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VIA ECF

July 7, 2022

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. Bureau of Alcohol, Tobacco, Firearms, and Explosives, et al.*, No. 21-191 – Argument Heard on February 17, 2022**

Dear Ms. Wolfe:

Plaintiffs-Appellees ("Plaintiffs") respectfully submit this letter brief in response to this Court's February 28, 2022 Order, holding this appeal in abeyance and instructing the parties to each "submit to this court a letter brief . . . addressing the effect, if any," that the Supreme Court's decision in *Berger v. North Carolina State Conference of the NAACP* "has on this appeal." Dkt. 89; *see also* Dkt. 104.[1]

Berger expressly declined to address either of the questions that might have impacted this appeal—(1) whether a presumption of adequate representation attaches when an existing party is a government entity and a proposed intervenor is not; and (2) whether a district court's decision on intervention as of right under Fed. R. Civ. P. 24(a) is reviewed for abuse of discretion or *de novo*. *Berger* thus does not disturb the basis for the District Court's denial of intervention to proposed intervenors ("Appellants").

Further, the District Court administratively closed this matter on May 6, 2022, in light of the April 11, 2022 final rule issued by Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") regarding the definition of a "firearm" under the Gun Control Act of 1968 (the "Act"). SDNY Dkt. 136. Thus, irrespective of *Berger*, this Court should continue to hold this appeal in abeyance, including because there is not presently an active case in which to intervene.

[1] Citations to "Dkt." refer to the Second Circuit's docket for this appeal, No. 21-191; citations to "SDNY Dkt." refer to the District Court's docket for the proceedings below, 20-CV-6885 (S.D.N.Y.).

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I. Background

In August 2020, Plaintiffs filed an Administrative Procedure Act ("APA") challenge in the District Court to ATF determinations concluding that certain unfinished frames and receivers—the key components of handguns and rifles, respectively—are not subject to regulation as "firearms" under the Act. SDNY Dkt. 1. Plaintiffs explained that ATF's determinations were inconsistent with the Act and have resulted in unfinished frames and receivers being sold over the internet (often in all-in-one gun-building kits) without background checks or serial numbers, making these "ghost guns" untraceable to law enforcement. *Id.* at ¶¶ 1–20, 55–147. Such "ghost guns," Plaintiffs noted, "are being used—in alarmingly rising numbers—to commit crimes and kill people in cities large and small all across the country." *Id.* at ¶ 2.

In November 2020, Appellants—owners and sellers of ghost gun components—moved to intervene pursuant to Fed. R. Civ. P. 24. SDNY Dkt. 43. The District Court denied Appellants' motion in January 2021. SDNY Dkt. 83. As to intervention by right, the District Court reasoned that Appellants had failed to rebut the presumption of adequate representation that attaches when a government entity is a party and when both the existing party and proposed intervenor share the same ultimate objective (here, defending ATF's determinations). *Id.* at 6–7. As to permissive intervention, the District Court noted that Appellants intended to "steer this litigation toward a Second Amendment challenge," which would be "outside the scope of the issues raised" by Plaintiffs. *Id.* at 9. The District Court also held that Appellants had not explained "why serving as *amici* would be insufficient to convey their interests in this action," or how Appellants had "an interest that elevates their interests" above the "thirty-three other interested parties" that had already been granted the "opportunity to participate in this action as *amici*." *Id.* at 9–10.

In March 2021, the District Court ruled on a separate motion to intervene filed by Polymer80, Inc. ("Polymer80"), the nation's largest ghost gun manufacturer. The District Court denied intervention as of right but granted permissive intervention, explaining that while Polymer80's pecuniary interests in losing revenue if ghost guns were regulated as "firearms" did not give Polymer80 a right to intervene, permissive intervention was appropriate because Polymer80 was in an "unusual situation" in two respects. SDNY Dkt. 113 at 11–18. First, Plaintiffs' challenge sought to invalidate three ATF determination letters issued to Polymer80 specifically, which are "at the center of this case." *Id.* at 4, 16. Second, ATF is currently

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"pursuing a criminal prosecution" against Polymer80 related to Polymer80's ghost gun building kits, and ATF recently executed a raid on a Polymer80 facility in connection with this investigation. *Id.* at 3–4, 16. Taken together, the District Court held that these "unusual" circumstances warranted "exercising its informed discretion to grant permissive intervention" to Polymer80. *Id.* at 17.

In April 2021, President Biden directed ATF to engage in a rulemaking concerning the subject matter of this litigation, and the parties thus proposed to stay the District Court litigation. SDNY Dkt. 123. The District Court granted a stay, which was later extended to accommodate ATF's rulemaking process. SDNY Dkts. 124, 127, 129. As set forth in Section III, *infra*, ATF has since issued a final rule, the validity of that rule is being litigated, and the District Court has administratively closed this case.

Meanwhile, in January 2021, Appellants appealed from the District Court's denial of their motion to intervene. SDNY Dkt. 101. As to intervention by right, Appellants contended principally that the District Court should not have applied a presumption of adequate representation; that the District Court did not properly account for Appellants' "economic interests" in upholding ATF's determinations that are not shared by the Government Defendants; and that this Court should "revisit its standard of review and apply *de novo* review to a denial of intervention as of right." Dkt. 40 at 13–14, 17–50. Appellants also disputed the denial of permissive intervention, but cited no case in which this Court overruled such a denial. *Id.* at 15, 53–57.

Plaintiffs responded on appeal, *inter alia*, that the District Court had correctly applied a presumption of adequate representation; that Appellants' economic motive did not alone provide grounds for intervention of right; that intervention of right is properly reviewed for abuse of discretion; and that the District Court's denial of permissive intervention was soundly within its discretion, including because it prevented Appellants from transforming this APA litigation into a Second Amendment case. Dkt. 61 at 15–37.

On February 16, 2022, Plaintiffs filed a letter pursuant to Fed. R. App. P. 28(j), alerting this Court to *Berger v. North Carolina State Conference of the NAACP*, U.S. No. 21-248, a case then-pending before the United States Supreme Court concerning intervention. Dkt. 83. This Court heard oral argument on February 17, 2022, and issued an order on February 28, 2022, holding this appeal in abeyance "pending the Supreme Court's issuance of its decision in *Berger*." Dkt. 89 at 1. The Supreme Court issued its

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decision in *Berger* on June 23, 2022. *Berger v. North Carolina State Conference of the NAACP*, No. 21-248, --- S. Ct. ---, 2022 WL 2251306 (June 23, 2022).

II. *Berger* Did Not Reach Either Issue That Could Have Affected this Appeal and Did Not Otherwise Disturb the Basis for the District Court's Intervention Denial

In *Berger*, the Supreme Court granted review on two questions that had the potential to affect this appeal: (1) whether a state agent authorized by state law to defend a state's interest in litigation must overcome a presumption of adequate representation to intervene as of right when a different state official is a defendant; and (2) whether a district court's finding of adequate representation in ruling on a motion to intervene as of right is reviewed *de novo* or for abuse of discretion. Petition for Certiorari (Aug. 19, 2021), U.S. No. 21-248; *see* Dkt. 83. *Berger* answered neither question in a manner that affects this appeal.

With respect to the first question, *Berger* held that no presumption of adequate representation attaches where a *state entity authorized by state law to defend a state in litigation* seeks to intervene, but expressly declined to extend that holding to a situation like that presented here: a private intervenor seeking to intervene where the government already is defending the challenged action. *Berger*, 2022 WL 2251306, at *9. Accordingly, *Berger* left unchanged this Court's precedent that private parties seeking to intervene in a case being litigated by a government entity must overcome a presumption of adequate representation. Dkt. 61 at 20 (citing, *inter alia*, *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999)).

With respect to the second question, *Berger* held that it did not need to decide whether a denial of intervention of right is reviewed for abuse of discretion or *de novo*, because the denial of intervention in that case was unwarranted under either standard. 2022 WL 2251306, at *11.

Appellants agree that the Court did not address either of these two questions.[2]

A. *Berger* Background

The *Berger* litigation involves a constitutional challenge to a North Carolina election law. In 2018, the North Carolina General Assembly approved a bill requiring voters to present photographic identification

[2] *See* Dkt. 106 at 2 ("Appellants recognize . . . that the Supreme Court limited its holding in *Berger* to the context of state agents."); *id.* at 5 ("[O]f 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.").

or explain their inability to produce such identification. *Id.* at *4. North Carolina's Governor vetoed the bill and the General Assembly overrode the veto. *Id.* The National Association of the Advancement of Colored People ("NAACP") sued the Governor and members of the State Board of Elections ("Board"), challenging the law's constitutionality. *Id.* North Carolina's attorney general—who, while previously serving as a state senator had voted against a similar voter-ID law and filed a declaration in a challenge to that law—assumed responsibility for defending the Board against the NAACP's suit. *Id.*

Members of North Carolina's House of Representatives ("House Members") moved to intervene, arguing that North Carolina law "expressly authorizes them to intervene on behalf of the General Assembly as a party in any judicial proceeding challenging a North Carolina statute," and noting that "in cases of this sort, state law further provides that both the General Assembly and the Governor constitute the State of North Carolina." *Id.* (quotation marks omitted). The House Members argued that "state interests would not be adequately represented" given the Governor's opposition to the law being challenged, the Board's allegiance to the Governor (who can appoint and remove Board members), and the Attorney General's prior opposition to a similar law. *Id.* According to the Supreme Court, the House Members also pointed to evidence that the Board (after the Governor's dismissal from the suit) had mounted a "tepid" defense of the law: The Board "conceded that its primary objective *wasn't* defending [the law], but obtaining guidance" on whether the Board needed to enforce the law; the Board failed to oppose the NAACP's motion for a preliminary injunction on timeliness grounds where the NAACP "waited nine months before seeking what it described as critical emergency relief"; the Board failed to produce any "competing expert reports" despite the NAACP offering "five expert reports"; and the Board "did not seek an interim stay of the . . . preliminary injunction" while the appeal was pending. *Id.* at *4–6 (quotation marks omitted).

The Middle District of North Carolina and the Fourth Circuit denied the House Members' request to intervene as of right. *Id.* at *5–6. In denying the motion to intervene, the Middle District of North Carolina applied a presumption that the existing government entities would adequately represent the House Members, *id.* at *5, and the Fourth Circuit similarly held that the House Members "were not entitled to intervene in District Court proceedings because they could not overcome a heightened presumption that the Board already adequately represented their interests," *id.* at *6 (quotation marks omitted). The Supreme

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Court granted a petition for certiorari to "resolve disagreements among the circuits about the proper treatment of motions to intervene in cases like this one." *Id.*

B. *Berger* Rejected a Presumption of Adequate Representation Only Where Duly Authorized State Actors Seek to Intervene—A Situation Not Presented Here

In determining whether the lower courts correctly applied a presumption of adequate representation by government defendants, the Supreme Court in *Berger* observed that lower courts have found "that a presumption of adequate representation" is "appropriate in certain classes of cases." *Berger*, 2022 WL 2251306, at *9. As an example, the Court cited the "presumption of adequate representation where a member of the public seeks to intervene to defend alongside the government" (notably, as in this case) and observed that "the Fourth Circuit," for instance, has held that "a court may presume that legally authorized government agents will adequately represent the public's interests in its chosen laws." *Id.*

According to the Supreme Court, however, the House Members in *Berger* were differently situated from a member of the public, and thus no presumption of adequate representation applied to the House Members' motion to intervene: "Here, by contrast, the legislative leaders are *among* those North Carolina has expressly authorized to participate in litigation to protect the State's interests." *Id.* The Supreme Court limited this holding to the scenario presented in *Berger*, stating that it "need not decide" whether a presumption may be proper "in any other circumstance":

> 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 *10 (emphasis added).

Berger thus declined to address, much less invalidate, this Court's settled precedent that a non-governmental party seeking to intervene alongside the government must overcome a presumption of adequate representation. As Plaintiffs have explained in their appellate briefing and oral argument to this Court—and as *Berger* does not disturb—a presumption of adequate representation applies in this case and Appellants have failed to overcome that presumption. Dkt. 61 at 19–28.

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In their letter brief addressing *Berger*, Appellants concede that *Berger* does not "prevent circuits from employing a presumption of adequate representation in cases where a private intervenor seeks to intervene on the side of a government party," and suggest instead that "*Berger*'s principles demonstrate that any such presumption should be limited." Dkt. 106 at 3. But the only "principle" Appellants cite is *Berger*'s restatement of language from *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), indicating that the burden of intervention is generally "minimal." *Id.* This Court has already interpreted *Trbovich*—correctly and consistent with *Berger*—to provide that "a party seeking to intervene *typically* has a 'minimal' burden," but a "heavier burden" can attach in certain narrow "circumstances." Dkt. 61 at 19. *Berger* did not address this Court's reading of *Trbovich*—which limited a presumption of adequate representation to certain circumstances—and, in any event, this Court's reading of *Trbovich* is fully consistent with Appellants' assertion that any "presumption should be *limited*." Dkt. 106 at 3 (emphasis added).

Because *Berger* limited its rejection of a presumption of adequate representation to situations involving government intervenors authorized by law to vindicate the public interest, and because Appellants are not such intervenors, *Berger* does not disturb the basis for the District Court's holding that Appellants failed to overcome a presumption of adequate representation by the Government Defendants.

C. *Berger* Did Not Disturb This Court's Precedent Reviewing Intervention of Right Determinations for Abuse of Discretion

In a footnote, *Berger* declined to address whether a denial of a motion to intervene by right "should be governed by a *de novo* or abuse-of-discretion standard." 2022 WL 2251306, at *11. The Court found it "*unnecessary to resolve that question* because, even under the latter and more forgiving standard," the "lower courts erred" by "failing to afford due respect to North Carolina's law designating the [House Members] as its agents in litigation" and presuming adequate representation. *Id.* (emphasis added)

As Appellants concede, under this Court's settled precent, this Court "reviews an order denying intervention for an abuse of discretion." Dkt. 40 at 16. Because *Berger* did not disturb this precedent, this Court's standard of review remains unchanged and Appellants must show that the District Court abused its discretion. As Plaintiffs demonstrated in their appellate briefing and at oral argument, Appellants have failed to identify any abuse of discretion by the District Court. Dkt. 61 at 17–36.

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III. Including In Light of Post-Argument Developments, This Court Should Continue to Hold This Appeal in Abeyance

Since this Court heard oral argument on February 17, 2022, there have been additional, material developments in this case. In light of these developments, described below, Plaintiffs respectfully submit that this Court should continue to hold this appeal in abeyance.

First, ATF published a final rule concerning the subject matter of this litigation on April 26, 2022. *Definition of "Frame or Receiver" and Identification of Firearms*, 87 Fed. Reg. 24652 (Apr. 26, 2022) (the "Rule"). The Rule is scheduled to take effect on August 24, 2022. *Id.*

Second, on May 9, 2022, Division 80 LLC ("Division 80")—an alleged distributor of ghost gun components—filed a lawsuit in the Southern District of Texas challenging the Rule. Division 80 claims the Rule violates the APA; violates Article I §§ 1 and 7 of the Constitution; and is unconstitutionally vague. Complaint, *Division 80 LLC v. Merrick Garland, et al.*, 22-CV-148 (S.D. Tex. May 9, 2022), Dkt. 1. On June 6, 2022, Division 80 filed a motion seeking a nationwide preliminary injunction that would prevent the Rule from going into effect and, per the current schedule, that motion will be fully briefed as of July 15, 2022. Order, *Division 80 LLC v. Merrick Garland, et al.*, 22-CV-148 (S.D. Tex. June 7, 2022), Dkt. 14.

Third, in light of the Rule's issuance, the parties in the District Court litigation filed a joint letter on April 29, 2022, asking the District Court to administratively close the case. SDNY Dkt. 135 (citing, *inter alia*, *Abreu v. Thomas*, 17-CV-1312, 2019 WL11157245, at *1 (N.D.N.Y. July 19, 2019) (explaining that administrative closure "is a docket management device which allows the removal of cases from the court's docket in appropriate situations" and that the "effect of an administrative closure is the same as a stay" (quotation marks omitted))). The parties explained that they would "be in a better position to know whether further proceedings in this matter are necessary after the effective date of the rule." *Id.* at 1. Specifically, "before making further decisions with respect to this action, Plaintiffs want to ensure that the rule does indeed take effect." *Id.* On May 6, 2022, the District Court granted the "parties' proposal to administratively close this case," and directed the parties "to submit a joint letter regarding the status of this case no later than October 3, 2022." SDNY Dkt. 136 at 2.

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Plaintiffs respectfully submit that, given these developments, this Court should continue to hold this appeal in abeyance. *Berger* has no effect on this appeal, but even if it did, the underlying litigation is administratively closed, with a joint status report due to the District Court on October 3, 2022. Judicial economy thus favors a continued abeyance, including because this case may well be mooted if the Rule is permitted to take effect. To be clear, this Court would be fully justified in simply affirming the District Court's denial of Appellants' motion to intervene on the facts as they stand today. However, it would conserve this Court's time and resources to continue holding this appeal in abeyance and order status reports regarding ongoing developments at any interval this Court deems prudent.

* * * * *

Plaintiffs respectfully submit that *Berger*, which failed to reach the questions that might have affected this appeal, does not undermine the basis for the District Court's denial of intervention to Appellants. Rather, for the reasons set forth in Plaintiffs' briefing and at oral argument, the denial of intervention should be affirmed. Regardless, this Court should continue to hold this appeal in abeyance while the underlying litigation is administratively closed in the District Court.

Sincerely,

/s/ Kathleen R. Hartnett

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