

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

Case No.: 6:13-cv-1860-ORC 28 DAB

WILLIAM EVERETT WARINNER,
Plaintiff,

v.

(Loc. R. 3.01(h) - Dispositive Motion)

KEN DETZNER, in his official capacity as Secretary of State of the State of Florida, and PAMELA JO BONDI, in her official capacity as Attorney General of the State of Florida,

Defendants.

/

MOTION TO DISMISS OR, ALTERNATIVELY, TO TRANSFER VENUE

Defendant, Florida Secretary of State Kenneth W. Detzner (“Secretary”), pursuant to Federal Rule of Civil Procedure 12(b)(3), moves to dismiss the Complaint for improper venue. Alternatively, the Secretary moves to transfer venue to a district and division in which this action could have been brought—the United States District Court for the Northern District, Tallahassee Division. Neither Defendant resides in this District and none of the events or omissions giving rise to Plaintiff’s claim occurred in this district. Rather, resolution of Plaintiff’s constitutional challenge to a congressional district is appropriate in the Northern District. Both Defendants reside in the Northern District—as well as the Plaintiff himself—the claim accrued in the Northern District, and the evidence exists there. This action must therefore be dismissed, or if it be in the interest of justice, transferred to the Tallahassee Division of the United States District Court for the Northern District. *See* 28 U.S.C. § 1406(a).

INTRODUCTION

Plaintiff's sole cause of action is a constitutional challenge to the boundary of Florida's Congressional District 5. (Doc. 1, ¶¶ 61-66). Plaintiff alleges that District 5 "is racially gerrymandered in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution." (Doc. 1, ¶ 1). Specifically, Plaintiff alleges that the Florida Legislature, in creating District 5, "subordinated traditional race-neutral districting principles to racial considerations" so that "race was a predominant factor" and that such "use of race ... is not narrowly tailored to serve a compelling state interest." (Doc. 1, ¶¶ 41, 64). In its regular 2012 session, the Florida Legislature passed Substitute for Senate Bill No. 1174, which establishes Florida's 27 congressional districts, including District 5. (Doc. 1, ¶ 13). Governor Rick Scott signed the bill into law on February 16, 2012. *Id.*

ARGUMENT

If an action is filed in the wrong division or district, the court "shall dismiss" it, "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). In other words, "[o]nce a court has determined that venue is improper, it must dismiss or transfer the case to the appropriate venue." *Florida Hometown Democracy, Inc. v. Browning*, No. 08-80636, 2008 WL 3540607, at *2 (S.D. Fla. Aug. 12, 2008) (granting the Secretary of State's motion to dismiss action brought in the Southern District and transferring to the Northern District). "On a motion to dismiss based on improper venue, the plaintiff has the burden of showing that venue in the forum is proper." *Wai v. Rainbow Holdings*, 315 F. Supp. 2d 1261, 1268 (S.D. Fla. 2004) (citations omitted).

Without any factual allegations in support, Plaintiff makes the conclusory allegation that venue in the United States District Court for the Middle District of Florida is proper under 28

U.S.C. § 1391(b). (Doc. 1, ¶ 9). It is not. Under 28 U.S.C. § 1391(b), a civil 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. This statute does not provide a basis for venue in this District.

A. All Defendants Reside in the Northern District

All Defendants reside in the Northern District. Indeed, Florida law specifically establishes the residence of the Secretary and the Attorney General as Tallahassee, in Leon County, Florida,¹ and Plaintiff has not alleged otherwise.

The Florida constitution establishes the City of Tallahassee, in Leon County, Florida, as the “seat of government.” Fla. Const. art. II, § 2. Tallahassee is where the offices of “cabinet members … shall be maintained and the sessions of the legislature shall be held” *Id.*; *see also McCarty v. Lichtenberg*, 67 So. 2d 655 (Fla. 1953) (holding that Tallahassee, in Leon County, is the place of residence of state officers). The Attorney General specifically resides in Tallahassee as a member of the cabinet and keeps her office in the capitol. Fla. Const. art. IV, § 4(a); Fla. Stat. § 16.01(1). The Department of State, which is “a department of the executive branch of the state government,” and is headed by the Secretary, Fla. Stat. § 20.10, also “ha[s] its

¹ 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).

official residence at the seat of government in Tallahassee in Leon County.” *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. State*, 295 So. 2d 314, 317 (Fla. 1st DCA 1974); *see Florida Hometown Democracy*, 2008 WL 3540607, at *3 (relying on the “general rule that the Secretary of State’s residence for venue purposes is the Northern District of Florida, where he performs his official duties”). The Secretary’s functions as the “custodian of state records” are “conferred by the State Constitution,” Fla. Stat. § 20.10(1), and include the custody of the constitution itself and original state statutes and other official papers of state government created at the seat of government. Fla. Stat. § 15.01; *see also generally*, Fla. Const.

All Defendants therefore reside in the Northern District and venue is not proper in the Middle District on the basis of any Defendant’s residence.

B. The Events or Omissions Giving Rise to the Claim Occurred in the Northern District

Plaintiff’s sole cause of action is a constitutional challenge to a law—Substitute for Senate Bill No. 1174. That law was passed, signed, and is kept by the Secretary in Tallahassee; the events or omissions giving rise to the claim therefore occurred in the Northern District and not in the Middle District. *See Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1339 (M.D. Ala. 2001) (finding it “not plausible to argue that Plaintiff’s claims arose in the Middle District of Alabama” where “Plaintiff’s suit is a [constitutional] challenge to federal legislation drafted by Congress and signed by the President in the District of Columbia.”).

Only the “events that directly give rise to a claim are relevant” for purposes of determining venue, and the Court should focus on “the relevant activities of the defendant, not of the plaintiff.” *Jenkins Brick Co. v. Bremer*, 321 F. 3d 1366, 1371–72 (11th Cir. 2003) (noting

“the statute protects defendants”).² To the extent Plaintiff alleges that the Florida Legislature’s actions in creating the boundary of District 5 were unconstitutional, those actions occurred in Tallahassee. The Legislature’s public records related to the drawing of District 5 are likewise housed in Tallahassee. See also *Carter v. Virginia State Board of Elections*, No. 3:11-CV-00030, 2011 WL 1637942, at *2 n.3 (W.D. Va. Apr. 29, 2011), where the court dismissed on ripeness grounds a one-person, one-vote challenge brought before the legislature had had an opportunity to enact a new redistricting plan. The court noted as an alternative basis for its dismissal that venue was improper in the Western District of Virginia, because “no part” of the events or omissions giving rise to the claim occurred in the Western District, and that venue was proper in Richmond, where the defendants sued in their official capacities resided.

The mere effects of the challenged district being felt in District 5 are of no consequence. *Leroy v. Great Western United Corp.*, 443 U.S. 173, 185-86, 99 S. Ct. 2710, 2717-18 (1979); *Florida Hometown Democracy*, 2008 WL 3540607, at *4 (rejecting plaintiffs’ argument “that they were adversely impacted” in their chosen district, because “that fact has no bearing on” the analysis of proper venue) (citing *Jenkins Brick*, 321 F.3d at 1371-72). And although it is “absolutely clear that Congress did not intend [by enacting § 1391(b)] to provide for venue at the residence of the plaintiff,” *Leroy*, 443 U.S. 173 at 185-86, even the Plaintiff himself resides in the Northern District.³ Thus, even if it were relevant where the Plaintiff experienced any alleged

² The court in *Jenkins Brick* analyzed section (a)(2) of 28 U.S.C. § 1391, but section (a)(2) is identical to section (b)(2) that may be at issue here. See *Florida Hometown Democracy*, 2008 WL 3540607, at n.2.

³ A true and correct copy of Plaintiff’s voter registration is attached as Exhibit A. It indicates that Plaintiff resides in Gainesville, Florida, which is located in the Northern District. The Court may examine facts outside of the complaint to determine whether venue is proper. *Wai*, 315 F. Supp. 2d at 1268.

adverse impacts of the Legislature's redistricting, that impact would have been felt by the Plaintiff in the Northern District, where he resides.

Further, even if the location of the congressional district itself were relevant to the issue of venue here, which it is not, part of District 5 exists within the geographical boundaries of the Northern District. Regardless, the fact that a portion of District 5 also exists in the Middle District does not support the propriety of venue there. "Only the events that directly give rise to a claim are relevant," *Jenkins Brick*, 321 F.3d at 1371, not their tangential effects. *See Rogers*, 129 F. Supp. 2d at 1339; *cf. Steen v. Murray*, 919 F. Supp. 2d 993, 994–99, nn.4, 8 (S.D. Iowa 2013) (finding venue was proper in Nebraska, where the defendant attorney negligently drafted an option contract, regardless of the fact that the contract was "dealing with Iowa land"); *Bassili v. Chu*, 242 F.Supp.2d 223, 231 (W.D.N.Y. 2002) (rejecting venue of a "Lanham Act product disparagement action based solely on the location of the plaintiff's inventory in a district in which neither party resides"); *see also Shayer v. Kirkpatrick*, 541 F. Supp. 922, 925 (D. Mo. 1982) (finding venue in redistricting action "was only proper" in district where defendant secretary of state had his offices).

Plaintiff attacks the constitutionality of legislation passed by the Florida Legislature in the Northern District, but brings his action in the Middle District. Venue does not lie in any and every remote locale affected by impugned legislation. Rather, an action may only be brought where a defendant resides or in the venue of a substantial part of the events or omissions giving rise to the claim, *none* of which occurred in the Middle District.

C. This Action May be Brought in the Northern District

Venue in this action is appropriate in the Northern District. All of the parties reside in the Northern District, and the challenged district was drawn in the Northern District. Venue is therefore proper in the Northern District and improper in the Middle District.⁴

CONCLUSION

All of the parties reside in the Northern District and both the events giving rise to the claims, as well as all of the evidence related to the Florida Legislature's creation of District 5, are located in the Northern District. The Middle District is an improper venue. The United States District Court for the Northern District, Tallahassee Division, however, is a proper venue. This action should therefore be dismissed or, alternatively, transferred to the Northern District. 28 U.S.C. §§ 1406(a), 1404.

WHEREFORE, the Secretary respectfully requests that the Court dismiss this action for improper venue or, alternatively, transfer the case to the United States District Court for the Northern District, Tallahassee Division.

⁴ Alternatively, change of venue is also proper under section 28 U.S.C. § 1404, for the convenience of the parties (all of whom reside in the Northern District) and witnesses, and in the interest of justice. The locus of operative facts; location of relevant documents and ease of access to sources of proof; and minimization of the financial burden on the Defendants (whose taxpayer-funded counsel is in Tallahassee) and, presumably, the Plaintiff (whose Florida counsel is also in Tallahassee), militate heavily in favor of venue in the Northern District.

Respectfully submitted,

/s/ Ashley E. Davis

J. ANDREW ATKINSON

General Counsel

Florida Bar No. 14135

JAndrew.Atkinson@DOS.MyFlorida.com

ASHLEY E. DAVIS

Assistant General Counsel

Florida Bar No. 48032

Ashley.Davis@DOS.MyFlorida.com

Florida Department of State

R.A. Gray Building

500 South Bronough Street

Suite 100

Tallahassee, Florida 32399-0250

Telephone (850) 245-6536

Facsimile (850) 245-6127

*Counsel for Defendant
Secretary of State*

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 9th day of January, 2014, and thereby served upon all counsel of record.

/s/ Ashley E. Davis
ASHLEY E. DAVIS
ASSISTANT GENERAL COUNSEL