No. 21-191

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiff-Appellees,

v.

BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES; ET AL.,

(*Remaining Defendants listed on inside cover*)

Defendants,

and

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

Intervenor-Appellants.

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 OPENING BRIEF

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April 15, 2021

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REGINA LOMBARDO, IN HER OFFICIAL CAPACITY AS ACTING DEPUTY DIRECTOR OF BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES; UNITED STATES DEPARTMENT OF JUSTICE; AND MERRICK GARLAND, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE,

Defendants.

RULE 26.1 DISCLOSURE STATEMENT

The undersigned attorney for Intervenor-Appellant BlackHawk Manufacturing Group, Inc., d/b/a 80% Arms, certifies that BlackHawk Manufacturing Group, Inc. is a corporation, formed and in good standing in the state of California. BlackHawk Manufacturing Group, Inc. is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

The undersigned attorney for Intervenor-Appellant Firearms Policy Coalition, Inc., certifies that Firearms Policy Coalition, Inc. is a nonprofit membership corporation, formed and in good standing in the state of Delaware under section 501(c)(4) of the Internal Revenue Code. Firearms Policy Coalition, Inc. is not publicly traded and has no parent corporation. There is no publicly held corporation that owns ten percent or more of its stock.

Respectfully submitted this 15th day of April 2021.

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

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INTRODUCTION

At what point does an ordinary object become a firearm? This is the question underlying the present litigation. Federal Defendants have consistently used a very specific process to answer this question for at least 30 years. But Plaintiff-Appellees maintain that Federal Defendants' process is flawed and should be overturned by a federal court.

Zachary Fort; Frederick Barton; BlackHawk Manufacturing Group, Inc., d/b/a 80% Arms ("80% Arms"); and Firearms Policy Coalition, Inc. ("FPC" and, collectively, "Intervenor-Appellants") are individuals and entities that engage in the production, sale, purchase, and possession of objects that Federal Defendants do not classify as firearms. If Plaintiff-Appellees succeed, however, those same items would be classified as firearms and would be subject to the entire universe of firearms regulation. For Intervenor-Appellants, this would mean, amongst other things, an increase in production costs, an increase in purchase price, an end to direct consumer delivery, a legally mandated federal background check, and an in-person transfer of the object.

In other words, a ruling from the lower court could completely upend the entire industry that Intervenor-Appellants have structured their business and personal practices around. Accordingly, Intervenor-Appellants sought to intervene in the matter. The denial of that intervention is the subject of this appeal.

JURISDICTIONAL STATEMENT

Plaintiff-Appellees assert the court below "has subject matter jurisdiction under 28 U.S.C. § 1331 as this case arises under the Administrative Procedure Act ("APA")," and that the court "has remedial authority under the APA," pursuant to 5 U.S.C. § 706. *Complaint*, Case No. 20-06885, ECF No. 11 (Aug. 27, 2020).[1] Both Intervenor-Appellants and Federal Defendants, however, have disputed Plaintiff-Appellees' standing to bring the underlying litigation and the lower court's subject matter jurisdiction over the Bureau of Alcohol, Tobacco, Firearms, and Explosives' ("ATF") 2015 Ruling and the ATF's Question and Answer section of its website—both of which are challenged by Plaintiff-Appellees as final agency actions under the APA. ECF No. 98 at 11–15, 16–18 (Federal Defendants' Memorandum in Support of their Motion for Summary Judgment); ECF No. 108-1, at 7–13, 17–18 (Intervenor-Appellants' *amici curiae* brief).

The lower court has yet to evaluate jurisdiction, as it ordered consolidated briefing on standing, subject matter jurisdiction, and the underlying merits, which briefing is still ongoing.

On November 12, 2020, Intervenor-Appellants filed a Motion to Intervene in the underlying litigation. ECF No. 43. On January 2, 2021, the district court denied

[1] Hereinafter, all CM/ECF citations are to the lower court's electronically maintained docket unless otherwise specified. Any pin citations are to the documents' internal pagination and not the pagination number assigned by the CM/ECF system.

Intervenor-Appellants' Motion. ECF No. 83. Intervenor-Appellants timely appealed that decision on February 1, 2021. ECF No. 101; Fed. R. App. P. 4(a)(1)(B).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 "[b]ecause a district court's order denying intervention is a final order." *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 473 (2d Cir. 2010) (quoting *N.Y. News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992)).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Intervenors-Appellants raise the following issues on appeal:

1. Whether this Circuit should revisit its standard of review for a denial of intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a), and apply a *de novo* standard in line with a majority of the federal circuits instead of reviewing for an abuse of discretion.

2. Whether the district court erred in denying Intervenors-Appellants' Motion to Intervene as of right, pursuant to Federal Rule of Civil Procedure 24(a), based on the court's determination that Federal Defendants adequately represent Intervenors-Appellants' interests in the underlying matter.

3. Whether the district court erred in denying Intervenors-Appellants' motion for permissive intervention, pursuant to Federal Rule of Civil Procedure 24(b), based on the court's determination that inclusion of Intervenors-Appellants could expand the litigation beyond its present scope and would substantially complicate the management of the litigation. Whether to grant permissive intervention is left to the discretion of the court and is subject to review for an abuse of discretion.

STATEMENT OF THE CASE

Intervenor-Appellants appeal from a denial of their Motion to Intervene entered by the U.S. District Court for the Southern District of New York (Woods, J.). The relevant order is unreported, but reproduced in the Appendix. A004–14.

I. Legal Background

At a base level, the underlying litigation is over the proper application of the legal definition of the term "firearm." A "firearm" is defined, in relevant part, by the Gun Control Act of 1968 ("GCA") as "(A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; [or] (B) the frame or receiver of any such weapon . . . ." 18 U.S.C. § 921(a)(3). Furthermore, a "frame or receiver" is defined as "[t]hat part of a firearm which provides housing for the hammer, bolt or breechblock, and firing mechanism, and which is usually threaded at its forward position to receive the barrel." 27 C.F.R. § 478.11.

The Bureau of Alcohol, Tobacco, Firearms, and Explosives ("ATF") is the agency responsible for implementing and enforcing the GCA, along with other firearms regulations. In determining whether a particular object meets the definition of a "firearm" under the GCA, the ATF undergoes a specific review of that item and then issues a determination or classification letter describing whether the object meets the definition of a firearm and why. For at least the past 30 years, the ATF

has specifically looked to the amount of manufacturing completed and the amount of manufacturing remaining in order to determine if an object "may readily be converted" into a firearm or a firearm frame or receiver.[2]

As a matter of law, firearms retailers must be licensed by the federal government to sell firearms, and individuals buying firearms from a licensed dealer must undergo a federal background check before having a firearm transferred to them by the retailer. 18 U.S.C. §§ 922(s) (background check), 923 (licensing). These transfers must be conducted in person, subject to limited exception. 18 U.S.C. § 922(c). It goes without saying, however, that objects that are not "firearms" are not subject to regulation as if they are "firearms."

The objects at issue in the underlying litigation are materials that individuals can purchase in order to continue the longstanding, legal tradition of self-manufacturing personal use firearms.[3] These objects, which vary widely, are

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[2] For example, a determination letter from January 2004 reads: "However, a solid AR-15 type receiver casting, without having the critical internal areas machined (magazine well and central area for the fire control components) or crosspin holes drilled, would not constitute a 'firearm' . . . ." Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Mark Malkowski, Continental Machine Tool Company, Inc. (Jan. 29, 2004). Machining has always been the predominant factor in the ATF's determinations. *See* Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Justin Halford (July 1, 2003) ("Based on our examination of the unfinished receiver, it is our opinion that the subject sample *has received sufficient machining* to be classified as the frame or receiver for a 'firearm' . . . .") (emphasis added); Letter from Edward H. Cohen, Jr., Chief, Firearms Technology Branch, to Robert Bower, Jr., Philadelphia Ordnance, Inc. (May 26, 1992) ("The receiver is basically complete except that the interior cavity has *not been completely machined*.") (emphasis added).

[3] Individuals who manufacture firearms for personal use are not regulated under the GCA. *See* 18 U.S.C. §§ 921(a)(21)(A), 922(a)(1)(A), 923(i). No party has disputed this fact.

colloquially referred to in the firearms industry as "receiver blanks," "frame blanks," "partially-manufactured frames," "partially-manufactured receivers," "80% frames," "80% receivers," "unfinished frames," or "unfinished receivers," for marketing purposes. Intervenor-Appellants refer to them as "Non-Firearm Objects"—because they are exactly that. Based on the text of the GCA and the ATF's current application of the GCA, these objects do not rise to the level of manufacturing necessary to make them "firearms"—in other words, Non-Firearm Objects may not "readily be converted to expel a projectile by the action of an explosive." *See* 18 U.S.C. § 921(a)(3).

II. Procedural Background

The cities of Syracuse, NY; San Jose, CA; Chicago, IL; and Columbia, SC; as well as Everytown for Gun Safety Action Fund and Everytown for Gun Safety Support Fund (collectively "Plaintiff-Appellees") initiated the underlying litigation on August 26, 2020. Plaintiff-Appellees seek to use the Administrative Procedure Act ("APA") to legally require the ATF to abandon its longstanding definition of "firearms," and adopt an interpretation requiring the federal government to regulate Non-Firearm Objects as firearms. The crux of Plaintiff-Appellees' argument is that the ATF violated the APA by employing an objective test based on the actual manufacturing process involved/remaining to evaluate whether a Non-Firearm Object is a "firearm" as defined by the GCA. Plaintiff-Appellees would replace the

longstanding, objective ATF application of the term "firearm" with a subjective assessment of the time required,[4] or ease, of converting an object into a firearm. If Plaintiff-Appellees succeed, the ATF would be required to regulate many kinds of materials simply because they could theoretically be manufactured into firearms.

Accordingly, on November 12, 2020, Intervenor-Appellants sought intervention in order to protect their direct, personalized interests in this matter. A015–17. Intervenor-Appellants sought intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a), or, in the alternative, permissive intervention, pursuant to Federal Rule of Civil Procedure 24(b). A015–17.

Intervenor-Appellants consist of two individuals, one producer and retailer of Non-Firearm Objects, and a nonprofit organization that is both an individual owner of Non-Firearm Objects, for use in its educational mission, and also represents its members, including the individuals and retailer individually named. Intervenor-Appellants Zachary Fort and Frederick Barton are both law-abiding citizens, who are not prohibited from owning or possessing firearms, who have lawfully purchased Non-Firearm Objects in the past and intend to continue to purchase those objects in the future. *See* A043–45 (Declaration of Frederick Barton); A051–53 (Declaration of Zachary Fort). Intervenor-Appellant 80% Arms is a corporation that produces

[4] Such theory is highly subjective and would be dependent on skill, expertise, hardware, tools, and many other, unascertainable, factors. Given the subjectivity and factors involved, this theory could be highly susceptible to abuse.

and sells Non-Firearm Objects, manufacturing jigs, and other firearm manufacturing tools, and lawfully sells those items directly to consumers. A054–57 (Declaration of Tilden Smith, Chairman of BlackHawk Manufacturing Group, Inc.). Intervenor-Appellant FPC is a nonprofit, membership organization dedicated to defending and promoting the People's rights—especially but not limited to First and Second Amendment protected rights—advancing individual liberty, and restoring freedom. A046–50 (Declaration of Brandon Combs, President of Firearms Policy Coalition, Inc.). FPC not only represents the interests of its members across the United States, including Intervenor-Appellants Fort, Barton, and 80% Arms, but FPC further represents itself as an owner and possessor of Non-Firearm Objects. A047–48 ¶¶ 7–10.

On December 2, 2020, Plaintiff-Appellees opposed Intervenor-Appellants' Motion to Intervene. A058–79. Federal Defendants did not file an opposition. Intervenor-Appellants replied on December 10, 2020. A080–101.

While Intervenor-Appellants' Motion was pending, the parties were simultaneously briefing the merits of the case. On September 29, 2020, the lower court, based on the parties' requests, established a consolidated and expedited briefing schedule, which sought to have merits briefing conclude by February 19, 2021. Due to extensions and the subsequent intervention of Polymer80, merits briefing is still ongoing at the time of filing of this brief.

III. Ruling Presented for Review

On January 2, 2021, the lower court issued its Memorandum Opinion and Order denying Intervenor-Appellants intervention as of right and permissive intervention. A004–14.

As to intervention as of right, the lower court found that Intervenor-Appellants met three of the four elements established by Federal Rule of Civil Procedure 24(a): (1) timeliness, (2) a significant interest in the litigation, and (3) potential impairment of that interest. Nevertheless, the court determined that Federal Defendants adequately represented Intervenor-Appellants' interests and therefore denied intervention. The lower court reached this holding by imposing a heightened burden on Intervenor-Appellants to establish inadequacy of representation. A006–11.

As to permissive intervention, despite determining that Intervenor-Appellants had a significant interest that was subject to impairment, the lower court reasoned that Intervenor-Appellants "seek to steer this litigation toward a Second Amendment challenge," thereby potentially expanding the litigation beyond the scope of the APA. A012. The lower court also determined that the court's admittance of two *amici curiae* briefs filed in support of Plaintiff-Appellees (comprising thirty-three *amici*) indicated a "substantial amount of interest in this litigation," and that "[p]ermitting all parties with an interest in the outcome of the litigation . . . to be

added as parties will undoubtedly increase the burden associated with the administration of this lawsuit without offsetting the gain." A013.

Ultimately, Intervenor-Appellants filed an *amici curiae* brief with the lower court in an attempt to protect their interests in the litigation to the extent allowed by the lower court but reserving their arguments for this appeal. Intervenor-Appellants made significantly distinct arguments from Federal Defendants and other *amici curiae* below, including arguing against Federal Defendants' attempt to invoke the *Chevron* doctrine. *See* ECF No. 108-1, at 18–22.

Intervenor-Appellants initiated this appeal on February 1, 2021. ECF No. 101.

SUMMARY OF ARGUMENT

Intervenor-Appellants, as individuals and organizations that produce, sell, purchase, and own the products at issue in the underlying litigation, have a direct, substantial, and impairable interest in the outcome of this case—which seeks to make illegal Intervenor-Appellants' current personal and business practices. As such, Intervenor-Appellants timely sought intervention in the matter below, both as of right and, in the alternative, permissively.

Intervenor-Appellants meet each requirement for intervention as of right, as established by Federal Rule of Civil Procedure 24(a) and this Circuit: (1) timeliness, (2) an interest that is (3) subject to impairment, and (4) inadequate representation. Fed. R. Civ. P. 24(a); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994). Accordingly, Intervenor-Appellants "must" be permitted to intervene. Fed. R. Civ. P. 24(a).

The lower court appropriately determined that Intervenor-Appellants meet the first three factors. A006–08. The lower court, however, incorrectly determined that Intervenor-Appellants' interests were adequately represented by Federal Defendants. A009–11. The lower court erred in doing so, or at minimum, abused its discretion.

First, Intervenor-Appellants' Motion to Intervene was filed prior to any dispositive motions being filed, complied with the existing briefing schedule, and

had no potential to prejudice any party to the litigation. As noted by the district court, no party opposed the timeliness of Intervenor-Appellants' Motion. A007.

Second, as recognized by the lower court, A008, Intervenor-Appellants have a significant interest in the underlying litigation, which directly involves Intervenor-Appellants' interests in the current and continued production, sale, purchase, and possession of Non-Firearm Objects. Because the underlying litigation attempts to make illegal and/or severely restrict Intervenor-Appellants' currently lawful individual and business practices, they have a legally protectable interest sufficient to support intervention as of right under Rule 24(a).

Third, as also recognized by the lower court, A008, if Plaintiff-Appellees are successful below, Intervenor-Appellants will suffer adverse personal and economic consequences, including but not limited to, increased production costs, increased purchase prices, an end to direct consumer delivery, a legally mandated federal background check, and an in-person transfer of the object. A ruling in favor of Plaintiff-Appellees could render illegal, or significantly restrict, the otherwise lawful and constitutionally protected property, activities, and/or business practices of Intervenor-Appellants and their customers and members.

Fourth, Intervenor-Appellants' interests are not adequately represented by Federal Defendants. A proposed intervenor need only demonstrate that "representation of his interest '*may be*' inadequate; and the burden of making that

showing *should be treated as minimal*." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972) (citation omitted) (emphasis added). The lower court erred in attempting to heighten that burden, based on the inapposite concept of *parens patriae* and the inapplicable heightened standard articulated in *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). A009. But, regardless of burden, Intervenor-Appellants have demonstrated that the Federal Defendants do not adequately represent their "more parochial" and economic interests in the underlying matter. *See United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995) ("The interests of the prospective intervenors are narrower and not subsumed by the general interest of the United States," because "prospective intervenors are seeking to protect a more 'parochial' financial interest not shared by other citizens . . . .") (citations omitted). Federal Defendants' support of Intervenor-Appellants' intervention in parallel litigation, and their affirmative absenteeism in this matter, further evidence an inadequacy of representation. Moreover, Federal Defendants, based on recent actions of the ATF and President Biden, have taken a stance much more akin to Plaintiff-Appellees than Intervenor-Appellants. As individuals and organizations that have relied on the ATF's classification of Non-Firearm Objects, Intervenor-Appellants have a very particularized interest in—and insight regarding—the Non-Firearm Objects industry, which is not and cannot be

represented by Federal Defendants' limited interest in defending the ATF's rulemaking process and enforcement orders.

In the alternative, Intervenor-Appellants sought permissive intervention, pursuant to Federal Rule of Civil Procedure 24(b). While the court will generally consider the same factors, the predominant consideration is whether the intervention will cause undue delay. *Olin Corp. v. Lamorak Ins. Co.*, 325 F.R.D. 85, 87 (S.D.N.Y. 2018). Intervenor-Appellants sought intervention prior to any dispositive motions being filed and agreed to abide by the accelerated briefing schedule to avoid prejudice to the parties and unnecessary expenditure of the court's resources. Further, in light of the court's later grant of permissive intervention to Polymer80, which is similarly situated to, but sought intervention a month and a half after, Intervenor-Appellants, it is evident that the lower court abused its discretion in denying Intervenor-Appellants permissive intervention.

Overall, this Circuit should remand this matter to the district court to require the intervention of Intervenor-Appellants, either as of right or permissively.

STANDARDS OF REVIEW

The Second Circuit currently reviews an order denying intervention for an abuse of discretion. *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 854 (2d Cir. 1998). There is, however, a circuit split as to the appropriate standard of review. The First, Third, and Fourth Circuits join the Second Circuit in reviewing all denials of intervention—whether as of right or permissively—for an abuse of discretion. *Int'l Paper Co. v. Town of Jay, ME*, 887 F.2d 338, 344 (1st Cir. 1989); *Harris v. Pernsley*, 820 F.2d 592, 597 (3d Cir. 1987),[5] *cert. denied* 484 U.S. 947 (1987); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991). The Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits, however, impose a heightened standard of review, predominantly *de novo* review, when evaluating a denial of intervention as of right, while reserving abuse of discretion for denials of permissive intervention. *United States v. Texas E. Transmission Corp.*, 923 F.2d 410, 413 (5th Cir. 1991) (*de novo*); *Grubbs v. Norris*, 870 F.2d 343, 345 (6th Cir. 1989) (*de novo*); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 797 (7th Cir. 2019) (*de novo*, except for timeliness analysis); *Sierra Club v. Robertson*, 960 F.2d 83, 85 (8th Cir. 1992) (*de novo*); *Scotts Valley Band of Pomo Indians v.*

[5] The Third Circuit "note[s], however, that our review of district court's decisions denying intervention of right is more stringent than the abuse of discretion review accorded to denials of motions for permissive intervention. Rule 24(a)(2) restricts the district court's discretion by providing that an applicant 'shall be permitted to intervene' if he or she satisfies the requirements of the Rule." *Harris*, 820 F.2d at 597 (citing *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 382 n.1 (1987) (Brennan, J., concurring in part)).

United States, 921 F.2d 924, 926 (9th Cir. 1990) (*de novo*); *United States v. Albert Inv. Co.*, 585 F.3d 1386, 1390 (10th Cir. 2009) (*de novo*); *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 n.16 (11th Cir. 1986) (reviewing denial of intervention of right "for error," and denial of permissive intervention for abuse of discretion); *Cook v. Boorstin*, 763 F.2d 1462, 1468 (D.C. Cir. 1985) (noting that intervention of right "seems to pose only a question of law," but stating "we would ordinarily be inclined to give substantial weight to a trial court's findings with regard to whether intervention would comport with efficiency and due process.").

While the Supreme Court has not resolved this circuit split, this Circuit should revisit its standard of review and apply *de novo* review to a denial of intervention as of right. Not only would this bring the Second Circuit in line with the majority of the circuits in the nation, but as noted by the Third Circuit, there must be a distinction between the burdens imposed by intervention as of right and permissive intervention to avoid surplusage. *Harris*, 820 F.2d at 597 (citing *Stringfellow*, 480 U.S. at 382 n.1 (1987) (Brennan, J., concurring in part)); *see Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are . . . reluctant to treat statutory terms as surplusage in any setting.") (internal quotation marks and citations omitted). Additionally, Federal Rule of Civil Procedure 24(a), by its plain text, removes discretion from the district court's decision-making process by stating "the court *must* permit . . . ." Fed. R. Civ. P. 24(a) (emphasis added); *see* 7C Charles Alan Wright & Arthur R. Miller,

Federal Practice and Procedure § 1902 (3d ed. 2020) ("An application for permissive intervention is addressed to the discretion of the court, whereas an application for intervention of right seems to pose only a question of law.") (citations omitted).

Regardless, whether this Circuit reviews denial of Intervenor-Appellants' Motion to Intervene as of right *de novo* or for an abuse of discretion, Intervenor-Appellants prevail.

ARGUMENT

I. Intervenor-Appellants are Entitled to Intervene as of Right in the Underlying Matter

Intervenor-Appellants meet each requirement for intervention as of right, as established by Federal Rule of Civil Procedure 24(a) and this Circuit. Accordingly, Intervenor-Appellants "must" be permitted to intervene. Fed. R. Civ. P. 24(a).

This Circuit employs a four-part test to evaluate intervention as of right: (1) the motion must be timely; (2) the applicant must assert an interest relating to the transaction or property that is the subject of the action; (3) the applicant must demonstrate that its interest may be impaired by the action; and (4) the applicant's interest must not be adequately represented by the existing parties. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994); *Floyd v. City of New York*, 302 F.R.D. 69, 83 (S.D.N.Y. 2014). "[C]ourts generally look at all four factors as a whole." *Tachiona ex rel. Tachiona v. Mugabe*, 186 F. Supp. 2d 383, 394 (S.D.N.Y. 2002) (citation omitted); *accord United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) ("Application of the rule requires that its components be read discretely, but together.").

The lower court appropriately determined that Intervenor-Appellants meet the first three factors. A006–08. But on the fourth factor, the district court erred. A009–11. The lower court misapplied this Circuit's precedent, failed to take into account the appropriate standard to establish inadequate representation, failed to

acknowledge Intervenor-Appellants' distinct arguments and perspective, and failed to account for Intervenor-Appellants' financial interests, which are neither shared nor represented by Federal Defendants.

Accordingly, this Circuit, under either the *de novo* or abuse of discretion standard, should reverse the district court's determination that Federal Defendants adequately represent Intervenor-Appellants' interests, and remand to the district court to grant Intervenor-Appellants intervention as of right.

A. Intervenor-Appellants' Motion to Intervene was Timely

Intervenor-Appellants' Motion to Intervene was filed prior to any dispositive motions being filed, complied with the existing briefing schedule, and had no potential to prejudice any party to the litigation—thus, Intervenor-Appellants' Motion was timely. Tellingly, no party opposed the timeliness of Intervenor-Appellants' Motion, which the district court noted. A007.

In determining whether a motion is timely, this Circuit considers four factors: (1) how long the applicant had notice of the interest before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness. *Pitney Bowes*, 25 F.3d at 70; *United States v. New York*, 820 F.2d 554, 557 (2d Cir. 1987). The requirements for intervention under Rule 24(a), including timeliness, "must be read . . . with an eye to the posture

of the litigation *at the time the motion is decided*." *Hooker Chems.*, 749 F.2d at 983 (emphasis added); *see also Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 133 (2d Cir. 2001) (overturning the district court's denial of intervention and requiring the district court to allow intervenor to be granted discovery and other rights to fully develop the record).

First, intervention as of right is timely when an applicant moves to intervene shortly after being put on notice that they have an interest in the litigation. *In re Tribune Co. Fraudulent Conveyance Litig.*, 291 F.R.D. 38, 41–42 (S.D.N.Y. 2013) (notice of interest was created in July and intervention in November was acceptable); *Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870 (S.D.N.Y. 1991) (two years was acceptable for intervention after notice of interest); *but see Nat'l Ass'n for Advancement of Colored People v. New York*, 413 U.S. 345, 366 (1973) (intervention not timely after four months *only because* applicants had notice far before commencement of the suit).

Here, less than three months elapsed between Plaintiff-Appellees' Complaint and Intervenor-Appellants' Motion, which is less than the time allowed in *Werbungs* and *Tribune Co.* Further, even though Intervenor-Appellants had no advanced notice, like the proposed intervenors in *NAACP v. New York*, Intervenor-Appellants moved more quickly than those in *NAACP v. New York*. Accordingly, Intervenor-Appellants' Motion was timely.

Second, a motion to intervene is generally deemed timely if the nonmovant is not prejudiced by delay. *Miller v. Silbermann*, 832 F. Supp. 663, 669 (S.D.N.Y. 1993). When determining the prejudice caused by the timeliness of a motion to intervene, the court focuses on the posture of that litigation *at the time the motion to intervene is made*. *Hooker Chems.*, 749 F.2d at 983.

Here, Intervenor-Appellants moved for intervention prior to any substantive motions being filed and agreed to abide by the established briefing schedule—mitigating any potential delay. A016; A031–32. Further, Plaintiff-Appellees' arguments, which are based on the legality of the ATF's classification of Non-Firearm Objects, cannot be materially affected by Intervenor-Appellants' intervention. As the moving party, Plaintiff-Appellees bear the burden of demonstrating that the ATF violated the APA; and Intervenor-Appellants' arguments, even those that differ from Federal-Defendants', are within the universe of issues the Plaintiff-Appellees must address. Intervenor-Appellants' intervention would have caused no delay when and as it was sought and was therefore timely.

Third, as fully demonstrated in Section I(C) below denial of Intervenor-Appellants' Motion to Intervene will prejudice Intervenor-Appellants' substantial interests, rights, activities, and business practices. For the sake of brevity, Intervenor-Appellants incorporate rather than repeat Section I(C)'s explanation of the prejudice they will suffer.

Finally, the unusual circumstances prong of the timeliness determination is a backstop for instances where denying intervention would be inequitable. *See Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 348, 353 (S.D.N.Y. 2009) ("An unusual circumstance provides a reasonable explanation for prolonged delay in seeking intervention.").

Here, both parties sought extensions on their previously established briefing schedule and the lower court granted Polymer80's later requested permissive intervention, after merits briefing had initially concluded, and ordered a further extended briefing schedule to include Polymer80's briefing. ECF Nos. 54, 68, 86, 113. The parties' and lower court's willingness to delay the litigation of the underlying case for another party's later intervention demonstrates that Intervenor-Appellants' Motion was not only timely filed, but that no equitable considerations weighed against intervention from industry participants.[6]

Under any applicable standard, Intervenor-Appellants timely filed their Motion to Intervene. Indeed, the district court concluded as much. A004.

[6] Intervenor-Appellant 80% Arms has at least one determination letter—which is properly in the administrative record before the district court, ATF0136–145 (2013 80% Arms determination letter), A008 (district court referencing determination letter)—that is akin to the Polymer80 letters challenged by Plaintiff-Appellees. ECF No. 65, at 1. While 80% Arms' determination letter is outside of the applicable statute of limitations, any invalidation of Polymer80's determination letters, on the basis of the ATF's purported flawed application of the GCA, could also invalidate 80% Arms' determination letter.

B. Intervenor-Appellants Have Significant, Protectable Interests in the Underlying Litigation

Intervenor-Appellants and their customers and members have significant, protectable interests in the production, sale, purchase, and possession of Non-Firearm Objects, each of which directly implicate their individual or corporate property and/or activities. Intervenor-Appellants have a significant interest in ensuring they can continue to engage in their personal and business activities as they do now, without involvement of inappropriate federal regulation.[7] Such involvement would, at a minimum, further restrict Intervenor-Appellants' ability to engage in lawful, constitutionally protected conduct and would significantly increase the cost of producing and purchasing Non-Firearm Objects and manufacturing those items into "firearms."

The lower court properly determined that Intervenor-Appellants satisfied this factor:

> Here, [Intervenor-Appellants] have sufficient legal and economic interests in the outcome of this case. If [Plaintiff-Appellees] are successful, FPC's members—producers, sellers, purchasers, and possessors of unfinished frames and receivers including Mr. Fort, Mr. Barton, and 80% Arms—will be impacted. Namely, their ownership of [Non-Firearm Objects] and existing business practices will be made

[7] Plaintiff-Appellees' argument that Intervenor-Appellants do not have a right to purchase a firearm without a background check is irrelevant and misplaced, as it assumes the accuracy of Plaintiff-Appellees' offered definition of a "firearm." *See* A072. In reality, given Non-Firearm Objects are not classified as "firearms," Intervenor-Appellants have the current, lawful ability to produce, sell, buy, and possess these objects without federal involvement. Intervenor-Appellants rely on that status to conduct their current activities, which would be made illegal if Plaintiff-Appellees are successful.

> illegal and may put some entities out of business entirely. [A035–36]. Furthermore, 80% Arms has purportedly received at least one determination letter similar to the ones challenged by Plaintiffs. [A084].

A008 (footnote omitted).

Rule 24(a)(2) provides for intervention as of right where the applicant "claims an interest relating to the property or transaction that is the subject of the action." The Second Circuit has adopted a "direct, substantial, and legally protectable interest" standard. *Bridgeport Guardians*, 602 F.3d at 473. This interest need not rise to the level of Article III standing, *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978), nor must the applicant wait until there is no doubt as to the applicant's interests to intervene, *Floyd*, 302 F.R.D. at 86, 99.

First, the outcome of the underlying litigation poses a direct and substantial threat to the constitutionally and statutorily protected property rights of Intervenor-Appellants, their customers, and their members. Intervenor-Appellants Fort, Barton, and FPC have purchased and would continue to purchase the Non-Firearm Objects at issue in the underlying litigation. A044 ¶¶ 4–5 (Barton); A048 ¶¶ 9–10 (FPC); A052 ¶¶ 4–5 (Fort). Intervenor-Appellant Fort has individually manufactured at least one Non-Firearm Object into a "firearm" (as defined by the GCA) for personal use through his own effort and expertise and would continue to do so in the future. A052 ¶ 4. Intervenor-Appellant FPC has and would continue to purchase Non-Firearm Objects in furtherance of its mission, educational activities, and advocacy

for the natural and individual right to keep and bear arms. A048 ¶¶ 9–11. Because Plaintiff-Appellees seek to make illegal, or significantly restrict, Intervenor-Appellants Fort, Barton, and FPC's currently legal property, activities, and/or practices, and restrict their future actions, Intervenor-Appellants Fort, Barton, and FPC have a legally protectable interest sufficient to support intervention as of right. *See Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 817–18 (9th Cir. 2001) (granting intervention based upon a determination that the proposed intervenor had a reliance interest that would be affected if the challenged agreement were invalidated).

Intervenor-Appellant 80% Arms seeks to represent the interests of its customers, who are too numerous to conveniently intervene in the underlying matter and who, due to the nature of the property in question, are chilled from coming forward to represent their own interests because of the degrading and vitriolic abuse they may suffer for exercising their rights—including, but not limited to, harassment, SWATing, and doxing.[8] Accordingly, Intervenor-Appellant 80% Arms asserts a

[8] *See* Fernando Alfonso III, *Lawyer Doxes 50 Journalists Who Doxed Gun Owners*, DAILY DOT (Mar. 2, 2020, 11:25 PM), https://www.dailydot.com/unclick/christopher-fountain-journal-news-gun-owners/ (last visited Nov. 2, 2020); John Cook, *Here Is a List of All the Assholes Handsome Law-Abiding Citizens Who Own Guns Some People in New York City* [sic], GAWKER (Jan. 8, 2013, 3:10 PM), https://gawker.com/5974190/here-is-a-list-of-all-the-assholes-who-own-guns-in-new-york-city (last visited Nov. 2, 2020); Editorial Staff, *Gawker Posts Full List Of All New York City Licensed Gun Owners*, THE WASHINGTON EXAMINER (Jan 9, 2013, 9:06 AM) https://www.washingtonexaminer.com/red-alert-politics/gawker-posts-full-list-of-all-ahole-new-york-city-licensed-gun-owners (last visited Nov. 2, 2020); K.C. Maas and Josh Levs, *Newspaper*

legally protectable interest on behalf of its customers sufficient to support intervention.

Second, when a potential intervenor has a financial interest in the litigation, it has a "direct, substantial, and legally protectable interest." *In re Pandora Media, Inc.*, No. 12-cv-08035-DLC, 2013 WL 6569872, at *8 (S.D.N.Y. Dec. 14, 2013) (citing *Bridgeport Guardians*, 602 F.3d at 473); *see N.Y. Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350, 351–52 (2d Cir. 1975) (per curium) ("There can be little doubt that the challenged prohibition against advertising the price of prescription drugs . . . affects the economic interests of members of the pharmacy profession."). In *Pandora Media*, the court found a "direct" and "legally cognizable" interest in the ability of the company that sought intervention to avoid imposition of certain licensing fees. *Id.* at *8. Similarly, this Circuit determined that a group of pharmacists had a sufficiently cognizable interest to intervene in a challenge to a state regulation that prohibited advertising the price of prescription

Sparks Outrage for Publishing Names, Addresses of Gun Permit Holders, CNN (Dec. 27, 2012, 10:23 AM), https://www.cnn.com/2012/12/25/us/new-york-gun-permit-map/index.html (last visited Nov. 2, 2020); Perry Chiaramonte, *Gun Control Groups Accused of 'Swatting' Open-Carry Permit Holders, Putting Lives at Risk*, Fox News (Sept. 1, 2015, Updated Jan. 12, 2017), https://www.foxnews.com/us/gun-control-groups-accused-of-swatting-open-carry-permit-holders-putting-lives-at-risk (last visited Nov. 2, 2020); Bob Owens, *Gun Control Group Tells Followers to "SWAT" Gun Owners*, Bearing Arms (Dec. 15, 2015, 3:24 PM), https://bearingarms.com/bob-o/2015/12/15/gun-control-groups-tells-followers-swat-gun-owners/ (last visited Nov. 2, 2020).

drugs, given it could detrimentally impact the pharmacists' existing business practices. *N.Y. Pub. Int. Rsch. Grp.*, 516 F.2d at 351–52.

Here, Intervenor-Appellant 80% Arms has significant financial interests in this matter. 80% Arms is a producer and seller of the Non-Firearm Objects at issue. The underlying litigation calls into question 80% Arms' continued ability to produce, sell, and distribute its products across the United States. If the lower court grants Plaintiff-Appellees the relief they request, the outcome would, at minimum, expose 80% Arms to significant increases in its operation and compliance costs and, at worst, could put 80% Arms out of business. A055–56 ¶¶ 5–12. Because this case attempts to make illegal 80% Arms' current business practices, 80% Arms has a legally protectable interest sufficient to support intervention as of right. Moreover, exposing 80% Arms, and similarly situated retailers and producers, to increased compliance and operational costs would similarly impact customers, like Intervenor-Appellants Fort and Barton, who would suffer increased expenses in acquiring currently lawful Non-Firearm Objects.

Finally, Intervenor-Appellant FPC represents itself, and the interests of its members across the nation. Numerous FPC members are producers, sellers, purchasers, and possessors of Non-Firearm Objects, including Intervenor-Appellants Fort, Barton, and 80% Arms. Because this case attempts to make illegal and/or severely restrict the currently lawful individual and business practices of

FPC's members, FPC and its members have a legally protectable interest sufficient to support intervention.

Accordingly, Intervenor-Appellants have met the significant protectable interest element of intervention.

C. Intervenor-Appellants' Interests will be Impaired by the Relief Sought by Plaintiff-Appellees

Intervenor-Appellants', their customers', and their members' interests in the production, sale, purchase, and possession of Non-Firearm Objects will be significantly impaired if the lower court grants Plaintiff-Appellees the relief they seek. Such a ruling would render illegal, or significantly restrict, the otherwise lawful and constitutionally protected property, activities, and/or business practices of Intervenor-Appellants and their customers and members.

Again, the lower court determined that Intervenor-Appellants met this element of intervention as of right:

> [Intervenor-Appellants] have shown that their interest may be impaired by invalidation of the ATF's interpretive rule and determination letters. "Rule 24(a)(2) also requires the movant to show that it is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede its ability to protect its interest[.]" *Laroe Estates* [*v. Town of Chester*, 828 F.3d 60, 70 (2d Cir. 2016) *vacated and remanded by Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645 (2017)] (quotation and brackets omitted). As with the second prong, [Intervenor-Appellants] may suffer adverse economic consequences if [Plaintiff-Appellees] prevailed. [Intervenor-Appellants] have thus adequately demonstrated that their interest may be impaired by a judgment in favor of Plaintiffs.

A008.

A proposed intervenor satisfies the third prong of the test if disposition of the action may, as a practical matter, impair or impede its ability to protect its interest. *Pitney Bowes*, 25 F.3d at 70. In *New York v. Scalia*, five trade organizations attempted to intervene in a case that would change standards of liability under the Fair Labor Standards Act. *New York v. Scalia*, No. 20-cv-01689-GHW, 2020 WL 3498755, at *2 (S.D.N.Y. June 29, 2020). The court evaluated whether the proposed intervenors would suffer impairment due to the adverse economic consequences if the court invalidated an agency's final rule. *Id*. The court determined that the potential cost to some employers in the trade organizations due to potential invalidation of the rule was sufficient to establish the impairment of a protectable interest. *Id*. Further, in *New York Public Interest Research Group*, this Circuit rejected the idea that proposed intervenors could simply "protect their interests after an adverse decision in the instant case by attacking any new regulation" because "[s]uch contention ignores the possible stare decisis effect of an adverse decision." 516 F.2d at 352.

In the present case, an invalidation of the ATF's determination concerning Non-Firearm Objects would significantly impair Intervenor-Appellants' interests. Like the trade organizations in *Scalia*, whose members would be affected by the invalidation of a regulation, Intervenor-Appellants, their customers, and their

members include individuals and businesses that produce, sell, purchase, and possess Non-Firearm Objects, all of whom would be directly and adversely affected by the invalidation of the ATF's longstanding rule. Depending on the extent of the lower court's ruling, and the ATF's decision on remand, Intervenor-Appellants could be exposed to criminal liability based on continued performance of previously lawful activities and would be prohibited from engaging in otherwise lawful and constitutionally protected activities, including but not limited to the direct purchase of Non-Firearm Objects. *See, e.g.*, 18 U.S.C. § 922(c) (regulating direct purchase). Additionally, Intervenor-Appellant 80% Arms, and those similarly situated, would be forced to comply with substantial additional legal and regulatory burdens, not only causing significant financial stress but potentially putting them out of business—thereby also impacting their customers, including Intervenor-Appellants Fort, Barton, and FPC.

Thus, Intervenor-Appellants meet the third factor for intervention as of right.

D. Intervenor-Appellants' Interests are not Adequately Represented by the Existing Parties

Intervenor-Appellants' interests are not adequately represented by Federal Defendants, who do not speak for individual owners and purchasers of Non-Firearm Objects, for businesses engaged in the production or sale of the same, nor for organizations seeking to preserve and restore individuals' rights—including the

individual right to possess and manufacture arms for the lawful purpose of, *inter alia*, self-defense.

"[T]he burden to demonstrate inadequacy of representation is generally speaking 'minimal.'" *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)); *see* 7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed. 2020) ("Nonetheless, there is good reason in most cases to suppose that the applicant is the best judge of the representation of the applicant's own interests and to be liberal in finding that one who is willing to bear the cost of separate representation may not be adequately represented by the existing parties.") (citations omitted).

Here, however, despite the "minimal" burden and the recognition of Intervenor-Appellants' significant, protectable interests subject to impairment by the court, the lower court determined that Federal Defendants adequately represent Intervenor-Appellants' interests in the underlying litigation. A009–11. The district court's conclusion is incorrect as a matter of law and constitutes an abuse of discretion.

1. The Lower Court Erred in Imposing a Significantly Heightened Burden on Inventor-Appellants

"The requirement of [Rule 24(a)] 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 (citation omitted) (emphasis added). In *Trbovich*, the Supreme Court determined that the Secretary of Labor—a federal party—might not adequately represent the proposed intervenor's interests even though the Secretary had a *statutory obligation* to represent the individual, because the Secretary had a competing interest in protecting a broader public interest. *Id*. at 538–39.

This Circuit has recognized this same principle when a proposed intervenor's argument *may not* be entirely represented, even by a governmental actor. *Cf. 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); *see N.Y. Pub. Int. Rsch. Grp.*, 516 F.2d at 352 (recognizing that governmental defendants' interests "may significantly differ" from those of proposed intervenors); *see also Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) ("[T]he government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'") (quoting *WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009); *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1256 (10th Cir. 2001)).

Indeed, the Second Circuit's application of the permissive *Trbovich* standard is very much in line with *every other circuit's* precedent on this issue, even when a governmental party is involved.[9]

[9] *See, e.g., Conserv. Law Found. of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992) (applying *Trbovich* standard to grant seven commercial fishing groups intervention where the federal defendant's "judgments are necessarily constrained by his view of the public welfare," because "the fisherman may see their own interest in a different, perhaps more parochial light."); *Commonwealth of Penn. v. President U.S. of America*, 888 F.3d 52, 61 (3d Cir. 2018) (granting intervention because "similar to *Trbovich*," the government was tasked "with serving two related interests that are not identical: accommodating the free exercise rights of religious objectors while protecting the broader public interest in access to contraceptive methods and services.") (citation omitted); *JLS, Inc. v. Pub. Serv. Com'n of West Virginia*, 321 Fed. App'x 286, 290 (4th Cir. 2009) ("We conclude that Movants clearly satisfied their 'minimal' burden of showing that [the Public Service Commission of West Virginia's] representation of their interests 'may be inadequate'" in regard to "the motivation that Movants have to defeat [plaintiff]."") (citation omitted); *Texas v. United States*, 805 F.3d 653, 663 (5th Cir. 2015) (granting intervention under *Trbovich* because "the Government has an institutional interest in shielding its actions from state intervention through the courts, whereas the [proposed intervenors'] interest is in working and providing for their families . . . ."); *Linton by Arnold v. Comm'r of Health & Enviro., State of Tenn.*, 973 F.2d 1311, 1319 (6th Cir. 1992) (noting it is "sufficient that the movants prove that representation may be inadequate," because the governmental party "acted as both a regulator and purchaser of movants' services thereby creating inherent inconsistencies between movants' interests and those of the State . . . .") (citation omitted); *Driftless Area Land Conserv. v. Huebsch*, 969 F.3d 742, 749 (7th Cir. 2020) (employing *Trbovich* standard to grant intervention because proposed intervenors had economic interests not represented by the Wisconsin Public Service Commission); *United States v. Union Elec. Co.*, 64 F.3d 1152, 1170 (8th Cir. 1995) (applying *Trbovich* standard in determining "[t]he interests of the prospective intervenors are narrower and not subsumed by the general interest of the United States," because "prospective intervenors are seeking to protect a more 'parochial' financial interest not shared by other citizens . . . .") (citations omitted); *Nat'l Farm Lines v. I.C.C.*, 564 F.2d 381, 384 (10th Cir. 1977) ("We have here also the familiar situation in which the governmental agency is seeking to protect not only the interest of the public but also the private interest of the petitioners in intervention, a task which is on its face impossible. The cases correctly hold that this kind of a conflict satisfies the minimal burden of showing inadequacy of representation."); *Georgia v. U.S. Army Corps of Eng'rs*, 302 F.3d 1242, 1256 (11th Cir. 2002) (employing *Trbovich* in finding the federal government did not independently represent proposed intervenors' interest, because the federal government had "no independent stake.") (citation omitted); *Hodgson v. United Mine Workers of Am.*, 473 F.2d 118, 130 (D.C. Cir. 1972) (granting intervention under liberal *Trbovich* standard).

First, the lower court erred in relying on *Butler, Fitzgerald & Potter v. Sequa Corp.*, to require a significantly heightened burden of proof for Intervenor-Appellants to demonstrate inadequacy of representation. A009; *see* A011 (requiring a "compelling showing" and imposing a "heavy burden"). The lower court cites to *Butler* for the proposition that "the Second Circuit has 'demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective[.]'" A009 (citing *Butler*, 250 F.3d at 179). But in *Butler*, this Circuit denied the motion of a *discharged attorney* to intervene into the attorney's *former client's* action. 250 F.3d at 177. Not only was that case between private parties, but the discharged attorney's purported interest was also "seemingly . . . not in the subject of the underlying action." *Id.* Moreover, this Circuit questioned "whether a discharged attorney's intervention into a former client's action fits within the language of the Federal Rules." *Id.* (citing Fed. R. Civ. P. 24(a)). *Butler*, and the burden it imposes, is inapposite to this matter.

Second, the lower court's invocation of the doctrine of *parens patriae* to impose a heightened burden in this matter is equally erroneous. A009. In *United States v. City of New York*, relied on by the lower court, the proposed intervenors were denied intervention when they sought to "enforce the obligations of New York City under federal law." But in that case the state of New York was *already explicitly granted intervention* "as a plaintiff 'on behalf of itself and **as *parens***

***patriae*, trustee, guardian and representative on behalf of all residents and citizens of New York** . . . .'" 198 F.3d 360, 363, 367 (2d Cir. 1999) (emphasis added). In *Hooker Chemicals*, another case the lower court cites as imposing a heightened burden, a New York-based organization was denied intervention, in part, because it was adequately represented by the state of New York, given the state had filed a complaint against Hooker Chemicals "on behalf of itself as *parens patriae* on behalf of all residents and citizens of the State of New York . . . ." 749 F.2d at 985. *Hooker Chemicals* specifically notes the *parens patriae* test is only applicable when "an intervenor['s] state is already a party . . . ." *Id*. at 984.

Federal Defendants do not have any requirement—statutory or otherwise—to represent Intervenor-Appellants' individual and corporate interests in the production, sale, purchase, or possession of Non-Firearm Objects. Nor do Federal Defendants represent Intervenor-Appellants' interest in the exercise of their legal right and lawful ability to individually manufacture those objects into personal use firearms. The ATF alleges a general interest in representing and protecting public health and safety, as well as balancing statutory and regulatory concerns with agency resource constraints. In contrast, Intervenor-Appellants' reliance interests, their currently lawful individual and business practices, their substantial financial interests, and their right to individually manufacture personal use firearms all fall outside the scope of Federal Defendants' interests. Because Federal Defendants

must balance the interests of the general public against the rights of individuals, and are limited to defending the ATF's decision-making, Federal Defendants' representation of Intervenor-Appellants' more specific interests is likely to be inadequate. *See Trbovich*, 404 U.S. at 539 (granting intervention to union members even though federal defendant legally required to represent their interests because of the Secretary's additional "obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.'") (quoting *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 475 (1968)); *see also Conserv. Law Found. of New England, Inc.*, 966 F.2d at 44 (1st Cir. 1992) (granting seven commercial fishing groups intervention where federal defendant's "judgments are necessarily constrained by his view of the public welfare," because "the fisherman may see their own interest in a different, perhaps more parochial light.").

Overall, the *parens patriae* concept and the *Butler* standard are wholly inapplicable here. Federal Defendants do not purport to represent—nor do they actually represent—Intervenor-Appellants' interests, and neither the lower court, nor Plaintiff-Appellees, cite any example of a federal agency holding an all-encompassing and non-conflicted status in APA litigation.

This Circuit should continue to apply its liberal standard in determining Intervenor-Appellants' interests *may* not be *completely* represented by Federal

Defendants, including Intervenor-Appellants' reliance on the ATF's interpretation to structure their business and individual practices; their intent to continue to produce, sell, purchase, and possess Non-Firearm Objects without undue government interference; and their ability to individually manufacture personal use firearms from the same. Accordingly, as a matter of law, Intervenor-Appellants are entitled to intervention as of right.

2. Intervenor-Appellants' Interests and Litigation Position Differ Significantly from Federal Defendants'

Given Federal Defendants litigate on behalf of the general public, they are obligated to consider a wide spectrum of views, many of which may conflict with the particular interests of Intervenor-Appellants and their customers and members. *See Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995) (the government will not adequately represent petitioners when petitioners seek to raise issues broader than the scope of the government's argument) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)), *abrogated on separate grounds by Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177–80 (9th Cir. 2011). Representation is inadequate when a proposed intervenor would be damaged by the adjudication of its interest, but the agency being sued would not. *See Sec. & Exch. Comm'n v. Everest Mgmt. Corp.*, 475 F.2d 1236, 1239 (2d Cir. 1972) (SEC inadequately represents an intervenor who seeks damages).

First, Intervenor-Appellants seek to protect and defend their, their customers', and their members' right and ability to produce, sell, purchase, and possess Non-Firearm Objects; their constitutionally and statutorily protected rights; and their prolonged and justifiable reliance on the ATF's long held legal position. By contrast, Federal Defendants' interest in this suit is limited to defending the legitimacy of the ATF's rulemaking process and enforcement orders. Furthermore, Federal Defendants have little interest in defending their determination letters, given no harm will come to the ATF if they are set aside—but significant harm would come to individuals and businesses, such as Intervenor-Appellants, who legally rely on those letters. Where, like here, a party has private interests, as opposed to the government's public interests, this difference warrants intervention. *Sierra Club v. Espy*, 18 F.3d at 1208; *Fresno County v. Andrus*, 622 F.2d 436, 438–39 (9th Cir. 1980).

Intervenor-Appellants can provide the lower court with information and expertise relating to the Non-Firearm Object industry and market participants, and the interplay between federal law and individual rights implicated in the relief Plaintiff-Appellees seek. For example, Intervenor-Appellants addressed in their *amici curiae* brief the actual process of firearm classification from the perspective of a producer and retailer, as opposed to that of the ATF. ECF No. 108-1, at 20–22. Furthermore, Intervenor-Appellants specifically advocated against Federal

Defendants' invocation of deference in this matter. ECF No. 108-1, at 18–20. In their *amici curiae* brief, Intervenor-Appellants argued for a much more robust interpretation of the definition of "firearm" as an issue of law and statutory construction than Federal Defendants, and, if included in the litigation as a party, would strongly advocate for this position in responsive briefing and at oral argument.[10]

Second, recent events demonstrate that the ATF has already shifted its interpretation of the definition of "firearms" in a way that significantly departs from Intervenor-Appellants' interests. The ATF evidenced the beginning of this drastic change in policy on December 11, 2020, when it raided a Polymer80 facility in Dayton, Nevada.[11] According to the affidavit used to apply for the search warrant, ATF's investigation of Polymer80 hinges on the sale of a "Buy Build Shoot Kit," which includes a Non-Firearm Object and other non-firearm parts.[12] In the affidavit,

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[10] Intervenor-Appellants have, thus far, been restricted to a single *amici curiae* brief filed in support of Federal Defendants. *Cf. Hooker Chems.*, 749 F.2d at 992 ("[A]n added reason for our reluctance to disturb Chief Judge Curtin's ruling derives from his offer to appellants of an elevated *amicus* status that would have enabled them to go a long way toward presenting their objections to the settlement.").

[11] Scott Glover, *Feds raid 'ghost gun' maker whose products they say are linked to 'hundreds of crimes'*, CNN (Dec. 11, 2020 2:52 PM), https://www.cnn.com/2020/12/11/us/atf-raid-ghost-gun-manufacturer-invs/index.html.

[12] "The ATF Senior Special Agent, who is an ATF certified firearms expert, determined that the 'Buy Build Shoot Kit' as designed, manufactured, and distributed by Polymer80, is a 'firearm' as defined under federal law, as a weapon 'which will or is designed or may readily be converted to expel a projective by the action of an explosive,' as well as 'handgun,' defined as 'a firearm which has a short stock and is designed to be held and fired by the use of a single hand' and 'any combination of parts from which a firearm . . . can be assembled.'" *Hart Affidavit* ¶8, Case No.

the ATF relies on a definition of "firearm" that may include Non-Firearm Objects in certain circumstances and is, in part, based on temporal considerations—a definition more consistent with Plaintiff-Appellees' desired outcome than Intervenor-Appellants' interests.[13]

The extent of Plaintiff-Appellees' arguments and the ATF's recent actions—including its raid of a Polymer80 facility, its seizure of lawfully owned property from an individual,[14] and its alleged investigation of the legal status of Non-Firearm Objects (potentially when sold with other objects)—demonstrate two facts: (1) Plaintiff-Appellees' invocation of the appropriate extent of the definition of "firearm" will necessarily require the lower court to examine the scope of the GCA, and its interplay with individual rights; and (2) Federal Defendants do not represent the extent of Intervenor-Appellants' interests in defending individual Americans from government's unconstitutional and illegal overreach. Intervenor-Appellants will, however, under the original meaning of the GCA and related firearm laws, demonstrate to the lower court that the ATF's longstanding interpretation of

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.

[13] The ATF notes that the "kit" only contains "components" and that "a confidential informant working with the ATF assembled a fully functional firearm in approximately 21 minutes." *Hart Affidavit* ¶ 8.

[14] On December 10, 2020, an individual was apparently visited by ATF agents who seized a Non-Firearm Object, lawfully owned by the individual, allegedly in furtherance of an ongoing investigation. *See GHOSTED: ATF Visiting End Users; Requesting Forfeiture of Polymer80 Kits* (Dec. 11, 2020), https://www.thefirearmblog.com/blog/2020/12/11/polymer80-kits/.

"firearm" is not only accurate, but that the ATF is without any constitutional or statutory authority to regulate Non-Firearm Objects—a position unlikely to be advanced by Federal Defendants.

Third, the current administration evidenced a more profound shift in position on April 8, 2021, when President Biden announced he was ordering the Justice Department[15] to issue a proposed rule related to the regulation of the products at issue in this case. *Remarks by President Biden on Gun Violence Prevention*, THE WHITE HOUSE (Apr. 8, 2021).[16] "The Justice Department will issue a proposed rule to help stop the proliferation of these firearms." *FACT SHEET: Biden-Harris Administration Announces Initial Actions to Address the Gun Violence Public Health Epidemic*, THE WHITE HOUSE (Apr. 7, 2021).[17] At the time of filing of this Brief, the referenced executive order has not been formalized or signed, but the press release and conference both indicate a shift of position much more in line with Plaintiff-Appellees' interpretation, as opposed to Intervenor-Appellants' and

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15 The ATF falls under the purview of the Department of Justice. 6 U.S.C. § 531.

16 https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/08/remarks-by-president-biden-on-gun-violence-prevention/

17 https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/07/fact-sheet-biden-harris-administration-announces-initial-actions-to-address-the-gun-violence-public-health-epidemic/

seemingly indicate an abandonment of the position previously taken in the underlying litigation.[18]

Finally, the lower court's reliance on the unreported *New York v. United States Department of Health and Human Services* regarding adequate representation is flawed. *See* A009. That opinion derives from four consolidated cases, brought by state and local governments, as well as health care organizations and associations challenging an agency rule related to healthcare providers. *New York v. U.S. Dep't of Health & Human Serv.*, No. 19-CIV-4676-PAE, 2019 WL 3531960, at *1 (S.D.N.Y. Aug. 2, 2019). Proposed intervenors were health care workers that specifically fell under the Rule's protections. *Id*. First, while the lower court cites this matter in addressing intervention as of right, it is worth noting that the court in *New York v. HHS* granted the proposed intervenors permissive intervention. *Id*. Second, that case is currently on appeal before this Circuit—and is thus not well-established law. *See* Case Nos. 19-4254, 20-31, 20-32, 20-41 (2d Cir.).

Moreover, the court's underlying reasoning in *New York v. HHS* is inapplicable to this case. For example, the likelihood that Federal Defendants will modify their application of the term "firearm" is entirely present here, as

[18] Of relevance, the court stayed the parallel litigation in the Northern District of California and set a status conference for May 27, 2021, to "[i]n light of recent developments regarding ATF's regulation of products at issue in this case . . . address the pending motions to intervene." *Order of Temporary Stay of Case*, Case No. 20-cv-06761-EMC (N.D. Cal. April 9, 2021), ECF No. 83.

demonstrated above, but was "entirely theoretical" in *New York v. HHS*. *Id*. at *6. Although theoretical at the time, the *New York v. HHS* appeal is now being held in abeyance by this Circuit "pending review of the matter by new leadership at the U.S. Department of Health & Human Services." Case No. 19-4254, ECF No. 258, at *2. Further, as argued in Intervenor-Appellants' Motion and demonstrated with the filing of their *amici curiae* brief, but not demonstrated by the proposed intervenors in *New York v. HHS*, Intervenor-Appellants have and will continue to make relevant arguments which Federal Defendants have abandoned, as well as arguing against the Federal Defendants' position on deference. *Compare* No. 19-civ-4676-PAE, 2019 WL 3531960, at *5–6, *with* ECF No. 108-1 (presenting additional argumentation about appropriate interpretation of "firearm" as a matter of law, arguing against *Chevron* deference, and presenting relevant information from industry participants about the determination process). The analysis in *New York v. HHS* is neither persuasive nor relevant to this Court's inquiry.

Plaintiff-Appellees' demand that certain items be regulated as if they were firearms, while arguing that individuals' firearm rights are not implicated, is self-defeating—Intervenor-Appellants intend to defend their interests in the Non-Firearm Object industry, which include their individual and organizational interests in exercising and supporting the right to individually manufacture firearms for

personal use.[19] Plaintiff-Appellees have, at no point, argued that individuals do not have such a right. Federal Defendants have an interest in defending their rulemaking process, but they do not, and cannot, express an interest in ensuring that individuals are able to exercise their natural rights independent of inappropriate government interference.

3. Federal Defendants, in Parallel Litigation, Have Advocated in Support of Intervenor-Appellants' Intervention

Federal Defendants' support of Intervenor-Appellants' intervention in parallel litigation, combined with their affirmative absenteeism from this appeal and their silence during briefing below, further indicates that Federal Defendants do not represent Intervenor-Appellants' interests.

Plaintiff-Appellees argued below that Federal Defendants adequately represent Intervenor-Appellants' interests, in part, because "the government . . . moved to dismiss a similar challenge to ATF's actions . . . and has given every indication it will defend this case similarly." A068. But Plaintiff-Appellees omit two key facts regarding that challenge. First, Intervenor-Appellants also moved to intervene in that action—which intervention remains pending after a hearing on Intervenor-Appellants' Motion on February 26, 2021. *Motion to*

[19] The ATF's own guidance indicates that a license is not required to make a firearm solely for personal use, so long as regulations are followed under 18 U.S.C. §§ 922(o), (p), and (r); 26 U.S.C. § 5822; and 27 C.F.R. §§ 478.39, 479.62, and 479.105. ATF, *Does an individual need a license to make a firearm for personal use?* (Mar. 17, 2020), https://www.atf.gov/firearms/qa/does-individual-need-license-make-firearm-personal-use.

Intervene, *California, et al. v. ATF, et al.*, Case No. 3:20-cv-06761-EMC, ECF No. 24 (N.D. Cal. Nov. 24, 2020).[20] More importantly, Federal Defendants filed a Response to Intervenor-Appellants' Motion in that matter that supports Intervenor-Appellants' intervention as appropriate. *Federal Defendants' Response to Motion to Intervene* ("CA Response"), Case No. 3:20-cv-06761-EMC, ECF No. 38 (N.D. Cal. Dec. 8, 2020) (available at A096–101). In that Response, Federal Defendants specifically support intervention as of right for Intervenor-Appellant 80% Arms, noting that because the plaintiffs in that matter "criticize ATF's action in part based on statements of [80% Arms] subsequent to ATF's action . . . the APA may constrain ATF's ability to adequately represent [80% Arms'] interests in the face of such post-hoc, extra-record materials." A098. Despite the Federal Defendants' silence, the exact same issue is present in this case.

First, Plaintiff-Appellees specifically implicate Intervenor-Appellant 80% Arms in their Complaint, referencing activities subsequent to the ATF's alleged "action." Plaintiff-Appellees argue that the "proliferation" of individually manufactured firearms is, in part, due to Intervenor-Appellant 80% Arms, ECF No. 11 ¶ 18 n.23, and that Intervenor-Appellant 80% Arms "trumpet[s] ATF's rule"

[20] That court recently temporarily stayed consideration of Intervenor-Appellants' motion "[i]n light of recent developments regarding ATF's regulation of products at issue in this case," and set a case management conference for May 27, 2021, for parties to "address the pending motions to intervene . . . and dismiss . . . ." Case No. 20-cv-06761-EMC, ECF No. 83 (N.D. Cal. April 9, 2021).

on its website, *id.* ¶ 107. Plaintiff-Appellees continued to implicate Intervenor-Appellant 80% Arms in the underlying litigation even after opposing intervention. On December 9, 2020, Plaintiff-Appellees filed a Declaration of Aaron Esty in support of their Motion for Summary Judgment. ECF No. 64. Therein, Plaintiff-Appellees repeatedly cite to Intervenor-Appellant 80% Arms' website in an attempt to support their arguments. *Id.* ¶¶ 20(b), 20(e), 21, 22, 24, 26(b), 27. Plaintiff-Appellees should not be permitted to implicate Intervenor-Appellant 80% Arms in the underlying lawsuit while also arguing against Intervenor-Appellants' ability to defend its business, industry, and financial interests.

Second, as to Intervenor-Appellants Fort and Barton, Federal Defendants note that their "alleged reliance interests are substantially different from the interests of the manufacturers of [Non-Firearm Objects] to whom ATF's classification letters are issued . . . and this weighs in favor of intervention." A099–100.[21] Accordingly, Federal Defendants do not adequately represent Intervenor-Appellant Fort's and Barton's reliance interests.

Finally, while Federal Defendants take no position on Intervenor-Appellant FPC's intervention, Intervenor-Appellants note that FPC not only represents the

[21] Federal Defendants argue Intervenor-Appellants Fort and Barton should be granted permissive intervention, but Intervenor-Appellants note that Federal Defendants' statements also demonstrate Federal Defendants do not adequately represent the interests of Intervenor-Appellants Fort and Barton.

interests of its members—including Intervenor-Appellants Fort, Barton, and 80% Arms, and those in substantially similar positions—but FPC is also an individual owner and purchaser of Non-Firearm Objects, like Fort and Barton. *See* A100–101. Intervenor-Appellant FPC uses those objects to educate legislatures, politicians, and the public about Non-Firearm Objects, the GCA, and the proper definition of a "firearm." A048 ¶¶ 9–11; ECF No. 46 ¶¶ 9–11. Intervenor-Appellant FPC's intervention allows this Court to conveniently and efficiently grant intervention to all of FPC's members, through FPC's representation of their interests.

Federal Defendants' silence below and their affirmative absenteeism from this appeal further evidence their inability or unwillingness to represent Appellant-Intervenors' interests. During the entirety of briefing below, Federal Defendants never took a position on Intervenor-Appellants' Motion to Intervene. Prior to Intervenor-Appellants filing their Motion on November 12, 2020, counsel for Intervenor-Appellants contacted counsel for Federal Defendants, who indicated they did not take a position on Intervenor-Appellants' Motion. A016. Briefing on the Motion concluded on December 10, 2020, and the lower court issued its Order denying Intervenor-Appellants intervention on January 2, 2021. A004. At no point during the almost two months Intervenor-Appellants' Motion was pending did Federal Defendants take any position on Intervenor-Appellants' Motion. Instead, only Plaintiff-Appellees ever alleged or argued that Federal Defendants adequately

represent Intervenor-Appellants' interests. *See* A066–69. Further, shortly after Intervenor-Appellants initiated this appeal on February 1, 2021, counsel for Federal Defendants filed an Acknowledgement and Notice of Appearance indicating that "federal defendants do not wish to participate in this appellate proceeding." Case No. 21-191, ECF No. 8-2 at 1. The district court's denial of Intervenor-Appellants' intervention as of right was based *exclusively* on adequate representation. If Federal Defendants adequately represent Intervenor-Appellants' interests, and wanted to ensure that representation was made clear, Federal Defendants would presumably have sought to participate in this appeal and defend their purported representation of Intervenor-Appellants.

As demonstrated by Federal Defendants' position in the parallel litigation, and their silence below and affirmative absenteeism here, Federal Defendants do not adequately represent Intervenor-Appellants' substantial interests in the outcome of this litigation. This silence also evidences the inappropriateness of the lower court's invocation of *parens patriae* in this matter, given the Federal Defendants have never purported to invoke that representation. *Cf. Hooker Chems.*, 749 F.2d at 985 ("The differences between *Trbovich* and the present case are significant. The Secretary [in *Trbovich*] did not purport, as the United States, State and City do here, to be suing as a *parens patriae* . . . .") (citation omitted).

4. At Minimum, Federal Defendants do not, and Cannot, Represent Intervenor-Appellants' Financial Interests

Intervenor-Appellants, their customers, and their members have economically relied on the ATF's determination that Non-Firearm Objects are not "firearms" pursuant to the GCA and will be directly impacted if Plaintiff-Appellees succeed. At minimum, Federal Defendants do not, and cannot, represent Intervenor-Appellants' significant and legally protectable financial interests in the ATF's application of the definition of "firearm."

This Circuit's precedent establishes that intervenors with financial interests in the challenged regulation have a direct, substantial, and legally protectable interest to intervene. *See N.Y. Pub. Int. Rsch. Grp.*, 516 F.2d at 351–52 (2d Cir. 1975) (per curium) ("There can be little doubt that the challenged prohibition against advertising the price of prescription drugs . . . affects the economic interests of members of the pharmacy profession."); *In re Pandora Media, Inc.*, No. 12-cv-08035-DLC, 2013 WL 6569872, at *8 (citing *Bridgeport Guardians*, 602 F.3d at 473). This legally protectable financial interest includes an impact on proposed intervenors' existing business practices or even a *potential* cost to proposed intervenors, or their members, due to the outcome of the litigation. *See N.Y. Pub. Int. Rsch. Grp.*, 516 F.2d at 352 ("Specifically, we are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the Regents."); *N.Y. v. Scalia*, No. 20-cv-

01689-GHW, 2020 WL 3498755, at *2 (S.D.N.Y. June 29, 2020) (determining proposed trade association intervenors had financial interest in the outcome because some members might face changing standards for liability if the rule were invalidated). Further, where "there is a likelihood that the property owners will make a more vigorous presentation of the economic side of the argument than would the governmental defendants," the government defendants fail to adequately represent the proposed intervenor's interests. *Town of North Hempstead v. Vill. of North Hills*, 80 F.R.D. 714, 717 (E.D.N.Y. 1978) (quoting *N.Y. Pub. Int. Rsch. Grp.*, 516 F.2d 350, 352 (2d Cir. 1975)). In *Town of North Hempstead*, the court granted intervention to preserve the economic interests of the intervenors because the village did not share "real and immediate economic interests of the proposed intervenors." 80 F.R.D. at 717.

This financial consideration permeates this Circuit's precedent. When denying intervention in *U.S. Postal Service*, this Circuit noted that "the Postal Service, a semi-private corporation, had as direct a *legal and economic interest* in the constitutionality of its monopoly as did [the proposed intervenor]." 579 F.2d at 191 (emphasis added). In *U.S. Postal Service*, this Circuit reasoned that economic interests should be considered, following *N.Y. Public Interest Research Group*, but determined that the existing party, the Postal Service, had an incentive to protect those economic interests. Federal Defendants have no such interest here. Federal

Defendants are not "semi-private," have not relied on the ATF's actions to make business decisions, and will not be economically impacted by a ruling for Plaintiff-Appellees.

Instead, like proposed intervenors in *New York v. Scalia* and *N.Y. Public Interest Research Group*, if Plaintiff-Appellees are successful, Intervenor-Appellants would suffer an immediate increase in overhead, production, and purchase costs; significant alterations to their business and personal practices; and Intervenor-Appellants will all be prevented from—or exposed to criminal liability for—continuing to engage in their business and personal practices.

Federal Defendants will not and cannot adequately represent or protect Intervenor-Appellants' economic interests. As demonstrated above, the outcome of this litigation could have a substantial monetary effect on Intervenor-Appellant 80% Arms' business practice, as well as the individual practices of other Intervenor-Appellants and their members. Federal Defendants do not share the economic interests of Intervenor-Defendants and have no duty, nor reason, to protect Intervenor-Appellants' economic interests. Intervenor-Appellants could be required to cease lawful practices; incur significantly higher financial burdens on the production, sale, and purchase of Non-Firearm Objects; or even lose their businesses, but Federal Defendants only seek to uphold the ATF's determination as to Non-Firearm Objects.

Accordingly, the lower court erred and abused its discretion in determining Intervenor-Defendants' interests are adequately represented.

II. Alternatively, the Lower Court Abused its Discretion in Denying Intervenor-Appellants Permissive Intervention

While intervention as of right should be reviewed *de novo*, this Circuit appropriately reviews denial of permissive intervention for an abuse of discretion. Even under this more deferential standard of review, however, the lower court should be reversed. The district court's reasoning is flawed in light of not only the recognized interests of Intervenor-Appellants, and the potential for impairment of those interests, but also the subsequent grant of permissive intervention to a similarly situated party that sought intervention after Intervenor-Defendants.

Federal Rule of Civil Procedure 24(b) governs permissive intervention and provides:

> 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). Courts have discretion under Rule 24(b). *Scalia*, No. 20-cv-01689-GHW, 2020 WL 3498755, at *4. "In deciding whether to permit intervention under Rule 24(b), courts generally consider the same factors that are relevant as of right under Rule 24(a)(2)." *Olin Corp*, 325 F.R.D. at 87 (citing *Peterson v. Islamic Republic of Iran*, 290 F.R.D. 54, 57 (S.D.N.Y. 2013)). Rule

24(b), however, "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *Sec. & Exch. Comm'n v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940). Permissive intervention also considers adequacy of representation a "minor factor at most." *United States v. Columbia Pictures Indus., Inc.*, 88 F.R.D. 186, 189 (S.D.N.Y. 1980).

In this case, Intervenor-Appellants have defenses to the claims asserted by Plaintiff-Appellees and to the relief being sought. These defenses differ significantly from those asserted by Federal-Defendants', as demonstrated above. *See*, Argument, Section I(D). Intervenor-Appellants' arguments in their *amici curiae* brief, although arising from the same questions of law and fact, demonstrate a significantly distinct perspective, and present significantly different argumentation, which would aid the district court in resolving the underlying APA suit. This case is not a mere dispute between parties. Plaintiff-Appellees seek to upend an entire industry using the APA. An industry that Intervenor-Appellants seek to represent.

"[T]he principal guide in deciding whether to grant permissive intervention is whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." *Olin Corp.*, 325 F.R.D. at 87 (quotations and citations omitted). An appellate court reviews timeliness at the time the district court exercised its discretion. *See, e.g.*, *NAACP v. New York*, 413 U.S. at 366–69

(reviewing the circumstances surrounding timeliness and undue delay at the time the court denied applicants' motion); *Pitney Bowes*, 25 F.3d at 73–74 (same).

In this case, there would be neither prejudice nor undue delay. As previously addressed, Intervenor-Appellants have had only a short window to ensure that their substantial interests are protected in this case and endeavored to move as quickly as possible, accommodating the accelerated schedule, and agreed to abide by the existing briefing schedule to avoid prejudice to the parties and unnecessary expenditure of the court's resources.

The district court's inclusion of Polymer80 in the case below further demonstrates that granting Intervenor-Appellants' intervention would not have prejudiced the parties. Polymer80, a producer and retailer of Non-Firearm Objects—like Intervenor-Appellant 80% Arms—moved the lower court to intervene a month and a half after Intervenor-Appellants. *Compare* ECF No. 43 (Intervenor-Appellants' Motion, filed Nov. 12, 2020) *with* ECF No. 78 (Polymer80's Motion, filed Dec. 30, 2020). Polymer80 sought intervention on the same basis as Intervenor-Appellants. *Compare* ECF No. 44 (Intervenor-Appellants' Memorandum in Support of their Motion) *with* ECF No. 79 (Polymer80's Memorandum in Support of its Motion). But, after denying Intervenor-Appellants permissive intervention on January 2, 2021, the lower court granted Polymer80 permissive intervention on March 19, 2021. ECF No. 113. The district court's basis

for such grant was "because this litigation challenges determination letters issued to Polymer80, the Court exercises its discretion to permit Polymer80 to intervene as a defendant, with conditions to limit the prejudice to Plaintiffs resulting from the late addition of Polymer80 to the case." ECF No. 113, at 1. But, Intervenor-Appellant 80% Arms has at least one determination letter akin to the Polymer80 letters being challenged, which is properly in the administrative record and which letter the lower court has previously acknowledged. A008 ("Furthermore, 80% Arms has purportedly received at least one determination letter similar to the ones challenged by Plaintiffs.") (citing A084); *see also* ATF0136–145 (Letter from Earl Griffith, Chief, Firearms Technology Branch, to Tilden Smith, 80 Percent Arms (July 15, 2019). The lower court further acknowledged this when it recognized that Intervenor-Appellants "have shown that their interest may be impaired by invalidation of the ATF's interpretive rule and determination letter." A008. It would be illogical to assume that if the lower court invalidates Polymer80's letters, that substantially similar letters, like 80% Arms', will not be similarly affected. If the lower court determined that Polymer80's inclusion would not unduly delay or prejudice parties two and a half months after it found that Intervenor-Appellants' inclusion would, the district court demonstrably abused its discretion. All considerations against Intervenor-Appellants' inclusion dissipate in light of Polymer80's inclusion.

Thus, the lower court's denial of permissive intervention was an abuse of discretion, and this Circuit should overturn that determination and remand this matter to the district court with instruction to grant Intervenor-Appellants permissive intervention.

CONCLUSION

For the foregoing 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 find the district court abused its discretion in denying Intervenor-Appellants permissive intervention and remand this matter to the district court.

DATED this the 15th day of April 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Intervenor-Appellants' Opening Brief* complies with the type-volume limit of Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the foregoing document contains 12,859 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 15th day of April 2021.

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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 15th day of April 2021.

/s/ Cody J. Wisniewski
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