IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

WILLIAM EVERETT WARINNER and JAMES C. MILLER, SR., Plaintiffs, v. KEN DETZNER, in his official capacity as Secretary of State of the State of Florida, Defendant.	No. 6-13-cv-1860-ORC 28 DAB RESPONSE TO MOTION TO DISMISS OR TRANSFER VENUE

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OR,

ALTERNATIVELY, TO TRANSFER VENUE

Defendant Secretary of State has filed a Motion to Dismiss or, Alternatively, to Transfer Venue, claiming venue is proper in the Northern District of Florida and improper in the Middle District. Plaintiffs respectfully request that the Court deny Defendant's motion.

ARGUMENT

I. VENUE IS PROPER IN THE MIDDLE DISTRICT OF FLORIDA

As an initial matter, Defendant's claim that venue in the Northern District is proper is of no consequence. Although a civil action could be brought in the Northern District under 28 U.S.C. § 1391(b), "proper venues are not mutually exclusive." *McClure v. Manchin*, 301 F. Supp. 2d 564, 569 (N.D. W. Va. 2003). "Indeed, venue is subject to the choice of the plaintiffs, not the defendant." *Id.*; *see also DeBacco v. DeBacco*, No. 2:12-CV-256-FtM-UASPC, 2012 WL 3609844, at *11 (M.D. Fla. Aug. 6, 2012) (noting presumption in favor of plaintiff's choice of forum). Accordingly, where venue is proper in multiple districts, Plaintiffs' choice of forum is given considerable deference.

Defendant argues he "resides" in the Northern District for purposes of 28 U.S.C. § 1391(b)(1) because the City of Tallahassee is the "seat of government." Mot. to Dismiss, Dkt. #21 at 3 (quoting Art. II § 2, Fla. Const.). But while Defendant cites to Florida law's "home venue privilege," there is no federal rule that requires actions against the Secretary of State "to be brought only in the district in which the state's seat of government is located, and no inconvenience resulting from litigating in the State's more populous district reasonably can be claimed by a state official who has a mandate to administer elections throughout the State." *Bay Cnty. Democratic Party v. Land*, 340 F. Supp. 2d 802, 804 (E.D. Mich. 2004). Indeed, "[t]he prevailing view is that suits against government officials generally are proper in the judicial district in which those officials perform their duties." *Id.* at 808 (citing *Fla. Nursing Home Ass'n v. Page*, 616 F.2d 1355, 1360 (5th Cir. 1980), *rev'd on other grounds, sub nom. Fla. Dep't of Health & Rehab. Servs. v. Fla. Nursing Home Ass'n*, 450 U.S. 147, 171 (1981)); *see also Buffalo Teachers Fed'n, Inc. v. Helsby*, 426 F. Supp. 828, 829-30 (S.D.N.Y. 1976) (in suit against state governmental official in federal district court, defendant may have more than one "residence" for venue purposes). Here, there is no question that Defendant has a statutory obligation to perform his official duties not only in Tallahassee but throughout the State. *See* § 97.012, Fla. Stat. "It is abundantly clear that [Defendant] perform[s] official duties in this district and therefore 'reside[s]' here within the meaning of 28 U.S.C. § 1391(b)(1)." *Bay Cnty. Democratic Party*, 340 F. Supp. 2d at 808.

Additionally, 28 U.S.C. § 1391(b)(2) permits venue to be laid in any district "in which a substantial part of the events . . . giving rise to the claim occur[]." "In cases involving state officials, a substantial connection to the claim occurs not only where the 'triggering event' takes place, but also where the effects of the decision are felt." *Bay Cnty. Democratic Party*, 340 F.

Supp. 2d at 809; *see also First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 263 (6th Cir. 1998) ("[T]his includes any forum with a substantial connection to the plaintiff's claim."); *U.S. v. Sec'y, Fla. Dep't of Corr.*, No. 12-22958-CIV, 2012 WL 6626818, at *2 (S.D. Fla. Dec. 19, 2012) (denying motion to dismiss or transfer venue where policy decision occurred in Tallahassee but "harm has clearly occurred in the Southern District of Florida"); *Sch. Dist. of Phila. v. Pa. Milk Mktg. Bd.*, 877 F. Supp. 245, 249 (E.D. Pa. 1995) (venue is proper "so long as [the district] has a substantial relationship to the action"). Defendant does not dispute that District 5's geographical boundaries fall well within the Middle District. Indeed, the vast majority of the District--which includes Duval, Clay, Putnam, Alachua, Marion, Lake, Seminole, and Orange Counties--is located in the Middle District. Accordingly, "a substantial part of the events giving rise to the claim" occurred in the Middle District.

Defendant's citation to pre-1990 cases on this point, including *Leroy v. Great Western United Corp.*, 443 U.S. 173 (1979), and *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 925 (W.D. Mo. 1982), is inapposite, as the venue statute was significantly liberalized in 1990. Because of those amendments, courts "no longer ask which district among the two or more potential forums is the best venue. Rather, they ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts." *First of Mich.*, 141 F.3d at 263 (internal quotation marks and citation omitted). "The amended venue statute was intended to expand the number of venues available to a plaintiff." *Winnebago Tribe of Neb. v. Babbitt*, 915 F. Supp. 157, 166 (D.S.D. 1996) (finding venue proper in Northern District of South Dakota even though plaintiff was a Nebraska tribe and defendant governmental agency resided in Washington). "Defendants' argument ignores the fact that under the 1990 Amendments to (b)(2), a case need not be tried in the *best* place, but merely a place with substantial contacts.

The 'fact that substantial activities took place in district B does not disqualify district A as proper venue as long as substantial activities took place in A, too . . . even if it is shown that the activities in B were more substantial.'" *Sch. Dist. of Phila.*, 877 F. Supp. at 249 (quoting *Database Am. v. Bellsouth Adver. & Publ'g Corp.*, 825 F. Supp. 1216, 1224 (D.N.J. 1993); *see also Merchants Nat'l Bank v. Safrabank (Cal.)*, 776 F. Supp. 538, 541 (D. Kan. 1991). Thus, Defendant's suggestion that the activities taking place in the Northern District are more substantial than those in the Middle District misses the mark and does not negate the propriety of venue in the Middle District. The Middle District "may or may not have the strongest ties to this case; the law, however, does not require that such an analysis be done or that such a determination be made." *Wilson v. Pa. State Police Dep't*, No. CIV. A. 94-6547, 1995 WL 129202, at *2 (E.D. Pa. Mar. 24, 1995).

In fact, Defendant's argument that venue is only proper in the Northern District is belied by multiple Florida redistricting cases filed and heard in both the Middle and Southern Districts. *See, e.g.*, *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002); *Wolfson v. Nearing*, 346 F. Supp. 799 (M.D. Fla. 1972); *Sobel v. Adams*, 208 F. Supp. 316 (S.D. Fla. 1962). *See also Bay Cnty. Democratic Party*, 340 F. Supp. 2d at 804 ("Federal actions against the Michigan secretary of state over rules and practices governing federal elections traditionally have been brought in both the Eastern and Western Districts of Michigan.").

II. DEFENDANT HAS NOT SHOWN THAT A TRANSFER OF VENUE IS WARRANTED

Nor is a change of venue appropriate under 28 U.S.C. § 1404(a). This statute provides that "[f]or 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 or to any district or division to which all parties have consented." *Id.* "[T]he Eleventh Circuit has

determined that a court should be somewhat restrictive in transferring actions, stating that the plaintiff's choice of forum should not [be] disturbed unless the movant can show that it is clearly outweighed by other considerations." *DeBacco*, 2012 WL 3609844, at *11 (internal quotation marks and citation omitted). "In order to overcome the presumption in favor of plaintiff's choice of forum, the movant must show that the balance of convenience is 'strongly in favor' of the transfer." *Id. See also Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 260 (11th Cir. 1996) (holding that plaintiff's choice of forum should not be disturbed unless it is "clearly outweighed" by other considerations); *Oller v. Ford Motor Co.*, Nos. 92–523–CIV–T–17A, 92-555-CIV-T-15C, 1994 WL 143017, at *2 (M.D. Fla. Mar. 30, 1994) ("[U]nless the balance of convenience and interest of justice strongly favor the defendant, the plaintiff's choice of forum will rarely be disturbed."). Accordingly, on a motion to transfer venue of a case, "the burden is on the defendant, when it is the moving party, to establish that there should be a change in forum." *Mason v. Smithkline Beecham Clinical Labs.*, 146 F. Supp. 2d 1355, 1359 (S.D. Fla. 2001). "Defendants moving for transfer have a heightened burden as they must prove with particularity the inconvenience caused by the plaintiff's choice of forum." *Id.*

Defendant's footnote listing the factors in favor of a transfer is not sufficient to overcome the deference due to Plaintiffs' choice of forum. *See* Mot. to Dismiss, Dkt. #21 at 7 n.4. Defendant cites the "location of relevant documents and ease of access to sources of proof," *id.*, but in the age of electronic discovery and filing, it is implausible that the physical location of original government documents will provide any practical limitation. *Cf. Ark. Right to Life State Political Action Comm. v. Butler*, 972 F. Supp. 1187, 1194 (W.D. Ark. 1997) ("The court cannot imagine that the parties would attempt or be required to submit all of those [campaign contribution] records for the court's examination, nor can the court foresee that the parties would

be required to continually return to the records for reexamination."). Moreover, attorneys for the Secretary of State regularly litigate in this Court, undermining the notion that litigation in the Middle District would impose a substantial or unusual burden on Defendant. While Defendant highlights that Plaintiffs' physical addresses are in the Northern District, he fails to mention that Plaintiffs' Gainesville homes are actually closer to Orlando than they are to Tallahassee. Additional factors militating in favor of retaining venue in the Middle District include ease of travel for out-of-state counsel who intend to file pro hac vice applications, *see* Compl., Dkt. #1 at 12, and that the Chief Judge of the Eleventh Circuit has already appointed a three-judge panel in this case, Dkt. #9, two of whom sit in the Middle District.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that Defendant's Motion to Dismiss or, Alternatively, to Transfer Venue be denied.

DATED this 5th day of February, 2014.

___/s/_____

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**Pro hac vice*

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed in the Court's CM/ECF System this 5th day of February, 2014, and thereby served upon all counsel of record.

_____/s/_____

Robert J. Telfer III