No. 07-10981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAXWELL HODGKINS and
SECOND AMENDMENT FOUNDATION, INC.,
Appellants,

v.

MICHAEL B. MUKASEY,
Appellee.

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

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SUMMARY OF ARGUMENT

Having assumed the correctness of its ultimate litigating position – that venue was improper – the government frames the case as one regarding a district court's discretion to transfer or dismiss improperly venued cases. The government thus distorts the District Court's holding, and skips over the appeal's core question – whether "a substantial part of the events or omissions giving rise to the claim occurred" in the Northern District of Texas. 28 U.S.C. § 1391(e)(2).[1] The court below dismissed the case because it believed the answer to this question was "no." Whether the case was one "laying venue in the wrong division or district," Section 1406(a), is entirely a question of law to be reviewed *de novo*.

The government next suggests that an order establishing venue in a court that would probably decline subject matter jurisdiction, and from which there could be no appeal of a transfer order, is not a "final" appealable order. But the government's jurisdictional argument depends entirely on assuming the correctness of its substantive position. The government carefully avoids disputing that the transferee court would most likely decline to exercise subject matter jurisdiction over the case. After all, the government would doubtless raise the transferee forum's unique jurisdictional problems were the case heard there. Nonetheless, the

[1] All further statutory references are to Title 28 of the United States Code.

government claims that the order being appealed from is not final, because the case could be relitigated in the transferee venue.

The jurisdictional challenge is thus boot-strapping. Only if the District of Columbia is an available forum under Sections 1404 and 1406 can it be said that re-litigation in that forum is available. Yet because the government assumes that the District of Columbia is an available forum, it claims that the decision establishing venue in that forum is not reviewable.

Missing from the government's "Catch-22" analysis is the fact that the venue order is not reviewable outside the Fifth Circuit. The District of Columbia Circuit lacks jurisdiction to review decisions of a district court sitting in Texas. If review of the venue determination is premature before this Court, it is not available in the next court.

In essence, the government urges that a district court may transfer a case to a forum that would decline subject matter jurisdiction over the case, and such a transfer order is not directly reviewable in any court. Not in the court of appeals covering the transferee court, because that court lies in a different circuit. And not in the court of appeals covering the transferor court, because an order transferring the case to a court lacking jurisdiction from which no appeal of the transfer order is possible is somehow not "final."

Plaintiffs respectfully submit that the order appealed from is final because it has the practical effect of terminating the litigation.

As for the government's other jurisdictional challenge, the order of dismissal was not voluntary in any sense of the word. Plaintiffs strenuously objected to dismissal of the case. The District Court did not grant a voluntary request of dismissal. Plaintiffs only offered that dismissal was a preferred outcome, were the outcome to be adverse, as a contingent means to preserve their appellate rights. Even if the dismissal were voluntary, the venue conditions inherent in the dismissal are prejudicial to the Plaintiffs, and were clearly opposed by them, rendering such a dismissal appealable.

Plaintiffs do not confuse questions of jurisdiction and venue. But where jurisdictional analysis identifies the location of a justiciable controversy, it becomes relevant to the government's venue challenge. And it is somewhat ironic for the government to claim the irrelevance of jurisdictional issues, where the absence of jurisdiction in the government's desired forum is fomenting the venue dispute.

But the most notable omission from the government's brief – as in its motion in the court below – is any reference to the Supreme Court's leading precedent on the issues being litigated: *Stafford* v. *Briggs*, 444 U.S. 527 (1980).

Stafford is explicit, and controlling: Section 1391(e)(2) established nationwide venue in cases against the government for the express purpose of abolishing the requirement to litigate such cases in Washington, D.C. This point remains unchallenged. As it is irrefutable.

ARGUMENT

I. THIS APPEAL RAISES A QUESTION OF LAW TO BE REVIEWED DE NOVO.

Right or wrong, the District Court based its judgment upon a finding that venue did not exist within its judicial district. Accordingly, the question presented by this appeal is whether the case was one "laying venue in the wrong division or district." Section 1406(a). Only at the conclusion of its brief does the government concede that the District Court did not engage in any discretionary balancing test. *See* Dfs. br. at 22 n.4.

Whether the case was filed in the "wrong district" is purely a question of law. *See 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). Such a question was not presented in *Lowery* v. *Estelle*, 533 F.2d 265 (5th Cir. 1976), upon which the government erroneously relies for its "abuse of discretion" standard of review. In *Lowery*, the venue was clearly wrong – the only issue was whether the district

court's action upon such a finding, dismissal as opposed to transfer, was an abuse of discretion. But in the instant case, the primary question of law upon which a district court might exercise discretion is itself at issue. If the case was not filed in the "wrong district," the District Court lacked authority to dismiss or transfer the case per Section 1406(a).

Had it concluded, correctly, that venue was proper in the Northern District of Texas, the District Court might have granted the government's alternative relief – a discretionary transfer, per Section 1404(a). But the opinion below contains no such analysis. Dfs. br. at 22 n.4. Nor would a discretionary transfer be available, considering the jurisdictional hurdles inherent in the government's preferred venue.

II. THE DISTRICT COURT'S ORDER IS "FINAL" AND THUS APPEALABLE.

As the government points out, "this Court has explained that a dismissal without prejudice is reviewable under § 1291 only when . . . the plaintiff is . . . '*effectively* out of court.'" Dfs. br. at 13 (quoting *Linn* v. *Chivatero*, 714 F.2d 1278, 1280 (5th Cir. 1983) (emphasis added).

"The appealability of an order depends on its effect, not its language." *Linn*, 714 F.2d at 1280 (citation omitted). The dispute in this case centers on the content of the word "effectively."

Linn is not unique in qualifying the final nature of dismissals without prejudice. As another of the government's cases points out, "[f]or a dismissal without prejudice to be *inherently* final, it must, *as a practical matter*, prevent the parties from further litigating the merits of the case in federal court." Dfs. br. at 13 (quoting *Robert N. Clemens Trust* v. *Morgan Stanley DW, Inc.*, 485 F.3d 840, 845 (6th Cir. 2007) (citations omitted)) (emphasis added).

"The critical determination [as to whether an order is final] is whether plaintiff has been *effectively excluded* from federal court *under the present circumstances*." *United States* v. *Yeager*, 303 F.3d 661, 665 (6th Cir. 2002) (citations omitted) (emphasis added).

Plaintiffs submit that transferring a case to a forum that would decline subject matter jurisdiction without the prospect of appeal constitutes "effective exclusion" from federal court. Plainly, that describes the result that would obtain had the government obtained its desired venue in the District of Columbia.

The purported availability of venue in Washington state is illusory. In both this action, and the companion case, the government urged that Texas and Ohio,

respectively, are too inconvenient for it. Indeed, the government would like for a remand on just that precise question. Dfs. br. at 22 n.4. Of course, this case presents only questions of law and should not require discovery, much less trial, but the government has elected to claim *distance from Washington, D.C.* as a basis for inconvenience. It is within judicial notice that Seattle is significantly more distant from Washington, D.C. than is Dallas.

Nor is the purported ability to refile the case in Texas, upon some future activity by Mr. Hodgkins, any guarantee that the result would not be the same. The government would, at a minimum, continue to insist that the case be transferred to Washington, D.C. *See* Dfs. br. at 22 n.4. There is no guarantee that should Plaintiffs refile their litigation anywhere else, the government would not still insist on a transfer to Washington, D.C. on grounds of convenience.[2]

And with respect to Plaintiffs' pre-enforcement challenge to 18 U.S.C. § 922(a)(9), a simple criminal prohibition on the acquisition of firearms for certain purposes, the government would still claim that nothing has "occurred" in Texas for venue purposes until Mr. Hodgkins violates the law.

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[2] Of course the government is not actually interested in having the case heard in Seattle any more than it desired to appear in Columbus or Dallas. The government is establishing a pattern of challenging any venue in these cases that is not Washington, D.C.

Should the case be transferred to the unavailable forum against Plaintiffs' will, the order accomplishing this result would be unreviewable. Every circuit that has considered the question, including each of the circuits encompassing the other purportedly available forums, has declared that it lacks jurisdiction to hear transfer orders originating within a different circuit. *See Starnes* v. *McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) (en banc); *Posnanski* v. *Gibney*, 421 F.3d 977, 979-80 (9th Cir. 2005) (collecting cases).

Plaintiffs readily concede that orders dismissing a case without prejudice are usually not final in nature. However, "under the present circumstances," *Yeager*, 303 F.3d at 665, the order below is all but certain to lead the case to an unavailable forum, thus tending to have the effect of "effectively exclud[ing]" Plaintiffs "from federal court." *Id.*

III. THE DISTRICT COURT DID NOT GRANT A VOLUNTARY REQUEST FOR DISMISSAL BY THE PLAINTIFFS.

The government incompletely cites to *Duffy* v. *Ford Motor Co.*, 218 F.3d 623, 626 (6th Cir. 1998) for the proposition that "[t]he general rule is that a plaintiff who requests and is granted a voluntary dismissal without prejudice *under Federal Rule of Civil Procedure 41(a)(2)* cannot appeal that dismissal, because it is not an

involuntary adverse judgment." (footnote and citations omitted) (emphasis added). *Duffy* warrants more careful treatment than that afforded in the government's brief.

In the Fifth Circuit, the *Duffy* principle is explained as one where a voluntarily-dismissing plaintiff "gets what he seeks." *Marshall* v. *Kansas City S. Ry. Co.*, 378 F.3d 495, 500 (5th Cir. 2004) (footnote omitted). This is hardly an apt description of what occurred below, where the District Court granted Defendant's motion to dismiss over Plaintiffs' objections.

As an initial matter, the *Duffy/Marshall* lines of cases relate to voluntary dismissals under Fed. R. Civ. P. 41 – not the granting of a contested motion to dismiss under Fed. R. Civ. P. 12 and Section 1406(a). Plaintiffs reject the notion that they requested a voluntary dismissal. It was the government that moved for dismissal or transfer. Plaintiffs strongly opposed both outcomes. In the contingency that they would lose the motion, Plaintiffs' expression of a preference for the outcome that is at least appealable does not thereby deprive the appellate court of jurisdiction.

The District Court might just as easily have entered the same dismissal, at its option, without Plaintiffs voicing their preference, and the government could not then claim voluntariness as a grounds for attacking this Court's jurisdiction.

But even were the *Duffy* rule applicable to the contingent preference for dismissal, there is the general rule cited by the government, and there are the ancillary rules more appropriately covering particular circumstances such as the case at bar. *Duffy* continues:

> Several circuits have recognized an exception to this rule of nonappealability, however, when the plaintiff has suffered "legal prejudice" from the conditions imposed by the district court and has not acquiesced in those conditions. The case law in this circuit suggests that this court would recognize a similar exception.

Duffy, 218 F.3d at 627 (citations omitted).

The Fifth Circuit stands among the courts recognizing that voluntary dismissal, albeit "without prejudice," is appealable when conditioned upon requirements in which the plaintiff has not acquiesced, and which legally prejudice the plaintiff. *Coliseum Square Ass'n* v. *Jackson*, 465 F.3d 215, 249 (5th Cir. 2006).

Clearly the Plaintiffs' request for a dismissal in lieu of transfer, contingent only upon losing a motion seeking dismissal or transfer which Plaintiffs vigorously *opposed*, is not "acquiescing" in the legal prejudice that accompanied the District Court's order. And the legal prejudice is quite severe – Plaintiffs are asked to refile the case in a forum that would not recognize subject matter jurisdiction, or refile the case in the same forum but face yet another venue challenge from the government. Notably at least one aspect of Plaintiffs' case – the challenge to 18

U.S.C. § 922(a)(9) – is in the form of a pre-enforcement challenge. There is, with respect to this provision, nothing left for Plaintiffs to do but violate the law.

When the government claims that Plaintiffs seek to "manufacture appellate jurisdiction by requesting a dismissal without prejudice in preference to a non-appealable transfer order," Dfs. br. at 16, it is saying, in effect, "the plaintiffs should not be allowed to obtain any kind of order that is appealable." Plaintiffs respectfully disagree.

The government's citation to *Marshall* is likewise unavailing. *Marshall* did not, as suggested by the government, Dfs. br. at 16, involve any transfer order. Rather, *Marshall* involved the attempt to voluntarily dismiss claims against one defendant to obtain review of a non-final order dismissing other defendants. This Court explained that the tactic violated "the 'settled rule in the Fifth Circuit that appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice.'" *Marshall*, 378 F.3 at 499 (footnote omitted).

It is difficult to discern what applicability the *Marshall* rule has to this case. Not only did Plaintiffs not voluntarily dismiss their case, but in no way did the District Court's dismissal act as a piecemeal dismissal that is being used to reach some earlier-entered non-final order. Here, the District Court dismissed the entirety of Plaintiffs' case, in one order. The citation to colorful language from

Marshall notwithstanding ("finality trap," Dfs. br. at 16 (quoting *Marshall* at 499); "having his cake . . . and eating it too," Dfs. br. at 14 (quoting *Marshall* at 500)), Plaintiffs' expression of a preference between two adverse outcomes does not raise any "early bite at reversing [other] claims dismissed involuntarily." *Marshall*, 378 F.3d at 500. In this case, there are no other claims.

But the government's position has another effect. By seeking to foreclose all possible avenues of appeal, it all but endorses the extraordinary writ of mandamus. Mandamus is not favored in this circuit. *In re Cragar Industries, Inc.*, 706 F.2d 503, 506 (5th Cir. 1983) (mandamus withheld despite finding that district court abused its discretion in transferring case). Had the District Court actually transferred the case, Plaintiffs would have been forced to petition for such a writ on an emergency basis before the file were transferred. *Starnes*, 512 F.2d at 935. Given the likely dispositive impact of determining venue for this action lies in the District of Columbia, Plaintiffs communicated a preference for an appealable order of dismissal.

In so doing, Plaintiffs did not seek to "manufacture" an appealable order. The government sought to manufacture an appealable order when it urged the District Court that venue lay in an unavailable forum. The government's invocation of the rule against having one's cake and eating it too, Dfs. br. at 14

(citation omitted), better describes a defendant who wishes to obtain what is for all intents and purposes a final order of dismissal, and have that order rendered unappealable as well.

IV. JURISDICTIONAL CONSIDERATIONS ARE RELEVANT TO QUESTIONS OF VENUE.

Beyond asserting its novel jurisdictional challenges to this appeal, the government's brief does not adequately address Plaintiffs' substantive arguments. Only a few such points merit reply.

Plaintiffs submit that to the extent Hodgkins is not violating the law, his coerced compliance is plainly a justiciable injury within the meaning of the Declaratory Judgment Act, and such injury must, by definition, be occurring for the most part in the judicial district where his coercion is compelled.

The government correctly states that "[v]enue is not necessarily proper in a given court simply because the court could constitutionally consider the matter, and Congress is not obliged to provide for venue in every court that has the power under Article III to hear a dispute." Dfs. br. at 20.

But in this case, it is enough that Congress has provided venue in the Northern District of Texas per Section 1391(e)(2). And examination of the "case or controversy" at issue, U.S. Const., art. III, is a useful guide to determining

where "a substantial part of the events or omissions giving rise to the claim occurred." Section 1391(e)(2).

Moreover, venue is *improper* in any court that would refuse to hear the case. Such courts are not considered to be available venues. Had the Northern District of Texas not been a proper venue, the case could only be transferred "to any district or division *in which it could have been brought*." Section 1406(a) (emphasis added). And a district court's discretionary power to transfer a case from an available forum can only be exercised if a case is transferred "to any other district or division *where it might have been brought*." Section 1404(a) (emphasis added).

If a transferee forum would decline to exercise subject matter jurisdiction, then it is plainly not a forum in which the case "could have been brought" or "might have been brought." If a transferee court lacks personal jurisdiction, "it is not a district 'where [the action] might have been brought'" under Section 1404(a)." *Hoffman* v. *Blaski*, 363 U.S. 335, 344 (1960) (citation omitted). This is so even if the defendant waives personal jurisdiction. *Id.* Unlike personal jurisdiction, the absence of subject matter jurisdiction cannot be waived. Thus, it is equally true that a transferee court is not one "where [the action] might have been brought" where the court lacks subject-matter jurisdiction. *See*, *e.g. Schecher*

v. *Purdue Pharma L.P.*, 317 F. Supp. 2d 1253, 1256 (D. Kan. 2004) (footnote omitted).

In theory, and almost always in practice, all district courts exercise identical subject-matter jurisdiction as defined by Congress. Cases such as this, where a defendant seeks transfer to the *one* judicial district in the nation that may be bound by an anomalous view of subject matter jurisdiction, are rare. But review of cases decided under the *forum non conveniens* doctrine governing transfer to overseas fora reveals that subject matter jurisdiction must be present in the transferee venue.

In asking that a case be transferred to a foreign venue, a defendant must first establish "that the claim can be heard in an available and adequate alternative forum." *Duha* v. *Agrium*, 448 F.3d 867, 873 (6th Cir. 2006). "[D]ismissal would not be appropriate where the alternative forum does not permit litigation of the subject matter of the dispute." *Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 255 n.22 (1981) (citation omitted). "A federal court has discretion to dismiss a case on the ground of *forum non conveniens* 'when an alternative forum has jurisdiction to hear [the] case.'" *Sinochem Int'l Co.* v. *Malay. Int'l Shipping Corp.*, ___ U.S. ___, 127 S. Ct. 1184, 1190 (2007) (citation omitted). Such dismissal "is a determination that the merits *should be adjudicated* elsewhere." *Sinochem*, at 1192 (citations omitted) (emphasis added).

Plaintiffs are confident that in due time, the D.C. Circuit's approach to jurisdiction will be conformed to that which exists in the rest of the country, including the Fifth Circuit. For now, the government cannot seek transfer to Washington, D.C., of cases involving the government by refusing to acknowledge justiciable "events or omissions" outside the District of Columbia, or claiming that anywhere but Washington, D.C. is inconvenient for it to litigate. This much is made clear by *Stafford* v. *Briggs*, 444 U.S. 527 (1980), as discussed in Plaintiffs' opening brief. The government's failure to address *Stafford* speaks volumes.

CONCLUSION

The order of dismissal was, for all intents and purposes, final. It would likely have the effect of shutting Plaintiffs from federal court. Stating a preference for an appealable order in the event of a loss is not the same as a voluntary dismissal. And the dismissal in this case was comprehensive.

The District Court erred as a matter of law in finding that venue does not lie within its judicial district. The challenged laws compel forbearance in the Northern District of Texas, and render desired, constitutionally-protected conduct impossible in that judicial district for Plaintiffs.

This Court has jurisdiction to hear the appeal. 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, January 3, 2008, a hard copy of Appellants' Brief, a computer readable 3.5 inch disk containing a copy of Appellants' Brief 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.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,500 words, excluding the parts of the brief excluded 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 this brief has been prepared in proportionately spaced typeface using WordPerfect 12 in 14 point Times New Roman font.

3. This brief and the accompanying electronic copy of this brief on a 3.5 inch diskette comply with 6th Cir. R. 31.1 because they have been converted into Portable Document File (PDF) format.

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Dated: January 3, 2008