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VIA ECF

February 16, 2022

Catherine O'Hagan Wolfe  
Clerk of the Court  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

**Re: *Everytown for Gun Safety Support Fund, et al. v. Bureau of Alcohol, Tobacco, Firearms, and Explosives, et al.*, No. 21-191 – Argument Scheduled for Feb. 17, 2022 at 10:00 a.m.**

Dear Ms. Wolfe:

Plaintiffs-Appellees ("Plaintiffs") submit this letter pursuant to Federal Rule of Appellate Procedure 28(j) to alert this Court to *Philip E. Berger v. North Carolina State Conference of the NAACP*, No. 21-248, currently pending before the U.S. Supreme Court. Oral argument in *Berger* is set for March 21, 2022.<sup>1</sup>

In *Berger*, the Supreme Court granted review of three questions from a Fourth Circuit decision affirming the denial of an intervention motion filed pursuant to Federal Rule of Civil Procedure 24 ("Rule 24"). Two of the granted questions concern the standards for evaluating Rule 24 motions:

1. Whether a state agent authorized by state law to defend the State's interest in litigation must overcome a presumption of adequate representation to intervene as of right in a case in which a state official is a defendant.
2. Whether a district court's determination of adequate representation in ruling on a motion to intervene as of right is reviewed *de novo* or for abuse of discretion.

Plaintiffs argue in this appeal that the district court's order denying Intervenor-Appellants' motion to intervene should be affirmed. Plaintiffs also have noted that the Court may wish to stay this appeal pending further developments in the district court, in which proceedings are currently stayed pending Defendant ATF's completion of its rulemaking. Pl. Br. 2 n.1. Relevant to the *Berger* questions presented, Plaintiffs' brief argues that there is a presumption of adequate representation by the government here that Intervenor-Appellants have failed to overcome, *id.* at 19-28, and that review of a denial of a motion to intervene as of right is for abuse of discretion, *id.* at 17, 25-28.

Regardless of the outcome in *Berger*, this Court may affirm here because the district court's denial of intervention was correct even if assessed *de novo* and without a presumption of adequacy (although the current law of this Circuit provides for abuse of discretion review and a presumption of adequacy).

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<sup>1</sup> The *Berger* docket is available here:  
<https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/21-248.html>.



Alternatively, the pendency of *Berger* provides further basis for this Court to stay decision of this appeal pending further developments below.

Sincerely,

*/s/ Kathleen R. Hartnett*

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cc: All Counsel of Record (via ECF)

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 16th day of February, 2022, I electronically filed the foregoing with the Clerk of the Court for the U.S. Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

Dated: February 16, 2022

Respectfully Submitted,

/s/Kathleen R. Hartnett

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