No. 21-191

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

EVERYTOWN FOR GUN SAFETY SUPPORT FUND, CITY OF SYRACUSE, NY, CITY OF SAN JOSE, CA, CITY OF CHICAGO, IL, CITY OF COLUMBIA, SC, EVERYTOWN FOR GUN SAFETY ACTION FUND,

Plaintiffs-Appellees,

v.

ZACHARY FORT, FREDERICK BARTON, BLACKHAWK MANUFACTURING GROUP, INC., FIREARMS POLICY COALITION, INC.,

Intervenors-Appellants,

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES,

(*Remaining Defendants listed on inside cover*)

Defendants.

On Appeal from the United States District Court for the Southern District of New York, No. 1:20-cv-6885-GHW

INTERVENOR-APPELLANTS ZACHARY FORT, FREDERICK BARTON, BLACKHAWK MANUFACTURING GROUP, INC., AND FIREARMS POLICY COALITION, INC.'S REPLY BRIEF

Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
cody@mslegal.org

Attorney for Intervenor-Appellants

July 27, 2021

MARVIN RICHARDSON, IN HIS OFFICIAL CAPACITY AS ACTING DIRECTOR OF THE BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES, UNITED STATES DEPARTMENT OF JUSTICE, MERRICK B. GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The district court erred in denying Intervenor-Appellants intervention as of right based on adequate representation. Nothing in Plaintiff-Appellees' Response Brief changes that fact.

From Intervenor-Appellants' timely filing of a motion to intervene at the initiation of this case through their appellate briefing, they have shown that Federal Defendants do not—and cannot—adequately represent Intervenor-Appellants' interests in this litigation. At every stage of this litigation, that fact has become more and more apparent. First, Federal Defendants did not oppose Intervenor-Appellants' intervention at the district court. Then, Federal Defendants supported Intervenor-Appellants' intervention in parallel litigation.

While briefing their cross-motion for summary judgment, Federal Defendants invoked the doctrine of *Chevron* deference. This doctrine requires the lower court to find the legal definition of "firearm" ambiguous and then to resolve that ambiguity in favor of Federal Defendants—deferring to their interpretation and expertise. Intervenor-Appellants opposed this argument in briefing below, arguing against any finding of ambiguity or invocation of deference.

After Intervenor-Appellants filed this appeal, Federal Defendants recused themselves—leaving Plaintiff-Appellees alone arguing that Federal Defendants

adequately represent Intervenor-Appellants' substantial interests—interests that the district court has recognized.

Moreover, Federal Defendants have continued to prove Intervenor-Appellants' consistent argument that Federal Defendants do not, in any way, represent Intervenor-Appellants' interests. Since this case was initiated in August 2020, there has been a change in administration; a change in the federal officials charged with leading the Department of Justice ("DOJ") and the Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF"); the Executive Branch announced a new approach to implementing the Gun Control Act of 1968 ("GCA"), specifically undermining the basis for their litigation position; and Federal Defendants have proposed a new rule that would, in essence, give Plaintiff-Appellees every measure of relief they seek.

The litigation below is currently stayed and, because of intervening changes in the regulatory landscape, will have to begin from step one once the stay is lifted. As a result, should this Circuit uphold the appropriate application of Federal Rule of Civil Procedure 24 and overturn the district court's denial of Intervenor-Appellants' intervention, the underlying case will not be delayed, yet Intervenor-Appellants would have the full opportunity to defend their substantial interests.

SUMMARY OF ARGUMENT

Intervenor-Appellants are individuals and organizations that produce, sell, purchase, and own the products Plaintiff-Appellees seek to have regulated or even criminalized. Federal Defendants do not, indeed could not, adequately represent Intervenor-Appellants' interests in their continued, lawful business and personal property and practices, their financial interests, nor their reliance on the ATF's longstanding implementation of the GCA.

Plaintiff-Appellees offer no argument and therefore waive any claim that Intervenor-Appellants fail to satisfy the first three elements mandating intervention as of right (timeliness, a protectable interest, and possible impairment of that interest). *See generally*, *Response Brief for Plaintiffs-Appellees* ("Everytown Br."), Case No. 21-191, ECF No. 61 (July 19, 2021). Intervenor-Appellants thus appropriately limit their Reply to the issues of adequate representation and permissive intervention.[1]

First, the Supreme Court has established the test and burden for a party to prove inadequate representation to mandate intervention as of right—the party need only show the representation "may be" inadequate and the showing "should be

[1] Intervenor-Appellants maintain that this Circuit should adopt a *de novo* standard of review to evaluate a district court's denial of intervention as of right—a point that Plaintiff-Appellees fail to address. Op. Br. at 16–18. Such change would bring this Circuit in line with the majority of circuits and would properly protect the importance of intervention as of right, which is statutorily distinct from discretionary permissive intervention. *Id.*

treated as minimal." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972). This Circuit should apply the Supreme Court's standards to determine that the district court made a clear error in finding that Intervenor-Appellants' interests are adequately represented.

Second, even if Intervenor-Appellants must make a more rigorous showing, Intervenor-Appellants have met that burden. Intervenor-Appellants have demonstrated that their motivation in opposing Plaintiff-Appellees is distinct from Federal Defendants' since Intervenor-Appellants seek to protect their longstanding personal and business practices as well as their unique financial interests.

Federal Defendants' ultimate objective is adverse to that of Intervenor-Appellants. Federal Defendants, in invoking the *Chevron* doctrine and devoting much of their briefing below to that issue, seek to rely on deference to uphold their application of the definition of "firearm." Intervenor-Appellants do not merely oppose this deferential argument but seek to defend the definition of "firearm" on its own merits. If the lower court were to rule for Federal Defendants based on *Chevron*, it would undermine the legally correct definition of the term "firearm," would subject Intervenor-Appellants to even more uncertainty with their industry moving forward, and could expand the congressionally granted statutory authority of the ATF via the GCA. Federal Defendants, through the change in administration and the publishing of a proposed rule specifically related to the underlying subject

matter (which, if finalized, would give Plaintiff-Appellees every form of relief they are seeking), have continued to demonstrate, as Intervenor-Appellants have argued, that Federal Defendants' interests are more in line with Plaintiff-Appellees than with Intervenor-Appellants. Intervenor-Appellants' combined distinct motivation and objective meet even a heightened burden.

Third, the *parens patriae* doctrine is inapplicable here and provides no basis to presume Intervenor-Appellants are adequately represented. Federal Defendants have not invoked the doctrine, have not opposed intervention, and have made no attempt to represent Intervenor-Appellants' interests. Every case the lower court and Plaintiff-Appellees cite to unilaterally impose *parens patriae* representation upon Federal Defendants is inapplicable.

Fourth, Polymer80, which was granted permissive intervention after the district court denied Intervenor-Appellants' intervention, is not relevant to this Circuit's inquiry under intervention as of right and, even if it were, does not adequately represent Intervenor-Appellants' interests. Not only does Intervenor-Appellant 80% Arms have Classification Letters distinct from Polymer80's, which letters could be undermined by the lower court's ruling, but Intervenor-Appellants also include two individuals and a membership organization, which Polymer80 does not, and cannot, represent.

Finally, at minimum, even under this Circuit's permissive standard of review, the lower court erred in denying Intervenor-Appellants permissive intervention. The lower court and Plaintiff-Appellees mischaracterize Intervenor-Appellants' arguments as expanding the scope of the litigation to raise Second Amendment issues. As addressed at length in Intervenor-Appellants' opening brief, this is not only not true, but would not be allowed under the limitations of APA review. Further, Polymer80's subsequent inclusion in this case as a permissive intervenor, after the lower court's denial of Intervenor-Appellant 80% Arms' permissive intervention, establishes a clear error.

Intervenor-Appellants want nothing more than to defend their interests, interests that the lower court recognized, without being required to rely on Federal Defendants' dynamic bureaucratic interests.

ARGUMENT

I. Intervenor-Appellants' Acknowledged Interests In The Underlying Matter Are Not Adequately Represented By The Federal Government Or Any Other Party

Federal Defendants do not, and cannot, adequately represent the interests of the individuals, business, and membership organization seeking intervention. According to the Federal Rules of Civil Procedure:

> On timely motion, the court *must permit anyone to intervene* who:
>
> . . .
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, *unless existing parties adequately represent that interest*.

Fed. R. Civ. P. 24(a) (emphasis added).

Intervenor-Appellants, regardless of the standard imposed, have shown that their interests in their continued business practices, their financial interests, and their long-term reliance interests in the ATF's application of the term "firearm" are all inadequately represented by the existing parties. Federal Defendants, at every step of this case, have allowed Intervenor-Appellants to make their case without opposition. Only Plaintiff-Appellees, who are directly adverse to Intervenor-Appellants, have ever opposed their intervention. If Federal Defendants ever had any inclination or responsibility to represent Intervenor-Appellants, that representation has long since been abdicated.

A. The Supreme Court's Liberal *Trbovich* Intervention Standard Applies Here

"The requirement of the Rule [24] is satisfied if the applicant shows that representation of his interest '*may be' inadequate*; and the burden of making that showing should be *treated as minimal*." *Trbovich*, 404 U.S. at 538 n.10 (emphasis added).

This standard, as established by the Supreme Court, serves as the basis of every circuit's intervention as of right analysis. *See* Op. Br. at 33, 34 n.9 (collecting sources from every federal circuit). The Supreme Court did not impose a hierarchy on this analysis. Even though, in *Trbovich*, the governmental defendant had a *statutory duty* to represent the interests of the party seeking intervention, the Supreme Court did not require that party to meet a heightened burden to prove inadequacy of representation simply because the defendant was a governmental party. *Trbovich*, 404 U.S. at 529–30. If the Supreme Court intended for the circuits to impose a heightened burden in cases involving federal defendants, *Trbovich* would have been the perfect vehicle to do so—and yet the Court specifically established a low, liberal requirement.

As explained in Intervenor-Appellants' opening brief, this Circuit has employed this same minimal standard. *See* Op. Br. at 32–33; *see also Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) ("[T]he burden to demonstrate inadequacy of representation is generally speaking 'minimal.'")

(quoting *Trbovich*, 404 U.S. at 538 n.10); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) ("An applicant for intervention as of right has the burden of showing that representation may be inadequate, although the burden 'should be treated as minimal.'") (quoting *Trbovich*, 404 U.S. at 538 n.10).

Intervenor-Appellants do not dispute that they bear the burden of proving inadequate representation. *Contra* Everytown Br. at 25–27. Rather, Intervenor-Appellants maintain that this Circuit should follow the Supreme Court in setting that burden, not the inapplicable case law the lower court relied on nor that offered by Plaintiff-Appellees.

Butler does not undermine the Supreme Court's standard. *Contra* Everytown Br. at 19, 25. Both the lower court and Plaintiff-Appellees fail to note that in *Butler* the proposed intervenor was the plaintiff's former, and since discharged, law firm that was seeking to intervene as a plaintiff to protect its charging lien by ensuring that the plaintiff succeeded in the litigation. *Butler*, 250 F.3d at 173 ("Prior to its discharge, the law firm obtained a $2.9 million charging lien that will be extinguished absent a favorable disposition for its former client. It moved therefore to intervene in the continuing litigation as a matter of right."). "The sole issue is whether the Butler law firm—GBJ's former counsel in its action against Sequa—may intervene in the suit to protect its asserted interest in the outcome." *Id.* at 174.

This is not a mere factual difference. *Contra* Everytown Br. at 24. In evaluating the adequate representation element, this Circuit noted: "Butler *concedes, as it must, that its interests are aligned* with those of GBJ, for its recovery upon the charging lien is predicated upon a favorable result for GBJ on the claims against Sequa." *Butler*, 250 F.3d at 180 (emphasis added). Butler's primary argument for a lack of adequate representation was based on the plaintiff's new counsel's lack of experience and financial resources to continue litigation—not divergent interests. *Id.* at 175. Not only were the proposed intervenor and plaintiff's interests not distinct, but the court also expressed concern that "[t]o allow Butler to reappear and again argue GBJ's case, this time nominally in support of Butler's own interests, impugns the historical privilege of clients to decide who will represent them, and when that representation shall cease." *Id.* at 179.

Unlike in *Butler*, Intervenor-Appellants here have never conceded an alignment of interest. And Intervenor-Appellants do not question the expanse of Federal Defendants' resources to continue this litigation. Rather, Intervenor-Appellants have repeatedly noted that Federal Defendants do not share any interest in Intervenor-Appellants' continued personal and business practices, *Mem. In Support of Mot. To Intervene*, Case No. 20-06885, ECF No. 44, at 17; *Reply Mem. in Supp. of Mot. to Intervene*, Case No. 20-06885, ECF No. 65, at 6; Op. Br. at 31; do not have any interest in Intervenor-Appellants' financial wellbeing, *Mem. in*

Supp. of Mot. to Intervene, ECF No. 44, at 18; *Reply Mem. in Supp. of Mot. to Intervene*, ECF No. 65, at 9; Op. Br. at 50–52; and, as discussed *infra*, have revealed their interests are more aligned with Plaintiff-Appellees than Intervenor-Appellants as this case has proceeded. Additionally, during merits briefing in the district court, Intervenor-Appellants expressed concern with Federal Defendants' invocation of *Chevron* deference, which is not simply a distinct legal strategy, but rather would lead to an entirely different outcome in this case. *See* Op. Br. at 43–45; *infra*, Section I(B)(2). Any heightened standard imposed on the proposed intervenors in *Butler* is inapplicable here.

This Circuit should not disregard Supreme Court precedent and employ a heightened standard to evaluate inadequacy of representation. The district court erred in doing so.

B. Even Under a Heightened Standard, Intervenor-Appellants have Demonstrated an Inadequacy of Representation

Even if this Circuit imposes the heightened standard set forth in *Butler*, Intervenor-Appellants have more than met that burden.

1. Intervenor-Appellants and Federal Defendants have distinct interests in the outcome of the litigation

"Although perhaps not an exhaustive list, we generally agree with the holdings of other courts that evidence of collusion, *adversity of interest*, nonfeasance, or incompetence may suffice to overcome the presumption of

adequacy." *Butler*, 250 F.3d at 180 (emphasis added) (citing *United States v. Int'l Bus. Machs. Corp.*, 62 F.R.D. 530, 538 (S.D.N.Y. 1974) (denying motion by law firm to intervene in client's action for purposes of asserting work product privilege) and *Daggett v. Comm'n on Govtl. Ethics & Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999) (rejecting argument that there is an exclusive list of circumstances that rebut a presumption of adequacy)).

When a government agent or agency must weigh other interests distinct from those of the applicants seeking intervention, it can constitute adversity of interest. *See Trbovich*, 404 U.S. at 538–39. *Stuart v. Huff*, cited favorably by Plaintiff-Appellees, supports this understanding of adversity of interest and distinct ultimate objectives. *See* Everytown Br. at 20 (citing *Stuart*, 706 F.3d 345, 352 (4th Cir. 2013)), *but see Stuart*, 706 F.3d at 352 ("[T]he Secretary of Labor was compelled by statute to 'serve two distinct interests,' such that the Secretary's ultimate objective was not the same as that of the proposed intervenor to begin with."). In other words, even though the governmental actor had a statutory mandate to represent the proposed intervenor, the presence of an additional statutory mandate constituted a *per se* distinct ultimate objective.

Federal Defendants have no statutory duty to represent Intervenor-Appellants. Instead, Federal Defendants have alleged an interest in representing and protecting public health and safety, but must also balance statutory and regulatory concerns

with agency resource constraints. *Fed. Def. Mem. in Supp. of Mot. for Summary Judgment* ("Fed. Def. Br."), ECF No. 98, Case No. 20-cv-06885, at 44–45 (Jan. 29, 2021). Those interests are distinct from Intervenor-Appellants' interests—especially given the lack of statutory mandate that was present in *Trbovich*. In contrast, Intervenor-Appellants' reliance interests, their currently lawful individual and business practices, their substantial financial interests, and their ability to individually manufacture personal use firearms all fall outside the scope of Federal Defendants' interests.

2. Federal Defendants' invocation of *Chevron* deference demonstrates an adverse interest to Intervenor-Appellants

Federal Defendants' specific invocation of *Chevron* deference demonstrates an interest and objective distinct from Intervenor-Appellants'. Intervenor-Appellants, by presenting and explaining this misalignment during merits briefing below, have continued to satisfy their burden to establish inadequate representation. Federal Defendants' invocation of deference and Intervenor-Appellants' established opposition to that argument is more than a "different view[] on the facts, the applicable law, or the likelihood of success of a particular litigation strategy," or a different "motive to litigate." Everytown Br. at 25–26 (quoting *United States v. City of New York*, 198 F.3d 360 (2d Cir. 1999) and *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Env't Conservation*, 834 F.2d 60, 62 (2d Cir. 1987)).

This is not a hypothetical problem; Federal Defendants have already invoked the *Chevron* doctrine, and as addressed by Intervenor-Appellants in their *amici curiae* brief, already conflated the analysis to lead the lower court toward invoking the doctrine and deferring to Federal Defendants. *See Brief of Amici Curiae Intervenor-Appellants*, ECF No. 108-1, Case No. 20-cv-06885, at 18–22.

This is not merely a "different legal strategy." If the lower court rules for Federal Defendants based on *Chevron*, it will have to make two specific holdings, both of which harm Intervenor-Appellants.

First, the lower court will have to hold that the definition of "firearm" is legally ambiguous. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation."). Intervenor-Appellants maintain that is incorrect. *Brief of Amici Curiae Intervenor Appellants*, at 20. But if the lower court holds as such, it will undermine Intervenor-Appellants' ability to rely on that definition now and in the future in structuring their personal and business practices.

Second, the lower court will have to determine that the ATF's application of the ambiguous definition is reasonable, not that it is the best interpretation, nor that it is legally required. Fed. Def. Br. at 20 (quoting *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)) ("[I]f the statute is silent or

ambiguous . . . , the question . . . is whether the agency's answer is based on a permissible construction of the statute."). This deference will subject the definition of "firearm" to potential future interpretation in other "reasonable" ways by other administrations or government officials. This will undermine the protections offered by the GCA, since it will allow the term "firearm" to be interpreted more broadly than Congress intended.

This issue is nearly identical to the fact pattern encountered by the Ninth Circuit in *California ex rel. Lockyer v. United States*, which Plaintiff-Appellees incorrectly assert weighs in their favor. *See* Everytown Br. at 20. In *Lockyer*, the Ninth Circuit determined that, even under a heightened burden, "the United States and the proposed intervenors have distinctly different and likely conflicting interests." 450 F.3d 436, 444 (9th Cir. 2006). The Ninth Circuit determined this specifically because of the government's invocation of deference:

> "Often, defending Acts of Congress leads the Solicitor General to lean heavily on the *Ashwander* principle of construing a statute so as to avoid constitutional doubt." *See* [Seth P. Waxman, *Defending Congress*, 79 N.C. L. REV. 1073, 1079–80 (2001)] (citing *Ashwander v. [Tenn. Valley Auth.]*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring)). We have recognized that willingness to suggest a limiting construction in defense of a statute is an important consideration in determining whether the government will adequately represent its constituents' interests. *See Prete v. Bradbury*, 438 F.3d 949, 958 (9th Cir. 2006).

Id. The limiting construction under *Ashwander* in *Lockyer* and the limiting construction of the GCA under *Chevron* here establish the same "distinctly different

and likely conflicting interests." *See id.* at 444; *see also* Op. Br. at 19 (citing Fed. Def. Br., at 39).

In *Lockyer*, proposed intervenors made a "strident argument" of irreconcilable conflict not made by any other party and thus "the proposed intervenors bring a point of view to the litigation not presented by either the plaintiffs or the defendants." *Id.* at 444–45. Intervenor-Appellants here stridently oppose the Federal Defendants' position that the objects at issue can legally be regulated under the GCA. Fed. Def. Br., at 29–30 ("ATF's interpretation is certainly 'based on a permissible construction of the statute' and must be upheld at *Chevron* Step Two."). By invoking a doctrine of discretion, Federal Defendants argue that the ATF could regulate Non-Firearm Objects, but that their decision not to is reasonable. Intervenor-Appellants maintain, as a matter of law, Non-Firearm Objects fall outside the GCA and are thus outside the ATF's statutory regulatory authority. *Brief of Amici Curiae Intervenor-Appellants*, at 19 ("Such deference, however, in inapplicable here, where the definition of firearm is not ambiguous."). This is not a Second Amendment argument, as the lower court and Plaintiff-Appellees have falsely construed it, but rather it is an administrative law question of the ATF's statutory authority and Congress's mandate to the agency to enforce federal statute.

3. Federal Defendants' ever-changing position toward "firearms" solidifies the distinct interests and objectives of Intervenor-Appellants

Intervening events have further demonstrated what Intervenor-Appellants have maintained since the inception of this litigation—Federal Defendants do not adequately represent Intervenor-Appellants' interests. By requiring Intervenor-Appellants to make a particularly strong showing of an inadequacy of representation at such an early stage in the case (prior to any dispositive motions being filed), the lower court required Intervenor-Appellants to predict what Federal Defendants would argue, and what Federal Defendants would target as their ultimate objective. Even under those circumstances, Intervenor-Appellants noted: "Representation is inadequate when a proposed intervenor would be damaged by the adjudication of its interest, but the agency being sued would not." A039 (citing *S.E.C. v. Everest Management Corp.*, 475 F.2d 1236, 1239 (2d Cir. 1972)). That potential for damage to Intervenor-Appellants has become more and more apparent.

Since Plaintiff-Appellees filed this case and since Intervenor-Appellants moved to intervene, the Executive Branch as a whole, including the DOJ and ATF, has shown a changing position toward the GCA and the definition of "firearm"—moving away from its longstanding position and toward the inappropriate regulation of the objects at issue sought by Plaintiff-Appellees.

First, the DOJ and ATF tipped their hand that their position toward Non-Firearm Objects was shifting when the ATF raided a Polymer80 facility in connection with its production and direct-to-consumer sale of Non-Firearm Objects in kits. *Polymer80 Mem. in Supp. of Mot. to Intervene*, Case No. 20-06885, ECF No. 79, at 19 (S.D.N.Y. Dec. 30, 2020); *see* Scott Glover, *Feds raid 'ghost gun' maker whose products they say are linked to 'hundreds of crimes'*, CNN (Dec. 11, 2020 2:52 PM).[2] In an affidavit the ATF used to apply for the search warrant authorizing the raid, the ATF relies on a definition of "firearm" that is, in part, based on temporal considerations—a definition more consistent with Plaintiff-Appellees' desired outcome than Intervenor-Appellants' interests.[3]

Second, on January 20, 2021, Joseph R. Biden, Jr. was formally inaugurated as the 46th President of the United States. *See Inaugural Address by President Joseph R. Biden, Jr.*, The White House (Jan. 20, 2021).[4] With this change in the chief executive came a change in the head of the Department of Justice and a new acting director of the ATF. Michael Balsamo & Mary Clare Jalonick, *Merrick Garland confirmed by Senate to be U.S. attorney general*, THE WASHINGTON TIMES

---

[2] https://www.cnn.com/2020/12/11/us/atf-raid-ghost-gun-manufacturer-invs/index.html.

[3] The ATF characterizes the items at issue as "components" and states that "a confidential informant working with the ATF assembled a fully functional firearm in approximately 21 minutes." *Hart Affidavit* ¶ 8, Case No. 3:20-mj-123-WGC (D. Nev. Dec. 9, 2020). A copy of the affidavit is also available at https://s.wsj.net/public/resources/documents/ghostraid-121420-warrant.pdf.

[4] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/01/20/inaugural-address-by-president-joseph-r-biden-jr/

(Mar. 10, 2021)[5]; *Executive Staff*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (June 8, 2021).[6] But these changes are not merely formalistic.

Within three months of taking office, President Biden announced a change in the federal government's treatment of Non-Firearm Objects. *Remarks by President Biden on Gun Violence Prevention* ("*Remarks by President Biden*"), THE WHITE HOUSE (Apr. 8, 2021) ("Much more need be done, but the first — first, I want to rein in the proliferation of so-called 'ghost guns.'").[7] This hostility toward the personal and business practices of Intervenor-Appellants is shared by Attorney General Garland. *Attorney General Garland's Full Remarks on Gun Violence Prevention at the White House Rose Garden*, The United States Department of Justice (Apr. 8, 2021) ("Yet because of a gap in the ATF regulations, these kits may not be considered firearms. As a result, they're being made and sold without serial numbers and sold without background checks. Within 30 days, ATF will issue a proposed rule to plug that gap . . . .").[8] President Biden charged the attorney general with crafting a new regulatory rule for the ATF specifically to regulate the objects at issue—the objects Federal Defendants had previously argued they did not intend to

[5] https://www.washingtontimes.com/news/2021/mar/10/merrick-garland-confirmed-senate-be-us-attorney-ge/.
[6] https://www.atf.gov/about-atf/executive-staff.
[7] https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/
[8] https://www.justice.gov/opa/speech/attorney-general-garland-s-full-remarks-gun-violence-prevention-white-house-rose-garden

regulate and the same objects that Plaintiff-Appellees argue that Federal Defendants must regulate. *See Remarks by President Biden* (Apr. 8, 2021). President Biden, standing upon the world's stage, effectively announced that his administration, including the DOJ and ATF, would provide Plaintiff-Appellees with the relief they are seeking. *See id.*

And this was no empty suggestion. On May 7, 2021, "the Attorney General signed ATF proposed rule 2021R-05, Definition of "Frame or Receiver" and Identification of Firearms." *Definition of "Frame or Receiver" and Identification of Firearms*, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (last reviewed May 24, 2021) (emphasis omitted).[9] On May 21, 2021, the Proposed Rule was formally published in the federal register. *Definition of "Frame or Receiver" and Identification of Firearms*, 86 Fed. Reg. 27,720 (May 21, 2021). According to the ATF's summary:

> This proposed rule would:
>
> - Provide new definitions of "firearm frame or receiver" and "frame or receiver"
> - Amend the definition of:
>   - "firearm" to clarify when a firearm parts kit is considered a "firearm," and
>
> . . .
>
> - Provide definitions for:
>   - "complete weapon,"
>
>   . . .
>   - "privately made firearm (PMF)," and

[9] https://www.atf.gov/rules-and-regulations/definition-frame-or-receiver

- "readily" for purposes of clarity given advancements in firearms technology.

Definition of "Frame or Receiver" and Identification of Firearms, BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES (last updated May 24, 2021).

The proposed rule reveals that Intervenor-Appellants' concerns with Federal Defendants representation has been correct since the beginning—not only do Intervenor-Appellants have distinct interests from those of Federal Defendants, but those interests are in opposition. *Compare* Fed. Def. Br. at 20 ("ATF's broader standard, and the classification determinations in these letters in particular, are consistent with the GCA's plain meaning because unfinished frames or receivers that have not crossed a critical threshold of manufacturing are neither designed to expel a projectile nor readily converted into a device that expels a projectile, and, thus, are not firearms under the GCA.") *with* 86 Fed. Reg. at 27,727 ("Unlike the prior definitions of 'frame or receiver' that were rigidly tied to three specific fire control components (i.e., those necessary for the firearm to initiate or complete the firing sequence), the new regulatory definition is intended to be general enough to encompass changes in technology and parts terminology."); *and compare* Fed. Def. Br. at 21 ("An unmachined frame or receiver is not 'designed to' expel a projectile, because its purpose is not to expel a projectile. Rather, its purpose is to be incorporated into something else that is designed to expel a projectile.") *with* 86 Fed. Reg. at 27,729 ("For clarification, 'partially complete' for purposes of this definition

'means a forging, casting, printing, extrusion, machined body, or similar article that has reached a stage in manufacture where it is clearly identifiable as an unfinished component part of a weapon.'").

Plaintiffs admit as much: "Because these new regulatory definitions would likely narrow the scope of this action and would potentially *moot the action entirely* if they were included in the Final Rule, Plaintiffs, the Government, and Polymer80 agreed that the case should be stayed . . . ."[10] Everytown Br. at 14. Plaintiff-Appellees in one breath argue that Federal Defendants have made a "vigorous defense," Everytown Br. at 12, and then in the next, note that Federal Defendants' Proposed Rule could "moot the action entirely," *id.* at 14. In other words, this new rule, if finalized, will provide Plaintiff-Appellees with every measure of relief they seek.

"Much more need be done, but the first — first, I want to rein in the proliferation of so-called 'ghost guns.' . . . You know, I want to see these kits treated as firearms under the Gun Control Act . . . ." *Remarks by President Biden* (Apr. 8, 2021). If nothing else, the statements of the chief executive, whom Federal Defendants represent, should be instructive to this Court.

---

[10] Intervenor-Appellants opposed the specific terms of a similar stay request in the Northern District of California, where that court has not yet ruled on Intervenor-Appellants' motion to intervene. *Applicants' Resp. to Stipulation*, Case No. 20-06761, ECF No. 87, at 3–4 (N.D. Cal. May 20, 2021). Intervenor-Appellants had no opportunity to offer the lower court argument about the stay, or weigh in on the stipulation, because they are not a party to the litigation.

C. Despite Plaintiff-Appellees' Continued Reliance on the *Parens Patriae* Doctrine, it is Inapplicable Here and Does Not Establish an Adequacy of Representation

Federal Defendants cannot be said to be acting in *parens patriae* in this litigation and thus, this Circuit should not bestow Federal Defendants with a presumption of representing Intervenor-Appellants' interests that they themselves do not want. The lower court and Plaintiff-Appellees failed to recognize that the doctrine is inapplicable here. In each binding case they cite, the governmental entity at issue either: (1) specifically invoked the doctrine or (2) opposed the proposed intervenor's intervention. Even in the out-of-circuit cases offered by Plaintiff-Appellees, no court *sua sponte* raised the doctrine and denied the proposed intervenors intervention.

First, the lower court and Plaintiff-Appellees incorrectly rely on *United States v. City of New York* to unilaterally impose *parens patriae* representation upon Federal Defendants. *See* A009; Everytown Br. at 25–26. Besides the distinguishing factors Intervenor-Appellants noted in their opening brief, Op. Br. at 35–36, Plaintiff-Appellees' brief fails to address several key facts in that case, namely that the City of New York: (1) explicitly invoked the doctrine of *parens patriae* affirmatively seeking to represent the intervenor, (2) opposed the proposed intervenor's intervention, and (3) went to great lengths to demonstrate how it more than adequately represented the interests of the proposed intervenor. *Municipal*

Appellee's Brief, *United States v. City of New York*, Case No. 98-6162, 1998 WL 34089954, at 21 (2d Cir. Sept. 28, 1998). That case also included the United States and the state of New York, both explicitly acting in *parens patriae* as plaintiffs along with the City of New York acting in *parens patriae* as defendant. *See id.*; *United States v. City of New York*, 198 F.3d 360, 363 (2d Cir. 1999). Finally, the proposed intervenor admitted its interests were not at stake in the litigation, but rather that it sought to hijack the litigation to take issue with the procedures used leading up to the administrative decision that underlaid the case. *Id*. at 362–63.

Federal Defendants have never invoked the doctrine of *parens patriae*, have never opposed Intervenor-Appellants' intervention, have advocated in favor of Intervenor-Appellants' intervention in parallel litigation, and have refrained from entering this appeal. Additionally, Intervenor-Appellants have unambiguously demonstrated their concern with protecting their substantial interests in this ligation, which the lower court recognized could be impaired, and not with any procedures antedating the litigation as proposed intervenors did in *City of New York*. A008.

Second, the lower court and Plaintiff-Appellees' reliance on *United States v. Hooker Chemicals & Plastics Corporation* is equally misplaced. *See* A009; Everytown Br. at 20, 25. In *Hooker*, this Circuit specifically limited its decision: "Thus, nothing in the law of this circuit shakes our agreement with other circuits that *in an enforcement action by a governmental entity* suing as a *parens patriae*, it is

proper to require a strong showing of inadequate representation before permitting intervenors to disrupt the government's exclusive control over the course of its litigation." 749 F.2d 968, 987 (2d Cir. 1984) (emphasis added). Plaintiff-Appellees also omit that in *Hooker*, the federal government was not the only party explicitly acting in *parens patriae*, but the City of Niagara Falls, another party to the case, also opposed the proposed intervenors' intervention, specifically invoking the doctrine of *parens patriae*. *Id.* at 987. "We agree with the district court that it is significant to the analysis required by Rule 24(a)(2) that the plaintiffs are governmental entities *suing on behalf of their citizens*. In such actions, the state or the United States presents itself 'in the attitude of *parens patriae*, trustee, guardian or representative of all her citizens.'" *Id.* at 984 (citing *Louisiana v. Texas*, 176 U.S. 1, 19 (1900) (emphasis added)).

Here, the United States has not presented itself "in the attitude of *parens patriae*," or in any way representative of Intervenor-Appellants' interests. Plaintiff-Appellees do not represent Intervenor-Appellants' interests. The United States' prosecution of Hooker Chemicals is not relevant to this Circuit's inquiry.

Finally, in every other case cited by Plaintiff-Appellees, either the governmental actor opposed intervention, or the court granted it. In *Planned Parenthood of Wisconsin*, the state legislature sought intervention where the state attorney general was already involved in the litigation and the attorney general

opposed the legislature's intervention—*parens patriae* was irrelevant between the dueling governmental entities. *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 795–96 (7th Cir. 2019) ("A state can speak in litigation only through its agents and may select its agents without the interference of the federal courts."). In *N. Dakota ex rel. Stenehjem*, the United States vehemently opposed intervention. *N. Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015). And in *Commonwealth of Pennsylvania*, the Third Circuit overturned the lower court and granted intervention over a "particularly strong" presumption because "there is no guarantee that the government will sufficiently attend to the Little Sisters' specific interests . . . ." *Commonwealth of Pennsylvania v. President United States of Am.*, 888 F.3d 52, 60–62 (3d Cir. 2018) (citing *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 967 (3d Cir. 1998)) (concluding that the proposed intervenors had carried their burden by showing "a reasonable doubt whether the government agency would adequately represent [their] concerns").

Not only have Intervenor-Appellants overcome their burden, neither the lower court nor Plaintiff-Appellees point to a single case in which the governmental defendant did not oppose intervention, did not invoke *parens patriae*, and yet the court ultimately denied intervention.

D. Intervenor-Appellants' Interests are not Adequately Represented by Polymer80

Plaintiff-Appellees cite no case law supporting their argument that Polymer80 adequately represents Intervenor-Appellants' interests—because Polymer80 cannot. *See* Everytown Br. at 31–32.

First, Polymer80 does not represent, in any way, the individuals or membership organization that were denied intervention. Indeed, Polymer80 has never made such an argument. Intervenor-Appellants Zachary Fort, Frederick Barton, and Firearms Policy Coalition, Inc. as consumers, individual firearm builders, educators, and representatives, A026–28, are distinct from a producer of Non-Firearm Objects.

Second, while Intervenor-Appellant 80% Arms has Classification Letters that are substantially similar to Polymer80's, which are specifically at issue in Plaintiff-Appellees' prayer for relief, those letters are distinct and represent different products. 80% Arms underwent an individualized process, as detailed in its *amici curiae* brief below, Case No. 20-06885, ECF 108-1, at 20-21, that is distinct from Polymer80. 80% Arms does not offer the same "kits" that Polymer80 does and is not currently under investigation by Federal Defendants. Intervenor-Appellant 80% Arms should have full opportunity to defend its own interests, as a beneficiary of Classification Letters that, in part, form the basis of its business, are distinct from Polymer80's, and could be undermined by the lower court's decision.

II. The District Court, At Minimum, Erred In Denying Intervenor-Appellants Permissive Intervention

A lower court's denial of permissive intervention is reviewed for abuse of discretion. As such, lower courts' decisions on this matter are afforded a high degree of deference. In this case, however, the lower court allowed a similarly situated party permissive intervention immediately after denying it to Intervenor-Appellants, thereby demonstrating an abuse of discretion.

> Federal Rule of Civil Procedure 24(b) governs permissive intervention: On timely motion, the court *may permit* anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact . . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b)(1), (b)(3) (emphasis added). In evaluating Polymer80's intervention, the lower court correctly noted "Rule 24(b) does not require a finding that party representation [is] inadequate." *Mem. Opinion and Order* ("Polymer80 Order"), Case No. 20-06885, ECF No. 113, at 16 (S.D.N.Y. Mar. 19, 2021) (quoting *New York v. U.S. Dep't. of Health & Hum. Servs.*, No. 19-04676, 2019 WL 3531960, at *6 (S.D.N.Y. Aug. 2, 2019) and citing *United States v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980); *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc. v. New York*, Case No. 19-11285, 2020 WL 5658703, at *12 (S.D.N.Y. Sept. 23, 2020) (collecting cases)). "The 'principal consideration' for permissive intervention is 'whether the intervention will unduly delay or prejudice

the adjudication of the rights of the original parties.'" Polymer80 Order, at 15 (quoting *Battle v. City of New York*, Case No. 11-03599, 2012 WL 112242, at *6 (S.D.N.Y. Jan. 12, 2012) and *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978)).

Plaintiff-Appellees assert that reversal of a lower court's decision denying permissive intervention in this circuit is a "rare bird . . . so seldom seen as to be considered unique." Everytown Br. at 33 (quoting *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994)). Contrary to Plaintiffs' argument, however, this case is precisely that "rare bird."

First, by granting Polymer80 permissive intervention on grounds indistinguishable from those first advanced by Intervenor-Appellants, the lower court abused its discretion in denying Intervenor-Appellants' motion. The lower court stated: "Given that their determination letters are directly implicated by the Court's decision in this case, permissive intervention is clearly appropriate. Polymer80 and its business will suffer dramatically." Polymer80 Order, at 16. Intervenor-Appellants have similar determination letters, that are directly cited by Plaintiff-Appellees in their complaint, are in the administrative record, and remain implicated by the outcome of this case, as the district court noted. *See* A008. Intervenor-Appellant 80% Arms conducts business that will be just as devastated by a ruling in Plaintiff-Appellees' favor as Polymer80's business. *Compare* A008 ("As

with the second prong, [Intervenor-Appellants] may suffer adverse economic consequences if Plaintiffs prevailed.") *with* Polymer 80 Order, at 11 ("Polymer80 has established that its inability to intervene may impair its ability to protect its interests.").

The distinguishing factor the lower court relied on for granting permissive intervention to Polymer80 while denying it to Intervenor-Appellants is that the DOJ and ATF are actively pursuing a criminal prosecution against Polymer80 related to their gun kits. Polymer80 Order, at 16. Surely, this is too high a bar for a prerequisite to permissive intervention—active prosecution by the governmental defendant cannot be the only open door to permissive intervention. *See, e.g.*, *Bldg. & Realty Inst. of Westchester & Putnam Cntys., Inc.*, 2020 WL 5658703, at *1 (granting tenant advocacy group permissive intervention as a defendant in action where landlords filed a complaint against the state of New York); *Ass'n of Conn. Lobbyists LLC v. Garfield*, 241 F.R.D. 100, 101 (D. Conn. 2007) (granting prospective candidates for office and non-profit lobbying organizations permissive intervention as defendants in lawsuit brought by lobbyists against state agency challenging the constitutionality of a state election law).

Second, the lower court and Plaintiff-Appellees' characterization of Intervenor-Appellants' arguments as introducing Second Amendment issues is fundamentally flawed. A012; Everytown Br. at 34–36. Intervenor-Appellants have

consistently shown that their arguments are confined to questions of statutory authority; namely, that the GCA authorizes the ATF to regulate "firearms," and that Non-Firearm Objects, as a matter of law, fall outside the statutory definition of that term, leaving no room for interpretation. *Brief of Amici Curiae Intervenor-Appellants*, at 18–22. Plaintiff-Appellees advance arguments redefining the word "firearm" which would completely upend settled doctrine and expand the ATF's authority beyond what Congress has allowed.

This alleged introduction of Second Amendment arguments is what led the lower court to conclude that granting permissive intervention would unduly delay and prejudice the existing parties. A011–12. It was inferred that such arguments would greatly expand the scope of the case and lead to it becoming "unnecessarily complex, unwieldly or prolonged." A011–12 (citing *Floyd v. City of N.Y.*, 770 F.3d 1051, 1057 (2d Cir. 2014)). But Intervenor-Appellants sought only to make administrative law arguments, not to introduce Second Amendment arguments. Moreover, a brief delay would not have been unduly prejudicial. In granting Polymer80 permissive intervention, the lower court noted the introduction of Polymer80 would delay the briefing schedule, but that this delay was not "undue." Polymer80 Order, at 16–17. The court even admitted this delay would prejudice Plaintiff-Appellees to some degree. *Id.* In their own intervention, Intervenor-Appellants repeatedly stated their intention to abide by the existing briefing

schedules so that the existing parties would not experience any delay or prejudice. A031–32 ("Applicants agree, should this Court grant their intervention, to abide by the currently established briefing schedule.").

The lower court's treatment of Polymer80 compared to its dismissal of Intervenor-Appellants, and its imbuing a phantom Second Amendment argument with substance, shows this case is one of those "rare birds" in which this Circuit should find the lower court abused its discretion in denying permissive intervention.

CONCLUSION

For these reasons, Intervenor-Appellants respectfully request that this Court reverse the district court's ruling that Intervenor-Appellants are adequately represented by Federal Defendants and remand this matter to that court to provide Intervenor-Appellants intervention as of right. In the alternative, Intervenor-Appellants request that this Court determine the district court abused its discretion when it denied Intervenor-Appellants permissive intervention and remand this matter to the district court to ensure Intervenor-Appellants can, at minimum, defend their court-recognized interests as permissive intervenors.

//

//

//

DATED this the 27th day of July 2021.

Respectfully submitted,

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
cody@mslegal.org

Attorney for Intervenor-Appellants

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Intervenor-Appellants' Reply Brief* complies with the type-volume limit of Local Rule 32.1(a)(4)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,993 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

DATED this the 27th day of July 2021.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system.

DATED this the 27th day of July 2021.

/s/ Cody J. Wisniewski
Cody J. Wisniewski
MOUNTAIN STATES LEGAL FOUNDATION