UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RAVE SALON, INC. d/b/a JOOSIE VAPES, Plaintiff, 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.	§	Civil Action No. 3:18-cv-00237-G-BT

OPPOSITION TO DEFENDANTS' MOTION TO TRANSFER VENUE

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INTRODUCTION

Joosie Vapes, a Texas-based retailer, challenges the Food and Drug Administration's (FDA) deeming rule under the Appointments Clause and the First Amendment to the U.S. Constitution. Compl. ¶¶ 1, 9-10. The deeming rule extends the Tobacco Control Act to products, like vaping hardware and vaping liquids, that do not contain tobacco. *Id.* ¶ 1; 81 Fed. Reg. 28,974 (May 10, 2016).

After Joosie Vapes filed its lawsuit in this Court, Defendants moved to transfer it to the U.S. District Court for the District of Columbia under 28 U.S.C. § 1404(a). *See* Defs.' Mem. in Supp. [Dkt. No. 22] at 7. Defendants seek to consolidate this case with two other cases, involving nine plaintiffs from five states. *Id.* at 6.

This Court should deny Defendants' motion. Because the plaintiff's choice of forum is entitled to deference, courts require a party seeking to transfer a case to show good cause for the transfer. *In re Volkswagen of Am., Inc.* (*Volkswagen II*), 545 F.3d 304, 315 (5th Cir. 2008) (en banc). Defendants have not come close to making this showing. First, Texas is the most natural venue to hear this case because that's where the Joosie Vapes is harmed. This Court provides Joosie Vapes with an opportunity to participate in and attend the litigation. Second, this case involves purely legal questions and will not involve any sort of comprehensive discovery. This Court is just as competent to rule on these constitutional questions as a court based in D.C., and consolidating the cases will deprive the Supreme Court of the benefits of percolation. Finally, Defendants argue that a host of other factors, such as convenience to counsel and the location of the administrative record, support transferring this case to D.C. Yet those factors are irrelevant to the transfer analysis.

RELEVANT BACKGROUND

Joosie Vapes is a vapor retailer and manufacturer located in Mesquite, Texas. Compl. ¶¶ 9-10. Denissa Moore, a 51-year-old woman who used to smoke two packs a day, co-owns Joosie Vapes with her husband. *Id.* ¶ 11. Ms. Moore tried to quit smoking by using Chantix, nicotine patches, and even hypnosis, but none of those methods were successful. *Id.* Ms. Moore then turned to vaping, and quit smoking after just a year. *Id.* ¶ 12. She founded Joosie Vapes in 2013 as a way to help others quit smoking. The company now serves around 6,000 customers. *Id.*

In May 2016, Leslie Kux, a senior career civil servant at FDA with a delegation to issue rules, issued the deeming rule, which subjects several non-tobacco-products to the Tobacco Control Act. *Id.* ¶¶ 1, 4, 33-38. The products include "e-cigarettes, e-hookah, e-cigars, vape pens, advanced refillable personal vaporizers, and electronic pipes." 81 Fed. Reg. at 28,976.

Joosie Vapes filed this civil rights lawsuit to challenge the deeming rule under the Appointments Clause and the First Amendment to the U.S. Constitution. Compl. ¶¶ 49-58. A company based in north Texas, *id.* ¶ 9, Joosie Vapes filed in the U.S. District Court for the Northern District of Texas. Defendants now move to transfer this case to D.C.

STANDARD OF REVIEW

Under 28 U.S.C. § 1404(a), a district court may, "[f]or the convenience of parties and witnesses, in the interest of justice, . . . transfer any civil action to any other district or division where it might have been brought." In determining whether to transfer a case, a court considers several factors, none of which are dispositive. *In re Volkswagen AG* (*Volkswagen I*), 371 F.3d 201, 203 (5th Cir. 2004). A court considers private interest factors: "(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." *Volkswagen II*, 545 F.3d at 315. A court also considers public interest factors: "(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] application of foreign law." *Id.*

To reflect "the appropriate deference to which the plaintiff's choice of venue is entitled," courts require a party seeking to transfer a case to show good cause for the transfer. *Id.* "Thus, when the transferee venue is not clearly more convenient than the venue chosen by the plaintiff, the plaintiff's choice [of venue] should be respected." *Id.*

ARGUMENT

I.

THIS CASE SHOULD REMAIN IN THE VENUE WHERE THE PLAINTIFF WAS HARMED: TEXAS

"In any balancing of conveniences, a real showing of convenience by a plaintiff who has sued in his home forum will normally outweigh the inconvenience the defendant may have shown." *Norwood v. Kirkpatrick*, 349 U.S. 29, 35 (1955). Here, Joosie Vapes is a Texas business that has been adversely affected by the deeming rule. Compl. ¶ 9. The company filed in this Court, where it is more convenient—both for Joosie Vapes to litigate its case and for all Texans affected by the rule to come to the courtroom to "hear and observe the proceedings." *Wyoming v. United States Dep't of Interior*, No. 07-CV-319-B, No. 08-CV-004-B, 2008 WL 11335154, at *3 (D. Wyo. May 14, 2008).

This Court should reject any suggestion that the District of Columbia is the better, let alone *clearly* better, venue because "the rule being challenged was the product of an extensive rulemaking proceeding that took place in or near D.C." Mem. in Supp. at 7. Virtually every rule is the product of an extensive rulemaking proceeding that takes place in or near D.C. Thus, under

Defendants' reasoning, virtually every case involving the Administrative Procedure Act, not to mention challenges to countless other federal laws and regulations, would have to be filed in D.C. That is not the law. Congress enacted the Mandamus and Venue Act of 1962 to amend federal venue rules and ensure that suits against federal agencies could be brought not just in the 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).

Those changes foreclose the very argument that Defendants offer today. Before 1962, plaintiffs who sued federal agencies were required to file suit 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)). Congress amended that statute so that plaintiffs challenging government agencies would no longer face "significant expense and inconvenience in bringing suits for enforcement of claimed rights." *Stafford v. Briggs*, 444 U.S. 527, 534 (1980). Congress thus rejected the notion that challenges to agency rules should always be litigated in Washington, D.C., and it recognized that vesting exclusive venue in D.C. had the unwanted effect of tailoring the nation's "'judicial processes to the convenience of the Government rather than provid[ing] 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)).

When Congress intends to cabin plaintiffs' challenges to D.C. courts today, it expressly does so by statute. The Clean Air Act, for example, contains a prominent requirement that petitions for review of certain EPA actions be filed in the D.C. Circuit. *See* 42 U.S.C. § 7607(b)(1). Likewise, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) mandates that any review of a CERCLA regulation be obtained in the D.C. Circuit.

See 42 U.S.C. § 9613(a). By contrast, Congress has provided no venue requirement in the Tobacco Control Act, *see* 21 U.S.C. § 3871(a)(1), and this Court should decline to read Section 1404(a) in a way that creates expansive venue requirements where none previously existed.

II.

HEARING THIS CASE IN TEXAS WILL NOT UNREASONABLY TAX JUDICIAL RESOURCES

Defendants argue that transfer is required to "prevent the unnecessary expenditure of judicial resources." Defs.' Mem. in Supp. at 7. Not so. Unlike other cases that have been transferred and consolidated, this case involves purely legal issues rather than complex factual inquiries. For instance, Joosie Vapes' Appointments Clause claim is that Leslie Kux, who is neither a principal nor an inferior officer of the United States, does not have the constitutional authority to issue the deeming rule. Compl. ¶ 51. Joosie Vapes' First Amendment claim is that the deeming rule violates the Free Speech Clause of the First Amendment by preventing Joosie Vapes from making truthful and non-misleading statements regarding vaping devices, e-liquids, and related products. *Id.* ¶ 58. Defendants admit that Kux signed the notice publishing the deeming rule, Defs.' Answer ¶¶ 34, 51, and ostensibly agree that the principal questions in the case are questions of law, *see id.* ¶¶ 50-52, 55-57. As a result, consolidating this case with cases pending in D.C. and Minnesota "would not benefit from the usual strengths of consolidated resolution: reducing discovery costs, providing singular resolution, and facilitating settlement." Andrew D. Bradt & Zachary D. Clopton, *MDL v. Trump: The Puzzle of Public Law in Multidistrict Litigation*, 112 Nw. U. L. Rev. 905, 920 (2018).

By contrast, cases in which courts have transferred Administrative Procedure Act lawsuits for consolidation involved factual complexities that tipped the balance in favor of consolidation. That consolidation can conserve resources when a case involves "a lengthy factual history," *Villa v. Salazar*, 933 F. Supp. 2d 50, 56 (D.D.C. 2013), or "50 linear feet of documents," *Environmental*

Defense v. United States Dep't of Transp., No. 06-2176 (GK), 2007 WL 1490478, at *5 (D.D.C. May 18, 2007), is plain enough. But neither of those considerations is present here.

III.

THE POSSIBILITY OF INCONSISTENT RULINGS DOES NOT IMPAIR THE INTERESTS OF JUSTICE

Defendants urge the Court to transfer this case for eventual consolidation to "avert the possibility of inconsistent judgments." Defs.' Mem. in Supp. at 1.[1] Yet consolidation is meant to ameliorate the problem of inconsistent *factual* judgments. For example, a court may consolidate two cases that pose the risk of inconsistent factual determinations on what caused a barge to sink: improper loading or unseaworthiness. *See Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 20-21 (1960).

This case does not involve a private factual dispute, but rather an important and unsettled issues of constitutional law. In cases addressing whether a statute or an administrative rule comports with the Constitution, federal courts are encouraged to come to their own independent judgment. *See United States v. Stauffer Chemical Co.*, 464 U.S. 165, 177 (1984) (White, J., concurring in the judgment). As the Supreme Court explained long ago, it may be "desirable to have different aspects of an issue further illumined by the lower courts." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918 (1950). And the Supreme Court Rules provide that an important factor in whether the Court will grant review in a case is whether there is a split of authority among the circuit courts. *See* Sup. Ct. R. 10(a).

[1] The existence of related cases in other districts, even when it weighs in favor of granting transfer venue, does not by itself make the transferee venue "clearly more convenient." *Permian Basin Petroleum Ass'n v. United States Dep't of the Interior*, No. MO-14-CV-050, 2015 WL 11622492, at *4-5 (W.D. Tex. Feb. 26, 2015).

Consolidating this case with two other cases would therefore deprive the federal courts of meaningful percolation. Perhaps for that reason, the government fails to cite a single instance of the court's transfer of a case for consolidation where an important question of constitutional law was involved. After all, the government itself has noted that the Supreme Court could "benefit substantially by permitting other courts of appeals to consider the question presented . . . ." Br. of United States as Amicus Curiae at 17, *Lawson v. FMR LLC*, 571 U.S. 429 (2014). The same rule should apply here.

The Supreme Court itself has extolled the benefits of percolation. In *Obergefell v. Hodges*, 135 S. Ct. 2587, 2594 (2015), the Supreme Court explained that the numerous circuit courts that have considered the issue "help[ed] to explain and formulate the underlying principles" at issue before the Court. *Id.* at 2597. Lower courts, too, routinely reject attempts to consolidate suits that raise the same question of law. In a recent case, the Judicial Panel on Multidistrict Litigation considered a request to consolidate nine lawsuits that turned on the same question of law. *See In re Clean Water Rule: Definition of "Waters of the United States"*, 140 F. Supp. 3d 1340-41 (Oct. 13, 2015). Like this case, those nine suits were Administrative Procedure Act challenges that involved little or no discovery. Accordingly, the panel held that consolidation would "not serve the convenience of the parties and witnesses or further the just and efficient conduct of [the] litigation." *Id.*

IV.

CONVENIENCE OF COUNSEL IS IRRELEVANT TO THE TRANSFER ANALYSIS UNDER SECTION 1404(a)

The word "counsel" does not appear anywhere in Section 1404(a), and the convenience of counsel is not a factor in determining whether to transfer a case. *Volkswagen I*, 371 F.3d at 206. Defendants concede this point, yet invite the Court to consider the same arguments by

reformulating it as an argument on the "expense imposed on the parties." Defs.' Mem. in Supp. at 11. *See id.* at 2 ("Defendants and their counsel are located in or near D.C; and counsel for plaintiffs in all three cases . . . has an office in Arlington, Virginia, which is in the D.C. metropolitan area."). This Court should decline that invitation, because both parties are entitled to free representation. Pacific Legal Foundation represents its clients free-of-charge, and the Food and Drug Administrative is entitled to the same representation from the Department of Justice. *See* 28 C.F.R § 50.15(a)(8)(i) (requiring the Department of Justice to represent any officer of the United States in any action in which the officer is named as a defendant in his official capacity).[2]

V.

THE LOCATION OF THE ADMINISTRATIVE RECORD IS IRRELEVANT TO THE TRANSFER ANALYSIS

This Court should reject Defendants' argument that transfer to the District of Columbia is warranted because the administrative record "resides in or near D.C." Defs.' Mem in Supp. at 2. As discussed above, this case turns principally on legal questions, and thus the administrative record is unlikely to aid this Court in its deliberations. To the extent that the administrative record is needed, however, it can be made available anywhere by CD-ROM. *Center for Food Safety v. Vilsack*, No. C11-00831-JSW, 2011 WL 996343, at *7 (N.D. Cal. Mar. 17, 2011). This Court should decline to consider the "residence" of the administrative record when deciding whether to transfer the case.

[2] Even if counsel's residence mattered, Pacific Legal Foundation lawyers representing Joosie Vapes reside in California, not on the East Coast. If the presence of an office in the locale mattered, the Department of Justice has more litigators in Dallas than PLF has in Arlington, Virginia.

VI.

NONE OF THE OTHER FACTORS FAVORS TRANSFER

Defendants do not argue that any of the other factors militate in favor of transferring the case to the District of Columbia. Because the burden is on Defendants, as the moving parties, to show good cause for transfer, *Volkswagen II*, 545 F.3d at 315, none of these factors support transferring the case. Therefore, Joosie Vapes' choice of this Court as the proper venue should not be disturbed.

CONCLUSION

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

DATED: May 18, 2018.

Respectfully submitted:

By /s/ Wencong Fa

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CERTIFICATE OF SERVICE

On May 18, 2018, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel of record electronically.

s/ Wencong Fa
WENCONG FA