IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SOUTHERN POVERTY LAW CENTER, *Plaintiff*, v. U.S. DEPARTMENT OF HOMELAND SECURITY, *et al.*, *Defendants*.	Civil Action No. 18-0760 (CKK)

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO RECONSIDER ORDER DENYING MOTION TO SEVER AND TRANSFER VENUE

Defendants United States Department of Homeland Security and U.S. Immigration and Customs Enforcement ("Defendants"), by and through their undersigned counsel, respectfully submit this Reply to Plaintiff, Southern Poverty Law Center's ("SPLC"), Response to Defendants' Motion to Reconsider Order Denying Motion to Sever and Transfer Venue. *See* ECF No. 217 ("SPLC's Response").

I. Defendants Have Met Their Burden to Show Justice Requires Reconsideration

A. Subsequent Recharacterization of SPLC's Claims as Condition of Confinement Claim is a Substantial Change in Facts Because It Directly Bears on the Court's Original Reasoning For Denying Transfer

Contrary to SPLC's assertion, Defendants have met their burden to justify reconsideration. "Justice may require reconsideration . . . where a controlling or significant change in the law or facts has occurred since the submission of the issue to the court." *McLaughlin v. Holder*, 864 F. Supp. 2d 134, 141 (D.D.C. 2012) (quotation omitted). "Developments that do not bear on the reasoning behind an order that a party asks a court to reconsider are not 'significant change[s]' . . . in the facts of a case." *Id.* (quotation omitted).

Here, the recharacterization of SPLC's case as primarily a conditions of confinement matter is a "significant change in the facts of the case" which warrants reconsideration because it directly impacts the reasoning of the Court's denial of Defendants' Motion to Transfer. This change is most recently encapsulated in the Court's recent dismissal of SPLC's access to counsel claim. *See* Defs.' Mot. Reconsider 5–6, ECF No. 216. SPLC attempts to sidestep this in two ways: first, they argue that this development is "procedural" not "factual." SPLC's Response 6, ECF No. 217. However, it is indisputable that this matter now primarily focuses on conditions of confinement and not nationwide policies or their enforcement. *See* Mem Op. 2, ECF No. 201 (noting "Plaintiff alleges that *their clients' conditions of confinement violate* the Fifth Amendment and the Administrative Procedures Act, 5 U.S.C. §§ 551 *et seq*") (emphasis added). It is also indisputable that this development directly undermines the Court's original reasoning for denying transfer. *Compare* Mem. Op. 4, ECF No. 62 ("Plaintiff has styled this as a case focused on national issues of immigrants' access to counsel during detention; accordingly, the local interest in conditions at the individual detention facilities weighs less heavily than the national interests involved.") *with* Mem. Op. 13, ECF No. 201 ("Although Plaintiffs couch all their Fifth Amendment claims as "conditions of confinement" claims, these claims in fact revolve entirely around the conditions' *effects* on Fifth Amendment rights *as to removal proceedings*."). As such, it meets the definition of a significant change in facts. *See McLaughlin*, 864 F. Supp. 2d at 141.

SPLC next accuses Defendants of misquoting the Court's Opinion dismissing its access to counsel claim, arguing that "Defendants thus attempt to attribute to the Court a position that the Court was clearly attributing to Plaintiff." SPLC's Response 7 n.6, ECF No. 217. This however ignores the multiple other instances in the decision characterizing SPLC's other claims

as condition of confinement claims. *See, e.g.*, Mem. Op. 13, ECF No. 201 ("In other words, to determine whether Defendants *in fact* violated Plaintiff's client's right to access to counsel for the purposes of removal proceedings by setting certain conditions of confinement, the Court must look to the effects on the representation in the removal proceedings themselves."); *see also id.* at 13 (comparing the case to *Nat'l Immigration Project* where "several detainees and legal services organizations challenged *the same kinds of conditions of confinement* as raised in this case, alleging that those conditions of confinement violated, among other things, the Fifth Amendment's guarantee of access to counsel as to removal proceedings") (emphasis added).

Moreover, this recharacterization matches the positions SPLC has taken in discovery to date. While SPLC argues that this is an "incomplete" picture of all of the discovery in the case, this misses the point. The Court's original order denied severance because "[r]esolution of the legal and factual issues in this case—even conditions that may differ from one facility to another—would seem to turn on those national standards and Defendants' enforcement of them." Mem. Op. 2, ECF No. 62. This directly contradicts the argument SPLC has made that it is entitled to facility specific discovery. Pl. Mot. Compel 31, ECF No. 116 ("Facility staff members would likely possess not only relevant but also crucial information at the very heart of SPLC's claims."). SPLC's position that facility specific discovery and custodians "have crucial information at the very heart of SPLC's claims" cannot be reconciled with the Court's rationale that "because this case focuses predominantly on Defendants' policy and enforcement decisions at the national and regional levels . . . [m]ost of the evidence as to those issues is likely found in this jurisdiction [D.C.] and other jurisdictions outside of the Middle District of Georgia." Mem. Op. 4, ECF No. 62. This clearly demonstrates that the "gravamen" or "heart" of SPLC's claim is

not enforcement of national standards, but conditions at the three specific facilities, warranting reconsideration of severance and transfer.

Finally, while SPLC objects to the Court considering Defendants' (now filed) Partial 12(c) Motion for Judgment on the Pleadings, ECF No. 219, on the grounds that it is has "no effect on the current nature of the case," *see* SPLC's Response 6 n.6, ECF No. 217, dismissal of four of SPLC's five remaining claims, including its Administrative Procedure Act claim, would be a significant change that would further support reconsideration as the only claim remaining then would be SPLC's Fifth Amendment punitive-conditions claim. *See generally* Defs.' Mot. Judgment on the Pleadings, ECF No. 219. There is no prohibition on the Court considering multiple motions simultaneously. *See, e.g.*, *Allen v. McEntee*, No. CIV. A. 92-0776(RCL), 1993 WL 121513, at *2 (D.D.C. Apr. 5, 1993), *aff'd*, 44 F.3d 1031 (D.C. Cir. 1994) (deciding nine different motions from two related cases simultaneously).

B. Harm to Public Interests Will Result From Denial of Reconsideration

Contrary to SPLC's assertion, *see* SPLC's Response 4, ECF No. 217, Defendants have also demonstrated that some harm, legal or at least tangible, would flow from a denial of reconsideration." *Cobell v. Norton*, 355 F. Supp. 2d 531, 540 (D.D.C. 2005). In demonstrating that the public and private interests now weigh in favor of transfer, Defendants have simultaneously established the requisite harm. SPLC's own response, however, only addresses the harms emanating from private interest and disregards the harms to the public interest. SPLC's Response 5, ECF No. 217. This is because SPLC attempts to shift the burden by asserting Defendants must demonstrate that they will suffer harm themselves from a denial of reconsideration. *See* SPLC's Response 4, ECF No. 217. This is not the standard; Defendants do not need to establish that they will suffer harm, only that "some harm" would occur. *Cobell*, 355 F. Supp 2d at 540. Indeed, courts have allowed demonstration of harm to non-parties to suffice

for reconsideration. *See, e.g.*, *Brennan Ctr. for Just. at New York Univ. Sch. of L. v. United States Dep't of Just.,* No. CV 18-1860 (RDM), 2021 WL 2711765, at *14 (D.D.C. July 1, 2021) ("[T]he Court is persuaded that the public disclosure of docket numbers corresponding to cases that the Department has only internally characterized as "terrorism-related" would "constitute an unwarranted invasion of personal privacy," 5 U.S.C. § 552(b)(7)(C), and that sustaining the Court's prior judgment would constitute "a manifest injustice.").

Defendants clearly establish that the Court's recent narrowing of SPLC's remaining Fifth Amendment claims to those that relate to bond hearings, elevates the local interests of courts in the Middle District of Georgia and/or Western District of Louisiana in this matter. *See* Defs' Mot. Reconsider 9–10, ECF No. 216. As such, the courts in the Middle District of Georgia and Western District of Louisiana "have a superior interest in addressing the instant controversy because '[t]here is a local interest in having localized controversies decided at home.'" *Abusadeh v. Chertoff*, No. 06-2014, 2007 WL 2111036, at *8 (D.D.C. July 23, 2007) (Kollar-Kotelly, J.). Were the Court to deny reconsideration, it would ultimately make a decision on a matter over which another court has a greater interest in adjudicating, "but for the Court's refusal to reconsider [its denial of Defendants' Motion to Transfer]." *See Cobell*, 355 F. Supp.2d 540. This is a harm to the public interest which warrants reconsideration.

II. Defendants' Arguments Are Based On The New Posture Of The Case

SPLC concludes by arguing that Defendants merely "reargue[] the merits of transfer," *see* Pl.'s Opp. 9, ECF No.217, disregarding the fact that Defendants' arguments are each premised on the changed fact that SPLC's case is now primarily a conditions of confinement claim as opposed to a challenge to national policies. *See* Defs.' Mot. Reconsider 7–10, ECF No. 216.

Rather than engage with this new argument SPLC asserts that venue is not appropriate in the Middle District of Georgia, "because the named Defendants do not reside there and the federal decision-making for which SPLC seeks to hold Defendants accountable occurred in D.C., not Georgia." SPLC's Response 9, ECF No. 217 (relying on its opposition and sur reply to Defendants' Motion to Transfer). This disregards the fact that the Court in its' original motion did not decide whether this case could have been brought in the Middle District of Georgia, because it concluded that "transfer would be inappropriate" because neither the public nor private interests weighed in favor of transfer. *See* Mem. Op. 3–4, ECF No. 62. SPLC also disregards the fact that even though none of the Defendants reside in Georgia, venue is still appropriate in the Middle District of Georgia (or Western District of Louisiana) because "a substantial part of the events or omissions giving rise to the claim occurred" in those districts. *See* 28 U.S.C. § 1391(e)(1).

Further, while a plaintiff's choice of forum is usually given deference, this deference is "not always warranted 'where the plaintiff's choice of forum has no meaningful ties to the controversy,' and where transfer is sought 'to a forum with which plaintiffs have substantial ties and where the subject matter of the lawsuit is connected . . . .'" *Jimenez v. R & D Masonry, Inc.*, 2015 WL 7428533, at *3 (D.D.C. 2015) (quotation omitted). Here, with the case now being primarily a question about specific conditions of confinement at three different facilities, SPLC's choice of D.C. as the forum for this litigation should be given less deference as the case now has minimal connections to DC. *See Abusadeh*, 2007 WL 2111036, at *8.

Finally, SPLC argues that the weighing of the private and public interests has not changed because there has been no change to SPLC's case. *See* SPLC's Response 10, ECF No. 217 ("'This is a case "focused on national issues of immigrants' access to counsel during detention; accordingly, the local interest in conditions at the individual detention facilities weighs less heavily than the

national interests involved.'") (quoting Mem. Op. 4, ECF No. 62). SPLC asserts this, however, despite the fact that its access to counsel claim was specifically dismissed by the Court. It is unclear how SPLC can continue to assert that this case is about the "national issues of immigrants' access to counsel during detention" when the access to counsel claim itself has been dismissed. *See* Mem. Op. 2, ECF No. 201.

The Court should conclude that, on balance, all the relevant private and public interest considerations weigh in favor of transferring the cases to Louisiana and/or Georgia. The mere fact that national policy is implicated by the case does not automatically warrant jurisdiction in Washington, D.C., especially "when countervailing considerations strongly favor a transfer." *Montgomery v. Barr*, 502 F. Supp. 3d 165, 178 (D.D.C. 2020). Here, the increased interests of the Western District of Louisiana and the Middle District of Georgia in reviewing access to court issues within their own jurisdiction warrant severance and/or transfer.

III. The Court May Sever SPLC's Claims In Its Discretion As Part of a Decision to Transfer

SPLC's assertion that Defendants "waive any argument regarding severance" and only "seek to transfer this case *in toto"* is incorrect and misrepresents the nature of Defendants' Motion for Reconsideration. *See* SPLC's Response 3, 4. First, Defendants' motion specifically notes how the changed posture of this case undermines the Court's original rationale for "in an exercise of its discretion . . . find[ing] that the claims in this case should not be severed." Mem. Op 2, ECF No. 68. In its motion, Defendants explain how the Court's reasoning for denying severance, that resolution "of the legal and factual issues in this case . . . would seem to turn on . . . national standards and Defendants' enforcement of them" and "the gravamen is not the practices of the different contractors running the three facilities, but rather Defendants' responsibility for enforcing their own standards," *see id.*, are directly undermined by the fact that this matter now focuses

primarily on conditions of confinement. *See* Defs.' Mot. Reconsider 7, ECF No. 216 ("That reasoning now no longer applies, particularly where it is clear that the case is now about the conditions of confinement at each facility, and the gravamen is thus the practices of the different contractors running the three facilities."). The changed circumstances of this case now primarily being a conditions of confinement case—as opposed to a challenge to nationwide standards—applies equally to both severance and transfer, something which this Court noted in its original Order denying severance and transfer. *See* Mem. Op. 2, ECF No. 62 ("The main reason that Plaintiffs oppose the *severance and transfer* is their insistence that this case is about Defendants' administration of detention policies . . . .") (emphasis added).

Moreover, SPLC's argument misrepresents the ultimate issue that is before the Court with this motion: whether Washington, DC continues to be the best venue for this matter in light of the changed circumstances of the case and whether the Court, as a result, should sever and/or transfer this matter in its discretion. The Court is afforded broad discretion to decide whether transfer from one jurisdiction to another is proper under § 1404(a). *See Ravulapalli v. Napolitano*, 773 F. Supp. 2d 41, 55 (D.D.C. 2011). Similarly, "[d]istrict courts have broad discretion in determining whether severance of particular claims is warranted." *M.M.M. on behalf of J.M.A. v. Sessions*, 319 F. Supp. 3d 290, 295 (D.D.C. 2018) (citation omitted). Under Rule 21 of the Federal Rules of Civil Procedure, "[o]n motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."). This discretion extends to the timing of when to sever as well. *Donkeyball Movie, LLC v. Does*, 810 F. Supp. 2d 20, 27 (D.D.C. 2011) ("The Court may [also] exercise discretion regarding the proper *time* to sever parties, and this determination includes consideration of judicial economy and efficiency.") (emphasis added). This is why Defendants' original Motion for Severance and Transfer of Venue, ECF No. 47 ("Motion to Transfer") framed its motion as a request for the

Court to exercise its discretion. *See* Motion to Transfer 18 n.8 ("If the Court declines to exercise its discretion to sever the claims, Defendants' request, in the alternative, that the Court transfer the entire action . . . ."). Nothing in Defendants' Motion to Reconsider, nor SPLC's response, prevents the court from severing this matter if the Court deems it appropriate in light of the changed circumstances of the case.

SPLC also asserts that Defendants are constrained to requesting that the case be transferred in its entirety to the Middle District of Georgia, as was requested in Defendants' original Motion to Transfer. *See* SPLC's Response 4, ECF No. 217. This is a ridiculous argument that further ignores not only Defendants' original rationale for arguing for transfer to the Middle District of Georgia, but also new facts in the case. Defendants originally proposed transferring the case in its entirety to the Middle District of Georgia where "two out of the three facilities at issue in this action are located . . . ." Motion to Transfer 18 n.8, ECF No. 47. As the claims against Irwin have been dismissed, and LaSalle has subsequently been added, this same logic now applies to the Western District of Louisiana. Regardless, as discussed above, transfer is in the ultimate discretion of the Court. The Court could consider other new facts that might warrant transfer "*in toto*" to the Middle District of Georgia instead, such as the fact that SPLC appears to be winding down operations in Louisiana. *See, e.g.*, Report of the Special Monitor 6, ECF No. 202 (noting SPLC does not appear to have used the VTC unit designated for SPLC's exclusive use since its inception); *see also* U.S. Dept. Justice, Executive Office for Immigration Review, *List of Pro Bono Legal Service Providers Louisiana* (July 2022) https://www.justice.gov/eoir/file/ProBonoLA/download (last visited August 3, 2022) (no longer listing SPLC or Southeast Immigration Freedom Initiative as a pro bono service provider for any of the immigration courts in Louisiana).

CONCLUSION

For the foregoing reasons, this Court should reconsider its Order denying Defendants' Motion to Transfer.

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CERTIFICATE OF SERVICE

I hereby certify that on August 5, 2022, I served a copy of the foregoing upon all counsel of record via the Court's CM/ECF filing system.

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