

1 Robert H. Tyler
CA S.B.N. 179572
2 rtyler@tylerbursch.com
Nada N. Higuera
3 CA S.B.N. 299819
nhiguera@tylerbursch.com
4 Tyler & Bursch, LLP
25026 Las Brisas Rd.
5 Murrieta, California 92562
6 Phone: 951-600-2733
Fax: 951-600-4996
7

8 Brian Kelsey, *Pro Hac Vice*
Tennessee Bar Number 022874
bkelsey@ljc.org
9 Mallory Reader, *Pro Hac Vice*
Michigan Bar Number P84806
10 mreader@ljc.org
Liberty Justice Center
11 141 W. Jackson Blvd., Ste. 1065
12 Chicago, Illinois 60604
13 Phone: 312-637-2280
Fax: 312-263-7702
14 *Attorneys for Plaintiff*

15 **UNITED STATES DISTRICT COURT**
16 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

17 JUSTIN HART,

18 Plaintiff,

19 v.

20 FACEBOOK, INC. et al.,

21 Defendants.
22
23

Case No. 3:21-cv-01543-W-WVG

**PLAINTIFF’S JOINT RESPONSE
IN OPPOSITION TO DEFENDANT
FACEBOOK, INC.’S AND
DEFENDANT TWITTER, INC.’S
MOTIONS TO TRANSFER VENUE**

**NO ORAL ARGUMENT
PURSUANT TO LOCAL RULE**

INTRODUCTION

1
2 The motions to transfer venue filed by Defendants Facebook, Inc. [Dkt. 33]
3 and Twitter, Inc. [Dkt. 34] raise a simple question for the Court: Can a private party
4 agreement trump a federal statute? The answer is “No.” Therefore, the Court should
5 deny the motions to transfer.

ARGUMENT

6 7 8 **I. 28 U.S.C. § 1404(a) gives this Court discretion on whether to transfer a case for convenience.**

9 Both Defendants bring their motions to transfer under 28 U.S.C. § 1404(a),
10 which gives this Court discretion on whether to transfer a case (“a district court may
11 transfer”), and it permits transfer for “convenience.” Rather than explaining why this
12 Court is inconvenient to the parties and the witnesses, both motions focus on forum-
13 selection clauses in their respective terms of services.
14

15 When evaluating a motion to transfer venue, district courts generally consider
16 eight factors. *See Hawkins v. Gerber Prods., Inc.*, 924 F. Supp. 2d 1208, 1212–13
17 (S.D. Cal. 2013). These eight factors include: “(1) plaintiff choice of forum; (2)
18 convenience of the parties; (3) convenience of the witnesses; (4) ease of access to
19 the evidence; (5) familiarity of each forum with an applicable law; (6) feasibility of
20 consolidation with other claims; (7) any local interest in the controversy; and (8) the
21 relative court congestion and time of trial in each forum.” *Id.* at 1213; *Williams v.*
22

1 *Bowman*, 157 F. Supp. 2d 1103, 1106 (N.D. Cal. 2001); *see also Jones v. GNC*
2 *Franchising, Inc.*, 211 F.3d 495, 498–99 (9th Cir. 2000).

3 **II. The Freedom of Information Act claim requires that venue lie in the**
4 **Southern District of California.**

5 The Freedom of Information Act (“FOIA”) *requires* that venue lie in: (1) the
6 judicial district where the plaintiff resides or has her principal place of business, (2)
7 the judicial district where the agency records are situated, or (3) the District of
8 Columbia. 5 U.S.C. § 552(a)(4)(B).

9 It is undisputable that this section of the FOIA is the controlling venue
10 provision for FOIA claims. *See, e.g., Our Children’s Earth Found. V. United State*
11 *EPA*, 2008 U.S. Dist. LEXIS 116814, at *19 (N.D. Cal. 2008) (citing *Boggs v. U.S.*,
12 987 F. Supp. 11, 18 n.4 (D.D.C. 1997)); *Lykins v. United States Dep’t of Justice*, 725
13 F.2d 1455, 1462 n.7, 233 U.S. App. D.C. 349 (D.C. Cir. 1984) (stating that
14 “Congress explicitly laid venue in FOIA cases” in the courts outlined in §
15 552(a)(4)(B)); *In re Scott*, 709 F.2d 717, 720, 228 U.S. App. D.C. 278 (D.C. Cir.
16 1983) (describing § 552(a)(4)(B) as “the applicable FOIA venue provision”); *accord*
17 *Banks v. Partyka*, 2007 WL 2693180, 2007 U.S. Dist. LEXIS 67590 at *2 (W.D.
18 Okla. 2007) (“Under both FOIA and the Privacy Act, venue is proper in the district
19 where claimant resides, in the district where agency records are situated, or in the
20
21
22
23

1 District of Columbia.”); and *Doe #1 v. Glickman*, 256 F.3d 371, 379 n.6 (5th Cir.
2 2001) (stating 5 U.S.C. § 552(a)(4)(B) governs venue in suits brought under the Act).

3 In the present action, Plaintiff, Justin Hart, requested records pursuant to the
4 FOIA from Defendants Department of Health and Human Services (“HHS”) and
5 Office of Management and Budget (“OMB”). Plaintiff resides and maintains his
6 principal place of business in the Southern District of California, and the records lie
7 with HHS and OMB in the District of Columbia. Therefore, the FOIA provides for
8 venue in only two locations: the Southern District of California or the District of
9 Columbia. 5 U.S.C. § 552(a)(4)(B). Despite Facebook’s and Twitter’s wishes, the
10 Northern District of California is not an available venue for the FOIA claim.
11

12 **III. Private parties’ forum-selection clauses do not transcend federal**
13 **venue statutes.**

14 “Section 1404(a) directs a district court to take account of factors other than
15 those that bear solely on the parties’ private ordering of their affairs.” *Stewart Org.,*
16 *Inc. v. Ricoh Corp.*, 487 U.S. 22, 30 (1988). The *Stewart* Court explained that a
17 forum-selection clause should receive “the consideration for which Congress
18 provided in § 1404(a).” *Id.* at 31. A forum selection clause is not dispositive in §
19 1404(a) balancing tests. *Id.* at 29. Thus, *Stewart* “strongly implies that Congress’
20 determination of where venue lies cannot be trumped by private contract and that,
21 therefore, a forum selection clause cannot render venue improper in a district if
22

1 venue is proper in that district under federal law.” 14D Charles A. Wright, et. al.,
2 Federal Practice and Procedure § 3803.1 (3d ed.). This result occurs “because private
3 parties should not have the power to transcend federal venue statutes that have been
4 duly enacted by Congress and render venue improper in a district where it otherwise
5 would be proper under congressional legislation.” *Id.*

6 This analysis should be dispositive on the Court’s examination of the subject;
7 however, out of respect for the Court, Plaintiff will address other arguments raised
8 in the motions.
9

10 **IV. The cases cited by Defendants differ from this lawsuit.**

11 The cases cited by Defendants in their briefs differ from this lawsuit in three
12 ways.

13 First, many cases cited by Defendants differ from this case because the forum
14 selection clauses in those cases were entered into freely, as a result of equal
15 bargaining power. In contrast, Plaintiff in this case was forced to check a box to
16 continue using the services provided by Facebook and Twitter. Whether the plaintiff
17 was able to bargain in agreeing to a forum selection clause is an important factor for
18 courts to consider when deciding motions to transfer. An underlying policy in favor
19 of upholding forum selection clauses stresses the importance of upholding forum
20 selection clauses which were bargained for by the parties. *See Atlantic Marine Const.*
21 *Co. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 579 (2013) (““interest
22
23

1 of justice’ is served by holding parties to their bargain.”); *M/S Bremen v. Zapata Off-*
2 *Shore Co.*, 407 U.S. 1, 15 (1972) (“There are compelling reasons why a freely
3 negotiated private international agreement, unaffected by fraud, undue influence, or
4 overweening bargaining power, [], should be given full effect.”); and *Stewart Org.,*
5 *Inc.*, 487 U.S. at 29 (“the District Court will be called on to address such issues as
6 the convenience of a Manhattan forum given the parties’ expressed preference for
7 that venue, and the fairness of transfer in light of the forum-selection clause and the
8 parties’ relative bargaining power.”). There is no evidence or allegation that Plaintiff
9 retained any bargaining power over the Terms of Service for either Defendant
10 Facebook, Inc. or Defendant Twitter, Inc. Plaintiff’s options were to check the box
11 agreeing to the Terms of Service or forego the use of Defendant Facebook, Inc.’s or
12 Defendant Twitter, Inc.’s services.
13

14 Second, the boilerplate arguments raised by Defendants fail to recognize that
15 this lawsuit is not one between two private parties. This is a complex lawsuit with
16 multiple state and federal claims against multiple defendants. Plaintiff’s first claim
17 is that Defendants Facebook, Inc. and Twitter, Inc. acted jointly with the federal
18 government to deprive Plaintiff of his First Amendment right to Free Speech. This
19 allegation of joint action with Defendants not covered by a forum selection clause
20 distinguishes this case from those cited by Defendants. *See, e.g., Trump v. Twitter,*
21 *Inc.*, No. 21-cv-22441-RNS, Dkt. No. 87 (S.D. Fla. Oct. 26, 2021) (cited by Twitter
22
23

1 Mot. at 6, 7, 8, 10). In addition, as stated above, venue rules on the FOIA claim
2 require it to be brought in this district or the District of Columbia. But the District of
3 Columbia may not have personal jurisdiction over Defendants Facebook, Inc. and
4 Twitter, Inc.; therefore, this District is the *only* forum in which all claims can be
5 brought against all Defendants.

6 Third, this forum is convenient for the parties because it is in California. The
7 forum selection clauses cited also require that California law govern their terms. This
8 Court has experience applying California laws in cases like this one with
9 supplemental jurisdiction over state law claims. In addition, the arguments cited by
10 Twitter that make it convenient to travel between the Northern and Southern
11 Districts of California apply equally to Defendants Facebook, Inc. and Twitter, Inc.
12 *See* Twitter Mot. to Transfer 11. In fact, it is generally easier for corporate counsel
13 to travel in-state for hearings than it is for a single Plaintiff, who is not in a regular
14 habit of traveling to other courts in California. This Court should not needlessly
15 inconvenience him over others.

16
17
18 **V. Severing the FOIA claim in order to transfer the remaining action is**
19 **inappropriate.**

20 Twitter, Inc. claims in the alternative that this Court should sever the FOIA
21 claim from the remainder of the lawsuit, but such an action would certainly not
22 further the interest of judicial efficiency.

1 The other claims do “bear[]” a “logical relation to the FOIA claim” because
2 the requested records serve the purpose of showing how the Defendants colluded to
3 violate Plaintiff’s First Amendment and contractual rights. *Cf. Pinson v. U.S. Dep’t*
4 *of Justice*, 74 F. Supp. 3d 283, 287–88, 290–95 (D.D.C. 2014). They share common
5 questions of both law and fact. *Cf. Harrison v. Fed. Bureau of Prisons*, No. 16-819
6 (RDM), 2019 WL 147720, at *4 (D.D.C. Jan. 9, 2019). Furthermore, the Motions to
7 Transfer are brought under 28 U.S.C. § 1404. Section 1404 differs from the *forum*
8 *non conveniens* doctrine because it requires that a full action be transferred if a
9 transfer takes place. *See Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d
10 1509, 1518 (10th Cir. 1991) (“Section 1404(a) only authorizes the transfer of an
11 entire action, not individual claims.”); *In re Flight Transp. Corp. Sec. Litig.*, 764
12 F.2d 515, 516 (8th Cir. 1985) (“It is well established that the transferor court under
13 § 1404 loses all jurisdiction over a case once transfer has occurred.” (internal citation
14 omitted)); *Wyndham Assocs. v. Bintliff*, 398 F.2d 614, 618 (2d Cir. 1968) (noting
15 that § 1404(a) “authorizes the transfer only of an entire action and not of individual
16 claims”), *cert. denied*, 393 U.S. 977 (1968). Thus, severing the FOIA claim to
17 transfer the remaining action under § 1404 is inappropriate.

20 CONCLUSION

21 The FOIA claim must be brought in the United States District Court for the
22 Southern District of California or the United States District Court for the District of
23

1 Columbia, pursuant to federal law. Because this action includes California state
2 claims, the District Court for the District of Columbia is improper. For the above-
3 stated reasons, Plaintiffs respectfully request that the Court deny both the Motions
4 to Transfer filed by Defendants Facebook, Inc. and Twitter, Inc.

5 Dated: November 29, 2021

Respectfully submitted,

6 /s/ Mallory Reader

7 Brian Kelsey, *Pro Hac Vice*
8 bkelsey@ljc.org
9 Mallory Reader, *Pro Hac Vice*
Michigan Bar Number P84806
mreader@ljc.org
10 Liberty Justice Center
11 141 W. Jackson Blvd., Suite 1065
Chicago, Illinois 60604
12 Phone: 312-637-2280
Fax: 312-263-7702

13 Robert H. Tyler
14 CA S.B.N. 179572
rtyler@tylerbursch.com
15 Nada N. Higuera
16 CA S.B.N. 299819
nhiguera@tylerbursch.com
17 Tyler & Bursch, LLP
25026 Las Brisas Rd.
18 Murrieta, California 92562
Phone: 951-600-2733
19 Fax: 951-600-4996

20 *Attorneys for Plaintiff*