

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:08-21243-CIV-ALTONAGA

LEAGUE OF WOMEN VOTERS OF FLORIDA,  
FLORIDA AFL-CIO, and MARILYNN WILLS,

Plaintiffs,

vs.

KURT S. BROWNING, in his official capacity  
as Secretary of State of the State of Florida, and  
DONALD L. PALMER in his official capacity as  
Director of the Division of Elections within the  
Department of State for the State of Florida,

Defendants.

\_\_\_\_\_/

**MOTION TO DISMISS FOR IMPROPER VENUE,  
OR, IN THE ALTERNATIVE, MOTION TO TRANSFER  
ACTION FOR THE CONVENIENCE OF THE PARTIES AND  
WITNESSES, AND INCORPORATED MEMORANDUM OF LAW,  
AND REQUEST FOR EXPEDITED TREATMENT**

Defendants Kurt S. Browning, in his official capacity as Secretary of State for the State of Florida, and Donald L. Palmer, in his official capacity as Director of the Division of Elections, pursuant to Federal Rule of Civil Procedure 12(b)(3), move the Court for an order dismissing this case for improper venue. In the alternative, Defendants respectfully seek an order transferring this case to the United States District Court for the Northern District of Florida, pursuant to 28 U.S.C. § 1404. Because a preliminary injunction hearing is set for June 19, 2008, Defendants respectfully seek expedited resolution of this Motion.

### **INTRODUCTION**

The Plaintiffs initiated this action on April 28, 2008, facially challenging a Florida Statute that has never been enforced. Despite the fact that both Defendants reside in Tallahassee, the sole individual Plaintiff resides in Tallahassee, organizational Plaintiff the League of Women Voters of Florida resides in Tallahassee, and organizational Plaintiff Florida AFL-CIO likewise appears to reside in Tallahassee, and despite the fact that the challenged law was enacted in Tallahassee and has not given rise to any enforcement in the Southern District (or anywhere else), Plaintiffs filed their action in this Court. Venue is not proper here, and this Court should dismiss. In the alternative, this Court should transfer the case to the Northern District of Florida, where proper venue lies.

### **VENUE IS NOT PROPER IN THIS DISTRICT**

Under 28 U.S.C. § 1391, a civil action based on federal-question jurisdiction, such as this action, may be brought only in “(1) a judicial district where any defendant resides, if all defendants reside in the same State; (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred or a substantial part of property that is the subject of the action is situated; or, (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.” *Id.* This statute does not provide a basis for venue in this District.

### **Neither Defendant Resides in the Southern District**

Neither the Secretary nor the Division Director resides in the Southern District, and the Plaintiffs have not alleged otherwise. Both reside in Tallahassee. Admittedly,

Defendants are sued in their official capacity, and “[o]fficial capacity suits are suits against state agencies, not against the people through whom agencies act,” *Hobbs v. Roberts*, 999 F.2d 1526, 1530 (11th Cir. 1993). But the Department of State itself is a resident of Tallahassee. *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. State*, 295 So. 2d 314, 317 (Fla. 1st DCA 1974) (“State of Florida, Department of State, is a department of the executive branch of the state government, which department is headed by the Secretary of State and which had its official residence at the seat of government in Tallahassee in Leon County.”)<sup>1</sup>; *see also Birnbaum v. Blum*, 546 F. Supp. 1363, 1366 (S.D.N.Y. 1982) (place where state officials perform official duties is official residence of state officials for venue purposes). This is not like *Florida Nursing Home Association v. Page*, 616 F.2d 1355 (5th Cir. 1980), *rev’d on other grounds*, 450 U.S. 147 (1981), in which a state agency headquartered in Tallahassee “maintain[ed] a large office in the Southern District and much of its business is transacted from that office.” *Id.* at 1360. Instead, the Department of State’s offices are in the Northern District. Venue would lie there.<sup>2</sup>

---

<sup>1</sup> For this reason, Florida law grants state officials a home venue privilege. “Absent waiver or exception, venue in civil actions brought against the state or one of its subdivisions properly lies in the county where the state, agency, or subdivision, maintains its principal headquarters.” *Carlile v. Game and Fresh Water Fish Comm’n*, 354 So. 2d 362, 366 (Fla. 1977). “The purpose of the home venue privilege given to state agencies is to promote orderly and uniform handling of state litigation and to minimize expenditure of public funds and manpower. In a case that is essentially a frontal challenge to an agency’s regulation, those purposes justify the application of the venue privilege.” *Fish and Wildlife Conservation Comm’n v. Wilkinson*, 799 So. 2d 258, 263 (Fla. 2d DCA 2001) (marks and citation omitted).

<sup>2</sup> All but two of the Department’s employees work in the Northern District. Pursuant to Section 267.031(5)(m), Fla. Stat., the Department maintained two “regional offices” of the Division of Historical Resources. The Legislature opted to eliminate these regional offices for budgetary reasons during the recent legislative session, effective July 1, 2008. *See* House Bill 5073. Neither of these offices had anything to do with elections.

**No Substantial Part of the Events or Omissions  
Giving Rise to the Claim Occurred in this District**

Plaintiffs allege that venue is proper in this District “on the ground that a substantial part of the events or omissions giving rise to the claims alleged herein occurred, and will continue to occur, in this district.” Compl. ¶ 13. Although they allege no specifics, presumably this allegation is limited to future harm. Indeed, they have not alleged that the challenged statute has been enforced against them or anyone else. To the extent the alleged harm lies merely in the passage of the challenged statute, that event occurred in Tallahassee. *Cf. Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1339 (M.D. Ala. 2001) (“Plaintiff’s suit is a challenge to federal legislation drafted by Congress and signed by the President in the District of Columbia.”).

To the extent the Plaintiffs argue that there could be some *future* harm in the Southern District, they have not pled sufficient supporting facts. Their sole venue allegation merely quotes a portion of 28 U.S.C. § 1391. Such a conclusory allegation is insufficient to sustain a challenge to venue. *Corley v. Osprey Ship Mgmt., Inc.*, 2007 U.S. Dist. LEXIS 5083, 4-5 (S.D. Fla. Jan. 24, 2007) (“Plaintiff only makes conclusory statements that a substantial part of the events or omissions giving rise to the claim occurred in the District. . . . [E]ven applying this provision [§ 1391], Plaintiff fails to allege any facts which would support his contention that venue is proper.”); *Biener Nissan, Inc. v. Nissan N. Am., Inc.*, 2004 U.S. Dist. LEXIS 2756, 2-3 (S.D.N.Y. Feb. 24, 2004) (“Plaintiffs’ Complaint alleges only in a conclusory fashion that venue was proper in this district, pursuant to 28 U.S.C. § 1391, ‘because a substantial part of the events giving rise to the claim occurred in this District.’ Indeed, as Defendant correctly points

out, ‘the Complaint does not describe a single event that actually occurred in the Southern District of New York.’”) (citation and note omitted).

If there is future harm to be suffered by Plaintiffs, logic suggests that the harm would be where the Plaintiffs are. Plaintiff Wills states in her declaration that she is a resident of Tallahassee. (Doc. 2, p.5.) Plaintiff League of Women Voters of Florida has its only office in Tallahassee. (Doc. 2, p. 11-12). The website of the remaining Plaintiff, the Florida AFL-CIO, states that it too is located in Tallahassee, *see* <http://www.flafcio.org/main/page/wwa> (last visited May 7, 2008), and its president, Cynthia Hall, submitted a declaration in this case saying she also lives in Tallahassee. (Doc. 2, p.12.)

There is nothing to suggest that a substantial part of events giving rise to this litigation took place in this District. And events that are only tangentially related “do not meet the substantiality component of section 1391(e)(2).” *Rogers*, 129 F. Supp. 2d at 1339. It is the Plaintiffs’ burden to institute an action in the proper District, because “to hold otherwise would circumvent the purpose of the venue statutes—it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue.” *Delta Air Lines, Inc. v. Western Conference of Teamsters Pension Trust Fund*, 722 F. Supp. 725, 727 (N.D. Ga. 1989). In this case, the Plaintiffs have chosen an improper venue. Pursuant to 28 U.S.C. § 1406(a), this Court should dismiss or transfer it to a District in which it could have been brought—in this case, the Northern District of Florida.

**EVEN IF VENUE IS PROPER IN THIS DISTRICT, THE COURT SHOULD  
TRANSFER TO THE NORTHERN DISTRICT OF FLORIDA FOR THE  
CONVENIENCE OF THE PARTIES AND WITNESSES**

If this Court concludes that venue is proper in this District under 28 U.S.C. § 1391, it should nonetheless transfer the case to the Northern District of Florida for the convenience of the parties and witnesses. Under 28 U.S.C. § 1404, the Court may do just that, “in the interest of justice.” Although the Court *must* dismiss or transfer if venue is improper, it has wide discretion to transfer under Section 1404. But where a transfer would be appropriate under Section 1404, the Court need not even determine whether venue was proper in the first instance. *See, e.g., Pepsico, Inc. v. Board of Trustees*, 1988 U.S. Dist. LEXIS 5322, 6-7 (S.D.N.Y. June 10, 1988) (“The court need not decide whether venue is properly placed in this district since, even if it were to be decided that the Fund is ‘doing business’ in this district, this Court finds that venue should be transferred to the Western District of Washington pursuant to 28 U.S.C. § 1404(a) for the reasons given below. Accordingly, this Court does not reach the Fund’s motion for transfer pursuant to 28 U.S.C. § 1406(a).”); *accord Matra Et Manhurin v. International Armament Co.*, 628 F. Supp. 1532, 1534 n.2 (S.D.N.Y. 1986) (same).

The “interests of justice” is a broad concept, but generally, the Section 1404 factors for a Court’s consideration are: “(1) the convenience of the witnesses; (2) the location of relevant documents and the relative ease of access to sources of proof; (3) the convenience of the parties; (4) the locus of operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) a forum’s familiarity with the governing law; (8) the weight accorded a plaintiff’s choice of forum; and (9) trial efficiency and the interests of justice, based on the totality of the

circumstances.” *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 n.1 (11th Cir. 2005).

These factors weigh heavily in favor of transfer.

### **Convenience of the Witnesses**

The Plaintiffs have so far identified four witnesses. Each of them has submitted a declaration in this case, and none of them resides in the Southern District of Florida. Cynthia Hall, Marilyn Wills, and Alma Gonzales all reside in Tallahassee, and Dianne Giliotti resides in Palm Harbor, which is in the Middle District. (Doc. 2, pp. 5, 10, 23, 32.) Both Defendants reside in Tallahassee, as does their staff. (Plaintiffs’ counsel has represented to the undersigned that they wish to depose certain members of Defendants’ staff.) Although Defendants have not definitively determined their witness list at this early stage of the litigation, it is likely that they will call some employees, who are residents of Tallahassee.

### **Location of Relevant Documents**

The Plaintiffs have also indicated a desire for review of a substantial body of documents. Defendants’ documents are in Tallahassee. Presumably, Plaintiffs’ documents, to the extent any relate to this litigation, are in Tallahassee as well.

### **Convenience of the Parties**

As discussed above, all parties reside in Tallahassee. Litigation would be most convenient in Tallahassee. There are no facts to suggest that this District would be more convenient for any party.<sup>3</sup>

---

<sup>3</sup> The fact that the Secretary waived a venue objection in the earlier iteration of this case is of no effect. At that time, the Secretary was a defendant in another case in this Court that included local defendants, two of the original Plaintiffs in this case (AFSCME and AFL-CIO), and which involved some of the same issues presented in this case. That case was recently tried before Judge King, who entered judgment in favor of

### **Locus of Operative Facts and Availability of Process**

This is a facial challenge to a Florida Statute, and there are very few, if any, operative facts that will impact this litigation. Furthermore, the availability of process should not be a significant factor. There is nothing to suggest that any potential witness will not be subject to process or would be unwilling to testify.

### **Relative Means of Parties**

A primary reason for Defendants' desire for a transfer is cost. The Secretary is mindful of protecting taxpayer dollars, particularly as the State finds itself in a well-known budget shortfall. The Secretary's counsel is located in Tallahassee and has defended various related challenges to the Florida Election Code, including several brought by Plaintiffs and their counsel. Hiring separate Miami counsel would involve additional costs in familiarizing new counsel with the issues related to this litigation. But with litigation pending in Miami, Defendants are forced to pay for their counsels' travel. In recently concluded litigation in this District, the Secretary incurred substantial travel costs.

Plaintiffs' counsel reside in Washington D.C. and New York City, so they will travel regardless of whether the case proceeds in Miami or Tallahassee. Indeed, the same counsel have already traveled to the Northern District for a hearing in the *NAACP* case cited below.<sup>4</sup> (Plaintiffs also employ local counsel, whose involvement appears limited. Defendants' counsel have had no discussions with Plaintiffs' local counsel regarding this

---

the Secretary. *Diaz v. Browning*, -- F. Supp. 2d --, 2008 U.S. Dist. LEXIS 27361 (S.D. Fla. Mar. 25, 2008) (King, J.). The Secretary currently has no other litigation pending in this District.

<sup>4</sup> Although that case is pending in the Tallahassee Division, the hearing took place in the United States Courthouse in Gainesville, Florida.



litigation. To date in this case, as in the earlier challenge to this law and in the *Diaz* case, Defendants' counsel interacted exclusively with Plaintiffs' New York and Washington-based counsel.) All available facts suggest that the costs to both sides would be lower if the case proceeded in Tallahassee.

#### **Forum's Familiarity with Controlling Law**

The controlling law in this case is the United States Constitution. Plaintiffs have asserted no statutory claims. Defendants are confident that this Court is familiar with issues of Constitutional law, and they are confident that the Court for the Northern District is as well. The Northern District is currently handling a case asserting a constitutional challenge to another provision of the Florida Election Code—a case that Plaintiffs' counsel in this case brought against the Secretary. *NAACP v. Browning*, No. 07-402 (N.D. Fla.) (Mickle, J.). By encompassing the seat of Florida's government, the District Court for the Northern District of Florida may be more familiar with Florida's election laws than many other Courts.

#### **Weight Accorded Plaintiffs' Choice of Forum**

Although a Plaintiff's choice of forum must be given appropriate weight, in this case the choice reveals no obvious benefit for Plaintiffs. The interests of justice support a transfer to the Northern District of Florida.

#### **Trial Efficiency, Interests of Justice, Totality of Circumstances**

For all of the reasons cited above, it is clear that considering the totality of circumstances, a transfer is appropriate.

**REQUEST FOR EXPEDITED TREATMENT**

Plaintiffs intend to file a motion for preliminary injunction, on which this Court will hold a June 19 hearing. For this reason, Defendants respectfully suggest that an expedited resolution of this Motion is appropriate.

**WHEREFORE**, Defendants respectfully request entry of an order dismissing this action for improper venue, or, in the alternative, transferring this action to the Northern District of Florida. Defendants further request expedited treatment of this Motion.

**CERTIFICATE OF PRE-FILING CONFERENCE**

Counsel for Defendants contacted counsel for Plaintiffs in a good faith effort to resolve the issues raised in this Motion. Plaintiffs do not consent to the relief sought.

**CERTIFICATE OF SERVICE**

**I hereby certify** that a true and correct copy of the foregoing was served through the Court's CM/ECF system on all counsel or parties of record on the attached service list this eighth day of May, 2008.

/s/ Allen Winsor

**PETER ANTONACCI**

Florida Bar No. 280690

Email: pva@gray-robinson.com

**ALLEN WINSOR**

Florida Bar No. 016295

Email: awinsor@gray-robinson.com

**ANDY BARDOS**

Florida Bar No. 822671

Email: abardos@gray-robinson.com

**GRAYROBINSON, P.A.**

301 South Bronough Street, Suite 600

Post Office Box 11189 (32302)

Tallahassee, Florida 32301

Telephone: 850-577-9090

Facsimile: 850-577-3311

*Attorneys for Defendants*

**SERVICE LIST**

**CASE NO. 1:08-21243-CIV-ALTONAGA**

Gary C. Rosen  
Becker & Poliakoff, P.A.  
3111 Stirling Road  
Fort Lauderdale, FL 33312  
Telephone: 954-985-4133  
*Attorney for Plaintiffs*

Elizabeth S. Westfall  
ADVANCEMENT PROJECT  
1730 M. Street, N.W., Suite 910  
Washington, D.C. 20036  
Telephone: (202) 728-9557  
*Attorney for Plaintiffs*

Wendy Weiser  
Renée Paradis  
Brennan Center for Justice  
161 Avenue of the Americas, 12<sup>th</sup> Floor  
New York, NY 10013  
Telephone (212) 998-6730  
*Attorneys for Plaintiffs*

James E. Johnson  
S.G. Dick  
Derek Tarson  
Jessica Simonoff  
Corey Whiting  
Courtney Dankworth  
DEBEVOISE & PLIMPTON LLP  
919 Third Avenue  
New York, New York 10022  
Telephone: (212) 909-6000  
*Of Counsel for Plaintiff League of Women  
Voters of Florida*