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.
_____/

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS FOR IMPROPER VENUE, OR, IN THE ALTERNATIVE, MOTION TO TRANSFER ACTION FOR THE CONVENIENCE OF THE PARTIES AND WITNESSES

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, respectfully submit this reply in support of their Motion to Dismiss for Improper Venue, or, in the Alternative, Motion to Transfer Action for the Convenience of the Parties and Witnesses. (Doc. 20.)

Venue Is Not Proper In This District

On this issue of whether venue is proper in this District, Plaintiffs attack Defendants' arguments only after mischaracterizing them. They first accuse Defendants of arguing that venue is improper in this District because future harm generally cannot support venue. (Resp. at 3.) Defendants made no such argument. Nor did Defendants

argue that venue for a challenge to a statute could lie only where the statute was enacted. (Resp. at 3; Motion at 4.) Instead, Defendants noted that if Plaintiffs will be harmed in the future, they will be harmed where they reside—which is not in this District. (Motion at 4-5.)

Defendants have not suggested that a challenge to this law could never lie outside the Northern District; under the right circumstances it could. But Plaintiffs bear the burden of pleading and demonstrating that "a substantial part of the events or omissions giving rise to the claim occurred" in this District—a burden they have not met. They cite Paragraphs 6-10, 16, 19, 36, 38-47, 81-82, and 94-106 of their Complaint as alleging that a substantial portion of future harm will take place in this District, but those paragraphs do not do that. And their conclusory venue allegation is legally insufficient. The alleged harm would take place—if at all—where Plaintiffs are. And they are not in this District. Venue does not properly lie here.

Even If Venue Were Proper In This District, the Court Should Transfer for the Convenience of the Parties and Witnesses

Even if venue is proper in this District, the Court should transfer the case to the Northern District of Florida, where all five of the parties reside. Plaintiffs' primary argument against transfer is that they brought the case here. But "the usual presumption in favor of a plaintiff's forum choice is greatly lessened when the plaintiff does not reside in the forum of his choice." *Cellularvision Tech. & Telecomms., L.P. v. Cellco P'ship*, 2006 U.S. Dist. LEXIS 81641, *5 (S.D. Fla. July 27, 2006); *accord Culp v. Gainsco, Inc.*, 2004 U.S. Dist. LEXIS 22390, *10 (S.D. Sept. 22, 2004) (same); *see also La Seguridad v. Transytur Line*, 707 F.2d 1304, 1307 (11th Cir. 1983) ("A plaintiff who chooses a foreign forum substantially undercuts the presumption his choice is reasonable: 'because

the central purpose of any *forum non conveniens* inquiry is to ensure that the trial is convenient, a foreign plaintiff's choice deserves less deference.'") (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 256 (1981) (note omitted)).

"It logically follows that the deference to Plaintiff's choice is even less where, as here, *all of the parties reside outside of the chosen forum*." *Cellularvision,* 2006 U.S. Dist. LEXIS 81641 at *6 (emphasis added). Recently, the United States District Court for the Middle District adhered to this approach. In *Ramada Worldwide, Inc. v. AB Assocs. Midland Mgmt*., 2008 U.S. Dist. LEXIS 30924, *16-17 (M.D. Fla. Mar. 28, 2008), the Court noted that because both defendants resided in the Western District of New York, venue would be more convenient for them there. And because Plaintiff was a New Jersey resident, the Western District of New York would likewise be more convenient for it, given New Jersey's proximity to New York. *Id.* at *16. Because the material events took place outside of the Middle District, and because "all parties reside either in New York or New Jersey, venue in the Western District of New York would be more convenient to the parties than Plaintiff's choice of venue." *Id.*

Similarly, in *Thermal Technologies., Inc. v. Dade Services Corp*., 282 F. Supp. 2d 1373 (S.D. Fla. 2003), this Court transferred the case to another District in Florida on grounds equally applicable here:

> Plaintiffs here have provided two reasons to keep the case in the Southern District, that they chose to file the case here in the first place, and that some infringing acts and/or solicitations to infringe may have occurred in the Southern District. Plaintiffs do not contest that it would be more convenient for Defendant to have the case tried in the Middle District or that it will be equally inconvenient for Plaintiffs to try the case in either the Southern or the Middle District. Therefore, Plaintiffs' choice of forum is entitled to less deference, and this case will be transferred to the Middle District of Florida.

Id. at 1379. In that case, like this one, there was no question that the convenience to Defendants favored a transfer. But unlike the case at hand, the inconvenience to the Plaintiffs was equal in either District. Here, because every Plaintiff resides in the Northern District, a transfer would promote the convenience of all parties.

While not disputing the convenience of the Northern District to them, Plaintiffs cite *Cellularvision Tech. & Telcoms., L.P. v. Cellco P'ship*, 2006 U.S. Dist. LEXIS 75363 (S.D. Fla. Sept. 12, 2006) for the proposition that "it is difficult to argue that [a] forum is inconvenient" to a Plaintiff who selected it. (Resp. at 10.) The opinion's next two sentences are more telling: "However, it is impossible to ignore the fact that [Plaintiff] has chosen a forum with which it has little or no apparent connection, aside from the location of their counsel. Plaintiff is headquartered in New York with offices in New Jersey and Connecticut, all documents and witnesses are located in the Northeast region of the country *and it is difficult to imagine how the Plaintiff's convenience will be materially advanced by litigation in South Florida rather than in New Jersey*." *Id.* at *7-8 (emphasis added). That opinion went on to grant the motion to transfer, finding "that the convenience of the parties weigh[ed] in favor of transfer." *Id.* at 8. The same analysis applies here.

A transfer would also promote efficiency in terms of financial cost.[1] Plaintiffs do not dispute the fact that litigating in Miami would be more expensive for Defendants, who, along with their counsel, reside in Tallahassee.[2] Nor do they dispute the fact that

[1] Plaintiffs incorrectly believe that the State Attorney for the Eleventh Judicial Circuit is obligated to defend the state's interest in this case. (Resp. at 9.)

[2] Plaintiffs again mischaracterize Defendants' argument, this time suggesting that Defendants would employ separate Miami counsel if the case remained in this District. (Resp. at 9.) Defendants retained their current counsel precisely to avoid the cost of

their Miami counsel is not substantively involved in the case. Their Washington D.C.- and New York-based counsel will have to travel regardless of whether the case proceeds in Miami or Tallahassee.[3]

Much of Plaintiffs' additional argument relies on the fact that the Defendants have not identified key non-party witnesses residing outside of this District. Plaintiffs are correct that the identity of witnesses in this case remains up in the air. Indeed, this facial challenge to a state statute will require minimal—if any—factual development. *See Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1274 (11th Cir. Fla. 2005) ("The First Amendment questions—which are the only issues before us—are purely legal; indeed, [Plaintiff's] constitutional challenge to the sign code is facial rather than as applied, so that our resolution of the legal questions is only minimally intertwined with the facts."). Plaintiffs nonetheless argue that because Defendants have not yet determined the witnesses on which they will rely, a transfer is not permitted. (Motion at 7.) This contention is incorrect.

First, there is no single factor that will demand or preclude a transfer. "While a number of factors relevant to transfer are appropriately considered, 'ultimately, the resolution of the question is for the Court's discretion.'" *Ramada Worldwide*, 2008 U.S.

---

familiarizing new counsel with the issues presented in this case. (Motion at 8.) But if this case remains in Miami, Defendants will unnecessarily incur additional travel costs. And to be clear, Defendants are not asserting the convenience of the undersigned counsel as grounds for transfer. Counsel's convenience is immaterial. The attendant costs to the Defendants and Florida's taxpayers, though, are not.

[3] The only difference would be that Plaintiffs' counsel would have to change planes en route to Tallahassee. Plaintiffs' argument to this effect, and the declaration of their travel agent, should be given little weight. *See Cellularvision Tech. & Telecomms., L.P. v. Cellco P'ship*, 2006 U.S. Dist. LEXIS 81641, 5-7 (S.D. Fla. July 27, 2006) ("It appears that the only real convenience in this district is for Plaintiff's counsel, but that convenience is generally not an appropriate consideration.").

Dist. LEXIS 30924 at *16 (quoting *Cortez v. First City Nat'l Bank of Houston*, 735 F. Supp. 1021, 1023 (M.D. Fla. 1990)). Moreover, the location of potential witnesses is certainly a relevant consideration. If it were not, then Plaintiffs' recital that they have identified potential witnesses whose existence "weighs in the analysis" would be incorrect.[4] *Cf. Culp v. Gainsco, Inc*., 2004 U.S. Dist. LEXIS 22390, *15 (S.D. Fla. Sept. 22, 2004) (granting transfer, noting "that there are other unnamed potential witnesses located within the [transferee district]" and finding that a transfer "would ease the burden of depositions and trial testimony on the majority of the potential trial witnesses, named and unnamed"). Moreover, none of the declarations Plaintiffs have submitted in this case are of residents of this District, but several are from residents of the Northern District.

Plaintiffs' last two arguments warrant little discussion. First, there is nothing to suggest that their claims would be more quickly decided in one forum than another. And if Plaintiffs held that concern, their appropriate course would have been to bring this action in an appropriate forum—the Northern District of Florida—just as their counsel did in another recent challenge to another provision of the Florida Election Code.[5] *NAACP v. Browning*, No. 07-402 (N.D. Fla., filed Sept. 21, 2007). In that case, the Court held a prompt hearing and rendered a prompt decision, as the Plaintiffs requested. Finally, Plaintiffs' argument that Defendants "induced" them into withdrawing their

[4] Although not pertinent here—other than for the sake of presenting an accurate record—Defendants note that nothing said at the Rule 26(f) conference was inconsistent with their venue motion. The Defendants were (and are) not certain which witnesses they will rely on at the scheduled hearing. It is likely, though, that if factual issues remained to be litigated at a trial, they would call employees residing in Tallahassee.

[5] The Advancement Project and the Brennan Center, both counsel in this action, represent the Plaintiffs in that challenge. Debevoise & Plimpton, which is of counsel to Plaintiff League of Women Voters of Florida in this case, were not counsel of record in the *NAACP* litigation.

motion for a temporary restraining order by not objecting to venue is without merit. The consent order that withdrew Plaintiffs' initial motion also stated unambiguously that "the parties agree that Defendants' consent to this order does not operate to waive any defenses referenced in Federal Rule of Civil Procedure 12." (Doc. 15.) Rule 12 governs motions to dismiss based on improper venue. Fed. R. Civ. P. 12(b).

Conclusion

All parties reside in the Northern District, and Plaintiffs do not seriously dispute the fact that the litigation would be more convenient there for all parties. Plaintiffs' forum selection notwithstanding, venue does not lie here. It lies in Tallahassee. Therefore, Defendants respectfully request that this Court enter an order dismissing the action for improper venue, or, in the alternative, transferring this case to the Northern District of Florida, Tallahassee Division.

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 twentieth 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

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

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