



MOUNTAIN STATES LEGAL FOUNDATION

July 1, 2022

VIA ECF

Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

**Re: *Everytown for Gun Safety Support Fund, et al. v. Zachary Fort, et al.*, No. 21-191 –
Orders dated February 28, 2022, and May 17, 2022**

Dear Ms. Wolfe:

I write as counsel for Intervenor-Appellants (“Appellants”) and submit this letter brief on behalf of Appellants pursuant to Federal Rule of Appellate Procedure 28(j) and this Court’s February 28, 2022 Order and May 17, 2022 Order regarding *Berger v. North Carolina State Conference of the NAACP*, No. 21-248 (U.S.). ECF Nos. 89, 104. In this Court’s February 28, 2022 Order, the Court ordered the parties to “no later than fourteen days after issuance of that decision . . . submit to this court a letter brief, not to exceed ten pages double-spaced, addressing the effect, if any, that the *Berger* decision has on this appeal.” ECF No. 89, at 1. This Court then reiterated that requirement in its May 17, 2022 Order. ECF No. 104, at 1.

On June 23, 2022, the Supreme Court issued an opinion in *Berger v. North Carolina State Conference of the NAACP*. 597 U.S. ____ (2022). Accordingly, Appellants submit the following:

* * *

The Supreme Court’s *Berger v. North Carolina State Conference of the NAACP* opinion provides this Court with an insightful and authoritative discussion as to the minimal burden required for intervention as of right established by Federal Rule of Civil Procedure 24(a), elucidated by the Supreme Court in *Trbovich v. Mine Workers*, and reiterated to this day. *See Berger v. North Carolina State Conference of the NAACP*, 597 U.S. ____, *13 (2022) (slip op.) (citing generally *Trbovich*, 404 U.S. 528 (1972)).



MOUNTAIN STATES LEGAL FOUNDATION

First and foremost, Appellants recognize, and note for this Court, that the Supreme Court limited its holding in *Berger* to the context of state agents. In *Berger*, the Supreme Court reviewed the lower courts' denial of a group of North Carolina legislative leaders' motion to intervene as of right, pursuant to Federal Rule of Civil Procedure 24(a), as defendants in a lawsuit challenging a North Carolina voter identification law. *Berger*, 597 U.S. at *3–6. The lower courts denied the motion, in part, because the North Carolina Attorney General was already a defendant in the litigation, applying a presumption of adequate representation against the legislative leaders. *Id.* at *5–6. In *Berger*, the Supreme Court considered, *inter alia*, whether it was appropriate for a federal court to apply a presumption of adequate representation against a state-sanctioned intervenor when there was already a state-sanctioned party in the litigation. *Id.* at *13. In essence, *Berger* addresses the question of whether a federal court could exclude—or apply a heightened burden against—a state-sanctioned representative from intervening in a federal case to defend a particular state interest based on an adequacy of representation. The Supreme Court determined the presumption was inappropriate in *Berger*, but relevant to this case, the Supreme Court noted:

In the end, to resolve this case we need not decide whether a presumption of adequate representation might sometimes be appropriate when a private litigant seeks to defend a law alongside the government or in any other circumstance. We need only acknowledge that a presumption of adequate representation is inappropriate when a duly authorized state agent seeks to intervene to defend a state law.

Id. at *15.

While *Berger* does not affirmatively prevent circuits from employing a presumption of adequate representation in cases where a private intervenor seeks to intervene on the side of a



MOUNTAIN STATES LEGAL FOUNDATION

government party, *Berger*'s principles demonstrate that any such presumption should be limited. Appellants maintain that such a presumption is not appropriate in this case.¹

Indeed, the logic in *Berger* is inconsistent with a denial of intervention in this case. In *Berger*, the Supreme Court discusses *Trbovich* in depth—a case that Appellants extensively addressed in briefing and at oral argument. *Berger*, 597 U.S. at *13–17; see App. Op. Br. at 33–34; App. Reply Br. at 8–9. In *Trbovich*, the Supreme Court “addressed a request to intervene by a private party who asserted a related interest to that of an existing government party.” *Berger*, 597 U.S. at *13 (citing *Trbovich*, 404 U.S. 528). While the private intervenor and the government’s interests were related, they were not identical: for instance, the government party in *Trbovich*, like Federal Defendants here, was required to consider broader public policy implications than a private party. See *Berger*, 597 U.S. at *14 (citing *Trbovich*, 404 U.S. at 538–39); see also App. Op. Br. at 32–45 and App. Reply Br. at 8–11 (citing and arguing the same). In summarizing *Trbovich*, *Berger* states: “[r]ather than endorse a presumption of adequacy, the Court held that a movant’s burden in circumstances like these ‘should be treated as minimal.’” *Berger*, 597 U.S. at *14 (quoting *Trbovich*, 404 U.S. at 538 n.10). There, like here, the proposed intervenors sought “to give voice to a different perspective” than the government party. *Id.* at *16.

¹ Regardless, Appellants maintain that even if this Court were to employ a presumption of adequate representation against them, Appellants have overcome that presumption and have demonstrated that Federal Defendants do not—and cannot—adequately represent Appellants’ individual, economic, and reliance interests. See, e.g., App. Reply Br. at 11–13, 23–26. Significant and legally protectable interests that the district court acknowledged and recognized could be impaired by the outcome of the underlying litigation. See App. Op. Br. at 10; A006–11.



MOUNTAIN STATES LEGAL FOUNDATION

In the instant case, Appellants seek, *inter alia*, to protect and defend their individual, economic, and reliance interests based on the ATF’s long-held legal position; conversely, the ATF’s interest is limited to defending the legitimacy of its rulemaking process and enforcement orders. *See App. Op. Br.* at 39. Moreover, as Appellants have noted, Federal Defendants have shifted their interpretation of the definition of “firearms” in a way that significantly departs from Appellants’ interests. *See id.* at 40. Indeed, the ATF has sought to impose a redefinition of “firearm” that is consistent with Plaintiff-Appellees’ desired outcome and directly adverse to Appellants’ interests.² *Id.* at 40–41, 42–43. Federal Defendants, as government representatives, are unable to represent the extent of Appellants’ interests in defending individual Americans from the government’s unconstitutional and illegal overreach. *See id.* at 41–42. Thus, there can be no dispute that Appellants’ and Defendants’ interests clearly diverge in significant and meaningful ways.

In addition, *Berger* further notes that applying a presumption “[w]here ‘the absentee’s interest is similar to, but not identical with, that of one of the parties,’ [] normally is not enough to trigger a presumption of adequate representation.” *Berger*, 597 U.S. at *15 (quoting 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* (“Wright & Miller”) § 1909 (3d ed. Supp. 2022)). A presumption only applies “where a movant’s interests *are identical* to those of an existing party,” and where they “overla[p] fully.” *Id.* at *14–15 (quoting 7C Wright & Miller §1909) (emphasis added). Because their interests are not identical and do not fully overlap, this

² Additionally, Federal Defendants are now defending that change in position in federal court. *See Division 80 LLC v. Garland et al*, No. 22-cv-00148 (S.D. Tex. Filed May 8, 2022).



MOUNTAIN STATES LEGAL FOUNDATION

Court should not apply a presumption of adequate representation against Appellants. *See id.* at *15. While the presumption of adequate representation may still be applicable in some classes of cases, this is not one of them.

Lastly, of note to this Court’s inquiry, the Supreme Court recognized that there is a disagreement as to whether a *de novo* or abuse-of-discretion standard should apply, but the Court declined to address the question. *Id.* at *18 n.* (“The parties disagree whether our review of this case should be governed by a *de novo* or abuse-of-discretion standard. We find it unnecessary to resolve that question because, even under the latter and more forgiving standard, a misunderstanding of applicable law generally constitutes reversible error.” (citation omitted)).

Overall, the Supreme Court’s opinion in *Berger*, while limited, strongly supports Appellants’ argument that the Supreme Court has established a minimal burden for a proposed intervenor to establish intervention as of right. *Berger* further supports Appellants’ argument that a presumption of adequate representation, if applied at all, should also be minimal. *Berger* operates as another Supreme Court case that demonstrates the liberal standard employed to evaluate intervention as of right—and as further support for Intervenor-Appellants’ assertion “that this Circuit should follow the Supreme Court in setting that burden, not the inapplicable case law the lower court relied on nor that offered by Plaintiff-Appellees.” App. Reply Br. at 9.

Appellants request this Court reverse the district court’s order finding that Federal Defendants adequately represent Appellants’ significant, impairable interests and remand this case to the district court. Doing so now, while the district court litigation is stayed, will prevent any party from experiencing prejudice, including Appellants, and will ensure that Appellants can



MOUNTAIN STATES LEGAL FOUNDATION

participate in the litigation below and protect their interests the moment that litigation resumes, including any discussions as to mootness.

We thank the Court for its attention to this matter.

Sincerely,

/s/ Cody J. Wisniewski

Cody J. Wisniewski

William E. Trachman

MOUNTAIN STATES LEGAL FOUNDATION

2596 S. Lewis Way

Lakewood, CO 80237

(303) 292-2021

cody@mslegal.org

wtrachman@mslegal.org

Counsel for Intervenor-Appellants

cc: All Counsel of Record (via ECF)