No. 07-10981

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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MAXWELL HODGKINS and
SECOND AMENDMENT FOUNDATION, INC.,

Appellants,

v.

ALBERTO GONZALES,

Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
(No. 3:06-CV-2114)

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# APPELLANTS' BRIEF

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## CERTIFICATE OF INTERESTED PERSONS

*Maxwell Hodgkins, et al. v. Alberto Gonzales*
No. 07-10981

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case.

1. The Honorable Janet Boyle, United States District Judge.

2. Maxwell Hodgkins, Plaintiff-Appellant.

3. The Second Amendment Foundation, Inc., Plaintiff-Appellant.

4. Alberto Gonzales, Defendant-Appellee.

5. Counsel for Defendant-Appellee:
United States Attorney Richard B. Roper and Assistant United States Attorney John R. Coleman (trial counsel), and Assistant United States Attorney Isaac Lidsky (appellate counsel)

6. Counsel for Plaintiffs-Appellants:
Alan Gura of Gura & Possessky, PLLC and William B. Mateja of Fish & Richardson P.C.

These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

WILLIAM B. MATEJA

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs-Appellants ("Plaintiffs") respectfully request that the case be set for oral argument. The appeal raises important, novel issues regarding venue in pre-enforcement constitutional challenges under the Declaratory Judgment Act, and the government's ability to forum-shop for jurisdictional defenses.

Although Supreme Court and Fifth Circuit precedent strongly counsel reversal, there is no authoritative application of such precedent to the unusual manner in which these issues have arisen in this case. The court below relied heavily upon out-of-circuit precedent from other district courts. The decisional process may well be aided by oral argument.

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## STATEMENT OF JURISDICTION

Plaintiffs seek declaratory and injunctive relief barring as unconstitutional the enforcement of various federal statutes forbidding the acquisition of firearms by United States citizens residing overseas. The District Court had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331 and 1343.

Plaintiffs Maxwell Hodgkins ("Hodgkins") and Second Amendment Foundation, Inc. ("SAF") filed their Complaint on November 15, 2006 against Defendant-Appellee Alberto Gonzales ("Defendant"), in his capacity as Attorney General of the United States. On January 16, 2007, Defendant Gonzales moved to dismiss or transfer the case, on grounds of improper or inconvenient venue.

This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1291. The District Court issued an opinion and order granting Defendant's motion to dismiss, and directing entry of judgment for Defendant on August 15, 2007. Final Judgment for Defendant was entered the same day. Plaintiffs timely filed their Notice of Appeal on September 13, 2007. The appeal is from a final order and judgment that disposed of all parties' claims.

## STATEMENT OF ISSUES

Whether, in a pre-enforcement challenge to the constitutionality of federal criminal statutes, venue based upon the location where "a substantial part of the events or omissions giving rise to the claim occurred," 28 U.S.C. § 1391(e)(2), lies in the judicial district in which a plaintiff is refraining from engaging in prohibited conduct, and in which a defendant is enforcing the challenged laws?

## STATEMENT OF THE CASE

On November 15, 2006, Plaintiffs filed this case in the United States District Court for the Northern District of Texas, challenging the constitutionality of various federal statutes and their implementing regulation which restrict the firearms rights of American citizens within the United States while said citizens maintain overseas residence. Specifically, Plaintiffs challenge the constitutionality of 18 U.S.C. §§ 922(a)(9) and (b)(3), and their implementing regulations, 27 CFR 478.29a, 478.96, 478.99, and 478.124, to the extent such laws prohibit American citizens from acquiring firearms solely for lack of domestic residence. Plaintiffs aver that such laws violate their Second Amendment right to keep and bear arms, and their Fifth Amendment rights of international travel and equal protection of the laws.[1]

[1]The Complaint also challenged the laws on vagueness grounds, as it was unclear whether the laws would prohibit citizens from accessing lawfully acquired firearms stored in the United States. Defendant's response, disavowing any prosecutorial intent to apply the laws in this manner, is well-taken. Accordingly, Plaintiffs did not pursue the vagueness challenge.

A companion case making substantially similar allegations was filed on November 29, 2006, in the United States District Court for the Southern District of Ohio, on behalf of Plaintiff SAF and another individual, Stephen Dearth. *Dearth v. Gonzales*, U.S. Dist. Court, S.D. Ohio No. 2006-CV-2012.[2]

On January 16, 2007, Defendant, the Attorney General, moved to dismiss this case, or have it transferred to the United States District Court for the District of Columbia. Defendant argued, *inter alia*, that his "official residence" was within the District of Columbia, that none of the events relating to the action occurred in Texas, that judicial efficiency would be best served by consolidating both actions in the District of Columbia, that venue based on 28 U.S.C. § 1391(e)(2) is limited to land use disputes, and that it was too inconvenient for the Department of Justice to litigate the action in the Northern District of Texas.

Defendant's motion also alluded to the D.C. Circuit's unique standing doctrine, hinting at the true reason why Defendant is eager to challenge venue in these cases: forum-shopping. Twice within the past three years, D.C. Circuit panels have explained that their circuit's standing doctrine, in cases such as these, conflicts

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Notably, Defendant's admission that Americans living overseas may continue to possess and use firearms acquired prior to establishing overseas residence underscores that the prohibition against acquiring new firearms, on account of overseas residence, serves no rational purpose.

[2]The *Dearth* court accepted the government's venue arguments and dismissed the case without prejudice. That decision is now pending appeal in the Sixth Circuit, No. 07-3594.

– to the detriment of plaintiffs – with Supreme Court precedent, as well as the precedent of other circuits. *Seegars v. Ashcroft*, 396 F.3d 1248 (D.C. Cir. 2005); *Seegars v. Gonzales*, 413 F.3d 1, 2 (D.C. Cir. 2005) ("As a panel we were constrained by [circuit precedent], even though, as my opinion for the court made clear, it appeared to be in conflict with an earlier Supreme Court decision") (Williams, Senior Circuit Judge); *Parker v. District of Columbia*, 478 F.3d 370, 375 (D.C. Cir. 2007). "Nevertheless, until and unless this court en banc overrules [its] precedent," the D.C. Circuit will continue following its own precedent, not that of the Supreme Court. *Parker*, 478 F.3d at 375.[3]

Defendant apparently does not wish to file a jurisdictional challenge without first seeking a transfer to the D.C. Circuit, where such a motion might be more favorably received. In other words, Defendant is shopping for a forum that might decline to exercise subject-matter jurisdiction over the case.

On April 30, 2007, Plaintiffs moved for summary judgment on their Second Amendment, right to travel, and equal protection claims. On May 15, 2007, the

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[3]"When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) (other citation omitted)); *Virginia* v. *American Booksellers Ass'n*, 484 U.S. 383 (1988). The Fifth Circuit does not require threats of prosecution to sustain pre-enforcement challenges to criminal statutes. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 659-660 (5th Cir. 2006); see also *Speaks v. Kruse*, 445 F.3d 396, 399 (5th Cir. 2006).

District Court denied Defendant's motion to stay briefing the opposition to the summary judgment motion, but extended Defendant's time to oppose the summary judgment motion until ten days after resolution of the venue challenge.

On August 15, 2007, the District Court granted Defendant's motion to dismiss the action without prejudice. The District Court found that none of the parties reside within the Northern District of Texas, a fact not contested by Plaintiffs. (R. 26: 250). The case was, after all, premised on the fact that Plaintiff Hodgkins does not reside in the United States, and Plaintiff SAF's organizational standing depends on the standing of its members and supporters. Defendant's "official residence" was, as the District Court found, located in Washington, D.C. for venue purposes.[4] (R. 26: 250).

Turning to Plaintiffs' venue claim based on the Northen District of Texas being "the 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 District Court held that "[a]llegations that acts or omissions will occur at a later date are insufficient to support venue under Section 1391(e)(2)." (R. 26: 251) (citation

[4]Plaintiffs noted that Defendant's obvious and well-known connections to Texas belie the claim that Texas is an inconvenient venue for Defendant, in the rather unlikely event that his personal involvement in the case were to become necessary. Defendant was named only in his capacity as the nation's chief law enforcement officer, and the parties had agreed that the case required neither discovery nor trial. However, the District Court did not address Defendant's claims of inconvenience, ruling only that venue did not exist within the District.

omitted). Concluding that Plaintiffs' fear of prosecution and consequent forbearance of activity was not an action or omission that "occurred," the District Court found venue to be improper and dismissed the action on such grounds. (R. 26: 251-52).

The District Court did not address Defendant's discretionary transfer arguments, founded on claims of inconvenience or judicial efficiency, nor did the District Court address Defendant's "land-based claims" argument.

On September 13, 2007, Plaintiffs timely filed their notice of appeal.

## STATEMENT OF FACTS

Plaintiff Maxwell Hodgkins is a natural born citizen of the United States and a resident of the United Kingdom. Mr. Hodgkins does not currently maintain a residence within the United States. (R. 1: 6 ¶ 1).

Hodgkins has many friends and family in his native Dallas, Texas area, within the Northern District of Texas, whom he enjoys visiting, and whom he intends to continue visiting on a regular basis. (R. 1: 7 ¶ 6). Among these are Hodgkins' grandfather, two uncles, and an aunt who live in Irving, Texas. Hodgkins last visited the Dallas area in December, 2006 and January of this year, and intends to continue visiting the Dallas area on a regular basis. (R. 23: 221).

Over the years, Hodgkins has lived in Denison, Sherman, McKinney, and University Park. He graduated from McKinney High School in 1994, and attended Southern Methodist University from 1994 through 1997. (R. 23: 221).

Dallas, Texas sits within the Northern District of Texas. 28 U.S.C. § 124(a)(1).

Plaintiff SAF is a non-profit membership organization incorporated under the laws of the state of Washington with its principal place of business in Bellevue, Washington. 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. (R. 1: 6-7 ¶ 2).

Defendant Gonzales was, at the time of the filing of the Complaint, the Attorney General of the United States, and as such was responsible for executing and administering the laws, customs, practices, and policies of the United States. In that capacity, Defendant was presently enforcing the unconstitutional laws, customs, practices and policies complained of in this action, and was sued in his official capacity. (R. 1: 7 ¶ 3).

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. (R. 1: 7 ¶ 7).

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 up to five years imprisonment. 18 U.S.C. § 924(a)(1)(D). "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." 27 CFR 478.29a.

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."

Plaintiffs reasonably fear that 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. (R. 1: 9 ¶ 12).

Apart from 18 U.S.C. § 922(a)(9)'s prohibition on the acquisition of firearms by Americans residing overseas, 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 domestic residence.

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*)? _____" (R. 1: 9 ¶ 17).

If an American citizen otherwise qualified to buy a firearm cannot answer 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." (R. 1: 10 ¶ 18).

These laws are enforced. Plaintiffs are aware of at least one incident where a firearms purchase transaction was canceled on account of a non-resident citizen's inability to complete Form 4473. (R. 1: 11 ¶ 19).[5]

## SUMMARY OF ARGUMENT

The District Court erred, as a matter of law, in granting Defendant's motion.

There is no question but that pre-enforcement constitutional challenges are actual, justiciable controversies. The controversy must be occurring in some location. It logically follows that "the events or omissions" forming such controversies, 28 U.S.C. § 1391(e)(2), occur in the place where plaintiffs are compelled to forego their desired action, since such forbearance is the cognizable injury.

That the District Court's construction of Section 1391(e)(2) is impermissibly narrow appears especially obvious considering that the modern venue statute was expressly designed to permit nationwide venue in actions against the government, and free plaintiffs of the need to sue the government only in Washington, D.C. A

[5]The incident referenced is the one experienced by Stephen Dearth, plaintiff in the companion case. Mr. Dearth is an American living in Canada who frequently travels to his native Ohio, but cannot cross the border with his guns lawfully possessed in Canada nor, owing to the challenged laws, acquire new guns in the United States.

second purpose of establishing nationwide venue against the government was to relieve the federal courts in the nation's capital of a growing disproportionate burden to hear cases involving the federal government. To the District Court's credit, it wisely ignored Defendant's inconvenience, land-based, and judicial efficiency arguments. But the effect of its reasoning undermines the core purpose of Section 1391(e)(2).

## STANDARD OF REVIEW

"As the district court's determination of whether a plaintiff has filed his action in the proper venue involves an interpretation of the venue statute, it is a question of law subject to *de novo* review." *First of Michigan Corp. v. Bramlet*, 141 F.3d 260, 262 (6th Cir. 1998); *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004).

## ARGUMENT

Venue is appropriate "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).[6] In rejecting the case as properly venued in the Northern District of Texas, the District Court offered:

> There are no allegations supporting that a substantial part of the events or omissions giving rise to the claim have occurred in this district, but only of events or omissions that may occur at some future point in time. As Plaintiffs have not established that a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas and no other grounds for venue exist, the Court finds that the Northern District of Texas is an improper venue.

(R. 26: 251) (citing *Dearth v. Gonzales*, 2007 WL 1100426, at *4 (S.D. Ohio 2007) and *Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334, 1339 (M.D. Ala. 2001)).

The District Court's holding is plainly erroneous. It fails to recognize that complying with an unconstitutional law for fear of prosecution is an actionable event or omission, creating a legitimate Article III "case or controversy," and of necessity, must have occurred or be occurring within some defined judicial district. In pre-enforcement actions such as this, brought under the Declaratory Judgment Act, Section 2201, the "claim" "occurs" when a plaintiff is prevented from doing something by virtue of the challenged law.

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[6] All further statutory references are to Title 28 of the United States Code unless otherwise indicated.

## I. PRE-ENFORCEMENT CHALLENGES RELATE TO PREVIOUS OR CURRENT EVENTS AND OMISSIONS, NOT FUTURE OR CONTINGENT MATTERS.

In its most recent examination of pre-enforcement actions under the Declaratory Judgment Act, the Supreme Court explained:

> [W]here threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat -- for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction.

*Medimmune, Inc. v. Genentech, Inc.*, __ U.S. __, 127 S. Ct. 764, 772 (2007) (emphasis omitted). In the parlance of the venue statute, Section 1391(e)(2), the "events or omissions giving rise to the claim" are "[t]he plaintiff's own action (or inaction) in failing to violate the law." *Medimmune*, 127 S. Ct. at 772.

*Medimmune*'s interpretation of the injury occasioned by a criminal enactment as either a past or present event, in the sense of coercion visited upon the plaintiff; or a past omission, in the sense of the plaintiff's refraining from conduct proscribed by the statute, could hardly be otherwise. For if there were no previous or on-going injury, the pre-enforcement claim would not be ripe. There would be no live "case or controversy" to adjudicate. U.S. Const., art. III.

Yet reviewing several pre-enforcement challenges, the Supreme Court invoked the past tense, explaining, "[i]n each of these cases, the plaintiff *had*

*eliminated* the imminent threat of harm by simply not doing what he claimed the right to do . . . That did not preclude subject-matter jurisdiction because the threat-eliminating behavior *was* effectively *coerced*." *Id.* (emphasis added).

The concept that such "events or omissions" *have* occurred, or *are* occurring, at the time a pre-enforcement challenge is brought, is thus necessary to the federal courts' enterprise of entertaining pre-enforcement challenges under the Declaratory Judgment Act.

Plaintiffs' "predicament – submit to a statute or face the likely perils of violating it -- is precisely why the declaratory judgment cause of action exists." *Mobil Oil Co. v. Atty Gen'l of Va.*, 940 F.2d 73, 74 (4th Cir. 1991). Had Hodgkins engaged in his intended conduct as described in the Complaint, he would have been criminally prosecuted within the Northern District of Texas. U.S. Const., amend. VI.

Plaintiffs respectfully disagree with the District Court's opinion that "standing cases are not on point for considering venue in this case." (R. 26: 251) (citation omitted). Venue and jurisdiction are plainly different concepts. However, if a court questions whether any events or omissions have occurred in a particular location that give rise to a justiciable claim, it is highly relevant to consider precedents that define the substance of such a claim, and the manner in which that

claim arises. Precedent that discusses standing goes to the heart of the question before the Court. By determining what are the "events or omissions giving rise to the claim," Section 1391(e)(2), it is possible to identify the judicial district in which such events or omissions occurred.

Thus, the Second Circuit's decision in *Bach v. Pataki*, 408 F.3d 75 (2d Cir. 2005) is directly on-point. In *Bach*, the plaintiff, a Virginia resident, frequently visited his parents in New York, and challenged that state's prohibition on the issuance of firearms carry permits to those who neither permanently reside nor work in the state. Because the prohibition clearly applied to the plaintiff, he did not bother applying for a firearms permit. Both the District Court and the Second Circuit rejected the defendants' standing challenge:

> The State Police informed Bach that he was statutorily ineligible for a carry license. Bach had nothing to gain thereafter by completing and filing an application . . . . Imposing a filing requirement would force Bach to complete an application for which he is statutorily ineligible and to file it with an officer without authority to review it. We will not require such a futile gesture as a prerequisite for adjudication in federal court.

*Bach*, 408 F.3d at 82-83 (footnotes, citations and internal quotation marks omitted). This would be no different than forcing Hodgkins to partially fill out a Form 4473, to prove that he is ineligible to purchase firearms in Texas. Of course there is no form to partially fill out, and have rejected, in challenging the restrictions of 18

U.S.C. § 922(a)(9), limiting generally Hodgkins' acquisition of firearms to specific uses.

Although venue was not an issue in *Bach*, the case is nonetheless instructive on the topic. The Second Circuit readily accepted that Bach suffered a justiciable injury by virtue of being legally disabled from applying for a firearms permit in New York, without regard to his lack of residence in that state. That injury could only have occurred in New York – the state where the plaintiff intended to carry a firearm.

The Complaint makes clear that the prospective enforcement of the challenged provisions is causing Hodgkins to refrain from acquiring firearms in the Northern District of Texas. Nothing more is required to prove that Hodgkins is refraining from conduct within that judicial district, such that an omission giving rise to the claim is occurring locally.[7]

[7]If the venue question turns entirely on Hodgkins testing 18 U.S.C. § 922(b)(3) within the Northern District of Texas, that deficiency could be cured upon his next visit there. *See Atlas Copco, Inc. v. EPA*, 642 F.2d 458, 466 n.69 (D.C. Cir. 1979) (case ripened after filing of appellate briefs but before oral argument); *Hargrave v. Vermont*, 340 F.3d 27, 34 (2d Cir. 2003); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1238 n.2 (10th Cir. 2004).

## II. PRE-ENFORCEMENT CHALLENGES ARE PROPERLY HEARD WHEREVER THEIR UNDERLYING EVENTS OR OMISSIONS, RELATING TO A PLAINTIFF'S COERCED COMPLIANCE, HAVE OCCURRED OR ARE OCCURRING.

Because it is "the plaintiff's own action (or inaction)," coerced by the law, that creates a justiciable Article III controversy, *Medimmune*, 127 S. Ct. at 772, federal courts routinely hear pre-enforcement challenges to federal criminal enactments in whichever judicial district a plaintiff claims that said statutes are chilling his or her behavior. Indeed, as the District of Columbia comprises a very small fraction of the nation's land mass and population, it is readily obvious that most pre-enforcement challenges to federal laws are brought somewhere else.

The restraint occasioned by a challenged law is usually compelled against the plaintiffs where they live. Such location ordinarily supplies a source of venue per Section 1391(e)(3). But the citizens aggrieved in this case are defined by their lack of domestic residence. If Plaintiff Hodgkins, and the impacted members and supporters of Plaintiff SAF, resided in the Northern District, they would lack standing to challenge laws that discriminate on the basis of their foreign residence.

The fact is that this claim is arising somewhere, and that location is the Northern District of Texas. That Section 1391(e)(2) provides for venue in the district where the claim is occurring, distinct from venue where either the

governmental defendant, § 1391(e)(1), or plaintiff, § 1391(e)(3), reside, establishes that judicial district as a proper venue.

Ample precedent rejects governmental attempts to shop for venues in derogation of a plaintiff's Section 1391(e)(2) selection. Federal courts routinely hear cases against government officials in districts where the claims occurred, per Section 1391(e)(2), but in which neither party resides – "officially" or literally – and no property is involved. For example, an inmate transferred to a different prison may still sue the Director of the Bureau of Prisons in the district where an inmate was allegedly injured. *Patmore v. Carlson*, 392 F. Supp. 737, 738-39 (E.D. Ill. 1975). An ROTC recruit may sue the Secretary of the Air Force for breach of contract in the district where the recruit had attended school and the contract was allegedly breached. *Mansfield v. Orr*, 545 F. Supp. 118, 120 (D. Md. 1982).

Perhaps most notably, based on Section 1391(e)(2) (and the identical provisions of Section 1391(b)(2)), cases against the ATF arising from the Branch Davidian incident were transferred from the Southern District of Texas to the Western District of Texas, on the government's motion, because the incident occurred in Waco (Western District of Texas), notwithstanding the fact that the ATF made its contested decisions in Houston (Southern District of Texas). *Andrade v. Chojnacki*, 934 F. Supp. 817, 826 (S.D. Tex. 1996).

Ironically, the District Court relied in part on a case that strongly supports the existence of venue in the Northern District of Texas. *Seariver Maritime Financial Holdings, Inc. v. Pena*, 952 F. Supp. 455 (S.D. Texas 1996). In *Seariver*, the new owners of the infamous Exxon Valdez, re-named the "S/R Mediterranean," challenged a law that would prohibit the vessel from returning to Alaska. The government argued that the case belonged in Alaska because, among other reasons, that was where plaintiffs sought to operate the ship, but were prevented by operation of the challenged law. Seariver contended that venue lay in Houston, where the law's impact was financially felt, but the court agreed that venue was proper only in Alaska or in the defendant's Washington, D.C. "residence," and dismissed the case.

If Seariver's foregone plans to sail the Exxon Valdez to Alaska established venue in Alaska, Hodgkins's foregone plans to acquire and purchase firearms in Texas establish venue in Texas.

The only support marshaled by the District Court for its view that "mere allegations that plaintiff is complying with an unconstitutional law for fear of prosecution are insufficient to support venue where nothing occurred in the judicial district," (R. 26: 251), is the lower court decision in the companion *Dearth* matter,

which in turn relied on the other case cited by the District Court, *Rogers v. Civil Air Patrol*, 129 F. Supp. 2d 1334 (M.D. Ala. 2001).

Putting aside the fact that compliance with an unconstitutional law for fear of prosecution is not a case of "nothing occurred," nothing in *Rogers* supports the District Court's proposition for which the case is cited. *Rogers* was merely a theoretical exercise challenging, under the Appointments Clause and Separation of Powers Doctrine, a provision of the 2001 defense budget determining the composition of a governmental board. Unlike the case at bar, and contrary to the District Court's suggestion, *Rogers* was not a pre-enforcement challenge where the plaintiff had been or was being coerced by criminal sanctions into abandoning some desired behavior.

Plaintiffs are not contesting the formation of a governmental body that might someday have some impact within a district. Rather, Plaintiffs are bringing a pre-enforcement challenge to a federal criminal enactment that has altered their behavior *at a specific location*. Plaintiffs assert a redressable injury – arising from the act of enforcement, the omission of coerced restraint – and that injury occurs in the judicial district where the law was and is being enforced, and where coercion was and is being compelled.

Plaintiffs averred numerous allegations of intended conduct, restraint, and enforcement. (R. 1: 7 ¶ 7; 9 ¶12; 11 ¶¶ 19, 20, 22; 12 ¶ 24; 13 ¶¶ 26, 28; 15 ¶ 33; 16 ¶ 35). Only by ignoring these alleged events and omissions – injuries of the type ordinarily at the heart of any pre-enforcement challenge – could the District Court conclude that "nothing occurred" in the Northern District of Texas.

## III. THE MODERN VENUE STATUTE PROVIDES FOR NATIONWIDE VENUE IN CASES AGAINST THE FEDERAL GOVERNMENT.

The District Court correctly ignored Defendant's claims for a discretionary transfer based on the purported inconvenience of litigating the case in Texas. This case, after all, raises only questions of law and might well be adjudicated not only without trial, but without argument. Indeed, as the Supreme Court observed:

> The Government official is defended by the Department of Justice whether the action is brought in the District of Columbia or in any other district. U.S. attorneys are present in every judicial district. *Requiring the Government to defend Government officials and agencies in places other than Washington would not appear to be a burdensome imposition*.

*Stafford v. Briggs*, 444 U.S. 527, 542 (1980) (quoting S. Rep. No. 1992, 87th Cong., 2d Sess., 3 (1962)) (emphasis added).

But in taking an overly-restrictive view of Section 1391, the District Court did not appreciate that the modern venue statute was crafted specifically to allow for nationwide venue in cases challenging governmental conduct. Section 1391 must be interpreted broadly to vindicate its "very specific purpose of easing

plaintiffs' burdens when suing government entities." *Sidney Coal Co. v. SSA*, 427 F.3d 336, 344 (6th Cir. 2005).

> The purpose of this bill [enacting Section 1391] is 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.

*Stafford*, 444 U.S. at 539-40 (quoting H.R. Rep. No. 1936, 86th Cong., 2d Sess., 3-4 (1960)).

Accepting that the District of Columbia is the only proper venue in this action because the nation's capital is the Attorney General's "official residence" directly contradicts Section 1391(e)'s purpose. Section 1391(e) "is designed to permit an action which is essentially against the United States to be brought locally rather than requiring that it be brought in the District of Columbia simply because Washington is the official residence of the officer or agency sued." *Stafford*, 444 U.S. at 540 (quoting H. R. Rep. No. 1936, 86th Cong., 2d Sess., 2 (1960)).

As the Supreme Court concluded:

> What emerges is that the bill's author, the Committees, and the Congress intended nothing more than to provide nationwide venue for the convenience of individual plaintiffs in actions which are nominally against an individual officer but are in reality against the Government.

*Stafford*, 444 U.S. at 542.

Defendant's motion below neglected to cite *Stafford*, but that case remains the Supreme Court's leading precedent on the interpretation of Section 1391. If the plaintiff's convenience in suing the government is the paramount concern, courts should be more open to preserving the forum choices made by those who reside overseas, and must travel to the United States to participate in the litigation.

## CONCLUSION

"Litigation is the pursuit of practical ends, not a game of chess." *Alexander v. Washington*, 274 F.2d 349, 351 (5th Cir. 1960) (citation omitted). Rather than pursue the practical end of determining whether certain provisions of the federal criminal code violate fundamental rights, the government would prefer shopping for a forum where it might raise dubious jurisdictional defenses. In so doing, the government adopts venue theories that, under more convenient circumstances, it has rejected.

The Northern District of Texas is clearly a judicial district in which "a substantial part of the events or omissions give rise to the claim occurred." Section 1391(e)(2). That is the judicial district from which Plaintiff Hodgkins hales, it is the judicial district to which he is most connected, and most critically, the judicial district in which he is foregoing conduct prohibited by the challenged provisions, by virtue of Defendant's active enforcement of the law within that judicial district.

The judgment below should be reversed, and the case remanded for further proceedings, with instructions that Defendant be ordered to answer the Complaint and respond to Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that on, November 14, 2007, a hard copy of Appellants' Brief, a computer readable 3.5 inch disk containing a copy of Appellants' Brief, a copy of the record excerpts, and the official record in this case, consisting of one volume of the pleadings were served upon Mr. Isaac Lidsky, Assistant U.S. Attorney, by Federal Express, c/o United States Department of Justice, 950 Pennsylvania Avenue, NW, Suite 7217, Washington, DC 20530.

WILLIAM B. MATEJA

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because it contains ____ words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Corel WordPerfect 12 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

3. This brief and the accompanying electronic copy of this brief on a 3.5 inch diskette comply with 5TH CIR. R. 31.1 because they have been converted into Portable Document File (PDF) format.

WILLIAM B. MATEJA