plaintiffs have framed the issue in this suit, the FDA's approval process is a *de facto* reversal of the burden of proof that would be applied were the same speech ban tested in federal court rather than in an administrative proceeding. Compl. ¶ 70.

The procedure outlined in the Tobacco Control Act and now applied to vaping devices raises new and weighty questions related to the intersection of public health concerns and a First Amendment doctrine that heavily disfavors prior restraints on speech. For that reason, this issue is similarly one which would benefit from thorough lower-court examination.

Yet the government cites as a *benefit* of potential transfer the fact that a First Amendment challenge to the deeming rule has already been brought in the District of Columbia. *See* Mem. in Supp. at 13 ("Transferring this case to the District of Columbia also may pave the way for more prompt resolution of Plaintiffs' First Amendment claim.") (citing the ongoing cases *Nicopure Labs LLC v. FDA*, No. 1:16-cv-00878-ABJ (D.D.C. filed May 10, 2016); *Right To Be Smoke-Free Coal. v. FDA*, No. 1:16-cv-01210 ABJ (D.D.C. filed June 20, 2016)).

Plaintiffs dispute that the cases already being litigated in the District of Columbia in fact raise "the same" First Amendment claim, as the plaintiffs in those cases do not frame the issue as one of subverting mandatory judicial procedures. Regardless, transfer to D.C. would *harm* the interests of justice for the reasons already discussed; it would prevent every federal district and circuit court except for the District of Columbia from consideration of an important question of First Amendment law.

C. Transfer Would Not Further Judicial Economy

Mendoza makes clear that, to the extent that consolidating questions of *law* in one court would further judicial efficiency, the interests in percolation outweigh any potential benefits of judicial economy. When the Supreme Court reviews a question of law which has been thoroughly examined and litigated in a multitude of lower courts, the Court consistently expresses appreciation not dismay, for so-called "duplicative efforts." *See, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597 (2015) (noting that numerous courts of appeal had ruled on the constitutionality of same-sex marriage bans, and extolling this case law as "help[ing] to explain and formulate the underlying principles" at issue before the Court).

Lower courts have recognized this value as well. The Judicial Panel on Multidistrict Litigation regularly rejects attempts to consolidate suits that challenge agency rules and raise identical questions of law. In one recent case,

for example, the JPML acknowledged that each of nine separate suits turned on the same question of law, namely "whether the EPA and the Corps exceeded their statutory and constitutional authority when they promulgated the Clean Water Rule." *In re Clean Water Rule*, 140 F. Supp. 3d at 1341. But because these suits were Administrative procedure Act (APA) challenges that would involve little or no discovery and turn instead on questions of law, the panel found that consolidation would "not serve the convenience of the parties and witnesses or further the just and efficient conduct of [the] litigation." *Id.*

Yet in this case, the government nonetheless argues that the interests of justice would be served by transfer and consolidation because this would "eliminate duplicative proceedings" and be "the most efficient [and] economical" course for the parties. Mem. in Supp. at 12.

For the reasons stated above, this argument fails. "Duplicative" litigation on unsettled and important questions of law is not wasteful, but instead is beneficial to the interests of justice. Even assuming, however, that the conservation of resources could *in some instances* justify transfer and consolidation, this consideration has force only where the *factual* issues involved are so complex and time-consuming that the judicial efforts expended to grasp them outweigh the benefits of multiplicity. This suit does not come close to being such a case.

The very case the government cites in support of consolidation for judicial economy, *Celanese Corp. v. Fed. Energy Admin.*, noted the "complex and voluminous agency record" and opined that "[t]he wisdom of avoiding duplicitous [sic] litigation increases with the complexity of the issues." 410 F. Supp. 571, 575-76 (D.D.C. 1976). In those other rare cases in which APA challenges have been transferred and consolidated, the factual issues at stake similarly guaranteed daunting amounts of judicial effort to become familiarized with the relevant factual record. *See, e.g.*, *Villa v. Salazar*, 933 F. Supp. 2d 50, 56 (D.D.C. 2013) ("In a potentially complex APA case like this one, which involves a lengthy factual history and a complicated statutory and regulatory scheme that the transferee district has begun dissecting, the interest of justice favors transfer.") (citation omitted); *Huffman v. U.S. E.P.A.*, No. 2:10-cv-01189, 2011 WL 322661, at *6 (S.D. W. Va. Jan. 31, 2011) ("Absent transfer, three judges and their staffs will devote dozens if not hundreds of hours to properly frame the issues, review substantial briefing and arguments at different points, and carefully craft opinions addressing complex subject matter.") (footnote omitted); *Envtl. Def. v. U.S. Dep't of Transp.*, No. 6-cv-2176 (GK), 2007 WL 1490478, at *5 (D.D.C. May 18, 2007):

> [T]here is a sizable administrative record in these cases. . . . [A]t this time it consists of nearly 200,000 pages of material, or approximately 50 linear feet of documents. . . . Judicial economy

> strongly favors consolidation of these two large cases so that the overlapping issues and records may be considered together.

(Citations omitted.)

This case, in contrast to each of the above, is not a challenge under the "arbitrary and capricious" standard requiring extensive review of the administrative record. Indeed, neither of Plaintiffs' claims depend on the evidentiary sufficiency of agency findings, and thus reviewing courts will need to invest little time familiarizing themselves with the bulk of that record.

The operation of the approval process for modified risk statements is fully contained in the text of the Tobacco Control Act itself; no familiarity with the administrative record is necessary to read and understand this provision. *See* 21 U.S.C. § 387k. Likewise, the evidence that Leslie Kux issued the deeming rule is straightforward: she was sub-delegated the authority to issue FDA rules in a ten-page Staff Manual Guide, and, in accordance with that sub-delegation, she signed the deeming rule for promulgation and publication. *See* 81 Fed. Reg. 28,974, 29,106 (May 10, 2016); FDA Staff Manual Guide 1410.21.

At issue in this case will be the *legal* questions of whether these provisions and sub-delegation violate the First Amendment and the Appointments Clause, respectively. Because neither question requires unusually significant expenditure of judicial resources to gain familiarity with

a complex rule or record, the interests of judicial economy do not support transfer and consolidation.

D. The Interests of Judicial Comity Can Be Fully Preserved Through Carefully Tailored Injunctive Relief

Besides preservation of resources, the government's other primary argument is that consolidation will "avoid[] possibly conflicting rulings." Mem. in Supp. at 11 (citations omitted).

To the extent that this Court is concerned with the potential for conflicting injunctions, there is a solution far less drastic than placing the sole power to decide the deeming rule's constitutionality in only one district or circuit court. When the same rule is challenged in multiple jurisdictions, and different courts reach different conclusions concerning the rule's legality, those courts have several options at their disposal to preserve judicial comity and avoid conflicting injunctions. A court may, for example, enjoin enforcement of an agency rule against only the named plaintiffs. *See, e.g.*, *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 393 (4th Cir. 2001), *overruled on other grounds*, *The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544, 550 n.2 (4th Cir. 2012). Or, in the alternative, a court may issue an injunction that applies only in a geographic area distinct from the territory of another court that has reached the opposite legal conclusion. *See, e.g.*, *AMC Entm't*, 549 F.3d at 771-73 (holding that a

nationwide injunction against the AMC theater chain enforcing an agency rule would not apply within the geographic boundaries of the Fifth Circuit, which had reached a different legal conclusion with respect to the same rule).

These approaches allow courts to reach opposing legal conclusions regarding the same agency rule without imposing conflicting judgments. *Compare GeorgiaCarry.Org, Inc. v. U.S. Army Corps of Eng'rs*, 38 F. Supp. 3d 1365 (N.D. Ga. 2014) (finding that a regulation restricting gun use on Army Corps of Engineers' property likely did not violate the Second Amendment under Eleventh Circuit precedent), *aff'd*, 788 F.3d 1318 (11th Cir. 2015), *with Morris v. U.S. Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1125 (D. Idaho 2014) (finding that the same regulation *did* violate the Second Amendment under Ninth Circuit precedent, but noting that the court's injunction against enforcement of the regulation would be "limited to Idaho because its scope is dictated by the allegations of the two named plaintiffs"), *dismissed without prejudice to reinstatement sub nom. Elizabeth E. Nesbitt, et al. v. U.S. Army Corps of Eng'rs, et al.*, No. 14-36049 (9th Cir. Dec. 15, 2017).

Since there is no overlap among the plaintiffs challenging the deeming rule in the three cases at issue here, each court may fully adjudicate the rights of the plaintiffs in each own case without in any way imposing a conflicting judgment on any plaintiff in another case. Such a solution preserves judicial

comity *without* depriving the federal court system of the benefit of multiple courts' examining an important and novel legal issue.

None of the cases cited by the government to support consolidation on the basis of comity point to a different conclusion, because each case is inapposite. Three cited cases involved multiple suits with *the same plaintiffs and defendants*, and therefore, the courts could not have avoided conflicting judgments if they had reached opposite legal conclusions. *See Skyline Displays, Inc. v. Sweeney*, 634 F. Supp. 746, 747-48 (D. Minn. 1986) ("Plaintiff Skyline Displays . . . brought this action . . . against defendant Patrick Sweeney. . . . Sweeney [earlier] commenced a law suit in the United States District Court for the Central District of California and served Skyline."); *In re Nine Mile Ltd.*, 692 F.2d 56, 58 (8th Cir. 1982) ("Prime Five filed a diversity suit in the District of South Carolina against petitioners and others . . . . [Two months later,] the petitioners filed the underlying action in this case against Carnes [an owner and officer of Prime Five] individually."), *overruled on other grounds*, *Mo. Hous. Dev. Comm'n v. Brice*, 919 F.2d 1306, 1311 (8th Cir. 1990); *Medtronic, Inc. v. Am. Optical Corp.*, 337 F. Supp. 490, 497 (D. Minn. 1971) ("[P]laintiff brought this action in the District Court in Minnesota against defendant seeking . . . declaratory judgment that [certain] patents are invalid and not infringed by [plaintiff] . . . . [Three months later], defendant brought a separate action in Massachusetts against [plaintiff].").

One case cited by Defendants involved multiple suits concerning *the same trademark*, similarly making it impossible for multiple courts to rule without potentially issuing conflicting injunctions. *See Cosmetic Warriors Ltd. v. Abrahamson*, 723 F. Supp. 2d 1102, 1109 (D. Minn. 2010) (Plaintiff CWL sued defendant Target in District of Minnesota alleging Trademark Infringement through defendant's use of "ONE" brand; corporation with exclusive license to "ONE" brand then "commenced a declaratory-judgment action against CWL in the Northern District of Texas, seeking a declaration that it is not liable for trademark infringement through the sale of One products") (citation omitted). And the final cited case involved multiple suits concerning *the same contract*. *See Graff*, 33 F. Supp. 2d at 1118 (plaintiff sued defendant in Minnesota "[a]lleging that defendant had breached its written employment contract," and subsequently "defendant filed a declaratory judgment action . . . [in Colorado] seeking a judicial declaration that it did not breach the parties' employment contract . . . .").

While judicial comity obviously requires consolidation when two parties have each sued the other over the same dispute in separate courts, there is no similar need to consolidate challenges to federal regulations brought by completely separate and unrelated plaintiffs in separate cases. The interests of comity can be fully respected in this case without transfer and consolidation.

II

TRANSFER TO THE DISTRICT OF COLUMBIA DOES NOT FURTHER THE CONVENIENCE OF THE PARTIES

When evaluating a motion for transfer under Section 1404(a), "a transfer should not be granted if the effect is simply to shift the inconvenience to the party resisting the transfer." *Graff*, 33 F. Supp. 2d at 1121 (citing *Van Dusen*, 376 U.S. at 646). Despite the government's protestations to the contrary, that is exactly what transfer here would accomplish. While Defendants are located in or near the District of Columbia, four of the Plaintiffs are vaping businesses located in Minnesota, and the fifth is a nonprofit organization that: will soon be transferring its incorporation to Minnesota; is mostly involved in Minnesota policy; and has three of its five board members residing in Minnesota. *See* Declaration of Kevin Price, President of Tobacco Harm Reduction 4 Life.

Each of the government's arguments that transfer to the District of Columbia would *not* be less convenient to the Plaintiffs is unavailing. First, the government points to an entirely *separate* lawsuit challenging the deeming rule, the *Moose Jooce* litigation, which was filed in the District of Columbia by plaintiffs from various states. *See* Mem. in Supp. at 14.

The choices of other plaintiffs in other cases have no relevance to the convenience of Plaintiffs here. Many plaintiffs, for reasons of their own, continue to choose the District of Columbia to file challenges to agency rules

under Section 1391(e) with regularity. But it would be absurd to suggest that this fact alone is evidence that every plaintiff who chooses *not* to do so must be feigning inconvenience. Once again, accepting such an argument would serve only to make *every* choice to bring a Section 1391(e) suit outside the District of Columbia inherently open to transfer against plaintiff's wishes, a result that cannot be squared with the plain meaning and intent of Section 1391(e)'s venue provision.

Second, the government argues that "because the plaintiffs in all three actions [challenging the deeming rule] are represented by the same attorneys, Plaintiffs will benefit as much as Defendants and the courts from consolidated proceedings." This claim is highly implausible; the only specific example of such convenience the government can propose is that Plaintiffs would not need to retain local counsel. Yet Plaintiffs in this case have obviously made the decision that it is more convenient for them to litigate in their home state with local counsel than to litigate 900 miles away without local counsel. The government cannot purport to tell Plaintiffs here what is best for them. The simple fact remains that "'when plaintiffs file suit in their home forum, convenience to parties rarely, if ever, operates to justify transfer.'" *JTH Tax, Inc. v. Lee*, 482 F. Supp. 2d 731, 738 (E.D. Va. 2007) (citation omitted).

Finally, the government suggests that consolidation would be more convenient to *counsel* for both Plaintiffs and the government. *See* Mem. in

Supp. at 3 ("Defendants and their counsel are located in or near D.C.; and counsel for Plaintiffs in all three cases (the Pacific Legal Foundation) has an office in Arlington, Virginia, which is in the D.C. metropolitan area."). But this simply misinterprets the statutory criteria of Section 1404(a). While Section 1404(a) explicitly states that the convenience of parties and witnesses must be taken into account in the transfer analysis, it conspicuously does *not* include convenience of counsel as a factor to be considered. "Convenience of counsel, [therefore], as opposed to the parties themselves or their witnesses, is not a factor in deciding a Section 1404(a) motion." *Greyhound Computer Corp. v. IBM Corp.*, 342 F. Supp. 1143, 1146 (D. Minn. 1972) (citations omitted); *see also Hoppe v. G.D. Searle & Co.*, 683 F. Supp. 1271, 1276 (D. Minn. 1988) (noting that "convenience to [plaintiff's] current counsel is not a factor to be considered in deciding the propriety of transfer") (citation omitted); *Nelson v. Soo Line R.R. Co.*, 58 F. Supp. 2d 1023, 1027 (D. Minn. 1999) (same); *Cosmetic Warriors*, 723 F. Supp. 2d at 1106 n.6 (same); *Austin v. Nestle USA, Inc.*, 677 F. Supp. 2d 1134, 1137 n.3 (D. Minn. 2009) (same); *Milham v. White*, No. 15-3333, 2016 WL 3030238, at *2 (D. Minn. May 26, 2016) (same); *Guiette v. U.S. Bank Nat'l Ass'n*, No. 17-cv-1859 (DWF/DTS), 2017 WL 6001738, at *3 (D. Minn. Dec. 4, 2017) (same); *Amazin' Raisins Int'l, Inc. v. Ocean Spray Cranberries, Inc.*, No. 04-cv-3358 ADM/AJB, 2004 WL 2595896, at *3 (D. Minn. Nov. 15, 2004) (same).

Nor does the convenience of counsel affect the "costs to the parties of litigating in each forum," which may be taken into account as one of the "interest of justice" factors. Pacific Legal Foundation represents all clients free of charge, and the FDA is likewise entitled to full DOJ representation. Since neither potential costs nor potential savings to counsel will be passed the parties in this litigation, Defendants' arguments related to the convenience of counsel have no relation whatsoever to any of the Section 1404(a) factors.

Finally, even if convenience of counsel *were* considered, transfer to Washington would once again simply serve to benefit Defendants at the expense of Plaintiffs. Although PLF has an office in Arlington, the three PLF attorneys handling this case are based in Sacramento.[1] Sacramento is approximately 1,500 air miles from Minneapolis and approximately 2,300 air miles from Washington. Further, as an institution with a fully staffed U.S. Attorney's office in every federal district in the country, the U.S. Department of Justice cannot claim to be seriously inconvenienced by litigating outside of Washington. *See Superior Oil Co. v. Andrus*, 656 F.2d 33, 41 (3d Cir. 1981) (interpreting a statute such that actions arising under it "may, as a practical matter, be brought in every judicial district" but noting that this result "should not place any greater burdens or any undue strains upon the federal

[1] *See* https://pacificlegal.org/staff/damien-schiff; https://pacificlegal.org/staff/thomas-berry; https://pacificlegal.org/staff/oliver-dunford.

government, for it is evident that in such actions the Department of Justice would appear for the government defendants, and each judicial district in which an action could be brought has a United States Attorney").

Finally, the government adds, seemingly as an aside, that "the fact that the administrative record resides with the FDA in or near the District of Columbia further supports a transfer there." This argument carries no weight, not only because this case is unlikely to turn on much if any of the administrative record, but also more fundamentally because modern technology makes the physical location of the administrative record irrelevant. "[T]he administrative record can be made available anywhere by CD-ROM. This factor is neutral in the forum non conveniens analysis." *Ctr. for Food Safety v. Vilsack*, No. C 11-00831 JSW, 2011 WL 996343, at *7 (N.D. Cal. Mar. 17, 2011); *see also Am. Steamship Owners Mut. Prot. & Indem. Ass'n, Inc. v. Lafarge N. Am., Inc.*, 474 F. Supp. 2d 474, 484 (S.D.N.Y. 2007) ("The location of relevant documents is largely a neutral factor in today's world of faxing, scanning, and emailing documents."), *aff'd sub nom. New York Marine & Gen. Ins. Co.*, 599 F.3d 102, 114 (2d Cir. 2010).

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to transfer this case to the U.S. District Court for the District of Columbia.

DATED: May 4, 2018.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I, Oliver J. Dunford, certify that the memorandum titled: MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER complies with Local Rule 7.1(f) and (h).

I further certify that, in preparation of the above document, I used the following word processing program and version: MicrosoftWord 2013 and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count.

I further certify that the above document contains the following number of words: 6,581.

I further certify that the above document is in a 13-point, proportional font and is double-spaced, except where permitted by the Local Rules.

DATED: May 4, 2018.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, causing it to be electronically served on Defendants' counsel of record.

s/Oliver J. Dunford
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