UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ROBERT S. BENNETT, NACHAEL FOSTER, ANDREW BAYLEY, and others similarly situated, Plaintiffs, v. STATE BAR OF TEXAS, Defendant.	Civil Action No. 4:21-cv-02829

REPLY IN SUPPORT OF DEFENDANT STATE BAR OF TEXAS' MOTION TO TRANSFER UNDER 28 U.S.C. § 1404(a)

For the reasons stated in Defendant's motion to dismiss (ECF No. 12), the Court should dismiss this action under binding Fifth Circuit precedent. In the alternative, the Court should transfer this action—including the issues raised in Defendant's motion to dismiss—to the U.S. District Court for the Western District of Texas, Austin Division ("Western District"). As Defendant has explained, *see* Mot. to Transfer 8-9 (Jan. 24, 2022), ECF No. 13, all of the applicable private and public-interest factors demonstrate that the Western District is a "clearly more convenient" venue than this Court. *In re Radmax, Ltd.*, 720 F.3d 285, 288 (5th Cir. 2013) (per curiam) (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc) ("*Volkswagen II*")). Plaintiffs' opposition fails to show otherwise, and gives no persuasive reason for keeping the case in this Court.

Plaintiffs' fleeting reference to the governing standard under Fifth Circuit case law both misinterprets that precedent and fails to apply it. Plaintiffs assert that "the Fifth Circuit has expressly refused to announce a standard governing 'intra-district transfers,'" and that there is "a general deference given to plaintiffs' initial choice" of venue. Opp'n to Mot. to Transfer 1 (Mar. 14, 2022), ECF No. 31 ("Opp'n") (citing *In re Radmax*, 720 F.3d at 289, and *Volkswagen II*, 545

F.3d at 308 n.2). Putting aside the fact that Defendant seeks an *inter*-district transfer to the Western District, the standard for intra and inter-district transfers is the same. *See In re Radmax*, 720 F.3d at 288. In both instances, the movant's burden of showing that a transferee venue is "clearly more convenient" under the applicable private and public-interest factors "adequately accounts for a plaintiff's choice" of venue. *Ayala v. Waste Mgmt. of Ariz., Inc.*, No. CV H-19-196, 2019 WL 2085106, at *3 (S.D. Tex. May 10, 2019); *see Volkswagen II*, 545 F.3d at 315 (explaining that a showing that the transferee venue is "clearly more convenient" outweighs deference to plaintiff's choice of venue). Here, all of the applicable factors weigh decisively in favor of transfer.

First, this action, in Plaintiffs' own words, "is based on" the Fifth Circuit's decision in *McDonald v. Longley*, 4 F.4th 229 (5th Cir. 2021), *petitions for cert. filed*, No. 21-800 (U.S. Nov. 24, 2021), *and* No. 21-974 (U.S. Dec. 30, 2021), which arose in the Western District. Pls.' Notice of a Related Case ¶ 2 (Dec. 3, 2021), ECF No. 7; *see* Compl. ¶¶ 2, 18 (Aug. 30, 2021), ECF No. 2. Factor 7, therefore, strongly supports transfer because the Western District has extensive "familiarity . . . with the law that will govern the case"—i.e., the Supreme Court First Amendment case law interpreted and applied in *McDonald*. *In re Radmax*, 720 F.3d at 288; *see* Mot. to Transfer 9-10. Although Plaintiffs now contend that this case is "substantially unrelated" to *McDonald* and implicates distinct "due process issues" (Opp'n ¶ 10), Plaintiffs' complaint does not contain *any* non-conclusory allegations that would support a due process claim. *See* Compl. ¶ 9 (alleging, in single paragraph referencing "due process," that "Plaintiffs' counsel . . . *suspects*" the Bar "predatorily pursues unsubstantiated claims" against Bar members (emphasis added)). Instead, on its face, the complaint unquestionably asserts "First Amendment-based claims" that rest squarely upon the Fifth Circuit's decision in *McDonald*. *Id.* ¶ 5; *see id.* ¶ 2 (citing *McDonald*); *id.* ¶ 10-12 (alleging "encroachments upon [Plaintiffs'] First Amendment Rights"); *id.* ¶ 21 (proposed class

includes "all Texas-licensed attorneys . . . who have endured First Amendment violations"). Accordingly, the Western District's prior experience with the "precise factual and legal" issues raised in Plaintiffs' complaint weighs heavily in favor of transfer. *FTC v. Cephalon, Inc.*, 551 F. Supp. 2d 21, 30-31 (D.D.C. 2008); *see In re Radmax*, 720 F.3d at 288.

Second, Plaintiffs argue that the Court should deny Defendant's motion because "[d]iscovery is warranted . . . in Houston[,] where the largest quantity of Texas Bar members practice," and where there allegedly is a greater number of lawyers who object to the State Bar's activities. Opp'n ¶¶ 11, 13. But Plaintiffs' speculative contention—which, at best, appears to relate to factor 1, "the relative ease of access to sources of proof," *In re Radmax*, 720 F.3d at 288—is undermined by the fact that unnamed putative class members (in Houston and elsewhere) would not actively participate in discovery in this case.[1] By contrast, all of the relevant physical documents and records in the Bar's possession that are potentially subject to discovery, as well as the vast majority of State Bar employees who have personal experience with the activities challenged in this lawsuit, are located in Austin. *See* Apffel Decl. ¶¶ 9-14. Thus, because "most of the important evidence and key witnesses" are located in Austin, factor 1 similarly supports transfer. *Ayala*, 2019 WL 2085106, at *5; *see also In re Radmax*, 720 F.3d at 288 (standard is "*relative* ease of access, not *absolute* ease of access" of sources of proof).

Finally, Plaintiffs assert that the "inconvenience" and "added cost" to Plaintiffs of litigating the case in the Western District instead of this Court disfavor transfer. Opp'n ¶¶ 13-14. Properly considered, however, the third factor—which considers "the cost of attendance for willing witnesses"—weighs in favor of transfer. *In re Radmax*, 720 F.3d at 288. That is because the

[1] As Defendant has explained, factor 6 regarding "localized interests" is not applicable here because Plaintiffs have brought a putative class action lawsuit on behalf of all Texas attorneys, not just those in Houston. *See* Mot. to Transfer 14.

Western District would be a more convenient venue for the *majority* of potential witnesses in this case, including State Bar employees, other Bar officials, and one of the three named Plaintiffs, who resides in Tarrant County. *See* Mot. to Transfer 13; *see also Volkswagen II*, 545 F.3d at 317 (considering plaintiffs' proximity to transferee venue). Plaintiffs' additional conjecture that there are "political hazards" associated with litigating this case in the Western District deserves no weight, and does not support keeping the case in this Court. Opp'n ¶ 13.

The remaining factors—which Plaintiffs do not address—also support transfer (or are at least neutral). *See* Mot. to Transfer 12-14. Further, Plaintiffs do not refute that transferring the case to the Western District would "facilitat[e] judicial economy" and efficiency, a key purpose of § 1404(a). *In re Rolls Royce Corp.*, 775 F.3d 671, 678 (5th Cir. 2014). The Court should therefore grant Defendant's motion to dismiss, or, in the alternative, grant Defendant's motion to transfer.

Dated: March 18, 2022

Respectfully submitted,

/s/ Patrick W. Mizell

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CERTIFICATE OF SERVICE

I certify that on March 18, 2022 I electronically filed the foregoing reply with the Clerk of the Court for the U.S. District Court for the Southern District of Texas by using the Court's CM/ECF system, which will send notification of such filing to the following:

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