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.**	CIVIL ACTION No. 3:06cv2114-B

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

Defendant Alberto Gonzales, by and through his undersigned counsel, respectfully moves to have this action dismissed pursuant to 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). Alternatively, Defendant requests that this case be transferred to the 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.[1]

Respectfully submitted,

PETER D. KEISLER

[1]Pursuant to Local Rule 7.1(a), counsel for Defendant consulted with counsel for Plaintiffs prior to the filing of this motion. Plaintiffs oppose the motion to transfer.

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MAXWELL HODGKINS	)	
	)	
and	)	
	)	
SECOND AMENDMENT FOUNDATION, INC.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	CIVIL ACTION No. 3:06cv2114-B
	)	
ALBERTO GONZALES,	)	
Attorney General for the United States,	)	
	)	
Defendant.	)	

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

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INTRODUCTION

Plaintiffs Maxwell Hodgkins and Second Amendment Foundation, Inc. ("SAF") filed this lawsuit challenging the constitutionality of certain federal gun control laws in the wrong district court, and the case should be either dismissed or transferred to the District of Columbia. Neither Plaintiff Hodgkins, a United States citizen residing in London, nor Plaintiff SAF, incorporated in the State of Washington, reside in the Northern District of Texas. Plaintiffs have not alleged that the challenged provisions have been enforced against them in an unconstitutional manner in Texas, nor have Plaintiffs alleged any specific threats of unconstitutional enforcement against them of the challenged provisions in the Northern District of Texas.[2] Indeed, the only fact connecting this lawsuit to the Northern District of Texas is Plaintiff Hodgkins' alleged intention to acquire firearms "while visiting his friends and family in Texas" at some indeterminate time in the future. Complaint ¶ 7.

By contrast, the District of Columbia is clearly an appropriate forum for the resolution of Plaintiffs' claims. The challenged statutes were enacted in Washington, D.C., and the challenged regulations were promulgated in Washington, D.C. The agency charged with enforcement of the

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[2]Although Defendant does not formally challenge Plaintiffs' Article III standing in this motion, it is nonetheless worth noting that Plaintiffs' standing is highly suspect. See, e.g., Younger v. Harris, 401 U.S. 37, 42 (1971) (speculative threat of enforcement of challenged statute insufficient for standing); Navegar, Inc. v. United States, 103 F.3d 994, 998 (D.C.Cir. 1997) (threat of enforcement of gun control laws must be "credible and immediate, and not merely abstract or speculative."); see also Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977) (associational standing requires immediate or threatened injury to members). Although the Court may decide the standing issue *sua sponte*, Fed.R.Civ.P. 12(h)(3), it need not resolve dispositive jurisdictional issues like standing before deciding a motion to transfer pursuant to 28 U.S.C. §§ 1404(a) or 1406(a). See Andrade v. Chojnacki, 934 F.Supp. 817, 824-25 (S.D.Tex. 1996) (citing Gold v. Scurlock, 290 F.Supp. 926, 929 (S.D.N.Y. 1968)).

challenged provisions, the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF"), is headquartered in Washington, D.C., and the official ultimately responsible for enforcement of the challenged provisions, Defendant Gonzales, officially resides in Washington, D.C. In addition, this largely legal dispute will be litigated by counsel from the Washington, D.C. metropolitan area. Furthermore, resolution of this dispute in Washington, D.C. is unlikely to present any additional inconvenience for Plaintiffs. For these reasons, this action should be dismissed or, in the alternative, transferred to the District Court for the District of Columbia.

BACKGROUND

Plaintiffs challenge the constitutionality of two provisions of the federal gun control laws that relate to the purchase or receipt of firearms by out-of-state residents.[3]

The first provision, codified at 18 U.S.C. § 922(a)(9), was originally enacted as section 110 of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 2019. As currently codified, § 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, 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

[3]A lawsuit raising nearly identical claims was filed by SAF and an additional plaintiff in the United States District Court for the Southern District of Ohio. They are represented, as here, by Mr. Gura. See Dearth v. Gonzales, Case No. 2:06cv1012 (S.D.Ohio).

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.[4]

Plaintiffs allege that § 922(a)(9), as implemented by the regulations, effectively prohibits non-resident U.S. citizens from receiving firearms for lawful purposes other than sporting purposes, e.g., self-defense, collecting, or other civic purposes. Complaint ¶ 7, 12. And, according to the 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. ¶ 22, 26, 32, 33. In addition, Plaintiffs claim that the language of § 922(a)(9) is unconstitutionally vague in violation of their Fifth Amendment Due Process rights. Id. ¶ 30. Specifically, Plaintiffs claim that a reasonable person would not know whether mere possession of firearms by a non-resident U.S. citizen is included in § 922(a)(9)'s prohibition on the "receipt" of a firearm by a non-resident other than for lawful sporting purposes. Id. Accordingly, Plaintiffs seek an order permanently enjoining the enforcement of 18 U.S.C. § 922(a)(9), and declaratory relief pursuant to 28 U.S.C. § 2201.

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—
> . . .

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[4]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 Hodgkins would not qualify as a resident of Texas 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.

> (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)*? _____ . . .)." The inability to answer Question 13 requires cancellation of the transaction. Complaint ¶ 18.

Plaintiffs allege that § 922(b)(3) and its related regulations also prevent American citizens residing in a foreign country from purchasing firearms in the United States, in violation of their Second Amendment right to bear arms, and their Fifth Amendment rights to equal protection and to international travel. Complaint ¶ 24, 28, 35. Accordingly, Plaintiffs seek to enjoin enforcement of this provision against American citizens living abroad, and seek appropriate declaratory relief.

ARGUMENT

I. VENUE IN THIS DISTRICT IS IMPROPER

The Northern District of Texas is an improper venue for this case. Accordingly, pursuant to 28 U.S.C. § 1406(a) and Rule 12(b)(3), Fed.R.Civ.P., Defendant moves to dismiss or, in the alternative, to transfer this case to the District Court for the District of Columbia.

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 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); Gogolin & Stelter v. Karn's Auto Imp., Inc., 886 F.2d 100, 104 (5th Cir. 1989) (same). Further, because venue has been challenged as improper under Rule 12(b)(3), Plaintiffs have the burden to establish that venue in this district is proper. See Von Graffenreid v. Craig, 246 F.Supp.2d 553, 557 (N.D.Tex. 2003) (citing Seariver Mar. Fin. Holdings, Inc. v. Pena, 952 F.Supp. 455, 458 (S.D.Tex.1996)); Advanced Dynamics Corp. v. Mitech Corp., 729 F.Supp. 519, 519 (N.D.Tex. 1990). As other district courts have cogently opined, "the burden should be on the plaintiff to institute an action in the proper place, because '[t]o hold otherwise would circumvent the purpose of the venue statutes—it would give plaintiffs an improper incentive to attempt to initiate actions in a forum favorable to them but improper as to venue.'" Seariver, 952 F.Supp. at 458 (quoting Delta Air Lines, Inc. v. Western Conference of Teamsters Pension Trust Fund, 722 F.Supp. 725, 727 (N.D.Ga. 1989)).

Plaintiffs have demonstrably failed to satisfy this burden. None of the parties reside in

the Northern District of Texas, no events giving rise to this lawsuit occurred in the Northern District of Texas, and there is no property that is the subject of this action situated in this district. Accordingly, this case must be dismissed, or, in the alternative, transferred to a proper venue.

A. The Attorney General Does Not Reside in the Northern District of Texas

A suit against the head of an agency acting in his official capacity may be brought in the district in which the official resides. 28 U.S.C. § 1391(e). In this respect, "[t]he general rule in suits against public officials is that a defendant's residence for venue purpose[s] is the district where he performs his official duties. . . . A number of the cases applying this principle have involved federal officials or agencies and have found only one official residence." Florida Nursing Home Assoc. v. Page, 616 F.2d 1355, 1360 (5th Cir. 1980), rev'd on other grounds, 450 U.S. 147 (1981) (internal citations omitted); see also Caremark Therapeutic Services v. Leavitt, 405 F.Supp.2d 454, 464 (S.D.N.Y. 2005) ("[V]enue with respect to a federal officer or employee is proper in the place of his or her official residence, where his or her official duties are performed."). The federal defendant in this case, Attorney General Alberto Gonzales acting in his official capacity, performs his official duties in the District of Columbia. See Seariver, 952 F.Supp. at 462 (Attorney General officially resides in the District of Columbia); Franz v. United States, 591 F.Supp. 374, 377 (D.D.C. 1984) (same). Accordingly, § 1391(e)(1) cannot serve as the basis for venue in this district.

B. A Substantial Part of the Events Giving Rise to Plaintiffs' Claims Did Not Occur in the Northern District of Texas

The venue statute also allows a federal official acting in an official capacity to be sued in "any 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). The only events detailed in the Complaint that "occurred" in this district were the birth and upbringing of Plaintiff Hodgkins. Complaint ¶ 6. These events did not give rise to Plaintiffs' claims. Likewise, Plaintiff Hodgkins' asserted desire to acquire firearms on his next visit to Texas is not an "event" that has "occurred," and cannot serve as the basis for venue in this district.

The task of interpreting § 1391(e)(2) appropriately begins with its text. Hamilton v. United Healthcare of Louisiana, Inc., 310 F.3d 385, 391 (5th Cir. 2002) ("As with all issues of statutory interpretation, the appropriate place to begin our analysis is with the text itself."). And, as the text of § 1391(e)(2) makes clear, only events which have "*occurred*"—that is, *in the past*—may form the basis for laying venue in this district. See United States v. Wilson, 503 U.S. 329, 333 (1992) ("Congress' use of a verb tense is significant in construing statutes."). In this respect, the question whether a pre-enforcement declaratory judgment suit satisfies the venue statute is distinct from the question whether a declaratory judgment plaintiff has standing under Article III's case or controversy requirement. Thus, even if Plaintiffs could demonstrate a credible threat of enforcement of these statutes in order to satisfy Article III—which they have failed to show in their complaint—this would in no way relieve Plaintiffs from establishing that substantial events have *occurred* in their chosen venue. See Seariver, 952 F.Supp. at 459-60.

Indeed, the better-reasoned decisions to consider § 1391(e)(2) in the context of declaratory judgment challenges to federal statutes or agency actions have held that mere allegations of a future impact of federal law in a judicial district are insufficient to support venue. See Reuben H. Donnelly Corp. v. F.T.C., 580 F.2d 264, 268 (7th Cir. 1978); Rogers v. Civil Air Patrol, 129 F.Supp.2d 1334, 1339 (M.D.Ala. 2001); Experian Information Solutions, Inc. v.

F.T.C., Case No. 3:00cv1631-H, 2001 WL 257834, at *3 (N.D.Tex. March 8, 2001) (substantial parts of events or omissions did not occur in the Northern District of Texas where plaintiff sought a declaration that an FTC rule infringed his First and Fifth Amendment rights); Honeywell v. Consumer Product Safety Commission, 566 F.Supp. 500, 501, 502 (D.Minn. 1983) (Accepting venue where "impact of the CPSC . . . will be felt . . . would have the effect of making venue purely a matter of subjective evaluation of potential impact."); but see Williams Exploration Co. v. United States Dept. of Energy, 561 F.Supp. 465, 467 (N.D.Okla. 1980).

In Donnelly, the plaintiff, publisher of the *Official Airline Guide*, brought suit in the Northern District of Illinois challenging on jurisdictional grounds an administrative complaint of the Federal Trade Commission, which alleged that the *Guide* disadvantaged smaller carriers in violation of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1). Donnelly, 580 F.2d at 265-66. Donnelly defended its choice of forum, in part, on the ground that "any cease and desist order which *might* be issued by the Commission against Donnelly and the [*Guide*] would have its impact in the Northern District." Id. at 268 (emphasis in original). The Seventh Circuit rejected this "novel extension of the federal venue provisions," reasoning that:

> [t]he injury which Donnelly speaks of, however, is not the injury which comprises part of its present cause of action; rather it is the impact which may result at the end of the administrative proceeding. To base a venue determination on the possibility of some future administrative ruling approaches the question backwards.

Id. Likewise, Plaintiffs' presumed theory of venue, which is based on the potential impact on Hodgkins and SAF should Hodgkins and SAF members someday seek to purchase a firearm in this district, approaches the venue question backwards.

The district court's decision in Rogers v. Civil Air Patrol, 129 F.Supp.2d 1334 (M.D.Ala.

2001), is similarly instructive. In that case, the plaintiff brought suit in the Middle District of Alabama challenging the constitutionality of the Floyd D. Spence National Defense Authorization Act of 2001 ("Authorization Act"), and seeking declaratory and injunctive relief. Id. at 1335. The Authorization Act provided for the appointment of a Board of Governors to govern the Civil Air Patrol ("CAP"), a volunteer civilian auxiliary of the United States Air Force, without subjecting Board decisions to the oversight of the United States Air Force. Id. at 1336. Plaintiff, a member of the CAP since 1987, challenged the statute under the Appointments Clause and the Separation of Powers Doctrine. Id. at 1335-36. He defended his choice of venue on the ground that "the Authorization Act will require performance in the Middle District of Alabama." Id. at 1339. The district court rejected this future action as a proper basis for venue:

> Allegations that the Authorization Act 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.**"

Id. (quoting 28 U.S.C. § 1391(e)(2) (emphasis in original)). Further, the district court held that a meeting of CAP's National Executive Committee in the district to select members of the Board "could not logically have given rise to Plaintiff's claims" because it "occurred after the suit was filed." Id. Significantly, the district court held that the "[t]he District of Columbia would . . . serve as a proper venue under sections 1391(b)(2) and 1391(e)(2) because a substantial part of the acts or omissions giving rise to the Plaintiff's claims occurred in that district." Id. at 1339-40.

Limiting venue under § 1391(e)(2) to districts where the events giving rise to a lawsuit have actually occurred is consistent with the purpose of the venue provision. When Congress

enacted § 1391(e) as section 2 of the Mandamus and Venue Act of 1962, Pub. L. No. 87-748, 76 Stat. 744, its purpose was to "make it possible to bring actions against Government officials and agencies in U.S. district courts outside the District of Columbia, which, because of certain existing limitations on jurisdiction and venue, may now be brought only in the U.S. District Court for the District of Columbia." S. Rep. No. 87-1992 (1962), reprinted in 1962 U.S.C.C.A.N. 2784, 2785. As the Senate Report makes clear, however, Congress' primary aim in amending the statute was to allow those affected by federal "administrative determinations" regarding "water rights, grazing land permits, and mineral rights" to challenge those determinations locally. Id. at 2786.[5] Indeed, reading Congress' amendment of the statute as intending to place the "venue decision entirely in hands of plaintiffs" is contrary to the "the purpose of statutorily specified venue[, which] 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); see also Donnelly, 580 F.2d at 267 ("'The venue statute was not intended to permit forum-shopping, by . . . permitting test cases far from the site of the actual controversy.'") (quoting Hartke v. Federal Aviation Administration, 369 F.Supp. 741, 746 (E.D.N.Y.1973)). Permitting extension of the venue statute to any district where a declaratory judgment plaintiff alleges possible future federal law enforcement was not Congress' intention when it amended the statute, and is clearly contrary to the very purpose of statutory venue.

[5]A letter from Byron White, then Deputy Attorney General of the Department of Justice to Senator Eastland, then Chairman of the Senate Judiciary Committee, reinforces this conclusion: "The principal demand for this proposed legislation comes from those who wish to seek review of decisions relating to public lands, such as the awarding of oil and gas leases, consideration of land patent applications and the granting of grazing rights or other interests in the public domain." Id. at 2789.

In sum, because nothing substantial has occurred in this district that could give rise to this claim, the first clause of § 1391(e)(2) cannot serve as the basis for venue in the Northern District of Texas.

C. Plaintiff Hodgkins' Continued Possession of Firearms in the United States Does Not Permit Venue in this District

Plaintiff Hodgkins' alleged continued possession of firearms legally acquired while residing within the United States does not permit venue in this district. Complaint ¶¶ 7, 15. Plaintiff Hodgkins' alleged possession of firearms—even if he had alleged they are within the Northern District of Texas—does not implicate 18 U.S.C. § 922(a)(9) or its implementing regulations. For this reason, Hodgkins' possession of firearms is not "a substantial event . . . giving rise to the claim," nor are Hodgkins' firearms "property that is subject of the action." 28 U.S.C. § 1391(e)(2). Further, Plaintiffs have alleged only that the firearms are "securely stored within the United States," not in the Northern District of Texas. Complaint ¶ 7. Plaintiffs have therefore failed to allege any tie of these firearms to the Northern District of Texas.

The fact that Plaintiff Hodgkins' possession of the firearms does not implicate § 922(a)(9) requires some explication. By its own terms, the statute punishes only the receipt of firearms by out-of-state residents, and therefore Hodgkins' continued possession of firearms acquired prior to the termination of his domestic residence could not subject him to prosecution. 18 U.S.C. § 922(a)(9). Heedless of this plain language, Plaintiffs allege that 18 U.S.C. § 922(a)(9) violates the Due Process Clause of the Fifth Amendment, because whether the statute's prohibition on receiving firearms encompasses continuous possession "is vague and ambiguous such that a reasonable person cannot know what conduct is or is not permitted by

law." Complaint ¶30. As Plaintiffs virtually concede, however, this asserted ambiguity is chimerical. Id. at ¶ 13. The terms "receive" and "possess" are given independent meaning throughout 18 U.S.C. § 922. For example, 18 U.S.C. § 922(g) makes it unlawful for certain people, such as those convicted of a crime punishable by more than one year, fugitives from justice, the mentally defective, and others, "to possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 U.S.C. § 922(g); see also 18 U.S.C. § 922(h), (k), (l), (p) (giving the words "receive" and "possess" independent meaning). Furthermore, the Supreme Court has expressly acknowledged that the term "receive" does not include mere "possession." See United States v. Bass, 404 U.S. 336, 342-43 (1971) (prior version of § 922(g) "does not reach possessions or intrastate transactions at all, but is limited to the sending or receiving of firearms . . . ."); see also Tot v. United States, 319 U.S. 463, 472 (1943) (striking down statutory presumption that mere possession was sufficient evidence of receipt prior to effective date of statute). This distinction was recently noted by the Fifth Circuit when it wrote that "'[r]eceipt' is knowingly taking possession . . . rather than simply remain[ing] in possession." United States v. Solomon, 29 F.3d 961, 964 (5th Cir. 1994) (citing United States v. Clark, 741 F.2d 699, 703 (5th Cir. 1984)). Thus, it is clear that the continued possession of firearms is not encompassed in § 922(a)(9)'s prohibition.

Plaintiffs' contrived ambiguity rests on Huddleston v. United States, 415 U.S. 814 (1974), in which the Supreme Court was asked to determine "whether the prohibition [contained in 18 U.S.C. § 922(a)(6)] against making false statements in connection with the *acquisition* of a firearm covers a firearm's redemption from a pawnshop." Id. at 818-19 (emphasis added); see

Complaint ¶ 14. The Supreme Court's affirmative response to this question relied on the unique characteristics of a pawnshop redemption, especially the fact that pawnbrokers are included in the statute's definition of a firearms dealer. Id. at 821 (citing 18 U.S.C. § 821(a)(11)). In fact, the Supreme Court's definition of the term "acquisition," consistent with the Fifth Circuit's definition of "receipt" in Solomon, clearly does not encompass the continuous possession of a firearm. Id. at 823 ("In sum, the word 'acquisition,' as used in § 922(a)(6), is not ambiguous, but clearly includes any person, by definition, who 'comes into possession, control, or power of disposal' of a firearm."). Plaintiff Hodgkins has not alleged that he has pawned his firearms and intends to redeem them on his next visit to Dallas. Instead, he alleges that he "legally owns firearms securely stored with the United States." Complaint ¶ 7. Such continuous possession is clearly not encompassed by § 922(a)(9)'s prohibition on a non-resident's receipt of firearms. Accordingly, Hodgkins' continuous possession of firearms cannot support venue in this district under § 1391(e)(2) because his continuous possession is not an event giving rise to Plaintiffs' claims, nor are the firearms property that is the subject of this dispute.

D. Plaintiffs Do Not Reside in the Northern District of Texas

Finally, if no real property is involved in the action, venue may be proper where a plaintiff resides. 28 U.S.C. § 1391(e)(3). No real property is involved in this action, but because neither plaintiff resides in the Northern District of Texas, § 1391(e)(3) does not permit laying venue in this district. Plaintiff Hodgkins resides in the United Kingdom. Complaint ¶ 1. Plaintiff SAF resides in Washington, the state in which it is incorporated. Complaint ¶ 2; Merch. Fast Motor Lines, Inc. v. Interstate Commerce Comm'n, 5 F.3d 911, 921 & n. 15 (5th Cir. 1993) ("For venue purposes the residence of a corporate plaintiff, including a membership corporation,

is the place of its incorporation.") (citing Am. Newspaper Publishers Ass'ns v. U.S. Postal Serv., 789 F.2d 1090, 1092 (5th Cir. 1986)); Teneco Oil Co. v. EPA, 592 F.2d 897, 899 (5th Cir. 1979) ("For the purposes of the general venue statute a corporation resides only at its place of incorporation.").[6] Accordingly, Plaintiffs cannot rely on § 1391(e)(3) to defend bringing this suit in this district.

E. This Case Could Be Transferred to the District of Columbia

A case filed in the wrong district must be dismissed or, alternatively, may be transferred "to any district or division in which it could have been brought" if such a transfer is "in the interest of justice." 28 U.S.C. § 1406(a). Because Defendant Gonzales resides in the District of Columbia, and because the events giving rise to this case, namely the passage of two statutes by Congress and the promulgation of regulations by the ATF, occurred in the District of Columbia, this case could have been brought in the District of Columbia. 28 U.S.C. § 1391(e)(1), (2). Accordingly, this case should be dismissed or, in the alternative, transferred to the District of Columbia.

II. ALTERNATIVELY, THIS CASE SHOULD BE TRANSFERRED PURSUANT TO 28 U.S.C. § 1404(a)

Even if venue were proper in this district, transfer of this case to the District of Columbia

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[6]Although the venue statute provides that a corporate *defendant* "shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced," see 28 U.S.C. § 1391(c), this subsection does not affect a corporate *plaintiff's* state of residence. See Johns-Manville Sales Corp. v. United States, 796 F.2d 372, 372 (10th Cir. 1986) (per curiam) (holding that a corporate plaintiff is only a resident of its state of incorporation for purposes of the venue statute, and that this determination is not affected by 28 U.S.C. § 1391(c) because "that subsection applies only to corporate defendants, not to corporate plaintiffs.").

would be appropriate "[f]or the convenience of parties and witnesses, [and] in the interest of justice." 28 U.S.C. § 1404(a). Unlike the mandatory dismissal or transfer required by § 1406(a) when venue is improper, transfer pursuant to § 1404(a) is discretionary, and the defendant "shoulders the burden of proving why the case should be transferred to an alternate forum." Salinas v. O'Reilly Auto., Inc., 358 F.Supp.2d 569, 570 (N.D.Tex. 2005) (citing Trevino v. Louisiana-I Gaming, Case No. Civ. A. 00-3110, 2002 WL 27769, at *1 (E.D.La. Jan.8, 2002)). Nonetheless, motions to transfer pursuant to § 1404(a) should be granted if doing so will "'protect litigants, witnesses, and the public against unnecessary inconvenience and expense.'" Id. (quoting Van Dusen v. Barrack, 376 U.S. 612, 616 (1964)).

To satisfy his burden, "the defendant must first show that the plaintiff could have initially brought the action in the transferee court." Id. (citing In re Volkswagen AG, 371 F.3d 201, 203 (5th Cir. 2004)). If so, the Court then determines "whether, on balance, a transfer would serve the interests of convenience and justice." Id. (citing Wolf Designs, Inc. v. Donald McEvoy Ltd., Inc., 355 F.Supp.2d 848, 851 (N.D.Tex. 2005)). Finally, although a plaintiff's choice of forum is ordinarily given considerable weight in the analysis, "[t]he plaintiff's choice of forum is accorded less weight . . . when the plaintiff sues outside its home district and where most of the operative facts occurred outside the district." Id. at 571 (citing Isbell v. DM Records, Inc., Case No. 3:02cv408-G, 2004 WL 1243153, at *13 (N.D.Tex. June 4, 2004)).

A. This Action Could Have Been Brought in the District of Columbia

In considering a motion to transfer pursuant to 28 U.S.C. § 1404(a), "the first determination to be made is whether the judicial district to which transfer is sought [is] a judicial district in which the claim could have been filed." In re Volkswagen AG, 371 F.3d 201, 203 (5th

Cir. 2004). As detailed above, this case could have been brought in the District Court for the District of Columbia because it is where Attorney General Gonzalez, acting in his official capacity, resides, and because substantial events giving rise to Plaintiffs' claims occurred in the District of Columbia. 28 U.S.C. § 1391(e)(1), (2).

B. Plaintiffs' Choice of Forum is Inconvenient and Contrary to the Public Interest

Litigation of this largely legal dispute in the District of Columbia will be more convenient for the parties and their attorneys. As noted, Defendant Gonzales resides in the District of Columbia, as do the officials and employees of the ATF responsible for interpreting and enforcing the statutes and regulations at issue. Plaintiff Hodgkins, a resident of the United Kingdom, will not be seriously inconvenienced by transfer to the District of Columbia, nor should litigation of this case in the District of Columbia seriously inconvenience Plaintiff SAF, a resident of the State of Washington.

By contrast, litigation of this case in the Northern District of Texas, far from the parties and their attorneys, will be significantly more expensive and time consuming than litigation in the District of Columbia. See Volkswagen, 371 F.3d at 205 (considering the time and expense associated with travel in § 1404(a) analysis). Nor is this a situation where transfer to the District of Columbia would simply "shift the expense and inconvenience from one party to the other," Enserch Int'l Exploration, Inc. v. Attock Oil Co., 656 F.Supp. 1162, 1167 (N.D.Tex.1987), because the burden imposed on the government by litigating this case in the Northern District of Texas is not counterbalanced by any greater convenience for the Plaintiffs. This forum is inconvenient for everyone.

The location of counsel also warrants transfer to the District of Columbia. 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.) cert. denied 540 U.S. 1049 (2003). But, "where 'convenience of counsel bears directly on the cost of litigation, it becomes a factor to consider.'" In re AT&T Access Charge Litig., Case No. 05cv1360, 2005 WL 3274561, at *4 (D.D.C. Nov. 16, 2005) (quoting Blumenthal v. Mgmt. Assistance, 480 F.Supp. 470, 474 (N.D.Ill.1979)); see also 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."). Defendant'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 the related case brought in the Southern District of Ohio, 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 this case is litigated in the Northern District of Texas and not the District of Columbia, the location of counsel, in these circumstances, provides another reason for transfer.

Finally, granting Defendant's motion also furthers "the interests of justice." As explained, transfer to the District of Columbia will conserve resources of the federal government, which serves the public interest. See Van Dusen v. Barrack, 376 U.S. 612, 616 (1964) (transfer statute designed to protect public from unnecessary expense). In addition, transfer to the District of Columbia is warranted because it allows for the possible consolidation of this case with the nearly identical case filed by Plaintiff SAF through counsel Gura in the Southern District of

Ohio.[7] The conservation of scarce judicial resources through consolidation of nearly identical cases clearly serves "the interests of justice." See Continental Grain Co. v. The FBL-585, 364 U.S. 19, 26 (1960) ("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."). In sum, Defendant's motion should be granted because litigation of this case in the District of Columbia is more convenient for the parties, and furthers the public interest.

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

Finally, because Plaintiffs' choice of forum demonstrably fails to satisfy the requirements of 28 U.S.C. § 1391(e), it should receive no deference. Horshoe Entertainment, 337 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 "the plaintiff[s] are nonresident[s] of the forum," and because "the cause of action did not conclusively arise in the selected forum." Salinas, 358 F.Supp.2d at 571 (quoting Eugene v. McDonald's Corp., Case No. 96 C 1469, 1996 WL 411444, at *2 (N.D.Ill. July 18, 1996)). See also Piper Aircraft v. Reyno, 454 U.S. 235, 255-56 (1981) (foreign plaintiff's choice of forum entitled to less deference); Toshiba Corp. v. Hynix Semiconductor, Inc., Case No. 3:04cv2391-L, 2005 WL 2415960, at *3 (N.D.Tex. Sept. 30, 2005) ("Where the plaintiff brings suit outside its home district, or where most of the operative facts occurred outside the district, plaintiff's choice of forum has reduced

[7] See Dearth v. Gonzales, Case No. 2:06cv1012 (S.D.Ohio). Defendant also intends to seek transfer of this case to the District Court for the District of Columbia.

significance and is given less weight."). Because Plaintiffs are non-residents, and because nothing has occurred in this district, Plaintiffs' decision to sue in this district is entitled to little respect.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2007, I electronically submitted the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, 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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