No. 07-10981

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAXWELL HODGKINS, et al.,

Plaintiffs-Appellants,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

MARK B. STERN
(202) 514-5089
ISAAC J. LIDSKY
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7217
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

STATEMENT REGARDING ORAL ARGUMENT

The district court's reasoning is plainly set out in its decision and uncontraverted by precedent. For the reasons set out in Part I of the Argument, it is also evident that this court lacks appellate jurisdiction. Accordingly, the government does not believe oral argument is necessary. However, counsel stands ready to present argument if the Court believes argument will facilitate its deliberations in this case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Regulations:

Rules:

Other Authorities:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAXWELL HODGKINS, et al.,

Plaintiffs-Appellants,

v.

MICHAEL B. MUKASEY, U.S. ATTORNEY GENERAL,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLEE

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, and the government challenged the propriety of venue in the Northern District of Texas. Plaintiffs asked the court to dismiss without prejudice if it determined that venue was not proper. Pursuant to this request, the district court dismissed plaintiffs' lawsuit without prejudice on August 15, 2007, and plaintiffs filed a timely notice of appeal on September 13, 2007. As explained in Part I of our Argument, the district court's grant of voluntary dismissal without prejudice was not appealable and this Court thus lacks jurisdiction.

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction to consider plaintiffs' appeal of the voluntary dismissal of their action without prejudice.

2. Whether the district court abused its discretion when it concluded that venue was improper in the Northern District of Texas.

STATEMENT OF THE CASE

Plaintiffs Maxwell Hodgkins and the Second Amendment Foundation initiated this action in the district court for the Northern District of Texas to challenge provisions of federal gun control law. The government moved to dismiss on the ground that venue was improper in the Northern District of Texas and that other fora would, in any event, be more appropriate. The district court held that venue was improper. Plaintiffs requested that their action be dismissed rather than transferred. Pursuant to that request, the district court dismissed plaintiffs' suit without prejudice. Plaintiffs appeal from that order.

STATEMENT OF FACTS

I. STATUTORY BACKGROUND.

A. Venue for Actions Against Federal Defendants.

For suits "in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity," venue is proper in any 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).

If venue is improper, a district court may either dismiss the action or transfer the case to a court in which the action could properly have been brought. 28 U.S.C. § 1406(a). If a court finds that venue is proper, it may nonetheless exercise its discretion to transfer an action "to any other district or division where it might have been brought" if it concludes that such transfer is warranted "[f]or the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a).

B. The Federal Prohibition Against the Purchase of Weapons by Non-residents for Non-sporting Purposes.

Two provisions of the federal gun control laws prohibit the purchase or receipt of firearms by foreign residents unless the purchase or receipt is for lawful sporting purposes. The first provision 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).

The second provision makes it "unlawful for any licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver . . . 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." 18 U.S.C. § 922(b)(3). In general, this prohibition does not apply to "the loan or rental of a firearm to

any person for temporary use for lawful sporting purposes." Ibid.

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)? _____." A purchaser's inability or unwillingness to answer Question 13 requires cancellation of the transaction. Pls. br. at 9.

II. THE PRESENT LITIGATION.

A. Plaintiffs' Second Amendment Foundation is a non-profit membership organization incorporated under the laws of the state of Washington with its principal place of business in Bellevue, Washington. Pls. br. at 7. As discussed below, this is one of two pending cases in which the Second Amendment Foundation challenges the constitutionality of 18 U.S.C. §§ 922(a)(9) and (b)(3). Plaintiffs' Excerpts of Record at 2 (hereinafter "R.E. __").

In this case, the Foundation joins plaintiff Maxwell Hodgkins. Their lawsuit alleges that plaintiff Hodgkins, who resides in the United Kingdom, "would like to access [his] 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" at some point in the future. Pls. br. at 1, 7-8.

In November 2006, plaintiffs filed this suit in the Northern District of Texas, challenging the constitutionality of the federal prohibition against non-resident acquisition of firearms for non-sporting purposes. Pls. br. at 2. Plaintiffs named as sole defendant the U.S. Attorney General, then Alberto Gonzales, in his official capacity.[1] R.E. 2.

[1] Pursuant to Fed. R. App. P. 43(c)(2), Michael B. Mukasey is substituted for Alberto Gonzales as Attorney General of the United States of America.

On January 16, 2007, the Attorney General moved to dismiss for improper venue pursuant to 28 U.S.C. § 1406, or to transfer the matter to another forum in the interests of justice pursuant to 28 U.S.C. § 1404. R.E. 1, 2. The Attorney General explained that the plaintiffs had failed to establish venue under any of the three prongs set forth in 28 U.S.C. § 1391(e), which governs venue over federal defendants, and that, in any event, the interests of justice would be advanced by laying venue in one of other fora.

B. The district court granted the government's motion to dismiss for improper venue. R.E. 5. The court first explained that plaintiffs could rely only on 28 U.S.C. § 1391(e)(2) to establish jurisdiction, "because neither [the Second Amendment Foundation], Hodgkins, nor [the Attorney General] reside[d] in the Northern District of Texas and no property [was] the subject of this action." R.E. 3. The court next turned to plaintiffs' argument that "a substantial part of the events or omissions giving rise to the claim occurred in the Northern District of Texas because, in essence, Hodgkins 'would like to access [his] firearms, as well as acquire new ones" when he visits friends and family in Texas[.]'" R.E. 3 (quoting Pls. Resp. at 2).

The court concluded that "[p]laintiffs' arguments [were] unpersuasive." R.E. 3-4. "'Because the Federal Declaratory Judgment Act makes no provision as to the venue of an action in which declaratory relief is sought,'" the court explained, "'the

venue of such actions is controlled by the federal statutes relating to venue.'" R.E. 4 (quoting Dearth v. Gonzales, 2007 WL 1100426 *1, *4 (S.D. Ohio 2007)). Turning to 28 U.S.C. § 1391(e)(2), the controlling venue provision, the court stressed that "[t]here [were] no allegations supporting that a substantial part of the events or omissions giving rise to the claim . . . occurred in [the Northern District of Texas], but only of events or omissions that may occur at some future point in time." R.E. 4. But "[a]llegations that acts or omissions will occur at a later date," the court explained, "are insufficient to support venue under Section 1391(e)(2)." R.E. 4. The court explained that plaintiffs erroneously conflated principles of standing with principles of venue. "Although [p]laintiffs cite[d] cases involving standing issues," the court observed, "Section 1391(e) makes no mention of standing and those cases [were] not on point for considering venue in this case." R.E. 4 (citing Seariver Maritime Fin. Holdings, Inc. v. Pena, 952 F. Supp. 455, 460 (S.D. Texas 1996)). Rather, "[t]he relevant issue [was] where 'a substantial part of the events or omissions giving rise to the claim occurred.'" R.E. 4 (quoting Rogers v. Civil Air Patrol, 129 F. Supp. 2d 1334, 1339 (M.D. Ala. 2001) (quoting 28 U.S.C. § 1391(e)(2))).

"As Plaintiffs [did] not establish[] 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[ed], the [c]ourt f[ound] that the Northern District of Texas [was] an improper venue." R.E. 4 (citing Dearth, 2007 WL 1100426 at *4; 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); Rogers, 129 F. Supp. 2d at 1339 ("performance at a later date in this judicial district cannot support venue under section 1391(e)(2)")).

Noting that "[p]laintiffs request[ed] dismissal rather than transfer," the court did not reach the government's transfer arguments (under § 1406 and § 1404), but instead dismissed plaintiffs' lawsuit without prejudice. R.E. 5 n.2.

C. In a second suit, filed in the Southern District of Ohio, which makes "substantially similar allegations," the Second Amendment Foundation joins a different individual plaintiff who similarly asserts an intention to purchase firearms in the Southern District of Ohio. Pls. br. at 3; Dearth, 2007 WL 1100426. The action commenced in the Southern District of Ohio and was dismissed for improper venue. Dearth, 2007 WL 1100426 at *5. Plaintiffs' counsel in this action also represents the plaintiffs in the Southern District of Ohio litigation.

On February 2, 2007, plaintiffs in the litigation in the Southern District of Ohio filed an amended complaint, seeking to add as a defendant Gregory Lockhart, the U.S. Attorney for the Southern District of Ohio. Dearth, 2007 WL 1100426 at *3.

On February 8, 2007, the Attorney General filed a motion to dismiss or transfer plaintiffs' lawsuit in the Southern District of Ohio for improper venue. Id. at *1. Plaintiffs opposed the defendant's motion and further "requested that, in the event the District Court accepted Defendant's venue arguments, that the case be dismissed rather than transferred." Id. at *5.

The district court for the Southern District of Ohio rejected plaintiffs' proposed amendment, concluded that venue was improper in the Southern District of Ohio, and held that the interests of justice dictated that either of two other fora would be a more proper forum for plaintiffs' lawsuit. Id. at *5. However, because plaintiffs "expressly asked for the dismissal of [their] case if the [district c]ourt determine[d] that venue in the Southern District of Ohio [was] flawed," the court "[did] not weigh whether transfer [was] more appropriate than dismissal," but instead dismissed plaintiffs' action without prejudice. Ibid. Plaintiffs have appealed that decision to the U.S. Court of Appeals for the Sixth Circuit, Pls. br. at 3 n.2, and argument has been calendared for January 30, 2008.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction to consider the voluntary dismissal without prejudice of plaintiffs' lawsuit. Plaintiffs premise this Court's jurisdiction on 28 U.S.C. § 1291. But that provision accords a court of appeals jurisdiction to review a judgment only if it "'ends the litigation on the merits and

leaves nothing for the court to do but execute the judgment.'" Coopers & Lybrand v. Livesay, 437 U.S. 463, 467 (1978) (citation omitted). The dismissal without prejudice at issue does nothing of the sort. Plaintiffs immediately can file their lawsuit in Washington State or Washington D.C. And if they persist in their desire to pursue their claims in the Northern District of Texas, a jurisdiction in which none of the parties reside, they may do so in the future at a time of their choosing, as they concede, because the "[venue] deficiency could be cured upon [Hodgkins's] next visit" to Texas, which he "intends to continue visiting on a regular basis." Pls. br. at 6, 17 n.7. The judgment at issue is thus in no sense final.

Moreover, plaintiffs have forfeited appellate review at this juncture because they explicitly requested that the district court dismiss their lawsuit without prejudice rather than transfer it and the court granted this relief. "By attempting to manufacture appellate jurisdiction through the voluntar[y] dismissal of [their] action," plaintiffs have ensnared themselves in this Circuit's "so-called 'finality trap,' thereby forfeiting altogether [their] right to appeal." Marshall v. Kansas City Southern Ry. Co., 378 F.3d 495, 499 (5th Cir. 2004).

2. In any event, the district court did not abuse its discretion by concluding that venue was improper in the Northern District of Texas. As plaintiffs recognize, because they chose to initiate their lawsuit against a federal defendant in a

district in which none of the parties reside, they could premise venue only on 28 U.S.C. § 1391(e)(2), which authorizes suit in a district if "a substantial part of the events or omissions giving rise to the claim occurred [in that district], or a substantial part of property that is the subject of the action is situated [in that district]." 28 U.S.C. § 1391(e)(2). Plaintiffs, however, allege no "events or omissions giving rise to the claim" occurring in Texas. Rather, they seek declaratory relief based on their allegation that Hodgkins will be visiting Texas; that he may attempt to purchase firearms; and that he will be refused purchase by a firearms dealer under existing law. As the district court concluded, these allegations do not amount to "events" for venue purposes. And in any event, even if plaintiff Hodgkins's desire to purchase a weapon in Texas could be construed as a relevant "event or omission" involving the Attorney General, it would not be sufficient to establish venue under the statute's substantiality requirement.

As the district court stressed, plaintiffs' endeavor to invoke standing principles in order to justify their venue choice is unavailing. Plaintiffs do not cite a single venue case that supports their position. The standing cases they muster cannot fill the void for the simple reason that, in plaintiffs' words, "[v]enue and jurisdiction are plainly different concepts." Pls. br. at 14.

STANDARD OF REVIEW

A dismissal for lack of venue pursuant to 28 U.S.C. § 1406 is reviewed for an abuse of discretion. Lowery v. Estelle, 533 F.2d 265, 267 (5th Cir. 1976).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO CONSIDER PLAINTIFFS' APPEAL OF THEIR VOLUNTARY DISMISSAL WITHOUT PREJUDICE.

A. Pursuant to 28 U.S.C. § 1291, this Court may exercise jurisdiction over "final decisions of the district courts of the United States." 28 U.S.C. § 1291. "The general test of whether a given decision is 'final' for these purposes is whether it '"ends the litigation on the merits and leaves nothing for the court to do but execute the judgment."'" Spiess v. C. Itoh & Co., 725 F.2d 970, 973 (5th Cir. 1984) (quoting Coopers & Lybrand, 437 U.S. at 467).

Applying that principle, this Court has explained that a dismissal without prejudice is reviewable under § 1291 only when there is "nothing left to decide" and the plaintiff is thus "effectively out of court." Linn v. Chivatero, 714 F. 2d 1278, 1280 (5th Cir. 1983); see also, e.g., Robert N. Clemens Trust v. Morgan Stanley DW, Inc., 485 F.3d 840, 845 (6th Cir. 2007) (explaining "that '[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'" (citation omitted)). As the Third Circuit explained in Berke v. Bloch, 242 F.3d 131, 135 (3d Cir. 2001), "an order

dismissing a complaint without prejudice is not a final and appealable order unless, for example, the plaintiff no longer can amend the complaint because the statute of limitations has run or if the plaintiff has elected to stand on their pleadings." (citations omitted). See also Morton Intern., Inc. v. A.E. Staley Mfg. Co., 460 F.3d 470, 477 (3d Cir. 2006) (no jurisdiction to review dismissal without prejudice where plaintiff "[did] not argue that it no longer [could] initiate litigation arising out of the basic controversy in [the] case").

"The reason for the dismissal without prejudice exception to the general rule that an order in a case is final for purposes of appeal when the court has dismissed the case as to all claims and parties is obvious, as the treatment of dismissals without prejudice as not being final 'disallows the manipulative plaintiff from having his cake (the ability to refile the claims voluntarily dismissed) and eating it too (getting an early bite at reversing the claims dismissed involuntarily).'" Morton Intern., Inc., 460 F.3d at 477 (quoting Kansas City S. Ry. Co., 378 F.3d at 500).

B. Plaintiffs' action was dismissed without prejudice, without any discussion of the merits of the dispute, and plaintiffs have not renounced their intention to reinstate litigation. In no sense does the district court's order "as a practical matter prevent the [plaintiffs] from further litigating the merits of the case in federal court." Plaintiffs can file

their suit in Washington, D.C., or Washington State. Indeed, plaintiffs not only concede this much, but also concede that the district court's order does not even prevent them, as a practical matter, from further litigating in the same venue. See, e.g., Pls. br. at 16 n.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."); id. at 6 (explaining that Hodgkins "intends to continue visiting on a regular basis * * * his native Dallas, Texas area, within the Northern District of Texas").

Plaintiffs' jurisdictional argument is particularly anomalous because the court dismissed, rather than transferred, their case at plaintiffs' own request. R.E. 5 n.2 ("Plaintiffs request[ed] dismissal rather than transfer."). Had the district court transferred plaintiffs' action, that decision would not have been subject to appellate review. See, e.g., Coopers & Lybrand, 437 U.S. at 467 (Generally, an order to transfer a case cannot be appealed because it is not a final decision for the purposes of creating appellate jurisdiction.); Blue Ash Development, Inc. v. Polan, 74 F.3d 1240, 1 (6th Cir. 1996) ("The settled rule is that neither a grant nor a denial of a motion to transfer is immediately appealable under 28 U.S.C. § 1291 or § 1292.").

This Court has explained that "[b]y attempting to manufacture appellate jurisdiction through the voluntar[y]

dismissal of [an] action," a plaintiff is ensnared in "the so-called 'finality trap,' thereby forfeiting altogether [his] right to appeal." Kansas City Southern Ry. Co., 378 F.3d at 499; see also, e.g., Duffy v. Ford Motor Co., 218 F.3d 623, 626 (6th Cir. 2000) ("The general rule is that a plaintiff who requests and is granted a voluntary dismissal without prejudice . . . cannot appeal that dismissal, because it is not an involuntary adverse judgment."). Like the plaintiffs in Marshall, plaintiffs here cannot manufacture appellate jurisdiction by requesting a dismissal without prejudice in preference to a non-appealable transfer order.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY CONCLUDING, UNDER 28 U.S.C. § 1406(a), THAT VENUE DID NOT LIE IN THE NORTHERN DISTRICT OF TEXAS.

For suits "in which a defendant is an officer or employee of the United States or any agency thereof acting in his official capacity," venue is proper in any 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).

Pursuant to 28 U.S.C. § 1406(a), a district court may dismiss an action if it concludes that venue is improper. However, "if it be in the interest of justice," the district

court may "transfer such [a] case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a).

A. As plaintiffs recognize, they cannot premise venue on § 1391(e)(1) because the U.S. Attorney General resides in Washington, D.C. not Texas.[2] Section 1391(e)(3) is similarly unavailing because plaintiff Second Amendment Foundation resides in Washington State, not Texas, and plaintiff Hodgkins alleges that he does not reside in the United States. Pls. br. at 5 ("The District Court found that none of the parties reside within the Northern District of Texas, a fact not contested by [p]laintiffs.").

Because plaintiffs have endeavored to sue the Attorney General in a district in which none of the parties reside, they must establish that venue is proper under § 1391(e)(2).

B. 1. The district court properly rejected plaintiffs' attempt to establish venue under § 1391(e)(2), which authorizes suit in a district if "a substantial part of the events or omissions giving rise to the claim occurred [in that district], or a substantial part of property that is the subject of the action is situated [in that district]." 28 U.S.C. § 1391(e)(2). Section 1391(e)(2) "requires a court to focus on the actions of the defendant and not of the plaintiff." Dearth, 2007 WL 1100426

---

[2] See Holloway v. Gunnell, 685 F.2d 150, 153 n.3 (5th Cir. 1982) ("'Where a public official is a party to an action in his official capacity he resides in the judicial district . . . where he performs his official duties.'" (quoting 1 Moore's Federal Practice at 1396 (1974))).

at *4 (citing Rogers v. Civil Air Patrol, 129 F. Supp. 2d 1334, 1338-39 (M.D. Ala. 2001) (citing Gaines, Emhof, Metzler & Kriner v. Nisberg, 843 F. Supp. 851, 854 (W.D.N.Y. 1991))).

Plaintiffs, however, allege no "events or omissions giving rise to the claim" occurring in Texas that involve the Attorney General. They simply seek declaratory relief based on the claim that plaintiff Hodgkins will be visiting Texas; that he may attempt to purchase firearms; and that he will be refused purchase by a firearms dealer under existing law.

In any event, even if plaintiff Hodgkins's desire to purchase a weapon in Texas could be construed as a relevant "event or omission" involving the Attorney General, it would not be sufficient to establish venue. Although plaintiffs' allegations about Hodgkins's desires "certainly may be relevant to [their] claim, they do not meet the substantiality component of section 1391(e)(2)." Rogers, 129 F. Supp. 2d at 1338; see also Cottman Transmission Systems, Inc. v. Martino, 36 F.3d 291, 294 (3d Cir. 1994) ("Events or omissions that might only have some tangential connection with the dispute in litigation are not enough" to satisfy substantiality requirement.).

Here, "[t]he gravamen of [plaintiffs'] complaint is that the [gun control provisions are] unconstitutional." Rogers, 129 F. Supp. 2d at 1339 (quotation omitted). Plaintiffs' suit is "a challenge to federal legislation drafted by Congress and signed by the President in the District of Columbia." Ibid. Plaintiff

Hodgkins's desire to travel to Texas to purchase a weapon is not a "substantial" event pertaining to the constitutionality of the legislation.

2. Plaintiffs cite no venue case in support of their theory that plaintiff Hodgkins's purported pre-enforcement injury was a "substantial . . . event[]" for purposes of establishing proper venue for their action against Attorney General Mukasey. 28 U.S.C. § 1391(e)(2).[3] Instead, plaintiffs rely on cases explicating the requirements of Article III standing. As the district court explained, those principles do not govern this venue dispute. R.E. 4 ("Although [p]laintiffs cite cases involving standing issues, Section 1391(e) makes no mention of standing and those cases are not on point for considering venue in this case." (citing Seariver Maritime Fin. Holdings, Inc., 952 F. Supp. at 460)); see also Dearth, 2007 WL 1100426 at *4.

[3] The only § 1391(e)(2) venue cases plaintiffs cite do not involve pre-enforcement challenges and do not premise venue on a plaintiffs' intentions or desires. Rather, they are cases in which "events" unequivocally "occurred," giving rise to venue. See, e.g., Pls. br. at 18 ("Federal courts routinely hear cases against government officials in districts where the claims occurred, per Section 1391(e)(2)[.]") (discussing Patmore v. Carlson, 392 F. Supp. 737, 738-39 (E.D. Ill. 1975) (inmate transferred to a different prison may sue the Bureau of Prisons' Director in the district where events giving rise to claim occurred); Mansfield v. Orr, 545 F. Supp. 118, 120 (D. Md. 1982) (ROTC recruit may sue the Secretary of the Air Force for breach of contract in the district where the recruit attended school and the contract was allegedly breached); Andrade v. Chojnacki, 934 F. Supp. 817, 826 (S.D. Tex. 1996) (cases against the ATF arising from the Branch Davidian incident were properly transferred to the Western District of Texas on the government's motion, because the events giving rise to the claims occurred in Waco). Plaintiffs err in relying on these precedents, which do not support their novel theory of venue.

Article III's standing requirement embodies a minimal constitutional threshold for the exercise of judicial authority. Federal venue statutes, by contrast, codify Congress' judgments about *where* justiciable disputes should be litigated. Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree, 723 F.2d 399, *403 (5th Cir. 1984) ("While 'ripeness' is primarily concerned with preventing judicial review of hypothetical or abstract problems that may not come to pass, . . . the finality requirement seeks mainly to ensure that the parties have exhausted all avenues of administrative relief before resorting to appellate judicial review.").

Plaintiffs "confuse[] these separate concepts." Janis v. Ashcroft, 348 F.3d 491, 493 (6th Cir. 2003). Venue 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. Venue under § 1391(e)(2) does not "logically follow[]" if a plaintiff can demonstrate standing to bring a pre-enforcement challenge, as, in plaintiffs' words, "[v]enue and jurisdiction are plainly different concepts." Pls. br. 10, 14.

Plaintiffs state that "[i]f 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." Pls. br. at 16 n.7. They are correct.

Plaintiffs' suit has been dismissed without prejudice. If plaintiffs wish to invoke § 1391(e)(2), plaintiff Hodgkins may complete an application to purchase a weapon upon his next visit to "his native Dallas, Texas area, within the Northern District of Texas," where he "intends to continue visiting on a regular basis." Pls. br. at 6.

3. Plaintiffs incorrectly state that "[h]ad Hodgkins engaged in his intended conduct as described in the Complaint, he would have been criminally prosecuted within the Northern District of Texas." Pls. br. at 14. Hodgkins incurs no liability for "partially fill[ing] out a Form 4473 [application]." Pls. br. at 15. Moreover, § 1391(e)(1) and (3) remain bases for establishing venue in the absence of "substantial . . . events or omissions" implicating a defendant's conduct. As explained above, plaintiffs might properly invoke venue in Washington State or Washington, D.C.

Plaintiffs state that "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." Pls. br. at 17. Plaintiffs' point is obscure. Venue in the District of Columbia is not exclusive; plaintiffs simply fail to establish venue in Texas. Plaintiffs' suggestion that "the Second Circuit's decision in Bach v. Pataki, 408 F.3d 75 (2d Cir. 2005) is directly on-point" is difficult to fathom in light of their

recognition that "venue was not an issue in Bach." Pls. br. at 16. In any event, plaintiff in that case sued "State and local officials" in the State in which they worked. Bach, 408 F.3d at 77.[4]

[4] Before the district court, the government argued not only that venue was improper under § 1406, but also that a transfer to another district would further the interests of justice pursuant to § 1404 (or § 1406). Because the district court concluded that venue was improper and granted plaintiffs' request for a dismissal without prejudice in favor of a transfer, the court did not reach the government's § 1404 transfer argument. Should this Court conclude that the district court abused its discretion in reaching its § 1406 holding, the government respectfully requests a remand for the district court to consider its § 1404 argument.

CONCLUSION

For the foregoing reasons, this Court should dismiss this appeal for lack of jurisdiction, or in the alternative, affirm the decision of the district court.

Respectfully submitted,

JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General

MARK B. STERN
(202) 514-5089

_____
ISAAC J. LIDSKY
(202) 514-3180
Attorneys, Appellate Staff
Civil Division, Room 7217
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

DECEMBER 2007

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of December, 2007, I caused an original and six paper copies and one electronic copy of the foregoing BRIEF OF APPELLEES to be filed with the Court by Federal Express, and caused paper and electronic copies to be served on the following counsel by Federal Express and E-Mail:

William Bryan Mateja
Fish & Richardson
Bank One Center, Suite 5000
1717 Main Street
Dallas, TX 75201
(214) 747-5070

Alan Gura
Gura & Possessky
101 N. Columbus Street, Suite 405
Alexandria, VA 22314
(703) 835-9085

ISAAC J. LIDSKY
Attorney for the Appellee

CERTIFICATE OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION, TYPEFACE
REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and, according to the count of Wordperfect 12, contains approximately 4,732 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 type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospace typeface using Wordperfect 12 with Courier New font of no more than 10.5 characters per inch (12 point font).

_____
ISAAC J. LIDSKY
Attorney for the Appellee

DECEMBER 2007