21-191

United States Court of Appeals
for the
Second Circuit

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

Plaintiffs-Appellees,

– v. –

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

Intervenors-Appellants,

BUREAU OF ALCOHOL, TOBACCO, FIREARMS AND EXPLOSIVES, MARVIN RICHARDSON, in his official capacity as Acting Director of the Bureau of Alcohol, Tobacco, Firearms and Explosives, UNITED STATED DEPARTMENT OF JUSTICE, MERRICK B. GARLAND, in his official capacity as Attorney General, United States Department of Justice

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, No. 1:20-cv-6885-GHW

RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellee Everytown for Gun Safety Support Fund, a 501(c)(3) organization, states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Plaintiff-Appellee Everytown for Gun Safety Action Fund, a 501(c)(4) organization, states that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

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INTRODUCTION

In the Administrative Procedure Act ("APA") case underlying this collateral appeal of an intervention denial, Plaintiffs-Appellees—City of Syracuse, NY, City of San Jose, CA, City of Chicago, IL, City of Columbia, SC, Everytown for Gun Safety Support Fund, and Everytown for Gun Safety Action Fund ("Plaintiffs")—seek to hold Defendant Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") accountable for several actions that have contributed to a drastic increase in gun violence nationwide. Specifically, Plaintiffs have challenged ATF's determinations, as expressed in a 2015 interpretive rule and three determination letters issued to a company named Polymer80, Inc. ("Polymer80"), that certain unfinished frames and receivers—the primary components of handguns and rifles, respectively—are not subject to regulation as "firearms" under the Gun Control Act of 1968 ("GCA"). ATF's challenged determinations rely on a flawed and unsupported statutory construction and have allowed individuals who are prohibited from purchasing or possessing firearms to obtain these unfinished frames and receivers—often sold as part of do-it-yourself gun-building kits—and quickly and easily convert them into operable firearms. Because of ATF's flawed determinations about what is and is not a firearm, unfinished frames and receivers and gun-building kits have been and continue to be sold over the internet without background checks and without serial numbers, making them effectively untraceable. These so-called

"ghost guns" have increasingly become the weapon of choice for criminals and are turning up at alarmingly escalating rates at crime scenes across the country, including in Syracuse, San Jose, Chicago, and Columbia (all Plaintiffs here).

The Government has vigorously defended ATF's actions in the litigation below. Specifically, in memoranda supporting ATF's Motion for Summary Judgment, the Government has advanced a panoply of procedural and substantive arguments as to why Plaintiffs should be denied relief. It has contested each Plaintiff's standing, it has argued that ATF's approach is consistent with the Gun Control Act, and it has advanced numerous policies that supposedly render ATF's approach reasonable. Most recently, the Government (with Plaintiffs' support) has asked the District Court to stay the underlying litigation pending a new ATF rulemaking process germane to the subject of this litigation, and the District Court has granted such a stay.[1] Although the new rule as currently proposed by ATF would allow for the regulation of unfinished frames and receivers and gun-building kits as "firearms," the Government has not ceased its defense of the present action or provided any indication that it intends to do so.

[1] Based on the current stay in the District Court proceedings, this Court would be well within its discretion to stay consideration of this appeal as well, pending a decision in the District Court as to whether this case has become moot or should proceed. While Appellants have informed Plaintiffs they are opposed to such a stay of their appeal, Plaintiffs believe a stay would serve the interests of judicial economy.

Despite the Government's zealous advocacy on behalf of ATF in this case, Intervenors-Appellants Zachary Fort, Frederick Barton, Blackhawk Manufacturing Group, Inc. (d/b/a 80% Arms), and Firearms Policy Coalition, Inc. ("Appellants") sought to intervene to defend ATF's actions. Appellants' motion to intervene, however, focused on Second Amendment issues that are irrelevant to the APA challenge advanced by Plaintiffs. Accordingly, the District Court denied their motion under Federal Rule of Civil Procedure Rule 24(a)(2)—which governs intervention as of right—and Rule 24(b)—which governs permissive intervention. In determining that Appellants did not have a right to intervene, the District Court concluded that Appellants failed to carry their burden to show that they are not "adequately represented" by the Government. And because Appellants indicated an intent to expand the case well beyond its current scope, the District Court denied permissive intervention as well.

Appellants' opening brief seeking to overturn the District Court's denial of intervention fails to identify any abuse of discretion by the District Court. With respect to intervention as of right, Appellants fail to apply this Court's longstanding precedent providing that prospective intervenors must rebut a presumption of adequate representation when they have the same "ultimate objective" as the existing party. *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). And they fail to rebut a similar presumption that attaches when the existing party is

a Government entity. *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (requiring a proposed intervenor to "make a particularly strong showing of inadequacy"). Overcoming these presumptions requires specific evidence of collusion, adversity of interest, nonfeasance, or incompetence. *Butler*, 250 F.3d at 180. Yet Appellants have failed to identify any such evidence, instead relying on generic assertions about their private financial interests. Because Appellants have failed to rebut the presumption of adequate representation with cognizable evidence, this Court should affirm the District Court's denial of intervention as of right.

Though Appellants' failure to rebut the presumption of adequate representation is a sufficient basis to affirm, there is an independent reason to affirm the District Court's denial of intervention as of right. As detailed below, the District Court has granted permissive intervention to Polymer80, another manufacturer and seller of unfinished frames and receivers and gun-building kits. Polymer80 is similarly situated in some respects to Appellants, but—unlike Appellants—is directly the subject of determination letters challenged by Plaintiffs, as well as currently the subject of Government enforcement action concerning gun-building kits. Appellants have not attempted to explain why Polymer80's participation does not make up for any perceived inadequacy of the Government.

Appellants likewise have shown no reason to disturb the District Court's well-founded exercise of its broad discretion to deny permissive intervention. Appellants'

request to intervene was, among other things, an effort to radically expand the scope of the case from an APA case to a Second Amendment case. Exercising its discretion, the District Court prudently determined that such an expansion would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). Plaintiffs are aware of no decision by this Court ever reversing the denial of permissive intervention and this case provides no reason to deviate from that sound practice.

STATEMENT OF ISSUES

1. Whether the District Court abused its discretion in denying intervention of right to Appellants, where Appellants—private parties seeking to defend a challenge to governmental determinations—failed to rebut the presumption that a government entity with the same ultimate objective as Appellants is an adequate representative.

2. Whether the District Court abused its discretion in denying permissive intervention to Appellants, who indicated an intent to inject inapposite Second Amendment arguments into the case that would prejudice and delay the adjudication of Plaintiffs' APA challenge.

STATEMENT OF THE CASE

A. Legal Background

The Gun Control Act of 1968, 82 Stat. 1213, 18 U.S.C. § 921 *et seq*. ("GCA"), defines certain objects as "firearms," regulates covered firearms to protect public safety, and establishes a system for the licensing of firearms manufacturers and

dealers. As relevant to this case, covered firearms include "(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; [and] (B) the frame or receiver of any such weapon." 18 U.S.C. § 921(a)(3). The "frame" is the core component of a handgun that provides housing for other internal components and has interfaces for attaching external components—the "receiver" plays a similar role for a rifle.

Manufacturers, importers, and dealers of covered firearms must obtain licenses, and manufacturers must place serial numbers on the frames and receivers of such firearms. 18 U.S.C. §§ 922(a), 923(i). In turn, certain classes of persons, including felons, fugitives, persons with domestic-violence misdemeanors, and persons subject to domestic-violence restraining orders, may not purchase covered firearms. 18 U.S.C. § 922(d), (g). To facilitate this restriction, licensed dealers must conduct background checks before selling covered firearms to persons without licenses. 18 U.S.C. § 922(t).

The Attorney General, who may issue "rules and regulations as are necessary to carry out the provisions of [the GCA]," 18 U.S.C. § 926(a), has delegated to ATF the authority to "investigate, administer, and enforce" the GCA, 28 C.F.R. § 0.130(a). Pursuant to that delegation, ATF has issued numerous "Rulings" that provide manufacturers, importers, dealers, and purchasers with guidance on how to

comply with the GCA.[2] Additionally, ATF has established the Firearms Technology Industry Services Branch ("FTISB"), which "is responsible for providing firearm industry-related technical support regarding firearms laws, regulations, and technology issues."[3] One of FTISB's primary responsibilities is receiving samples of frames and receivers from firearms manufacturers and issuing determination letters classifying those frames and receivers as "firearms" or "not firearms."

In a 2015 interpretive rule—comprising a 2015 Ruling and a related "Q&A"—and three subsequent determination letters to Polymer80, ATF determined that certain unfinished frames and receivers are not covered by the GCA. The Ruling, which opined on whether licensees may assist unlicensed individuals in completing unfinished frames and receivers, stated that frames and receivers are not firearms if they lack "minor drilling and machining activities in or on the fire control area or other critical areas." **ATF0290**.[4] That bright-line rule would apply, the Ruling explained, even for frames and receivers that "can be machined using common power tools." ***Id.*** A "Q&A" posted on ATF's website shortly after the

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[2] The ATF website provides that "Rulings represent ATF's guidance as to the application of the law and regulations to the entire state of facts involved, and apply retroactively unless otherwise indicated." *Rulings*, Bureau of Alcohol, Tobacco, Firearms and Explosives (last updated Aug. 5, 2019), https://bit.ly/3w23WU5.

[3] *Fact Sheet – Firearms and Ammunition Technology Division*, Bureau of Alcohol, Tobacco, Firearms and Explosives (last updated June 2020), https://bit.ly/3Ac6Okl.

[4] Citations beginning with "ATF" refer to the administrative record, filed in the district court below. *See City of Syracuse v. Bureau of Alcohol, Tobacco, Explosives & Firearms*, No. 20-cv-6885 (S.D.N.Y. Dec. 8, 2020), ECF No. 60.

Ruling reiterated this rule—"receiver blanks, 'castings' or 'machined bodies' in which the fire-control cavity area is completely solid and un-machined have not reached the 'stage of manufacture' which would result in the classification of a firearm per the GCA." **ATF0364**. The three determination letters—all of which were issued to the company Polymer80 between 2015 and 2017—used a similarly bright-line and mechanistic approach to find that several Polymer80 products were not "firearms" without ever grappling with the question of whether they were "designed" or "may readily be converted" to be finished frames and receivers and operable weapons: an "AR-15 pattern receiver casting," a "WARRHOGG BLANK," a "Glock-type 'GC9 Blank,'" and two other "Glock-type" "blank" frames. **ATF0225**, **ATF0229**, **ATF0253**.

B. Procedural History

In August 2020, Plaintiffs filed a Complaint in the Southern District of New York alleging that the 2015 interpretive rule and the Polymer80 determination letters, as well as ATF's failure to timely respond to Plaintiffs' petition for agency rulemaking, all violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. *See* Compl., *City of Syracuse v. Bureau of Alcohol, Tobacco, Explosives & Firearms*, No. 20-cv-6885 (S.D.N.Y. Aug. 26, 2020) (or "*District Court Case*"), ECF No. 1. The Complaint alleged that each of ATF's determinations relied on a flawed interpretation and application of the GCA's definition of "firearm" and that

ATF had failed to supply a reasoned explanation for any of the actions. *Id.* ¶¶ 174, 183, 189, 195. The Complaint also explained that ATF's actions directly have caused an escalating public safety emergency. *See id.* ¶¶ 120–147. Cities around the country, including Plaintiffs Syracuse, Chicago, and San Jose, have recovered an increasing number of ghost guns each year. *Id.* ¶¶ 120–22. Polymer80, which uses ATF's actions to advertise its products, has been the primary source of these crime-enabling guns. *Id.* ¶¶ 137–139.

The Plaintiffs and the Government agreed to, A102–103, and the Court accepted, a proposed briefing schedule that would resolve this matter on cross-motions for summary judgment after production of the administrative record, which was briefly extended by subsequent orders. *See* Order Setting Briefing Schedule, *District Court Case*, No. 20-cv-6885 (S.D.N.Y. Sept. 29, 2020), ECF No. 35; Order Extending Briefing Schedule, *District Court Case*, No. 20-cv-6885 (S.D.N.Y. Nov. 24, 2020), ECF No. 55; Order Extending Briefing Schedule, *District Court Case*, No. 20-cv-6885 (S.D.N.Y. Jan. 19, 2021), ECF No. 87.

On November 12, 2020, Appellants filed a motion to intervene as of right or, in the alternative, to intervene by permission. *See* A015. Appellants argued that, as owners and sellers of ghost gun components, they needed to intervene to "defend their reliance interests in the ATF's long-held precedent." A025. According to Appellants, the "lawsuit calls into question Applicant 80% Arms' continued ability

to produce, sell, and distribute its products." A035–A036. The focus of Appellants' motion, however, was an argument that a ruling adverse to ATF would implicate Appellants' Second Amendment rights. Appellants made more than a dozen references to the Second Amendment, including a statement that the regulation of ghost gun components "could create felons out of millions of Americans for exercising their natural, inalienable, Second Amendment protected rights." A025; *see also, e.g.*, A034 ("The outcome of the instant litigation poses a direct and substantial threat to the constitutionally and statutorily protected property rights of Applicants, their customers, and their members.").

On January 2, 2021, the District Court denied Appellants' motion to intervene. *See City of Syracuse, NY v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 20-cv-6885, 2021 WL 23326 (S.D.N.Y. Jan. 2, 2021) (enclosed at A004–A014). With respect to intervention as of right, the District Court determined that Appellants had satisfied three of the elements required to establish a right to intervene—timeliness, an interest relating to the subject matter of the action, and threatened impairment of that interest—but failed to establish the fourth element, inadequacy of representation by the Government. A007–A0011.

Notably, in determining that Appellants had established a cognizable interest, the Court made clear that Appellants' claimed Second Amendment rights are not such an interest in this case. A008. The "legal claims presented . . . in this action,"

the Court explained, "involve issues of statutory interpretation and the ATF's compliance with the APA; it is not a constitutional challenge to the ATF's regulations or interpretive letters." A008 n.1. Instead, the Court determined that Appellants' interest in this case was limited to the possibility that "their ownership of ghost guns and existing business practices will be made illegal and may put some entities out of business entirely." *Id.*

The Court then concluded that Appellants had failed to establish, as is required to intervene by right, that the Government is not an adequate representative of Appellants' interests. A009–A011. The Court explained that Appellants had failed to rebut the strong presumption of adequate representation that applies when the proposed intervenor and the existing party share the same "ultimate objective" and the existing party is a government entity that represents the public interest. *Id.*

The District Court also declined Appellants' alternative request to intervene by permission. Noting Appellants' repeated invocation of the Second Amendment, the court concluded that Appellants' "submissions suggest that they seek to steer this litigation toward a Second Amendment challenge to the ATF's interpretation of the GCA—an issue that is outside the scope of the issues raised by Plaintiffs." A012. For that reason, and because Appellants had not explained why their interest in the case was greater than those of the numerous *amici* who had not sought to intervene,

the court concluded that permissive intervention would be inappropriate. A012–A013.

On January 29, 2021, the Government submitted its motion for summary judgment and opposition to Plaintiffs' motion for summary judgment, vigorously defending ATF's challenged actions. *See* Memorandum of Law in Support of Motion for Summary Judgment and Opposition to Plaintiffs' Motion for Summary Judgment, *District Court Case* (S.D.N.Y. Jan. 29, 2021) ("Gov't SJ Br."), ECF No. 98. The Government argued that "Plaintiffs cannot establish standing to maintain their claims," that the challenged actions were not "final agency action" subject to judicial review, and that "Plaintiffs' challenge to ATF's interpretation of the GCA cannot succeed because ATF reasonably interpreted the statutory terms at issue in accordance with their plain meaning, and Plaintiffs' arbitrary-and-capricious claims are contradicted by the administrative record." *Id.* at 2. The Government further confirmed its vigorous defense of the challenged actions in its summary judgment reply brief, filed on March 19, 2021. *See* Reply Memorandum of Law in Support of Motion for Summary Judgment, *District Court Case* (S.D.N.Y. Mar. 19, 2021) ("Gov't SJ Reply Br."), ECF No. 114.

Around two months after denying Appellants' motion to intervene, the District Court granted permissive intervention to Polymer80, which had moved for intervention on December 30, 2020, shortly after learning of government

enforcement action against it for its sale of gun-building kits. Among other things, Polymer80 stated that it has an interest in this case because the determination letters challenged by Plaintiffs directly pertain to Polymer80 products and Polymer80 thus "would face very adverse financial and commercial consequences from unfavorable decisions in this case." Polymer80's Memorandum of Law in Support of its Motion to Intervene at 12, *District Court Case* (S.D.N.Y. Dec. 30, 2020), ECF No. 79. Specifically, it "could lose over half of its annual revenue (and maybe as much as 75 percent thereof), should negative rulings ensue in this matter." *Id.* at 13. The District Court concluded that, for the same reasons that Appellants could not intervene as of right, Polymer80 could not intervene as of right. *See City of Syracuse, NY v. Bureau of Alcohol, Tobacco, Firearms and Explosives*, No. 20-cv-6885, 2021 WL 1051625, at *8 (S.D.N.Y. Mar. 19, 2021). But because the determination letters challenged by Plaintiffs directly concerned Polymer80 and Polymer80's interests would thus "be directly affected by the . . . ruling in this case," the District Court allowed Polymer80 permissive intervention.[5] *Id.* at *9.

[5] The District Court also took note of the fact that because ATF is "pursuing a criminal prosecution against [Polymer80]" for gun-building kits, it would "simply not be fair" to "[f]orc[e] Polymer80 to entrust the representation of its interests to the entities that are simultaneously pursuing a criminal investigation of it." *City of Syracuse, NY*, 2021 WL 1051625, at *9. This unusual circumstance, combined with the fact that the determination letters at issue specifically concern Polymer80, "distinguish[ed] Polymer80" from Appellants and other would-be intervenors. *Id.*

Shortly thereafter, subsequent developments led the parties to agree to stay the District Court litigation. On April 7, 2021, President Biden directed ATF to engage in a rulemaking with respect to the regulation of ghost guns. On April 26, 2021, in response to a joint request by Plaintiffs and ATF that recognized the potential for the rulemaking to narrow the issues in the case, the District Court temporarily stayed the action, deemed all substantive motions to have been withdrawn, and directed the parties to submit a status report by June 25, 2021. Memo Endorsement, *District Court Case* (S.D.N.Y. Apr. 26, 2021), ECF No. 124.

On May 21, 2021, ATF published in the Federal Register a Notice of Proposed Rulemaking which would, as relevant here, define the GCA term "readily" and revise the definition of the GCA term "frame or receiver." *See* Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27,720, 27,729 (May 21, 2021). Because these new regulatory definitions would likely narrow the scope of this action and would potentially moot the action entirely if they were included in the Final Rule, Plaintiffs, the Government, and Polymer80 agreed that the case should be stayed until after ATF issues the Final Rule. *See* Letter Motion to Stay, *District Court Case* (S.D.N.Y. June 21, 2021), ECF No. 126.

On June 21, 2021, the District Court stayed the case "pending ATF's issuance of the final rule" and directed the parties "to submit a joint status update by no later than the earlier of two weeks after ATF's issuance of the final rule or February 21,

2022." *See* Order Granting Letter Motion to Stay, *District Court Case*, No. 20-cv-6885 (S.D.N.Y. June 21, 2021), ECF No. 127. Accordingly, this appeal is the only active aspect of the case.

SUMMARY OF ARGUMENT

The District Court did not abuse its discretion in denying Appellants' motion to intervene.

First, regarding intervention of right, Appellants failed to carry their burden to overcome the strong presumption of adequate representation that attaches when the existing party is a Government entity with the same ultimate objective as the proposed intervenor. Appellants and the Government share the same core goal in this case: defending the ATF actions challenged by Plaintiffs. The Government has made clear its willingness and ability to vigorously pursue this goal, through extensive summary judgment briefing and numerous representations to the District Court.

In questioning the competency of the Government's representation, Appellants assert that they have private pecuniary motives that the Government does not; that they would adopt a different litigation strategy and more aggressive requests for relief; that the Government has not affirmatively opposed Appellants' motion to intervene; and that developments outside this litigation indicate a change in the Government's position. But similar arguments have already been rejected by this

Court as insufficient to justify intervention, and none of these contentions change the simple fact that, to date, the Government has capably and forcefully defended the actions of ATF that Plaintiffs challenge in this case.

Although Appellants' failure to overcome the strong presumption of adequate representation is dispositive, this Court can also affirm because Appellants have not demonstrated that Polymer80—which has been granted permissive intervention—is an inadequate representative. Polymer80 makes and distributes ghost guns, is the subject of the same ATF determination letters that Plaintiffs challenge, and was permitted by the District Court to intervene in furtherance of Polymer80's commercial interests in the outcome of this case. Thus, to the extent Appellants have an economic interest in this case distinguishable from the Government's, Polymer80 will represent that interest.

Second, regarding permissive intervention, Appellants' motion aimed to transform this APA case focused on discrete administrative actions by ATF into a sweeping examination of the Second Amendment. The District Court correctly concluded that granting this disruptive motion would unduly prejudice and delay the adjudication of the original parties' rights—all the more so given that Appellants are welcome to present their views as *amici*. That was well within the bounds of the District Court's broad discretion. Indeed, despite decades of Second Circuit case law concerning the right of third parties to intervene, Plaintiffs have been unable to

identify a single decision in which this Court has ever reversed the denial of permissive intervention.

ARGUMENT

This Court "review[s] the denial of a motion to intervene, 'whether as of right or by permission, for abuse of discretion.'" *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000) (internal citations omitted).[6] "A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) basis its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or clearly erroneous factual finding, cannot be located within the range of permissible decisions." *Klipsch Group, Inc. v. ePRO E-Commerce Limited*, 880 F.3d 620, 627 (2d Cir. 2018). Additionally, this Court reviews evidentiary decisions for an abuse of discretion and asks whether "the challenged evidentiary rulings were 'arbitrary and irrational.'" *Omega SA v. 375 Canal, LLC*, 984 F.3d 244, 256 (2d Cir. 2021) (internal citations omitted).

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[6] Although Appellants ask this Court to change this standard of review, they concede that it is the law of the Circuit. Appellants' Br. at 16–18. It therefore applies on this appeal.

I. The District Court Did Not Abuse Its Discretion In Denying Intervention as of Right.

Under Rule 24(a)(2), a proposed intervenor of right must (1) file a timely motion; (2) "assert[] an interest relating to the property or transaction that is the subject of the action"; (3) demonstrate that "without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest"; and (4) show that its "interest is not adequately represented by the other parties." *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 389 (2d Cir. 2006). A "'[f]ailure to satisfy *any one* of these four requirements is a sufficient ground to deny the application.'" *Floyd v. City of New York*, 770 F.3d 1051, 1057 (2d Cir. 2014) (quoting *"R" Best Produce, Inc. v. Shulman-Rabin Mktg. Corp.*, 467 F.3d 238, 241 (2d Cir. 2006)).

Applying this settled framework, the District Court determined that Appellants satisfied the first three requirements (timeliness, an interest, and potential impairment) but failed to satisfy the fourth—providing evidence sufficient to rebut the presumption that the Government is an adequate representative of Appellants' reliance and economic interests. On appeal, Appellants have failed to show that this determination by the District Court was an abuse of discretion—*i.e.*, that it relied on the wrong legal standard or that the determination was not within the range of permissible decisions. The District Court also determined that, because this case does not involve the adjudication of Second Amendment rights and thus could not

impede Appellants' ability to protect those rights in a later proceeding, Appellants cannot justify their intervention with reference to the Second Amendment. *See* A008 n.1 (explaining that the "legal claims presented to the Court in this action involve issues of statutory interpretation and the ATF's compliance with the APA; it is not a constitutional challenge to the ATF's regulations or interpretive letters"). Appellants do not appear to contest this latter determination.

A. The District Court Correctly Required Appellants to Rebut the Presumption that the Government is an Adequate Representative.

Following the Supreme Court's decision in *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972), this Court has stated that a party seeking to intervene *typically* has a "minimal" burden. *See Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001) (citing *Trbovich*, 404 U.S. at 538 n.10). However, this Court's settled post-*Trbovich* precedent imposes a heavier burden on a proposed intervenor of right in two circumstances, both applicable here.

First, this Court has "demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Id.*; *see United States v. New York State Bd. of Elections*, 312 F. App'x 353, 355 (2d Cir. 2008) (applying *Butler* to affirm district court's denial of intervention); *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978) ("The applicant must at least overcome the presumption of adequate representation that arises when it has the same ultimate objective as a party to the existing suit.").

Several other Courts of Appeals have recognized the heightened burden on a proposed intervenor that shares the same "ultimate objective" as the party in suit. *See Stuart v. Huff*, 706 F.3d 345, 352 (4th Cir. 2013) (rejecting a minimal showing for intervention in all cases because "in *Trbovich* . . . the proposed intervenors did not even share the same ultimate objective as an existing party"); *California ex rel. Lockyer v. United States*, 450 F.3d 436, 443–44 (9th Cir. 2006); *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 111 (1st Cir. 1999); *Planned Parenthood of Wisconsin, Inc. v. Kaul*, 942 F.3d 793, 799 (7th Cir. 2019); *Entergy Gulf States Louisiana, L.L.C. v. U.S. E.P.A.*, 817 F.3d 198, 203 (5th Cir. 2016).

Second, this Court has consistently held that the "proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999) (citing *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 985 (2d Cir. 1984)). This heightened intervention showing for cases involving a "government representative" applies not only where the government is prosecuting an action, but also where the government is defending a challenge to its actions. *See Stuart*, 706 F.3d at 351; *Lockyer*, 450 F.3d at 443–44; *Planned Parenthood of Wisconsin*, 942 F.3d at 799; *N. Dakota ex rel. Stenehjem v. United States*, 787 F.3d 918, 921 (8th Cir. 2015); *Commonwealth of Pennsylvania*

v. President United States of America, 888 F.3d 52, 60 (3d Cir. 2018); *New York v. U.S. Dep't of Health and Human Servs.*, No. 19-cv-4676, 2019 WL 3531960, at *5 (S.D.N.Y. Aug. 2, 2019) ("*N.Y. v. H.H.S.*"); *see also* 7C Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure, § 1909 (3d ed.) ("The rare cases in which a member of the public is allowed to intervene in an action in which the United States, or some other governmental agency, represents the public interest are cases in which a very strong showing of inadequate representation has been made.").

The District Court correctly determined that both of these circumstances—same ultimate objective and government representative—apply here, and thus that to establish the Government's lack of adequate representation, Appellants must overcome a presumption of adequate representation. That this case involves a government representative is undeniable. And it is also clear that the Government and Appellants share the same "ultimate objective" in this litigation: Appellants sought to "defend their reliance interests in the ATF's long-held precedent," A025, and the Government likewise sought to uphold the legality of ATF's interpretive rule and ATF's determination letters, *see* Gov't SJ Br. at 2.

Brennan, the case in which this Court first applied the "ultimate objective" principle, is instructive. In *Brennan*, this Court determined that the "National Association of Letter Carriers," a "national labor union which acts as the bargaining agent for some 200,000 employees of the Postal Service," could not intervene to

defend against a challenge to the constitutionality of the statutes that established the Postal Service where the Government was already so defending. 579 F.2d at 190. This Court explained that the "Postal Service ha[d] been represented throughout by the United States Attorney for the Western District of New York" and it could be presumed that the U.S. Attorney would "advance all of the appropriate legal arguments in favor of constitutionality." *Id.* at 191. Similarly here, the District Court was correct to presume that the government will advance "all of the appropriate legal arguments" that ATF's actions are valid under the APA. And, as a matter of fact, the government's Motion for Summary Judgment advances a robust (if erroneous) set of arguments in favor of upholding ATF's actions. *See* Gov't SJ Br.; Gov't SJ Reply Br.

The District Court's application of the presumption of adequate representation in the context of a challenge to federal agency action is consistent with other cases in the Southern District of New York. For example, in *N.Y. v. H.H.S.*, the district court considered whether two private parties could intervene as defendants in a case in which a group of state plaintiffs "challenge[d] . . . a final rule issued by the U.S. Department of Health and Human Services." 2019 WL 3531960, at *1. After explaining the "ultimate objective" principle and the "government representative" principle, the court stated that "defendant HHS and the Proposed Intervenors share the same goal: upholding the Rule." *Id.* at *5. Accordingly, the Proposed

Intervenors had to "rebut the presumption of adequate representation by HHS." *Id.* Similarly, in *New York v. United States Department of Education*, No. 20-cv-4260, 2020 WL 3962110 (S.D.N.Y. July 10, 2020) ("*N.Y. v. D.O.E.*"), the district court determined that the Government and a Proposed Intervenor both had the ultimate objective of upholding a final rule issued by the Department of Education. *Id.* at *4. The Proposed Intervenor was thus obligated to rebut the presumption of adequate representation. *Id.* These cases reinforce that the District Court here properly applied this Court's longstanding precedent requiring a heightened showing of inadequate representation in circumstances such as those presented here.

Appellants provide no reason to deviate from this precedent. First, Appellants ignore the above-described cases and summarily assert that this Court requires only a "minimal" showing under *Trbovich* in *all* circumstances. *See* Appellants' Br. at 32–33. Remarkably, Appellants attempt to support this assertion with a citation to *Brennan*, *id.* at 33, the case in which this Court recognized that more than a minimal showing is required when a proposed intervenor and existing party share the same "ultimate objective." *See* pp. 19–21, *supra*; *see also Stuart*, 706 F.3d at 352 ("For in *Trbovich* . . . the proposed intervenors did not even share the same ultimate objective as an existing party."). That this Court follows a general rule in the absence of certain circumstances does not mean the Court cannot apply a different rule when those certain circumstances exist. Second, Appellants contend, erroneously, that

every other Court of Appeals requires only a "minimal" showing under *Trbovich* in *all* circumstances. *See* Appellants' Br. at 34. As shown above, however, that contention is incorrect—many Courts of Appeals have recognized the need for a heightened showing of inadequacy in cases involving the same "ultimate objective" or a "government representative." *See* p. 20, *supra*. But even were other Courts of Appeals to take a different approach, this Court could not ignore its own precedent. Third, Appellants argue that the "ultimate objective" principle does not apply because the facts of *Butler* are different from the facts of this case. *See* Appellants' Br. at 35. But *Butler*'s facts had nothing to do with the general legal proposition it articulated—a proposition that had been applied by this Court before *Butler* and has been applied since. *See* pp. 19–20, *supra*.

Appellants also suggest that the "government representative" principle applies only where a State government has brought an affirmative suit on behalf of its residents, expressly invoking its *parens patriae* status—not where a government is defending a challenged action. Appellants' Br. at 35–37. There is no reasoned basis for such a distinction: Whether on offense or defense, the Government's role is to advocate for the interests of its constituents. As the Fourth Circuit has explained in the context of a constitutional challenge to a statute, the Government is best positioned to defend a statute because it is familiar "with the matters of public concern that lead to the statute's passage in the first place." *Stuart*, 706 F.3d at 351.

That rationale also applies in the context of a statutory challenge to an executive action and this case provides a useful example—in defending ATF's actions, the Government has expressly referenced ATF's supposed obligation to protect the interests of "law-abiding citizens with respect to the possession of firearms appropriate to the purpose of lawful activity." Gov't SJ Br. at 36. Accordingly, the "government representative" principle applies in suits against the federal government. *See* pp. 20–21, *supra*.

B. The District Court Did Not Abuse Its Discretion In Concluding That Appellants Did Not Rebut the Presumption of Adequate Representation.

With respect to rebutting the presumption of adequate representation, this Court has been clear that several types of evidence are particularly helpful and that several other types are not cognizable. In general, "evidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption of adequacy." *Butler*, 250 F.3d at 180. By contrast, it is "not enough that the applicant would . . . press for more drastic relief, particularly when the [existing party's] interest is in securing preventive relief of the same general sort as the applicant." *Hooker Chems.*, 749 F.2d at 985. Similarly, "[r]epresentation is not inadequate simply because . . . the applicant and the existing party have different views on the facts, the applicable law, or the likelihood of success of a particular litigation strategy." *City of New York*, 198 F.3d at 367; *see also Stuart*, 706 F.3d at

353 ("The relevant and settled rule is that disagreement over how to approach the conduct of the litigation is not enough to rebut the presumption of adequacy."). A proposed intervenor also cannot show inadequate representation "simply because it has a motive to litigate that is different from the motive of an existing party." *Nat. Res. Def. Council, Inc. v. N.Y. State Dep't of Environmental Conservation*, 834 F.2d 60, 62 (2d Cir. 1987).

Below, Appellants did not provide evidence or argue that the Government had colluded with Plaintiffs, that the Government was adverse to Appellants, that the Government had committed nonfeasance by failing to fulfill some required task, or that the Government was not competent to make proper legal arguments defending ATF's actions. That failure is unsurprising because such arguments would have been directly contradicted by the representations the Government provided the court before Appellants filed their motion to intervene. *See* A102. And such arguments would have been further undermined by the substantive motions the Government has submitted since. *See* p. 12, *supra*.

Instead, the evidence that Appellants proffered was largely the type that this Court has deemed non-cognizable. Specifically, Appellants contended that the Government "does not speak directly" for Appellants because the Government is litigating "on behalf of the general public." A038. The Government's representation of the public interest, however, is precisely what makes it a presumptively adequate

representative. *See* pp. 20–21, *supra*. Appellants also contended that intervention was justified because the Government is only motivated to defend the "legitimacy of its rulemaking process and enforcement orders," whereas Appellants are motivated to protect their economic interests and their "justifiable reliance on the ATF's long held legal position." A039. But as this Court has noted, the mere existence of a different motive based on private economic interests does not rebut the presumption of adequate representation. *See Nat. Res. Def. Council*, 834 F.2d at 61–62. Indeed, the one case that Appellants rely on to support their economic interests argument, *New York Pub. Int. Rsch. Grp., Inc. v. Regents of Univ. of State of N.Y.*, 516 F.2d 350 (2d Cir. 1975), was decided before the "same ultimate objective" and "government representative" principles were solidified as the law of this Circuit and thus said nothing about the presumption required by those principles.

Appellants also continue to rely on the Government's consent to their intervention in a different case—an argument that the District Court correctly deemed to be forfeited. In their reply brief below, Appellants noted that, in a similar case to this one brought in the Northern District of California, Government attorneys did not oppose Appellants' intervention motion. *See* A086. But the attorneys representing ATF in this case have not taken that position. Accordingly, the District Court "decline[d] to accept those arguments as also being offered in this case, absent a request from [the Government] to do so or even a proper request from [Appellants]

that the Court take judicial notice of the filings in the California case." A011 n.2. It was not "arbitrary and irrational" for the District Court to refuse to impute to the Government a position it has not taken in this case, particularly given Appellants' procedural failings.

On appeal, Appellants press the even more remarkable argument that the Government's alleged "affirmative absenteeism"—*i.e.*, its decision to say nothing about whether Appellants should be allowed to intervene in this case—must be interpreted as a statement that the Government is unwilling to represent the interests of Appellants. The Government's full-throated defense of ATF's interpretive rule and determination letters belies this argument. Moreover, because this Court requires an affirmative showing of "adversity of interest" to overcome the presumption of adequate representation, a mere showing of neutrality is insufficient.

C. Appellants' Newly Raised Arguments Are Meritless.

Appellants raise a host of new arguments on appeal that are both waived and meritless. *See In re Nortel Networks Corp. Securities Litigation*, 539 F.3d 129, 133 (2d Cir. 2008) ("Although we may exercise discretion to consider waived arguments where necessary to avoid a manifest injustice, the circumstances normally 'do not militate in favor of an exercise of discretion to address . . . new arguments on appeal' where those arguments were 'available to the [parties] below' and they 'proffer no reason for their failure to raise the arguments below.'" (internal citation omitted)).

Appellants contend that the Government is an inadequate representative because Appellants would litigate this case differently. *See* Appellant's Br. at 39–40. As discussed, the availability of (or preference for) different litigation tactics does not rebut the presumption of adequate representation. *See* p. 25, *supra*. Regardless, any difference between the Appellants' theoretical litigating position and the Government's is negligible. Although Appellants point to the Government's invocation of *Chevron* deference as a tactic they disagree with, Appellant's Br. at 39, Appellants fail to acknowledge that the Government has invoked *Chevron* deference only as an *alternative* to the argument that the plain meaning of the Gun Control Act excludes from its definition of "firearm" the unmachined frames and receivers at issue in the challenged determinations, Gov't SJ Br. at 19–40.

Similarly, Appellants contend that the Government is an inadequate representative because the Government is "unlikely" to make the argument that "ATF is without any constitutional or statutory authority to regulate" unfinished frames and receivers. Appellants' Br. at 41–42. Again, that the existing party is not seeking the most "drastic relief" does not rebut the presumption of adequate representation. *See* p. 25, *supra*. And to the contrary, the Government *has* made the argument that "unmachined" frames and receivers are excluded from the statutory definition of a firearm. *See* Gov't SJ Br. at 19–26. Although the Government has not made a Second Amendment argument, such an argument is outside the scope of

this case and Appellants' interest in making such an argument cannot serve as a basis for intervention. As the District Court explained, "the legal claims presented to the Court in this action involve issues of statutory interpretation and the ATF's compliance with the APA; it is not a constitutional challenge to the ATF's regulations or interpretive letters." A008 n.1. Quite simply, resolution of this case will not "impair or impede [Appellants'] ability to protect its interest" in making that argument. *MasterCard*, 471 F.3d at 389.

Appellants also point to ATF's December 2020 raid of a Polymer80 facility as indicating that the Government "has already shifted its interpretation of the definition of 'firearms' in a way that significantly departs" from Appellants' interests. Appellants' Br. at 40. But ATF's raid focused on gun-building kits that contain all components needed to assemble a firearm, not just the unfinished frames and receivers that are at issue in this case. *See* Exhibit B to Memorandum of Law in Opposition to Polymer80's Motion to Intervene, *District Court Case* (S.D.N.Y. Jan. 22, 2021), ECF No. 92-2. Moreover, since the raid on Polymer80, the Government has continued to defend the challenged ATF actions vigorously and has taken the position that it "is entirely reasonable for ATF to determine that a kit that provides every part needed to create a functional weapon is 'readily convertible' to expel a projectile, while an unfinished frame or receiver standing alone is not." Gov't SJ Reply Br. at 13. And despite their assertion that the Polymer80 raid signified a

change in the Government's position, Appellants have failed to identify any aspects of the Government's subsequent substantive filings that are deficient (apart from an apparent disagreement with the *Chevron* doctrine).

Finally, Appellants' reliance on the Biden Administration's recently announced proposed rule is misplaced. If the final rule does indeed align ATF's interpretation of the GCA with Plaintiffs' interpretation, it is likely that the scope of this case would be narrowed and there is a possibility that the case would be mooted entirely. For that reason, Plaintiffs, the Government, and Polymer80 have agreed to stay the District Court case until ATF issues the final rule. If the case is mooted entirely, there will be nothing left for Appellants to intervene in. By contrast, if it is merely narrowed, it would mean that there are outstanding disputes between ATF and Plaintiffs left unresolved by the new rule, and there is no reason to assume that the Government would not present a full-throated defense. Either way, Appellants would not have an improved case for intervention.[7]

D. Appellants Have Failed to Explain Why Polymer80 Does Not Adequately Represent Their Interests.

This Court may also affirm on the alternative grounds that the District Court

[7] As noted above, *see* n.1, *supra*, given the current stay of the District Court proceedings pending ATF's issuance of a new final rule, it would serve the interests of judicial economy for this Court to exercise its discretion to hold this appeal in abeyance pending further proceedings in the District Court after the stay is lifted, including because the underlying litigation may become moot.

has permitted Polymer80 to intervene in the case and Appellants have made no showing that Polymer80 is an inadequate representative.[8] Polymer80, one of the nation's largest manufacturers and distributors of ghost guns kits and parts, and the subject of the three determination letters challenged by Plaintiffs, stated in its Motion to Intervene that it "would face very adverse financial and commercial consequences from unfavorable decisions in this case." Memorandum of Law in Support of Polymer80's Motion to Intervene at 12, *District Court Case* (S.D.N.Y. Dec. 30, 2020), ECF No. 79. According to Polymer80, it "could lose over half of its annual revenue (and maybe as much as 75 percent thereof), should negative rulings ensue in this matter." *Id.* at 13. This theory of economic harm—and the Government's allegedly differential interest—also animated Appellants' argument for intervention. Appellants have advanced no theory as to why Polymer80 is an inadequate representative (even assuming the Government is). Accordingly, Polymer80's presence in this case strongly undermines any argument by Appellants that their interests are not being represented.

II. The District Court Did Not Abuse Its Discretion in Denying Permissive Intervention.

Because "[s]ubstantially the same factors" govern motions to intervene as of right and motions for permissive intervention, this Court previously has, upon

[8] Plaintiffs disagree with the District Court's decision to allow intervention by Polymer80, which Plaintiffs opposed, and reserve their right to appeal the decision.

"affirm[ing] the District Court's denial of [a] motion to intervene as a matter of right," determined that it "need not also examine [the district court's] denial of permissive intervention." *In re Bank of New York Derivative Litig.*, 320 F.3d 291, 300 n.5 (2d Cir. 2003). Additionally, a court may deny permissive intervention if intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3); *see also In re Holocaust Victim Assets Litig.*, 225 F.3d at 202.

Applying these substantive rules in conjunction with the abuse of discretion standard of review, this Court has stated that "[r]eversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 73 (2d Cir. 1994). Indeed, Plaintiffs have been unable to identify a single case in which this Court reversed a denial of permissive intervention.

This appeal is no "rare bird." Although Appellants make pro forma references to Plaintiffs' APA claims, Appellants' chief aim is to turn the case into a dispute over the Second Amendment. The district court thus determined that allowing Appellants to intervene would radically expand this case beyond the questions currently presented and would prejudice Plaintiffs. There is no basis for disturbing that determination.

A. The District Court Did Not Abuse Its Discretion In Denying Permissive Intervention Because Appellants Seek to Unduly Expand this Case.

Appellants' motion to intervene focused not on the APA issues at hand, but on tangential Second Amendment questions. The motion contained more than a dozen references to the Second Amendment, including an argument that ATF's regulation of ghost gun components under the GCA "could create felons out of millions of Americans for exercising their natural, inalienable, Second Amendment protected rights." A025.

As the District Court correctly concluded, permitting Appellants to inject those Second Amendment issues into this APA case would significantly and needlessly alter the scope of this litigation. A012. Referencing Appellants' repeated references to the Second Amendment, the District Court noted that Appellants "seek to steer this litigation toward a Second Amendment challenge of the ATF's interpretation of the GCA." *Id.* Because such a challenge "goes well beyond the limited issue" of APA compliance, allowing Appellants to intervene "would substantially complicate the management of this litigation." *Id.*[9]

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[9] To be clear, Plaintiffs strongly disagree with the suggestion that regulating unfinished frames and receivers as firearms—which would require them to be serialized and for licensed sellers to conduct background checks—would violate the Second Amendment. *See, e.g., United States v. Marzzarella,* 614 F.3d 85, 98 (3d Cir. 2010) (rejecting Second Amendment challenge to GCA's prohibition on possession of guns with obliterated serial numbers, in part because "preserving the

It was not an abuse of discretion for the District Court to determine that radically expanding the scope of this case would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). When a plaintiff challenges an agency action solely because the agency has failed to comply with the APA or another statute, a third party should not be allowed to commandeer the litigation by intervening and raising a peripheral constitutional question. A court in the Southern District of New York recently reached the same conclusion in *New York v. D.O.E.*, a case in which the plaintiffs brought an APA challenge against a Department of Education Final Rule that "provide[d] greater protections for individuals accused of sexual harassment." 2020 WL 3962110, at *1. The court denied permissive intervention to a third party who sought to argue that the Rule was *required* by the First Amendment. *Id.* at *3. The court explained that permitting the third party to intervene "would complicate the analysis by introducing new issues of law while not contributing to the development of the factual record related to the current parties' dispute." *Id.* at *4 (internal quotations omitted). The same logic applies here.

Appellants now make a bare assertion that their defenses "differ significantly" from those raised by the Government and that their arguments "demonstrate a

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ability of law enforcement to conduct serial number tracing—effectuated by limiting the availability of untraceable firearms—constitutes a substantial or important interest").

significantly different perspective" from the Government's. Appellants' Br. at 54. But Appellants provide no examples of any arguments relevant to the APA claims that would be different from what the Government has already presented. Instead, Appellants continue to indicate their desire to argue that "ATF is without any constitutional or statutory authority to regulate" unfinished frames and receivers. Appellants' Br. at 41–42. Thus, to the extent Appellants do have "significantly different" arguments to offer, they *undermine* Appellants' case for permissive intervention, because those arguments focus on peripheral Second Amendment issues that lie well beyond the scope of this APA case. The District Court's denial of permissive intervention should be affirmed.

B. Polymer80's Participation Weighs Against Permissive Intervention.

As discussed above, the District Court allowed intervention by Polymer80—whose determination letters are directly challenged by Plaintiffs—to protect its financial and reliance interests, which are the same type of interests that motivate Appellants. *See* pp. 31–32, *supra*. Even assuming these financial interests were to allow Appellants to offer relevant APA arguments different from the Government's, Appellants have not and cannot offer any relevant APA arguments that are significantly different from Polymer80's. Permitting Appellants to intervene would thus increase the difficulty of managing the case without adding any value.

Accordingly, Polymer80's participation further undermines Appellants' case for permissive intervention.

Curiously, Appellants contend that Polymer80's inclusion improves their case for permissive intervention. Because Polymer80 and Appellants are similarly situated entities, Appellants argue, concluding that Polymer80's intervention would not prejudice the existing parties means that the District Court should have concluded that Appellants' intervention would not prejudice the existing parties. Appellants' Br. at 55–56. But unlike Appellants, Polymer80 did *not* indicate an intent to fill the case with peripheral Second Amendment issues. There was thus no reason to think that Polymer80's inclusion would prejudice the existing parties in the same way that Appellants' inclusion would. Moreover, although Appellants are correct that an ATF determination letter to Appellant 80% Arms was in the Administrative Record, *id.*, Polymer80's determination letters are the direct subject of this case. The District Court thus did not abuse its discretion in allowing Polymer80 to intervene but not Appellants.

CONCLUSION

For the foregoing reasons, the District Court's denial of Appellants' intervention motion should be affirmed.

Dated: July 19, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Second Circuit Local Rule 32.1 because this brief contains 8773 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of July, 2021, 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.

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