

U.S. DISTRICT COURT
 NORTHERN DISTRICT OF TEXAS
FILED

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CLERK, U.S. DISTRICT COURT
 By _____ Deputy

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

MAXWELL HODGKINS

AND

**SECOND AMENDMENT
 FOUNDATION, INC.,**

Plaintiffs,

v.

ALBERTO GONZALES,
**Attorney General for the United
 States,**

Defendant.

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CIVIL ACTION NO. _____

3-06 CV 2114-B

COMPLAINT

COME NOW the Plaintiffs, Maxwell Hodgkins and the Second Amendment Foundation, Inc., by and through undersigned counsel, and complain of the Defendant as follows:

THE PARTIES

1. Plaintiff Maxwell Hodgkins is a natural born citizen of the United States and his principal place of residence is Flat 1, 63 Argyle Road, London, W13 0LW, United Kingdom. Mr. Hodgkins does not currently maintain a residence within the United States.

2. Plaintiff Second Amendment Foundation, Inc. (hereafter "SAF"), is a non-profit membership organization incorporated under the laws of Washington with its principal place of

business at 12500 N.E. 10th Place, Bellevue, Washington, 98005. SAF has over 600,000 members and supporters nationwide, including thousands in Texas. The purposes of SAF include education, research, publishing and legal action focusing on the Constitutional right to privately own and possess firearms, and the consequences of gun control. SAF brings this action on behalf of itself and its members.

3. Defendant Alberto Gonzales is the Attorney General of the United States, 950 Pennsylvania Avenue, N.W., Washington, D.C., 20530-0001, and as such is responsible for executing and administering laws, customs, practices, and policies of the United States. In that capacity, Mr. Gonzales is presently enforcing the unconstitutional laws, customs, practices and policies complained of in this action, and is sued in his official capacity.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202.

5. Venue lies in this Court pursuant to 28 U.S.C. § 1391.

STATEMENT OF FACTS

6. Mr. Hodgkins was born and raised in Dallas, where he has many friends and family whom he enjoys visiting, and whom he intends to continue visiting on a regular basis.

7. Mr. Hodgkins legally owns firearms securely stored within the United States. He 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. Moreover, as the right to keep and bear arms is guaranteed to Mr. Hodgkins under the

United States Constitution, Mr. Hodgkins may not be required to articulate any particular purpose for wishing to keep and bear arms.

8. Mr. Hodgkins is over the age of 21, is not under indictment, has never been convicted of a felony or misdemeanor crime of domestic violence, is not a fugitive from justice, is not an unlawful user of or addicted to any controlled substance, has not been adjudicated a mental defective or committed to a mental institution, has not been discharged from the Armed Forces under dishonorable conditions, has never renounced his citizenship, and has never been the subject of a restraining order relating to an intimate partner. Mr. Hodgkins is fully qualified under Texas law to possess firearms, and holds a valid Arizona permit to publicly carry a concealed handgun, which is valid within the State of Texas.

9. The Second Amendment to the United States Constitution provides: “A well regulated Militia being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”

10. Title 18, U.S.C. § 922(a)(9) provides: “It shall be unlawful – for any person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State to receive any firearms unless such receipt is for lawful sporting purposes.” A violation of this section is punishable by fine and/or imprisonment of up to five years. 18 U.S.C. § 924(a)(1)(D). Title 27, CFR 478.29a provides: “No person, other than a licensed importer, licensed manufacturer, licensed dealer, or licensed collector, who does not reside in any State shall receive any firearms unless such receipt is for lawful sporting purposes.”

11. Title 27, CFR 478.11 provides, “An individual resides in a State if he or she is present in a State with the intention of making a home in that State.”

12. Moreover, Mr. Hodgkins and SAF reasonably fear that Mr. Hodgkins, and all similarly situated American citizens, would be arrested and criminally prosecuted under 18 U.S.C. § 922(a)(9) for receiving firearms for lawful, but non-sporting purposes, e.g. for self-defense, or for no particular purpose.

13. Under federal law generally, and under Title 18, U.S.C. § 922 specifically, “receive” has a different meaning than “possess.” For example, Title 18, U.S.C. § 922(g) sets forth the classes of people who cannot “possess in or affecting commerce, any firearm or ammunition; or receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” In this instance, use of the verb “possess” directs that person who joins a disqualifying class must relinquish his or her firearms already possessed, for example, upon becoming subject to a restraining order or upon conviction of a felony. Neither Section 922(a)(9) nor any other provision direct that an American may not “possess” firearms by virtue of not having a residence within the United States.

14. In other contexts, however, to “acquire” a firearm under 18 U.S.C. § 922 has been held to include the act of redemptive possession, as from a pawn dealer, without a transfer of title. Huddleston v. United States, 415 U.S. 814 (1974).

15. Thus, while it appears on the face of Section 922(a)(9) and 27 CFR 478.29a that expatriates are not barred from continued possession of firearms lawfully acquired prior to their termination of domestic residence for *any* lawful purpose, the state of the law in this regard is vague and ambiguous. Mr. Hodgkins and SAF reasonably fear that Mr. Hodgkins, and all similarly situated American citizens, might be arrested and criminally prosecuted for accessing

legally possessed firearms for lawful, but non-sporting purposes, e.g. for self-defense, or for no particular purpose.

16. Title 18, U.S.C. § 922(b)(3), and 27 CFR 478.96, 478.99, bar a firearms dealer from selling firearms to individuals who do not reside within the state in which the dealer's place of business is located. An exception to this prohibition allows a dealer to sell rifles and shotguns to residents of states where the dealer does not maintain a place of business, as long as the transaction would be legal "in both states," that is, the purchaser's state, and the dealer's state. By operation of this section, otherwise qualified American citizens wishing to buy firearms cannot do so unless they maintain a residence within the United States.

17. All firearms purchasers within the United States who do not possess a Federal Firearms License, meaning, virtually all ordinary civilian consumers of firearms, must complete "Form 4473, Firearms Transaction Record Part I – Over-The-Counter, OMB 1140-0020," administered under Defendant's authority, in order to purchase a firearm. 27 CFR 478.124. Question 13 on Form 4473 provides, "What is your State of residence (*if any*)? _____"

18. If an American citizen otherwise fully qualified to buy a firearm cannot provide an answer to Question 13 on Form 4473, the transaction must be canceled. Defendant maintains an interactive web-page at <http://www.atf.treas.gov/forms/4473/index.htm> explaining a previous version of Form 4473, where question 13 appears as question 9. Clicking on question 9 in this interactive form opens a window with the following message: "9. If the buyer does not have a State of residence, the Federal firearms licensee should NOT contact the National Instant Criminal Background Check System or State Point of Contact and should stop the transaction."

19. On information and belief, Plaintiffs are aware of at least one transaction terminated when an otherwise qualified American citizen attempted to buy a firearm, but could not, on account of his residency, answer Question 13.

20. Accordingly, American citizens, including Mr. Hodgkins, who are otherwise fully qualified to purchase firearms legally, who may already lawfully possess firearms, and who can lawfully receive firearms (albeit for limited purposes), cannot lawfully purchase new firearms on account of their lack of residence within the United States. Title 28 U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, as applied to Mr. Hodgkins and to similarly situated individuals, are presently causing said individuals injury in that they prevent presently-intended firearms purchases.

FIRST CAUSE OF ACTION
U.S. CONST., AMEND. II – THE RIGHT TO KEEP AND BEAR ARMS
WITH RESPECT TO 18 U.S.C. § 922(a)(9) AND 27 CFR 478.29a
DECLARATORY JUDGMENT ACT, 28 U.S.C. § 2201, 2202

21. Paragraphs 1 through 20 are incorporated as though fully stated herein.

22. Title 18, U.S.C. § 922(a)(9) and 27 CFR 478.29a , limiting the receipt of firearms by otherwise qualified American citizens solely on account of their residence status outside the United States, violate Plaintiffs' rights under the Second Amendment to the United States Constitution. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Second Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a.

SECOND CAUSE OF ACTION
U.S. CONST., AMEND. II – THE RIGHT TO KEEP AND BEAR ARMS
WITH RESPECT TO 18 U.S.C. § 922(b)(3), 27 CFR 478.96, 478.99 and 478.124
DECLARATORY JUDGMENT ACT, 28 U.S.C. § 2201, 2202

23. Paragraphs 1 through 22 are incorporated as though fully stated herein.

24. Title 18, U.S.C. § 922(b)(3), and 27 CFR 478.96, 478.99 and 478.124, as applied, banning the purchase of firearms by otherwise qualified American citizens solely on account of their residence status outside the United States, violate Plaintiffs' rights under the Second Amendment to the United States Constitution. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Second Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, to the extent these are applied in such a manner as to forbid American citizens who do not reside in any state from purchasing firearms.

THIRD CAUSE OF ACTION
U.S. CONST., AMEND. V – EQUAL PROTECTION
WITH RESPECT TO 18 U.S.C. § 922(a)(9) AND 27 CFR 478.29a
DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202

25. Paragraphs 1 through 24 are incorporated as though fully stated herein.

26. Title 18, U.S.C. § 922(a)(9) and 27 CFR 478.29a, banning the receipt of firearms by otherwise qualified American citizens solely on account of their residence status outside the United States, violate Plaintiffs' rights to equal protection of the law under the Fifth Amendment to the United States Constitution. Plaintiffs are deprived of equal protection: (1) by virtue of the fact they are being discriminated against in their exercise of a constitutional right on account of residence status; (2) by virtue of the fact they are being discriminated against on account of

residence status irrespective of whether a constitutional right is at stake; and (3) by virtue of the fact that Section 922(a)(9) and 27 CFR 478.29a allow non-resident Americans to use pre-possessed firearms for all reasons, but forbid the receipt of firearms received after said Americans' relinquishment of domestic residence except for sporting purposes. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Fifth Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a.

FOURTH CAUSE OF ACTION
U.S. CONST., AMEND. V – EQUAL PROTECTION
WITH RESPECT TO 18 U.S.C. § 922(b)(3), 27 CFR 478.96, 478.99 and 478.124
DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202

27. Paragraphs 1 through 26 are incorporated as though fully stated herein.

28. Title 18, U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, as applied, banning the purchase of firearms by otherwise qualified American citizens solely on account of their residence status outside the United States, violate Plaintiffs' rights to equal protection of the law under the Fifth Amendment to the United States Constitution. Plaintiffs are deprived of equal protection: (1) by virtue of the fact they are being discriminated against in their exercise of a constitutional right on account of residence status, and (2) by virtue of the fact they are being discriminated against on account of residence status irrespective of whether a constitutional right is at stake. By maintaining and enforcing this law, Defendant is violating Plaintiffs' individual rights under the Fifth Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, to the extent these are applied in such a manner as to forbid American citizens who do not reside in any state from purchasing firearms.

FIFTH CAUSE OF ACTION
U.S. CONST., AMEND. V – DUE PROCESS
WITH RESPECT TO 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a
DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202

29. Paragraphs 1 through 28 are incorporated as though fully stated herein.

30. Title 18, U.S.C. § 922(a)(9) and 27 CFR 478.29a, banning the receipt of firearms, for some purposes, by otherwise qualified American citizens, solely on account of said citizens' residence status outside the United States, violate Plaintiffs' rights to due process under the Fifth Amendment to the United States Constitution. These sections violates Plaintiffs' Fifth Amendment Due Process rights in that the language of these sections, standing alone and within the context of the remainder of Title 18, U.S.C. § 921 et seq., is vague and ambiguous such that a reasonable person cannot know what conduct is or is not permitted by law. Although Plaintiffs reasonably believe that Section 922(a)(9) and 27 CFR 478.29a do not forbid non-resident American citizens from accessing their already-possessed firearms for non-sporting purposes given the title's distinction between possession and receipt, precedent such as Huddleston leaves Plaintiffs wondering whether such firearms may lawfully be accessed for purposes other than sport. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Fifth Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a.

SIXTH CAUSE OF ACTION
U.S. CONST., AMEND. V- RIGHT TO TRAVEL
WITH RESPECT TO 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a
DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202

31. Paragraphs 1 through 30 are incorporated as though fully stated herein.

32. United States citizens enjoy a liberty interest in international travel protected by the Due Process Clause of the Fifth Amendment to the United States Constitution. See, e.g., Kent v. Dulles, 357 U.S. 116 (1958).

33. Title 18, U.S.C. § 922(a)(9) and 27 CFR 478.29a, banning the receipt of firearms, for some purposes, by otherwise qualified American citizens, solely on account of said citizens' residence status outside the United States, violate Plaintiffs' right to international travel under the Fifth Amendment to the United States Constitution, as they burdens the exercise of this right with an inability to receive firearms for self-defense and other non-sporting purposes while visiting the United States. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Fifth Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a.

SEVENTH CAUSE OF ACTION
U.S. CONST., AMEND. V- RIGHT TO TRAVEL
WITH RESPECT TO 18 U.S.C. § 922(b)(3), 27 CFR 478.96, 478.99 and 478.124
DECLARATORY JUDGMENT ACT, 28 U.S.C. §§ 2201, 2202

34. Paragraphs 1 through 33 are incorporated as though fully stated herein.

35. Title 18, U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, as applied, banning the purchase of firearms by otherwise qualified American citizens solely on account of their residence status outside the United States, violate Plaintiffs' right to international travel

under the Fifth Amendment to the United States Constitution, as they burden the exercise of this right with an inability to purchase firearms while visiting the United States. By maintaining and enforcing these laws, Defendant is violating Plaintiffs' individual rights under the Fifth Amendment to the United States Constitution. Plaintiffs are therefore entitled to declaratory and permanent injunctive relief against enforcement of 18 U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, to the extent these are applied in such a manner as to forbid American citizens who do not reside in any state from purchasing firearms.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that judgment be entered in their favor and against defendants as follows:

ON THE FIRST, THIRD, FIFTH, AND SIXTH CAUSES OF ACTION:

1. An order permanently enjoining Defendant, his officers, agents, servants, employees, and all persons in active concert or participation with him who receive actual notice of the injunction, from enforcing 18 U.S.C. § 922(a)(9) and 27 CFR 478.29a;.

ON THE SECOND, FOURTH, AND SEVENTH CAUSES OF ACTION:

2. An order permanently enjoining Defendant, his officers, agents, servants, employees, and all persons in active concert or participation with him who receive actual notice of the injunction, from enforcing 18 U.S.C. § 922(b)(3) and 27 CFR 478.96, 478.99 and 478.124, in such a manner as to forbid American citizens who do not reside in any state from purchasing firearms.

ON ALL CAUSES OF ACTION:

3. Declaratory relief consistent with the injunction;
4. Attorney fees and costs of suit pursuant to 28 U.S.C. § 2412; and
5. Any other further relief as the Court deems just and appropriate.

Dated: November 14, 2006

Respectfully Submitted,

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