

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA**

MAYOR AND CITY COUNCIL OF  
BALTIMORE,

*Plaintiff,*

v.

BUREAU OF ALCOHOL, TOBACCO,  
FIREARMS AND EXPLOSIVES,

*Defendant.*

No. 1:23-cv-03762-RDM

**COMBINED MEMORANDUM IN OPPOSITION TO THE NATIONAL SHOOTING  
SPORTS FOUNDATION, INC.'S RENEWED MOTION TO INTERVENE AND  
MOTION TO FILE UNDER SEAL DOCUMENTS IN SUPPORT OF INTERVENTION  
AND FOR A LIMITED PROTECTIVE ORDER**

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## INTRODUCTION

Having once been denied intervention, the National Shooting Sports Foundation, Inc. (“NSSF”) tries again. This time, NSSF’s renewed motion to intervene attaches anonymous declarations from three federal firearms licensee (“FFL”) members and a survey of member FFLs and offers two new legal theories in support of standing. But these new materials and theories do not overcome the lack of standing that doomed NSSF’s first attempt.

As an initial matter, the renewed motion does both too little and too much: NSSF provides no explanation as to why it could not have submitted similar evidentiary materials in support of standing with its first motion, or why it is appropriate to offer brand new theories of standing on a “renewed” motion. While the Court left the door open for NSSF to cure its initial standing deficiencies, it did not provide an avenue for NSSF to make entirely new arguments. And NSSF makes no effort—none—under Rule 54(b) to justify this attempt at advancing new arguments. Regardless, NSSF’s new materials and arguments fare no better at demonstrating either its standing or interest in this case, which is focused narrowly on whether ATF properly withheld a slice of crime gun data under Exemption 3 of the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552(b)(3).

Crucially, NSSF still has not identified a member with standing. The three member FFL declarants, let alone any anonymous respondent to the member survey, have no cognizable injuries but merely gesture at reputational harms and speculate without foundation that the release of crime gun data would lead to financial losses or to litigation costs in future cases. NSSF’s new standing theories, that this data harms *all* FFLs and that NSSF has standing in its own right, are likewise speculative, as each theory depends on the hypothetical, downstream financial consequences of an adverse decision in this case.

Finally, NSSF has no good reason for sealing the identities of the FFL member declarants over the presumption of public access. For these reasons, Baltimore respectfully requests that the Court deny both NSSF's renewed motion to intervene and its motion to file under seal documents in support of the renewed motion and for the entry of a limited protective order.

### **BACKGROUND**

This case arises from Baltimore's four-part FOIA request for data from ATF aimed at identifying gun crime trends in the city. Compl. Ex. 1, ECF. No. 1-1. Part 1 seeks records sufficient to identify the ten FFLs that are the sources of the most crime guns recovered in Baltimore from 2018 through 2022, along with the time between retail sale and recovery of those guns (known as "time-to-crime"), and the types of crimes those guns were connected with, *e.g.*, homicide or aggravated assault. Part 2 asks for data regarding guns recovered in Baltimore in violent crimes and suicide, specifically the guns' time-to-crime, firearm type, and source state. Parts 3 and 4 asked for "tables or spreadsheets" used to compile two tables included in a recent ATF report on gun trafficking that identified the top five cities that are the sources of guns recovered in Baltimore and the top five cities where guns sourced from Baltimore were recovered. ATF denied Baltimore's request, asserting that disclosure is barred under FOIA Exemption 3 and the Tiahrt Rider.<sup>1</sup> Compl. Ex. 2. The "proprietary of ATF's withholding responsive records" on that basis is the "only remaining dispute between the parties." Joint Status Report, ECF No. 24 at 2.

NSSF filed its first motion to intervene on January 23, 2024, ECF Nos. 11, 11-3 ("First Mem."), and Baltimore filed an opposition brief on February 14, 2024. ECF No. 21 ("First Opp."). This Court denied NSSF's intervention in a March 4 Minute Order, holding that NSSF failed to establish associational standing because "NSSF does not point to any specific member who falls

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<sup>1</sup> Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, 125 Stat. 552, 609-10 (2011).

into this generic description [of a member with standing that] NSSF provides, nor does NSSF argue that all of its members are affected by the challenged activity, which can, in some circumstances, be sufficient to dispense with the identification requirement.”

On March 19, 2024, NSSF filed a Renewed Motion to Intervene that attached a number of exhibits. ECF No. 26-1 (“Renewed Mem.”). Those exhibits include a declaration from an NSSF employee, Salam Fatohi, who oversaw a March 2024 survey of NSSF members that requested responses to a series of 17 questions, to which 302 retailer FFLs across 14 states responded. ECF No. 26-2 (“Fatohi Decl.”). The “summary” of the survey responses includes tallies of yes/no answers and a summary of selected, anonymized comments from the respondents. ECF No. 26-3 (“Member Survey”).

Also on March 19, 2024, NSSF filed a motion to limit public access to three additional documents intended to bolster NSSF’s standing arguments. ECF No. 25 (“Sealing Mot.”). The three documents are declarations from FFLs—all members of NSSF<sup>2</sup>—two from Maryland and one from Ohio. NSSF offers these declarations to demonstrate that “there is a significant risk of harm to an FFL being associated, in any way, with FOIA requests seeking gun-crime trace information.” NSSF moved to file those documents under seal, to file a redacted version of those documents on the public docket, and for a limited protective order. NSSF proposes that the identities of the member declarants remain sealed and subject to a protective order.

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<sup>2</sup> According to NSSF’s Motion to File Under Seal, these declarants are members of NSSF; however, the declarants themselves do not mention membership in their declarations.

## ARGUMENT

### **I. NSSF fails to show good reason to raise new arguments or have this Court reconsider its prior order denying intervention.**

NSSF already had an opportunity to present arguments and declarations in support of its standing to intervene. The first time around, this Court denied intervention because NSSF failed to establish associational standing by failing to identify any member who would suffer an injury in fact from a response to Baltimore’s FOIA request. The Court suggested that if NSSF were concerned about identifying particular members, it could “file a motion for leave to submit the necessary information under seal.”

In its renewed motion, NSSF goes further, offering new materials and presenting new arguments for standing, namely that *all* member FFLs would incur “reputational and economic” harm from disclosure and that NSSF has standing in its own right. *Compare* Renewed Mem. at 4-8, 12-14 *with* First Mem. at 5. NSSF fails to explain why it did not submit these materials and arguments in its first motion. NSSF’s piecemeal rollout of its arguments runs counter to the “considerations of judicial economy and the obligation of the courts ‘to secure the just, speedy, and inexpensive determination of every action’” under Federal Rule of Procedure 1, which “require ‘good reason’ before reopening matters once resolved.” *Brown v. Dist. of Columbia*, No. 17-cv-348, 2019 WL 1924245, at \*2 (D.D.C. Apr. 30, 2019) (Moss, J.) (quoting *In Def. of Animals v. Nat’l Insts. of Health*, 543 F. Supp. 2d 70, 76 (D.D.C. 2008)).

NSSF’s renewed motion to intervene is properly considered as a motion to reconsider under Federal Rule of Civil Procedure 54(b) because this Court’s prior order was a “decision . . . that adjudicate[ed] fewer than all the claims or the rights and liabilities of fewer than all the parties.” *See Safari Club Int’l v. Salazar*, No. 11-cv-01564, 2012 WL 13069817, at \*1 (D.D.C. Apr. 16, 2012). Under Rule 54(b), a court has broad discretion in “determining whether reconsideration is

necessary under the relevant circumstances,” with “the caveat that where litigants have once battled for the court’s decision, they should neither be required, nor without good reason permitted, to battle for it again.” *Fleck v. Dep’t of Veterans Affs. Off. of Inspector Gen.*, 651 F. Supp. 3d 46, 51 (D.D.C. 2023) (Moss, J.) (cleaned up). “A court will ordinarily grant a motion for reconsideration under Rule 54(b) only when the movant demonstrates that there has been ‘(1) an intervening change in the law; (2) the discovery of new evidence not previously available; or (3) a clear error in the first order.’” *Shapiro v. U.S. Dep’t of Just.*, No. 13-cv-555, 2016 WL 3023980, at \*2 (D.D.C. May 25, 2016) (Moss, J.) (quoting *Stewart v. Panetta*, 826 F. Supp. 2d 176, 177 (D.D.C. 2011)). “The party seeking reconsideration bears the burden of demonstrating that it is warranted.” *Fleck*, 651 F. Supp. 3d at 51.

NSSF does not carry that burden. There is no new law, no clear error in the first order, and NSSF makes no showing that the Member Survey or member declarations were unavailable for its first motion to intervene. Nor has NSSF explained why it did not argue its new standing theories previously. NSSF’s attempt to have this Court reconsider its prior order “cannot be used as an opportunity to reargue facts and theories upon which a court has already ruled, nor as a vehicle for presenting theories or arguments that could have been advanced earlier.” *Anand v. U.S. Dep’t of Health & Hum. Servs.*, No. 21-cv-1635, 2022 WL 4231981, at \*1 (D.D.C. Apr. 27, 2022) (quoting *Est. of Gaither ex rel. Gaither v. Dist. Of Columbia*, 771 F. Supp. 2d 5, 10 (D.D.C. 2011)).

Furthermore, in its March 4 Minute Order, this Court specifically directed that a “reverse FOIA case” is the proper procedure for asserting FOIA exemptions not claimed by the agency, but NSSF brings this renewed motion in the same deficient posture, which further demonstrates that NSSF has not established any good reason for reconsidering this Court’s prior ruling.

**II. NSSF has no right to intervene under Rule 24(a).**

To intervene as of right, NSSF must demonstrate that it has Article III standing and that it meets the four Rule 24(a) factors, which require showing (1) a timely motion, (2) an interest relating to the property or transaction that is the subject of the action, (3) that disposition of the action would impair NSSF’s interest, and (4) that the existing parties do not adequately represent NSSF’s interests. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731-32 (D.C. Cir. 2003).

**A. NSSF lacks Article III standing.**

As before, NSSF fails on all of its standing theories. All suffer from the same deficiency: the theories hinge on the occurrence of future events supported only by speculation—whether from NSSF’s three member declarants, the Member Survey, or by argument in its memorandum— about downstream harms deriving from the release of trace data in response to Baltimore’s FOIA request. Simply put, these harms lack the imminence required to show standing.

“The standing inquiry for an intervening-defendant is the same as for a plaintiff: the intervenor must show injury in fact, causation, and redressability.” *Crossroads Grassroots Pol’y Strategies v. Fed. Election Comm’n*, 788 F.3d 312, 316 (D.C. Cir. 2015). To establish an Article III injury in fact, the movant must demonstrate “‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Imminence “cannot be stretched beyond its purpose, which is to ensure that the injury is not too speculative for Article III purposes—that the injury is *certainly* impending.” *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 409 (2013) (quoting *Lujan*, 504 U.S. at 565 n.2). “[A]llegations of *possible* future injury’ are not sufficient.” *Id.* (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990)).

Additionally, a movant must demonstrate that the injury in fact is “fairly traceable to the challenged action” and “that the requested relief will remedy the alleged injury in fact.” *Teton Historic Found. v. U.S. Dep’t of Def.*, 785 F.3d 719, 724 (D.C. Cir. 2015) (cleaned up). To demonstrate redressability, movants “must show ‘more than the remote possibility . . . that their situation might . . . improve were the court to afford relief.’” *Id.* at 726 (quoting *Warth v. Seldin*, 422 U.S. 490, 507 (1975)).

Because NSSF seeks to intervene in this case at summary judgment, NSSF “must support each element of standing by affidavit or other evidence.” *Cigar Ass’n of Am. v. USDA*, 323 F.R.D. 54, 60 (D.D.C. 2017). “Proffered facts must be sufficiently specific to rise above the level of ‘conclusory allegations,’ and the court will not presume missing facts needed to establish an element of standing.” *Id.* (quoting *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015)).

NSSF’s newly submitted information—which contains little more than conclusory allegations—does not cure its associational standing problem. The member declarations and Member Survey responses lack the factual basis necessary to demonstrate that an identifiable member has standing, much less that *all* FFL members have standing. In addition, NSSF lacks standing in its own right because it has not shown that the release of trace data would impair its operations—rather than its abstract advocacy interests—and otherwise asserts future harms to its finances and membership that are entirely speculative and unsupported.

### **1. NSSF lacks associational standing.**

“An association has standing to sue on behalf of its members if: ‘(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit.’” *Chamber of Com.*

of *U.S. v. EPA*, 642 F.3d 192, 199 (D.C. Cir. 2011) (quoting *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002)).

The three member declarations and the Member Survey's anonymous responses are too speculative to establish that any declarant or survey respondent has standing in their own right, and the harms they discuss are neither traceable nor redressable. Likewise, NSSF fails to establish standing based on its members' supposed "privacy" or "proprietary" interests, both for lack of any established economic harm and by failing to show that the data requested by Baltimore implicates cognizable privacy or proprietary interests.

Perhaps recognizing that its efforts to show an individual member with standing still falls short, NSSF now argues that "[t]he release of any information related to any crime-gun trace harms the reputational and economic interests of all FFLs" and that yet-to-be-identified NSSF members have standing on the idea that *some* member is likely to be named in response to Baltimore's FOIA request. Renewed Mem. at 4, 8-9. Neither theory holds water.

**i. NSSF has yet to identify any member with standing.**

NSSF offers the member declarations and the survey responses in an attempt to show the reputational and economic harms that will result to FFL members if Baltimore's FOIA Request is granted. Renewed Mem. at 5-7. But these declarants and survey respondents offer no factual basis to conclude that they are likely to be identified in a response to Baltimore's FOIA request, and their claimed harms fall short of constituting Article III injuries in fact.

To start, none of the individual declarants have established standing because none provide sufficient concrete facts that would allow the Court to conclude that their injuries are "certainly impending." *Clapper*, 568 U.S. at 410 (quoting *Whitmore*, 495 U.S. at 158). Without any specifics, each declarant avers in a single sentence that they have complied with federal reporting requirements, including responding to requests from the ATF and National Tracing Center. *See*

ECF No. 25-1 at ¶ 7; ECF No. 25-2 at ¶ 7; ECF No. 25-3 at ¶ 7. But when? How often? During the limited time period at issue in Baltimore’s FOIA request? The declarations are silent on these critical points. The survey results similarly offer no facts connecting them to the information sought by Baltimore.

Moreover, “[r]eputational harm typically gives rise to a cognizable injury in one of two situations. The first is when the harm causes a ‘loss of clients or other business’ – *i.e.*, economic injury.” *Statewide Bonding, Inc. v. U.S. Dep’t of Homeland Sec.*, No. 18-cv-2115, 2019 WL 689987, at \*4 (D.D.C. Feb. 19, 2019) (quoting *Morgan Drexen, Inc. v. Consumer Fin. Prot. Bureau*, 785 F.3d 684, 692-93 (D.C. Cir. 2015)). “The second situation involves an *individual* whose reputation is damaged as a result of public stigmatization.” *Id.* (emphasis added). Here, “[a]s profit-based enterprises, [NSSF’s member declarants] presumably mean economic harm to their businesses, rather than stigmatic harms.” *Id.*; accord *Am. Chemistry Council, Inc. v. Nat’l Acad. of Scis.*, No. 23-cv-2113, 2024 WL 1141465, at \*15 (D.D.C. Mar. 15, 2024). NSSF asserts that its members have a “legally protectable interest in avoiding the public incorrectly associating the FFLs with gun trafficking and other crimes,” Renewed Mem. at 11, but its member FFLs are for-profit enterprises that must demonstrate economic harm rather than public stigmatization alone.<sup>3</sup> “It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires.” *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 466 (2010) (Stevens, J., concurring in part and dissenting in part).

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<sup>3</sup> Every case cited by NSSF in support of its theory that its members face reputational harm involves damage to an *individual’s* reputation from public stigmatization or reputational harm to a non-profit organization bringing a First Amendment claim. See *Meese v. Keene*, 481 U.S. 465 (1987); *Foretich v. U.S.*, 351 F.3d 1198 (D.C. Cir. 2003); *Parsons v. U.S. Dep’t of Just.*, 801 F.3d 701 (6th Cir. 2015); *Turkish Coal. of Am., Inc. v. Bruininks*, 678 F.3d 617 (8th Cir. 2012); *Doe v. Nat’l Bd. of Med. Exam’rs*, 199 F.3d 146 (3d Cir. 1999).

The member declarants' statements are far too speculative to make out reputational harm resulting in economic injury. They allege in a conclusory manner that they fear "reputational harm," "decreased firearms sales as a result of decreased consumer confidence in the confidentiality of information submitted to the ATF,"<sup>4</sup> and increased "operating costs associated with an increased risk of litigation exposure from suits against gun manufacturers and FFLs." *See* ECF No. 25-1 at ¶ 11; ECF No. 25-2 at ¶ 12; ECF No. 25-3 at ¶ 11. One member declarant also predicted that "[c]ompetitor businesses *could* point to [REDACTED] being named and tell shared customers that we are not doing things the right way." ECF No. 25-3 at ¶ 11 (emphasis added). This is not enough for Article III standing.

Relatedly, to the extent NSSF is arguing that any of its anonymized respondents to the Member Survey have standing in their own right, that argument likewise fails. Some respondents generally aver that trace data disclosure would hurt their business without any explanation as to how, why, or when economic injury would likely occur as a result of disclosure. *E.g.* Renewed Mem. at 6 ("I feel [identification through disclosure] would be detrimental to our overall financial bottom line.") (quoting Member Survey).<sup>5</sup>

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<sup>4</sup> Allegations that consumer confidence will be compromised as a result of disclosure of confidential information are not plausible because Baltimore does not seek confidential consumer information in its FOIA request. *See infra* at 14-15.

<sup>5</sup> Some Member Survey respondents cite potential harm from disclosures of crime gun data that preexists this case. *See* Member Survey at 4 ("We were specifically named in [a local news] article (they are owned by USA Today), and this has brought concerned comments from customers. This WILL result in a decrease of new customer acquisition . . . ."; "It's frustrating that the information released [as part of the Demand Letter 2 publication] made it sound like we were not compliant and was detrimental to my business . . . ."). Those preexisting harms cannot establish standing in this case since the resolution of this case in ATF's or NSSF's favor will not redress any harms already suffered. *Pulphus v. Ayers*, 909 F.3d 1148, 1154 (D.C. Cir. 2018) (plaintiff failed to establish reputational injury where it derived from public criticism predating the challenged government action).

The declarants and Member Survey respondents “merely speculate and make assumptions” and “set forth no specific facts” about what actions third parties—namely customers—will take if ATF produces materials in response to Baltimore’s FOIA Request. *Clapper*, 568 U.S. at 411-12; *see also Barker v. Conroy*, 282 F. Supp. 3d 346, 356 (D.D.C. 2017) (explaining that to demonstrate an injury’s imminence, “[p]laintiffs cannot rely on speculation about the unfettered choices made by independent actors not before the court”) (quoting *Clapper*, 568 U.S. at 415 n.5). Without “substantia[ing] or explain[ing] what economic effects the reputational harms are causing,” such “‘vague [and] conclusory’ assertions of reputational harm are . . . insufficient to establish injury.” *Statewide Bonding, Inc.*, 2019 WL 689987, at \*4 (citation omitted); *see also Ezell Trucking, Inc. v. Fed. Motor Carrier Safety Admin.*, 309 F.3d 24, 26 (D.C. Cir. 2002) (business’s claim of reputational harm was too speculative where there was no evidence that insurance providers or customers made decisions based on a challenged drug testing violation).

The downstream economic harms also fail the traceability test, as they depend on a “causal chain” that “rel[ies] on the speculation that various different groups of actors not present in this case . . . might act in a certain way in the future.” *Ctr. for Biological Diversity v. U.S. Dep’t of Interior*, 563 F.3d 466, 479 (D.C. Cir. 2009). Moreover, to the extent that declarants fear future litigation from being identified in connection with a crime gun trace and attendant operating costs, the “theoretical possibility” of civil liability based on lawsuits that might occur “is neither ‘actual’ nor ‘imminent,’ but purely conjectural[.]” *Coal. for Mercury-Free Drugs v. Sebelius*, 725 F. Supp. 2d 1, 17 (D.D.C. 2010), *aff’d*, 671 F.3d 1275 (D.C. Cir. 2012) (quoting *Lujan*, 504 U.S. at 560).

Because no identified NSSF member has standing, NSSF’s lacks associational standing. *Cf. Cal. Assoc. of Priv. Postsecondary Schs. v. DeVos*, 344 F. Supp. 3d 158, 175 (D.D.C. 2018)

(Moss, J.) (denying a renewed motion for preliminary injunction where declarations failed to identify a member with standing).

**ii. NSSF cannot otherwise demonstrate that *all* of its members, or some unidentified members, have standing.**

Unable to identify a member to support associational standing, NSSF theorizes that either *all* of its members have standing, or alternatively, that it has standing because “[t]here is a substantial likelihood that one or more of NSSF’s member FFLs will be identified in connection with one or more traces responsive to Baltimore’s FOIA requests” and have standing themselves. Renewed Mem. at 8. Even if it were proper for NSSF to introduce these new theories of standing, they both fail.

First, NSSF cannot establish associational standing on the notion that its members as a whole face a “substantial risk” of future injury because, as explained by the Supreme Court, it “would make a mockery” of Article III to use an “organization’s self-description of the activities of its members” to find standing based on a “statistical probability that some of those members are threatened with concrete injury.” *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-98 (2009).<sup>6</sup>

Second, NSSF’s argument that all of its members have standing also fails. This is not the rare case where there is no need to identify specific injured members because “*all* the members of the organization are affected by the challenged activity.” *Summers*, 555 U.S. at 499 (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). In *Patterson*, a civil rights organization had standing to challenge the compelled production of a list of its entire membership “because it and

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<sup>6</sup> See *Swanson Grp. Mfg. LLC*, 790 F.3d at 244 (“[A] statistical probability of injury to an unnamed member is insufficient to confer standing on the organizations.”); see also *Advocs. For Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 41 F.4th 586, 592-93 (D.C. Cir 2022) (explaining that when standing is not established in the administrative record, affidavits are required).

its members are in every practical sense identical” and to require that individual members step forward to assert their constitutionally protected right to withhold the fact of their membership “would result in nullification of the right at the very moment of its assertion.” 357 U.S. at 459. Here, the record does not demonstrate that NSSF members would be equally injured, if at all, by identification of some members nor that any member cannot come forward to identify themselves as members of NSSF. The Member Survey does not demonstrate any concrete, nonspeculative economic consequences resulting from reputational harm that would establish standing for *all* NSSF’s members. *See* Renewed Mem. at 5-6. The idea that the release of one FFL’s data would cause reputational and resulting economic harm to the entire industry is speculative and unfounded.<sup>7</sup>

NSSF cites to the Member Survey to assert that industry-wide harm will result from disclosure of *any* trace data. Renewed Mem. at 7. But that supposed harm could never be redressed by relief in this case because certain crime gun trace information is already regularly made public and unchallenged. *See Rtskhiladze v. Mueller*, No. 20-cv-1591, 2021 WL 3912157, at \*11 (D.D.C. Sept. 1, 2021) (no redressability where there existed “an independent, sufficient, unchallenged,

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<sup>7</sup> If anything, responses to the Member Survey contradict that that idea. *See* Member Survey at 4 (“I believe gun buyers would shy away from FFL gun dealers listed in the Newspaper or Nightly News.”) (emphasis added). Additionally, the survey questions capture little more than the subjective view of FFLs about what it would be mean to be identified as a source of traced crime guns, in contrast to the public polling study that supported the stigmatizing nature of screening films labeled as political propaganda in *Meese*, 481 U.S. at 473 & n.7. *See also Advocs. for Highway & Auto Safety*, 41 F.4th at 593 (survey included responses from specific, individual members demonstrating that those members would be harmed by the challenged rule). Here, the Member Survey measures only what some NSSF’s members worry will happen if there is a public “misimpression that you or your business engaged in criminal or other wrongdoing” or if there is “resulting industry-wide reputational harm.” *See* Member Survey at 2-3. These survey responses do not demonstrate any likelihood that reputational and economic harm will occur to all FFLs; nor can they, because representative members of the public were not surveyed.

and admittedly accurate source of those same injuries that would not be affected by any decision or relief ordered in” that case), *appeal filed*, No. 21-5243 (D.C. Cir. Oct. 29, 2021). For example, the identities of FFLs that sell crime guns are regularly disclosed in public court filings, ATF press releases, and news stories.<sup>8</sup> Prohibiting disclosure here does nothing to redress any supposed industry-wide harm already occurring through the identification of FFLs associated with traced crime guns.

**iii. NSSF members’ asserted privacy or confidentiality interests in the data requested are insufficient as a matter of fact and law to constitute an injury.**

NSSF’s members also lack the “legally protectable privacy and/or proprietary interests” that NSSF claims support an injury in fact. *See* Renewed Mem. at 10. First, Baltimore’s request does not ask for “firearm acquisition and disposition records” that might implicate any individual’s privacy interests. *See id.* As Baltimore has previously explained, *see* First Opp. at 4, Baltimore does not seek records of individual firearm transactions or the data that could be used to reconstruct individual firearms transactions or to connect any one gun to any particular crime.<sup>9</sup> And in any

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<sup>8</sup> *See, e.g., infra* at 16-17 (court filings); Press Release, ATF, *Firearms Purchaser Sentenced to 21 Months for Lying to Acquire a Firearm* (Feb. 15, 2024), <https://www.atf.gov/news/pr/firearms-purchaser-sentenced-21-months-lying-acquire-firearm>; Nick Penzenstadler, *Gun Shops that Sell the Most Guns Used in Crime Revealed in New List*, USA Today (Feb. 15, 2024), <https://www.usatoday.com/story/news/investigations/2024/02/15/shops-selling-most-crime-guns-revealed-atf/72581120007/>.

<sup>9</sup> NSSF misconstrues Parts 3 and 4 of Baltimore’s request to assert that “Baltimore has quite literally requested every trace for every crime gun with a known purchaser that was recovered in Baltimore between 2017 and 2021.” Renewed Mem. at 9. Rather, Parts 3 and 4 of the request “asked for any tables or spreadsheets used to compile the charts that list the ‘Top Source Cities’ of firearms recovered in Baltimore and the ‘Top Recovery Cities’ of firearms sourced from Baltimore.” Compl. ¶ 40. To be clear, Baltimore “does not seek information that could reasonably be expected to interfere with law enforcement investigations, nor does it seek information that would infringe on personal privacy.” *Id.* ¶ 42. To the extent that any personally identifying information or any information connecting a gun to a particular crime would be included in the

case, NSSF’s members have no basis for claiming the types of personal privacy interests protected by 5 U.S.C. § 552(b)(6) and (b)(7)(C) because those FOIA exemptions apply to individuals not businesses. *FCC v. AT&T Inc.*, 562 U.S. 397, 409-10 (2011) (Exemption 7C); *Sims v. CIA*, 642 F.2d 562, 572 n.47 (D.C. Cir. 1980) (Exemption 6); *see also Elec. Priv. Info. Ctr. v. Dep’t of Homeland Sec.*, 384 F. Supp. 2d 100, 118 n.29 (D.D.C. 2005) (explaining that “neither corporations nor business associations have privacy interests that can be protected under Exemption 6”).<sup>10</sup>

Second, NSSF members lack any cognizable “proprietary” injury that supports standing under *Food Marketing Institute v. Argus Leader Media*, 588 U.S. 427 (2019). In *Food Marketing Institute*, a trade association had standing to intervene to challenge an agency’s court-ordered FOIA disclosure because the record showed, and the parties “d[id] not meaningfully dispute,” “that disclosure would likely cause them *some* financial injury.” 588 U.S. at 433. Here, Baltimore disputes that member FFLs would incur a financial injury from being named in a release of trace data, and NSSF lacks any support on the record to demonstrate a non-speculative downstream financial injury. *See supra* at 10-11.

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documents responsive to Baltimore’s request, Baltimore fully expects that ATF would redact that information.

<sup>10</sup> Furthermore, it bears noting that the Declaration of Salam Fatohi submitted by NSSF highlights how little, if any, information that Baltimore seeks comes from the FFLs themselves. Fatohi explains that when requesting a trace, ATF does not inform the FFL recipient of the location of the recovery nor circumstance of the recovery, only the make, model, and serial number of the firearm so that the FFL can identify the purchaser based on its acquisition and disposition record. Fatohi Decl. ¶ 12. However, as repeatedly stated, Baltimore does not seek purchaser information—essentially the only arguably “commercial” information FFLs provide when responding to a trace request. Thus, this Declaration makes clear that FFLs can have no “proprietary” interest in the data Baltimore seeks.

Moreover, NSSF’s members have no proprietary interest here because none of the information requested by Baltimore implicates the “commercial or financial information” that is “confidential” and thereby protected from disclosure under Exemption 4. Information covered by Exemption 4 must in and of itself serve a commercial function or purpose. *Citizens for Resp. & Ethics in Wash. v. U.S. Dep’t of Just.*, 58 F.4th 1255, 1263, 1266-68 (D.C. Cir. 2023) [hereinafter CREW]. The trace data requested by Baltimore patently lacks commercial value because it does not include records that “actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or [that] relate to the income-producing aspects of a business.” *Shteynlyuger v. Ctrs. for Medicare & Medicaid Servs.*, No. 20-cv-2982, 2023 WL 6389139, at \*19 (D.D.C. Sept. 30, 2023) (Moss, J.) (alteration in original) (quoting CREW, 58 F.4th at 1263). The only store-level data Baltimore asks for is the identification of the top 10 source dealers of crime guns from 2018 through 2022, with information about the circumstances of the recoveries of those crime guns and the time-to-crime of those guns. Compl. ¶ 37. That information is not private to FFLs themselves but is possessed by ATF and created with law enforcement agencies. *See* Fatohi Decl. ¶¶ 12-13.

The information requested by Baltimore is not “confidential” either because FFLs have no reasonable expectation of privacy in the information they transmit to ATF. As sanctioned by the Tiahrt Rider, ATF routinely publishes reports reflecting data derived from the trace data collected by ATF, in part from individual FFLs. It even has an entire webpage dedicated to publicizing trace data reports, which are “intended to provide the public with insight into firearms recoveries.”<sup>11</sup> That information is also regularly made public in various court filings. *See e.g.*, Government’s

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<sup>11</sup> ATF, *Firearms Trace Data – 2022*, <https://www.atf.gov/resource-center/firearms-trace-data-2022> (last reviewed Oct. 11, 2023).

Statement of Offense in Support of Defendant’s Plea of Guilty at 4-14, *United States v. Bournes*, No. 23-cr-74 (D.D.C. Oct. 5, 2023), ECF No. 42 (listing the make, model, and caliber of guns illegally purchased by defendants from named FFLs based in Georgia and Texas); Affidavit in Support of Criminal Complaint and Arrest Warrant at 2-7, *United States v. Minor*, No. 22-mj-171 (D.D.C. July 29, 2022), ECF No. 1-1 (ATF special agent describing the makes, models, and calibers of handguns, dates of retail sale and recovery, and the names of the source FFLs in Maryland); Affidavit in Support of Criminal Complaint and Arrest Warrant at 4-8, 12-13, *United States v. Oxner*, No. 22-mj-35 (W.D. Va. June 6, 2022), ECF No. 3-1 (ATF special agent detailing investigation into the recovery and source of a pistol used in a Washington, D.C., homicide, listing the purchases of firearms at named Virginia and Maryland FFLs). Thus, far from having an assurance from ATF that trace data will be kept confidential, FFLs know and expect that information will be regularly published and used in public court filings.

## **2. NSSF lacks organizational standing.**

NSSF has no organizational standing because it shows no injury in fact. There are two types of harms NSSF claims it will incur. One harm is insufficient in its quality: NSSF’s assertion that it will use resources to “respond[] to the proliferation of new requests and lawsuits” due to an adverse decision in this case amounts, at most, to a setback to the NSSF’s advocacy objectives, rather than a setback to the NSSF’s operations. Renewed Mem. at 12-13. The other harm lacks imminence: NSSF’s argument that it may face diminished financial support and membership as a result of an adverse decision in this case is entirely speculative and completely unsupported by documentation. *Id.* at 14.

An organization seeking to invoke standing in its own right must show (1) that an “agency’s action or omission to act injured the [organization’s] interest” and (2) that “the organization [has] used its resources to counteract that harm.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905,

919 (D.C. Cir. 2015) (quoting *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)), *reh'g en banc denied*, (D.C. Cir. Mar. 24, 2016)). To meet those elements, the organization must show that the challenged “conduct perceptibly impaired the organization’s ability to provide services.” *Id.* (quoting *Turlock Irrigation Dist. v. Fed. Energy Regul. Comm’n*, 786 F.3d 18, 24 (D.C. Cir. 2015)).

As to the first type of harm, NSSF states that a ruling in this case could lead to future FOIA requests and lawsuits seeking ATF trace data, to which NSSF would incur costs in responding. Renewed Mem. at 12-13. Those costs categorically do not make out an injury in fact because as “[this] circuit[’s] precedent makes clear . . . an organization’s use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury.” *Food & Water Watch*, 808 F.3d at 919; *see also Turlock Irrigation Dist.*, 786 F.3d at 24 (“The mere fact that an organization redirects some of its resources to litigation and legal counseling in response to actions or inactions of another party is insufficient to impart standing upon the organization.”) (quoting *Nat’l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir.1995)).

As to the second type of harm, NSSF asserts that the “stare decisis” or “persuasive” effect of an adverse decision in this case will harm its “ability to protect” its members in “future cases” and will lead to diminished financial support and membership. Renewed Mem. at 13-14. These assertions do not amount to injuries in fact.

First, the future effect of an adverse decision here cannot establish an Article III injury because “where a threshold legal interpretation must come out a specific way before a party’s interests are even at risk, it seems unlikely that the prospect of harm is actual or imminent.” *Deutsche Bank Nat’l Tr. Co. v. FDIC*, 717 F.3d 189, 193 (D.C. Cir. 2013); *see also Teva*

*Pharms. USA, Inc. v. Azar*, 369 F. Supp. 3d 183, 197 (D.D.C. 2019) (Moss, J.) (“It is unassailable that the ‘mere potential precedential effect of an agency action’ is not, alone, sufficient to establish standing.”) (quoting *Teva Pharms. USA, Inc. v. Sebelius*, 595 F.3d 1303, 1312-13 (D.C. Cir. 2010)).<sup>12</sup>

Second, the assertion of future diminished financial support and membership is wildly speculative and totally without support on the record. Renewed Mem. at 13-14. NSSF compares the effect that the release of trace data will have on it to the effect on the NAACP of releasing its membership list in 1950s Alabama, the issue in *Patterson*. There, the Court found that the NAACP was a proper party to vindicate its members’ First Amendment rights of free association because the record, and logical inferences from that record, supported it: civil rights activists would withdraw from membership in the NAACP, or be dissuaded from joining it, because “on past occasions revelation of the identity of its rank-and-file members has exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility membership.” *Patterson*, 357 U.S. at 462-63. Where identification as an organization’s member carries consequences for those members, it is logical to infer that the organization itself could suffer from the identification of members. See *Pollard v. Roberts*, 283 F. Supp. 248, 258 (E.D. Ark. 1968) (finding that the link between release and reprisals was so obvious that one “would be naive not to recognize” the link between the identification of political party contributors and diminished party membership and contribution), *aff’d*, 393 U.S. 14 (1968) (mem.). Here, nothing on the record establishes that reprisals are likely to happen against FFLs

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<sup>12</sup> NSSF supports its position that future litigation establishes an injury in fact in this case by pointing to inapposite reasoning from cases outside of this circuit finding that an intervenor had an interest in a case where the outcome of *that* case, not some future case, would impair the intervenor’s economic and property interests. See Renewed Mem. at 13-14.

who might be named in the release of trace data, or that those reprisals against FFLs would happen *due to their NSSF membership*, which in turn would deter NSSF membership.<sup>13</sup>

In short, NSSF's claimed injuries to itself are supported with only the most conclusory and groundless of arguments. That is simply not enough at this stage. *See Cigar Ass'n of Am.*, 323 F.R.D. at 60.

**B. NSSF still fails to meet the other requirements for intervention as of right.**

In addition to standing, NSSF would need to have an interest in this case in order to intervene as of right. As discussed above, it does not. It also fails to meet two other requirements for intervention as of right: demonstrating that the disposition of this action would impair NSSF's or its members' interests (if they had one); and showing that ATF does not provide adequate representation. *See Fund for Animals*, 322 F.3d at 731.

The disposition of this lawsuit would not impair any "privacy and/or proprietary interests of NSSF members and their customers" as NSSF represents. Renewed Mem. at 16. Baltimore's FOIA Request asks for basic statistical information about crime guns recovered in Baltimore, not customer information, such as information that would identify any purchaser. *See supra* at 2, 14. Further, NSSF has no basis for asserting privacy interests that belong to individuals, not to businesses, under privacy-based exemptions to disclosure under FOIA. *See supra* at 14-15. NSSF also lacks a "proprietary" interest in this case because the data that Baltimore requested does not

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<sup>13</sup> Moreover, NSSF's supposed future diminished financial support and membership "flunks the traceability and redressability requirements because such injury depends entirely on the independent decisions of third-part[ies]." *Iowaska Church of Healing v. United States*, No. 21-cv-2475, 2023 WL 2733774, at \*6 n.7 (D.D.C. Mar. 31, 2023) (organization lacked traceable or redressable injury from potential lost membership income and charitable contributions resulting from agency's denial of nonprofit and church status), *appeal filed*, No. 23-5122 (D.C. Cir. May, 31, 2023).

implicate the kind of “confidential” and “financial or commercial” information covered by Exemption 4. *See supra* at 15-17.

Denying intervention does not carry “practical consequences” for NSSF that would show an impaired interest. *100Reporters LLC v. U.S. Dep’t of Just.*, 307 F.R.D. 269, 278 (D.D.C. 2014). NSSF points vaguely to the “risk of significant harm associated with the public disclosure of gun trace information,” Renewed Mem. at 16, but it does not connect the dots between the trace data requested by Baltimore here and some practical impediment to NSSF’s future operations. By contrast, in *100Reporters*, a company connected the dots between (1) records relating to a specific company’s plea agreement and monitorship that implicated “confidential and proprietary information” including about the company’s “compliance programs, business operations, and internal controls,” and (2) the disclosure of those records, which would “impair [the company’s] ability to detect and prevent compliance issues moving forward.” 307 F.R.D. at 275, 279.

NSSF’s purported interests are also adequately represented here. ATF has consistently adopted and defended NSSF’s preferred reading of the Tiahrt Rider, taking the view that that the Tiahrt Rider prohibits disclosure of information from the Firearm Trace System database under FOIA. This vigorous opposition has involved numerous court cases across the country. *See, e.g., Ctr. for Investigative Reporting v. U.S. Dep’t of Just.*, 14 F.4th 916 (9th Cir. 2021); *Everytown for Gun Safety Support Fund v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 984 F.3d 30 (2d Cir. 2020); *Lindsay-Poland v. U.S. Dep’t of Just.*, No. 22-cv-7663, 2023 WL 8810796 (N.D. Cal. Dec. 19, 2023); *Brady Ctr. to Prevent Gun Violence v. U.S. Dep’t of Just.*, 410 F. Supp. 3d 225 (D.D.C. 2019) (Moss, J.).

**III. NSSF should be denied permissive intervention.**

Because NSSF has failed to establish standing, permissive intervention is not warranted. See Minute Order (citing *Yocha Dehe v. U.S. Dep't of the Interior*, 3 F.4th 427, 431-32 (D.C. Cir. 2021)).

Furthermore, NSSF seeks to intervene to inject new issues into this case. It seeks to intervene to assert that FOIA exemptions other than those asserted by ATF—“including in addition and without limitation Exemptions 4 and 6”—bar disclosure of the records requested by Baltimore. Renewed Mem. at 18-19. But NSSF has no basis for asserting Exemption 6, and the data requested by Baltimore does not implicate Exemption 4. See *Elec. Priv. Info. Ctr.*, 384 F. Supp. 2d at 118 n.29; see also *Flyers Rts. Educ. Fund, Inc. v. FAA.*, 71 F.4th 1051, 1057 (D.C. Cir. 2023) (explaining that Exemption 4 is “inapplicable” where “an agency’s analysis or reformulation of confidential commercial information” does not reveal the underlying confidential commercial information). This case simply does not implicate the issues that NSSF wishes to insert into it.

Moreover, it would burden the parties to this litigation to brief issues that are not relevant to a determination of whether ATF properly invoked the Tiahrt Rider in refusing to disclose the data that Baltimore requested. Baltimore has now briefed these issues twice, including after this Court stated that a “reverse FOIA case” would be the proper action for NSSF to attempt to block any disclosure of trade secret information.

**IV. The identity of NSSF member declarants should not be sealed.**

“[T]here is a ‘strong presumption in favor of public access to judicial proceedings,’” including judicial records,<sup>14</sup> which “may be outweighed in certain cases by competing interests.” *Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 665 (D.C. Cir. 2017) (quoting *United States v. Hubbard*, 650 F.2d 293, 317 (D.C. Cir. 1980)). To make this determination, courts must weigh what are often referred to as the “*Hubbard* factors,” which are “(1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.” *EEOC v. Nat’l Children’s Ctr., Inc.*, 98 F.3d 1406, 1409 (D.C. Cir. 1996).

Here, the “need for public access” favors disclosure. It is NSSF’s burden to demonstrate the absence of a need for public access to overcome the presumption in favor of disclosure and NSSF has made no such argument. *Vanda Pharms., Inc. v. FDA*, 539 F. Supp. 3d 44, 52 (D.D.C. 2021). They cannot do so here: the fact that FFLs respond to trace requests **as required by law**, which is all that the three declarations say, is not confidential information. Additionally, in a case, like this one, “where the government is a party . . . [t]he appropriateness of making court files accessible is enhanced.” *Id.* at 52-53 (internal quotation marks omitted and alterations in original) (quoting *United States v. Thomas*, 840 F. Supp. 2d 1, 4 (D.D.C. 2011)). Second, the “extent of previous public access” favors disclosure: court filings regularly describe the process of tracing a

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<sup>14</sup> The member declarations are judicial records subject to this presumption because they “contain[] information with which [NSSF] hope[s] to influence the court, and upon which the court must base its decision.” See *Metlife, Inc.*, 865 F.3d at 667.

recovered crime gun to its source FFL and name FFLs from which individuals purchased firearms illegally in straw purchases or for trafficking. *See supra* at 16-17.

The fourth *Hubbard* factor requires showing a specific property or privacy interest in the declarations themselves. *United States ex rel. Durham v. Prospect Waterproofing, Inc.*, 818 F. Supp. 2d 64, 68 (D.D.C. 2011). NSSF asserts that redacting the names of the declarants will “protect[] the privacy interests of the FFL as provided for under the Tiahrt Rider and past ATF guidance.” Sealing Mot. at 2. But nothing in the Tiahrt Rider creates a privacy interest in statements about an FFL’s compliance with federal law. To the extent that NSSF is asserting a privacy interest based on the “significant risk of harm to an FFL being associated, in any way, with FOIA requests seeking gun-crime trace information,” *id.* at 1, that asserted interest is the kind of generalized, downstream harm that does not make out a privacy interest in the declarations themselves. *See Durham*, 818 F. Supp. 2d at 68 (no privacy interest in relator’s “keeping his identity secret from his employer to avoid any potential retaliation should disclosure occur”).

With regard to the fifth *Hubbard* factor, it is difficult to see any prejudice in future litigation from revealing the members’ authorship of these declarations, which each generically state that the member complies with all reporting requirements imposed by federal law, describe federal recordkeeping and trace response requirements, assert that the members do not disclose that information publicly, and represent that disclosure of the data sought by Baltimore would harm their businesses. NSSF’s general assertion that FFLs would face harm from being associated with crime gun traces does not demonstrate prejudice because “generalized reputational harm” does not weigh in favor of sealing, *Friedman v. Sebelius*, 672 F. Supp. 2d 54, 60-61 (D.D.C. 2009), and the identities of the declarants is not a “[s]ensational disclosure” that establishes prejudice. *See id.* at 60.

As to the sixth factor, the declarations are not discovery materials that deserve a stronger presumption of privacy, *see id.* at 61, but are instead introduced to support a motion, which, as a public filing, would counsel against sealing. NSSF’s motion to file under seal should be denied.

For the same reasons, NSSF has not shown good cause for a protective order granted under this Court’s inherent authority. *See Gardner v. Saul*, No. 20-cv-2983, 2020 WL 12969217, at \*2 (D.D.C. Oct. 16, 2020) (“[U]nless ‘Congress has spoken directly to the issue at hand,’ the ‘common-law standard enshrined in the *Hubbard* balancing test’ governs ‘[ ]sealing decisions.’”) (quoting *In re Leopold to Unseal Certain Elec. Surveillance Applications & Ords.*, 964 F.3d 1121, 1129-30 (D.C. Cir. 2020)). If NSSF is permitted to intervene in this case, any materials that NSSF submits in support of its case should be filed unredacted on the public docket.

### **CONCLUSION**

For the above reasons, the Court should deny NSSF’s renewed motion to intervene and motion to file under seal and for a limited protective order.

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Dated: April 9, 2024