No. 24-10612

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MERRICK GARLAND, in his official capacity as Attorney General of the United States, STEVEN DETTELBACH, in his official capacity as the Director of the Bureau of Alcohol, Tobacco, Firearms, & Explosives of the United States Department of Justice, and the BUREAU OF BUREAU OF ALCOHOL, TOBACCO, FIREARMS, & EXPLOSIVES,
Defendant-Appellants,

v.

STATES TEXAS, STATE OF LOUISIANA, STATE OF MISSISSIPPI, STATE OF UTAH, JEFFREY W. TORMEY, GUN OWNERS OF AMERICA, INC., GUN OWNERS FOUNDATION, TENNESSEE FIREARMS ASSOCIATION, AND VIRGINIA CITIZENS DEFENSE LEAGUE,
Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
Case No. 2:24-CV-89-Z

Brief of *Amici Curiae* States of Kansas, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming, and Phillip Journey, and Chisholm Trail Antique Gun Association in support of Appellees and affirmance
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Dated: November 25, 2024

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1, in addition to those listed in the briefs of the parties, have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal.

Amici: Individuals Phillip Journey, Allen Black, and Donald Maxey and Organization Chisholm Trail Antique Gun Association join the States in this brief. Chisholm Trail Antique Gun Association is a membership-based not-for-profit corporation. Chisholm Trail Antique Gun Association does not have a parent corporation, and no publicly held corporation owns more than 10 percent of its stock.

Counsel for Amici: Anna St. John and M. Frank Bednarz of the Hamilton Lincoln Law Institute represent Phillip Journey. William E. Trachman and Michael D. McCoy of the Mountain States Legal Foundation represent Chisholm Trail Antique Gun Association and its members Allen Black and Donald Maxey. Kansas Solicitor General Anthony Powell is counsel of record for all parties here.

Dated November 25, 2024

/s/ Anthony Powell
Anthony Powell

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INTEREST OF *AMICI CURIAE*

Hundreds of thousands of Americans regularly engage in selling and trading firearms, sometimes at gun shows. There is nothing nefarious about this, and these activities are protected by the Second Amendment. But the Bureau of Alcohol, Tabaco, Firearms, and Explosives ("ATF") has unlawfully restricted this right by requiring everyday Americans to register as firearms "dealers" when they do no more than trade and sell a single firearm. Worse, it has done so by promulgating a Rule that an ordinary person cannot comprehend. So, rather than risk civil and criminal penalties, these Americans will stop engaging in constitutionally protected behavior altogether.

Amici States of Kansas, Arkansas, Iowa, Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Kentucky, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia, West Virginia, and Wyoming, and Phillip Journey, Allen Black, Donald Maxey, and Chisholm Trail Antique Gun Association are parties to a similar lawsuit pending in the Tenth Circuit and Kansas District Court, *see Kansas v. Garland*, No. 24-CV-01086-TC-TJJ, 2024 WL 3360533 (D. Kan. filed May 20, 2024), *appeal docketed* 24-3101 (10th Cir. July 22, 2024), and have an interest in seeing this Court reach the legally correct result. Like the plaintiffs in this case, *amici* filed their lawsuit to protect their sovereign interest in enforcement of their own laws, to protect their pocketbook interests, and to vindicate their Second Amendment rights. All of these harms flow from a rule that

should not exist in the first place.

This Court can and should affirm because, as the district court held, the Rule goes against the statute it claims to interpret. There are other problems with the Rule as well. The plaintiffs explained this below, arguing that the Rule's lack of clarity made it arbitrary and capricious and therefore unlawful. While the district court did not reach the issue, *amici* believe it is one of the most concerning aspects of the Rule and urge this Court to consider the argument.

BACKGROUND

I. The Federal Firearms Act of 1938 and Gun Control Act of 1968

For the first 150 years of our nation's history, there was no significant regulation of firearms possession or transfer. Congress initiated the first federal licensing requirement for firearms dealers with the Federal Firearms Act of 1938 ("FFA"), Pub. L. 75-785, 52 Stat. 1250 (June 30, 1938). The law required "[a]ny ... dealer desiring a license to transport, ship, or receive firearms or ammunition in interstate or foreign commerce" to apply for a license with "the Secretary of the Treasury, who shall prescribe by rules and regulations the information to be contained in such application." *Id.* § 3, 52 Stat. at 1251. The Secretary was required to issue the license to any applicant who paid the fee. *Id.*. The FFA defined a "dealer" as "any person engaged in the business of selling firearms or ammunition or cartridge cases, primers, bullets or propellent powder, at wholesale or retail, or any person engaged in the business of repairing such firearms or of manufacturing or fitting special barrels, stocks, trigger mechanisms, or breach mechanisms to firearms." *Id.* § 3, 52 Stat. at 1250.

Thirty years later, Congress passed the Gun Control Act of 1968 ("GCA"), Pub. L. 90-168, 82 Stat. 1213 (Oct. 22, 1968)—the statute this Rule purports to interpret. In relevant part, the GCA explains that its purpose is not "to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of

hunting, trapshooting, target shooting, personal protection, or other lawful activity." 82 Stat. 1213. Nor is the GCA "intended to discourage or eliminate the private ownership or use of firearms for law-abiding purposes, or provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably needed to implement and effectuate the provisions of this title." *Id.* This is no-broader-than-reasonably-necessary requirement helps ensure the GCA's focus on mitigating firearms-related crime does not unduly burden lawful gun owners' Second Amendment rights.

By 1982, Congress had grown concerned that ATF was utilizing questionable techniques to generate arrests and began investigating. *The Right to Keep and Bear Arms, Report of the Subcommittee on the Constitution*, Sen. Jud. Comm., 97th Cong., 2d Sess., at 20 (1982). The Senate Subcommittee on the Constitution issued a report that, among other things, summarized the jarring evidence it received. Some of its findings include:

• The "enforcement tactics made possible by current federal firearms laws are constitutionally, legally and practically reprehensible." *Id.*

• "Although Congress adopted the Gun Control Act with the primary object of limiting access of felons and high-risk groups to firearms, the overbreadth of the law has led to neglect of precisely this area of enforcement." *Id.*

• ATF's statistics showed "that in recent years the percentage of its arrests devoted to felons in possession and persons knowingly selling to them have dropped

from 14 percent down to 10 percent of their firearms cases." After the hearings, ATF said "that 55 percent of its gun law prosecutions overall involve persons with no record of a felony conviction, and a third involve citizens with no prior police contact at all." *Id.*

• The Subcommittee found that ATF had "primarily devoted its firearms enforcement efforts to the apprehension, upon technical malum prohibitum charges, of individuals who lack all criminal intent and knowledge." *Id.*

• The Subcommittee also found that ATF "[a]gents anxious to generate an impressive arrest and gun confiscation quota [had] repeatedly enticed gun collectors into making a small number of sales—often as few as four—from their personal collections," even though each of the sales "was completely legal under state and federal law." *Id.* ATF still "charged the collector with having 'engaged in the business' of dealing in guns without the required license," which saddled "numerous collectors ... [with] a felony record carrying a potential sentence of five years in federal prison" even though many had "no criminal knowledge or intent." *Id.*

• The Committee also received expert evidence "establishing that approximately 75 percent of [ATF] gun prosecutions were aimed at ordinary citizens who had neither criminal intent nor knowledge, but were enticed by agents into unknowing technical violations." *Id.* at 23.

II. Federal Firearms Owners Protection Act of 1986

Two years later, the Senate Judiciary Committee issued a report showing "the

urgent need for changes [to federal firearms law] to prevent the recurrence of [ATF] abuses documented in detail in earlier Committee hearings and in hearings held by other Committees." Federal Firearms Owners Protection Act ("FOPA"), S. Rep. No. 98-583, Sen. Jud. Com., 98th Cong., 2d Sess., at 3 (1984) (footnoted omitted). It explained that many hobbyists sold firearms from their personal collections; and many were charged and convicted for selling without a license, based on courts' broad reading of the GCA's reach. *Id.* at 8. And it claimed that the proposed bill would "narrow" the GCA's "broad parameters by requiring" that dealers "undertake such activities as part of a 'regular course of trade or business with the principal objective of livelihood and profit.'" *Id.* Both Senator Hatch and Representative Volker, sponsors of the bill in the Senate and House, highlighted ATF's improper focus on small-scale local sales that demonstrated Congress's concerns with ATF. *See* 131 Cong. Rec. at S9125 (1985); 132 Cong. Rec. at H1652 (1985).

Congress found that "additional legislation [was necessary] to correct existing firearms statutes and enforcement policies." Firearm Owners Protection Act of 1984, Pub. L. 99-308, 100 Stat. 449, 449 (May 19, 1986) (detailing need to safeguard citizens' Second, Fourth, and Fifth Amendment rights and to prevent the "unconstitutional exercise of authority" under the Ninth and Tenth Amendments). Congress also found "additional legislation [was] needed to reaffirm [its] intent," as expressed in the GCA, that this title did not intend to impose "undue or unnecessary ... burdens on law-abiding citizens" in the lawful "acquisition, possession or use of firearms" or to

"discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." *Id.*

Congress responded to these abuses with the Firearm Owners Protection Act of 1984 ("FOPA"), Pub. L. 99-308, 100 Stat. 449 (May 19, 1986); *see also* S. Rep. No. 98–583, at 6 (1984). In doing so, Congress made a few findings. First, "the rights of citizens ... require additional legislation to correct existing firearms statutes and enforcement policies." 100 Stat. at 449 (codified at 18 U.S.C. § 921 Note). Second, "additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968." *Id.* Recognizing that need, the FOPA clarified that "it is not the purpose of this title to place undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap-shooting, target shooting, personal protection, or any other lawful activity." *Id.* And, importantly, the FOPA reiterated that it "is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." *Id.*

The FOPA narrowed the definition of "dealer" by defining "engaged in the business" as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." 100 Stat. at 450 (to be codified at 18 U.S.C. § 921(a)(21)). But the FOPA expressly excluded "a person who

makes 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 of firearms." *Id.* Importantly for this case, the plural term "sales, exchanges, [and] purchases" was used. Also, the FOPA did not bar private individuals from making a profit when "such occasional sales" occurred. *Id.* It also narrowed the definition of "dealer" by defining "with the principal objective of livelihood and profit" as an intent that "the sale or disposition of firearms is predominantly [to] obtain livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection." *Id.* (to be codified at 18 U.S.C. § 921(a)(22)).

III. The Bipartisan Safer Communities Act of 2022

In 2022, Congress passed a narrow amendment to the GCA in the Bipartisan Safer Communities Act ("BSCA"), Pub. L. Section 3 of 117-159, 136 Stat. 1313 (2022). The BSCA amended the definition of "dealer" in two ways. First, it replaced "with the principal objective of livelihood and profit" with "to predominantly earn a profit." *Id.* § 12002, 136 Stat. at 1324. Second, it defined "to predominantly earn a profit" as an "intent underlying the sale or disposition of firearms [that] is primarily one of obtaining pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection." *Id.* at 1325. The only difference between the FOPA's definition of intent—"primarily one of obtaining livelihood and pecuniary gain"—and the BSCA's definition—"primarily one of obtaining pecuniary gain"—was the BSCA's omission of "livelihood." *See id.*

IV. The Rule

The Rule at issue here, "Definition of 'Engaged in the Business' as a Dealer in Firearms," 89 Fed. Reg. 28,968 (April 10, 2024) ("the Rule"), took the statutory tweak in the BSCA and created a separate definition of what it means to be "engaged in the business" as a firearms dealer. While the BSCA altered the requisite level of motive to constitute being "engaged in the business," it did not alter the requirement for a "regular course" of trade involving "repetitive" transactions of "firearms." By contrast, the Rule states "even a single firearm transaction, or offer to engage in a transaction, when combined with other evidence, may be sufficient to require a license." 89 Fed. Reg. at 28,976; 29,091.

In addition, the Rule creates a series of five presumptions—three of which are explicitly multipart—any one of which ATF will use to presume someone is dealing in firearms. *See* 89 Fed. Reg. at 29,091. The Rule has exceptions to those presumptions, which in turn have their own exceptions. *See id.* For example, ATF will presume someone is "engaged in the business of dealing in firearms" when they "[r]esell[] or offer[] for resale firearms, and also represent[] to potential buyers or otherwise demonstrate[] a willingness and ability to purchase and resell additional firearms." *Id.* (emphases added). Therefore, just offering to sell one gun and then suggesting the possibility that a subsequent sale could occur fits this presumption. But the GCA does not criminalize such conduct. *See* 18 U.S.C. § 921(a)(11)(A) and (21)(C) (defining "dealer" and "engaged in the business"); 922 (unlawful acts). Although this

presumption is—and the other four are—rebuttable, they are not exhaustive of the conduct that could require a person to obtain a license. 89 Fed. Reg. at 29,092.

The Rule also narrows the express safe harbor that Congress created in the FOPA. 18 U.S.C. § 921(a)(21)(C) excludes someone from being "engaged in the business" if that person "makes 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 of firearms." But the Rule purports to change this unqualified exception by defining the term "personal collection" as:

> Personal firearms that a person accumulates for study, comparison, exhibition (e.g., collecting curios or relics, or collecting unique firearms to exhibit at gun club events), or for a hobby (e.g., noncommercial, recreational activities for personal enjoyment, such as hunting, skeet, target, or competition shooting, historical re-enactment, or noncommercial firearms safety instruction). The term shall not include any firearm purchased for the purpose of resale with the predominant intent to earn a profit .... In addition, the term shall not include firearms accumulated primarily for personal protection.

89 Fed. Reg. at 29,090 (to be codified at 27 C.F.R. § 478.11). The Rule also states that if someone "restocks" their personal collection after selling a firearm, they may not be subject to the exemption for selling from a personal collection. *Id.* at 29,092.

The Rule acknowledges that it will produce several effects on those who sell firearms without a license. The first is that a significant number of firearm hobbyists will become federal firearms licensees and be compelled to abide by the new regulations. *Id.* at 29,898. A second anticipated effect is that there will be many individuals that stop selling firearms altogether. *Id.* at 29,054.

ARGUMENT

This Court should affirm the district court's order and leave the preliminary injunction in place. The Court should do so for a number of reasons, including that ATF's Rule is contrary to the very statute is claims to interpret, a point aptly argued by the plaintiffs here, and which *amici* will not repeat. The Court should also affirm the preliminary injunction for another reason argued below, though not reached by the district court: The Rule is arbitrary and capricious because it (1) creates a labyrinthian, unpredictable test that creates presumptions, exceptions, and exceptions to the exceptions; (2) it is a sharp departure from past practice without reasonable explanation; and (3) ATF's explanation for the Rule is implausible.

A rule is arbitrary and capricious if: "the agency has relied on factors which Congress has not intended it to consider," if the agency "entirely failed to consider an important aspect of the problem," or if the agency "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Rest. L. Ctr. v. United States Dep't of Lab.*, 120 F.4th 163, 175 (5th Cir. 2024) (quoting *Motor Vehicle Mfrs. Assn of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.* ("*State Farm*"), 463 U.S. 29, 43 (1983)).

When an agency promulgates a rule, the very least it must do is make the rule clear enough that people can follow it. It must give people some idea of how to act so that they will not run afoul of the law. It should do this by giving clear instructions

and by clearly explaining the rule so that people can know what to expect in the future.

The Rule at issue here fails to meet this most basic requirement. It is a web of presumptions, exceptions to those presumptions, and exceptions to those exceptions designed to snare anyone any individual ATF agent wants to penalize. It is a change from the past without explanation, designed to keep people on edge in case ATF changes its mind again in the future. And it is not reasonably explained, so ATF can change things up again if it so chooses. In short, the Rule turns a common American activity—buying, trading, and selling firearms—into a minefield. Any sale (or intent to sell) can trigger agency action and result in civil and criminal penalties. The end result (perhaps an intended one) is that constitutional behavior will be chilled.

I. ATF created an impermissible multi-factor test with civil and criminal consequences.

Under the Administrative Procedure Act ("APA"), a reviewing court should set aside any agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "Illogic and internal inconsistency are characteristic of arbitrary and unreasonable agency action." *Chamber of Com. of United States of Am. v. United States Dep't of Lab.*, 885 F.3d 360, 382 (5th Cir. 2018), *judgment entered sub nom. Chamber of Com. of Am. v. United States Dep't of Lab.*, No. 17-10238, 2018 WL 3301737 (5th Cir. June 21, 2018).

While the law does not require the agency to create a black-and-white rule,

ATF must provide the public some idea of what behavior requires them to obtain licenses. *See Firearms Regul. Accountability Coal., Inc., et al. v. Garland, et al.*, No. 23-3230, 2024 WL 3737366, at *11 (8th Cir. Aug. 9, 2024) ("An agency may promulgate a holistic, multi-factor, weight-of-the-evidence test, but only if that test defines and explains the criteria the agency is applying."). And it must explain why the factors are necessary in the first place. A rule is arbitrary and capricious when it "allows ATF to reach whatever result it wants." *Id.* (alteration omitted)).

The Eighth Circuit explained this in a case dealing with another multi-factor ATF balancing test:

> The ATF informs us it "reasonably chose to avoid brightline rules subject to easy circumvention" in favor of an undefined standard. The problem is the Final Rule does not explain how providing any amount of mathematical guidance, never mind bright-line mathematical rules, was likely to lead to circumvention of the law. Such guesswork fails to create an identifiable metric that members of the public can use to assess whether their weapon falls within the Final Rule's definition of a "rifle."

Id. at *8. The court held the rule was arbitrary and capricious (and therefore unlawful) because it "makes it 'nigh impossible for a regular citizen to determine what constitutes a braced pistol, and whether a specified braced pistol requires NFA registration.'" *Id.* (quoting *Mock v. Garland*, 75 F.4th 563, 584 (5th Cir. 2023)).

And as this Court stated in *Mock* (considering the same ATF Rule as the Eighth Circuit):

> Under the Final Rule, it is nigh impossible for a regular citizen to determine what constitutes a braced pistol, and outside of the sixty contemporaneous adjudications that the ATF released, whether a

> specified braced pistol requires NFA registration. Various AR pistols without a recognizable "brace" may fall into the strictures of the Final Rule. Such an owner may not be on notice that his firearm is subject to criminal penalties without registration.
>
> Nor does the ATF bother to clarify the matter. The agency maintains that its six-factor test objectively assesses "design features common to rifles." But it simultaneously declares that the objective criteria given to assess certain factors "are not themselves determinative," and that adjudications are made "on a case-by-case basis…"
>
> Predictably then, the six-part test provides no meaningful clarity about what constitutes an impermissible stabilizing brace.

75 F.4th at 585.

Likewise, in *Chamber of Commerce*, this Court held a rule that contained numerous exemptions not supported by the statute failed even the highly deferential *Chevron* test. 885 F.3d at 381. The Court noted that "DOL knew, and continues to concede, its new definition encompassed actors and transactions that the Department does not believe Congress intended to cover as fiduciary." *Id.* (internal quotation marks omitted). And "[w]hen Congress has acted with a scalpel, it is not for the agency to wield a cudgel." *Id.* at 383. So, "DOL had to create exemptions not exclusively for the statutory purposes, but to blunt the overinclusiveness of the new definition." *Id.* at 381. These exceptions were not a reasonable exercise use of agency authority—they were an unreasonable abuse of power. *Id.* at 387.

A. This Rule creates unlawful presumptions about who is engaged in the business of dealing firearms.

This Rule fails for the same reasons as others that apply illogical multi-factor tests or contain exceptions not found anywhere in the statute.

Through this Rule, ATF is attempting to define "engaged in the business" of selling firearms. But rather then tell firearm hobbyists specifically what it means to be "engaged in the business," ATF crafted a series "presumptions." If a person a took (or had taken, even decades ago) any one of a long list of actions, the agency would "presume" the person was "engaged in the business" of dealing firearms. Then, (obviously recognizing the presumptions ran afoul of the law), ATF created a series of "exceptions" to the presumptions. Then, to make sure those exceptions would be applied narrowly, it created exceptions to the exceptions to the presumptions. The result is a is highly subjective multi-factor test that grants massive amounts of discretion to the individual ATF agents enforcing it.

ATF claims the Rule is meant to "clarify" what it means to be a "dealer in firearms," but it makes it even more confusing for people who are just trying to follow the law. The Rule begins with the presumption that "persons who are engaged in certain firearms purchase-and-sale activities are more likely than not to be 'engaged in the business' of dealing in firearms at wholesale or retail. 89 Fed. Reg. at 28,975. This would include when a person: (1) sells or offers for sale firearms, and also represents to potential buyers or otherwise demonstrates a willingness and ability to purchase and sell additional firearms; (2) spends more money or its equivalent on purchases of firearms for the purpose of resale than the person's reported taxable gross income during the applicable period of time; (3) repetitively purchases for the purpose of resale, or sells or offers for sale firearms…; (4) repetitively sells or offers

for sale firearms." *Id.* at 28,976—77. A firearm need not be actually sold in order for the presumption to apply; an "item or service exchanged for a firearm could be either a direct or an indirect form of payment." *Id.* at 29,069. How will ATF determine whether a service is more or less valuable then the firearm? Answer: unclear. And since the Rule kicks in when a person intends to sell a firearm—even if he does not actually sell it—it is nigh impossible to predict when someone will fall under the Rule.

Even though they are unclear, anyone who meets one of these criteria is presumed to be a "dealer" and must obtain a federal license and run background checks before selling (or intending to sell) a firearm.

B. **The Rule is littered with exceptions to presumptions and exceptions to those exceptions.**

But of course, Congress has said not everyone who sells firearms is a dealer, so ATF created exceptions to the presumptions. For example, the agency claims to uphold a statutory exemption by not presuming someone selling firearms from their "personal collection" is a dealer. 89 Fed. Reg. 28,969, 28,977. Another exception is when a firearm is deemed a "bone fide gift." *Id.* at 28,977. ATF will also not presume someone is a dealer when that person sells more than one firearm with the intent to "liquidate all or part of a personal collection." *Id.* at 28,969.

But the Rule then creates exceptions to the exceptions to the presumptions. ATF will consider the purpose for which someone originally acquired the firearm, which could have happened years or decades ago and could be different then how the

person used the firearm. *Id.* at 28,969 ("[F]irearms accumulated primarily for personal protection are not included in the definition of 'personal collection…"). How will ATF determine the original purpose for which a firearm was purchased (perhaps decades ago)? Answer: unclear. And if someone who liquidated a collection later purchases another firearm, the exception to the presumption no longer applies. How long will ATF monitor the person to make sure he never acquires another firearm? Answer: unclear.

C. The test leaves ATF too much discretion.

Not only does the Rule have multiple factors that leave great discretion to individual ATF agents, it gives no indication how the factors will be weighed. So, ATF will have even more discretion, which is not allowed. *See Firearms Regul. Accountability Coal*, 2024 WL 3737366, at *11. As one of the largest gun show organizers in the country reported, "If you talk to five different ATF agents about what the Final Rule covers, you will likely get five different answers." Declaration of Kehril ¶ 8, *Kansas v. Garland*, No. 6:24-cv-01086-TC-TJJ, ECF No. 104-2 (filed May 1, 2024) (attached as Ex. 1).

ATF agents are not the only ones confused by the Rule—firearm hobbyists who are subject to the Rule are left guessing as to whether it applies to them. In Kansas, a state court judge (who is a plaintiff in the Kansas case and, through his attorney, *amicus* here) said he was not sure if his own collection of firearms fell into the definition of "personal collection" such that he would be required to obtain a

license before selling them. Declaration of Journey ¶ 11, *Kansas v. Garland*, No. 6:24-cv-01086-TC-TJJ, ECF No. 4-1 (filed May 1, 2024) (attached as Ex. 2). He is not alone. He also spoke of hundreds of fellow hobbyists who approached him "in a panic" at a gun show, asking him how the Rule would affect them. *Id.* ¶ 15. He could not answer them. *Id.* Leaving the "guesswork" up to the enforcing agents and the regulated people is unlawful. *Firearms Regul. Accountability* Coal, 2024 WL 3737366, at *8.

This Rule provides no "meaningful clarity" as to whether a person will be considered a "dealer" in firearms or not. It provides many factors, but those factors are not determinative, because there are exceptions and exceptions to the exceptions. ATF did not explain how the factors would be weighed. And there is nothing in the Rule justify why the presumptions, exceptions, and exceptions to the exceptions are necessary in the first place, other than a throw-away sentence about circumventing the law. It beggars belief that ATF sincerely wanted to create a Rule that would clearly apply to one category of people and would leave others free to go about their lives. Rather, the agency clearly wanted the freedom to investigate and punish anyone in the name of taking firearms out of the hands of American citizens. In short, the Rule is the definition of arbitrary and capricious.

II. ATF sharply departed from past practice without explanation.

The Rule is also arbitrary and capricious because it deviates sharply from past practice without reasonable explanation. "One of the basic procedural requirements

of administrative rulemaking is that an agency must give adequate reasons for its decisions." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016). "It is a general rule that an agency must either conform itself to its prior decisions or explain the reasons for its departure...." *Am. Silicon Techs. v. United States*, 22 C.I.T. 776, 777 (1998) (internal quotation marks omitted). "Requiring an adequate explanation of apparent departures from precedent thus not only serves the purpose of ensuring like treatment under like circumstances, but also facilitates judicial review of agency action in a manner that protects the agency's predominant role in applying the authority delegated to it by Congress." *LeMoyne-Owen Coll. v. N.L.R.B.*, 357 F.3d 55, 61 (D.C. Cir. 2004) (Roberts, J.). An agency must "provide a more detailed justification" for the change "when its prior policy has engendered serious reliance interests that must be taken into account." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). It may not "depart from a prior policy sub silentio or simply disregard rules that are still on the books." *Id.*

ATF has engaged in rulemaking related to "engaged in the business" for decades, always sticking to the definitions provided by Congress. So, millions of firearm owners bought, sold, and traded firearms without obtaining federal licenses, reasonably believing that they were not "dealers" because under the law, they were not. This is the first time ATF has tried to redefine a term defined by Congress. ATF's brand-new definition upends the agency's prior practice of not defining the term and harms the interests of these hobbyists. It is a departure from past practice

that must be explained.

ATF does not adequately explain the departure. As an initial matter, it does not acknowledge it is departing at all. An agency cannot "provide reasoned explanation for its action" unless "it display[s] awareness that it *is* changing position." *Fox Television Stations*, 556 U.S. at 515 (emphasis in original). While the preamble to the Rule traces the general history of federal firearms regulation and mentions that ATF has not defined the term before, 89 Fed. Reg. at 28,969-70, this is insufficient. As Justice Souter, sitting for the First Circuit, explained, "a change must be addressed *expressly*, at least by the agency's articulate recognition that it is departing from its precedent." *Nat'l Lab. Rels. Bd. v. Lily Transportation Corp.*, 853 F.3d 31, 36 (1st Cir. 2017) (Souter, J.) (emphasis added). The agency then needs to explain the reasons for the change. *Encino Motorcars, LLC*, 579 U.S. at 221 ("Agencies are free to change their existing policies *as long as they provide a reasoned explanation for the change*." (emphasis added)). ATF did not. It did not explain the connection between that past practice and the current rulemaking. The agency did not explain why the terms were not previously defined and what changed so that the agency thinks it must do so now.

But even if this general history were to qualify as acknowledgement of sharp deviation from past practice, it is still insufficient. Again, when a prior rule has generated reliance interests—as this Rule has—the agency must provide a greater explanation. Such reliance interests include the States' interests in continued tax revenue, *see, e.g.*, Kan. Admin. Regs. § 92-19-22a(a)(4), (b)(1); Tenn. Code Ann. § 67-4-

710; gun show operators continued interest in running their businesses, *see, e.g.*, Ex. 1; and Americans' interests in enjoying their constitutional rights to buy, sell, and trade firearms, *see, e.g.*, Ex. 2.

This type of flip-flop is especially problematic because it demonstrates that the statute is "subject to more than one reasonable interpretation," *Hardin v. ATF*, 65 F.4th 895, 898 (6th Cir. 2023), and ATF could change its mind again on a whim.

III. ATF provided an implausible explanation for the Rule.

Finally, an agency cannot provide an implausible explanation for its action. The APA requires that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The Court should set aside any agency action that is "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *BNSF Ry. Co. v. Fed. R.R. Admin.*, 62 F.4th 905, 910 (5th Cir. 2023) (quoting *State* Farm, 463 U.S. at 43).

"The need for an explanation is particularly acute when an agency is applying a multi-factor test through case-by-case adjudication." *LeMoyne-Owen Coll.*, 357 F.3d at 61. Even in the era of *Chevron* deference, courts held agency actions were arbitrary and capricious when the agency, for example, failed to "articulate a comprehensible standard" for when conduct would fall under a given rule. *U.S. Postal Serv. v. Postal Regul. Comm'n*, 785 F.3d 740, 753 (D.C. Cir. 2015); see also *Chamber of Com. of United*

States of Am., 885 F.3d at 382. An "open-ended rough-and-tumble of factors … can lead to predictability and intelligibility only to the extent the [agency] explains, in applying the test to varied fact situations, which factors are significant and which less so, and why." *LeMoyne-Owen Coll.*, 357 F.3d at 61. "In the absence of an explanation, the 'totality of the circumstances' can become simply a cloak for agency whim—or worse." *Id.*

To the extent ATF explained the rule, its explanations are implausible. ATF claims the Rule's purpose is to "clarify" whether a person is "dealer in firearms" such that he must obtain a federal license and run a background check before selling a firearm. But, as discussed above, the Rule provides no clarity at all. It is a labyrinthine, multi-part balancing test that even lawyers and judges cannot follow. "As a consequence, the purported standard is indiscriminate and offers no meaningful guidance" to either the agents charged with implementing it or the firearm owners who are required to follow it. *U.S. Postal Serv*, 785 F.3d at 754. Further, ATF failed to explain how the factors it did provide would be weighted and why. *See LeMoyne-Owen Coll.*, 357 F.3d at 61; *see also U.S. Postal Serv*, 785 F.3d at 754 (it is not "obvious or intuitively clear" why one action falls under the rule and another does not). The explanation that ATF promulgated the Rule to provide "clarity" is simply implausible.

The only rational for the Rule is that ATF wanted to implement a universal background check requirement. The agency admitted as much. *See* Press Release *Justice Department Publishes New Rule to Update Definition of "Engaged in the Business" as a*

Firearms Dealer, Dep't of Justice, Apr. 11, 2024[1]; Deepa Shivaram, *Here's the New Plan to Boost Background Checks for Guns Bought at Shows or Online*, AP, Apr. 11, 2024[2] ("The Justice Department announced a new rule Thursday that will require anyone who sells guns to run federal background checks—a process that would cut down on what's been known as the 'gun show loophole.'").

But of course, the Rule itself does not mention this because ATF does not have the power to require each and every person who buys a firearm to undergo a background check. So, ATF stated it would "clarify" a standard that did not need clarification. It did so by creating such a confusing and ambiguous test that almost anyone who sells a firearm (or only intends to sell a firearm) could be caught in the net.

The Rule is not the product of well-reasoned decision making. It is therefore arbitrary and capricious.

CONCLUSION

For these reasons, the Court should affirm the decision of the district court and maintain the injunction and the status quo.

November 25, 2024

[1] Located at https://www.justice.gov/opa/pr/justice-department-publishes-new-rule-update-definition-engaged-business-firearms-dealer

[2] Located at https://www.npr.org/2024/04/11/1244007539/biden-guns-background-check-rule.

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CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limit of Federal Rules of Appellate Procedure 27(d)(2)(C) and 32(a)(7)(B) because it contains 5,907 words. It also complies with the typeface and type-style requirements of Federal Rules of Appellate Procedure 27(d)(1)(E) and 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on November 25, 2024, I electronically filed the foregoing motion with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Anthony Powell
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