

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

PROJECT VOTE, et al.,	:	Case No. 1:08CV02266
Plaintiffs,	:	Judge James S. Gwin
vs.	:	
MADISON COUNTY BOARD OF ELECTIONS, et al.,	:	
Defendants.	:	

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF
DEFENDANT MADISON COUNTY BOARD OF ELECTIONS TO DISMISS, OR IN
THE ALTERNATIVE, TRANSFER VENUE**

Defendant Madison County Board of Elections (the "Board") respectfully moves this Court for an Order dismissing Plaintiffs' Complaint for lack of subject matter jurisdiction and for improper venue. In the alternative, the Board moves this Court for an Order transferring this case to the United States District Court, Southern District of Ohio, Eastern Division.

I. This Court lacks subject matter jurisdiction.

This Court lacks subject matter jurisdiction because there is no case or controversy between Plaintiffs and the Ohio Secretary of State or Plaintiffs and the Board. "A fundamental requirement of jurisdiction in the federal courts is that a justiciable case or controversy exists

under Art. III, § 2 of the Constitution. Such a justiciable case or controversy is distinguished from a dispute which is hypothetical, contingent or abstract in nature.” *Naso v. Sun Refining and Marketing Co.*, 582 F.Supp. 1566 (N.D.Ohio 1983). The type of dispute that is now before this Court is a hypothetical and contingent dispute.

The Plaintiffs explain in their Complaint, “Plaintiffs understand that Brunner’s legal position on the merits [of this case] is in accord with that taken by Plaintiffs. . . . She is named as a defendant . . . *in the event* that the Secretary of State is ordered in the now-pending state court action before the Ohio Supreme Court to take action that violates the rights of plaintiffs. . . .” (Compl., p. 5, fn. 2) (emphasis added). Plaintiffs readily admit that their claims against Secretary of State Brunner are merely contingent and hypothetical. Thus, this Court lacks jurisdiction to hear those claims and should dismiss the Complaint.

Not only do Plaintiffs fail to show a case or controversy against Secretary of State Brunner, they also fail to show a case or controversy regarding their claims against the Board. Plaintiffs misconstrue the Board’s intention of not permitting same-day registration and absentee voting as not permitting new registrants to vote by absentee ballot at a later date or at the polls. Throughout their Complaint Plaintiffs allege that the Board’s intention to prohibit same-day registration and absentee voting violates federal law. But *nowhere* in the Complaint do Plaintiffs cite to a case or a federal statute that requires same-day registration and absentee voting. In essence, Plaintiffs have “made up” a controversy by falsely construing the Board’s intentions. Accordingly, Plaintiffs’ Complaint should be dismissed.

II. This Court is not the proper venue for this action.

A civil action may be brought *only* in a judicial district (1) where any defendant resides, if all defendants reside in the same State; (2) where a substantial part of the events or omissions giving rise to the claim occurred; or (3) where any defendant may be found, if there is no district in which the action may otherwise be brought. 28 U.S.C. § 1391(b). *None* of these requirements exist here.

A. The defendants do not reside within this Court's geographic territory.

There are only two defendants in this case: the Board and Ohio Secretary of State Jennifer Brunner. Neither defendants reside within the geographic territory served by the Northern District Court of Ohio, nor do Plaintiffs make any allegations that the defendants reside within the Northern District. (See Complaint, ¶ 4.)

The Board resides in Madison County, Ohio, and Secretary of State Brunner resides, and her official office is located, in Franklin County, Ohio. Thus, the only proper venue for the claims made in this case is the United States District Court, Southern District of Ohio, Eastern Division. See LR 3.8 (omitting, for venue purposes, Madison and Franklin Counties as counties served by the Northern District Court of Ohio); and S.D. Ohio LR 82.1 (listing, for venue purposes, Madison and Franklin Counties as counties served by the Southern District Court of Ohio, Eastern Division).

B. No part of the events giving rise to Plaintiffs' claims occurred within the geographic territory served by this Court.

Contrary to Plaintiffs' assertions in Paragraph 4 of their Complaint, *no* part of the events giving rise to the Complaint occurred within the geographic area served by the Northern District Court of Ohio. Indeed, as Plaintiffs explain, their claims are based on (1) the intention of the Board not to permit same-day registration and absentee voting *in Madison County, Ohio*; (2) the

action of the Madison County Prosecuting Attorney, Stephen J. Pronai, in advising the Board that Ohio law does not permit same-day registration and absentee voting; and (3) the alleged inaction of Secretary of State Brunner *in regard to Madison County*. (Complaint, ¶¶ 16, 18, 24, 25, and 40.) Plaintiffs fail to provide any explanation regarding how voting *in Madison County* somehow occurs within the territory of the Northern District Court of Ohio. And Plaintiffs fail to provide any explanation as to how Secretary of State Brunner's alleged inaction in either *Franklin County* (where she is located) or *Madison County* occur within the territory of the Northern District Court of Ohio. That is because there is no explanation. None of Plaintiffs' allegations are based on events or omissions that have occurred or will occur within the geographic territory served by this Court. Rather, their allegations are based on events or omissions that allegedly occurred or will occur within the territory served by the United States District Court, Southern District of Ohio, Eastern Division.

C. Because this Court is not the proper venue, Plaintiffs' Complaint must be dismissed, or in the alternative, transferred.

The Sixth Circuit Court of Appeals has recognized, "Improperly venued cases are governed by 28 U.S.C. § 1406. . . ." *Thompson v. Greenwood*, 507 F.3d 416, 419 (6th Cir. 2008). That statute states, "The district court of a district in which is filed a case laying venue in the wrong division or district *shall dismiss*, 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) (emphasis added). Thus, this Court has "only two options: (1) dismiss the case, or (2) transfer the case to a jurisdiction of proper venue, if it be in the interest of justice." *Thompson*, 507 F.3d at 420.

It is clear that this case is improperly venued in this Court. Indeed, there are no facts to support venue here whatsoever. Because this case is improperly venued and because this Court lacks subject matter jurisdiction, this case should be dismissed. But if this Court finds that, in the

interest of justice, this case should be transferred, then the case should be transferred to the United States District Court, Southern District of Ohio, Eastern Division, where both defendants reside and where another action involving similar claims is currently pending. *See Ohio Republican Party v. Brunner*, Case No. 2:08-cv-00913-GCS-NMK (S.D. Ohio, Eastern Division).

III. Conclusion

For the foregoing reasons, Defendant Madison County Board of Elections seeks an Order dismissing Plaintiffs' Complaint, or in the alternative, transferring this case to the United States District Court, Southern District of Ohio, Eastern Division.

Respectfully submitted,

/s/ Donald C. Brey

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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2008, a copy of the foregoing *Memorandum of Points and Authorities in Support of Motion of Defendant Madison County Board of Elections to Dismiss, or in the Alternative, Transfer Venue* was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's system.

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