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

STEPHEN DEARTH	)	
	)	
and	)	
	)	
SECOND AMENDMENT FOUNDATION, INC.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION No. 2:06cv1012
	)	
ALBERTO GONZALES,	)	Judge Frost
Attorney General of the United States	)	Magistrate Judge Abel
	)	
and	)	
	)	
GREGORY G. LOCKHART	)	
United States Attorney for the	)	
Southern District of Ohio	)	
	)	
Defendants.	)	
	)	

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

Defendant Alberto Gonzales, by and through his undersigned counsel, respectfully moves to dismiss this case for improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, and 28 U.S.C. § 1406(a). In the alternative, Defendant Gonzales moves to transfer this case to the United States District Court for the District of Columbia, pursuant to 28 U.S.C. §§ 1406(a) or 1404(a). In support of this motion, Defendant submits the accompanying memorandum.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
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STEPHEN DEARTH, and SECOND AMENDMENT FOUNDATION, INC. Plaintiffs, v. ALBERTO GONZALES, Attorney General of the United States and GREGORY G. LOCKHART United States Attorney for the Southern District of Ohio Defendants.	)	CIVIL ACTION No. 2:06cv1012 Judge Frost Magistrate Judge Abel

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS OR, IN THE ALTERNATIVE, TRANSFER

This is one of two virtually identical lawsuits challenging the constitutionality of certain federal gun control provisions filed by Plaintiff Second Amendment Foundation, Inc. ("SAF") and an individual plaintiff within a two week period. Like its companion case, Hodgkins v. Gonzales, Case No. 3:06cv2114-B (N.D.Tex.) (Complaint attached as Exhibit A), this case was filed in an improper venue. Simply put, Plaintiffs fail to allege any relevant connection between the Southern District of Ohio and their constitutional challenge. Specifically, Plaintiffs have not alleged that the challenged provisions have been enforced in an unconstitutional manner in the

Southern District of Ohio, nor have Plaintiffs alleged specific threats of enforcement of the challenged provisions in this district. Indeed, as it was originally filed, the only allegation connecting this lawsuit to the Southern District of Ohio is Plaintiff Dearth's alleged intention to acquire firearms "within the *United States*, which he would securely store at his relative's home in Mount Vernon, Ohio," Amended Complaint ¶ 8 (emphasis added). In addition, none of the original parties reside in this district: Plaintiff Dearth resides in Canada, Plaintiff SAF resides in the State of Washington, and Defendant Gonzales resides in the District of Columbia.

Hodgkins, filed two weeks earlier, contained all of the same defects in venue. Accordingly, On January 16, 2007, Defendant Gonzales moved to dismiss the complaint in Hodgkins, on the grounds that Defendant Gonzales does not reside in Texas, no events giving rise to the lawsuit had occurred in Texas, and neither of the plaintiffs reside in Texas—the three possible bases for pleading proper venue under the applicable venue provision, 28 U.S.C. § 1391(e).[1] In the alternative, Defendant Gonzales sought transfer of Hodgkins to the District of Columbia, where venue is plainly appropriate. Because the original complaint in this case contained similar defects in venue, and because consolidation of these cases in the District of Columbia would allow a single consistent resolution of the identical legal issues both cases present,[2] Defendant Gonzales intended to file a similar motion here, and stated this intention in its brief it filed in support of its motion to dismiss or transfer Hodgkins. Exhibit B at p.18 n 7. The motion to dismiss or, in the alternative, transfer this case was to be filed by Monday,

[1]A copy of this motion, and the memorandum in support thereof, is attached as Exhibit B.

[2]Hodgkins contains a single additional cause of action challenging one of the provisions on vagueness grounds. As Defendant explained in its motion to dismiss or transfer in Hodgkins, this claim is meritless. See Exhibit B at 11-13.

February 5, 2007, at the latest.

On February 1, 2007, in a transparent attempt to avoid this impending motion, Plaintiffs amended their complaint by adding an allegation that Plaintiff Dearth "would have received firearms in Ohio for non-sporting purposes, or for no particular purpose at all, but has refrained from doing so by compulsion of [the challenged provisions]," Amended Complaint ¶¶ 13, 18, and by naming as an additional defendant the local United States Attorney, Defendant Lockhart, who resides in this district. 28 U.S.C. § 545(a). Plaintiffs attempt to manipulate the federal venue provisions should not succeed, and this Court has the authority and the discretion to ensure that it does not. Accordingly, this Court should grant Defendant Gonzales's motion to dismiss for improper venue. In the alternative, this Court should transfer this case to the United States District Court for the District of Columbia, where it may be consolidated with Hodgkins.

BACKGROUND

This lawsuit is a pre-enforcement challenge to the constitutionality of two provisions of the federal gun control laws that prohibit the purchase or receipt of firearms by out-of-state residents unless the purchase or receipt is for lawful sporting purposes.

The first provision, codified at 18 U.S.C. § 922(a)(9), makes it 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.

18 U.S.C. § 922(a)(9). Violations of this section are punishable by fine and/or imprisonment of up to five years. See 18 U.S.C. § 924(a)(1)(D). Consistent with this statute, Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regulations provide that "[n]o 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." 27 C.F.R. 478.29a. The regulations explain that "[a]n individual resides in a State if he or she is present in a State with the intention of making a home in that State." 27 C.F.R. § 478.11.[3]

The second provision challenged by Plaintiffs, codified at 18 U.S.C. § 922(b)(3), makes it unlawful

> for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver—
> . . .
> (3) any firearm to any person who the licensee knows or has reasonable cause to believe does not reside in . . . the State in which the licensee's place of business is located, except that this paragraph (A) shall not apply to the sale or delivery of any rifle or shotgun to a resident of a State other than a State in which the licensee's place of business is located if the transferee meets in person with the transferor to accomplish the transfer, and the sale, delivery, and receipt fully comply with the legal conditions of sale in both such States . . . , and (B) shall not apply to the loan or rental of a firearm to any person for temporary use for lawful sporting purposes.

18 U.S.C. § 922(b)(3); see also 27 C.F.R. §§ 478.96, 478.99 (implementing 18 U.S.C. § 922(b)(3)). To ensure compliance with this provision and other restrictions on the sale of firearms, prospective purchasers of firearms must complete ATF Form 4473, which is entitled "Firearms Transaction Record Part I - Over-the-Counter." 27 C.F.R. § 478.124. Question 13 on Form 4473 provides, "What is your State of residence *(if any)*? _____" Amended Complaint ¶ 15. The inability to answer Question 13 requires cancellation of the transaction. Amended

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[3]The definition of State of Residence in 27 C.F.R. § 478.11 addresses the situation presented by active members of the Armed Forces, and alien residents, but does not explicitly address non-resident U.S. citizens. Id. An illustrative example provided in the regulation suggests that Plaintiff Dearth would not qualify as a resident of Ohio during his visit. Id. ("Example 1. A maintains a home in State X. A travels to State Y on a hunting, fishing, business, or other type of trip. A does not become a resident of State Y by reason of such trip."). In addition, foreign countries are not included in the definition of the word State. Id.

Complaint ¶ 16. The Amended Complaint also alleges that "Mr. Dearth attempted to buy a firearm within the United States," but could not because of his inability to answer Question 13. Amended Complaint ¶ 17. Plaintiff Dearth subsequently confirmed his inability to purchase a firearm with an official of the Federal Bureau of Investigation. Id.

Plaintiffs allege that §§ 922(a)(9) and 922(b)(3) and their implementing regulations effectively prohibit non-resident U.S. citizens, like Plaintiff Dearth, from receiving firearms for lawful purposes other than sporting purposes, e.g., self-defense, collecting, or other civic purposes. Amended Complaint ¶ 8, 13, 18. And, according to the Amended Complaint, this prohibition violates Plaintiffs' rights to bear arms secured by the Second Amendment of the United States Constitution, and their rights to equal protection and international travel secured by the Fifth Amendment of the United States Constitution. Id. ¶ 20, 22, 24, 26, 29, 31. Accordingly, Plaintiffs seek an order permanently enjoining the enforcement of § 922(a)(9), an order permanently enjoining the enforcement of § 922(b)(3) against American citizens who reside abroad, and appropriate declaratory relief.

ARGUMENT

The venue requirements for suits against a United States officer acting in his official capacity are set forth in 28 U.S.C. § 1391(e), which 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 . . . 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 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 noted, "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). As explained below, Plaintiffs have a selected a venue that is both unfair *and* inconvenient.

I. PLAINTIFFS' ELEVENTH HOUR AMENDMENTS CANNOT SUPPORT VENUE IN THIS DISTRICT

As Plaintiffs implicitly conceded by their last minute amendments, the original complaint in this case could not support venue in this district. The sole original defendant in this suit, Attorney General Gonzales, resides in the District of Columbia, and therefore cannot provide the basis for venue in this district. 28 U.S.C. § 1391(e)(1); See Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455, 462 (S.D.Tex. 1996) (Attorney General officially resides in the District of Columbia); Franz v. United States, 591 F.Supp. 374, 377 (D.D.C. 1984) (same). Nor did the original complaint allege that "a substantial part of the events giving rise to the claim[s] occurred" in this district. 28 U.S.C. § 1391(e)(2). The allegation that "Mr. Dearth intends to purchase firearms within the *United States*, which he would store securely at his relatives' home in Mount Vernon, Ohio," Amended Complaint ¶ 8 (emphasis added), is not an "event" that has "occurred" in this district. Nor is Mr. Dearth's failed attempt "to buy a firearm within the *United States* on or about January 28, 2006," Amended Complaint ¶ 17 (emphasis added), a sufficient basis for pleading venue in this district under § 1391(e)(2). Finally, neither Plaintiff SAF, a resident of Washington State, nor Plaintiff Dearth, a resident of Canada, reside in the Southern District of Ohio. Amended Complaint ¶¶ 1, 2. Therefore, venue in this district cannot be based on the residence of the Plaintiffs. 28 U.S.C. § 1391(e)(3).

Having been made aware of these shortcomings by Defendant Gonzales's motion to

dismiss or transfer in Hodgkins, Plaintiffs amended their complaint. Neither of these amendments cure the patent deficiencies in Plaintiff's choice of forum, and this Court should dismiss this case for improper venue or transfer this case to an appropriate venue.

A. Plaintiffs' Last Minute Attempt to Cure Deficiencies in Venue by Adding Defendant Lockhart Should Not Succeed

1. Plaintiffs Added Defendant Lockhart To Manufacture Venue

Plaintiffs' last minute addition of Defendant Lockhart serves a single transparent purpose: to manufacture venue. Defendant Lockhart is required by law to "reside in the judicial district for which he is appointed," the Southern District of Ohio. 28 U.S.C. § 545(a). Accordingly, this judicial district is now one "in which a defendant in the action resides." 28 U.S.C. § 1391(e)(1).

Fabricating venue in this manner is the only conceivable purpose in adding Defendant Lockhart to this case. In both this case and in Hodgkins, Plaintiffs seek "[a]n order permanently enjoining Defendants, their officers, agents, servants, employees, and all persons in active concert or participation with them who receive actual notice of the injunction, from enforcing 18 U.S.C. § 922(a)(9) and 27 C.F.R. 478.29a," and "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." Amended Complaint, Prayer for Relief; Exhibit A. Accordingly, Plaintiffs sued Attorney General Gonzales, the executive branch official ultimately charged with the enforcement of these provisions, in both this case and in Hodgkins. Initially, Plaintiffs did not sue the United States Attorney in either the Northern District of Texas or in the Southern District of Ohio, and for good reason —it's not necessary.

Defendant Lockhart, like all United States Attorneys, exercises his authority to enforce

the laws of the United States under the direction of the Attorney General, Defendant Gonzales. 28 U.S.C. § 519.[4] As one district court put it, "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." United States v. Di Girlomo, 393 F.Supp. 997, 1005 (D.Mo.) *aff'd* 520 F.2d 372 (8th Cir. 1975). As Plaintiffs recognized when they brought these suits seeking to enjoin only Defendant Gonzales, suing the local United States Attorney is unnecessary because he acts at the direction of the Attorney General. Perhaps for this reason, local United States Attorneys are not named as a defendant in cases challenging the constitutionality of the federal gun control laws.[5]

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[4]This statute provides: "Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and *shall direct all United States attorneys . . . in the discharge of their respective duties.*" 28 U.S.C. § 519 (emphasis added). See also 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party . . . is reserved to officers of the Department of Justice, *under the direction of the Attorney General*.") (emphasis added).

[5]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

In addition, Plaintiffs have not alleged a past attempt by Mr. Dearth to purchase firearms in the Southern District of Ohio, but only in the "United States," Amended Complaint ¶ 17. Nor have Plaintiffs alleged a future intent to purchase firearms in Southern District of Ohio, but only in the "United States." Amended Complaint ¶ 8. If it is necessary to enjoin Defendant Lockhart from prosecuting Plaintiff Dearth, it must be equally necessary to enjoin every United States Attorney in the country. Of course, Plaintiffs, having already sued to enjoin the Attorney General, have not considered it necessary to do so.

The foregoing leads to one possible conclusion: In adding Defendant Lockhart, Plaintiffs' sole purpose was to manufacture venue. Indeed, in Hodgkins, Plaintiff SAF, through counsel, has indicated its intention to name the local United States Attorney in the Northern District of Texas for the very same purpose. See Joint Status Report at ¶ 5, Hodgkins v. Gonzales, Case No. 3:06cv2114-B (N.D.Tex. Feb. 7, 2007) (attached as Exhibit 3). Thus, Plaintiffs' intention in naming Defendant Lockhart is clear. The question is whether adding a defendant for this purpose is permissible.

2. Adding Defendant Lockhart to Manufacture Venue Should Not Be Permitted

This Court should not permit such a flagrant attempt to game the venue provision. This

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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).

Court has the authority to drop Defendant Lockhart from this case "on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Rule 21, Fed.R.Civ.P.[6] Because he was added to fabricate venue, dropping Defendant Lockhart would be "just." Indeed, as one district court has recognized,"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). This power has been exercised by other courts facing similar situations in decisions that are particularly pertinent to the situation here.

For example, in Kings County Econ. Cmty. Dev. Ass'n v. Hardin, 333 F.Supp. 1302 (N.D.Cal. 1971), plaintiffs, residents of the Eastern District of California, attempted to bring a lawsuit in the Northern District of California seeking to compel the Secretary of Agriculture to consider the environmental effects of the federal farm subsidy program on the San Joaquin Valley, which is also located in the Eastern District of California. Id. at 1303. As is the case here, plaintiffs' chosen venue was based exclusively on the presence of two named defendants, both dispensable inferior officers, who resided in the Northern District of California and could therefore satisfy the requirements of § 1391(e)(1). Id. Notwithstanding this fact, Defendants

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[6]Indeed, there is precedent for the proposition that Plaintiffs were required to seek leave before adding Defendant Lockhart and that their failure to do so makes his addition a nullity. 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 (7th Cir. 1975)).

moved to dismiss for improper venue. Id.

In addressing this motion, the district court began its analysis by acknowledging that plaintiffs' interpretation of § 1391(e)(1), if accepted, would allow those seeking to challenge federal laws and regulations to sue "wherever a departmental officer can be found and joined (and this is nearly anywhere in today's America), regardless of the specifics of the other subsections" of § 1391(e). Id. at 1304. The district court recognized that this result "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." Id. With these concerns in mind, the district court rejected plaintiffs' attempt to plead venue on the basis of the dispensable defendants, citing three reasons:

> (1) it is inconsistent with the general rule that venue is confined to districts with some minimum contact with the real parties in interest or the subject matter of the action; (2) it assumes that subsections (2), (3) and (4) [now (2) and (3)] are unnecessary to § 1391(e) 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 in a category of action of increasing importance and frequency in the federal courts."

Accordingly, the district court found venue improper and transferred the case pursuant to 28 U.S.C. § 1406(a). Id.

The district court's decision in Liberty Mutual Ins. Co. v. Batteast, 113 F.R.D. 77 (N.D.Ill. 1986), though it interpreted the general venue provision, is similarly instructive. In Batteast, an insurance company, Liberty Mutual, brought a declaratory judgment action against two of its insureds, Wyeth Laboratories, Inc. and American Home Products Corp., and three members of the Batteast family, seeking to resolve disputes concerning Liberty's obligations to defend and indemnify its insureds in a lawsuit brought by the Batteasts against the insureds. Id.

at 78. Significantly, only the Batteasts resided in the plaintiff's chosen forum. Id. The insureds, Wyeth and American Home, moved to dismiss the Batteasts pursuant to Rule 21, Fed.R.Civ.P., on the ground that the Batteasts' interests could not be adversely affected by resolution of the dispute without them, and moved to transfer the lawsuit to an appropriate venue. Id. at 79. The district court granted both motions, agreeing that the Batteasts had no interest in the lawsuit and that "*the Batteasts were named as defendants in this cases solely in an attempt to prevent a transfer of venue to another more appropriate jurisdiction.*" Id. at 81 (emphasis added).

As the foregoing illustrates, other district courts have refused to allow the requirements of venue to be gutted through the addition of unnecessary defendants. This Court should do the same by exercising its discretion to drop Defendant Lockhart and dismiss this case, or by transferring this case to the United States District Court for the District of Columbia, where venue is clearly appropriate and the only venue where this case may be consolidated with its companion case, Hodgkins.

B. Plaintiff Dearth's Past Restraint Is Not an "Event" "Giving Rise" to Plaintiffs' Claims

The other added allegation of the Amended Complaint, that "Mr. Dearth would have received firearms in *Ohio* for non-sporting purposes, or for no particular purpose at all, but has refrained from doing so by compulsion of [the challenged provisions]." Amended Complaint ¶¶ 13, 18 (emphasis added), is clearly insufficient to support venue under 28 U.S.C. § 1391(e)(2). Besides failing to recognize that the State of Ohio contains two judicial districts, Plaintiff Dearth's alleged restraint falls far short of establishing his standing, the only possible manner in which this allegation can be said to "give rise" to this case. 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). Moreover, even if Plaintiff Dearth's alleged restraint can be considered an event giving rise to Plaintiffs' claim, it is clearly not a "substantial" event giving rise to the claim. As another district court has recognized, "[e]vents that have only a tangential connection with the dispute at bar are not sufficient to lay venue." Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp 455, 460 (S.D.Tex. 1996) (citing Cottman Transmission Sys., Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994)). Accordingly, this facile allegation cannot support venue in this district, and this case should be dismissed for improper venue or transferred to an appropriate venue pursuant to 28 U.S.C. § 1406(a).

II. THE COURT SHOULD TRANSFER THIS CASE TO THE DISTRICT OF COLUMBIA IN THE "INTEREST OF JUSTICE" AND FOR THE CONVENIENCE OF THE PARTIES

Even if venue is technically appropriate 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 interests of justice." 28 U.S.C. § 1404(a). When considering a motion to transfer pursuant to 28 U.S.C. § 1404(a), a district court must first determine "whether the action 'might have been brought' in the transferee court." Jamhour v. Scottsdale Ins. Co., 211 F.Supp.2d 941, 945 (S.D.Ohio 2002). Once this threshold requirement has been satisfied, a "district court should consider the convenience of the witnesses and those public-interest factors of systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice.'" Moses v. Business Card Express, Inc., 929 F.2d 1131, 1137 (6th Cir. 1991) (citing

Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 30 (1988)).

Litigation of this case in the United States District Court for the District of Columbia is clearly appropriate. Attorney General Gonzalez, acting in his official capacity, officially resides in the District of Columbia, and substantial events giving rise to Plaintiffs' claims—specifically, the passage of the challenged statutes and the promulgation of the challenged regulations — occurred in the District of Columbia. 28 U.S.C. § 1391(e)(1), (2). Furthermore, transfer of this case to the United States District Court for the District of Columbia is in "the interest of justice" for two primary reasons. First, transfer of this case to the District of Columbia will deny Plaintiffs' attempt to manipulate venue through the last minute addition of Defendant Lockhart and thereby protect the "systematic integrity and fairness" of the federal courts. Moses, 929 F.2d at 1137. Second, the United States District Court for the District of Columbia is the only venue appropriate for both this case and Hodgkins, and thus the only venue in which these virtually identical cases can be consolidated. Furthermore, litigation of this case to the United States District Court for the District of Columbia is more convenient. Finally, Plaintiffs' chosen forum is entitled to little respect because none of the parties reside in this district, none of the events giving rise to Plaintiffs' claims occurred in this district, and Plaintiffs' choice is a clear example of forum shopping.

A. Transfer of this Case to the District of Columbia Serves the "Interest of Justice"

1. Protecting the Integrity of the Venue Provisions Serves the "Interest of Justice"

Transfer to the District of Columbia serves the "interest of justice" because it prevents Plaintiffs' transparent attempt to manipulate the venue provision. As many courts have recognized, a plaintiff's "blatant display of forum manipulation" is contrary to the "interest of

justice," and is therefore a relevant consideration in the transfer determination. Samsung Electronics Co., Ltd. v. Rambus, Inc., 386 F.Supp.2d 708, 721 (E.D.Va. 2005) (citing The Holmes Group, Inc. v. Hamilton Beach/Proctor Silex, Inc., 249 F.Supp.2d 12, 15 (D.Mass.2002)). See also Wireless Consumers Alliance, Inc. v. T-Mobile USA, Inc., Case No. 03cv3711, 2003 WL 22387598, at *6 (N.D.Cal. Oct. 14, 2003) (citing "Discouraging Forum Shopping" as an element of its "Interest of Justice" analysis). By adding Defendant Lockhart at the eleventh hour to avoid Defendant Gonzales's impending motion to dismiss, Plaintiffs have engaged in just the type of "forum manipulation" that concerned these courts. Fortunately, transfer pursuant to § 1404(a) permits this Court to check Plaintiffs' attempt to game the venue provision, thereby discouraging similar behavior in the future.

Considerations of the "systemic integrity and fairness that, in addition to private concerns, come under the heading of 'the interest of justice'" likewise weigh against retaining this case in this forum. Moses, 929 F.2d at 1137. In effect, Plaintiffs' theory of venue would permit declaratory judgment plaintiffs seeking to challenge the constitutionality of any federal statute to bring the case in any district in the country through the simple expedient of naming as a defendant the local United States Attorney (or any other local federal officer charged with enforcement of the challenged statute). For the three reasons cited by the district court in Kings County, this theory of venue should be rejected. Kings County, 333 F.Supp. at 1304; see also Hartke v. F.A.A., 369 F.Supp. 741, 746 (E.D.N.Y. 1973) ("The statutory reference to the district in which a defendant 'resides' may not reasonably be construed to include every district where some subordinate has an office."); 14D Wright, Miller & Cooper, Federal Practice and Procedure § 3815 p. 371-3 (3d ed. 2007) ("Since other portions of § 1391(e) provide a wide choice of

venue, the federal courts have not been willing to adopt an expansive interpretation of residency and have rejected arguments that an agency resides wherever it has a regional office or that an officer can be sued in any district *simply by joining a subordinate who resides in that district.*") (emphasis added).

A refusal to permit Plaintiffs' attempt to game the venue statute by naming inferior officers as defendants is buttressed by a long line of cases that have refused attempts to base venue on a federal agency defendant's regional office. Thus, in Reuben H. Donnelly Corp. v. F.T.C., 580 F.2d 264 (7th Cir. 1978), the Seventh Circuit held that plaintiffs could not justify venue in the Northern District of Illinois on the basis of a regional office of the defendant Federal Trade Commission. Id. at 267. The Seventh Circuit recognized that permitting a federal agency to be sued in any district in which the agency maintains an office would render the other subsections of § 1391(e) superfluous, and that "such an interpretation would mean that a plaintiff could file a suit in any district regardless of how remote that district's contact may be with the litigation." Id. As the Court of Appeals recognized, "'The venue statute was not intended to permit forum-shopping, by suing a federal official wherever he may be found, or permitting test cases far from the site of the actual controversy.'" Id. (quoting Hartke v. Federal Aviation Administration, 369 F.Supp. 741, 746 (E.D.N.Y.1973)); see also Williams v. United States, Case No. C-01-0024, 2001 WL 1352885 (N.D.Cal. Oct. 23, 2001) ("Venue does not lie in every judicial district where a federal agency has a regional office."); Schwarz v. I.R.S., 998 F.Supp. 201, 203 (N.D.N.Y. 1998) ("Venue is not proper merely because a federal agency maintains a regional office in a district.") (citing Davies Precision Machining, Inc. v. Defense Logistics Agency, 825 F.Supp. 105, 107 (E.D.Pa. 1993)). For the same reasons, this Court should reject

Plaintiffs' attempt to manipulate the venue statute and transfer this case to the District of Columbia.

2. Consolidation of this Case with *Hodgkins* Serves the "Interest of Justice"

Transfer of this case to the United States District Court for the District of Columbia also serves the "interest of justice" because it permits consolidation of this case with Hodgkins, in which Defendant Gonzales's motion to dismiss or, in the alternative, transfer is currently pending. As noted these cases raise virtually identical legal issues of constitutional law that should be resolved in a single consolidated case. See e.g., Printz v. United States, 521 U.S. 898 (1997) (resolving consolidated cases presenting nearly identical issues concerning constitutionality of interim provisions of the Brady Handgun Violence Prevention Act). Indeed, the Supreme Court has addressed this very situation, cautioning that "[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)); see also 15 C Wright, Miller & Cooper, Federal Practice and Procedure § 3854 p. 250-63 (3d ed. 2007) (collecting cases holding that transfer to allow consolidation serves the "interest of justice").

The United States District Court for the District of Columbia is the only District Court in which these cases can be consolidated.[7] This case cannot be transferred to the United States

[7]At this stage of the litigation, venue would also be technically proper in the United States District Court for the Eastern District of Washington, where Plaintiff SAF is incorporated. See Johns-Manville Sales Corp. v. United States, 796 F.2d 372, 373 (10th Cir. 1986) (per curiam); Investment Finance Management Co. v. United States, Case No. C-3-89-234, 1990 WL 1016527, at *4 (S.D.Ohio October 25, 1990) ("[A] corporation resides, for purposes of § 1391(e), only in

District Court for the Northern District of Texas, because venue in that district is clearly improper. See 28 U.S.C. §§ 1391(e), 1404(a). For the same reason, Hodgkins cannot be transferred to this district. By contrast, because the common defendant in these cases officially resides in the District of Columbia, and because the events giving rise to both lawsuits—the passage of the challenged statutes and the promulgation of the challenged provisions—occurred in the District of Columbia, these cases can be consolidated in the United States District Court for the District of Columbia. 28 U.S.C. § 1391(e)(1), (2). Thus, as Defendant Gonzales argued in his motion to dismiss or transfer in Hodgkins, Exhibit B at 17-18, transfer of this case to the District of Columbia should be granted because its consolidation with Hodgkins serves the "interest of justice."

B. Litigation in the District of Columbia is More Convenient

Litigation of this largely legal dispute in the District of Columbia will be more convenient for the parties and less expensive. First, as discussed above, transfer to the District of Columbia will allow for consolidation of this case with Hodgkins, thereby eliminating the need to brief and argue the same legal issues twice. Parallel litigation of these cases is a "waste 'of time, energy and money," and therefore transfer to a district where these cases can be consolidated "'protect[s] litigants . . . and the public against unnecessary inconvenience and expense,'" the very purpose of the transfer provisions. Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (quoting Continental Grain Co. v. Barge F.B.L.-585, 364 U.S. 19, 26, 27 (1960)).

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its state of incorporation."). Given the tenuous nature of Plaintiff SAF's standing, see Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (associational standing requires immediate or threatened injury to members), and the greater inconvenience imposed on the parties by litigating this case in Seattle, Defendant Gonzales does not recommend transfer of this case to that district.

Transfer of these cases to the United States District of Columbia will also save the parties the expense of flying lawyers who reside in the Washington, D.C. area to two distant locales. Ordinarily, "[t]he factor of 'location of counsel' is irrelevant and improper for consideration in determining the question of transfer of venue." In re Horseshoe Entertainment, 337 F.3d 429, 434 (5th Cir. 2003) cert. denied 540 U.S. 1049. But, "where 'convenience of counsel bears directly on the cost of litigation, it becomes a factor to consider.'" In re AT&T Access Charge Litigation, Case No. 05cv1360, 2005 WL 3274561, at *4 (D.D.C. November 16, 2005) (quoting Blumenthal v. Mgmt. Assistance, 480 F.Supp. 470, 474 (N.D.Ill.1979) ("[I]f the convenience of counsel bears directly on the cost of litigation, it becomes a factor to consider.")).[8] Defendant Gonzales's attorneys in charge of this case live and work in the Washington, D.C. metropolitan area. Likewise, Plaintiffs' counsel Mr. Gura, who also serves as counsel in Hodgkins, has his office in Alexandria, Va, which is in the Washington, D.C. metropolitan area. As there can be little doubt that the cost associated with attorney travel will be greater if these cases are not consolidated in the District of Columbia, the location of counsel, in these circumstances, provides another reason for transfer.

C. Plaintiffs' Choice of Forum is Entitled to Little Deference

As explained above, Plaintiffs' choice of forum fails to satisfy the requirements of 28 U.S.C. § 1391(e), and therefore should receive no deference. See Horseshoe Entertainment, 337

[8]See also Dupre v. Spanier Marine Corp., 810 F.Supp. 8233, 826 (S.D.Tex. 1993) (location of counsel is a factor when the primary counsel for both cases practice outside of the district); Mobil Oil Corp. v. W. R. Grace & Co., 334 F.Supp. 117, 124 n.5 (S.D.Tex. 1971) ("Plaintiff contends that the convenience of counsel is not relevant. This Court disagrees. The cost of counsel's transportation and time in route must be borne by the parties. Therefore this factor directly bears upon the convenience of the parties and costs of litigation.").

F.3d at 434-35 ("Obviously, to be considered at all, the plaintiff's choice of forum must be one which is permitted under the relevant venue statute."). But, should the Court disagree with this conclusion, Plaintiffs' choice of forum is still entitled to little weight because "a non-resident plaintiff's choice of forum is entitled to less deference than forum choices made by residents or citizens." Imperial Products, Inc. v. Endura Products, Inc., 109 F.Supp.2d 809, 818 (S.D.Ohio 2000) (citing Dowling v. Richardson-Merrell, Inc., 727 F.2d 608, 613 (6th Cir.1984)). See also Piper Aircraft v. Reyno, 454 U.S. 235, 255-56 (1981) (foreign plaintiff's choice of forum entitled to little deference.). In addition, a plaintiff's choice of forum is entitled to less weight when, as here, "most of the operative facts occurred outside the district." Salinas v. O'Reilly Auto., Inc., 358 F.Supp.2d 569, 571 (N.D.Tex. 2005) (citing Isbell v. DM Records, Inc., Case No. 3:02cv408-G, 2004 WL 1243153, at *13 (N.D.Tex. June 4, 2004)). Finally, 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." Dupre, 810 F.Supp. at 828. Plaintiffs' decision to bring two identical cases in district courts without a connection to the issues presented, rather than bringing these cases in the most obvious forum, the District of Columbia, appears to be just such an attempt. Accordingly, Plaintiffs' decision to sue in this district should not factor in the Court's analysis.

CONCLUSION

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

Dated: February 8, 2007 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify pursuant to Local Rule 5.2(b), that on February 8, 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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