IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MAXWELL HODGKINS, et al.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 09-00587 (JR)
	)	
ERIC HOLDER,	)	
Attorney General of the	)	
United States	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs' Opposition to Defendant's Motion to Dismiss fails to distinguish the binding precedent of this judicial circuit that requires dismissal of plaintiffs' lawsuit for lack of jurisdiction. Plaintiffs do not have standing to bring this pre-enforcement challenge to § 922(a)(9) & (b)(3) under Article III or the Declaratory Judgment Act because none of the plaintiffs has demonstrated that the threat of his prosecution (or in the case of the organizational plaintiff, the threat of it or its members' prosecution) is sufficiently credible and immediate to create the "case" or "controversy" necessary to invoke this Court's jurisdiction.

Plaintiff Hodgkins has not alleged an intention to engage in prohibited conduct, and therefore cannot demonstrate a credible and immediate threat of prosecution. Without such a threat, he does not have standing to seek a declaratory judgment notwithstanding his alleged past unsuccessful attempt to purchase a firearm. Plaintiff Second Amendment Foundation (SAF) has not alleged that it or any of its members have suffered a cognizable injury and, therefore, it lacks standing to bring this suit on its own behalf or in a representative capacity. Finally, although plaintiff Dearth has alleged an intention to purchase firearms at some indeterminate time in the

future to use for purposes not permitted by the challenged provisions, he has not alleged that he has been singled-out for prosecution by the federal government, or that his prosecution is a special priority for the federal government. Nor has he alleged when in the future he might seek to purchase a firearm for purposes prohibited by the challenged provisions. Without such allegations Dearth is unable to demonstrate his standing under the binding precedent of the District of Columbia Circuit.

Plaintiffs' attempt to distinguish the binding precedent of this circuit is unavailing. Plaintiffs seek to equate plaintiff Dearth with Anthony Heller, the lone plaintiff found to have standing in *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007). Specifically, plaintiffs argue that private individuals' refusals, in January 2006 and June 2007, to violate the prohibition of 18 U.S.C. 922(b)(3) (or 18 U.S.C. § 922(a)(5)) and sell Dearth a firearm is somehow equivalent to the District of Columbia's denial of Heller's application for a license to a carry a handgun in *Parker*. This argument is unavailing for three reasons. First, plaintiffs incorrectly label the prospective sellers' refusal to violate federal criminal law an "administrative denial," but—unlike the refusal of the District of Columbia to issue Anthony Heller a registration certificate to own a handgun—the private individuals' refusal to violate § 922(b)(3) (or § 922(a)(5)) is not an action of defendant and is not an "administrative denial." Second, as defendant pointed out in his opening brief, plaintiffs have brought suit under the Declaratory Judgment Act, which does not provide a remedy for past injuries. Unlike Heller, plaintiffs have not brought suit under 42 U.S.C. § 1983 (nor could they), nor have they brought suit under any other statute that provides a cause of action to remedy past grievances. Finally, unlike Heller, Dearth is not presently suffering from an inability to purchase a firearm for self-defense in his

home. His attempts to purchase a firearm will likely be frustrated by the challenged provisions only upon his next attempt to purchase a firearm while visiting the United States, and he has alleged no actual or concrete plans to make such an attempt, as is necessary to invoke the jurisdiction of a federal court. For any and all of these reasons, plaintiffs cannot evade this circuit's stringent standing requirements for pre-enforcement challenges to criminal statutes pursuant to the Declaratory Judgment Act.

As a result, plaintiffs must establish that they have been personally threatened with prosecution or that their prosecution is a special priority for the government. Plaintiffs do not seriously contend that they can satisfy this standard, but argue that the Court should simply ignore the D.C. Circuit's binding precedent because, according to plaintiffs, this precedent is wrong. Such an argument may be appropriate before an *en banc* panel of the United States Court of Appeals for the District of Columbia Circuit or the Supreme Court, but it is wholly inappropriate here. The Court must faithfully apply this precedent. Accordingly, because none of the plaintiffs have alleged that they have been singled-out for prosecution under the challenged provisions, their pre-enforcement challenge must be dismissed for lack of standing.

Plaintiffs' remaining argument is similarly meritless. Plaintiffs contend, in effect, that because defendant did not challenge plaintiffs' standing in prior litigation, but successfully moved to dismiss for improper venue, the patent deficiencies in plaintiffs' standing should be ignored. Not surprisingly, plaintiffs provide no support for this novel argument, and, indeed, this proposition is contrary to the constitutional requirement that a federal court cannot proceed to decide the merits of a dispute before establishing its jurisdiction. In sum, plaintiffs do not have standing to bring this lawsuit, and this lawsuit should be dismissed for lack of jurisdiction.

ARGUMENT

I. No Plaintiff Has Standing to Bring this Pre-Enforcement Challenge Under the Declaratory Judgment Act

To establish standing to bring a lawsuit under the Declaratory Judgment Act in federal court, plaintiffs must establish the "*continuing* existence of a live and acute controversy." *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (emphasis added). To satisfy this requirement in the context of pre-enforcement challenge to a federal criminal statute, such as plaintiffs' challenge to 18 U.S.C. § 922(a)(9) & (b)(3), plaintiffs must allege (and ultimately prove) that they have been "personally threatened with prosecution or that [their] prosecution has . . . 'special priority' for the government." *Seegars v. Gonzalez*, 396 F.3d 1248, 1255 (D.C. Cir. 2005) (quoting *Navegar, Inc. v. United States*, 103 F.3d 994, 1001 (D.C. Cir. 1997)); *see also Parker v. District of Columbia*, 478 F.3d 370, 375 (D.C. Cir. 2007) ("Applying *Navegar–Seegars* to the standing question in this case, we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution."). None of the plaintiffs are able to satisfy this standard and, therefore, this lawsuit must be dismissed for lack of jurisdiction.

A. Plaintiff Hodgkins Has Not Alleged An Intention to Violate the Challenged Provisions And, Therefore, Cannot Demonstrate a Live Controversy

In his opening brief, defendant argued that plaintiff Maxwell Hodgkins did not have standing to challenge § 922's prohibition on his receipt of firearms for purposes other than sporting purposes, because—among other reasons—Hodgkins had not alleged an intention to purchase or otherwise "receive" firearms while visiting the United States in the future. Instead, Hodgkins alleges that he seeks to access firearms he already owns that are securely stored in the

United States, Compl. ¶ 8, activity that plaintiffs concede is not prohibited by the challenged provisions. Compl. ¶ 30 ("Section 922(a)(9) and 27 C.F.R. § 478.29a allow non-resident Americans to use pre-possessed firearms for all reasons."). But, without allegations of an intention to engage in prohibited conduct, Hodgkins cannot demonstrate "the *continuing* existence of a live and acute controversy" that is required to invoke this Court's jurisdiction. *Steffel*, 415 U.S. at 459 (emphasis added).

Hodgkins' alleged past attempt to purchase a firearm from some unidentified seller "[o]n or about October 1, 2008," Compl. ¶ 24, is irrelevant to whether there presently exists a "live controversy" for purposes of the Declaratory Judgment Act. In *Steffel*, the fact that the plaintiff (1) had engaged in prohibited conduct—distributing handbills in a shopping center—in the past, (2) had twice been warned to stop, (3) had been "told by the police that if he again handbills at the shopping center and disobeys a warning to stop he will likely be prosecuted", and (4) had witnessed the prosecution of his companion for similar conduct, did not establish plaintiff's standing to seek a declaratory judgment that the Georgia statute at issue violated his First and Fourteenth Amendment rights. *Steffel*, 415 U.S. at 459. Instead, the Supreme Court remanded the case to the district court to determine whether the plaintiff still intended to engage in prohibited handbilling, because without such an intention the case would no longer "present[] 'a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* at 459-60 (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941)).

Likewise, in *Golden v. Zwickler*, 394 U.S. 103 (1969), the Supreme Court affirmed the dismissal of a declaratory judgment action challenging the constitutionality of a statute making

"it a crime to distribute anonymous literature in connection with an election campaign," notwithstanding plaintiff's prior *conviction* under the statute and his alleged intention to continue distributing anonymous literature in subsequent campaigns. *Id.* at 104-06. The Supreme Court found that plaintiff's allegation of an intention to engage in prohibited conduct was not sufficiently credible or immediate to warrant the issuance of a declaratory judgment because the Congressman who had been the subject of the anonymous literature was no longer running for elective office. *Id.* at 109-10. Of course, Hodgkins does not allege an intention to engage in prohibited conduct, nor does he allege (nor could he given his law-abiding intentions) that he has been singled-out for prosecution by the federal government. *Parker*, 478 F.3d at 375. Therefore, Hodgkins' alleged past attempt to purchase a firearm does not establish his standing to seek a declaratory judgment.

B. Plaintiff Second Amendment Foundation Does Not Have Organizational Standing or Representational Standing

Plaintiff SAF does not have standing to bring this declaratory judgment action, and plaintiffs' cursory arguments to the contrary are without merit.

1. SAF Has Not Alleged that it Suffered A Cognizable Injury on Account of the Challenged Provisions and, Therefore, Cannot Sue on Its Own Behalf

Plaintiffs' argument that SAF has standing in its own right is baseless. SAF has not alleged that it has been "singled out or uniquely targeted by the [federal] government for prosecution" under the challenged provisions, and therefore it does not have standing to challenge these provisions under the Declaratory Judgment Act on its own behalf. *Parker*, 478 F.3d at 375. Furthermore, SAF's allegation that its purposes "include education, research,

publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control" does not establish its standing. Compl. ¶ 3.

Plaintiff relies upon *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but the organizational plaintiff in *Havens* was found to have standing to seek monetary damages (but not injunctive relief) because the discriminatory practices of the defendant had allegedly frustrated "its efforts to assist equal access to housing through counseling and other referral services," and caused it "to devote significant resources to identify and counteract the defendant's racially discriminatory steering practices." *Id.* at 379. The Supreme Court found that "[s]uch concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests." *Id.* Unlike the organizational plaintiff in *Havens*, however, SAF is not suing for damages to remedy the expenditure of resources caused by the enforcement of the allegedly unconstitutional provisions against expatriate citizens. Compl. ¶¶ 3, 25-37. Indeed, SAF has not alleged that the enforcement of the challenged provisions against expatriate citizens has impacted it in any manner. Compl. ¶ 3. As a result, *Havens Realty* and its progeny do not support SAF's standing. *See also Fair Employment Council v. BMC Mktg. Corp.*, 28 F.3d 1268, 1277 (D.C. Cir. 1984) (rejecting an organization's argument that "the time and money that plaintiffs spend in bringing suit against a defendant would itself constitute a sufficient 'injury in fact,' [as] a circular position that would effectively abolish the [standing] requirement altogether."); *Haitian Refugee Ctr. v. Gracey*, 809 F.2d 794, 799 & n.2 (D.C. Cir. 1987) (same).

Although not alleged in the Complaint, plaintiffs argue in opposition to defendant's motion to dismiss that "[t]he government's enforcement of the challenged provisions . . . directly

impacts the organization." Pl. Opp. at 26.[1] But, mere "conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing." *Nat'l Treasury Employees Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996). "Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'" *Id.* (quoting *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995)). Furthermore, as the Court of Appeals has recognized, to permit SAF to avoid the otherwise applicable jurisdictional requirements for bringing a declaratory judgment through the simple expedient of alleging that its organizational purpose is "impacted" by the mere existence of the challenged provisions would effectively eviscerate Article III's standing requirements: "Individual persons cannot obtain judicial review of otherwise non-justiciable claims simply by incorporating, drafting a mission statement, and then suing on behalf of the newly formed and extremely interested organization." *Id.* Thus, SAF has not suffered any cognizable injury and does not have standing to challenge § 922 on its own behalf.

2. SAF Has Not Alleged That Its Members Have Suffered a Cognizable Injury and, Therefore, Cannot Sue on Behalf of Its Members

Plaintiffs' argument that SAF has organizational standing on behalf of its members is similarly flawed. As plaintiffs recognize, an organization may bring a lawsuit on behalf of its members only if, among other things, "its members would otherwise have standing to sue in their own right." Pl. Opp. at 26 (quoting *United Food & Commercial Workers Union Local 751 v.*

[1] Even if allegations presented in plaintiffs' opposition brief were otherwise sufficient to confer standing (they are not), they could not be considered in resolving defendant's motion to dismiss. *See Smith v. United States*, 475 F. Supp. 2d 1, 8 (D.D.C. 2006) ("Factual allegations in briefs or memoranda of law may not be considered when deciding a Rule 12(b)(6) motion . . . .") (citing *Henthorn v. Dep't of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994)).

Brown Group, Inc., 517 U.S. 544, 553 (1996) (citation omitted)). SAF has not alleged that *any* of its members have suffered *any* injury on account of the challenged provisions, Compl. ¶ 3, let alone an injury "of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Golden*, 394 U.S. at 108 (quoting *Maryland Cas.*, 312 U.S. at 273). As a result, it does not have organizational standing.

Plaintiffs' reliance on *Fraternal Order of Police v. United States*, 152 F.3d 998 (D.C. Cir. 1998), is misplaced for the obvious reason that in that case—unlike here—individual members of the Fraternal Order of Police, the Chief Law Enforcement Officers, were injured because the amendments to the Gun Control Act criminalized their provision of firearms to officers under their command who had committed a misdemeanor crime of domestic violence, which presented a "conflict[] with their obligations under state law." *Id.* at 1001. SAF alleges no similar injury to any of its members. Compl. ¶ 3. Accordingly, it lacks organizational standing.

C. Plaintiff Dearth Has Not Alleged A Threat of Prosecution of Sufficient Immediacy and Reality to Invoke the Jurisdiction of this Court

Plaintiff Dearth has not alleged that he has been "personally threatened with prosecution" nor has he alleged that his "prosecution has . . . 'special priority' for the government." *Seegars*, 396 F.3d at 1255 (quoting *Navegar*, 103 F.3d at 1001). Accordingly, Dearth cannot satisfy the jurisdictional requirements for bringing a pre-enforcement challenge in this Court for this reason alone. But Dearth's allegations are insufficient to establish pre-enforcement standing for other reasons as well. As defendant pointed out in his opening brief, Dearth resides in Canada and is therefore not presently subject to the challenged provisions. His allegation of a vague desire to "purchase firearms within the United States" at some indeterminate time in the future, Compl. ¶ 11, does not satisfy his burden of alleging a "live and acute controversy" of "sufficient

immediacy and reality to warrant the issuance of a declaratory judgment." *Steffel*, 415 U.S. at 459-60 (emphasis added); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 & n. 2 (1992) ("'some day' intentions—without any description of concrete plans, or indeed any specification of *when* the someday will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Thus, Dearth is clearly unable to satisfy the standing requirements for bringing a pre-enforcement challenge to § 922 under the Declaratory Judgment Act.

Plaintiffs seek to evade these requirements by labeling the past refusal of private individuals to sell Dearth firearms—for fear of prosecution under 18 U.S.C. § 922(b)(3) or § 922(a)(5)—"administrative denials." Pl. Opp. at 8. In doing so, plaintiffs seek to equate Dearth's failed attempts to purchase firearms with the District of Columbia's denial of plaintiff Anthony Heller's application for a registration certificate to own a handgun in *Parker*, which the Court of Appeals found gave Heller standing to bring a claim against the District of Columbia pursuant to 42 U.S.C. § 1983 (but not 22 U.S.C. § 2201). Pl. Opp. at 10; *see also Parker*, 478 F.3d at 376-78. Plaintiffs' analogy fails for at least three reasons.

1. Dearth's Past Unsuccessful Attempts to Purchase Firearms Do Not Constitute "Administrative Denials"

First, Dearth's past unsuccessful attempts to purchase firearms from private individuals, the most recent of which occurred over two years ago, are not "license or permit denial[s]." *Parker*, 478 F.3d at 376. Dearth's attempts to purchase firearms were unsuccessful due to firearms dealers' refusal to violate the prohibition contained in § 922(b)(3) (as implemented by 27 C.F.R. §§ 478.96, 478.99), or unlicensed individuals' refusal to sell firearms on account of

those individuals' fear of prosecution under § 922(a)(5).[2] The refusal of these private individuals to violate the law and risk prosecution does not constitute an "administrative denial," just as a pharmacist's refusal to sell prescription drugs to an individual without a prescription, *see* 21 U.S.C. § 829, or a local liquor store's refusal to sell alcohol to an individual under the age of twenty-one, *see* D.C. Code § 25-781, would not constitute an "administrative denial." Dearth's unsuccessful attempts to purchase a firearm are categorically different than the District of Columbia's denial of Anthony Heller's application for a license to carry a firearm in his home at issue in *Parker*, 478 F.3d at 376, New York's presumed denial of David Bach's application for a license to carry a concealed weapon at issue in *Bach v. Pataki*, 408 F.3d 75, 82-83 (2d Cir. 2005), and the Federal Communication Commission's "order directing [Jerry Szoka] to cease broadcasting" at issue in *Grid Radio v. Fed. Commc'n Comm'n*, 278 F.3d 1314, 1316 (D.C. Cir. 2002). Likewise, the prospective sellers' refusals to violate the law in January 2006 and June 2007 are categorically different from the government action at issue in the cases cited by the majority in *Parker* in support of the proposition that the District of Columbia's denial of Heller's application gave him standing under 42 U.S.C. § 1983. *See Parker*, 478 F.3d at 376 (citing *Cassell v. Fed. Commc'n Comm'n*, 154 F.3d 478, 480 (D.C. Cir. 1998) (reviewing the Federal Communication Commission's denial of a license application to operate a private land mobile radio service); *Wilkett v. I.C.C.*, 710 F.2d 861, 863 (D.C. Cir. 1983) (reviewing the Interstate Commerce Commission's denial of an application for an expanded trucking license); *City of*

[2] Although the Complaint makes clear that plaintiff Dearth's first attempt to purchase a firearm in January 2006 was through a licensed firearms dealer, Compl. ¶ 22, the Complaint does not indicate whether Dearth's subsequent attempt to purchase a firearm in June 2007was through a licensed dealer or an unlicensed individual. Compl. ¶ 23.

Bedford v. F.E.R.C., 718 F.2d 1164, 1168 (reviewing Federal Energy Regulatory Commission's denial of a preliminary hydroelectric permit)). Thus, unlike Heller, the government never said "no" to Dearth. The refusal of private individuals to risk prosecution by violating federal criminal law is not an "administrative denial."[3]

The characterization of plaintiffs' claims and the challenged actions of the defendant should not be controversial. Defendant is not being sued for denying applications of the individual plaintiffs, because plaintiffs never submitted an application for the government to deny. *See* Compl. ¶¶ 22-24. And, of course, defendant is not being sued for prosecuting either of the plaintiffs under the allegedly unconstitutional provisions. Rather, defendant is being sued, pursuant to the Declaratory Judgment Act, 22 U.S.C. § 2201, for his *prospective* enforcement of the challenged provisions, which Dearth alleges will effectively prevent him from receiving firearms in this country for purposes other than sporting purposes if he someday returns to the United States and seeks to purchase a firearm. *See* Compl. ¶¶ 11, 21, 25-37. This is the typical method of challenging the constitutionality of a criminal statute without subjecting oneself to prosecution. *See Steffel*, 415 U.S. at 459-60 (1974); *Seegars*, 396 F.3d at 1251 ("No plaintiff in this case has been arrested and prosecuted for violating the disputed provisions of the Code, so

[3] Plaintiffs cannot seriously contend otherwise. If plaintiffs believed that these (as yet unidentified) individuals' refusal to sell firearms to them constituted "administrative denials," they presumably would have attempted to sue these individuals under the Administrative Procedures Act, which—unlike the Declaratory Judgment Act—expressly provides a cause of action for the remedy of final agency actions that are "contrary to constitutional right." 5 U.S.C. § 706. Of course, because the individuals who chose not to sell Dearth and Hodgkins firearms are private individuals, and not officers of a federal agency, such a lawsuit would not raise a cognizable claim. *See* 5 U.S.C. § 701(b)(1), 706(2).

plaintiffs' case constitutes a 'preenforcement' challenge."); *Nat'l Rifle Ass'n v. Magaw*, 132 F.3d 272, 279-80 (6th Cir. 1997).

Indeed, in the prior litigation challenging these statutes plaintiffs emphasized that their virtually identical claims brought under the Declaratory Judgment Act were pre-enforcement challenges.[4] Defendant never suggested otherwise, but argued only that plaintiffs' fear of prosecution in a judicial district was not an "event" that had "occurred" in that district for purposes of 28 U.S.C. § 1391(e)(2).[5] Thus, Dearth's claims are unlike Anthony Heller's in *Parker*, where the Court of Appeals found that the District of Columbia's denial of Heller's gun license "constitute[d] an injury independent of the District's prospective enforcement of its gun laws, and an injury to which the stringent requirements for pre-enforcement standing under *Navegar* and *Seegars* would not apply." *Parker*, 478 F.3d at 376. Plaintiffs' attempt to evade the requirements for pre-enforcement standing should be denied for this reason alone.

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[4] *See Dearth v. Gonzales*, Case No. 2:06-cv-1012, 2007 WL 1100426, at *4 (S.D. Ohio 2007) ("Plaintiffs allege that venue is nonetheless proper under 28 U.S.C. § 1391(e)(2) because their cause of action is being brought under the Declaratory Judgment Act, 28 U.S.C. § 2201, *as a pre-enforcement action.*") (emphasis added); *see also Hodgkins v. Gonzales*, Case No. 3:06-cv-2114-B, at 3 (N.D. Tex. Aug. 15, 2007) ("As grounds for venue, Plaintiffs argue that a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas because, in essence, Hodgkins 'would like to access [his] firearms, as well as acquire new ones' when he visits friends and family in Texas and if Hodgkins were to do so "he would be arrested and prosecuted in Dallas.' (Pl. Resp. at 2, 11; Compl. at ¶ 7, 12). Hodgkins argues that such acts or omissions are sufficient in the context of a *preenforcement challenge under 28 U.S.C. § 2201*. (Pl. Resp. at 6-12).") (emphasis added) (attached as Exhibit A).

[5] *See, e.g.*, Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Transfer, at 5-10, in *Dearth v. Gonzales*, Case No. 2:06-cv-1012 (S.D. Ohio) (attached as Exhibit B); Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Transfer, at 9-10, in *Hodgkins v. Gonzales*, Case No. 3:06-cv-2114-B (N.D. Tex.) (attached as Exhibit C).

2. Standing to Seek a Declaratory Judgment Pursuant to 28 U.S.C. § 2201 Cannot be Based on Past Events

Plaintiffs' attempt to analogize the refusal of private individuals to sell firearms to Dearth with the District of Columbia's denial of Anthony Heller's application for a gun license in *Parker* fails for an additional reason: Unlike Heller, Dearth has not brought suit under 42 U.S.C. § 1983, and therefore cannot evade "the stringent requirements for pre-enforcement standing under *Navegar* and Seegars." *See Parker*, 478 F.3d at 376, 378 (finding past denial of application for gun license sufficient for standing under § 1983, but not 22 U.S.C. § 2201).[6] Thus, *Parker* does not disturb the Supreme Court's clear precedent that the Declaratory Judgment Act requires the "*continuing* existence of a live and acute controversy," and that standing to seek a declaratory judgment cannot be based on past events. *See Steffel*, 415 U.S. at 459-60 (past threats of prosecution under challenged statute are not sufficient to establish standing under Declaratory Judgment Act); *Golden*, 394 U.S. at 104-06, 109-10 (past prosecution under challenged statute is not sufficient to establish standing under Declaratory Judgment Act); *see also Navegar*, 103 F.3d at 1001 (past visits by ATF agents and past letters

[6] The Second Circuit's decision in *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005), which—unlike *Navegar*, *Seegars*, and *Parker*—is not binding on this Court, is also distinguishable on the ground that Bach's claims were also brought under 42 U.S.C. § 1983. *See* Complaint at ¶¶ 50-55, in *Bach v. Pataki*, Case No. 02-cv-1500 (N.D.N.Y.) (attached as Exhibit D). Likewise, *Grid Radio v. FCC*, 278 F.3d 1314 (D.C. Cir. 2002) has no relevance here because Jerry Szoka's injury was never disputed. *Id.* at 1319. Indeed, the Court of Appeals was considering his appeal of a cease-and-desist order and his civil forfeiture of $11,000, which the Court of Appeals recognized was sufficient injury. *Id.* at 1317-19 ("[T]he cease-and-desist order and forfeiture are, as Szoka argues, present injuries, both of which are fairly, if circuitously, traceable to the Commission's microbroadcasting ban."). The FCC did not dispute Szoka's injury, but only whether such injury was caused by the microbroadcasting ban, as opposed to Szoka's operation without a license. *Id.* at 1319. Causation and standing are separate elements of Article III standing, and plaintiffs' reliance on *Grid Radio* is, therefore, misplaced.

from ATF to plaintiffs warning them of challenged Act's prohibitions regarding manufacture and sale of firearms is not sufficient to establish standing under the Declaratory Judgment Act).[7] Accordingly, Anthony Heller's standing in *Parker* to bring a claim pursuant to 42 U.S.C. § 1983 based on the District of Columbia's past denial of his application for a gun license does not relieve Dearth from his burden of establishing, in this case brought pursuant to the Declaratory Judgment Act, 22 U.S.C. § 2201, "a threat of prosecution under the statute which is credible and immediate." *Navegar*, 103 F.3d at 998.

3. Unlike Heller and the Other Plaintiffs in the Navegar-Seegars-Parker *Line of Cases, Dearth is Not Presently Impacted by the Challenged Provisions*

The final distinction between Dearth and Heller is that but for the District of Columbia's challenged provisions, Heller was—at all times during the litigation—prepared to purchase a handgun immediately for use for self-defense in his home. *Parker*, 478 F.3d at 373-74. By contrast, the challenged provisions' frustration of Dearth's alleged intention to purchase a firearm in this country for purposes other than sporting purposes will not arise until he actually visits the United States. Compl. ¶ 11. And, in this respect, he has alleged no concrete or immediate plans to do so, as is required by Article III of the Constitution. *See Lujan*, 504 U.S. at 564. Indeed, even those individual plaintiffs found not to have standing in *Seegars* and *Parker*

[7] Plaintiffs' continuing attempts to equate standing with venue should continue to be rejected. The differences between the two concepts are readily apparent. While a past attempt to purchase a firearm could plausibly be considered an "event" that has "occurred" for purposes of 28 U.S.C. § 1391(e)(2), it does not give rise to pre-enforcement standing unless accompanied by a "credible and immediate" threat of prosecution. *Navegar*, 103 F.3d at 998. Conversely, while a "credible and immediate" threat of prosecution could give rise to pre-enforcement standing, it would not, as a future, contingent event, be an "event" that had "occurred" for purposes of § 1391(e)(2). *See Dearth*, 2007 WL 1100426, at *4; *Hodgkins*, Case No. 3:06-cv-2114-B, at 3 (Ex. A)

could at least allege a present intention to engage in prohibited conduct. *Seegars*, 396 F.3d at 1251; *Parker*, 478 F.3d at 373-74. Dearth's inability to allege a similar present intention to engage in prohibited conduct, and his failure to allege any concrete plans to immediately engage in prohibited conduct, distinguishes his allegations of standing from those of Anthony Heller, as well as the other plaintiffs in *Seegars* and *Parker* who were not found to have standing. Dearth's allegations of injury are simply insufficient.

II. Plaintiffs' Disagreement With The Binding Precedent of the D.C. Circuit is Irrelevant

Unable to meet the requirements for pre-enforcement standing established by *Navegar* and its progeny, or to distinguish the holdings of these cases, plaintiffs instead argue that this binding precedent is wrong and should simply be ignored. Pl. Opp. at 14-22. This argument is wholly inappropriate in a district court, which must "faithfully apply the analysis articulated by *Navegar*" until it is overruled by the Supreme Court or an en banc panel of the Court of Appeals. *Seegars*, 396 F.3d at 1254; *see also In re Korean Air Lines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C. Cir. 1987) (binding precedent for a district court within a circuit is set only by the Supreme Court and the court of appeals for that circuit).

In any event, plaintiffs' argument that they would have standing under any other circuit's precedent cannot withstand close scrutiny. The only plaintiff who even alleges an intention to engage in prohibited conduct that could give rise to a credible fear of prosecution, Dearth, does not allege when he might wish to do so. Instead, he vaguely alleges that he'd like to purchase firearms in the United States from some unidentified individual at some indeterminate point in the future. Such general allegations do not "show that there is a substantial controversy, between parties having adverse legal interests, of sufficient *immediacy and reality* to warrant the issuance

of a declaratory judgment." *Golden*, 394 U.S. at 109-110 (emphasis added) (citation omitted); *see also Lujan*, 504 U.S. at 564; *Elend v. Basham*, 471 F.3d 1199, 1209 (11th Cir. 2006) (holding that declaratory judgment plaintiffs lacked standing to challenge Secret Service's alleged policy or practice of establishing protest zones at presidential appearances because plaintiffs only alleged that they intended to protest again at some indefinite time and place in the future); *Magaw*, 132 F.3d at 293 (plaintiffs lacked standing to challenge gun regulations based on allegations that they "'wish' or 'intend' to engage in proscribed conduct"); *San Diego Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126-27 (9th Cir. 1996) (same).[8] In sum, none of the plaintiffs has standing to challenge the constitutionality of § 922 under the binding precedent of this circuit, and plaintiffs' self-serving prediction of this precedent's demise is both baseless and irrelevant.

III. Plaintiffs' Prior Decision to Bring Similar Lawsuits in Improper Venues Does Not Establish Their Standing In this Lawsuit

Essentially conceding that they lack standing under the binding precedent of this circuit, plaintiffs argue that the fact that they previously brought similar lawsuits in improper venues—where they contend they would have had standing—somehow relieves them of their

[8] Plaintiffs do not argue that the Supreme Court's decision in *Medimmune, Inc. v. Genetech*, 549 U.S. 118 (2007), undermines the binding precedent of the D.C. Circuit, nor could they. *Medimmune* concerned the operation of the Declaratory Judgment Act in the context of a patent dispute, not a pre-enforcement challenge to a criminal statute. *Id.* at 120. It was decided prior to the Court of Appeals' decision in *Parker*, and, as plaintiffs point out, the Court of Appeals was well aware of the Supreme Court's decision when it rendered its decision in *Parker*. *See* Pl. Opp. at 22 & n.13. Furthermore, had the Supreme Court considered the *Parker* decision's allegiance to the *Navegar* theory "utterly inconsistent" with its decision in *Medimmune*, one would have expected it to grant the *Parker* plaintiffs' conditional cross-petition for certiorari on that issue. It did not. *See Parker v. District of Columbia*, 128 S.Ct. 2994 (June 27, 2008).

burden of establishing their standing in this Court. Plaintiffs' novel theory is based on several false premises, is unsupported by citation to any relevant authority, and, indeed, is contrary to the fundamental requirements of Article III and the clear precedent of this circuit. Thus, this argument is riddled with numerous deficiencies and must be rejected.

Plaintiffs' argument derives from an initial legal proposition, unsuccessfully advanced during the *Hodgkins* litigation, that a district court should not transfer a case pursuant to 28 U.S.C. § 1404(a) or § 1406(a) to a district in which plaintiffs would lack standing because it would not be a "district or division where [the case] might have been brought." 28 U.S.C. § 1404(a). This argument is not only irrelevant for purposes of resolving defendant's pending motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), it is wrong. None of the cases plaintiffs cites support their novel theory.[9] In fact, plaintiffs' proposition is contrary to binding Supreme Court precedent stating that "[t]here is no valid reason for reading the words 'where it might have been brought' to narrow the range of permissible federal forums beyond those permitted by federal venue statutes." *Van Dusen v. Barrack*, 376 U.S. 621, 623 (1964) (distinguishing *Hoffman v. Blaski*, 363 U.S. 335 (1963), and holding that a plaintiff's inability to bring a suit in the transferee forum because of state law limitations does not limit the transferor court's ability to transfer under § 1404(a)'s limiting language). Plaintiffs' argument has been rejected by a district court in the Northern District of Illinois, which relied upon *Van Dusen* to hold that

[9] *See Hoffman v. Blaski*, 363 U.S. 355 (1960) (28 U.S.C. § 1404(a) requires only that the transferee district court be a proper venue and be able to exercise personal jurisdiction over the defendants); *Piper Aircraft v. Reyno*, 454 U.S. 235 (1981) (dismissal for *forum non conveniens* is appropriate even where alternative forum's law is less favorable to plaintiff); *Scherer v. Purdue Pharma L.P.*, 317 F.Supp.2d 1253 (D. Kan. 2004) (transferring case without determining subject matter jurisdiction of transferee court).

differences in respective circuits' law of standing may be considered in the "interest of justice" analysis, but are not relevant to "the phrase 'where the action might have been brought[,' which] refers only to whether venue is proper and not a plaintiff's capacity to sue." *Carbonara v. Olmos*, Case No. 93-cv-2626, 1994 WL 61797, at *1 (N.D. Ill. Feb. 24, 1994) (citing *Van Dusen*, 376 U.S. at 616-24); *see also Ackert v. Bryan*, 299 F.2d 65, 70 (2d Cir. 1962) (upholding a § 1404(a) transfer despite the fact that transferee court would likely lack jurisdiction). Thus, plaintiffs' initial legal premise is wrong.

Undeterred, plaintiffs leap from their flawed initial legal premise to the truly fantastic proposition that this Court should ignore the binding precedent of this circuit, under which plaintiffs effectively concede they lack jurisdiction, and deny defendant's motion to dismiss. Plaintiffs provide absolutely no support for this argument and, indeed, none exists. Federal courts have an unwavering obligation to assure themselves that they have jurisdiction at all stages of litigation. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). This is true even in cases of transfer. *See Hoffman*, 363 U.S. at 340 n. 9 ("When, therefore, jurisdiction of the [transferee court] was assailed in the Seventh Circuit, by the petition for mandamus, that court surely had power to determine whether it would hold, on such an appeal, that the Illinois District Court did or did not have jurisdiction of the action and, if not, to say so and thus avoid the delays and expense of a futile trial."); *cf. Walker v. S.W.I.F.T. SCRL*, 517 F. Supp. 2d 801 (E.D. Va. 2007) (dismissing for lack of standing a transferred case notwithstanding transferor court's earlier, contrary holding).

Furthermore, it is unclear—as a logical matter—how plaintiffs' novel proposition follows from plaintiffs' initial flawed premise that a court should not transfer a case to a forum in which

plaintiff would lack standing. The two prior lawsuits were not transferred to this Court. Rather, they were both dismissed for improper venue pursuant to 28 U.S.C. § 1406(a), at plaintiffs' contingent request.[10] Nearly two years later, plaintiffs filed this lawsuit in this forum, notwithstanding the potential availability of alternative fora.[11] Accordingly, plaintiffs were not, as they contend, "forced to litigate their case[] in [a] venue[] where they would lack standing." Pl. Opp. at 22. They *chose* "to litigate their case[] in [a] venue[] where they would lack standing." *Id*. They can hardly complain about it now.[12]

Finally, though it is not necessary to reject plaintiffs' frivolous argument, defendant denies that plaintiffs had standing in either of the prior two lawsuits. Although defendant decided not to challenge plaintiffs' standing during the prior litigation in his initial motions to

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[10] *See Hodgkins v. Gonzales*, Case No. 3:06-cv-2114-B, at 4 (N.D. Tex. Aug. 15, 2007) ("[T]he Court finds that the Northern District of Texas is an improper venue.") (Ex. A); *id.* at 5 n. 2 ("The Court notes that Plaintiffs request dismissal rather than transfer."); *Dearth v. Gonzales*, Case No. 2:06-cv-1012, 2007 WL 1100426, at *5 (S.D. Ohio April 10, 2007) ("Thus, in light of Plaintiffs' request for dismissal and the Court's conclusions that venue here is improper or, if proper and concurrent, inconvenient compared to alternative forums, the Court DISMISSES the case without prejudice."). Plaintiffs appealed these decisions, and both appeals were dismissed for lack of appellate jurisdiction. *See Dearth v. Mukasey*, 516 F.3d 413, 414 (6th Cir.2008) ("Because the plaintiffs requested the dismissal without prejudice as an alternative to transfer, however, the district court's order is an unappealable voluntary dismissal."); *Hodgkins v. Mukasey*, 271 Fed. Appx. 412 (5th Cir. 2008) (same).

[11] For example, venue might have been proper under 28 U.S.C. § 1391(e)(3) in the Western District of Washington, the venue in which SAF is incorporated, Compl. ¶ 3, or possibly, as the district court in *Dearth* suggested, the District of Minnesota. *Dearth*, 2007 WL 1100426, at *5.

[12] Even if this case had been transferred here, this Court would be obligated to apply the binding precedent of this circuit and dismiss plaintiffs' claims for lack of jurisdiction. *See Hartline v. Sheet Metal Workers' Nat. Pension Fund*, 286 F.3d 598, 599 (D.C. Cir. 2002) ("When a case that is governed by federal law is transferred from one federal court to another, the transferee court should decide the federal claim based on its own circuit's interpretation of the law.") (citing *Korean Air Lines Disaster*, 829 F.2d 1171 (D.C. Cir.1987)).

dismiss, defendant's decision did not operate as a waiver of his jurisdictional defense, and he would not have been precluded from moving to dismiss for lack of subject matter jurisdiction if his motions to dismiss or transfer had been denied. *See* Fed. R. Civ. P. 12(h)(3). Likewise, the district courts were entitled to dismiss plaintiffs' prior lawsuits for the non-merits reason of improper venue without first determining whether plaintiffs had standing. *See Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[A] federal court has leeway 'to choose among threshold grounds for denying audience to a case on the merits.'") (citations omitted). Thus, defendant never conceded subject matter jurisdiction in the prior litigation, and no federal court determined whether plaintiffs' allegations were sufficient to establish their standing. Accordingly, plaintiffs' assertion that they would have had standing in either of these jurisdictions, *see* Pl. Opp. at 22, is a baseless and self-serving assertion of absolutely no relevance to resolving the instant motion.

In summary, the Court should reject plaintiffs' untenable argument that their prior attempts to litigate their claims in improper venues (where they contend, without support, that they would have had standing) should somehow prevent dismissal of their lawsuit under the binding precedent of this circuit. "The point has been cogently made that venue provisions are designed with geographical convenience in mind, and not to 'guarantee that the plaintiff will be able to select the law that will govern the case.'" *In re Korean Air Lines Disaster*, 829 F.2d at 1175 (quoting *Piper Aircraft*, 454 U.S. at 257 n. 24). The law that governs this case requires dismissal of plaintiffs' lawsuit for lack of jurisdiction.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court grant defendant's motion to dismiss.

Respectfully submitted,

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EXHIBIT A

Hodgkins v. Gonzales, Case No. 3:06-cv-2114-B (N.D. Tex. Aug. 15, 2007)

B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

MAXWELL HODGKINS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**CIVIL ACTION NO. 3:06-CV-2114-B**
	§	
ALBERTO GONZALES,	§	
Attorney General for the United States,	§	
	§	
Defendant.	§	

MEMORANDUM ORDER

Before the Court is Defendant's Motion to Dismiss or, in the Alternative, Transfer (doc. 10). For the following reasons, the Court **GRANTS** Defendants Motion to Dismiss and **DISMISSES** this case **without prejudice** pursuant to 28 U.S.C. § 1406(a).

I. Background

Plaintiffs Maxwell Hodgkins ("Hodgkins") and Second Amendment Foundation, Inc. ("SAF") bring this action against Defendant Alberto Gonzales ("Gonzales"), as Attorney General for the United States, challenging the constitutionality of various subsections of 18 U.S.C. § 922 and related regulations pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201.

SAF is a non-profit membership organization incorporated and with its principal place of business in Washington and brings this action on behalf of itself and its unspecified members. (Compl. at ¶ 2). Although Hodgkins was born and raised in Dallas, Texas, and regularly visits Dallas, Hodgkins currently resides in the United Kingdom and does not maintain a residence in the United States. (Compl. at ¶¶ 1, 6). Plaintiffs allege that Hodgkins owns firearms "stored within the

United States," and "would like to access such firearms, as well as acquire new ones, for lawful sporting purposes as well as for self-defense, collecting, and civic purposes, while visiting his friends and family in Texas." (Compl. at ¶ 7). Plaintiffs filed their Complaint on November 15, 2006.

Gonzales filed the present Motion to Dismiss or, in the Alternative, Transfer on January 16, 2007, arguing that venue is improper because Gonzales does not reside in this district, a substantial part of the events giving rise to Plaintiffs' claims did not occur in this district, Plaintiffs do not reside in this district, and the District of Columbia is a more appropriate forum. Plaintiffs respond that the events and omissions giving rise to their claims arose in this district and the Northern District of Texas is the appropriate venue. Having reviewed the parties arguments, the Court now turns to the merits of its decision.

II. Analysis

Pursuant to 28 U.S.C. § 1406(a), a district court may dismiss an action for improper venue or, if in the interest of justice, transfer the case "to any district or division in which it could have been brought." As Defendant Gonzales has raised a proper objection to venue, Plaintiffs bear the burden of establishing that venue in the Northern District of Texas is appropriate.[1] *See Seariver Maritime Fin. Holdings, Inc. v. Pena*, 952 F.Supp. 455, 462 (S.D. Tex. 1996). Plaintiffs argue that venue is proper under under 28 U.S.C. § 1391(e). (Compl. at ¶ 2; Pl. Resp. at 1, 4). 28 U.S.C. § 1391(e) provides:

> A civil action in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity or under color of legal authority . . . may, except as otherwise provided by law, be brought in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the

[1]Some courts have held that defendants bear the burden of establishing venue is improper. *Seariver Maritime Fin. Holdings, Inc.*, 952 F.Supp. at 458 n.2. Even if the burden was on Gonzales, based on the information before the Court, the Court would find that venue is improper.

> subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

Specifically, Plaintiffs argue that venue is proper under 28 U.S.C. § 1391(e)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this district.

Although Plaintiffs do not specifically argue that venue is proper under any other part of 28 U.S.C. § 1391(e), Gonzales contends that no other part of the statute applies because neither SAF, Hodgkins, nor Gonzales reside in the Northern District of Texas and no property is the subject of this action. The Court agrees.

Gonzales argues that he is a resident of the District of Columbia for venue purposes while Plaintiff states that Gonzales resides in Virginia. (Def. Br. at 6; Pl. Resp. at 17, n. 6). Under either scenario, Gonzales does not reside in the Northern District of Texas for venue purposes. Although Plaintiffs state that they are "constrained to note that Mr. Gonzales is a leading citizen of Texas" and "might even claim Texas domiciliary for income tax purposes," Plaintiffs do not argue or provide evidence that Gonzales resides specifically in the Northern District of Texas. (*See* Pl. Resp. at 17 n.6). Plaintiffs acknowledge that they do not reside in the Northern District of Texas. (Pl. Resp. at 6).

As grounds for venue, Plaintiffs argue that a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas because, in essence, Hodgkins "would like to access [his] firearms, as well as acquire new ones" when he visits friends and family in Texas and if Hodgkins were to do so "he would be arrested and prosecuted in Dallas." (Pl. Resp. at 2, 11; Compl. at ¶ 7, 12). Hodgkins argues that such acts or omissions are sufficient in the context of a pre-enforcement challenge under 28 U.S.C. § 2201. (Pl. Resp. at 6-12). Plaintiffs' arguments are

unpersuasive.

"Because the Federal Declaratory Judgment Act makes no provision as to the venue of an action in which declaratory relief is sought, the venue of such actions is controlled by the federal statutes relating to venue." *Dearth v. Gonzales*, 2007 WL 1100426, at *4 (S.D. Ohio 2007) (citing *Barber-Greene Co. v. Blaw-Knox Co.*, 239 F.2d 774, 776 (6th Cir. 1957). Although Plaintiffs cite cases involving standing issues, Section 1391(e) makes no mention of standing and those cases are not on point for considering venue in this case. *See Seariver Maritime Fin. Holdings, Inc.*, 952 F.Supp. at 460. The relevant issue here is where "a substantial part of the events or omissions giving rise to the claim **occurred**." *Rogers v. Civil Air Patrol*, 129 F.Supp.2d 1334, 1339 (M.D. Ala. 2001) (quoting 28 U.S.C. § 1391(e)(2)). Allegations that acts or omissions will occur at a later date are insufficient to support venue under Section 1391(e)(2). *Id.*

Here, Plaintiffs allege that Hodgkins "would like to" access and acquire firearms when he visits Texas and fear that Hodgkins, and others similarly situated, would be arrested and prosecuted for doing so. (Compl. at ¶ 7, 12). There are no allegations supporting that a substantial part of the events or omissions giving rise to the claim have occurred in this district, but only of events or omissions that may occur at some future point in time. As Plaintiffs have not established that a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas and no other grounds for venue exist, the Court finds that the Northern District of Texas is an improper venue. *See Dearth*, 2007 WL 1100426, at *4 (mere allegations that plaintiff is complying with an unconstitutional law for fear of prosecution are insufficient to support venue where nothing occurred in the judicial district); *Rogers v. Civil Air Patrol*, 129 F.Supp.2d at 1339 ("performance at a later date in this judicial district cannot support venue under section 1391(e)(2)").

III. Conclusion

For the foregoing reasons, Defendant's Motion to Dismiss is **GRANTED** and this matter is **DISMISSED without prejudice** for refiling in an appropriate venue.[2]

SO ORDERED.

SIGNED August 15th, 2007

JANE J. BOYLE
UNITED STATES DISTRICT JUDGE

[2] The Court notes that Plaintiffs request dismissal rather than transfer. (Pl. Resp. at 25 n.10).

EXHIBIT B

Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Transfer, in *Dearth v. Gonzales*, Case No. 2:06-cv-1012 (S.D. Ohio)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

STEPHEN DEARTH, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION No. 2:06cv1012
	)	
ALBERTO GONZALES, et al.	)	Judge Frost
	)	Magistrate Judge Abel
Defendants.	)	
_____	)	

DEFENDANTS' REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER

Plaintiffs' opposition to Defendants' motion to dismiss or, in the alternative, transfer fails to provide any basis for maintaining this case in this venue. Plaintiffs' theory of venue, which would allow a declaratory judgment plaintiff to file suit challenging the constitutionality of a federal criminal law in any judicial district in which he alleges a desire to engage in the prohibited activity, has been rejected by every court to consider it, and should be rejected here as well. Furthermore, Plaintiffs do not present a single legitimate reason for the eleventh-hour addition of Defendant Lockhart, essentially conceding that he was added solely for the purpose of manufacturing venue. Indeed, Plaintiffs' opposition brief further confirms that there is no tie between his claims and the US Attorney. Plaintiffs' attempt to create venue in this manner should not be permitted, and this Court should exercise its authority to drop Defendant Lockhart. Finally, Plaintiffs have not rebutted the sound reasons for the permissive transfer of this case to the United States District Court for the District of Columbia, including: (1) protecting the integrity of the venue statute; (2) conserving scarce judicial resources; and (3) relieving the

parties of unnecessary expense. Accordingly, Defendants' motion to dismiss or, in the alternative, transfer should be granted.

ARGUMENT

I. THE SOUTHERN DISTRICT OF OHIO IS AN IMPROPER VENUE

The relevant venue statute, 28 U.S.C. § 1391(e), does not provide "nationwide venue" in suits against federal officials as Plaintiffs wishfully assert,[1] but permits such suits to be filed—

> in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the proper that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e). As the Supreme Court has stressed, "[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interests of some overriding policy, is to be given a 'liberal' construction." Olberding v. Ill. Cent. R.R. Co., 346 U.S. 338, 340 (1953); see also Leroy v. Great W. United Corp., 443 U.S. 173, 184 n. 18 (1979) (quoting Olberding). Furthermore, because venue is challenged as improper under Rule 12(b)(3), Plaintiffs have the burden to establish that venue in this district is proper.[2] Finally,

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[1]Contrary to plaintiff's assertion, the Supreme Court's decision in Stafford v. Briggs, 444 U.S. 530 (1980), does not hold that "nationwide venue exists 'for the convenience of individual plaintiffs'" in suits against federal officers. Pl. Opp. at 7 (quoting Stafford, 444 U.S. at 542). In fact, the Supreme Court's decision held only that § 1391(e) did not apply to actions for money damages brought against officers or employees of the federal government. Id. at 779-85.

[2]See Centerville ALF, Inc. v. Balanced Care Corp., 197 F.Supp.2d 1039, 1046 (S.D.Ohio 2002) ("Plaintiffs bear the burden of establishing that venue is proper once an objection to venue has been raised, and must demonstrate that venue is proper for each claim asserted in their complaint."); see also Charles Alan Wright, et al, Federal Practice and Procedure § 3826 at 259 ("'the better view,' and the position that probably represents the weight of judicial authority, is that, when an objection has been raised, the burden is on the plaintiff to establish that the district he or she has chosen is a proper venue.").

venue and subject matter jurisdiction are separate inquiries, and the Court need not establish its subject matter jurisdiction before deciding to transfer a case to an appropriate venue. See Reuben H. Donnelly v. F.T.C., 580 F.2d 264, 266 (7th Cir. 1978) (addressing the "threshold question" of venue before considering whether plaintiffs had exhausted their administrative remedies, a question of subject matter jurisdiction); cf. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.,---S.Ct.---, 2007 WL 632763, at *10 (March 5, 2007) (district court may dismiss a case on *forum non conveniens* grounds before establishing its jurisdiction).

Plaintiffs have failed to satisfy their burden of demonstrating proper venue, and this case should be dismissed pursuant to Rule 12(b)(3), Fed.R.Civ.P. and 28 U.S.C. § 1406(a), or transferred to the United States District Court for the District of Columbia pursuant to § 1406(a).

A. The Events Giving Rise to this Claim Did Not Occur in this District

In a suit against a federal official acting in his official capacity venue is proper in a "judicial district in which . . . (2) a substantial part of the events or omissions giving rise to the claim occurred . . . ." 28 U.S.C. § 1391(e)(2). Plaintiffs, unable to identify a single "event" alleged by the amended complaint to have occurred in this district that could give rise to Plaintiffs' claims, attempt to confuse this relatively straightforward inquiry by conflating issues related to Article III standing with the distinct issue of venue. Such attempts have been rejected by other courts and should be rejected here as well.

1. None of the Events Giving Rise to Plaintiffs' Claims Occurred in this District

In their opposition brief, Plaintiffs contend that "[t]he fact is that this claim is arising somewhere." Pl. Opp. at 9. Indeed, the First Amended Complaint ("FAC") identifies two "events" that have "occurred" that could be said to "give rise to" plaintiffs' claims, but neither of

these "events" occurred within this district. First, the passage of the challenged statutes and the promulgation of the challenged regulations in the District of Columbia comprise a "substantial part of the events . . . giving rise" to Plaintiffs' claims. See Rogers v. Civil Air Patrol, 129 F.Supp.2d 1334, 1339 (M.D.Ala. 2001) ("Plaintiff's suit is a challenge to federal legislation drafted by Congress and signed by the President in the District of Columbia . . . [and therefore] virtually all of the activity giving rise to Plaintiff's claims took place in or around the District of Columbia."); Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455, 462 (S.D.Tex. 1996) ("the District of Columbia would appear to be an obvious choice [of venue] in light of Plaintiff's challenge to the constitutionality of federal legislation."). Therefore, the United States District Court for the District of Columbia is an appropriate venue.[3]

Second, the FAC alleges that "Mr. Dearth attempted to buy a firearm within the United States on or about January 28, 2006." FAC at ¶ 17. Although not mentioned in the First Amended Complaint, Plaintiffs now reveal in their opposition brief that Plaintiff Dearth's failed attempt to purchase a firearm occurred "at a sporting goods store in Minnesota." Pl. Opp. at 14 n.3. But, Plaintiffs did not file their complaint in the United States District Court for the District of Minnesota.[4]

By contrast, Plaintiffs cannot point to a single "event" that has even arguably "occurred" in the Southern District of Ohio giving rise to their claims. Plaintiff Dearth's asserted desire "to

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[3]The District of Columbia is also appropriate because it is where Defendant Gonzales, acting in his official capacity, resides. 28 U.S.C. § 1391(e)(1).

[4]It is also worth noting that—assuming *arguendo* Plaintiff SAF has standing— Plaintiffs could have brought this action in the United States District Court for the Eastern District of Washington, where Plaintiff SAF is incorporated and therefore resides. See 28 U.S.C. § 1391(e)(3).

purchase firearms within the United States," FAC ¶ 8, is not an "event," has not "occurred," and is not limited to this "judicial district." 28 U.S.C. § 1391(e)(2). As the district court in Rogers noted, "Allegations that [a challenged statute] will require performance at a later date in this judicial district cannot support venue under section 1391(e)(2). That section provides for venue where a 'substantial part of the events or omissions giving rise to the claim **occurred.**'" Rogers, 129 F.Supp.2d at 1339 (quoting 28 U.S.C. § 1391(e)(2)) (emphasis in original). Thus, the district court concluded, an "event [that] succeeded the filing of the Complaint . . . could not logically have given rise to Plaintiff's claims." Id. This common sense reading of the venue statute is reinforced by the decisions of other courts to consider the issue. See Reuben H. Donnelly Corp. v. F.T.C., 580 F.2d 264, 268 (7th Cir. 1978) (future impact of challenged federal law in judicial district not sufficient basis for venue); Seariver, 952 F.Supp at 459 (same); Experian Information Solutions, Inc. v. F.T.C., Case No. 3:00cv1631-H, 2001 WL 257834, at *3 (N.D.Tex. March 8, 2001) (same); Honeywell v. Consumer Product Safety Commission, 566 F.Supp. 500, 501, 502 (D.Minn. 1983) (same).

Likewise, the allegation that "Mr. Dearth would have purchased firearms in Ohio, but has refrained from doing so," FAC ¶ 18; see also FAC ¶ 13, which were inserted into the Amended Complaint after Plaintiffs were aware of the imminent challenge to venue, is not specifically alleged to have occurred in this district (as opposed to the Northern District of Ohio), nor, for the reasons addressed more fully below, can Mr. Dearth's asserted inhibition in Ohio be considered a "substantial part of the events" giving rise to his claim.

2. Standing and Proper Venue Are Independent Requirements

Unable to point to a single event alleged in the complaint that has occurred in the

Southern District of Ohio, Plaintiffs argue, without any support, that Plaintiff Dearth's alleged inhibition in the State of Ohio is an "event" giving rise to Plaintiffs' claims because it comprises Dearth's "injury" for Article III standing purposes.[5] While it is not hard to imagine an "event" occurring in a judicial district that would both permit laying venue in that district and comprise a plaintiff's "injury" for standing purposes—a car accident, an assault, breach of a contract—plaintiff has not cited a single decision in which the inchoate threat of "injury" that sometimes allows declaratory judgment plaintiffs to challenge a federal statute is also an "event" sufficient to satisfy the venue provision. Indeed, this argument has been routinely rejected by those courts to consider it.

Thus, for example, in Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455 (S.D.Tex. 1996), plaintiffs, the owners of the vessel formerly known as the Exxon Valdez, brought suit in the Southern District of Texas seeking a declaratory judgment that a provision of the Oil Pollution Act that prohibited the vessel from operating on Prince William Sound, Alaska violated the constitution. Id. at 456. In response to the government's motion to dismiss for improper venue or to transfer the case to Alaska, plaintiffs argued "that the effects of [the challenged provision] . . . are felt in Houston, and that these local effects give rise to venue." Id. at 459. The district court rejected this argument: "The 'effects' to which Plaintiffs refer are the injury resulting from [the challenged provision], rather than an 'event giving rise to a claim' that could properly lay venue." Id.

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[5]Defendants dispute that this asserted inhibition would be sufficient "injury" for Article III purposes. See Nat'l Rifle Ass'n v. Magaw, 132 F.3d 272, 293 (6th Cir. 1997) (holding that allegations that individual plaintiffs "'desire' and 'wish' to engage in certain activities possibly prohibited by the federal gun laws, but are 'restrained' and 'inhibited' from doing so" are not sufficient to confer Article III standing).

Plaintiffs' present argument is similar to the Seariver plaintiffs' unsuccessful argument rejected by the district court in Seariver. The Seariver plaintiffs' argument proceeded, in part, as follows:

> [S]tanding principles, therefore, must guide the determination of venue. If the right to bring a constitutional declaratory judgment action depends on whether there is a "danger" of suffering "direct injury" as a result of a statute's "operation," then venue is logically found where that injury has already occurred and is occurring.

Id. (quoting Plaintiffs' Response at 9). After acknowledging that "a realistic danger of direct injury can confer standing on a party," the district court nevertheless held that "Plaintiffs' arguments as to standing are not probative on the venue issue." Id. at 459-60. The requirement of standing is separate and in addition to the requirement of proper venue, and therefore even "[i]f Plaintiffs' claims raise a genuine issue of standing, the question must be addressed by a court with proper venue." Id. Thus, notwithstanding the alleged "injury" felt by the Seariver plaintiffs —tangible economic injury—the district court held that "a 'substantial part of the events or omissions giving rise to the claim' did not occur in this judicial district, and that Section 1391(e)(2) does not provide a basis for venue here." Id. at 461. Accordingly, the district court dismissed the action for improper venue.[6]

Likewise, in Reuben H. Donnelly Corp. v. F.T.C., 580 F.2d 264 (7th Cir. 1978), plaintiff Donnelly brought suit in the Northern District of Illinois seeking a declaratory judgment that the Federal Trade Commission lacked jurisdiction over its publication of the *Official Airline Guide*.

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[6]To avoid Alaska jurisdiction, the Seariver plaintiffs re-filed their action in the United States District Court for the District of Columbia. The D.C. district court subsequently granted the government's motion, under 28 U.S.C. § 1404(a), to transfer the case to Alaska. See Seariver Mar. Fin. Holdings, Inc. v. Pena, Case No. 96-02142 (D.D.C. Jan. 29, 1997) (attached as Exhibit A).

Id. at 266. Donnelly defended its chosen venue as proper under § 1391(e)(2), on the ground that "the impact of any Commission action, for example, a cease and desist order, *will* be felt by Donnelly in Illinois." Id. at 268 (emphasis added). The Seventh Circuit rejected this argument as "a novel extension of the federal venue provisions," id., and it is even less available here, where Plaintiffs are alleging that Congress exceeded its authority in passing the challenged provisions, and that the impact of this allegedly unconstitutional action *may* be felt in the Southern District of Ohio. See also Honeywell, Inc. v. Consumer Prod. Safety Comm'n, 566 F.Supp. 500, 501-02 (D.Minn. 1983) (rejecting attempts by declaratory judgment plaintiffs to base venue on the impact of some future, contingent enforcement of federal law in the chosen venue); Experian Fin. Solutions, Inc. v. F.T.C., Case No. 3:00cv1631-H, 2001 WL 257834, at *3 (N.D.Tex. March 8, 2001) (same).

Because standing and venue are separate inquiries, Plaintiffs' citation to cases related to standing are inapposite.[7] The only "events" relevant to this case occurred in the District of Columbia and in Minnesota. Unwilling to file this lawsuit in either of these jurisdictions, Plaintiffs cite a number of inapposite declaratory judgment cases that stand for the proposition that the government doesn't challenge venue when venue is proper. Some of these cases were brought by plaintiffs who resided in the chosen forum, thereby satisfying venue pursuant to § 1391(e)(3).[8] Presumably for this reason, the government did not challenge venue in any of

[7]See, e.g., Medimune, Inc. v. Genetech, Inc., — U.S. — , 127 S.Ct. 764, 767 (2007) (addressing whether "a patent licensee [must] . . . terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed"); Bach v. Pataki, 408 F.3d 75, 82-83 (2d Cir. 2005).

[8]See, e.g., Carhart v. Gonzales, 331 F.Supp.2d 805, 814 (D.Neb. 2004) ("Plaintiff LeRoy Carhart, M.D., practices medicine and surgery and performs abortions in Nebraska."), affirmed

these cases, and no court addressed whether the "injury" suffered by pre-enforcement declaratory judgment plaintiffs could satisfy § 1391(e)(2). Likewise, the declaratory judgment cases cited by plaintiffs that based venue on § 1391(e)(2) all involved the occurrence of actual "events" in the chosen forum.[9] By contrast, Plaintiffs are not residents of the district in which they seek to bring this declaratory judgment, nor can they point to any actual events that have occurred in this district. Plaintiffs' citation to cases in which venue is proper merely highlights the impropriety of Plaintiffs' chosen forum.

Finally, common sense supports granting Defendants' motion. Plaintiffs' interpretation of § 1391(e)(2), if accepted, would completely undermine the venue provision by allowing declaratory judgment plaintiffs to bring suit in any judicial district simply by pausing in the jurisdiction (presumably moments before filing their complaint) to feel inhibited by an allegedly unconstitutional federal law. This interpretation "raises the real possibility of test cases being brought, far from the site of actual controversy, in districts whose judges have acquired a reputation for sympathy for the particular cause being urged in the complaint." Kings County Econ. Cmty. Dev. Ass'n v. Hardin, 333 F.Supp. 1302, 1304 (N.D.Cal. 1971). Furthermore, Plaintiffs' interpretation would render superfluous the other provisions of § 1391(e), a result

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413 F.3d 791 (8th Cir. 2005) cert. granted 126 S.Ct. 1314 (2006); Planned Parenthood Fed'n of Am. v. Gonzales, 320 F.Supp.2d 957 (N.D.Cal. 2004) (Plaintiff Planned Parenthood Golden Gate resides in district) affirmed 435 F.3d 1163 (9th Cir.) cert. granted 126 S.Ct. 2901 (2006); Nat'l Abortion Fed'n v. Gonzales, 330 F.Supp.2d 436, 459 (S.D.N.Y. 2004) (plaintiff Westhoff resides in district) affirmed 437 F.3d 278 (2nd Cir. 2006); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002) (plaintiffs reside in California).

[9]See Andraje v. Chojnacki, 934 F.Supp. 817, 826 (S.D.Tex. 1996) (fifty-one day siege and physical attacks in district); Mansfield v. Orr, 544 F.Supp. 118, 120 (D.Md. 1982) (breach of contract in district); Patmore v. Carlson, 392 F.Supp. 737, 738-39 (E.D.Ill. 1975) (assault with club in district).

certainly not intended by the provision's drafters. See TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'") (quoting Duncan v. Walker, 533 U.S. 167, 174 (2001)). Accordingly, Plaintiff's expansive interpretation of the word "event" in § 1391(e)(2) must be rejected.[10]

B. Plaintiff's Attempt to Cure Obvious Deficiencies in Venue by Adding Defendant Lockhart Should Not Succeed

This Court should also reject Plaintiffs' transparent attempt to manufacture venue by naming the local United States Attorney, Gregory G. Lockhart, as an additional defendant. It is telling that Plaintiffs' opposition brief did not attempt to refute the fact that Defendant Lockhart was added for the sole purpose of manufacturing venue. See Pl. Opp. at 15-19. Instead, Plaintiffs claim that naming Defendant Lockhart is "well-within Plaintiffs' rights" and a "a time-honored, ordinary practice." Pl. Opp. at 15. In fact, naming Defendant Lockhart is not "well-within Plaintiffs' rights."[11] Furthermore, the three cases cited by Plaintiffs, the most recent of

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[10]Even if the Court disagrees, and thinks that Plaintiff's alleged inhibition is an "event," it is nonetheless certainly not a "substantial part of the events" giving rise to Plaintiffs' claims. See Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp 455, 460 (S.D.Tex. 1996) ("Events that have only a tangential connection with the dispute at bar are not sufficient to lay venue.") (citing Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994)).

[11]See Keller v. University of Michigan, 411 F.Supp. 1055, 1057 (E.D.Mich. 1974) ("[T]he proper procedure to add parties [before a responsive pleading is served] would still have been to request leave of this Court pursuant to Rule 21."); Int'l Bro. of Teamsters v. American Fed. of Labor, 32 F.R.D. 441, 442 (E.D.Mich. 1963) ("[W]hen a proposed amendment to a complaint seeks to effect a change in the parties to the action, Rule 21, F.R.Civ.P., controls and, to that extent, limits Rule 15(a), F.R.Civ.P."); see also Williams v. United States Postal Service, 873 F.2d 1069, 1072 n.2 (7th Cir. 1989) ("[A] plaintiff cannot add new defendants through a complaint amended as a matter of course.") (citing La Batt v. Twomey, 513 F.2d 641, 650 n.9

which was decided in 1934, hardly demonstrate the ordinary practice of naming the local United States Attorney in challenges to federal legislation.[12] Rather, as illustrated in Defendants' opening brief, naming the local United States Attorney in declaratory judgment actions challenging federal gun laws is *not* the ordinary practice, presumably because doing so is completely unnecessary.[13] Indeed, Plaintiffs admit that naming Defendant Lockhart is "not

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(7th Cir. 1975)).

[12]Pl. Opp. at 16 (citing Nolan v. Morgan, 69 F.2d 471, 472 (7th Cir. 1934); Tedrow v. A.T. Lewis & Son Dry Goods Co., 255 U.S. 98, 99 (1921); G.S. Willard Co. v. Palmer, 255 U.S. 106, 107 (1921)).

[13]See e.g., Printz v. United States, 521 U.S. 898 (1997) (consolidated cases challenging constitutionality of interim provisions of the Brady Handgun Violence Prevention Act and naming the United States as the lone defendant); Seegars v. Gonzales, 396 F.3d 1248 (D.C.Cir. 2005) (challenging constitutionality of District of Columbia's firearm statutes and naming the Mayor of Washington, D.C. and the Attorney General as defendants), *cert. denied* 126 S.Ct. 1187 (2006); Navegar v. United States, 103 F.3d 994 (D.C.Cir. 1997) (challenging the constitutionality of the Violent Crime Control & Law Enforcement Act of 1994 and naming only the United States as defendant); Nat'l Rifle Ass'n v. Magaw, 132 F.3d 272 (6th Cir. 1997) (challenging the constitutionality of the Violent Crime Control & Law Enforcement Act of 1994 and naming the Director of the ATF, and the United States as defendants); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121 (9th Cir. 1996) (challenging the constitutionality of the Violent Crime Control and Law Enforcement Act of 1994 and naming the Attorney General and the acting Director of the ATF as defendants); Westfall v Miller, 77 F.3d 868 (5th Cir. 1996) (challenging gun control regulation and naming Chief of the National Firearms Act Branch and United States as defendants); State of Wyoming v. United States, Case No. 06cv0111 J (D.Wyo.) (challenging constitutionality of ATF interpretation of "expungement" for purposes of gun control laws and naming the United States, the ATF, the Director of the ATF, and the Chief of the Firearms Division of the ATF as defendants); Grand Lodge of the Fraternal Order of Police v. Ashcroft, 185 F.Supp.2d 9 (D.D.C. 2001) (challenging the constitutionality of the Violent Crime Control and Law Enforcement Act of 1994 and naming the Attorney General and the United States as defendants); Doe v. Bureau of Alcohol, Case No. 3:94cv1699, 1997 WL 852086 (D.Conn. Sept. 12, 1997) (challenging constitutionality of ATF regulations and naming ATF and Bridgeport, Ct. Chief of Police as defendants); Romero v. United States, 883 F.Supp. 1076 (W.D.La. 1994) (challenging the constitutionality of the interim provisions of the Brady Handgun Violence Prevention Act and naming the United States as the lone defendant); Century Arms, Inc. v. Kennedy, 323 F.Supp. 1002 (D.Vt. 1971) (challenging the constitutionality of the Gun Control Act of 1968 and naming Secretary of the Treasury).

strictly required," Pl. Opp. at 15, virtually conceding that the sole reason for doing so was to attempt to manufacture venue.

In the end, this Court need not resolve whether Plaintiffs have a legal right to name the United States Attorney or establish the (in)frequency of such a practice. This Court has the authority to prevent Plaintiffs' attempt to manufacture venue by dropping Defendant Lockhart "*of its own initiative* at any stage of the action and on such terms as are just." Rule 21, Fed.R.Civ.P. (emphasis added). The decision to drop Defendant Lockhart is firmly committed to this Court's discretion. See Sutherland v. Michigan Dept. of Treasury, 344 F.3d 603, 612 (6th Cir. 2003) ("This Court reviews a decision to drop a misjoined party pursuant to Rule 21 for abuse of discretion.") (citing Letherer v. Alger Group, L.L.C., 328 F.3d 262, 266 (6th Cir. 2003)).

As Defendants argued in their opening memorandum, and as Plaintiff concedes, adding Defendant Lockhart is completely unnecessary. See 28 U.S.C. §§ 516, 519; United States v. Di Girlomo, 393 F.Supp. 997, 1005 (D.Mo.) ("Congress has clearly vested the Attorney General with the raw power to supersede the functions of the local United States Attorneys, and subjected them to his supervision."), aff'd 520 F.2d 372 (8th Cir. 1975); Pl. Opp. at 15. Plaintiffs' attempts to argue that Defendant Lockhart should nevertheless remain as a defendant are unconvincing. Plaintiffs state that "to the extent the controversy stems from Plaintiffs' present disability to obtain firearms in the Southern District of Ohio, *as exemplified by Plaintiff Dearth's thwarted attempt to purchase a firearm*, the person most directly responsible for that disability is Defendant Lockhart." Pl. Opp. at 18 (emphasis added). It is unclear, however, why "Plaintiff Dearth's thwarted attempt to purchase a firearm" in *Minnesota*, Pl. Opp. at 18, 14 n.3,

exemplifies the need to name Defendant Lockhart, as opposed to the United States Attorney for the District of Minnesota. Nor do Plaintiffs explain why naming Defendant Gonzales alone is not sufficient to rectify Plaintiffs' "present disability to obtain firearms" in the Southern District of Ohio or any other district. The answer, of course, is that the only reason for adding Defendant Lockhart is to manufacture venue.

The only remaining question is whether dropping Defendant Lockhart is "just." Rule 21, Fed.R.Civ.P. "Rule 21 gives district courts the power to dismiss improperly named defendants to prevent the manipulation of the venue provisions of the Judicial Code in an attempt to defeat the ends of justice." Liberty Mutual Ins. Co. v. Batteast, 113 F.R.D. 77, 81 (N.D.Ill. 1986) (dropping defendants "named . . . solely in an attempt to prevent a transfer of venue to another more appropriate jurisdiction."). More specifically, district courts have taken a dim view of attempts to manufacture venue under § 1391(e) by naming as defendants unnecessary subordinate officers. See Hartke v. F.A.A., 369 F.Supp. 741, 746 (E.D.N.Y. 1973) ("The venue statute was not intended to permit forum-shopping, by suing a federal official wherever he could be found, or permitting test cases far from the site of the actual controversy."); Kings County Econ. Cmty. Dev. Ass'n v. Hardin, 333 F.Supp. 1302, 1304 (N.D.Cal. 1971) (refusing to allow manipulation of venue statute by the addition of unnecessary defendants).

Plaintiffs do not even attempt to address the district court's holding in Batteast, and make only half-hearted and ultimately unsuccessful attempts to distinguish the other cases cited in Defendants' opening brief. For example, the concern expressed by the district court in Kings County, in addressing plaintiffs' theory of venue in that case, is equally if not more applicable to the facts of this case. The district court worried that, given the ubiquitous presence of the federal

government, plaintiffs' theory of venue, if accepted, would allow declaratory judgment plaintiffs to sue "*in any district in the United States* [by naming] as 'a defendant' a subordinate departmental official residing there." Kings County, 333 F.Supp. at 1304. This is precisely what Plaintiffs here are attempting to do, and the consequences of allowing this ploy to succeed are the same: (1) it would undermine the "general rule that venue is confined to districts with the real parties in interest or the subject matter of the action;" (2) it would render the other subsections of § 1391(e) superfluous "since subsection (1) would, without these other provisions, allow suit in nearly any district chosen by plaintiffs;" and (3) "it allows the most obvious kind of forum shopping . . . ." Id.

Similarly, plaintiffs do not successfully dispute the relevance of the district court's decision in Hartke v. FAA, 369 F.Supp. 741 (E.D.N.Y. 1973), in which the district court found, as Plaintiffs characterize it, "improper venue under section 1391(e) where events complained of by plaintiff occurred in another district and local subordinate FAA officials in New York had no relation to events there." Pl. Opp. at 17 (citing Hartke v. FAA, 369 F.Supp. 741 (E.D.N.Y.)). Defendant Lockhart has no relation to the only "events" complained of by Plaintiffs in this case: the passage of laws and promulgation of regulations in Washington, D.C. and Plaintiff Dearth's unsuccessful attempt to purchase a firearm in Minnesota.

Accordingly, this Court should not permit Plaintiffs' attempt to create venue where none exists by naming an unnecessary defendant, but should exercise its authority to drop Defendant Lockhart pursuant to Rule 21, Fed.R.Civ.P, and dismiss or transfer this case pursuant to 28 U.S.C. § 1406(a).

II. THIS CASE SHOULD BE TRANSFERRED TO CONSERVE JUDICIAL RESOURCES AND TO PROTECT THE INTEGRITY OF THE VENUE STATUTE

Plaintiffs' brief in opposition fails to provide a persuasive reason to defer to Plaintiffs' choice of forum, and similarly fails to persuasively counter the three primary reasons for the permissive transfer of this case to the United States District Court for the District of Columbia: (1) protecting the integrity of the venue statute; (2) conserving scarce judicial resources; and (3) relieving the parties of unnecessary expense. Accordingly, even if venue is found to be technically proper, this case should be transferred pursuant to 28 U.S.C. § 1404(a).

A. Plaintiffs' Choice of Forum is Entitled to No Deference

As an initial matter, Plaintiffs fail to dispute the well-established rule that a non-resident plaintiff's decision to sue outside its home forum is accorded little deference, or the equally well-established rule that a plaintiff's choice of forum is accorded less deference when, as here, the operative facts occurred outside the chosen forum.[14] Nor do Plaintiffs contest the proposition,

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[14]See, e.g., Ray Mart, Inc. v. Stock Building Supply of Texas, LP, 435 F.Supp.2d 578, 594 (E.D.Tex.2006) ("Plaintiffs' choice of forum is accorded less weight when most of the operative facts occurred outside the district.") (internal citations omitted); Salinas v. O'Reilly Automotive, Inc., 358 F.Supp.2d 569, 571 (N.D.Tex. 2005) ("plaintiff's choice of forum is accorded less weight, however, when the plaintiff sues outside its home district and where most of the operative facts occurred outside the district.") (citing Isbell v. DM Records, Inc., 2004 WL 1243153, at *13 (N.D.Tex. June 4, 2004)); Indian Harbor Ins. Co. v. Factory Mut. Ins. Co., 419 F.Supp.2d 395, 405 (S.D.N.Y. 2005) ("plaintiffs' chosen forum carries less weight when no party resides in the forum nor is it the locus of operative facts.") (citing cases); Spherion Corp. v. Cincinnati Financial Corp.,183 F.Supp.2d 1052, 1058 (N.D.Ill. 2002) ("plaintiff's choice of forum is important, but this factor is given less weight 'when the plaintiff is a non-resident of the chosen forum,' or 'where the cause of action did not conclusively arise in the chosen forum.'") (quoting Countryman v. Stein Roe & Farnham, 681 F.Supp. 479, 482-83 (N.D.Ill.1987)); Cochran v. NYP Holdings, Inc., 58 F.Supp.2d 1113, 1119 (C.D.Cal. 1998) ("plaintiff's choice of forum is ordinarily given great deference, unless plaintiff is a non-resident or the forum lacks any real contacts with the action.") aff'd 210 F.3d 1036 (9th Cir. 2000); In re Eastern Dist. Repetitive Stress Injury Litigation, 850 F.Supp. 188, 194 (E.D.N.Y. 1994) (plaintiff's choice of

announced in Dupre v. Spanier Mariner Corp., 810 F.Supp. 823 (S.D.Tex. 1993), that a district court should be "loathe to respect those choices [of forum] that appear to be blatant attempts at forum shopping with little or no factual justification."[15]

In the instant case, Plaintiffs have filed this lawsuit in a venue in which none of the parties reside and where nothing related to the case has occurred. Plaintiffs do not attempt to conceal their motivation for doing so, but state candidly that they have chosen this forum because they are "interested in asking the Sixth Circuit to revisit some of its Second Amendment precedent, although existing Sixth Circuit precedent strongly backs their equal protection claim." Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss or, in the Alternative, Transfer at 3 n.1, Hodgkins v. Gonzales, Case No. 3:06cv2114-B (N.D.Tex.) (Docket #12) (attached as Exhibit A to Plaintiffs' brief in opposition to the instant motion). See also Pl. Opp. at 24 ("Plaintiffs have filed this case in part to have the Sixth Circuit reconsider its 'collective right' precedent."). Plaintiffs' forum choices, in both this case and in the related case pending in the Northern District of Texas, are not related to the underlying facts or to the location of the parties, but are simply calculated to take advantage of what Plaintiffs view as favorable circuit

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forum entitled to less deference when it has no connection to the events giving rise to the claim). See also 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3848 (3d ed. 2007) ("Also, as the many illustrative cases cited in the note below demonstrate, the plaintiff's venue choice is to be given less weight if he or she selects a district court with no obvious connection to the case or the plaintiff is a nonresident of the chosen forum or neither element points to that court.") (citing cases).

[15]Id. at 828; see also Carolina Cas. Co. v. Data Broadcasting Corp., 158 F.Supp.2d 1044, 1048 (N.D.Cal. 2001) ("If there is any indication that plaintiff's choice of forum is the result of forum shopping, plaintiff's choice will be accorded little deference."); 15 Wright, Miller & Cooper, Federal Practice and Procedure § 3848 (3d ed. 2007) ("courts give less weight to a plaintiff's forum choice if that party appears to be forum shopping").

precedent (or to avoid unfavorable circuit precedent). Accordingly, Plaintiffs' choice of forum "is entitled to no weight whatever [because] it appears that the plaintiff was forum shopping and . . . the selected forum has little or no connection with the parties or the subject matter." Polaroid Corp. v. Casselman, 213 F.Supp. 379, 383 (S.D.N.Y. 1962).

Rather than address this precedent, all of which concerned motions to transfer among the federal courts pursuant to 28 U.S.C. § 1404(a), Plaintiffs engage in a misleading and ultimately fruitless analysis of Supreme Court and Sixth Circuit *forum non conveniens* cases. Puzzlingly, Plaintiffs first claim that the law of *forum non conveniens* is "inapposite," but then proceed to rely on two *forum non conveniens* cases to support their asserted entitlement to deference. Pl. Opp. at 19-20 (citing Piper Aircraft v. Reyno, 454 U.S. 235 (1981); Duha v. Agrium, 448 F.3d 867 (6th Cir. 2006)). Defendants' single "see also" citation to the Supreme Court's decision in Piper Aircraft v. Reyno, 454 U.S. 234 (1981), was not intended to suggest that the law governing deference to a plaintiff's choice of forum in *forum non conveniens* cases should apply, but merely to illustrate by analogy that the common sense reasons for deferring to a plaintiff's choice of forum do not apply when a plaintiff sues outside of his or her home forum. As the Supreme Court stated in Piper, "a plaintiff's choice of forum is entitled to greater deference when the plaintiff has chosen the home forum" because "when the home forum has been chosen, it is reasonable to assume that this choice is convenient" Id. at 255-56. Of course, the Southern District of Ohio is neither Plaintiff's "home forum" and therefore "this assumption is much less reasonable." Id. at 256.[16] Plaintiffs are right, however, to suggest that "[t]he *forum non*

[16]The Supreme Court's statement that "Citizens or residents deserve somewhat more deference than foreign plaintiffs," Id. at 256 n.23, was simply intended to distinguish foreign plaintiffs from people who reside in this country, (i.e., citizens or legal residents) and, as the

conveniens doctrine is quite different from Section 1404(a)." Norwood v. Kirkpatrick, 349 U.S. 29, 31 (1955). Indeed, as it relates to the deference owed to a plaintiff's choice of forum, the Supreme Court has made clear that far less deference is owed to a plaintiff's choice of forum in the context of a motion to transfer pursuant to § 1404(a), than in the context of a motion to dismiss pursuant to the doctrine of *forum non conveniens*. See Norwood, 349 U.S. at 32. Accordingly, Plaintiffs' arguments for why their choice of forum is entitled to deference fail, and their choice of forum is entitled to no deference.

B. Transfer to the United States District Court for the District of Columbia Promotes Judicial Efficiency, Protects the Integrity of the Venue Statute, and Saves Money

For the reasons stated in Defendants' opening brief, transferring this case to the United States District Court for the District of Columbia serves the "interest of justice" and furthers the "convenience of the parties." 28 U.S.C. § 1404(a). Plaintiffs' arguments to the contrary are unpersuasive.

First, Defendants argued in their opening brief that the "interests of justice" are served by preventing Plaintiffs from forum shopping by bringing suit in a district in which none of the parties reside and none of the relevant events occurred, and then, on the eve of Defendant Gonzales's motion to dismiss or transfer for improper venue, naming an unnecessary defendant in a transparent attempt to manufacture venue. Def. Mem. at 14-17. Plaintiffs do not dispute that forum shopping is a relevant consideration for Courts considering a motion to transfer, but argue that their actions in this case are contemplated by the venue statute "as understood by the Supreme Court." Pl. Opp. at 22 (citing Stafford v. Briggs, 444 U.S. 527 (1980)). This argument

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cases cited *supra* demonstrate, does not alter the conclusion that a plaintiff's choice of forum is entitled to less deference when the plaintiff sues outside the district in which he resides.

is patently absurd. See Stafford, 444 U.S. at 545 ("We think these laws ought to be construed in the spirit in which they were made—that is, as founded in justice—and should not be strained by technical constructions. . . .") (quoting Brown v. Duchesne, 19 How. 183, 197 (1856)); see also Leroy v. Great Western United Corp., 443 U.S. 173, 186-87 (1979) (rejecting a broad interpretation of the venue statute because it would "leave the venue decision entirely in the hands of plaintiffs").

Second, Defendants argued that transfer to the United States District Court for the District of Columbia would serve the "interests of justice" because it would allow consolidation of this case with the virtually identical case pending in the Northern District of Texas. Def. Mem. at 17-18. As the Supreme Court has clearly stated: "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." Ferens v. John Deere Co., 494 U.S. 516, 531 (1990) (quoting Continental Grain Co. v. The FBL-585, 364 U.S. 19, 26 (1960)). In response to this clear command, Plaintiffs argue that the sound reasons of judicial efficiency supporting transfer in order to consolidate related cases should be limited to cases founded on diversity jurisdiction, lest Plaintiffs be forced to litigate their claims in a forum with less favorable law than the improper or inconvenient fora in which they brought suit. Pl. Opp. at 22-23. This argument has no basis in the law and has been expressly rejected by the Supreme Court. See Abbott Laboratories v. Gardner, 387 U.S. 136, 155 (1967) ("The venue transfer provision, 28 U.S.C. s 1404(a), may be invoked by the Government to consolidate separate actions."), overruled on other grounds, Califano v. Sanders, 430 U.S. 99 (1977); cf. 28 U.S.C. § 1407; In Re NSA Telecoms. Records Litig., 444 F.Supp.2d

1332 (J.P.M.L. 2006).

Finally, Defendants argued that litigation of this case in the District of Columbia, where counsel reside, would save the parties and therefore the public the expense of flying counsel to Ohio and might also significantly reduce costs through consolidation of the related cases. Def. Mem. at 18-19. In response, Plaintiffs first argue contrary to fact that Plaintiff Dearth, who lives in Winnipeg, Manitoba, Canada, "is located a short drive from this judicial forum." Pl. Opp. at 21.[17] Then Plaintiffs argue that it is "not even apparent that anyone would be required to physically appear before the Court." Pl. Opp. at 22. This argument ignores the significant likelihood that, should this case proceed in this district, the parties will present oral argument to the Court on their dispositive cross-motions, Local Rule 7.1 (S.D.Ohio), or the possibility that this case will be argued at the appellate level. But, Plaintiffs' chief argument is that no forum is too inconvenient for the government, and that the government therefore cannot utilize the transfer mechanism of § 1404(a). As noted *supra*, this argument was flatly rejected by the Supreme Court. Abbott Laboratories, 387 U.S. at 155. Accordingly, both the interests of justice and the convenience of the parties support transfer of this case to the United States District Court for the District of Columbia.

CONCLUSION

For all of the foregoing reasons, the United States respectfully requests this Court to

[17]This Court may take judicial notice of the fact that Winnipeg is located approximately 1,242 miles from Columbus, decidedly not a short drive. See http://www.google.com/maps ?hl=en&q=may&near=Winnipeg,+MB,+Canada&sa=X&oi=local&ct=image. (estimating driving time at approximately nineteen hours).

grant Defendants' motion to dismiss or, in the alternative, to transfer.

Dated: March 19, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Local Rule 5.2(b), that on March 19, 2007, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Southern District of Ohio, using the electronic case files system of the court. The electronic case files system sent a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by electronic means:

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EXHIBIT C

Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss or, in the Alternative, Transfer, in *Hodgkins v. Gonzales*, Case No. 3:06-cv-2114-B (N.D. Tex.)

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

MAXWELL HODGKINS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION No. 3:06-CV-2114-B
	§	
ALBERTO GONZALES,	§	
Attorney General for the United	§	
States,	§	
	§	
Defendant.	§	

DEFENDANT'S REPLY TO PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER

INTRODUCTION

In their Opposition to Defendant's Motion to Dismiss or, in the Alternative, Transfer Plaintiffs appear to be arguing that the Declaratory Judgment Act permits plaintiffs to bring pre-enforcement declaratory judgment actions *in any judicial district* in which they may, at some indeterminate point in the future, wish to act in a manner prohibited by an allegedly unconstitutional statute, notwithstanding the fact that nothing else related to the lawsuit has ever occurred in the district, and the fact that neither plaintiffs nor defendants reside in the district. Plaintiffs' position is contradicted by the relevant precedent, the intent of the venue provision, and common sense. Accordingly, because venue is improper in this district, this case should be dismissed or transferred to the United States District Court for the District of Columbia.

Likewise, Plaintiffs' opposition to the permissive transfer of this case fails to adequately address the reasons for such a transfer: litigation of this case in the United States District Court for the District of Columbia is *more* convenient than litigation in this district not only because the District of Columbia is the site of the relevant events, parties and counsel, and the only proper venue, but also because transfer of this case to the District of Columbia will allow it to be consolidated with the nearly identical case filed by Plaintiff SAF in the Southern District of Ohio, in which Defendant has recently moved to transfer for many of the same reasons cited herein. Such transfer would thus promote judicial economy as well.

ARGUMENT

I. VENUE IS IMPROPER

As the Supreme Court has declared, "the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of

trial." Leroy v. Great Western United Corp., 443 U.S. 173, 183-86 (1979). To accomplish this purpose the venue provision that applies to suits against federal officers, such as Defendant Gonzales, allows a plaintiff to bring suit—

> in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e).[1] Plaintiffs have conceded that none of the parties reside in the Northern District of Texas and therefore Plaintiffs have the burden of demonstrating that a "substantial part of the events or omissions giving rise to the claim occurred" in this district. 28 U.S.C. § 1391(e)(2). Plaintiffs have failed to carry this burden.

A. Plaintiff Hodgkins' Alleged "Injury" Is Not an "Event" Giving Rise to this Lawsuit

Defendant's opening brief argued, on the basis of several opinions, "that mere allegations of a future impact of federal law in a judicial district are insufficient to support venue." Defendant's Mem. at 7. Plaintiffs' brief in opposition concedes that the future contingent event alleged in the complaint—Plaintiff Hodgkins' prosecution for violating the challenged provisions—is not a sufficient basis for venue, but argues nonetheless that the threat of this future contingent event, which is allegedly chilling Plaintiff Hodgkins' behavior, is both "injury" sufficient to satisfy Article III's standing requirements,[2] and an "event" giving rise to Plaintiffs'

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[1]This provision is far more generous to prospective plaintiffs than the general venue provisions because, unlike those provisions, it allows suit to be brought in the district in which a plaintiff resides. See 28 U.S.C. § 1391(a), (b), (e). Plaintiffs have still failed to demonstrate proper venue.

[2]Defendant denies that Plaintiffs have standing to bring this lawsuit under any circuit's governing precedent, see infra Part II, but believes this issue ought to be reached only if the Court determines this district is a proper venue. See Reuben H. Donnelly v. F.T.C., 580 F.2d 264, 266

claims for purposes of § 1391(e)(2). Plaintiffs' Opp. at 6. This argument has been considered and rejected by other courts and should be rejected here as well.

A similar attempt to conflate Article III's standing inquiry with the venue inquiry under § 1391(e)(2), was specifically rejected in Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455 (S.D.Tex. 1996). In Seariver, Plaintiffs, the owners of the vessel formerly known as the Exxon Valdez, brought suit in the Southern District of Texas seeking a declaratory judgment that a provision of the Oil Pollution Act that prohibited the vessel from operating on Prince William Sound, Alaska violated the constitution. Id. at 456. In response to Defendant's motion to dismiss for improper venue or to transfer the case to Alaska, Plaintiffs argued "that the effects of [the challenged provision] . . . are felt in Houston, and that these local effects give rise to venue." Id. at 459. The district court rejected this argument: "The 'effects' to which Plaintiffs refer are the injury resulting from [the challenged provision], rather than an 'event giving rise to a claim' that could properly lay venue." Id.

Plaintiffs' present argument is uncannily similar to the Seariver plaintiffs' unsuccessful argument rejected by the district court in Seariver. That argument proceeded, in part, as follows:

> [S]tanding principles, therefore, must guide the determination of venue. If the right to bring a constitutional declaratory judgment action depends on whether there is a "danger" of suffering "direct injury" as a result of a statute's "operation," then venue is logically found where that injury has already occurred and is occurring.

Id. (quoting Plaintiffs' Response at 9). After acknowledging that "a realistic danger of direct injury can confer standing on a party," the district court nevertheless held that "Plaintiffs'

(7th Cir. 1978) (addressing the "threshold question" of venue before considering whether plaintiffs had exhausted their administrative remedies, a question of subject matter jurisdiction).

arguments as to standing are not probative on the venue issue." Id. at 459-60. The requirement of standing is separate and in addition to the requirement of proper venue, and therefore even "[i]f Plaintiffs' claims raise a genuine issue of standing, the question must be addressed by a court with proper venue." Id. Thus, notwithstanding the alleged "injury" felt by the Seariver plaintiffs —tangible economic injury that, unlike the alleged injury suffered by Plaintiff Hodgkins over in London, was occurring and had occurred in Texas—the district court held that "a 'substantial part of the events or omissions giving rise to the claim' did not occur in this judicial district, and that Section 1391(e)(2) does not provide a basis for venue here." Id. at 461. Accordingly, the district court dismissed the action for improper venue.[3]

Other opinions cited in Defendant's initial brief likewise reject attempts to base venue on the threat of federal law enforcement in a judicial district. For example, in Reuben H. Donnelly Corp. v. F.T.C., 580 F.2d 264 (7th Cir. 1978), plaintiff Donnelly brought suit in the Northern District of Illinois seeking a declaratory judgment that the Federal Trade Commission lacked jurisdiction over its publication of the *Official Airline Guide*. Id. at 266. Donnelly defended its chosen venue as proper under § 1391(e)(2), on the ground that "the impact of any Commission action, for example, a cease and desist order, will be felt by Donnelly in Illinois." Id. at 268. This argument, rightly rejected by the Seventh Circuit, is indistinguishable from the argument Plaintiffs make here, which is that Congress exceeded its authority in passing the challenged provisions, and that the impact of this allegedly unconstitutional action may be felt in the

[3]To avoid Alaska jurisdiction, the Seariver plaintiffs re-filed their action in the United States District Court for the District of Columbia. The D.C. district court subsequently granted the government's motion, under 28 U.S.C. § 1404(a), to transfer the case to Alaska. See Seariver Mar. Fin. Holdings, Inc. v. Pena, Case No. 96-02142 (D.D.C. Jan. 29, 1997) (attached as Exhibit A).

Northern District of Texas.

The district court decisions in Honeywell, Inc. v. Consumer Prod. Safety Comm'n, 566 F.Supp. 500 (D.Minn. 1983), and Experian Fin. Solutions, Inc. v. F.T.C., Case No. 3:00cv1631-H, 2001 WL 257834 (N.D.Tex. March 8, 2001), similarly reject attempts by declaratory judgment plaintiffs to base venue on the impact of some future, contingent enforcement of federal law in the chosen venue. See Honeywell, 566 F.Supp. at 501-02; Experian, 2001 WL 257834 at 3. Plaintiffs fail to adequately distinguish these cases. If the future impact of possible enforcement of federal law in the chosen venue is an insufficient basis for venue, the "threat" of this possible federal law enforcement must also be insufficient.

Thus, as stated by the district court in Rogers v. Civil Air Patrol, 129 F.Supp.2d 1334 (M.D.Ala. 2001), mere "[a]llegations that the [challenged provision] will require performance at a later date in this judicial district cannot support venue under section § 1391(e)(2)." Like Rogers, this case is "a challenge to federal legislation drafted by Congress and signed by the President in the District of Columbia." Id. at 1339. And, as in Rogers, Plaintiffs have not alleged "any significant activity that took place within this judicial district, prior to the filing of Plaintiff's Complaint, which gave rise to Plaintiff's cause of action." Id. Accordingly, because "virtually all of the activity giving rise to Plaintiff[s'] claims took place in or around the District of Columbia, it is not plausible to argue that Plaintiff[s'] claims arose in [the Northern District of Texas.]" Id.[4]

[4]Likewise, in Experian, the district court noted that "the issue before the Court involves a pure question of law: Did the FTC exceed its statutory authority in making the rule?" The district court suggested that the District of Columbia would be a proper venue. Experian, 2001 WL 257834 at 3-4. Likewise, the issue here is a pure question of law: did Congress exceed its constitutional authority when it enacted the challenged provisions. This issue should also be

Unable to distinguish this precedent, Plaintiffs cite a number of inapposite declaratory judgment cases that stand for the proposition that the government doesn't challenge venue when it is proper. Some of these cases were brought by plaintiffs who resided in the chosen forum, thereby satisfying venue pursuant to § 1391(e)(3).[5] Presumably for this reason, the government did not challenge venue in any of these cases, and no court addressed whether the "injury" suffered by pre-enforcement declaratory judgment plaintiffs could satisfy § 1391(e)(2). Likewise, the declaratory judgment cases cited by plaintiffs that based venue on § 1391(e)(2) all involved the occurrence of actual "events" in the chosen forum.[6] By contrast, Plaintiffs are not residents of the district in which they seek to bring this declaratory judgment, nor can they point to any actual events that have occurred in this district. Thus, Plaintiffs' citation to cases in which venue is proper merely highlights the impropriety of Plaintiffs' chosen forum.

Finally, common sense supports the refusal to allow declaratory judgment plaintiffs seeking to challenge a federal criminal law to sue wherever they allege they may in the future

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resolved in the District of Columbia.

[5]See e.g., Carhart v. Gonzales, 331 F.Supp.2d 805, 814 (D.Neb. 2004) ("Plaintiff LeRoy Carhart, M.D., practices medicine and surgery and performs abortions in Nebraska."), affirmed 413 F.3d 791 (8th Cir. 2005) cert. granted 126 S.Ct. 1314 (2006); Planned Parenthood Fed'n of Am. v. Gonzales, 320 F.Supp.2d 957 (N.D.Cal. 2004) (Plaintiff Planned Parenthood Golden Gate resides in district) affirmed 435 F.3d 1163 (9th Cir.) cert. granted 126 S.Ct. 2901 (2006); Nat'l Abortion Fed'n v. Gonzales, 330 F.Supp.2d 436, 459 (S.D.N.Y. 2004) (plaintiff Westhoff resides in district) affirmed 437 F.3d 278 (2nd Cir. 2006); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 243 (2002) (plaintiffs reside in California); Hersh v. United States, 347 B.R. 19 (N.D.Tex. 2006) (plaintiff was a "Dallas Attorney").

[6]See Xcaliber Int'l Ltd., LLC v. Ieyoub, 377 F.Supp.2d 567, 571 (E.D.La. 2005) (sales of tobacco in district), rev'd on other grounds, 442 F.3d 233 (5th Cir. 2006); Andraje v. Chojnacki, 934 F.Supp. 817, 826 (S.D.Tex. 1996) (fifty-one day siege and physical attacks in district); Mansfield v. Orr, 544 F.Supp. 118, 120 (D.Md. 1982) (breach of contract in district); Patmore v. Carlson, 392 F.Supp. 737, 738-39 (E.D.Ill. 1975) (assault with club in district).

desire to engage in the prohibited activity. Plaintiffs' argument, if accepted, "raises the real possibility of test cases being brought, far from the site of the actual controversy, in districts whose judges have acquired a reputation for sympathy for the particular cause being urged in the complaint." Kings County Econ. Cmty. Dev. Ass'n v. Hardin, 333 F.Supp. 1302, 1304 (N.D.Cal. 1971). In addition, Plaintiffs' interpretation renders superfluous the other provisions of § 1391(e), a result certainly not intended by Congress. Cf. Kings County, 333 F.Supp. at 1304.[7]

B. Plaintiff Hodgkins Has Not Alleged "Injury" in the Northern District of Texas

Even if the Court disagrees with the foregoing and concludes that the "restraint occasioned by the challenged law" can be considered a "substantial part of the events giving rise" to this declaratory judgment action, Plaintiffs have still failed to tie this "event" to this judicial district. Plaintiff Hodgkins does not reside in this district, and he has not alleged that he has been inhibited from receiving firearms in Texas in the past, only that "he would like to acquire new [firearms] . . . while visiting his friends and family in Texas" at some indeterminate point in the future. Complaint ¶ 5. Therefore, to the extent Plaintiff Hodgkins' alleged "injury" is an "event" giving rise to this claim, it is an event that has occurred and is occurring outside the Northern District of Texas. Accordingly, for either of two independent reasons, Plaintiffs have failed to

[7]Contrary to Plaintiffs' assertion, the statement that § 1391(e) was largely intended to broaden the venue provision so that proceedings involving "water rights, grazing land permits, and mineral rights" could be brought locally is from the body of the Senate Report. S. Rep. No. 87-1992 (1962), reprinted in 1962 U.S.C.C.A.N. 2784, 2786. This evidence of legislative intent is also reflected in Byron White's letter to the Chairman of the Judiciary Committee. Id. at 2789. This legislative history is cited merely to demonstrate that while Congress wanted to broaden the venue provisions for suits against federal officers, they did not intend to provide universal venue for declaratory judgment plaintiffs challenging federal statutes.

satisfy their burden of demonstrating proper venue, and this case must be dismissed or transferred to an appropriate venue. 28 U.S.C. § 1406(a).

II. LITIGATION OF THIS CASE IN THE DISTRICT OF COLUMBIA CONSERVES THE PUBLIC'S MONEY AND JUDICIAL RESOURCES

Even if venue were proper in this district, transfer of this case to the District of Columbia would be appropriate "[f]or the convenience of parties and witnesses, [and] in the interest of justice." 28 U.S.C. § 1404(a). To begin with, Plaintiffs' choice of forum is entitled to little respect because "the plaintiff[s] are nonresident[s] of the forum," and because "the cause of action did not conclusively arise in the selected forum." Salinas v. O'Reilly Auto., Inc., 358 F.Supp.2d 569, 571 (N.D.Tex. 2005) (quoting Eugene v. McDonald's Corp., Case No. 96 C 1469, 1996 WL 411444, at *2 (N.D.Ill. July 18, 1996)). Furthermore, Plaintiffs do not address the primary reason this case should be transferred: transfer would allow this case to be consolidated with the nearly identical case brought by Plaintiff SAF currently pending in the Southern District of Ohio, Dearth v. Gonzales, Case No. 06-CV-1012 (S.D.Ohio), in which Defendant recently filed a similar motion to dismiss or, in the alternative, transfer. Instead of litigating two cases far from the site of the relevant events and the relevant parties, Defendant's motions seek to litigate a consolidated case in the District of Columbia. Not only does this avoid the unnecessary expenditure of the public's money, it conserves judicial resources by avoiding unnecessary parallel litigation. As the Supreme Court has observed, "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." Ferens v. John Deere Co., 494 U.S. 516, 531 (1990) (quoting Continental Grain Co.

v. The FBL-585, 364 U.S. 19, 26 (1960)).

In addition, Plaintiffs' argument with respect to its so-called "public concerns" is based on an incorrect description of the governing law and an incorrect presumption regarding Defendant's motives for seeking transfer. First, as demonstrated by the many declaratory judgment cases from the around the country cited by Plaintiffs, the Department of Justice does not challenge venue in all declaratory judgment actions, only those, as here, in which venue is patently improper or plaintiffs are engaging in blatant forum-shopping. See e.g., Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455 (S.D.Tex. 1996). Furthermore, Plaintiffs' plea that the Court not dismiss or transfer the case—because they want to take advantage of what they consider favorable Fifth Circuit precedent and avoid unfavorable District of Columbia Circuit precedent—turns venue law on its head and provides a classic example of forum-shopping. Their claim that the government's transfer motion constitutes forum-shopping and an attempt to deprive them of a chance to win their case, when Plaintiffs have blatantly ignored § 1391(e) and Plaintiff SAF has filed essentially the same case in two different district courts, looks a lot like chutzpah.

Moreover, even were the Court sympathetic to their argument, Plaintiff's premise is incorrect. The Fifth Circuit's opinion in United States v. Emerson, 270 F.3d 203 (5th Cir. 2001), does not provide comfort for their claims or give them pre-enforcement standing. More to the point are the decisions finding against pre-enforcement standing in challenges to the Assault Weapons Ban found in the Crime Control and Law Enforcement Act of 1994,[8] as well as

[8]See Nat'l Rifle Ass'n v. Magaw, 132 F.3d 272, 279 (6th Cir. 1997) ("courts have allowed pre-enforcement review of a statute with criminal penalties when there is a *great* and *immediate* danger of irreparable loss.") (emphasis added); Navegar v. United States, 103 F.3d

subsequent decisions describing the requisite injury for pre-enforcement challenges to state and local gun control laws.[9] Although the Fifth Circuit has not considered standing in relationship to a pre-enforcement challenge to gun control laws, its precedent likewise requires "a substantial controversy of sufficient immediacy and reality." Shields v. Norton, 289 F.3d 832, 837 (5th Cir. 2002) (plaintiff bringing a pre-enforcement challenge to Take Provision of the Endangered Species Act could "not establish a specific, concrete threat of immediate litigation sufficient to establish the controversy requisite to declaratory judgment.").[10]

Because the District of Columbia is a proper, convenient forum for the resolution of this case and the related case brought by Plaintiff SAF, transfer to that district meets both the convenience and interest of justice prongs of § 1404(a). By contrast, Plaintiffs, clearly sensitive to differences in circuit precedent, have filed two nearly identical suits, both in improper venues.

994, 1001 (D.C. Cir. 1997) (requiring "credible" and "imminent" threat of prosecution); San Diego County Gun Rights Comm. v. Reno, 98 F.3d 1121, 1126 (9th Cir. 1996) ("To assert standing . . . plaintiffs must show a '*genuine* threat of *imminent* prosecution' under the Crime Control Act.").

[9]See e.g., Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998) ("actual present harm or a significant possibility of future harm [requried] to justify pre-enforcement relief."); Coalition of New Jersey Sportsmen, Inc. v. Whitman, 44 F.Supp.2d 666, 673 n.10 (D.N.J. 1999) (alleged future harm must be "real and substantial," and of "sufficient immediacy and reality.") aff'd 263 F.3d 157 (2001).

[10]The cases cited by Plaintiffs on the issue of standing are inapposite. Medimuune, Inc. v. Genetech, Inc., —U.S.— , 127 S.Ct. 764 (2007), resolved the question whether "a patent licensee [must] . . . terminate or be in breach of its license agreement before it can seek a declaratory judgment that the underlying patent is invalid, unenforceable, or not infringed," and discussed the standing requirements for pre-enforcement challenges to criminal laws only in dicta. 127 S.Ct. at 767. Likewise, the Fifth Circuit decisions cited by Plaintiffs involve "First Amendment[s] challenges [that present] unique standing issues because of the chilling effect, self-censorship, and in fact the very special nature of political speech itself." Ctr. for Individual Freedom v. Carmouche, 449 F.3d 655, 660 (5th Cir. 2006); Speaks v. Kruse, 445 F.3d 396, 399 (5th Cir. 2006) (First Amendment challenge).

This Court should grant Defendant's motion.

CONCLUSION

For all of the foregoing reasons, Defendant Gonzales respectfully requests this Court to grant Defendant's motion to dismiss or, in the alternative, to transfer.

Dated: February 20, 2007

Respectfully submitted,

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EXHIBIT D

Complaint, in *Bach v. Pataki*, Case No. 02-cv-1500 (N.D.N.Y.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

02-CV-1500

David D. BACH,

Plaintiff,

v.

Civil Action No. _____

George E. PATAKI, in his official capacity as Governor of New York; Eliot SPITZER, in his official capacity as Attorney General of New York; James W. MCMAHON, in his official capacity as Superintendent, New York State Police; J. Richard BOCKELMANN, in his official capacity as Ulster County Sheriff,

Defendants.

FEDERAL CONSTITUTIONAL ISSUES OF FIRST IMPRESSION IN THE SECOND CIRCUIT

Plaintiff's Application for Preliminary and Permanent Injunction, and Declaratory Relief

Plaintiff, David D. Bach, *pro se*, states as follows:

Introduction

1. This Application seeks declaratory and injunctive relief to protect the substantive constitutional rights of ordinary, law–abiding, nonresident citizens of sister States to keep and bear otherwise lawful firearms while temporarily residing, visiting and traveling within the State of New York; and to protect these citizens from unlawful discrimination and criminal prosecution under State law. Bach seeks a declaratory judgment that New York's licensing provisions (as codified in NY Penal Law §§ 265.00 and 400.00, *et seq.*), facially, and as applied,

violate the fundamental personal rights, privileges and immunities of ordinary, law–abiding, nonresident citizens to keep and bear arms, and travel interstate under the Second and Fourteenth Amendments, and Article IV of the United States Constitution. In addition, Bach requests the Court to grant a preliminary injunctive order pending a determination of the merits to prevent any further irreparable harm to Bach and other ordinary nonresident citizens whose constitutional rights continue to be infringed under New York law.

Jurisdiction and Venue

2. This action arises under 42 U.S.C. § 1983, and 28 U.S.C. §§ 1331, and 1343(a)(3) and (4), which grant federal courts original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, and any civil action authorized by law to be commenced by any person. Discretionary jurisdiction is also conferred and authorized by 28 U.S.C. §§ 2201 and 2202. Venue is proper in this judicial district under 28 U.S.C. § 1391(b) in that the defendants reside in this judicial district and a substantial part of the events giving rise to the claim occurred in this judicial district.

Parties

3. Plaintiff David D. BACH, is a citizen of the United States, and the State of Virginia where he also maintains his domicile.

4. Defendant George E. PATAKI, is Governor and Chief Executive of the State of New York. He is sued in his official capacity.

5. Defendant Eliot SPITZER, is Attorney General and Chief Legal Officer of the State of New York. He is sued in his official capacity.

6. Defendant James W. MCMAHON, is Superintendent of the New York State Police. Defendant McMahon is responsible for administering New York State's firearms licensing system through the New York State Police, Pistol Permit Bureau. He is sued in his official capacity.

7. Defendant J. Richard BOCKELMANN, is Sheriff of Ulster County, New York. Sheriff Bockelmann is responsible for processing firearms license applications through the Pistol Permit Unit for residents of Ulster County. He is sued in his official capacity.

Factual Background

8. Bach is a citizen of the United States and the State of Virginia. He possesses a permit to carry a concealed handgun in accordance with Virginia law and owns a 9mm pistol substantially similar to the type used by the United States Armed Forces, National Guard, and law enforcement.[1]

9. Bach is a Commissioned Officer in the United States Naval Reserve with over twenty–five years of service. He is experienced in handling and providing instruction in many types of small arms due to his service as a Navy SEAL. He holds a Department of Defense Top Secret Security Clearance and has never been convicted of a felony, firearms related crime, or any other serious offense.[2]

10. Bach is a graduate from an accredited law school and has been a licensed attorney in good standing from the State of Pennsylvania since 1985. During the past seventeen years, he has been employed by the Office of the General Counsel, Department of the Navy as a civilian attorney, except for a period of approximately four–and–a–half years when he volunteered to return to active duty as a Navy SEAL both during and after Operation DESERT STORM.[3]

11. Bach is married and has three young children. Although born in New Jersey, he grew up in the Town of Saugerties, County of Ulster, New York where his parents continue to reside.[4]

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[1] Attachment 1 to Bach affidavit (copy of valid Permit to Carry Concealed Handgun issued by the Commonwealth of Virginia).
[2] *See* Bach affidavit.
[3] *Id.*
[4] *Id.*

12. Bach and his family periodically visit his parents on their farm for several days at a time. During the ten–hour drive between Virginia and Upstate New York, and while visiting, Bach wishes to possess and carry his personal firearm at various times in accordance with New York law to protect his family from violent criminal acts.[5]

13. Law enforcement personnel are relatively few and far between and have no legal duty to respond to an emergency 911 call, or protect or defend a citizen or family from violent criminal acts. Despite the exceptional efforts of New York's law enforcement personnel, they cannot prevent the vast majority of violent criminal attacks that occur daily as evidenced by the tens of thousands of ordinary, law–abiding American citizens who have been, and continue to be brutally attacked, terrorized and murdered by sadistic criminals each year in New York State.

14. According to the FBI's Uniform Crime Statistics, over 100,000 violent crimes are committed in New York State each year. This figure represents nearly eight percent of all violent crimes committed in the U.S. per annum.

15. As a parent, Bach bears ultimate responsibility for the safety, welfare, protection and defense of his family. The State of New York however, has no legal duty whatsoever to protect or defend Bach or his family from violent criminal acts.

16. NY Penal Law §§ 265.00 and 400.00, *et seq.*, when read together, prohibit Bach and other *ordinary*,[6] law–abiding nonresident citizens from possessing, carrying or transporting a firearm within New York State borders.

17. NY Penal Law §§ 265.00(3) defines "firearm" as "(a) any pistol or revolver; or (b) a shotgun having one or more barrels less than eighteen inches in length; or (c) a rifle having one or more barrels less than sixteen inches in length...."

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[5] *Id.*

[6] For purposes of this suit, an "ordinary" nonresident citizen is someone who meets none of the narrowly prescribed exemptions under NY Penal Law § 265.20.

18. Under NY Penal Law § 265.01, a person is guilty of criminal possession of a weapon in the fourth degree when he possesses any firearm. Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

19. Under NY Penal Law § 265.02, a person is guilty of criminal possession of a weapon in the third degree when he possesses any loaded firearm. Criminal possession of a weapon in the third degree is a class D felony.

20. NY Penal Law § 265.20 enumerates various exemptions for citizens to possess or carry a firearm in or through New York State. For example, section 265.20(3) exempts persons who have been issued a valid firearm license under NY Penal Law § 400.00.

21. None of the exemptions prescribed in section 265.20 apply to Bach or other ordinary nonresident citizens of other States.

22. Among other requirements, NY Penal Law § 400.00(3)(a) requires an applicant for a firearms license to be domiciled in New York State:

> 3. Applications. (a) Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his principal place of business as merchant or storekeeper....

23. NY Penal Law § 400.00(3)(a) prohibits Bach and other ordinary nonresidents from obtaining the required license to possess and carry a firearm within the State solely because they live out of State and without regard to age, mental competency or legal status to keep and bear such arms.

24. Bach and other ordinary nonresidents thus are deprived of a rational and effective means to protect and defend themselves, their families, and their private property from acts of criminal violence while temporarily residing, visiting or traveling within the State of New York.

25. Although the State of New York deprives Bach and other ordinary nonresident citizens of a rational and effective means to protect and defend themselves and their families, the State

enjoys absolute immunity from legal liability for harmful or deadly acts committed by violent criminals.

26. Bach and other nonresident citizens thus continue to suffer irreparable harm because NY Penal Law §§ 265.00 and 400.00 *et seq.*:

(a) Deprive nonresidents of their fundamental rights, privileges and immunities to keep and bear arms, and travel interstate. The alleged deprivation of these substantive constitutional rights constitutes *per se* irreparable harm.

(b) Impose a prior restraint on constitutionally protected activity by establishing an impossible standard that completely bars ordinary nonresidents from obtaining the required license to possess or carry an otherwise lawful firearm in or through the State.

(c) Continue to have a chilling effect on constitutionally protected activity by requiring nonresident citizens to choose between being subjected to felony prosecution and loss of personal property for exercising their substantive constitutional rights, or remaining defenseless victims of actual and imminent violent criminal acts.

(d) Deprive nonresidents of a rational and effective means to protect and defend themselves, their families and private property from violent criminal acts while traveling within the State of New York. Because the State cannot reasonably assure the safety and welfare of nonresidents within its borders from violent attacks, nonresidents continue to suffer serious bodily harm, loss of life and property.

(e) Unduly burden and indiscriminately penalize nonresidents who are deprived of substantial rights and benefits presently accorded to residents. New York residents may obtain a firearms license for self–protection and defense of their families and private property while traveling throughout New York State provided they meet certain criteria that do not apply to ordinary nonresident citizens.

(f) Unreasonably burden and restrict the interstate movement of nonresidents by requiring them to surrender their constitutionally protected rights, privileges and immunities to keep and bear arms while traveling interstate in order to gain entry or pass through the State of New York.

27. The irreparable harm and its chilling effect on constitutionally protected activity is neither remote nor speculative, but actual and imminent as evidenced by the State's continued discrimination against nonresidents and the tens of thousands of disarmed citizens who are brutalized and murdered each year throughout New York State.

28. The irreparable harm to ordinary, nonresident citizens caused by defendants' firearm restrictions outweighs any remote harm the State may suffer if a preliminary injunction issues. Nonresident citizens merely will be eligible to obtain a New York State firearms license provided they meet whatever reasonable, constitutionally valid criteria the State may require. Nonresidents will have the right to choose whether to use a rational and effective means to protect and defend themselves and their families from violent criminal acts, and to participate in lawful firearms training without fear of criminal prosecution and loss of personal property. These substantial rights and benefits are presently accorded to New York residents based on the unfettered discretion of local authorities, but are denied entirely to nonresidents.

29. There is neither a constitutionally valid reason to justify New York's pernicious firearms restrictions against nonresidents nor empirical evidence to demonstrate that nonresidents are:

(a) less capable than residents of safely and responsibly handling firearms;

(b) more prone to committing violent criminal acts;

(c) pose a danger to the community; or,

(d) otherwise constitute the peculiar source of the evil at which the restrictions are aimed.

30. Whatever the State's interests are in banning ordinary nonresidents from possessing firearms, these interests cannot trump the fundamental rights, privileges and immunities of

national and state citizenship without an unusually strong justification that is narrowly tailored to achieve those interests.

31. The public has a substantial interest in protecting the health, safety and welfare of all citizens, including nonresidents, and in vindicating their constitutionally protected rights.

32. Because neither the State nor its law enforcement officials owe a legal duty to respond to an emergency 911 call, or protect or defend an individual citizen or family from violent criminal acts, citizens must rely on self–protection to significantly reduce the risk of deadly harm.

33. Even assuming a duty existed, New York law enforcement officials lack the resources and capability to prevent violent criminal attacks from occurring.

34. Armed, law–abiding United States citizens prevent approximately 2.5 million criminal attacks on their person and property annually.

35. Armed, law–abiding United States citizens serve as an effective deterrent to violent crime.

36. Perversely, by ensuring that nonresidents who abide by New York law will not carry a personal firearm within the State, the law effectively aids and abets criminals by guaranteeing that they will find easy prey who are often identifiable by their out–of–state license plates and unfamiliar with their surroundings.

37. Because attempting to use a cumbersome long–gun as a personal defense weapon is an ineffective alternative to a handgun, particularly in an automobile, citizens are deprived of the only rational and effective means they have to repel attacks from violent criminal predators.

38. Law enforcement chooses handguns as its primary weapon of protection. When used properly, a handgun offers an extremely effective means of personal protection in close combat situations, such as stopping violent criminals.

39. A citizen bearing a cell phone programmed with a speed button to 911 is an ineffective alternative to a loaded handgun in stopping an ongoing violent attack by a knife or club wielding sociopath, drug addict, gang member or street punk intent on committing murder, rape, robbery, aggravated assault or some other heinous crime.

40. Without an effective weapon, whether a person lives, or is maimed or is otherwise seriously injured by a violent criminal often depends on the mercy of her or his assailant.

41. Nonresident citizens will continue to suffer irreparable harm as long as New York law continues to prohibit them from possessing and carrying firearms, and thus deprive them of the only rational and effective means they have to protect and defend themselves, and their family members from violent predators while temporarily residing, visiting, or traveling in or through the State of New York.

42. On November 14, 2001, Bach mailed written inquiries to Eliot Spitzer, New York State Attorney General; Sergeant James Sherman, New York State Police, Pistol Permit Bureau; and J. Richard Bockelmann, Ulster County Sheriff.[7] In his inquiries, Bach sought to confirm his understanding of New York law whereby an ordinary citizen of another State is ineligible to obtain a New York firearms license, and thus submission of a firearms license application and nonrefundable fee by such a citizen would be a futile act.[8]

43. By letter of November 27, 2001, Peter A. Drago, Director of Public Information and Correspondence, State of New York, Office of the Attorney General referred Bach to the New York State Police in Albany as the "appropriate authority to contact with [his] request."[9]

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[7] *See* Attachment 2 to Bach affidavit (letters from D. Bach to Eliot Spitzer, New York State Attorney General, Sergeant James Sherman, New York State Police, Pistol Permit Bureau, and J. Richard Bockelmann, Ulster County Sheriff of November 14, 2001).

[8] *Id.*

[9] *See* Attachment 3 to Bach affidavit (letter from Peter A. Drago, Director of Public Information and Correspondence, State of New York, Office of the Attorney General to D. Bach of November 27, 2001).

44. By letter of December 5, 2001, Sergeant James Sherman of the New York State Police, Pistol Permit Bureau, confirmed that "no exemption exists which would enable you to possess a handgun in New York State."[10] Further, "[t]here are no provisions for the issuance of a carry permit, temporary or otherwise, to anyone not a *permanent* resident of New York State nor does New York State recognize pistol permits issued by other states."[11] Finally, Sergeant Sherman warned that anyone "found to be in possession of a pistol or revolver that is not registered on a New York State Pistol Permit, exempt personnel excluded, would be subject to automatic forfeiture of the firearm in question and criminal prosecution."[12]

45. By letter of December 18, 2001, Ulster County Undersheriff, George A. Wood confirmed that "[t]here are two ways in New York State to lawfully possess a pistol/revolver. First is to be licensed, as outlined in §400.00, and the second is to meet one of the 'exceptions' outlined in §265.20 of the NYS Penal Law."[13] Further, he informed Bach that he clearly would not meet the exemption for military personnel under NY Penal Law § 265.20(1)(d) while temporarily visiting in the State despite Bach's current military status as a Selected Naval Reservist.[14]

46. Based on the foregoing responses regarding the State's application of New York law, neither Bach nor other ordinary nonresidents, i.e., those not meeting any exemption under NY Penal Law § 265.20, are eligible to obtain a valid New York State firearms license.

47. New York is currently the only State in the Union that prohibits ordinary, law–abiding citizens of sister States from possessing, carrying or transporting a handgun in or through the State.

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[10] *See* Attachment 4 to Bach affidavit (letter from Sergeant James Sherman, New York State Police, Pistol Permit Bureau to D. Bach of December 5, 2001).
[11] *See Id.* (emphasis in the original).
[12] *Id.*
[13] *See* Attachment 5 (letter from George A. Wood, Ulster County Undersheriff to D. Bach of December 18, 2001).
[14] *Id.*

48. The acts complained of herein were taken under color of State law.

49. The acts complained of herein represent the official policy, custom, usage and practice under the laws of the State of New York.

First Cause of Action

Second and Fourteenth Amendments of the United States Constitution

42 U.S.C. § 1983

(Violation of Rights to Keep and to Bear Arms)

50. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 49.

51. The Second Amendment protects individual Americans in their rights to keep and to bear arms regardless of whether they are a member of a select militia or performing active military service or training.

52. Defendants acting in accordance with, and under color of State law, institute, authorize, tolerate, ratify, permit and acquiesce in policies, practices, usage and customs of denying required firearm licenses to otherwise competent nonresidents solely because they live out of State.

53. Defendants acting in accordance with, and under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to prohibit ordinary, law–abiding nonresidents from possessing, carrying or otherwise transporting a personal firearm while temporarily residing, visiting, or traveling within the State of New York in violation of the Second and Fourteenth Amendments to the United States Constitution.

54. By prohibiting nonresidents from keeping and bearing a personal firearm while temporarily residing, visiting, or traveling within the State, defendants acting under color of State law as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to unlawfully deprive Bach and other ordinary, law–abiding, nonresident citizens of their basic rights,

privileges and immunities to keep and bear an otherwise lawful firearm in violation of the Second and Fourteenth Amendments to the United States Constitution.

55. By completely barring ordinary, law–abiding, nonresident citizens of the most rational and effective means they have to protect and defend themselves, and their families from the real and substantial danger of violent criminal acts, defendants acting under color of State law as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, unlawfully deprive nonresidents of their basic rights to life, liberty and private property in violation of the Second and Fourteenth Amendments to the United States Constitution.

Second Cause of Action

Fourteenth Amendment of the United States Constitution

42 U.S.C. § 1983

(Violation of Privileges or Immunities)

56. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 55.

57. The fundamental right to keep and bear an otherwise lawful, personal firearm while traveling interstate, is a privilege and immunity guaranteed to American citizens by virtue of their national citizenship, and may not be abridged by any State or local government.

58. By prohibiting nonresidents from possessing, carrying or transporting an otherwise lawful, personal firearm while traveling interstate, defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to force nonresident United States citizens by threat of criminal prosecution, to surrender their constitutionally protected rights, privileges and immunities to keep and bear arms guaranteed to them by virtue of their national citizenship in order to enter or to pass through the State in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

Third Cause of Action

Fourteenth Amendment of the United States Constitution

42 U.S.C. § 1983

(Violation of Equal Protection)

59. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 58.

60. Any classification that abridges the privileges or immunities of national citizenship, or serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional under Section 1 of the Fourteenth Amendment to the United States Constitution.

61. Defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to chill the assertion of substantive constitutional rights by imposing a criminal penalty on ordinary, law–abiding, nonresident United States citizens who choose to exercise their rights, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

62. Defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to penalize nonresident United States citizens for exercising their constitutionally protected rights to keep and bear arms, and travel interstate in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

63. New York State's discriminatory classification, which targets ordinary, law–abiding, nonresident citizens is neither narrowly tailored nor the least restrictive means to achieve the State's objective, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

64. New York State's discriminatory classification, which targets ordinary, law–abiding, nonresident citizens lacks a rational basis and is not reasonable in light of its stated purpose of

reducing criminal violence, and protecting the health, safety and welfare of all classes of citizens within its borders in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

65. Defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to deprive nonresident United States citizens within the State's jurisdiction, equal protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

Fourth Cause of Action

Fourteenth Amendment of the United States Constitution

42 U.S.C. § 1983

(Violation of Substantive Due process)

66. Plaintiff hereby alleges and incorporates by reference each allegation contained in paragraphs 1 through 65.

67. The rights of citizens to keep and bear arms are among the fundamental personal rights and liberties protected by the Due Process Clause of the Fourteenth Amendment from State and local infringement.

68. By infringing the fundamental, personal rights, privileges and immunities of nonresident United States citizens to keep and bear arms while traveling interstate in or through New York State, defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to violate the substantive due process rights of ordinary, law–abiding nonresidents under Section 1 of the Fourteenth Amendment to the United States Constitution.

Fifth Cause of Action

Article IV of the United States Constitution

42 U.S.C. § 1983

(Violation of Privileges and Immunities)

69. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 68.

70. United States citizens possess a fundamental constitutional right to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. Thus, a citizen of one State who travels in other States intending to return home at the end of his journey, is entitled to enjoy the privileges and immunities of citizens in the several States that he visits by virtue of his State citizenship.

71. A State may be permitted to discriminate against nonresidents only where the presence or activity of nonresidents is the peculiar source of the evil or cause of the problem that the State seeks to remedy, and the discrimination bears a close relation to the achievement of substantial State objectives

72. Defendants acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, continue to unlawfully burden the rights of nonresident United States citizens to move freely and unencumbered in or through the State of New York in violation of Article IV, § 2, Cl. 1 of the United States Constitution.

73. New York's discrimination against nonresidents bears no reasonable relationship to the State's substantial interest in reducing violent crime and protecting the health, safety and welfare of all classes of citizens within its borders in violation of Article IV, § 2, Cl. 1 of the United States Constitution.

74. NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, are not narrowly tailored to achieve a substantial State interest in violation of Article IV, § 2, Cl. 1 of the United States Constitution.

75. Nonresidents as a class do not constitute the peculiar source of the evil or cause of the problem that the State seeks to remedy under NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*

Sixth Cause of Action

(Injunctive Relief Against All Defendants)

76. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 75.

77. Plaintiff is entitled to provisional and permanent injunctive relief to prevent defendants or their agents from continuing to infringe the fundamental rights of individual citizens under the Second and Fourteenth Amendments, and Article IV of the United States Constitution.

Seventh Cause of Action

(Declaratory Relief Against All Defendants)

78. Plaintiff alleges and incorporates by reference each allegation contained in paragraphs 1 through 76.

79. An actual controversy has arisen and now exists between the plaintiff and defendants concerning their rights under the United States Constitution. Plaintiff contends, and defendants dispute, that the contested provisions under NY Penal Law §§ 265.00 and 400.00, *et seq.*, are illegal and unenforceable under the United States Constitution.

80. Plaintiff desires a judicial determination of the parties' respective rights and duties with respect to the public's substantial interest in preserving the precious and primary rights of personal security, personal liberty and private property for all classes of citizens traveling in or through the State of New York without fear of government reprisal.

81. A judicial declaration is necessary and appropriate at this time, and under the circumstances in order that the plaintiff and defendants may ascertain their respective rights and duties under the Constitution of the United States.

Plaintiff therefore prays for judgment as follows:

1. For a preliminary and permanent injunction prohibiting all defendants, officers, agents, servants, employees, and attorneys, and persons in active concert or participation with them, from continuing to enforce NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, which when read together, bar ordinary, law–abiding, nonresident citizens of the United States from obtaining the required license to possess, carry or transport an otherwise lawful, personal firearm while temporarily, residing, visiting, or traveling in or through the State of New York solely because they live out of State.

2. For a declaration that the Second Amendment protects individual Americans in their rights to keep and to bear arms regardless of whether they are a member of a select militia or performing active military service or training.

3. For a declaration that NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, infringe the fundamental rights, privileges or immunities of nonresident United States citizens to keep and bear arms within New York State's jurisdiction, in violation of the Second and Fourteenth Amendments to the United States Constitution.

4. For a declaration that NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, abridge the privileges or immunities of nonresident United States citizens within New York State's jurisdiction, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

5. For a declaration that NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, deprive nonresident United States citizens within New York State's jurisdiction, equal

protection of the laws in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

6. For a declaration that NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, deprive nonresident United States citizens within New York State's jurisdiction, of substantive due process in violation of Section 1 of the Fourteenth Amendment to the United States Constitution.

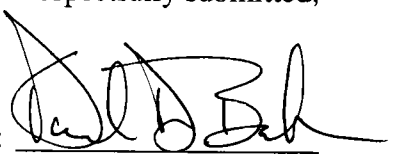
7. For a declaration that NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, when read together, violate the privileges and immunities of nonresident United States citizens within New York State's jurisdiction, under Article IV, § 2, Cl. 1 of the United States Constitution.

8. For a declaration that defendants' past and continuing conduct while acting under color of State law, as prescribed by NY Penal Law §§ 265.00 and 400.00(3)(a) *et seq.*, is repugnant to the United States Constitution under the Second and Fourteenth Amendments, and Article IV.

9. For costs of suit in accordance with 42 U.S.C. § 1988.

10. For any other relief this court deems just and proper.

Respectfully submitted,

Dated: November 29, 2002 By: 

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