IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN DEARTH and SECOND AMENDMENT FOUNDATION, INC., **Plaintiffs,** **vs.** **ERIC H. HOLDER, Jr., Attorney General of the United States,** **Defendant.**	**Case No. 09-cv-0587-RLW**

DEFENDANT'S REPLY BRIEF IN SUPPORT OF HIS MOTION FOR JUDGMENT ON THE PLEADINGS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

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During a seven-year investigation of violent crime, Congress heard testimony about the ease and frequency with which individuals evaded State firearms regulations simply by crossing State lines to buy firearms that they later used in criminal activities. To further its compelling interest in combating violent crime, and to supplement the States' ability to enforce their own firearms regulations, Congress in 1968 prohibited federally-licensed firearms dealers from selling firearms to individuals who did not reside in the same State in which the dealer conducted business. Later, Congress became aware of a law enforcement problem posed by nonresident aliens acquiring firearms from licensed dealers through an intermediary, and then smuggling the weapons out of the country. These aliens could obtain firearms from unlicensed persons by making false statements about their residence, and faced no legal penalty because federal law did not prohibit the making of false statements to non-licensed persons in connection with firearms purchases. Congress in 1991 responded by prohibiting the receipt of firearms by individuals without a residence in the United States. These two laws (collectively, "the State residency requirements") are codified at 18 U.S.C. §§ 922(b)(3) and (a)(9).

Plaintiff Stephen Dearth is a U.S. citizen who resides in Canada and has chosen not to maintain any residence in any U.S. State. He alleges that he seeks to buy firearms in the United States without having federal law apply equally to him. Despite the existence of longstanding laws restricting the sale or possession of firearms to residents of a U.S. State, Plaintiff Dearth contends that, as applied to him, the State residency requirements violate the Constitution. But as explained in Defendant's opening brief, this contention has no merit.

As a preliminary matter, the Court should observe the constitutional-avoidance principle and decline to rule on Plaintiffs' constitutional claims until it has decided the threshold issue of whether State law would independently prohibit Plaintiff Dearth from buying firearms. In any

event, as explained in Defendant's opening brief, Plaintiffs' constitutional challenges to the State residency requirements lack any merit. First, Plaintiffs' Second Amendment challenge fails because the State residency requirements are part of a longstanding regulatory regime and therefore receive a presumption of legality, and Plaintiffs have failed to rebut that presumption by showing any substantial burden on Plaintiffs' constitutional rights. Second, even assuming that the challenged statutes were not presumptively lawful, they are constitutional because they substantially relate to the important government interest in combating violent crime and preserving public safety. Third, the State residency requirements do not burden Plaintiffs' Fifth Amendment liberty interest in international travel without due process of law because they neither restrict Plaintiff Dearth's ability to travel internationally, nor affect his ability to reside abroad or to travel to the United States. Fourth, Plaintiffs' equal protection claim fails because the challenged laws do not burden a fundamental right, and expatriate U.S. citizens are not similarly situated with U.S. citizens residing in the United States; in any event, Congress possessed a rational basis for enacting these laws. As explained further below, Plaintiffs' responsive brief does virtually nothing to diminish any of these arguments. Accordingly, the Court should enter judgment on the pleadings, or summary judgment, for Defendant.

I. JUDICIAL ESTOPPEL DOES NOT BAR DEFENDANT FROM ASSERTING THAT THE COURT SHOULD RESOLVE THE STATUTORY ISSUE OF WHETHER STATE LAW INDEPENDENTLY BARS PLAINTIFF DEARTH'S PURCHASE OF A FIREARM.

The Court is obliged to avoid consideration of constitutional issues unless a case cannot be decided on other grounds. See Ashwander v. TVA, 297 U.S. 288, 341-56 (1936). Defendant's opening brief accordingly noted that the Court should observe the constitutional-

avoidance principle and decline to rule on the constitutionality of the State residency requirements until it first resolves the issue of whether State law would independently bar Plaintiff Dearth's purchase of firearms. Mem. Supp. Def. Mot. for Summ. J. ("Def. Mem.") at 16 n.19 [ECF No. 25]. Plaintiff Dearth himself concedes that "[s]ome states might have such a law." Pl. Opp. to Def. Mot. for Summ. J. ["Pl. Opp."] at 5 [ECF No. 28]. However, Plaintiffs contend that judicial estoppel prevents Defendant from raising this argument because when Plaintiffs previously brought suit in the Southern District of Ohio, Defendant successfully dismissed for improper venue. Id. at 5-6. Plaintiffs are mistaken.

In November 2006, Plaintiffs commenced suit in the Southern District of Ohio, based on Plaintiff Dearth's unsuccessful attempt to purchase a firearm in Minnesota. Dearth v. Gonzales, 2007 WL 1100426, at *1 (S.D. Ohio April 10, 2007). Defendant moved to dismiss for improper venue because Plaintiffs did not allege that any events had occurred in Ohio. See id. at *1, 4. Contrary to Plaintiffs' representation, Defendant did not contend as the basis for his motion that "nothing was actually happening in any state," Pl. Opp. at 5, but that "a substantial part of the events or omissions giving rise to the claim" had not occurred in Ohio. Dearth, 2007 WL 1100426, at *4. The district court agreed that Plaintiffs' selected venue was improper, and that either the District of Minnesota or the District of Columbia would be a proper forum for Plaintiffs' suit. Id. However, because Plaintiffs "expressly asked for the dismissal of this case if the [district c]ourt determine[d] that venue in the Southern District of Ohio [was] flawed," the court "[did] not weigh whether transfer [was] more appropriate than dismissal," but instead dismissed Plaintiffs' action without prejudice. Id. at *5. Plaintiffs then filed the present action in this Court on March 27, 2009. See Complaint [ECF No. 1].

In short, Defendant's position is not "clearly inconsistent with its earlier position," as required to invoke judicial estoppel. New Hampshire v. Maine, 532 U.S. 742, 750 (2005). Consequently, Defendant is not judicially estopped from arguing that the Court should observe the constitutional-avoidance principle in this case, and decline to rule on the constitutionality of the State residency requirements until it resolves the threshold issue of whether State law independently bars Plaintiff Dearth's purchase of firearms.[1]

II. THE COURT SHOULD ENTER SUMMARY JUDGMENT FOR DEFENDANT ON PLAINTIFFS' SECOND AMENDMENT CLAIM.

Because "there are certain types of firearms regulations that do not govern conduct within the scope of the [Second] Amendment," the D.C. Circuit has adopted a two-step approach to determining the constitutionality of such regulations. Heller v. Dist. of Columbia ("Heller II"), __ F.3d __, 2011 WL 4551558, at *5 (D.C. Cir. Oct. 4, 2011) (citations omitted). "We ask first

[1] Defendant's opening brief also explained that, to the extent that Plaintiff Second Amendment Foundation's ("SAF") claims are premised on organizational standing on its own behalf, those claims are barred by collateral estoppel. Def. Mem. at 42-44. In any event, SAF fails to demonstrate that it has "suffered injury in fact, including such concrete and demonstrable injury to the organization's activities – with a consequent drain on the organization's resources – constituting more than simply a setback to the organization's abstract social interests." Nat'l Ass'n of Home Builders v. EPA, __ F.3d __, 2011 WL 6118589, at *2 (D.C. Cir. Dec. 9, 2011). SAF states only that "[o]wing to [its] mission, [its] resources are taxed by inquiries into the operation and consequences of federal firearms restrictions based on residence and travel." Decl. of Julianne Versnel ¶ 5 [ECF No. 23-4]. This bare assertion does not establish organizational standing. See Nat'l Ass'n of Home Builders, 2011 WL 6118589, at *3 (association lacked organizational standing; "As for the other expenditures claimed [beyond expenses for the present case], [it] has not shown they were for 'operational costs beyond those normally expended' to carry out its advocacy mission. Nat'l Taxpayers Union[, Inc., 68 F.3d 1428, 1434 (D.C. Cir. 1995)] (association's 'self-serving observation that it has expended resources to educate its members and others regarding [challenged statutory provision] does not present an injury in fact'); id. ('The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.' (quotation marks omitted))").

whether a particular provision impinges upon a right protected by the Second Amendment; if it does, then we go on to determine whether the provision passes muster under the appropriate level of constitutional scrutiny." Id. (citations omitted).

Here, as demonstrated in Defendants' opening brief, Def. Mem. at 20-22, the State residency requirements do not burden conduct falling within the Second Amendment's guarantee. Because such laws are longstanding in American law, they are presumptively lawful, and Plaintiffs have failed to rebut this presumption. In any event, as explained below, the State residency requirements pass muster under any level of constitutional scrutiny.

A. The State Residency Requirements Are Presumed Not to Burden Conduct Within the Scope of the Second Amendment.

1. Because Laws Conditioning the Purchase or Possession of Firearms on Residence in a U.S. State Are Longstanding in American Law, the State Residency Requirements Are Presumptively Lawful.

"With respect to the first step" of the two-step approach for determining the constitutionality of firearms regulations, "Heller tells us that 'longstanding' regulations are 'presumptively lawful,' that is, they are presumed not to burden conduct within the scope of the Second Amendment." Heller II, 2011 WL 4551558, at *6 (quoting Dist. of Columbia v. Heller, 554 U.S. 570, 626-27 & n.26 (2008)) (citations omitted). In applying this initial step to the firearms-registration provisions at issue, the D.C. Circuit in Heller II surveyed the earliest-enacted firearms-registration laws of seven States and the District of Columbia (enacted between 1881 and 1932), and concluded that "the basic requirement to register a handgun is longstanding in American law, accepted for a century in diverse states and cities and now applicable to more than one fourth of the Nation by population. Therefore, we presume the District's basic

registration requirement. . . does not impinge upon the right protected by the Second Amendment." Id. at *7 (internal citation omitted).

Because a similar analysis applies here, the same presumption applies to the State residency requirement. Between 1909 and 1939, at least thirteen States[2] and the District of Columbia enacted laws conditioning the purchase or possession of a firearm on obtaining a license, and a license applicant was required to establish State residency (or residency in a U.S. State). See Def. Mem. at 21-22 & Ex. 4. Plaintiffs present several objections to this evidence, none of which has merit.

First, Plaintiffs seek to discount the relevance of laws conditioning the possession, acquisition, or carrying of a firearm on State residency, as opposed to laws conditioning the *purchase* of firearms on State residency. Pl. Opp. at 11, 12.[3] This distinction is trivial in light of

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[2] In addition to the eleven States and the District of Columbia cited in Defendant's opening brief, see Def. Mem. at 21-22 & Ex. 4, Georgia and Illinois also enacted laws in the early twentieth century limiting the possession or carrying of handguns (or concealed handguns) to State residents. See Act of Aug. 12, 1910, No. 432, 1910 Ga. Laws 134 ("[I]t shall be unlawful for any person to have or carry about his person, in any county in the State of Georgia, any pistol or revolver without first taking out a license from the Ordinary of the respective counties in which the party resides. . . "); Act of July 11, 1919, § 4, 1919 Ill. Laws 431, 432 ("It shall be unlawful for any person to carry concealed upon his person, any pistol, revolver, or other firearm, without a written license therefor . . . It shall be the duty of chief police officers in cities, and of justices of the peace and police magistrates elsewhere in the State. . . to issue a license to any citizen of the State of Illinois to carry concealed a pistol or revolver.").

[3] Contrary to Plaintiffs' characterization, the early State laws do not uniformly regulate only the "carrying of handguns in public." Pl. Opp. at 11. While some States chose to regulate only public carrying (by permitting owners to possess and carry an unlicensed firearm in his or her home or place of business), other States phrased their statutes broadly to cover both possession and public carrying. See Act of Aug. 12, 1910, No. 432, 1910 Ga. Laws 134 ("[I]t shall be unlawful for any person to *have or carry about his person*, in any county in the State of Georgia, any pistol or revolver without first taking out a license. . . "); Act of July 11, 1919, § 4, 1919 Ill. Laws 431, 432 ("It shall be unlawful for any person to *carry concealed upon his person*, any pistol, revolver, or other firearm, without a written license therefor. . ."); Act of Feb. 25,

their fundamental resemblance: like the challenged laws, these early State laws regulated firearms ownership on the basis of whether an individual resided in the State in which the firearm was purchased, possessed, or carried (or in any U.S. State).

Second, while Plaintiffs contend that State residency requirements are not longstanding because the challenged laws here were enacted in 1968 and 1994, Pl. Opp. at 10, that is not the relevant inquiry.[4] The provisions challenged in Heller II were enacted in 1975 and 2008,

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1939, ch. 14, 1939 Me. Acts 53 ("No person shall in a threatening manner display, *or shall wear under his clothes*, or *conceal about his person* any firearm . . . or other dangerous or deadly weapon unless first licensed. . ."); Act of May 21, 1913, ch. 608, § 1, 1913 N.Y. Laws 1627, 1628 ("Any person . . . who shall *have in his possession* in any city, village or town of this state, any . . . firearm of a size which may be concealed upon the person, without a written license therefor. . . shall be guilty of a misdemeanor.") (emphasis added).

[4] Plaintiffs' observation that some of the early State residency requirements are not in effect in 2012, Pl. Opp. at 10 n.2, is similarly misplaced. The D.C. Circuit concluded that the registration requirements were "longstanding in American law" because they had been "accepted for a century in diverse states and cities and [were] now applicable to more than one fourth of the Nation by population," noting that "[t]oday seven states require registration of some or all firearms." Heller II, 2011 WL 4551558, at *7 & n. *. The State residency requirements are similarly longstanding. The laws of twelve States and the District of Columbia continued to require State residency (or residency in a U.S. State) until at least 1968, when federal law established a nationwide State residency requirement. See D.C. Code Ann. § 22-3206 (1967); Pickett v. State, 179 S.E.2d 303, 304 (Ga. App. 1970) (citing 1970 text of Ga. Code. Ann. § 26-2903); Burns' Ind. Stat. Ann. § 10-4738(1) (1972 Supp.); Schwanda v. Bonney, 418 A.2d 163, 164 (Me. 1980) (quoting 1980 text of 25 Me. Rev. Stat. Ann. § 2031); MacNutt v. Police Comm'r of Boston, 572 N.E.2d 577, 579 (Mass. App. Ct. 1991) (quoting 1972 text of Mass. Gen. Laws ch. 140, § 131); Act of July 1, 1968, 1968 Mich. Acts 511, 512; Act of June 18, 1967, 1967 Mo. Laws 675; Mont. Crim. Code §§ 94-8-210(1), 94-8-214(4) (1973); State v. Sima, 361 A.2d 58, 60 (N.J. Super. Ct. App. Div. 1976) (quoting 1976 text of N.J. Stat. Ann. § 2A:151-44); N.Y. Penal Law § 265.05(5) (1968); N.C. Gen. Stat. §§ 14-402, 14-403 (1999); Act of May 21, 1975, 1975 R.I. Pub. Laws 738, 741, 744-45; West Virginia Judicial Inquiry Comm'n v. Dostert, 271 S.E.2d 427, 430 n.5 (W. Va. 1980) (quoting 1980 text of W. Va. Code § 61-7-2). Although in 1925, Illinois repealed its State residency requirement for obtaining a license to carry a concealed firearm, it only did so in the course of repealing its licensing statute altogether, revoking all concealed-weapons licenses, and banning (with limited exceptions) all concealed carrying of firearms. See Act of July 3, 1925, §§ 4, 9, 1925 Ill. Laws 339, 340-41.

respectively, see 2011 WL 4551558, at *1, but the D.C. Circuit nonetheless concluded that the challenged laws constituted the same type of firearms regulation that had existed since the early twentieth century and were therefore longstanding. See id. at *6-7. The same is true here.

Third, Plaintiffs incorrectly contend that all of the early State residency requirements only applied to handguns, not long guns. Pl. Opp. at 12. The early laws of Maine and New Jersey were not so limited.[5] Contrary to Plaintiffs' suggestion, State laws restricting the possession or purchase of firearms, including long guns, are longstanding in American law, not "novel."

In sum, historical evidence establishes that the basic requirement of residence in a U.S. State as a qualification for the purchase or possession of firearms is longstanding in American law. The State residency requirements are thus accorded a presumption that they do not impinge on the rights protected by the Second Amendment.

2. Plaintiffs Have Failed to Rebut the Presumption of Legality Accorded to the State Residency Requirements.

Although a plaintiff may rebut the presumption of legality accorded a longstanding firearms regulation by showing that it has "more than a de minimis effect" on the right protected by the Second Amendment, Heller II, 2011 WL 4551558, at *6, Plaintiffs have failed to make any such demonstration here. Plaintiffs are incorrect in assuming that "every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right." Planned Parenthood

[5] See Act of Feb. 25, 1939, ch. 14, 1939 Me. Acts 53 ("No person shall in a threatening manner *display*, or shall wear under his clothes, or conceal about his person *any firearm*, slung-shot, knuckles, bowie knife, dirk, stiletto, *or other dangerous or deadly weapon* unless first licensed to do so as herein provided."); Act of March 11, 1924, ch. 137, § 2, 1924 N.J. Acts 305 ("Any person desirous of obtaining a permit to carry a revolver, pistol *or other firearm*, pursuant to the provisions of the act, shall in the first instance, make application therefor to the chief of police of the municipality in which the applicant resides.") (emphasis added).

of Se. Pennsylvania v. Casey, 505 U.S. 833, 873 (1992); see also Eugene Volokh, Implementing the Right to Keep and Bear Arms for Self-Defense: An Analytical Framework and a Research Agenda, 56 UCLA L. Rev. 1443, 1454 (2009) ("A restriction may also be justified on the grounds that it imposes a less than substantial burden on a right, and therefore doesn't unconstitutionally 'infringe[]' the right even though it regulates the right's exercise.").

In Heller, the Supreme Court cautioned that "nothing in [this] opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms," 554 U.S. at 626-27, and Plaintiffs acknowledge that "[t]o be sure, the government may regulate the acquisition of arms." Mem. Supp. Pl. Mot. for Summ. J. at 8 [ECF No. 23-1]; see also Jennings v. ATF, No. 5:10-CV-140-C (N.D. Tex. Sept. 29, 2011), slip op. at 13 ("Outside the list of examples of presumptively lawful limitations, neither Heller nor its companion case, McDonald v. City of Chicago, 130 S. Ct. 3020 (2010), directly addresses the buying and selling of firearms, let alone holds this to be at the 'core' of the Second Amendment right.") (attached as Ex. 1), *appeal docketed*. "[T]o uphold the constitutionality of a law imposing a condition on the commercial sale of firearms," therefore, "a court necessarily must examine the nature and extent of the imposed condition." United States v. Marzzarella, 614 F.3d 85, 92 n.8 (3d Cir. 2010).

Thus, Plaintiffs' contention that for purposes of evaluating their Second Amendment claim, the existence of alternative means for Plaintiff Dearth to obtain firearms is "irrelevant," see Pl. Opp. at 6-10, is simply incorrect.[6] When deciding whether a regulation of the sale of

[6] Plaintiffs also mischaracterize the relevant issue by contending that Defendant is "telling" Plaintiff Dearth that he "should exercise [his] constitutional rights somewhere else." Pl. Opp. at 7. Rather, having established that the State residency requirements are accorded a presumption of legality, Defendant is insisting that in order to rebut that presumption, Plaintiff Dearth must demonstrate that the requirement has "more than a de minimis effect upon" his

firearms substantially burdens a plaintiff's Second Amendment rights, a reviewing court should ask whether the regulation affords the plaintiff reasonable alternative means for obtaining firearms sufficient for self-defense purposes. See United States v. Marzzarella, 595 F. Supp. 2d 596, 606 (W.D. Pa. 2009) (finding that even assuming *arguendo* that First Amendment law "provides a suitable framework for determining the validity of" a ban on guns with obliterated serial numbers, "a more appropriate standard of review would be the standard applicable to content-neutral time, place and manner restrictions," and upholding the ban partly because it "leaves open ample opportunity for law-abiding citizens to own and possess guns"), *aff'd*, 614 F.3d 85 (3d Cir. 2010). Examining the existence of available means is necessary to determine whether the challenged laws have only a de minimis effect on a plaintiff's Second Amendment right, or, alternatively, substantially affect his or her right.

As explained in Defendant's opening brief, Plaintiff Dearth has reasonable means available to him to obtain firearms sufficient for self-defense purposes. Def. Mem. at 6-7, 33. He legally owns firearms in Canada, where he resides, and may transport them into the United States during visits – without needing to obtain an import license – if they are useful for legitimate hunting and sporting purposes. He may also purchase additional handguns or long guns in Canada and transport them into the United States without an import license if they are

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Second Amendment right. Heller II, 2011 WL 4551558, at *6. Any such demonstration turns on the existence of reasonable alternative means available to him for exercising that right.

In this context, Plaintiffs' reliance on Ezell v. City of Chicago, 651 F.3d 684 (7th Cir. 2011), is misplaced. Ezell explained that the "occasional expense and inconvenience of having to travel to a firing range in the suburbs" was "not the relevant constitutional harm." 651 F.3d at 698. Rather, the alleged harm stemmed from an unusual regulatory combination: the City of Chicago mandated range training as a prerequisite to lawful possession of *any* firearms, but simultaneously banned all firing ranges in the City. Id. at 698, 689-90.

useful for lawful sporting purposes. Had he purchased firearms in the United States before moving to Canada, he could use those firearms while visiting the United States. Because he does not appear to be otherwise barred by law from possessing or using firearms, see Pl. Statement of Undisputed Material Facts ¶ 3 [ECF No. 23-2], while visiting the United States, he may lawfully possess a firearm owned by another person (such as the "many friends and relatives whom he enjoys visiting" in the United States, Compl. ¶ 10) to use for lawful sporting purposes. He may also borrow or rent a firearm from a licensed dealer for such purposes. (Firearms useful for lawful sporting purposes may also be used for self-defense.) Finally, he may choose to establish residency in a particular State, and may purchase firearms for any purpose in that State.

In sum, because Plaintiff Dearth has reasonable means available to him for obtaining firearms sufficient for self-defense purposes, he fails to demonstrate that the challenged laws substantially burden his constitutional rights. See Casey, 505 U.S. at 873 ("As our jurisprudence relating to all liberties save perhaps abortion has recognized, not every law which makes a right more difficult to exercise is, ipso facto, an infringement of that right."); Peruta v. Cty. of San Diego, 758 F. Supp. 2d 1106, 1114-15 (S.D. Cal. 2010) ("[T]o the extent that [laws regulating concealed firearms] and Defendant's policy burden conduct falling within the scope of the Second Amendment, if at all, the burden is mitigated by [other provisions] that expressly permit loaded open carry for immediate self-defense."), *appeal docketed*; Kachalsky v. Cacace, __ F. Supp. 2d __, 2011 WL 3962550, at *29 (S.D.N.Y. Sept. 2, 2011) (upholding provision of concealed-license statute requiring proper cause to obtain a concealed-weapons license in part because "[t]he other provisions of [the statute] create alternative means by which applicants may

secure permits"), *appeal docketed.*[7]

In arguing otherwise, Plaintiffs severely overread prior decisions by contending that "the D.C. Circuit and the Supreme Court have both rejected the notion that in a Second Amendment case, the availability of some arms negates a claim to other arms." Pl. Opp. at 8. Neither Heller nor Parker v. Dist. of Columbia, 478 F.3d 370 (D.C. Cir. 2007), stand for such a broad principle. The relevant issue in both cases was whether a District law could ban the *possession* of *all* handguns by all law-abiding individuals in the District. Parker rejected as "frivolous" the notion that a total ban on handgun possession "does not implicate the Second Amendment because it does not threaten total disarmament." 478 F.3d at 400. Similarly, the Supreme Court explained that it was "no answer to say . . . that it is permissible to *ban the possession* of handguns so long as the possession of other firearms (i.e., long guns) is allowed. . . . Whatever the reason, handguns are the most popular weapon chosen by Americans for self-defense in the home, and a *complete prohibition* of their use is invalid." 554 U.S. at 630 (emphasis added). Additionally, the D.C. Circuit has made clear that "prohibiting certain arms might not meaningfully affect

[7] Rulings in another constitutional context are also instructive here. While there is a constitutional right to travel *within* the United States, there is no constitutional right to travel by a particular mode of transportation, such as by airplane, even if it might be the most convenient method. See Town of Southold v. Town of E. Hampton, 477 F.3d 38, 54 (2d Cir. 2007) ("[T]ravelers do not have a constitutional right to the most convenient form of travel."); Gilmore v. Gonzales, 435 F.3d 1125, 1136-37 (9th Cir. 2006) (there is no right to air travel even if it is the most convenient means); City of Houston v. FAA, 679 F.2d 1184, 1198 (5th Cir. 1982) (rejecting claim of violation of passengers' constitutional right to travel: "At most, their argument reduces to the feeble claim that passengers have a constitutional right to the most convenient form of travel."). Similarly, Plaintiff Dearth cannot legitimately claim that the right to keep and bear arms dictates that he be afforded access to a particular method of purchasing firearms he happens to prefer (purchase from a U.S. dealer) rather than an alternative method (transporting into the United States firearms he purchases abroad), even if the former method may be viewed as a more convenient method for purchase.

individual self-defense," and thus would not "impinge on the right protected by the Second Amendment." Heller II, 2011 WL 4551558, at *12 (internal citation and punctuation omitted); see also id. at *14-16 (upholding ban on certain semi-automatic rifles and magazines holding more than ten rounds because it does not "prevent a person from keeping a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun"). In any event, the challenged provisions do not ban the possession of either handguns or long guns; rather, they "impos[e] a condition[] and qualification[] on the commercial sale of arms," and Heller expressly stated that "nothing in [this] opinion should be taken to cast doubt on" such laws. 554 U.S. at 626-27. And neither Heller nor Parker stated that in evaluating the constitutionality of a law imposing a condition on the commercial sale of arms (such as State residency), a reviewing court should ignore whether the law provides the plaintiff with reasonable alternative means for obtaining firearms sufficient for self-defense purposes.[8]

Finally, the sole "evidence" presented to rebut the presumption of legality attaching to the challenged laws is a conclusory legal allegation in Plaintiff Dearth's affidavit: "The enforcement of the federal restrictions on firearms acquisition by expatriated Americans is presently interfering with my efforts to acquire firearms for self-defense." Decl. of Stephen Dearth ¶ 7 [ECF No. 23-3]. Because this is an unsupported legal conclusion, rather than factual evidence, it is not entitled to any evidentiary weight. See Fed. R. Civ. P. 56(c)(4) (affidavits in opposition to

[8] Additionally, that Canada's firearms laws are not identical to the laws of the United States, Pl. Opp. at 9-10, is irrelevant, because Plaintiff Dearth does not contend that under Canadian law, he is unable to obtain firearms sufficient for self-defense purposes. Moreover, any assertion about the challenged laws' purported effect on "former plaintiff Maxwell Hodgkins," Pl. Opp. at 10, is irrelevant because Mr. Hodgkins has moved to the United States and thus lacks standing to challenge the laws at issue. See Def. Mem. at 15.

or supporting summary judgment must "set out facts that would be admissible in evidence"). Plaintiffs' closing brief also includes two generalized legal conclusions that, in addition to being incorrect, fail to constitute sufficient evidence to rebut the challenged laws' presumption of legality. Plaintiffs assert broadly that the challenged laws "*forbid*[] expatriated Americans from acquiring all firearms for the core Second Amendment purpose of self-defense" and "*forbid*[] expatriated Americans from purchasing *all firearms* from licensed gun dealers." Pl. Opp. at 13. Neither assertion is accurate. Expatriated Americans who maintain a residence in the United States may purchase firearms from a dealer in their State of residence when they visit the United States. U.S. citizens who have abandoned U.S. residency may rent or borrow handguns or long guns from a federally-licensed dealer while in the United States for lawful sporting purposes and also use such firearms for the purpose of self-defense; they may also lawfully possess firearms owned by another person to use for lawful sporting purposes while visiting the United States, and also use such arms for self-defense. They may also acquire any firearms they wish, as authorized by the laws of the nation in which they have chosen to reside. And as explained above, see supra n.7, Plaintiffs cannot legitimately claim that the Constitution mandates that Plaintiff Dearth must have access to a particular method of firearms purchase he happens to prefer, even if that method might be viewed as a more convenient method of purchase. Moreover, generalized assertions about the laws' purported effect on "expatriated Americans" do nothing to show that *Plaintiff Dearth* cannot obtain firearms sufficient for self-defense purposes (which, as explained above, he has failed to demonstrate).

In sum, Plaintiffs have failed to rebut the presumption of legality accorded to the State residency requirements by demonstrating that they substantially burden Plaintiff Dearth's Second Amendment rights.

B. In Any Event, the State Residency Requirements Are Constitutional Because They Relate Substantially to the Compelling Government Interest in Combating Violent Crime and Protecting Public Safety.

Because Plaintiffs have failed to rebut the presumption that the State residency requirements are lawful, the Court's inquiry may end here. However, in the event that a "standard of scrutiny" analysis is necessary here, the State residency requirements satisfy the second step of the D.C. Circuit's two-step approach because they relate substantially to the compelling government interest in protecting public safety and combating violent crime.

1. If the Court Were to Determine that the State Residency Requirements Impinge on a Right Protected by the Second Amendment, It Should Apply No More Than Intermediate Scrutiny.

If a reviewing court concludes that "a particular provision impinges upon a right protected by the Second Amendment," it proceeds to "determine whether the provision passes muster under the appropriate level of constitutional scrutiny." Heller II, 2011 WL 4551558, at *5. As explained in Defendants' opening brief, the D.C. Circuit, like other Courts of Appeals, applies an intermediate standard of review to Second Amendment challenges. See Def. Mem. at 23 (citing cases). Therefore, if the Court deems it necessary to conduct an independent means-end analysis of the State residency requirement, it should adopt the reasoning of these courts, and apply no more than intermediate scrutiny.

In urging this Court to apply strict scrutiny to the State residency requirements, Plaintiffs overlook the fact that "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful regulatory measures," Heller, 554 U.S. at 626-27 & n.26; McDonald, 130 S. Ct. at 3047. Strict scrutiny contemplates that a law is "presumptively invalid." See, e.g., Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("Restrictions on

speech based on its content are 'presumptively invalid' and subject to strict scrutiny."); see also Heller, 554 U.S. at 688 (Breyer, J., dissenting) ("[T]he majority implicitly . . . rejects [a "strict scrutiny" test] by broadly approving a set of laws [including] governmental regulation of commercial firearm sales . . . whose constitutionality under a strict scrutiny standard would be far from clear."). Nor have Plaintiffs provided any cogent reason why the firearms regulations at issue should be subjected to a more stringent standard of constitutional scrutiny than that applied by most other courts reviewing such provisions, including the D.C. Circuit.

Rather, Plaintiffs' threefold argument (Pl. Opp. at 14-15) is mistaken at every step. First, even if the Second Amendment could be understood as extending some limited protection to the purchase or acquisition of firearms – an assertion that Plaintiffs fail to support with any citation to any federal decision – that protection falls outside the core of the Second Amendment. See Jennings, slip op. at 13 ("Outside the list of examples of presumptively lawful limitations, neither Heller nor [McDonald] directly addresses the buying and selling of firearms, let alone holds this to be at the 'core' of the Second Amendment right."). Any contrary conclusion cannot be reconciled with the Supreme Court's statement that "nothing in [Heller] should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of firearms," which are "presumptively lawful." Heller, 554 U.S. at 626-27 & n.26.[9] Notably, the law held

[9] Although 18 U.S.C. § 922(a)(9) targets the receipt of firearms in addition to their commercial purchase, intermediate scrutiny remains the appropriate analysis because any alleged burden on Plaintiff Dearth falls at least one level outside the core right recognized in Heller. See Osterweil v. Bartlett, __ F. Supp. 2d __, 2011 WL 1983340, at *10 (N.D.N.Y. May 20, 2011) (intermediate scrutiny was the appropriate level of scrutiny for Second Amendment challenge to state licensing law as applied to out-of-State residents because, inter alia, "the burden imposed by this law falls at least one level outside the core right recognized in Heller, i.e., the right of a law abiding individual to keep and carry a firearm for the purpose of self defense in the home. Although plaintiff still owns a house in New York, *which he uses for vacation purposes*, that

unconstitutional in Heller was a ban on handgun *possession*, not a law regulating the purchase or acquisition of firearms. See id. at 635 ("[W]e hold that the District's ban on handgun possession in the home violates the Second Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.").

Second, Plaintiffs incorrectly contend that as to Plaintiff Dearth, the State residency requirements bar the purchase or acquisition of protected arms and therefore also constitute a ban on possession. Pl. Opp. at 15. As explained above, see supra II.A.2, both contentions are incorrect. Plaintiff Dearth may purchase or otherwise acquire firearms sufficient to use for self-defense purposes in his nation of residence and transport them to the United States during visits. He may therefore possess those arms, both in his nation of residence and when he visits the United States. Moreover, Plaintiffs' argument is fundamentally at odds with Heller II. Having concluded that certain semi-automatic rifles warranted protection under the Second Amendment, the D.C. Circuit explained that "intermediate rather than strict scrutiny is the appropriate standard of review" because "[u]nlike the law held unconstitutional in Heller, the laws at issue here do not prohibit the *possession* of 'the quintessential self-defense weapon,' to wit, the handgun. Nor does the ban on keeping certain semi-automatic rifles prevent a person from *keeping* a suitable and commonly used weapon for protection in the home or for hunting, whether a handgun or a non-automatic long gun." Heller II, 2011 WL 4551558, at *14 (quoting Heller, 554 U.S. at 629) (emphasis added).

So too here. The State residency requirements do not prevent Plaintiff Dearth from

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house is no longer his 'home.'") (emphasis added), *appeal docketed*. Moreover, Plaintiff Dearth alleges only that he seeks to "*purchase* firearms within the United States." Compl. ¶ 11 (emphasis added).

keeping a suitable and commonly used weapon for protection, whether a handgun or long gun. He may possess both handguns and long guns useful for sporting purposes in the United States by transporting those firearms into the United States.[10] Thus, if the Court deems it necessary to apply a constitutional means-end analysis, intermediate scrutiny is the appropriate standard.

2. The State Residency Requirements Satisfy Intermediate Scrutiny.

a. 18 U.S.C. § 922(a)(9) Relates Substantially to the Compelling Government Interest in Combating Violent Crime and Protecting Public Safety.

As explained in Defendant's opening brief, Congress enacted 18 U.S.C. § 922(a)(9) in response to the law enforcement problem posed by nonresident aliens obtaining firearms in the United States from licensed firearms dealers using an intermediary, to whom they could make false statements about their residence with no criminal penalty. Def. Mem. at 12-13. To prevent such acquisition (which often preceded smuggling of the weapons out of the country), Congress generally prohibited the receipt of firearms by any person who does not reside in any State. Id.

Although Plaintiffs question whether Defendant has offered sufficient support that Section 922(a)(9) advances the goals of protecting public safety and combating violent crime, Pl. Opp. at 17, available evidence since its enactment has underscored Congress's concerns about aliens obtaining firearms in the United States before smuggling these weapons abroad. Between 2002 and 2011, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") referred for prosecution at least 207 cases involving aliens present in the United States in which two or more firearms were believed to have been trafficked. Declaration of Christopher A. Pellettiere ¶¶ 2-3

[10] In addition to rifles and shotguns, a number of handguns are useful for lawful sporting purposes. Def. Mem. at 24 & n.25.

(attached as Ex. 2). The 207 identified cases involved approximately 3,887 firearms believed to have been trafficked. Id. ¶ 3.

Moreover, Mexican drug trafficking organizations represent a significant organized crime threat to the United States. See U.S. Department of Justice, National Drug Intelligence Center, National Drug Threat Assessment (2011), at 1-3.[11] Based on the number of firearms seized in Mexico and successfully traced by ATF to non-licensed purchasers, the U.S. Government Accountability Office has concluded that "a large proportion of the firearms fueling Mexican drug violence originated in the United States." U.S. Government Accountability Office, Firearms Trafficking: U.S. Efforts to Combat Arms Trafficking to Mexico Face Planning and Coordination Challenges (June 2009) ("Firearms Trafficking") at 3.[12] According to the Congressional Research Service ("CRS"), "[t]he Mexican government estimates that 2,000 firearms are smuggled across the Southwest border daily." Vivian S. Chu & William J. Krouse, Gun Trafficking and the Southwest Border (Sept. 21, 2009), at 2.[13] During fiscal year 2008, U.S. Immigrations and Customs Enforcement ("ICE") "initiated 103 cases involving Mexico-related weapons smuggling" and ATF "referred 73 cases involving arms trafficking to Mexico for

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[11] *Available at* http://www.justice.gov/ndic/pubs44/44849/44849p.pdf.

[12] According to eTrace reports from ATF, over 20,000 firearms seized by Mexican authorities and traced from fiscal year 2004 to fiscal year 2008 originated in the United States. Firearms Trafficking at 15. "While the eTrace data only represents data from gun trace requests submitted from seizures in Mexico and not all the guns seized, it is currently the only systematic data available, and the conclusions from its use that the majority of firearms seized and traced originated in the United States were consistent with conclusions reached by U.S. and Mexican government and law enforcement officials involved personally in combating arms trafficking to Mexico." Id. at 16.

[13] *Available at* fpc.state.gov/documents/organization/128845.pdf.

prosecution" by U.S. Attorneys Offices. Firearms Trafficking at 43-44. In 2009, ICE provided a detailed explanation of the target of one of its weapons smuggling investigations, Ernesto Tornel Olvera-Garza of Monterrey, Mexico:

> During the course of the investigation, agents learned that between 2006 and the time of his arrest in October 2007, he trafficked in high-powered, high-capacity handguns and assault rifles. Since his temporary visa did not allow him to legally buy guns in the United States, Mr. Olvera-Garza instead paid people in the United States to buy guns for him and lied about who the guns were for. Mr. Olvera-Garza organized and led the gun-smuggling conspiracy, which included at least nine "straw purchasers" who purchased firearms on his behalf. More than 50 weapons were purchased and smuggled to Mexico as part of this ring. One of Mr. Olvera-Garza's smuggled pistols was recovered in Mexico after it was used in a running gun battle where two Mexican soldiers were killed. Mr. Olvera-Garza has pleaded guilty and is pending sentencing.

Escalating Violence in Mexico and the Southwest Border as a Result of the Illicit Drug Trade: Hearings Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary, 111th Cong. 44 (2009) (testimony of Janice Ayala, Deputy Assistant Director, Office of Investigations, U.S. Immigration and Customs Enforcement).[14] ICE reported that an operation begun in 2008 to combat weapons smuggling had "seized 1,440 weapons, 122,410 rounds of ammunition and arrested 329 individuals on criminal charges, resulting in 94 criminal indictments and 51 convictions to date." Id. Additionally, CRS has noted that "the cross-border flow of illegal firearms has also been an issue for Canada, because Canadian gun laws are also generally much stricter than U.S. gun laws." Chu & Krouse, Gun Trafficking and the Southwest Border, at 3.

Additionally, the "fit" between this goal and Section 922(a)(9) is substantial. Although Plaintiffs question Section 922(a)(9)'s exception for lawful sporting purposes, Pl. Opp. at 16, that

[14] *Available at* http://judiciary.house.gov/hearings/printers/111th/111-25_49476.PDF.

exception does not undermine the objectives for which the law was enacted. Congress sought to prevent nonresident aliens from obtaining firearms from unlicensed persons and then smuggling the firearms out of the United States. At the same time – as explained in Defendant's opening brief – Congress did not want to hinder the hunting and tourist industry by prohibiting international hunters. See Def. Mem. at 12-13.[15] Congress recognized that an outright prohibition on the receipt of firearms by nonresident aliens might inhibit the lawful use of such weapons by hunters visiting the United States. By excepting the receipt of weapons for sporting purposes, no such prohibition was necessary. Thus, the sporting-purposes exception is consistent with the concern expressed by Congress in 1994 – the acquisition of weapons by aliens lawfully in the United States in order to smuggle them beyond U.S. borders.

None of Plaintiffs' attempts to undermine the "fit" between Section 922(a)(9) and its compelling goals succeed. First, Plaintiffs assert that nonresident aliens should enjoy rights similar to those accorded to U.S. citizens. Pl. Opp. at 16-17. They do. Nonresident aliens are treated in the same manner under Section 922(a)(9) as nonresident U.S. citizens.[16]

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[15] See also 137 Cong. Rec. S9072 (June 28, 1991) ("I have been trying to pin down the meaning of the provision. . . dealing with receipt of firearms by a nonresident. . . . [I]t was called to my attention as being a provision that might have a serious impact upon foreign visitors who come to a State such as mine to hunt and to buy guns. They usually end up by giving them to their guides or leaving them in this country. This provision, as I understand it, would bar anybody from even delivering to that person a gun for such a time period."); id. ("If this is going to seriously impede the very substantial guide business for foreign hunters in my State, then I have no alternative but to object.") (statements of Sen. Ted Stevens).

[16] Additionally, ATF is revising its regulations to ensure that the State residency requirements will apply in the same manner to U.S. resident citizens and resident aliens. See Open Letter to All Federal Firearms Licensees (Dec. 22, 2011), *available at* http://www.atf.gov/press/releases/2011/12/122211-atf-open-letter-state-of-residence.pdf.

Second, Plaintiffs question why Section 922(a)(9) should apply to Plaintiff Dearth, who is a nonresident U.S. citizen rather than a nonresident alien. Pl. Opp. at 17. It is true that the specific problem addressed by Section 922(a)(9) is the problem of nonresident aliens purchasing firearms from unlicensed persons and smuggling them out of the United States. By imposing criminal liability for the receipt of firearms by an individual who does not reside in any State, Section 922(a)(9) aims to discourage such behavior. But if Sections 922(a)(9) and (b)(3) did not apply to nonresident U.S. citizens – the result that Plaintiffs desire here – this loophole would encourage similar behavior by nonresident citizens (including residents of Canada and Mexico), who have also obtained firearms from licensed dealers and non-licensees in order to smuggle them out of the country.[17] Given the demand for such weapons to be smuggled out of the United States, it is not surprising that nonresident U.S. citizens have a financial motive to do so.

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[17] See Leader of International Firearms Trafficking Network Sentenced to 32 Years in Prison, U.S. Federal News, May 5, 2009, 2009 WLNR 8517185 (Westlaw) (U.S. citizen living in Canada admitted to smuggling approximately 500 firearms into Canada); Three Sentenced for Involvement in a 100+ Firearm Straw Purchase and Export Ring, Dec. 20, 2011 (two U.S. citizens residing in Mexico sentenced for smuggling 36 firearms from the United States to Mexico), *available at* http://www.justice.gov/usao/txs/1News/Releases/2011%20December/111220%20Bravo-Hernandez.html; Rafael Romo, American Citizen in Mexican Custody on Arms Trafficking Allegation, Sept. 6, 2011 (U.S. citizen residing in Mazatlan, Mexico arrested for purchasing weapons in United States, then smuggling the weapons to Mexico), *available at* http://www.borderlandbeat.com/2011/09/american-citizen-in-mexican-custody-on.html; Naxiely Lopez, 15 High-Powered Rifles Seized After Traffic Stop, The Monitor (McAllen, Texas), Jan. 13, 2011, 2011 WLNR 709786 (two U.S. citizens living in Mexico arrested for attempting to smuggle 15 AK-47 rifles into Mexico); Naxiely Lopez, Man Sentenced for Straw Purchase of Guns, The Monitor (McAllen, Texas), Jan. 5, 2011, 2011 WLNR 264059 (U.S. citizen living in Mexico bought nine AK-47 type rifles and four pistols to smuggle to Mexico); Prison Term Set for Gun Smuggler, San Antonio Express-News, Aug. 27, 2009, 2009 WLNR 16829243 (U.S. citizen residing in Mexico convicted for attempting to smuggle converted semi-automatic machine gun, AK-47 rifle, and 3000 rounds of ammunition into Mexico); Diana Washington Valdez, Firearms in Mexico Have Ties to El Paso, El Paso Times, Dec. 14, 2008, 2008 WLNR 24011948 (U.S. citizen residing in Mexico indicted for smuggling weapons to Mexico).

Additionally, as explained in Defendant's opening brief, because the vast majority of U.S. citizens reside in the United States, the State residency requirements affect only a narrow class of persons. Def. Mem. at 33. Plaintiffs mischaracterize this explanation as asserting that a law that has been demonstrated to be unconstitutional cannot be upheld on the basis that it violates the rights of only a small number of persons. Pl. Opp. at 17-18. Defendant is not making any such assertion. Plaintiffs' mistake is to *assume* as a foregone conclusion precisely what the D.C. Circuit's two-step inquiry aims to determine: whether a firearms regulation violates the Second Amendment. And in applying the second step (a constitutional means-end analysis), a reviewing court may analyze the degree of fit between the means used by the law and its proposed end by examining the number of persons affected by the law. See Osterweil v. Bartlett, __ F. Supp. 2d _, 2011 WL 1983340, at *11 (N.D.N.Y. May 20, 2011) ("[T]here is a substantial relationship between New York's residency requirement and the government's significant interest. The statute burdens only a narrow class of persons, i.e., otherwise qualified out-of-state residents who wish to obtain a license to carry a firearm in New York."), *appeal docketed*; Peterson v. LaCabe, 783 F. Supp. 2d 1167, 1177 (D. Colo. 2011) ("I disagree [with plaintiff] that the statute should be reviewed under strict scrutiny and conclude, like the cases discussed above, that intermediate scrutiny is appropriate [because, inter alia], the statute burdens only a narrow class of persons, i.e., otherwise qualified out-of-state residents who wish to obtain a license to carry a concealed weapon in Colorado."), *appeal docketed*.

Furthermore, "intermediate scrutiny, by definition, permits legislative bodies to paint with a broader brush than strict scrutiny. . . . As a consequence, the degree of fit between" the State residency requirements "and the well-established goal of promoting public safety need not be

perfect; it must only be substantial." Heller II, 698 F. Supp. 2d 179, 191 (D.D.C. 2010) (citations and internal punctuation omitted), *aff'd in relevant part*, __ F.3d __, 2011 WL 4551558, at *10; see also Osterweil, 2011 WL 1983340, at *11 ("Although prohibiting gun possession by nearly all nonresidents [of New York State] might not be the most precisely focused means to achieve this end, intermediate scrutiny, by definition, permits the government to paint with a broader brush. Morever, because the government objective is exceptionally compelling in this area, the State must be afforded wider latitude to combat the great social harm inflicted by gun violence.") (footnote omitted). Here, Defendant has established that Section 922(a)(9) substantially relates to the compelling governmental goals of preventing violent crime and protecting public safety.

b. 18 U.S.C. § 922(b)(3) Also Substantially Relates to the Compelling Government Interest in Protecting Public Safety and Combating Violent Crime.

In 1968, Congress enacted restrictions on the commercial purchase of firearms outside the State in which an individual resides, in response to testimony about individuals' evasion of State firearms laws by crossing State lines and then using the purchased weapons in criminal activities. See Def. Mem. at 7-13. As the D.C. Circuit has recognized, the findings made by Congress in 1968 "express the widely accepted knowledge that there is a vast interstate market in firearms that makes the states unable to control the flow of firearms across their borders or to prevent the crime inevitably attendant to the possession of such weapons once inside their borders." Navegar, Inc. v. United States, 192 F.3d 1050, 1063 (D.C. Cir. 1999).

Plaintiffs' opposition brief fails to undermine the conclusion that Section 922(b)(3) relates substantially to the goals of preventing violent crime and protecting public safety. First, Plaintiffs mistakenly contend that the rationale underlying Section 922(b)(3) "is overstated"

because as amended, the Gun Control Act permits the interstate sales of rifles and shotguns. Pl. Opp. at 19. In enacting the Gun Control Act in 1968, Congress declined to "indiscriminately place further restrictions on the acquisition of all types of firearms." S. Rep. No. 89-1866, at 4 (Def. Mem, Ex. 2) [ECF No. 25-2].[18] "Rather, in seeking to reduce the criminal use of firearms," Congress "especially concern[ed] itself with the particular type of weapon that is predominantly used by the criminal." Id. The handgun's "size, weight, and compactness make it easy to carry, to conceal, to dispose of, or to transport," and "[a]ll these factors make it the weapon most susceptible to criminal use." Id. "The evidence before" Congress, moreover, "overwhelmingly demonstrated that the handgun is the type of firearm that is principally used in the commission of serious crime." Id. at 7.[19] Congress thus enacted different requirements for the transfer of

[18] For example, Congress recognized the widespread use of long guns for lawful sporting purposes. See 114 Cong. Rec. 21657, 21773 (July 17, 1968) ("I feel that a sportsman or a hunter who goes into a noncontiguous State on a lawful hunting trip and loses his rifle or shotgun or breaks it, or has it stolen, he should not have to return to his State of residence to purchase another gun. I know many, many hunters in my district who are not financially able to do this, but they may be financially able to purchase a used weapon or even a new weapon in the State where they are hunting.") (statement of Rep. Del Latta), id. at 21796 ("Mr. Chairman, suppose the gentleman from Illinois goes from the State of Illinois on a hunting trip out to Wyoming, and his gun is stolen, or it in some way becomes damaged, how is the gentleman going to get a gun to complete his hunting trip in Wyoming?") (statement of Rep. Basil Whitener); id. at 21806 ("We have many big-game hunting guides in my State and they have hunters coming from 'Outside' as we call it – from other States, hunters who want to hunt in Alaska; and these guides oftentimes lend the hunters guns. Under this legislation, if the hunters are from another jurisdiction, they would be prohibited from borrowing a gun for hunting purposes. I do not see any reason for that kind of a law.") (statement of Rep. Howard Pollock).

[19] For example, the FBI reported that "handguns were used in 70 percent of the murders committed with firearms" during the preceding year, id. at 5, and in 78 percent of the firearm-related homicides of police officers killed in the line of duty. Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary ("1967 Hearings"), 90th Cong. 873 (1967), *available at* http://www.lexisnexis.com/congcomp/getdoc?HEARING-ID=HRG-1967-SJS-0031.

handguns, as opposed to rifles and shotguns, because it found that "concealable weapons" presented a particular challenge for state and local law enforcement authorities, Pub. L. No. 90-351, Title IV, § 901(a)(2), (4), (5), (6), 82 Stat. at 225, and that "the sale or other disposition of *concealable weapons* by importers, manufacturers, and dealers holding Federal licenses, to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms." Id. § 901(a)(5), 82 Stat. at 225 (emphasis added).[20] Thus, contrary to Plaintiffs' suggestion, the rationale for Section 922(b)(3) has not been "overstated."

Second, as applied to Plaintiff Dearth, Section 922(b)(3) substantially relates to the purpose for which it was enacted: "to aid state and local gun control efforts by reducing the flow of firearms from loose-control to tight-control states." Def. Mem. at 30 (quoting Franklin E. Zimring, Firearms and Federal Law: The Gun Control Act of 1968, 4 J. Legal Stud. 133, 134 (1975)). Plaintiffs' contention that such reduction was not the goal of the State residency requirements but is instead a post hoc rationale invented in response to litigation, Pl. Opp. at 20, is mistaken. The legislative history of the Gun Control Act of 1968 is replete with testimony about State and local firearms regulations being undermined by the flow of firearms purchased in

[20] Homicide statistics reveal the disproportionate threat that handguns continue to pose to the public safety. From 2005-2009, at least 70 percent of those killed by firearms across the country were killed by handguns. See Federal Bureau of Investigation, Uniform Crime Reports ("FBI Crime Reports"), table 8, *available at* http://www2.fbi.gov/ucr/cius2009/offenses/expanded_information/data/shrtable_08.html. In 2009, at least 70 percent of the people murdered by firearms in the District of Columbia were killed with handguns. See FBI Crime Reports, table 20, *available at* http://www2.fbi.gov/ucr/cius2009/data/table_20.html. Handguns were used in 72 percent of the 490 firearm-related felony homicides of law enforcement officers killed in the line of duty from 2000 through 2009. See FBI Crime Reports, table 27, *available at* http://www2.fbi.gov/ucr/killed/2009/data/table_27.html.

jurisdictions with more lax firearms requirements.[21] Section 922(b)(3)'s restriction on the sale

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[21] See, e.g., S. Rep. No. 89-1866, at 3 ("Not only is mail order a means of circumventing State and local law, but the over-the-counter sale of firearms, primarily handguns, to persons who are not residents of the locale in which the dealer conducts his business, affords similar circumvention."); Federal Firearms Act: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary, 89th Cong. 67 (1965) ("A third major problem area [with respect to interstate traffic in firearms] involves individuals going across State lines to procure the firearms which they could not lawfully procure or possess in their own State, or in other cases, in order to circumvent certain local waiting periods and police notification requirements.") (statement of Sheldon S. Cohen, Commissioner of Internal Revenue), *available at* http://www.lexisnexis.com/congcomp/getdoc?HEARING-ID=HRG-1965-SJS-0054; id. at 124 ("[O]ur big problem is that we have absolutely no control of the weapons coming in [to California]. . . . An honest citizen in California buying a handgun must go through a certain procedure and this must be registered with my office. And it is just a normal registration procedure. The less honest citizen who does not want to have it a matter of record that he has a gun can go over to Arizona or to Nevada, which in some instances is just going a mile or two, and purchase a gun over-the-counter, without any record either there, or in the State of California.") (statement of Thomas C. Lynch, Attorney General, State of California); id. at 404 ("Although under present New Jersey law a permit to carry a pistol or revolver is required, there is no way to detect weapons which are smuggled into New Jersey without a permit to purchase or carry. [The proposed bill] would go a long way to ameliorate this situation.") (statement of Arthur J. Sills, Attorney General, Department of Law and Public Safety, State House, Trenton, New Jersey); 1967 Hearings at 46-47 ("The other major loophole in State enforcement of firearms laws [other than mail-order purchase] involves purchase across State lines. It is well known among law enforcement officers that the crossing of State lines to avoid State law in the acquisition of firearms is common practice. . . . Special surveys undertaken by the [Treasury Department's] Alcohol and Tobacco Tax Division clearly reveal the frustration of strict State gun laws by out-of-State purchase. The State of Massachusetts requires a permit to purchase a handgun. It was determined from police records in Massachusetts that over 86 percent of weapons used in murders and holdups had been purchased in the States of Maine and New Hampshire, and particularly in those counties that are a short driving distance from Massachusetts. Maine and New Hampshire have no permit requirement. . . . Missouri State law also requires a permit to purchase a concealable weapon. It was found that during the period February 1966 to February 1967 approximately 5,000 persons who gave a residence address in the city or county of St. Louis, Mo., purchased firearms – primarily handguns – in the neighboring State of Illinois which has no permit requirement. Approximately 200 of these purchasers were determined to have records of felony convictions. . . . Detroit, Mich., also has a serious problem enforcing its rather strict firearms laws. Dealers in nearby Toledo, Ohio, brazenly advertise 'No Permit Required' to buy guns and some estimate that 90 percent of their customers are from Michigan, principally Detroit.") (testimony of Sheldon S. Cohen, Commissioner of Internal Revenue); id. at 407 ("I think for easier administration of law enforcement, we should say, no sale of handguns to a nonresident, period. And then each of our

of firearms by licensed dealers to individuals who do not reside in the State where the licensee does business was aimed at strengthening these State and local regulations.

And as applied to Plaintiff Dearth, Section 922(b)(3) substantially relates to this purpose by preventing him from evading State and local firearms regulations simply by traveling to a different State where firearms regulations are more lax.[22] Many States impose particular conditions on the commercial sale of firearms. For example, the District of Columbia prohibits the sale of certain semi-automatic rifles, pistols, and shotguns. D.C. Code §§ 7-2501.01(3A)(A), 7-2502.02(a)(6). Similarly, California bars the sale of certain semiautomatic pistols, Cal. Penal Code § 12276.1(4), and conditions the receipt of a handgun from a licensed dealer on a demonstration of the receiver's ability to handle a handgun safely and properly operate its safety features. Id. § 12071(8). Without Section 922(b)(3), if a non-resident U.S. citizen decided to visit the District of Columbia or California, he or she could circumvent these requirements

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communities could enforce our own gun laws.") (statement of William L. Cahalan, Prosecuting Attorney, Wayne County, Michigan); Federal Firearms Legislation: Hearings Before the Subcomm. to Investigate Juvenile Delinquency of the Sen. Comm. on the Judiciary, 90th Cong. 91 (1968), *available at* http://www.lexisnexis.com/congcomp/getdoc?HEARING-ID=HRG-1968-SJS-0021 ("The interstate shipment of guns allows easy circumvention of local laws. The Crime Commission found strong indications that out-of-State sources provide a substantial number of guns to those who commit crimes. It also cited studies by the Massachusetts State Police showing that 87 percent of concealable firearms used to commit crimes in Massachusetts in a recent year were obtained outside the State. In New York City, although there are only 18,000 permits for handguns we also find that many more residents own pistols and they are purchased out-of-State, either through the mail or in person.") (statement of Mayor John V. Lindsay, New York City).

[22] As noted in Defendant's opening brief, the Complaint fails to specify the State in which Plaintiff Dearth allegedly intends to purchase firearms. Def. Mem. at 16 n.19.

simply by crossing State lines.[23]

Third, Plaintiffs incorrectly contend that Plaintiff Dearth is being treated differently under Section 922(b)(3) than other U.S. citizens. Pl. Opp. at 19. To the contrary, it is Plaintiff Dearth who is demanding to be able to "opt out" of requirements of federal law that apply to all U.S. citizens, whether they reside in the United States or not. Simply put, Plaintiff Dearth seeks to be treated differently from, and better than, resident U.S. citizens, and not equally with them.

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[23] See also, e.g., Conn. Gen. Stat. §§ 29-37a (two-week waiting period for purchasing long guns); Iowa Code § 724.15 (annual permit required to purchase handgun, conditioned upon, inter alia, the permit holder having "no history of repeated acts of violence"); Md. Code Ann., Crim. Law §§ 4-305(b); 5-101(c), (g); 5-134(b)(2), (b)(14); 5-406(a)(2) (prohibiting purchase of a detachable magazine with a capacity of more than 20 rounds of ammunition for a firearm; prohibiting sale of certain firearms if the purchaser has been convicted of certain disqualifying crimes, or if the purchaser fails to complete a certified firearms safety training course; prohibiting sale of handguns not on handgun roster); Mich. Comp. Laws § 28.422 (purchaser of handgun must obtain license from chief of police or county sheriff and score 70% on a basic pistol safety review questionnaire); N.C. Gen. Stat. § 14-402 (prohibiting purchase of pistol without a permit from the sheriff in the county where the purchaser resides, or a valid North Carolina concealed handgun permit held by a North Carolina resident); N.J. Stat. Ann. §§ 2C:58-3(a), (b) (prohibiting purchase of handgun without permit, and purchase of rifle or shotgun without firearms purchaser identification card); Or. Rev. Stat. §§ 166.412(2)(c), 166.470(g) (requiring dealers to obtain thumbprints from firearms purchasers and retain them for five years; prohibiting sale of firearm to individual convicted of certain violent misdemeanors within the previous four years); 18 Pa. Cons. Stat. §§ 6102, 6112, 6113, 6142 (all firearms sales must be made by a State-licensed dealer; no sale of firearms unless purchaser either buys or is provided with a locking device for the firearm); R.I. Gen. Laws Ann. § 11-47-35 (before applying for the purchase of a handgun, a buyer must receive a state-issued handgun safety card by completing a safety course); Tenn. Code Ann. § 39-17-1316(a)(1) (no sale of firearms to individuals convicted of the offense of stalking); Va. Code. Ann. § 18.2-308.2:2(P)(1) (requiring completion of an "enhanced background check" for the purchase of more than one handgun within a 30-day period from a licensed dealer); Wash. Rev. Code §§ 9.41.090(1), (5) (purchaser of pistol must provide identifying information, including driver's license or state identification number, to dealer; dealer must wait 60 days before delivering pistol to buyer if the buyer has not resided in the State for the previous 90 days).

Fourth, Plaintiffs mistakenly contend that Section 922(b)(3) could not satisfy intermediate scrutiny if the government's interests could feasibly be served by demanding proof of overseas residence. Pl. Opp. at 21. But "intermediate scrutiny does not require that a regulation be the least intrusive means of achieving the relevant government objective, or that there be no burden whatsoever on the individual right in question." United States v. Masciandaro, 638 F.3d 458, 474 (4th Cir. 2011), *cert. denied*, __ S. Ct. __, 2011 WL 2516854 (Nov. 28, 2011); see also Heller II, 2011 WL 4551558, at *10 (under intermediate scrutiny, the "fit" between a law between a firearms regulation and an important or substantial governmental objective may "employ[] not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective") (quoting Bd. of Trustees of State Univ. v. Fox, 492 U.S. 469, 480 (1989) (internal punctuation omitted)).[24]

In sum, 18 U.S.C. § 922(b)(3) plainly satisfies intermediate scrutiny.

III. THE CHALLENGED PROVISIONS DO NOT IMPINGE ON PLAINTIFFS' FREEDOM TO TRAVEL INTERNATIONALLY.

Defendants' opening brief demonstrated that Plaintiffs' challenge based on an alleged fundamental constitutional right to international travel was meritless. Def. Mem. at 34-39. In particular, Plaintiffs' reliance on Kent v. Dulles, 357 U.S. 116 (1958), and Aptheker v. Sec'y of State, 378 U.S. 500 (1964), for the proposition that an alleged fundamental "right to international travel" exists is severely misplaced because "[b]oth Kent and Aptheker . . . were qualified the following term in Zemel v. Rusk, 381 U.S. 1 (1965)." Regan v. Wald, 468 U.S.

[24] In any event, demanding proof of overseas residence would not feasibly serve the government's interests because it would not prevent U.S. citizens (in this instance, U.S. citizens residing abroad) from circumventing State firearms laws simply by traveling to a State in which firearms laws are more lax, which is the very problem Section 922(b)(3) seeks to remedy.

222, 241 (1984).[25] Although "[i]n Kent. . . the constitutional right to travel within the United States and the right to travel abroad were treated indiscriminately," the Supreme Court made clear that "[t]hat position has been rejected in subsequent cases." Id. at 241 n.25 (citing Haig, 453 U.S. at 306; Califano v. Aznavorian, 439 U.S. 170, 176-77 (1978)). Consequently – and contrary to the impression conveyed by Plaintiffs – it is now well established that "the *freedom* to travel outside the United States must be distinguished from the *right* to travel within the United States," and that the former is "subject to reasonable governmental regulation." Haig, 453 U.S. at 306-07 (emphasis in original). In perhaps its clearest statement on this issue, the Supreme Court declared:

> Aznavorian urges that the freedom of international travel is basically equivalent to the constitutional right to interstate travel, recognized by this Court for over 100 years. But this Court has often pointed out the crucial difference between the freedom to travel internationally and the right of interstate travel. The constitutional right of interstate travel is virtually unqualified. By contrast the 'right' of international travel has been considered to be no more than an aspect of the 'liberty' protected by the Due Process Clause of the Fifth Amendment. As such this 'right,' the Court has held, can be regulated within the bounds of due process. Thus, legislation which is said to infringe the freedom to travel abroad is not to be judged by the same standard applied to laws that penalize the right of interstate travel, such as durational residency requirements imposed by the States.

Aznavorian, 439 U.S at 176-77 (citations and internal punctuation omitted).

Plaintiffs do not contend that the Supreme Court has ever repudiated its statements in Haig, Regan, or Aznavorian. Instead, Plaintiffs rely unduly on Kent and Aptheker, as well as a Fifth Circuit case, Hernandez v. Cremer, 913 F.3d 230 (5th Cir. 1990), which involved a U.S.

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[25] Contrary to Plaintiffs' characterization (Pl. Opp. at 21), Defendant never stated that Kent or Aptheker had been formally overruled, but only that in light of subsequent Supreme Court cases, Plaintiffs' reliance on these cases for the proposition that an alleged fundamental "right to international travel" exists was severely misplaced.

citizen who was barred from entering the country. Plaintiff Dearth does not contend (nor can he) that he is barred from entering the United States. Far more on point is a different Fifth Circuit case, United States v. Lebman, 464 F.2d 68 (5th Cir. 1972), in which the defendant challenged Section 922(b)(3) as unconstitutionally infringing the much broader right to inter*state* travel. The Fifth Circuit held that this argument failed because it was "unable to discern any inhibition on the non-resident firearms purchaser's right to travel occasioned by a statute regulating the sale of firearms to a non-resident by a licensed dealer," especially "in light of the explicit Congressional finding that "the sale or other disposition of concealable weapons to nonresidents of the State in which the licensees' places of business are located, has tended to make ineffective the laws, regulations, and ordinances in the several States and local jurisdictions regarding such firearms." Id. at 74 (citation and internal punctuation omitted). Plaintiffs' similar argument based on the narrower right to inter*national* travel similarly fails.[26]

CONCLUSION

For the reasons stated above and in Defendant's opening brief, the Court should enter judgment on the pleadings for Defendant or, in the alternative, enter summary judgment for Defendant.

Dated: February 1, 2012

Respectfully Submitted,

TONY WEST
Assistant Attorney General

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United States Attorney

[26] The equal protection argument in Plaintiffs' closing brief (Pl. Opp. at 24) relies only on arguments previously asserted by Plaintiffs. Defendant has previously responded to these arguments. Def. Mem. at 40-42.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

REBEKAH JENNINGS; BRENNAN HARMON; ANDREW PAYNE; NATIONAL RIFLE ASSOCIATION OF AMERICA, INC.,	)	
Plaintiffs,	)	
v.	)	
THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, et al.,	)	
Defendants.	)	Civil Action No. 5:10-CV-140-C

ORDER

On this date, the Court considered:

(1) Defendants Bureau of Alcohol, Tobacco, Firearms and Explosives; Kenneth E. Melson, in his official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives; and Eric H. Holder, Jr., in his official capacity as Attorney General of the United States' ("Defendants") Motion to Dismiss or, in the Alternative, for Summary Judgment, Brief, and Appendix, filed December 22, 2010;

(2) Plaintiffs' Response and Cross-Motion for Summary Judgment, Brief, and Appendix, filed January 28, 2011;

(3) Defendants' Combined Reply in Support of their Motion to Dismiss or, in the Alternative, for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment, Brief, and Appendix, filed April 6, 2011;

(4) Plaintiffs' Reply in Support of Plaintiffs' Cross-Motion for Summary Judgment, filed May 18, 2011;

(5) Defendants' Notice of Recent Authority, filed May 12, 2011;

(6) Plaintiffs' Notice of Supplemental Authority, filed July 18, 2011;

(7) Defendants' Response, filed July 22, 2011; and

(8) Brief of *Amici Curiae* Brady Center to Prevent Gun Violence, Graduate Student Assembly and Student Government of the University of Texas at Austin, Mothers Against Teen Violence, Students for Gun-Free Schools in Texas, and Texas Chapters of the Brady Campaign to Prevent Gun Violence in Support of Defendants, filed January 28, 2011.

After considering the relevant arguments and authorities, the Court **DENIES** Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1), **GRANTS** Defendants' Motion for Summary Judgment, **DENIES** as moot Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6), and **DENIES** Plaintiffs' Cross-Motion for Summary Judgment.

I. FACTS

a. Preliminary Statement

Plaintiffs bring this action for declaratory judgment and injunctive relief challenging the constitutionality of federal statutes and regulations that ban the sale by federal firearm license holders ("FFLs") of handguns and handgun ammunition to persons under the age of twenty-one ("the ban"). The crux of Plaintiffs' allegations is that the ban violates both the Second Amendment to the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

b. Statutory Scheme

The statutes and regulations that implement the ban, and thus are the subject of this lawsuit, are the following:

(1) 18 U.S.C. § 922(b)(1), which states: "It shall be unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver any firearm or ammunition to any individual who the licensee knows or has reasonable cause to believe is less than eighteen years of age, and, if the firearm, or ammunition is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the

licensee knows or has reasonable cause to believe is less than twenty-one years of age."

(2) 18 U.S.C. § 922(c)(1), which prescribes that "a licensed importer, licensed manufacturer, or licensed dealer may sell a firearm to a person who does not appear in person at the licensee's business premises . . . only if" the person signs a sworn statement attesting "that, in the case of any firearm other than a shotgun or a rifle, I am twenty-one years or more of age."

(3) 27 C.F.R. § 478.99(b)(1), which provides: "A licensed importer, licensed manufacturer, licensed dealer, or licensed collector shall not sell or deliver any firearm or ammunition . . . if the firearm, or ammunition, is other than a shotgun or rifle, or ammunition for a shotgun or rifle, to any individual who the importer, manufacturer, dealer, or collector knows or has reasonable cause to believe is less than 21 years of age."

(4) 27 C.F.R. §§ 478.124(a), 478.96(b), which require that federal firearms licensees obtain a signed copy of Form 4473 before transferring a handgun to a purchaser. Form 4473 states that the information provided therein "will be used to determine whether [the transferee is] prohibited under law from receiving a firearm" and instructs licensees that it is "unlawful for a licensee to sell any firearm other than a shotgun or rifle to any person under the age of 21."[1]

Each of these laws operates in reference to FFLs. Title 18, Section 922(a)(1)(A) of the U.S. Code requires any person who "engage[s] in the business of importing, manufacturing, or dealing in firearms" to obtain a federal firearms license. A firearms "dealer," in turn, is any person who, inter alia, "engage[s] in the business of selling firearms at wholesale or retail," including pawnbrokers. 18 U.S.C. § 921(a)(11)(A), (C). A person "engage[s] in the business" of selling firearms, and therefore must obtain a federal firearms license, if he "devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of

[1]Plaintiffs do not challenge 18 U.S.C. § 922(x), which prohibits anyone, not just FFLs, from transferring handguns to individuals under 18 and also prohibits individuals under 18 from possessing handguns, subject to specified exceptions.

firearms." *Id.* § 921(a)(21)(C). In other words, anyone who engages in the firearms business regularly must become an FFL, and the ban therefore forecloses 18- to 20-year-olds from gaining access to the entire licensed market for handguns and handgun ammunition. The ban, however, does not apply to other avenues such as gifts or to those who sell arms on an irregular basis only.[2]

c. Plaintiffs

Rebekah Jennings is a 19-year-old resident of Boerne, Texas. She is a decorated competitive pistol shooter but does not own a pistol of her own and must rely on her father to loan her his pistol for practice and competition. Jennings reportedly desires to purchase her own handgun from an FFL, both for her self-protection and to further her interest in competitive pistol shooting.

Brennan Harmon is a 19-year-old resident of San Antonio, Texas, where she lives alone in an apartment. There have been shooting incidents in apartment complexes that neighbor Harmon's apartment. Harmon's family owns several firearms, and her father has instructed her in their proper and safe handling. Harmon currently owns a rifle and a shotgun, but she does not own a handgun. She finds the long guns insufficient for self-defense. Harmon therefore desires to own a handgun for self-defense and other lawful purposes, and she would purchase one from an FFL if such a transaction were not prohibited under the ban.

[2]The Court emphasizes that the ban does *not* prohibit the possession of handguns or handgun ammunition by 18- to 20-year-olds. Those in this age group are free to acquire handguns and ammunition from sources other than FFLs. Even still, the ban is temporal in nature, meaning the prohibition expires once the would-be buyer reaches the age of 21.

Andrew Payne is an 18-year-old resident of Lubbock, Texas. Payne and his father visit shooting ranges for recreation and to gain proficiency in the effective use of firearms, including handguns. Payne does not own a handgun, but he would purchase a handgun and handgun ammunition if such a transaction were not illegal under the ban.

The National Rifle Association ("NRA") is a membership organization committed to protecting and defending the fundamental right to keep and bear arms, as well as the safe and responsible use of firearms for self-defense and other lawful purposes. Many of the NRA's members are 18-to-20 years old or will enter that age bracket during the pendency of this litigation. Under the ban, these members are unable to purchase a handgun or handgun ammunition from an FFL.

One representative NRA member in this class is Halie Fewkes, a 19-year-old resident of Washington. She lives in Pullman, where she attends college. She plans to live in an off-campus apartment next semester, and she would like to purchase a new handgun to keep in that apartment for self-defense and for use in target shooting. The ban, however, prevents her from purchasing a handgun from a licensed dealer. She is not aware of anyone she knows selling a used firearm, and she is uncomfortable with the idea of engaging in a face-to-face transaction with an unlicensed stranger.

The NRA's licensed dealer members also allege to be harmed by the ban, as the law prohibits them from making profitable handgun sales and handgun ammunition sales to otherwise qualified 18- to 20-year-olds. Roger Koeppe and Paul White are two such members; they own and operate FFLs in Houston, Texas, and Richmond, Utah, respectively.

II. STANDARDS

a. Motion to Dismiss

A court must dismiss a claim pursuant to a Rule 12(b)(1) motion if it lacks subject matter jurisdiction over the claim asserted in the complaint. Fed. R. Civ. P. 12(b)(1). If a Rule 12(b)(1) motion is filed conjunctively with any other Rule 12 motions, the court should consider the Rule 12(b)(1) attack first. *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The party seeking the federal forum bears the burden of establishing jurisdiction. *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001).

Standing is one aspect of justiciability, and a federal court's jurisdiction is invoked only when the plaintiff has actually suffered injury resulting from the conduct of the defendant. *Warth v. Seldin*, 422 U.S. 490, 499 (1975); *see Lewis v. Knutson*, 699 F.2d 230, 236 (5th Cir. 1983) ("[T]he constitutional limitation continues to arise when plaintiff fails to allege a personalized injury."). Additionally, because Article III standing requires an injury-in-fact caused by a defendant's challenged conduct that is redressable by a court, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), a party is ordinarily denied standing to assert the rights of third persons. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263-64 (1977).

b. Motion for Summary Judgment

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists when the evidence is such that a reasonable jury could return a verdict for the non-movant, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); that is, "[a]n issue is material if its resolution could affect the outcome of the action."

Wyatt v. Hunt Plywood Co., 297 F.3d 405, 409 (5th Cir. 2002). When reviewing a motion for summary judgment, the court views all facts and evidence in the light most favorable to the non-moving party. *United Fire & Cas. Co. v. Hixson Bros.*, 453 F.3d 283, 285 (5th Cir. 2006). In doing so, the court "refrain[s] from making credibility determinations or weighing the evidence." *Turner v. Baylor Richardson Med. Ctr.*, 476 F.3d 337, 343 (5th Cir. 2007).

Where parties have filed cross-motions for summary judgment, the court must consider each motion separately because each movant bears the burden of showing that no genuine dispute of material fact exists and that it is entitled to judgment as a matter of law. *Shaw Constructors, Inc. v. ICF Kaiser Eng'rs, Inc.*, 395 F.3d 533, 538-39 (5th Cir. 2004).

III. ANALYSIS

a. Standing

Defendants challenge the standing to bring suit of both firearms dealers subject to the ban's criminal prohibition and the 18- to 20-year-olds whose constitutional rights are allegedly burdened by the statutory scheme. Article III restricts the judicial power to actual "cases" and "controversies," a limitation understood to confine the federal judiciary to "the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 129 S. Ct. 1142, 1148 (2009); *see* U.S. Const. art. III, § 1. The doctrine of standing enforces this limitation. *Summers*, 129 S. Ct. at 1149; *Lujan*, 504 U.S. at 559-60.

In general, individuals who allege that their constitutional rights are burdened by a law have standing to sue. In *Doe v. Bolton*, for example, the Supreme Court held that not only "Georgia-licensed doctors consulted by pregnant women" but also a pregnant woman herself has

standing to challenge a statute criminalizing the provisions of most abortions even though "[t]he physician [was] the one against whom these criminal statutes directly operate[d] . . . ." 410 U.S. 179, 187-88 (1973); *see also Roe v. Wade*, 410 U.S. 113, 124 (1973) (holding that "a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes."). Similarly, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court allowed a challenge to a statute prohibiting pharmacists from advertising their prices for prescription drugs brought "not by one directly subject to its prohibition, that is, a pharmacist, but by prescription drug consumers who claim they would greatly benefit if the prohibition were lifted and advertising freely allowed." 425 U.S. 748, 753 (1976).

The Individual Plaintiffs do not own handguns, but each of them desires to obtain one for lawful purposes, including self-defense. They have all identified a specific handgun they would purchase from an FFL if lawfully permitted to do so. The FFLs from whom Harmon and Payne would purchase their handguns have refused to sell them handguns in the past because they are under 21. Were the Court to hold that the ban is unconstitutional, it could provide the relief that Plaintiffs seek. Therefore, the Individual Plaintiffs have standing to sue even though they have not been threatened with or been subject to prosecution under the ban.

Once a court has determined that at least one plaintiff has standing, it need not consider whether the remaining plaintiffs have standing to maintain the suit. *Arlington Heights*, 429 U.S. at 264. Nevertheless, out of an abundance of caution, the Court will address whether the NRA, as an association or organization, has standing as well.

An association may have standing solely as the representative of its members, even in the absence of injury to itself. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 342 (1972). The test for representational standing requires that

(1) the members of the association would have standing individually,

(2) the interests pursued through the litigation are germane to the association's purpose, and

(3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

Nat'l Treasury Emps. Union v. United States Dep't of the Treasury, 25 F.3d 237, 241 (5th Cir. 1994) (citing *Hunt*, 432 U.S. at 343).

The NRA has a stated interest in vindicating the Second Amendment rights of its membership, and this suit does not require the participation of its individual members in light of the equitable relief it seeks. Furthermore, in addition to Jennings, Harmon, and Payne, whom the Court has held have standing and each of whom is an NRA member, the NRA presents evidence of several other similarly situated members between the ages of 18 and 20 who allege to have been injured by the ban in ways similar to those asserted by the Individual Plaintiffs. Therefore, the NRA has standing to bring this suit on behalf of its law-abiding 18- to 20-year-old members.

The NRA also brings this suit on behalf of its FFL, or vendor, members. As the Supreme Court has explained, "vendors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Craig v. Boren*, 429 U.S. 190, 195 (1976) (collecting cases). In *Craig*, for example, the Supreme Court held that a licensed vendor of low-alcohol beer had

standing to challenge an Oklahoma statute that barred the vendor from selling such beer to 18- to 20-year-old men but allowed its sale to 18- to 20-year-old women. As the Court noted:

> The legal duties created by the statutory sections under challenge are addressed directly to vendors such as appellant. She is obliged either to heed the statutory discrimination, thereby incurring a direct economic injury through the constriction of her buyers' market, or to disobey the statutory command and suffer, in the words of Oklahoma's Assistant Attorney General, "sanctions and perhaps loss of license." This Court repeatedly has recognized that such injuries establish the threshold requirements of a "case or controversy" mandated by Art. III.

Id. at 194 (internal citations omitted). The Court further held that "[a]s a vendor with standing to challenge the lawfulness of [the sales restriction], appellant . . . is entitled to assert those concomitant rights of third parties that would be 'diluted or adversely affected' should her constitutional challenge fail and the statutes remain in force." *Id.* at 195. "Otherwise," explained the Court, "the threatened imposition of governmental sanctions might deter appellant . . . and other similarly situated vendors from selling 3.2% beer to young males, thereby ensuring that 'enforcement of the challenged restriction against the [vendor] would result indirectly in the violation of third parties' rights.'" *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 510 (1975)).

Both the Supreme Court and the Fifth Circuit have repeatedly applied this rationale to hold that vendors and service providers have standing to challenge sales and similar restrictions that burden their would-be customers' constitutional rights. *See, e.g.*, *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681-84 (holding that "corporation primarily engaged in the mail-order retail sale of nonmedical contraceptive devices" had standing to challenge a statute that made it a crime, *inter alia*, "for anyone other than a licensed pharmacist to distribute contraceptives to persons 16 or over" and could assert the privacy rights of its would-be customers); *Reliable*

Consultants, Inc. v. Earle, 517 F.3d 738, 740, 743 (5th Cir. 2008) (vendor had standing to challenge statute criminalizing the sale of “a device designed or marketed for sexual stimulation” and could assert the constitutional rights of its customers); *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 333-34 (5th Cir. 1981) (holding that plaintiffs who wished to open an abortion clinic had standing to challenge an adverse zoning decision and could assert the rights of their would-be clients); *see generally United States v. Coil*, 442 F.3d 912, 915 n.2 (5th Cir. 2006) (“The Supreme Court has consistently upheld the standing of vendors to challenge the constitutionality of statutes on their customers’ behalf where those statutes are directed at the activity of the vendors.”).

The ban prevents 18- to 20-year-olds from purchasing handguns and handgun ammunition from FFLs who would likely purchase these items were it legal to do so. The NRA presents evidence from its vendor members that they have lost profits from refusing to sell handguns to 18- to 20-year-olds and would sell handguns to law-abiding citizens in this age range if it were legal to do so. The fact that the ban restricts a would-be buyers’ market demonstrates a judicially cognizable injury directly affecting FFLs. *See Craig*, 429 U.S. at 194. As such, the NRA also has standing to bring this suit on behalf of its FFL members. Therefore, Defendants’ Motion to Dismiss pursuant to Rule 12(b)(1) is **DENIED**.

b. Second Amendment

The text of the Second Amendment reads: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II. In 2008, the Supreme Court held in *District of Columbia v. Heller* that

the Second Amendment guarantees an individual right to possess and carry weapons. 554 U.S. 570, 592 (2008). The Court stated, however, that the right to bear arms is not absolute:

> Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. For example, the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, ***nothing in our opinion should be taken to cast doubt on*** longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or ***laws imposing conditions and qualifications on the commercial sale of arms***.

Heller, 554 U.S. at 626-27 (citations omitted and emphasis added). In so qualifying the Second Amendment, the Court carved out conditions and qualifications on the commercial sale of arms as presumptively lawful regulatory measures. *See id.* at 627 n.26.

While this Court has found no case dealing with a post-*Heller* interpretation of the ban, most courts that have considered challenges to other above-mentioned presumptively lawful regulations have made relatively short shrift of them. *See, e.g.*, *United States v. Scroggins*, 599 F.3d 433, 451 (5th Cir. 2010) (post-*Heller* decision upholding as constitutional 18 U.S.C. § 922(g)(1), which criminalizes the possession of a firearm by a felon); *United States v. Dorosan*, 350 F. App'x 874, 875-76 (5th Cir. 2009) (upholding as constitutional under the "sensitive places" exception in *Heller* 39 C.F.R. § 232.1(l), which criminalizes bringing a handgun onto property belonging to the United States Postal Service); *United States v. McRobie*, No. 08-4632, 2009 U.S. App. LEXIS 617, at *2-3 (4th Cir. 2009) (post-*Heller* decision

upholding as constitutional 18 U.S.C. § 922(g)(4), which criminalizes the possession of a firearm by a person committed to a mental institution). The Court finds no reason to treat laws imposing conditions and qualifications on the commercial sale of arms, such as the ban, any differently.

Outside the list of examples of presumptively lawful limitations, neither *Heller* nor its companion case, *McDonald v. City of Chicago*, 130 S. Ct. 3020 (2010), directly addresses the buying and selling of firearms, let alone holds this to be at the "core" of the Second Amendment right. The Fifth Circuit, however, has recognized a distinction between the right to "keep and bear arms" and "dealing in firearms" and has held that at least one statutory scheme related to dealing in firearms is not violative of the Second Amendment. *See United States v. King*, 532 F.2d 505, 510 (5th Cir. 1976). Although *King* was decided pre-*Heller*, its holding is likely of the nature contemplated by the Court's articulated exceptions to the Second Amendment.

The Fifth Circuit, albeit pre-*Heller*, has also recognized that young persons do not enjoy the same guarantees of the Second Amendment as do their elders of society. In *United States v. Emerson*, the court held that the Second Amendment protects an individual right to bear arms but also noted that "felons, *infants* and those of unsound mind may be prohibited from possessing firearms." 270 F.3d 203, 261 (5th Cir. 2001) (emphasis added); *see also id.* at 227 n.21 (quoting Robert Dowlut, *The Right to Arms: Does the Constitution or the Predilection of Judges Reign?*, 36 OKLA L. REV. 65, 96 (1983) ("Colonial and English societies of the eighteenth century, as well as their modern counterparts, have excluded *infants*, idiots, lunatics, and felons [from possessing firearms]."); Stephen P. Halbrook, *What the Framers Intended*: A Linguistic Analysis of the Right to "Bear Arms", 49 LAW & CONTEMP. PROBS. 151 (1986) ("violent criminals, *children*, and those of unsound mind may be deprived of firearms . . . .") (alterations in the

original and emphasis added)). The exception to the right to bear arms carved out for "infants" in *Emerson* seems to be congruent with the notion in *Heller* that conditions and qualifications on the commercial sale of arms are presumptively lawful regulatory measures.

Considering *Heller's* specific exception of conditions and qualifications on the commercial sale of arms from the individual right to keep and bear arms, along with the Fifth Circuit's treatment of the distinction between possession and dealing of firearms and its exempting young persons from Second Amendment guarantees, the Court is of the opinion that the ban does not run afoul of the Second Amendment to the Constitution. *See United States v. Rozier*, 598 F.3d 768, 771 (11th Cir. 2010) (citing *Heller*, 128 S. Ct. at 2817) (suggesting that, under a proper reading of *Heller*, the right to bear arms is enjoyed only by those not disqualified from the exercise of the Second Amendment rights; disqualification likely includes those affected by the aforementioned presumptively lawful regulatory measures).

In essence, it is within the purview of Congress, not the courts, to weigh the relative policy considerations and to make decisions as to the age of the customer to whom those licensed by the federal government may sell handguns and handgun ammunition. *See Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) ("Under the system of government created by our Constitution, it is up to the legislatures, not courts, to decide on the wisdom and utility of legislation."). Therefore, with regard to the Second Amendment issue, Defendants' Motion for Summary Judgment is **GRANTED**, Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED** as moot, and Plaintiffs' Motion for Summary Judgment is **DENIED**.

c. Equal Protection

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Although this clause applies expressly to the states only, the Supreme Court has held that its protections are encompassed by the Due Process Clause of the Fifth Amendment and are therefore applicable to the federal government as well. *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954). Plaintiffs claim that the ban violates their right to equal protection of the laws guaranteed under the Due Process Clause of the Fifth Amendment. The focus of Plaintiffs' claim is the allegedly unequal treatment effected by the ban between 18- to 20-year-olds and those over the age of 20.

"[A]ge is not a suspect classification under the Equal Protection Clause." *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000). Therefore, the government "may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest."[3] *Id.* The Constitution permits legislators to "draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases." *Id.* at 86.

Defendants point to evidence that Congress, in passing the ban, found "that there is a causal relationship between the easy availability of firearms other than rifles and shotguns, and juvenile and youthful criminal behavior, and that such firearms have been widely *sold by*

[3]Because the Court has held that Plaintiffs' claims do not raise Second Amendment concerns, their Equal Protection argument need not be evaluated based on any heightened standard of scrutiny.

federally licensed importers and dealers to emotionally immature, or thrill-bent juveniles and minors prone to criminal behavior." 1968 U.S.C.C.A.N. 2112, 2197-98 (emphasis added). In so finding, Congress passed the ban in an attempt to "increase safety and strengthen local regulation" by "[e]stablishing minimum ages of 18 for the purchase of long guns and 21 for the purchase of handguns." *Id.* at 2256.

Congress identified a legitimate state interest—public safety—and passed legislation that is rationally related to addressing that issue—the ban; thus, it acted within its constitutional powers and in accordance with the Equal Protection Clause. *See Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 332 (5th Cir. 2004) (quoting *FCC v. Beach Commc'ns*, 508 U.S. 307, 313 (1993) ("Under rational basis review, differential treatment 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'")). Therefore, with regard to the Equal Protection issue, Defendants' Motion for Summary Judgment is **GRANTED**, Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED** as moot, and Plaintiffs' Motion for Summary Judgment is **DENIED**.

IV. CONCLUSION

For the reasons stated herein,

(1) Defendants' Motion to Dismiss Pursuant to Rule 12(b)(1) is **DENIED**;

(2) as to the Second Amendment issue,

- (a) Defendants' Motion for Summary Judgment is **GRANTED**,
- (b) Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED** as moot, and
- (c) Plaintiffs' Motion for Summary Judgment is **DENIED**; and

(3) as to the Equal Protection issue,

(a) Defendants' Motion for Summary Judgment is **GRANTED**,

(b) Defendants' Motion to Dismiss Pursuant to Rule 12(b)(6) is **DENIED** as moot, and

(c) Plaintiffs' Motion for Summary Judgment is **DENIED**.

SO ORDERED.

Dated September 29, 2011.

SAM R. CUMMINGS
UNITED STATES DISTRICT JUDGE

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEPHEN DEARTH and SECOND AMENDMENT FOUNDATION, INC.,	)	**Case No. 09-cv-05879RLW**
Plaintiffs,	)	
vs.	)	
ERIC H. HOLDER, Jr., Attorney General of the United States,	)	
Defendant.	)	

DECLARATION OF CHRISTOPHER A. PELLETTIERE

I, Christopher A. Pellettiere, pursuant to 28 U.S.C. § 1746(2), do hereby declare and state as follows:

1. I am the Chief, Office of Strategic Management, Office of the Director, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). In the capacity, I serve as an advisor to and action officer for the ATF Director, Deputy Director, and Executive Staff on matters related to organizational strategy development, management processes, and performance goals. My duties include the compilation and review of statistical data for all ATF programs and I serve as the designated "clearing house" for publicly disseminated data regarding ATF programs. This declaration is based on my personal knowledge as well as knowledge made available to me in the course of my duties as the Chief of the Office of Strategic Management.

2. I searched all cases recommended for prosecution from FY 2003 through the first quarter of FY 2012 (October 1, 2002 through December 31, 2011) for charges under 18 U.S.C. § 922(g)(5)(A) or (g)(5)(B) that included indications that firearms were being trafficked. A section 922(g)(5)(A) violation is charged when an alien, who is unlawfully present in the United States, possesses, ships, transports, or receives a firearm or ammunition in or affecting foreign or interstate commerce. A section 922(g)(5)(B) violation occurs when an alien who has been admitted to the United States under a nonimmigrant visa (and who does not fall within certain exceptions) possesses, ships, transports, or receives a firearm or ammunition in or affecting foreign or interstate commerce. An indication that firearms are being trafficked occurs when investigating Special Agents record any or all of the following information on the "Firearms Trafficking Tab" in ATF's criminal case management system (NFORCE): the type of firearm trafficking believed to have been engaged in (e.g., handguns, long guns, international or domestic), the source country and state in which the firearms were acquired, the suspected target country and state for the firearms, the suspected number of trafficked firearms , or the number of firearms recovered by law enforcement. For purposes of this query, I relied upon the number of firearms believed to have been trafficked as a primary indicator of firearms trafficking activity.

3. After eliminating all cases where only one firearm was believed to have been involved—on the basis that single-gun cases often involve a possessory offense and not necessarily a trafficking activity—207 cases were identified where two or more firearms were believed to have been trafficked. In the 207 identified cases there were approximately 3,887 firearms believed to have been trafficked. See Exhibit A (attached hereto).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 30th day of January, 2012.

Christopher A. Pellettiere
Chief, Office of Strategic Management
Office of the Director

Bureau of Alcohol, Tobacco, Firearms and Explosives

Office of Field Operations

All Cases and Defendants Recommended for Prosecution

CASES AND DEFENDANTS RECOMMENDED FOR PROSECUTION											
	Referral FY										
Data	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	Grand Total
Cases Recommended for Prosecution	13	24	17	22	29	24	24	21	26	7	207
Percent of All Cases Recommended	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Cases Accepted for Prosecution	9	22	16	17	27	23	21	18	23	5	181
Percent of Cases Accepted for Prosecution	69.23%	91.67%	94.12%	77.27%	93.10%	95.83%	87.50%	85.71%	88.46%	71.43%	87.44%
Cases Declined	4	1	1	5	2	1	3	1	1	0	19
Percent of Cases Declined	30.77%	4.17%	5.88%	22.73%	6.90%	4.17%	12.50%	4.76%	3.85%	0.00%	9.18%
Cases Pending A Prosecutorial Decision	0	1	0	0	0	0	0	2	2	2	7
Percent of Cases Pending a Prosecutorial Decision	0.00%	4.17%	0.00%	0.00%	0.00%	0.00%	0.00%	9.52%	7.69%	28.57%	3.38%
Cases With Arrests	8	21	16	18	26	22	20	18	21	4	174
Cases With Indictments	8	22	16	18	26	22	17	17	23	4	173
Cases With Convictions	8	19	13	15	24	20	13	15	15	1	143
Cases With Sentencing	8	19	13	13	24	19	13	13	11	1	134
Defendants Recommended for Prosecution	13	24	17	22	29	24	24	21	26	7	207
Percent of All Defendants Recommended	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Defendants Accepted for Prosecution	9	22	16	17	27	23	21	18	23	5	181
Percent of Defendants Accepted for Prosecution	69.23%	91.67%	94.12%	77.27%	93.10%	95.83%	87.50%	85.71%	88.46%	71.43%	87.44%
Defendants Declined	4	1	1	5	2	1	3	1	1	0	19
Percent of Defendants Who Are Declined	30.77%	4.17%	5.88%	22.73%	6.90%	4.17%	12.50%	4.76%	3.85%	0.00%	9.18%
Defendants Pending a Prosecutorial Decision	0	1	0	0	0	0	0	2	2	2	7
Percent of Defendants Pending a Prosecutorial Decision	0.00%	4.17%	0.00%	0.00%	0.00%	0.00%	0.00%	9.52%	7.69%	28.57%	3.38%
Defendants Arrested	8	21	16	18	26	22	20	18	21	4	174
Defendants Indicted	8	22	16	18	26	22	17	17	23	4	173
Defendants Convicted	8	19	13	15	24	20	13	15	15	1	143
Percent of All Defendants Recommended for Prosecution Who are Convicted	61.54%	79.17%	76.47%	68.18%	82.76%	83.33%	54.17%	71.43%	57.69%	14.29%	69.08%
Percent of Indicted Defendants Who Are Convicted	100.00%	86.36%	81.25%	83.33%	92.31%	90.91%	76.47%	88.24%	65.22%	25.00%	82.66%
Defendants Sentenced to Prison	6	17	12	13	20	15	11	13	11	1	119
Total Prison Months Sentenced	234	463	324	261	546	394	471	204	202	18	3,117
Average Prison Sentence (In Months)	39.00	27.24	27.00	20.08	27.30	26.27	42.82	15.69	18.36	18.00	26.19
Defendants Sentenced to Probation	3	11	5	5	7	2	4	1	0	0	38
Total Probation Months Sentenced	96	384	144	96	27	36	96	36	0	0	915
Average Probation Sentence (In Months)	32.00	34.91	28.80	19.20	3.86	18.00	24.00	36.00	0.00	0.00	24.08
Life Sentence Received	0	0	0	0	0	0	0	0	0	0	0
Death Sentence Received	0	0	0	0	0	0	0	0	0	0	0
Firearms Trafficking Cases Recommended for Prosecution	13	24	17	22	29	24	24	21	26	7	207
Firearms Trafficking Cases as a Percent of All Cases Recommended	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%	100.00%
Number of Firearms Trafficking Defendants Convicted	8	19	13	15	24	20	13	15	15	1	143
Firearms Trafficking Defendant Recommended	13	24	17	22	29	24	24	21	26	7	207
Percent of Firearms Trafficking Defendants Recommended for Pros Who Are Convicted	61.54%	79.17%	76.47%	68.18%	82.76%	83.33%	54.17%	71.43%	57.69%	14.29%	69.08%
Estimated Number of Guns Trafficked	153	862	409	251	582	170	315	264	776	105	3,887
Gang Cases Recommended for Prosecution	1	5	6	4	4	3	4	4	3	1	35
Gang Related Cases as a Percent of All Cases Recommended for Prosecution	7.69%	20.83%	35.29%	18.18%	13.79%	12.50%	16.67%	19.05%	11.54%	14.29%	16.91%
Gang Related Defendants Recommended for Prosecution	1	5	6	4	4	3	4	4	3	1	35
Gang Related Defendants as a Percentage of All Defendants	7.69%	20.83%	35.29%	18.18%	13.79%	12.50%	16.67%	19.05%	11.54%	14.29%	16.91%
Gang Related Defendant Convicted	2	3	1	3	4	3	0	2	4	0	22
Percent of Gang Defendants Recommended for Prosecution Who are Convicted	200.00%	60.00%	16.67%	75.00%	100.00%	100.00%	0.00%	50.00%	133.33%	0.00%	62.86%