UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

STATE OF TEXAS, *et al.*, Plaintiffs, v. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, *et al.*, Defendants.	Civil Action No. 2:24-cv-00089-Z Judge Matthew J. Kacsmaryk

MOVANT STATES' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO INTERVENE AS DEFENDANTS

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INTRODUCTION

This case challenges a Final Rule that implements Congress's amendments to the Nation's firearms laws. Among other important changes, the Bipartisan Safer Communities Act expanded the category of firearm dealers who must go through a background-check process before they can sell firearms to a would-be customer, and who must retain records of those sales that federal, state, and local law enforcement can use to solve violent crimes and to go after straw purchasers and gun traffickers. Because federal defendants can no longer be counted on to defend the Final Rule, and because elimination of the Final Rule would impose significant harms on Movant States, these 15 Movant States now move to intervene.[1] This Court and the Fifth Circuit have previously explained that, especially in cases that bear on the public interest, putative intervenors should be allowed to participate when their participation would promote the greater justice and would not harm existing parties. Movant States satisfy that low bar.

The basis for intervention is straightforward. The challengers seek final relief that would prevent implementation of the Final Rule across the country, whether in the form of vacatur or an injunction. But that relief would work enormous harms to Movant States' interests, giving Movant States a right to intervene under Rule 24(a). Indeed, as federal defendants have explained, absent the Final Rule, fewer firearms dealers would obtain a federal license and be subject to Congress's recordkeeping requirements. Those records are critical in better enabling the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") to provide state and local law enforcement with evidentiary leads to solve violent crime, including to go after straw purchasers and illegal gun

[1] The Movant States seeking to intervene in this action are: New Jersey, Arizona, Colorado, Connecticut, Delaware, Hawai'i, Maryland, Attorney General Dana Nessel on behalf of the People of Michigan, Minnesota, Nevada, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

traffickers. Without those records, state and local law enforcement will have to expend additional financial and law enforcement resources to solve the same violent crimes or to engage in the same interstate gun trafficking investigations—and worse still, will be unable to solve many crimes, allowing some criminals to recidivate. Not only would the loss of the Final Rule harm Movant States' access to crime-solving information, it would also make it easier for potentially dangerous individuals to obtain firearms in the first place and for these individuals to do so without going through a background check. This profoundly harms Movant States' financial and quasi-sovereign interests—including to the safety of their residents.

Given the harms that Movant States would incur from an adverse judgment in this case, their need to intervene is clear. Although federal defendants were previously defending the Final Rule, there is little doubt that will now change: the President-Elect promised to rescind a series of ATF rulemakings during the 2024 presidential campaign, and called out this particular Final Rule explicitly. Without intervention, then, Movant States have no party representing their interests—and this Court would be deprived of any adequate defense of the Final Rule on the merits. Additionally, this intervention is neither belated nor premature: this dispute remains ongoing and this Court has not issued final judgment; federal defendants will only now cease their defense of the Final Rule; and Movant States are prepared to litigate in each case challenging this Final Rule. This Court should allow them to intervene here and provide that defense.

BACKGROUND

Seeking to aid federal, state, and local law enforcement in "their fight against crime and violence," Gun Control Act of 1968 ("GCA"), Pub. L. No. 90-618, § 101, 82 Stat. 1213, 1213 (1968), Congress originally enacted the GCA to address the significant role that interstate gun trafficking plays in contributing to "lawlessness and violent crime in the United States."

Huddleston v. United States, 415 U.S. 814, 824 (1974). The GCA reflects the judgment "that there was a serious problem of individuals going across State lines to procure firearms which they could not lawfully obtain or possess in their own State," and that absent federal restrictions on firearms trafficking, state and local law enforcement would not be able "to control this traffic within their own borders through the exercise of their police power." *Mance v. Sessions*, 896 F.3d 699, 705–06 (5th Cir. 2018) (citing Congress's findings in the GCA). The "principal" means by which Congress decided to deter and facilitate the investigation of interstate gun trafficking was to establish baseline requirements for federally licensed firearms dealers. *See Huddleston*, 415 U.S. at 824 (noting Congress made "the principal agent of federal enforcement . . . the dealer").

Federal law thus requires that all those "engaged in the business" of selling firearms obtain a federal firearms license, and sets forth a number of basic safety measures all federal firearms licensees ("FFLs") must follow. Among other things, to keep firearms out of the hands of persons who would use them unlawfully, federal law prohibits FFLs from transferring firearms to felons, individuals with domestic violence restraining orders, or those with outstanding arrest warrants. *See* 18 U.S.C. § 922(d). To ensure that FFLs in fact do not sell to such individuals, federal law requires FFLs to engage in background checks via the National Instant Criminal Background Check System ("NICS") before transferring firearms. *See* 18 U.S.C. § 922(t); *Abramski v. United States*, 573 U.S. 169, 172–73 (2014) (detailing background check process); *see id.* at 181 (internal citations omitted) (explaining that such provisions are "designed to accomplish . . . Congress's principal purpose in enacting the statute—to curb crime by keeping firearms out of the hands of those not legally entitled to possess them"). But Congress recognized that some firearms sold would still be used in crime, and thus federal law also requires licensees to maintain records of their firearms sales, and allows for the use of those records in a criminal investigation—including

a trafficking investigation. *See* 18 U.S.C. § 923(g); *Abramski*, 573 U.S. at 173 (noting the GCA ensures "that the dealer keep certain records, to enable federal authorities both to enforce the law's verification measures and to trace firearms used in crimes").

Over five decades later, Congress recognized that a number of loopholes had undermined the efficacy of these longstanding anti-trafficking laws and resolved to close them. *See* Bipartisan Safer Communities Act ("BSCA"), Pub. L. No. 117-159, 136 Stat. 1313 (2022). Prior to the BSCA, significant loopholes allowed unlicensed dealers to bypass the GCA's requirements altogether, and sell firearms without running purchasers via NICS or maintaining records of sales. Congress therefore decided to expand the number of dealers who must become FFLs and be subject to background-check and recordkeeping requirements by broadening the GCA's definition of entities "engaged in the business" of dealing firearms. *See* 18 U.S.C. § 922(a)(1)(A). In place of a test requiring persons to be licensed only when they had "the principal objective of livelihood and profit," Firearms Owners' Protection Act, Pub. L. No. 99-308, § 101, 100 Stat. 449, 450 (1986), the BCSA defines "engaged in the business" to mean any "person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business to predominantly earn a profit through the repetitive purchase and resale of firearms[.]" 18 U.S.C. § 921(a)(21)(C) (excluding those "who make[] occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection"). A person seeks "to predominantly earn a profit" if "the intent underlying the sale or disposition of firearms is predominantly one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection." *Id.* § 921(a)(22).

In light of that important statutory change, ATF proposed updating its regulations to reflect the new definition and to provide guidance—in light of the BCSA and prior court decisions—of

what conduct qualifies. Twenty States—including Movant States—filed a comment letter that supported ATF's proposed rule because (1) the expansion of basic federal background-check requirements would "reduc[e] the number of guns transferred to prohibited persons" by "curtail[ing] the opportunities" for prohibited persons to avoid NICS, and (2) the rule assists state and local "law enforcement by ensuring that accurate and adequate records are kept for more transactions, providing them with the information they need to effectively inspect gun dealers, trace crime guns, prosecute gun charges, and help keep the communities they serve safe." Appx. at 34 (Att'y General of Massachusetts et al., Comment Letter on Proposed Rule Titled "Definition of Engaged in the Business as a Dealer in Firearms" (Dec. 7, 2023), https://www.regulations.gov/comment/ATF-2023-0002-320285)).

On April 19, 2024, ATF then published the Final Rule, Definition of "Engaged in the Business" as a Dealer in Firearms, 89 Fed. Reg. 28,968 (Apr. 19, 2024) ("Final Rule"). The Final Rule implements the BSCA's expanded definition of "engaged in the business," and it clarifies in greater detail how that statutory definition applies to firearm dealers. ATF estimates that anywhere from 25,563 to 95,505 previously unlicensed individuals would now require federal licensees, and therefore would be subject to the various background check and recordkeeping requirements applicable to FFLs. *See id.* at 29,071–73. Because that means 25,563 to 95,505 entities would now be subject to federal background check and recordkeeping requirements, ATF found that the Final Rule will "help[] prevent firearms from being sold to felons or other prohibited persons, who may then use those firearms to commit crimes and acts of violence," *id.* at 29,085, and "help Federal, State, local, and Tribal law enforcement solve crimes involving firearms through crime gun tracing." *Id.* at 28,988.

Plaintiffs filed this action on May 1, 2024, ECF 1, and sought a temporary restraining order ("TRO") and preliminary injunction against the enforcement of the Final Rule, ECF 16. This Court granted Plaintiffs' motion for TRO in part, ECF 44, and after considering supplemental briefing, issued a preliminary injunction on June 11, 2024, enjoining enforcement of the Final Rule against Plaintiffs, ECF 70. The Federal Government appealed the preliminary injunction, contending both that Plaintiffs lacked standing to challenge the Final Rule and that they were unlikely to succeed on the merits of their challenge. ECF 73. On September 24, 2024, a group of 22 States—including Movant States here—submitted an amicus brief in the Fifth Circuit in support of federal defendants' appeal. *See* Br. of Amici Curiae New York et al., *Texas v. ATF*, No. 24-10612 (5th Cir. Sept. 24, 2024), ECF 51-1 ("ECF 51-1"). The Fifth Circuit has not yet heard argument or issued a decision on the appeal from this Court's preliminary-injunction order. But in the meantime, proceedings continue in this Court: federal defendants filed an answer, ECF 74, and both parties filed motions for summary judgment, ECF 82; ECF 89. Briefing is underway on both motions, and this Court has not yet heard oral argument or issued a decision on summary judgment.

ARGUMENT

I. MOVANT STATES ARE ENTITLED TO INTERVENE AS OF RIGHT.

Under Rule 24(a), a movant has a right to intervene where it "has an interest relating to . . . the subject of the action" and the outcome of the lawsuit might "impair or impede [their] ability to protect that interest;" the existing parties cannot or will not adequately represent movant's interest; and the motion is timely. *Field v. Anadarko Petro. Corp.*, 35 F.4th 1013, 1017 (5th Cir. 2022) (internal citations omitted); *see also La Union del Pueblo Entero v. Abbott*, 29 F.4th 299, 305 (5th Cir. 2022) (same). Rule 24 should be "liberally construed" in favor of intervention, and courts accept the putative intervenor's factual allegations as true for purposes of resolving the motion. *Texas v. United States*, 805 F.3d 653, 656–57 (5th Cir. 2015) (internal citation omitted). The Fifth

Circuit has repeatedly cited both its "broad policy favoring intervention and the intervenor's minimal burden" under the Rule. *La Union*, 29 F.4th at 305 (internal citation omitted). Said simply, "courts should allow intervention where no one would be hurt and the greater justice could be attained." *Texas*, 805 F.3d at 657; *La Union*, 29 F.4th at 305. Movant States easily satisfy that test.

A. Movant States Have Substantial Interests In Upholding The Final Rule.

The Fifth Circuit has required an intervenor to have a "direct, substantial, legally protectable interest in the proceedings." *Texas*, 805 F.3d at 657 (internal citation omitted); *La Union*, 29 F.4th at 305 (same); *see also* Fed. R. Civ. P. 24(a)(2) (asking whether the putative intervenor has "an interest relating to the property or transaction that is the subject of the action"). Although intervention is unwarranted when putative intervenors have only "ideological, economic, or precedential" interests, *La Union*, 29 F.4th at 305 (internal citation omitted), the interests test is not otherwise a high bar. Rather, as the Fifth Circuit has put the point, "an interest is sufficient if it is of the type that the law deems worthy of protection, even if the intervenor does not have an enforceable legal entitlement or would not have standing to pursue her own claim." *Texas*, 805 F.3d at 658; *see id.* at 657 (asking whether intervenors have a "stake in the matter" beyond the "generalized preference that the case come out a certain way"). Such interests can sometimes include financial or property interests, or they can be "non-property interests" that "are concrete, personalized, and legally protectable." *Id.* at 658; *see also La Union*, 29 F.4th at 305 (internal citation omitted) (emphasizing an intervenor need not "possess a pecuniary or property interest to" qualify). And both the Fifth Circuit and this Court have emphasized that they will assess "[t]he interest requirement . . . by a more lenient standard whenever the case presents a public interest question." *All. for Hippocratic Med. v. FDA*, No. 22-233, 2024 WL 1260639, at *4 (N.D. Tex. Jan. 12, 2024) (internal citations omitted); *see also La Union*, 29 F.4th at 305–06 (agreeing "interest requirement may be judged by a more lenient standard" in such cases). Movant States

have a right to intervene here because invalidation of the Final Rule, in this public interest case, would harm Movant States' interests in two ways: (1) it would reduce the availability of records on which state and local law enforcement consistently rely to solve crimes, and (2) it would increase prohibited persons' access to firearms in Movant States.[2]

1. Because the invalidation of the Final Rule will make it more difficult for Movant States to solve gun crimes, thus imposing direct and substantial financial and quasi-sovereign burdens on Movant States, Movant States have a protectable interest in defending the Final Rule.

Invalidation of the Final Rule will reduce the number of entities that maintain firearms transaction records by anywhere from 25,563 to 95,505 dealers. 89 Fed. Reg. at 29,071–73. Thus, invalidation will make it harder for Movant States to solve crimes involving firearms. Whenever state or local law enforcement recovers a firearm that was used in a crime, that firearm can provide important evidence as to the identity of the perpetrator, or help to identify gun trafficking networks.

[2] Beyond establishing sufficient interests to justify their Rule 24(a) intervention, Movant States do not also need to independently establish their Article III standing to intervene as defendants in this Court. As the Supreme Court has held, there is no need to establish standing where Movant States ask only that this Court reject Plaintiffs' claims. *See Va. House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019) (defendant-intervenor need not establish Article III standing since its defense of redistricting plan did not "entail[] invoking a court's jurisdiction"); *see also Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 200 (2022) (confirming legislative leaders may intervene to defend law without discussing standing); *Melone v. Coit*, 100 F.4th 21, 28–29 (1st Cir. 2024) (rejecting argument that intervenor defendant has "to establish independent Article III standing" if it "simply seeks to defend the agency's position"); *GreenFirst Forest Prods. Inc. v. United States*, 577 F. Supp. 3d 1349, 1354 n.4 (Ct. Int'l Trade 2022) (same). That makes sense: only a party who invokes a court's jurisdiction has to prove standing, and a party does not affirmatively "invok[e] a court's jurisdiction" by defending a suit. *Bethune-Hill*, 587 U.S. at 663; *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928, 938, n.3 (N.D. Tex. 2019) ("Putative Intervenors may join in defense. And as long as they do not also intend to add an affirmative claim for relief during the district court proceedings, Putative Intervenors need not establish standing to intervene."). Movant States would need to establish standing to assert a cross-appeal or file an appeal, but have taken no such actions here. In any event, even if Movant States must establish Article III standing, they can do so for the same reasons their interests would be harmed by a court order invalidating the Final Rule.

See Appx. at 3–8. Whenever law enforcement can identify the manufacturer and serial number of the firearm, which are evident on the gun, they can submit that information to ATF so that ATF can identify at least some of the previous retailers and purchasers of the weapon. *Id.* at 3–4, 14; *see also* Final Rule, 89 Fed. Reg. at 28,988 (noting "[c]rime-gun tracing is one of the most valuable and effective services ATF provides to law enforcement agencies . . . in investigating crimes involving firearms"); *id.* (adding that in FY2022, "the Department performed over 623,000 crime-gun traces. Of these, 27,156 were deemed 'urgent,' which included firearms used in criminal activities such as mass shootings, homicides, bank robberies, and other immediate threats to officer and public safety").

The ease with which ATF can track the crime gun to prior purchasers and identify persons who may be the perpetrator of the crime, or involved as a straw-purchaser or member of an illegal firearms trafficking network, depends on whether the retailers involved were licensed and subject to GCA recordkeeping requirements. As the Final Rule explains, "[w]hen a firearm is recovered in a criminal investigation and submitted for tracing, ATF is often able to identify the last known purchaser through records maintained by the licensee . . . . When a firearm is transferred by an unlicensed person, however, such records rarely exist." 89 Fed. Reg. at 29,083; *see also id.* at 28,988 (noting "[u]nder the GCA, 'dealers must store, and law enforcement officers may obtain, information about a gun buyer's identity. That information helps to fight serious crime. When police officers retrieve a gun at a crime scene, they can trace it to the buyer and consider him as a suspect'" (quoting *Abramski*, 573 U.S. at 182)); *id.* at 29,083 (ATF can "determine the purchaser in 77 percent" of law enforcement's trace requests "[l]argely as a result of the records the GCA requires licensees to maintain"); *see also* Appx. at 3–4 (N.J. declaration discussing experience with ATF tracing system); *id.* at 13–15 (A.Z. declaration explaining same).

A court order invalidating the Final Rule, especially one with nationwide effect, would make it more difficult for ATF to provide helpful leads to state and local law enforcement that they could use in solving crime. ATF has recognized that the Final Rule would "increas[e] licensure of those engaged in the business of dealing in firearms, and correspondingly increase the availability of GCA-required records from those newly licensed dealers"—and thus "enhance the capacity of the Department to successfully complete crime-gun traces for law enforcement partners globally." 89 Fed. Reg. at 29,083; *see also id.* at 28,988 (because the Final Rule will help "more persons become licensed" and ensure "the transaction records maintained by those dealers will allow law enforcement to trace more firearms involved in crime and to apprehend more violent offenders who misuse firearms," the Final Rule "will help Federal, State, local, and Tribal law enforcement solve crimes involving firearms through crime gun tracing"). The converse follows: the invalidation of the Final Rule would *decrease* the "sellers who maintain firearms transaction records, submit multiple sales reports, report theft and losses of firearms, and respond to crime gun trace requests," *id.* at 29,063, undermine "ATF's capacity to complete crime-gun traces," and thus cut back on "the evidentiary leads ATF provides to law enforcement investigating crimes involving firearms, particularly violent offenses such as homicide, aggravated assault, armed robbery, and armed drug trafficking," *id.* at 29,083; *see* Appx. at 4–5 (N.J. declaration detailing role of ATF information in provide leads to solve violent gun crimes).

That the Final Rule, by design, results in greater evidentiary leads to state law enforcement confirms that Movant States have a direct and substantial interest in its defense. For one, the States are important "intended beneficiaries" of the Final Rule and the GCA. *See Texas*, 805 F.3d at 658-69 (emphasizing that intended beneficiaries of a federal policy have a sufficient interest supporting intervention as of right where that policy is challenged, and collecting cases). In enacting the GCA,

Congress found that its licensed dealer requirements—including its recordkeeping requirements—would aid state and local law enforcement in their fight against violent crime. *See supra* at 2–3. And the Final Rule repeatedly finds that the expansion of who must qualify as an FFL and the expansion of who must retain purchaser records serves state and local law enforcement by improving ATF's capacity to generate evidentiary leads. *See, e.g.*, 89 Fed. Reg. at 28,988 (agreeing Final Rule "will help Federal, State, local, and Tribal law enforcement solve crimes involving firearms through crime gun tracing"); *see also id.* at 28,994 (highlighting the "crucial intelligence provided directly to law enforcement in their respective jurisdictions"); *id.* at 28,989 (same); *id.* at 29,063 (same); *id.* at 29,070 (same); *id.* at 29,083 (emphasizing Final Rule enhances ATF tracing function, which is "one of the most valuable and effective services ATF provides to law enforcement agencies"); *id.* at 29,083–85 (same). And that interest is substantial: asking ATF to trace a crime gun to generate leads, in order to identify suspects in a violent crime or to identify those who served as the perpetrator's straw purchaser or firearms trafficker, is a routine part of many state and local law enforcement investigations, and has repeatedly allowed law enforcement to solve crime—just as the GCA and Final Rule intend. *See* Appx. at 3–4.

Movant States also have other, financial interests that will be impacted from a court order invalidating the Final Rule. *See Biden v. Nebraska*, 600 U.S. 477, 490 (2023) (emphasizing a State suffers an Article III injury—a higher burden than the showing Movant States must make—when the State would suffer a "financial harm"). The Final Rule explains that increasing the number of dealers that retain firearms records allows ATF to provide evidentiary leads to state and local law enforcement officers who "can use this information to better target limited resources" to solve crime—including "to pursue illicit firearms traffickers"—which means that the loss of such information from a court order invalidating the Final Rule would do the opposite. 89 Fed. Reg. at

28,989. The experience of state law enforcement bears this out: where trace records do not reveal a firearm's most recent purchaser, state officers must take additional investigative steps to identify the current owner. *See* Appx. at 6–8. Those investigative steps can be burdensome—requiring law enforcement officers to conduct interviews and/or to cross state lines—demanding significant monetary and personnel resources. *See* Appx. at 6 (explaining out-of-state travel, out-of-state interviews, out-of-state surveillance, and other investigative steps demand significant financial costs from state). Invalidation of the Final Rule and the concomitant loss of recordkeeping for a significant volume of firearms sales would thus directly increase state costs to solve violent crime and fight illegal trafficking. *See, e.g.*, *Gen. Land Office v. Biden*, 71 F.4th 264, 274 (5th Cir. 2023) (finding States have an "interest in [their] fiscal policy" that suffers when States would be required to "redirect resources").

Movant States also have related quasi-sovereign interests that support their defense of the Final Rule. *See, e.g.*, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 603-04, 607 (1982) ("*Snapp*") (finding States have quasi-sovereign interests in the health and safety of their residents, and that where "the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them") (quoting *Missouri v. Illinois*, 180 U.S. 208, 241 (1901));[3] *Castillo v. Cameron Cnty., Tex.*, 238 F.3d 339, 351 (5th Cir. 2001) (holding "State's quasi-sovereign interest in protecting its citizens from criminal activity" gave it standing

[3] Although Movant States acknowledge that "[a] State does not have standing as *parens patriae* to bring an action *against* the Federal Government" based upon these interests, *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023) (emphasis added) (quoting *Snapp*, 458 U.S. at 610, n.16 (citing *Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923))), the so-called "*Mellon* bar" is no obstacle to a State's assertion of standing to *defend* federal action based on its quasi-sovereign interests in the health and well-being of its residents. *Cf. Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007) (explaining "critical difference between allowing a State to protect her citizens from the operation of federal statutes (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do)" (citations omitted)).

to appeal an injunction); *Texas v. United States*, No. 18-68, 2018 WL 11226239, at *1 (S.D. Tex. June 25, 2018) (granting New Jersey's motion to intervene-of-right to defend federal policy, so as to protect "its unique proprietary, sovereign, and quasi-sovereign interests"). Indeed, few interests matter more to States than protecting their residents from violence. *See, e.g.*, *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 651 (2022) (noting the State's "strong sovereign interest in ensuring public safety and criminal justice within its territory" in the preemption context); *Castillo*, 238 F.3d at 351 (agreeing "State has a legitimate interest in 'protect[ing] its citizens from criminal elements.'" (quoting *Nat'l People's Action v. Village of Wilmette*, 914 F.2d 1008, 1011 (7th Cir. 1990)).

But when ATF is able to provide fewer evidentiary leads from a gun trace, it reduces the chance that state law enforcement can solve that crime—let alone find the gun traffickers or straw purchasers who facilitated the offense. *See* Appx. at 4. If state law enforcement cannot trace the firearm to a criminal offender or straw purchaser because the straw purchaser evaded the GCA recordkeeping system by approaching an unlicensed dealer, that straw purchaser and criminal will more likely remain on the street and be able to recidivate. *See* Appx. at 8 (discussing dangers of recidivism); 89 Fed. Reg. at 29,063, 29,083 (explaining "[s]traw purchasers . . . are the lynchpin of most firearms trafficking operations" and that tracing data is "beneficial" to States in capturing them and thus "help[s] law enforcement reduce criminal activities"). That harms Movant States.

2. Movant States have a second protectable—and profound—interest in defending the Final Rule: elimination of the Final Rule will increase the tide of unlawful firearms within and into their borders, again imposing direct and substantial financial and quasi-sovereign harms.

Elimination of the Final Rule will increase the trafficking and use of unlawful firearms in Movant States by increasing the number of firearms sales that do not involve background checks. Between 2017 and 2021, "the most frequent types of trafficking channels identified in ATF

investigations were unlicensed firearm dealing"—at 40.7%. BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): CRIME GUNS – VOLUME III, pt. 3, at 1–4 (2023) (hereinafter "NFCTA VOL. III"). Transactions in which the firearms purchaser does not undergo a background check have a shorter time-to-crime, suggesting the traced firearms "were rapidly diverted from lawful firearms commerce into criminal hands." BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, NATIONAL FIREARMS COMMERCE AND TRAFFICKING ASSESSMENT (NFCTA): CRIME GUNS – VOLUME II, pt. 3, at 35 (2023); *see* 89 Fed. Reg. at 29,084 (describing how longer time-to-crime data indicates that having new licensees conduct purchaser background checks "will deter violent felons, traffickers, and other prohibited persons from obtaining firearms from those dealers"). Studies estimate that extending licensure requirements to these dealers will decrease interstate trafficking of firearms into Movant States. *See* Brian Knight, *State Gun Policy & Cross-State Externalities: Evidence from Crime Gun Tracing*, 5 AM. ECON. J.: ECON. POL'Y 200, 224 (2013) (emphasizing regulations can "eliminate incentives for trafficking into this state"). Conversely, allowing traffickers to acquire firearms while avoiding background checks exposes Movant States to increased firearms trafficking. *See* Appx. at 8.

Elimination of the Final Rule will increase prohibited persons' access to firearms even in the States that maintain more stringent licensing requirements, given the nature of illegal interstate firearms trafficking.[4] Crime guns are rarely purchased at a firearms retailer just prior to their use

[4] Indeed, for this reason, Movant States have little choice to intervene to defend the Final Rule, as they lack the powerful unilaterally to avoid these harms themselves. Even for Movant States that have adopted their own licensing requirements, given the above-discussed nature of interstate gun trafficking, a reduction in the scope of federally-mandated background checks across the country will have a direct impact on public safety within their borders. *See, e.g.*, Ellicott C. Matthay et al.,

in crime. Instead, many people who are prohibited from possessing a firearm turn to unlicensed dealers because they cannot pass a background check to legally purchase a gun from an FFL. These guns acquired by unlicensed dealing are frequently used in crimes, including shootings. NFCTA VOL. III, pt. 4, at 5 (reporting 368 cases where a firearm acquired from an unlicensed dealer was recovered in a shooting). While some states do strictly regulate the transfer of firearms under state law to require background checks, crime guns can still flow in from states that have little to no regulation of firearms transfers. *See* NFCTA VOL. III, pt. 3, at 1–4, *see* Appx. at 8–9 (discussing the majority of guns recovered from crime scenes originating in out of state).[5]

Conversely, for Movant States with little to no regulation of firearms transfers other than compliance with federal law, the Final Rule will help reduce the intrastate transfer of firearms to criminals. For example, Arizona law does not require background checks, permits, or the registration of firearms sold in private sales. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 44-7852, 13-3109(B), 13-3118. In other words, if a firearms sale in Arizona is not regulated by the GCA, it is not regulated at all. This makes it incredibly easy for criminals to purchase or obtain firearms from unlicensed dealers without documentation. According to ATF data, of the 39,771 crime guns recovered in Arizona between 2017 and 2021 and successfully traced to a known purchaser, the

In-State and Interstate Associations Between Gun Shows and Firearm Deaths and Injuries, 167 ANNALS INTERNAL MED. 837, 842 (2017) (finding an association between Nevada gun shows and "cross-border increases in firearm injuries in California"); Erin G. Andrade et al., *Firearm Laws and Illegal Firearm Flow Between U.S. States*, 88 J. TRAUMA ACUTE CARE SURG. 752, 758 (2020) (concluding that "[s]tates with stricter firearm legislation are negatively impacted by the weaker regulations in other states, as crime guns are trafficked from out-of-state").

[5] This means that even states like New Jersey which passed state laws that require every in-state transfer to go through a state licensed dealer are powerless to resolve this issue on their own. *See* N.J. Stat. Ann. § 2C:58-2, -3; *see also* Colo. Rev. Stat. Ann. §§ 18-12-112(2)(a), 18-12-501(1)(a), 24-33.5-424(3)(a); Conn. Gen. Stat. §§ 29-36*l*(f)(2); Del. Code Ann. tit. 11, § 1448A(a) (similar state laws). The nature of this problem demands a solution at the federal level.

purchaser and the person who used the gun in a crime were the same individual in only 14% of cases.[6] *See* Appx. at 15. In Arizona in particular, the trafficking of firearms presents an immense public safety risk. Indeed, the ATF Phoenix field division generated the highest percentage of trafficking investigations involving unlicensed dealers (14.0% of 3,404 investigations) and involving straw purchasers (14.1% of 3,305 investigations). NFCTA VOL. III, pt. 3, at 4. The Final Rule with make it more difficult for criminals to access firearms in Arizona, furthering the State's interest in public safety.

Movant States thus have substantial financial and quasi-sovereign interests in defending a federal regulation that ensures more firearms transfers will involve background checks. State law enforcement expends significant resources on investigating and prosecuting prohibited persons in possession of firearms that originate out of state that were acquired without background checks. *See* Appx. at 6-8. Although the Final Rule would not eliminate all unlicensed dealing, requiring tens of thousands of new licensees to conduct background checks lowers the costs that the Movant States directly sustain related to crimes committed by prohibited persons that would be rejected by a simple background check. *See* Appx. at 8–10.

Given the "possibility" that Movant States' interests in the expansion of recordkeeping and background checks enshrined in the Final Rule would be "'impaired or impeded'" by a court order in this case, *Field*, 35 F.4th at 1020 (quoting *La Union*, 29 F.4th at 307), Movant States maintain a right to intervene "to air their views so that a court may consider them before making potentially

[6] Of the 39,771 crime guns recovered in Arizona and traced to a known purchaser, the vast majority of those guns (32,771) were purchased within Arizona. Appx. at 15. Meaning the majority of crime guns recovered in Arizona were purchased in the state and later transferred without documentation to someone else within the state.

adverse decisions," the "very purpose of intervention," *Brumfield v. Dodd*, 749 F.3d 339, 345 (5th Cir. 2014).

B. Existing Parties Will No Longer Adequately Represent Movant States' Interests, And Movant States Timely Intervened In Light Of That Change.

This Court should allow Movant States to intervene to defend their interests because there are no longer parties adequately defending them, and because Movant States timely filed as soon as that representation become inadequate. As to the representation of Movant States' interests, they bear only a "minimal" burden at this step—to show that the representation by existing parties "*may* be inadequate." *Edwards v City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996) (emphasis added) (quoting *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972)). Although federal defendants were defending this Final Rule, and protecting Movant States' interests in it, that will change after the January 20, 2025 inauguration. The President-Elect has promised to quickly reverse ATF rules adopted by the Biden Administration, even citing this Final Rule. *See, e.g.*, Gram Slattery, *Trump pledges to 'roll back' Biden gun rules, fire ATF chief at NRA rally*, REUTERS (May 20, 2024), https://tinyurl.com/5n8asdf8 (noting "Republican presidential candidate Donald Trump pledged to unravel gun regulations put in place by Democratic President Joe Biden," and quoting President-Elect's promise "in my second term" to "roll back every Biden attack on the Second Amendment"). According to the President-Elect, such actions "will be terminated on my very first week back in office, perhaps my first day." NRA, *President Donald J. Trump Speaks at 2024 NRA Presidential Forum in Harrisburg, PA*, YOUTUBE (Feb. 10, 2024) https://www.youtube.com/watch?v=v_RBnl1vIjs. And the President-Elect even focused on the Final Rule when he "pointed to [current ATF Director Steven M.] Dettelbach's effort to expand background checks on weapons sold at gun shows, to include private kitchen-table gun sales and online firearms marketplaces" for particular criticism. Glenn Thrush, *A.T.F. Braces for a Likely*

Rollback of Its Gun-Control Efforts, N.Y. TIMES (Dec. 14, 2024), https://tinyurl.com/j385b7dc. Because federal defendants will now likely seek elimination of this Final Rule, they can no longer adequately defend Movant States' interests in its survival.

Indeed, the decisions taken during the last Trump Administration—including policies that make it harder for law enforcement to track crime guns, and policies cabining the scope of federal background checks—confirm that federal defendants are unlikely to adequately represent Movant States' interests going forward. As to the former, less than a month into the President-Elect's first term in office, his Administration narrowed the availability of certain NICS records. Whenever a person purchases a firearm from an FFL, the FFL relays the buyer's information to the FBI through the NICS for verification that the buyer has no criminal record and is otherwise eligible to procure the firearm. *See* Appx. at 5, 16; *see* FBI, 2022 NICS OPERATIONAL REPORT at 31 (2022) (more than 440 million checks have occurred since NICS launched in 1998); FBI, FEDERAL DENIALS 1998-2022 at 1 (2022) (preventing more than 2.3 million transfers to prohibited purchasers). The first Trump Administration not only narrowed who qualified as a "fugitive from justice"—a term that statutorily renders an individual ineligible to purchase firearms—but also purged *all* fugitive records from the NICS database, even records which met the FBI's narrowed definition, removing those records as a tool for law enforcement investigations. *See* Sari Horwitz, *Tens of Thousands with Outstanding Warrants Purged from Background Check Database for Gun Purchases*, WASH. POST (Nov. 22, 2017), https://tinyurl.com/4a7pakyv. This previous conduct confirms the incoming Trump Administration does not share Movant States' interests in expanding the role of NICS and expanding the availability of such records for law enforcement, as the Final Rule does.

The Fifth Circuit's "two presumptions of adequate representation" are thus inapplicable in this case. *Edwards*, 78 F.3d at 1005. Although the Fifth Circuit will presume that representation is

adequate where an existing party is a "governmental body or officer charged by law" that has been charged with representing the intervenor's interests, federal defendants are not "charged by law" with representing Movant States' interests. *Id.* at 1005; *see Entergy Gulf States La., L.L.C. v. EPA*, 817 F.3d 198, 203 (5th Cir. 2016) (holding EPA is not "a representative of Sierra Club by law"). Just the opposite rule applies in this Circuit: States retain a "heightened" interest in intervention as of right when federal defendants will "abandon[ ] any defense" of the regulation in question. *DeOtte v. State*, 20 F.4th 1055, 1070 (5th Cir. 2021). Second, even though representation is presumptively adequate if an existing party "has the same ultimate objective" as the putative intervenors, *Edwards*, 78 F.3d at 1005, representation by an Administration that in fact opposes the Final Rule undermines the notion that representation of Movant States' interests is adequate. *See Entergy* 817 F.3d at 203 ("adversity of interest" undermines adequate representation); *Brumfield*, 749 F.3d at 346. Federal defendants—despite "having started out as . . . all[ies]"—will be Movant States' "adversar[ies]," and not "faithful representative[s] of [Movant States'] interest." *Mandan, Hidatsa & Arikara Nation v. U.S. Dep't of the Interior*, 66 F.4th 282, 285 (D.C. Cir. 2023).

Intervention provides the precise solution for this problem: to ensure this Court has parties who are willing and well-suited to defend the Final Rule, and thus to ensure appropriate adversarial presentation on the merits and equities questions implicated here. Indeed, judges within this Circuit have repeatedly allowed Movant States to intervene in precisely this sort of situation, authorizing them to provide the adequate defense that federal defendants would not. *See, e.g.*, *Texas*, 2018 WL 11226239, at *1 (S.D. Tex. June 25, 2018) (finding State's "interests are inadequately represented by the existing parties" in challenge to Deferred Action for Childhood Arrivals policy given federal defendants' conclusion that it was unlawful, and thus permitting State to intervene); *California v.*

Texas, 593 U.S. 659, 668 (2021) (noting that because the Trump Administration "took the side of the plaintiffs" in a challenge to the Affordable Care Act, the courts had allowed a group of States—including multiple Movant States—to "intervene[] in order to defend the Act's constitutionality"). This Court should follow the same course.

Movant States' intervention is also timely—as they are filing promptly upon their interests no longer being adequately represented in this case. *See Wal-Mart Stores, Inc. v. Texas Alcoh. Bev. Comm'n*, 834 F.3d 562, 565 (5th Cir. 2016) (emphasizing timeliness is not a strict standard and "is contextual") (internal citations omitted); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-66 (5th Cir. 1977) (emphasizing timeliness is "determined from all the circumstances" using the following considerations: (1) the length of time during which the would-be intervenor knew or should have known of his interest; (2) the extent of the prejudice to the existing parties; (3) the extent of the prejudice to the would-be intervenor; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely) (internal citations omitted). Indeed, Movant States are filing this motion as soon as doing so became necessary, and the denial of their motion would leave their interests unrepresented given the incoming change in federal Administration. By contrast, granting the motion would prejudice no party, and would instead ensure adversarial presentation.

Movant States have acted swiftly and diligently at every stage in this case. *See U.S. ex rel. Hernandez v. Team Fin., L.L.C.*, 80 F.4th 571, 578 (5th Cir. 2023) (noting that "length of time" it took to intervene "is measured from the moment that the prospective intervenor knew that his interests would 'no longer be protected.'" (quoting *Stallworth*, 558 F.2d at 264). Movant States made their interests in the Final Rule clear from the beginning: they filed a comment letter in which they supported the Final Rule at the notice-and-comment stage, identifying for the ATF their own

law enforcement interests that the Final Rule promotes. *See supra* at pp. 4–5. Movant States likewise advocated for their interests in this litigation, submitting a multistate amicus brief in support of federal defendants in their appeal from this Court's preliminary injunction. *See* ECF 73 (notice of appeal filed July 2, 2024); ECF 51-1 (amicus brief filed September 24, 2024) (reiterating "strong[] support [for] the BSCA and the Final Rule's efforts to . . . assist state and local law enforcement in their efforts to eradicate gun trafficking"). At that time, however, Movant States had no reason to intervene as their interest in defending the Final Rule was aligned with federal defendants' own. *See supra* at pp. 17-20 (discussing adequacy). But since that will change after Inauguration on January 20, 2025, *see supra* at 17-18, Movant States have swiftly filed their papers, so that there will be a seamless transition from one government's defense of the Final Rule (federal defendants) to other governments with interests in it (Movant States). "[T]he timeliness of [Movants States'] motion should be assessed in relation to that point in time," *i.e.*, when their "need to seek intervention. . . ar[o]se." *Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 595 U.S. 267, 280 (2022).

Movant States would also suffer tremendous prejudice if this Court denies intervention in the unusual case, like this one, in which the change in Administration leaves them (and the Court) without a party committed to defending the Final Rule. As laid out above, Movant States maintain significant financial and quasi-sovereign interests in the Final Rule, *see supra* at 7–16—and their "interest is heightened" where federal defendants will "abandon[] any defense" of the merits of the Final Rule. *DeOtte*, 20 F.4th at 1070. Federal defendants may simply abandon defense of the Final Rule, or may seek to settle this challenge on terms favorable to the challengers. If intervention is denied, Movant States as "[n]on-parties" would be thwarted from opposing the settlement and/or opposing or appealing from an adverse judgment. *In re Lease Oil Antitrust Litig.*, 570 F.3d 244,

249 (5th Cir. 2009). Intervention in this existing federal suit "is the most efficient, and most certain, way" for Movant States to avoid prejudice to their interests. *Id.*

By contrast, granting Movant States' request to intervene would not prejudice the existing parties at all. By way of this intervention motion, Movant States do "not seek to delay or reconsider phases of the litigation that ha[ve] already concluded." *Wal-Mart*, 834 F.3d at 565. Said another way, because Plaintiffs would retain the full benefit of the preliminary-injunction order regardless of the disposition of this intervention motion, Plaintiffs cannot contend that intervention would harm them. Instead, Movant States seek to continue defending the Final Rule after the anticipated abandonment by Defendants, including at the summary-judgment stage. *See Kane Cnty. v. United States*, 928 F.3d 877, 883 (10th Cir. 2019) (approving of intervention following change in presidential administration); *Pasqua Yaqui Tribe v. EPA*, No. 20-2266, 2021 WL 25776939, at *1 (D. Ariz. May 5, 2021) (same). It is appropriate here: the only discovery to date has been the Administrative Record, *see* ECF 81; the Court's preliminary relief remains on appeal, *see* ECF 73; and summary judgment proceedings are ongoing. *See Edwards*, 78 F.3d at 1001 (that "motions were filed prior to entry of judgment favors timeliness."); *Nat'l Horsemen's Benevolent & Protective Ass'n v. Black*, No. 21-71, 2022 WL 974335, at *4 (N.D. Tex. Mar. 31, 2022) ("Parties intervening five months after learning of their interest have been deemed timely.").[7]

[7] Nor is the possibility that Movant States will oppose a potential settlement between Plaintiffs and federal defendants prejudicial; "prejudice must be measured by the delay in seeking intervention, not the inconvenience to the existing parties of allowing the intervenor to participate in the litigation." *Sierra Club v. Espy*, 18 F.3d 1202, 1206 (5th Cir. 1994); *see also Lopez-Aguilar v. Marion Cnty. Sheriff's Dep't*, 924 F.3d 375, 390 (7th Cir. 2019) (adding that the "burden to the parties of reopening the litigation and resuming settlement negotiations" is not prejudice undermining timeliness if that particular burden "would have been the same" had movants been parties from the case's inception); *see also In re Lease Oil Antitrust Litig.*, 570 F.3d at 248 ("Any potential prejudice caused by the intervention itself is irrelevant, because it would have occurred regardless of whether the intervention was timely.").

The timeliness of this intervention motion contrasts sharply with the cases in which States' motions were denied as untimely. *See, e.g.*, *Cook County, Illinois v. Texas*, 37 F.4th 1335, 1337, 1342 (7th Cir. 2022) (denial of intervention motion filed over six months after district court vacated federal regulation being challenged, four months after President Biden took office, and two months after Biden Administration dismissed appeals defending the same rule in other courts); *Huisha-Huisha v. Mayorkas*, No. 22-5325, 2022 WL 19653946, at *1-2 (D.C. Cir. Dec. 16, 2022) (not permitted to intervene in defense of federal policy when district court already vacated the policy and movants had been submitting filings in other courts for more than a year indicating they could not rely on federal defendants to defend policy). Unlike those cases, there is no final decision here, President-Elect Trump has yet to take office, and up until this point, Movant States reasonably relied on federal defendants to represent their interests. *Cf. Cook Cnty.*, 37 F.4th at 1342 ("States were justified in relying on DHS's continued defense of the . . . Rule at least through the November 2020 election"). This motion is timely, and would allow Movant States to provide a defense.[8]

II. ALTERNATIVELY, PERMISSIVE INTERVENTION IS APPROPRIATE.

Because Movant States satisfy the standard for mandatory intervention, this Court need not consider permissive intervention under Rule 24(b). But to the extent this Court reaches that issue, it should allow intervention under Rule 24(b). Such intervention is appropriate when the proposed

[8] Just as Movant States have not brought this motion to intervene too late (for timeliness purposes), Movant States have also not filed too early (for adequacy purposes) because they are not required to wait until the incoming Administration in fact terminates its defense of this Final Rule. For one, Movant States acted swiftly to avoid any risk that this Court would find their motion came too late. *Compare Cook Cnty.*, 37 F.4th at 1342. For another, Movant States would likely have no formal advance notice from federal defendants that they are ceasing the defense of the Final Rule, and may learn of that development only when federal defendants and Plaintiffs settle. *Compare id.* Finally, even though Movant States may be justified in waiting to ascertain what position federal defendants will take after the change in administration before intervening in other cases, federal defendants' forthcoming position in *this* case is sufficiently clear. *See supra* at 17–18.

intervenor can show: (1) the applicant "has a claim or defense that shares with the main action a common question of law or fact"; (2) the motion is timely; and (3) intervention will not delay or prejudice adjudication of the existing parties' rights. Fed. R. Civ. P. 24(b)(1)(B), (b)(3). That is easily met here: Movant States motion is timely, *see supra* at 20–23; intervention will not delay or prejudice any party, *see supra* at 21–22 (noting parties maintain benefit of the preliminary injunction, which Movant States do not challenge); and common questions of law and fact exist since Movant States seek to defend the precise agency action that the challengers here attack (the Final Rule). Indeed, absent the intervention of defendants like Movant States, this Court would lose the practical benefit of adversarial presentation on the merits. *See Franciscan Alliance v. Azar*, 414 F. Supp. 3d 928, 940 (N.D. Tex. 2019) (permitting intervention where "Intervenors' arguments will 'significantly contribute' to the development of the issues" "now that Defendants do not defend the Rule" (quoting *NOPSI v. United Gas Pipe Line Co.*, 732 F.2d 452, 472 (5th Cir. 1984))); *see also, e.g.*, *VanDerStok v. Garland*, 680 F. Supp. 3d 741, 756 (N.D. Tex.) (determining that permissive intervention "preserves judicial resources"), *aff'd in part, vacated in part on other grounds*, 86 F.4th 179 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 1390 (2024). Not only would Movant States be able to defend the Final Rule absent a federal defense, but they can provide briefing on the impact of any decision on other States, and they can brief the impact on this litigation of a future decision by the ATF to reverse course and decide to rescind the Final Rule. Because Movant States satisfy the standard for permissive intervention, and would provide useful briefing to the Court, this Court should exercise its discretion to grant the motion to intervene.

CONCLUSION

This Court should grant Movant States' motion to intervene as defendants.

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Respectfully submitted,

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