

George M. Lee [Cal. SBN 172982]
SEILER EPSTEIN LLP
275 Battery Street, Suite 1600
San Francisco, CA 94111
Tel. (415) 979-0500
Fax (415) 979-0511
gml@seilerepstein.com

Cody Wisniewski*
*Pro hac vice application forthcoming
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, CO 80227
Tel. (303) 292-2021
Fax (303) 292-1980
cody@mslegal.org

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, BRYAN)
MUEHLBERGER, FRANK BLACKWELL,)
and GIFFORDS LAW CENTER TO)
PREVENT GUN VIOLENCE,)

Petitioners,

v.

BUREAU OF ALCOHOL, TOBACCO,)
FIREARMS AND EXPLOSIVES; REGINA)
LOMBARDO, in her official capacity as)
Acting Deputy Director of Bureau of Alcohol,)
Tobacco Firearms and Explosives; MICHAEL)
R. CURTIS, in his official capacity as Chief,)
Firearms Technology Industry Services)
Branch of Bureau of Alcohol, Tobacco,)
Firearms and Explosives; UNITED STATES)
DEPARTMENT OF JUSTICE; and)
WILLIAM BARR, in his official capacity as)
Attorney General of the United States,)

Defendants,

and

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

Applicants in Intervention.

Case Number: 3:20-cv-06761-EMC

**MEMORANDUM IN SUPPORT OF
ZACHARY FORT; FREDERICK
BARTON; BLACKHAWK
MANUFACTURING GROUP, INC.; AND
FIREARMS POLICY COALITION,
INC.'S MOTION TO INTERVENE**

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1 Applicants in Intervention, Zachary Fort; Frederick Barton; BlackHawk Manufacturing
2 Group, Inc., d/b/a 80% Arms; and Firearms Policy Coalition, Inc. (collectively, “Applicants”),
3 have a direct and personalized interest in the matter before this Court, including, *inter alia*, the
4 continued legality of their, as well as their customers’ and members’ personal and business
5 practices, and respectfully submit the following *Memorandum in Support of their Motion to*
6 *Intervene* in the above-captioned case as Defendant-Intervenors.

7 INTRODUCTION

8 The State of California, Giffords Law Center to Prevent Gun Violence (“Giffords Law
9 Center”), and the individuals involved in this litigation (collectively, “Petitioners”) seek to use the
10 Administrative Procedure Act (“APA”) to impose their policy preferences on the entire nation.
11 The crux of Petitioners’ argument is that the Bureau of Alcohol, Tobacco, Firearms, and
12 Explosives (“ATF”) has violated the APA by employing an objective test based on the actual
13 manufacturing process involved to evaluate whether a “receiver blank,” “frame blank,” “partially-
14 manufactured frame,” “partially-manufactured receiver,” “80% frame,” “80% receiver,”
15 “unfinished frame,” or “unfinished receiver” (collectively, “Non-Firearm Objects”) is a “firearm”
16 as defined by the Gun Control Act of 1968 (“GCA”). If Petitioners succeed, the ATF may be
17 required to regulate materials of all kinds, including but not limited to Non-Firearm Objects,
18 simply because individuals, through their own knowledge and skill, can manufacture them into
19 firearms. The process of individually manufacturing firearms for personal use is legal in the United
20 States—a point Petitioners do not dispute. Petitioners, however, argue it is too easy to manufacture
21 a Non-Firearm Object into a firearm, attempting to substitute their own reasoning for that of the
22 ATF.

23 The ATF’s determination that Non-Firearm Objects do not constitute “firearms” as defined
24 by the GCA, which Petitioners seek to overturn, has been relied upon by Applicants, as well as
25 their customers, members, and numerous individuals across the nation.¹ Petitioners, however, rely

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28 ¹ Petitioners’ contention that the ATF’s “determinations are the product of an unexplained regulatory reversal beginning in 2006” is not accurate. *See* Complaint, ECF No. 1, ¶ 8. For example, a determination letter from January 2004 reads: “However, a solid AR-15 type receiver casting, without having the critical internal areas machined

1 entirely on their own interpretation of the GCA in an attempt to force ATF to revise its long-
 2 standing determination. Because Petitioners' interpretation of the GCA differs from the ATF's,
 3 and because Petitioners attempt to show alleged negative societal impacts of the ATF's position,
 4 Petitioners incorrectly assert they are entitled to the reversal of a well-established agency
 5 precedent. Petitioners, however, cannot substitute their judgment for that of the agency.

6 Applicants timely seek to intervene in this matter to defend their, their customers', and
 7 their members' interests that would be directly impacted should this Court grant Petitioners the
 8 relief they seek. Each Applicant would be directly and adversely impacted by a judgment in favor
 9 of the Petitioners on any of their claims for relief. Applicants include Zachary Fort and Frederick
 10 Barton could be exposed to criminal liability for, and would be prevented from engaging in, the
 11 constitutionally and statutorily protected conduct they currently engage in should this Court grant
 12 the Petitioners' requested relief. BlackHawk Manufacturing Group, Inc., d/b/a 80% Arms ("80%
 13 Arms"), is a lawful producer and retailer of Non-Firearm Objects and would be irreparably harmed,
 14 including but not limited to suffering a prohibition or significant disruption of its business
 15 practices, should this Court rule in favor of Petitioners. Firearms Policy Coalition, Inc. ("FPC")
 16 is a nonprofit organization that owns and possesses Non-Firearm Objects;² has members who
 17 produce, buy, sell, possess, and own Non-Firearm Objects; and has members that have firearms
 18 individually manufactured for personal use from the same. FPC represents its members, including
 19 Zachary Fort, Frederick Barton, and 80% Arms, who would all be harmed should this Court rule
 20 in Petitioners' favor, but who are too numerous to conveniently intervene. Each party has an
 21 interest in protecting itself, its customers, and/or its members from a sudden reversal of long
 22

23 (magazine well and central area for the fire control components) or crosspin holes drilled, would not constitute a
 24 'firearm' as defined in the NFA." Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to Mark
 25 Malkowski, Continental Machine Tool Company, Inc. (Jan. 29, 2004). Machining has always been the predominant
 26 factor in the ATF's determinations. *See* Letter from Sterling Nixon, Chief, Firearms Technology Branch, ATF, to
 27 Justin Halford (July 1, 2003) ("Based on our examination of the unfinished receiver, it is our opinion that the subject
 28 sample *has received sufficient machining* to be classified as the frame or receiver for a 'firearm'") (emphasis
 added); Letter from Edward H. Cohen, Jr., Chief, Firearms Technology Branch, to Robert Bower, Jr., Philadelphia
 Ordnance, Inc. (May 26, 1992) ("The receiver is basically complete except that the interior cavity has *not been
 completely machined.*") (emphasis added).

² *See* Declaration of Brandon Combs ("Combs Decl.") at ¶¶ 9–10.

1 accepted precedent that could create felons out of millions of Americans for exercising their
2 natural, inalienable, Second Amendment protected rights and could prohibit them from engaging
3 in conduct that is lawful across the United States.

4 Furthermore, Applicants' interests are not adequately represented by Defendants. While
5 the ATF currently seeks to preserve its determination on behalf of the general public, it must
6 balance competing statutory, regulatory, and resource concerns and may therefore compromise
7 legally defensible positions Applicants seek to preserve, *inter alia*, their particular interests in the
8 continued ownership, possession, production, purchase, and sale of Non-Firearm Objects.
9 Moreover, Applicants seek to defend their reliance interests in the ATF's long-held precedent and
10 preserve their rights as protected by the Second Amendment—a position that the ATF will not
11 adequately represent.

12 Applicants meet all criteria for intervention as of right and request this Court grant their
13 Motion to Intervene in this matter pursuant to Federal Rule of Civil Procedure 24(a). In the
14 alternative, Applicants request this Court grant them permissive intervention pursuant to Federal
15 Rule of Civil Procedure 24(b).

16 **DESCRIPTION OF APPLICANTS FOR INTERVENTION**

17 Zachary Fort is a resident of the state of New Mexico. Mr. Fort is a law-abiding citizen
18 who owns and possesses constitutionally protected arms for the lawful purpose of, *inter alia*, self-
19 defense. Mr. Fort is not prohibited from purchasing firearms by any federal or state law. Mr. Fort
20 has purchased at least one Non-Firearm Object in the past. Through Mr. Fort's own effort and
21 expertise, he has undertaken the manufacturing processes necessary to convert a Non-Firearm
22 Object into a "firearm" as defined by the GCA. Mr. Fort intends to continue to purchase Non-
23 Firearm Objects so long as he can continue to do so without undergoing a federal background
24 check and will continue to manufacture those items into firearms as defined by the GCA in the
25 future. Should this Court rule in Petitioners' favor, Mr. Fort's current property and/or future ability
26 to acquire similar property will be directly and adversely impacted, thereby harming Mr. Fort and
27 many other similarly situated Americans across the country. Mr. Fort is a member of Firearms
28 Policy Coalition, Inc.

1 Applicant Frederick Barton is a resident of the State of Colorado. Mr. Barton is a law-
2 abiding citizen who owns and possesses constitutionally protected arms for the lawful purpose of,
3 *inter alia*, self-defense. Mr. Barton is not prohibited from purchasing firearms by any federal or
4 state law. Mr. Barton has purchased at least one Non-Firearm Object in the past and had it shipped
5 directly to his residence, not to a Federal Firearms Licensee, and did not undergo a federal
6 background check. Mr. Barton intends to continue to purchase Non-Firearm Objects so long as he
7 can continue to have them shipped to his residence, not to a Federal Firearms Licensee, and
8 continues to not be subjected to a federal background check. Mr. Barton intends to manufacture
9 those items into “firearms” as defined by the GCA in the future. Should this Court rule in
10 Petitioners’ favor, Mr. Barton’s current property and/or his future ability to acquire similar
11 property will be directly and adversely impacted, thereby harming Mr. Barton and many other
12 similarly situated Americans across the country. Mr. Barton is a member of Firearms Policy
13 Coalition, Inc.

14 BlackHawk Manufacturing Group, Inc., d/b/a 80% Arms, is a corporation incorporated
15 under the laws of California with its principal place of business in Garden Grove, California. 80%
16 Arms is a producer and seller of Non-Firearm Objects, manufacturing jigs, and other firearm
17 manufacturing tools. 80% Arms sells its products directly to customers across the United States,
18 including within the state of California. 80% Arms is explicitly implicated in this matter by
19 Petitioners’ Complaint. ECF 1, at ¶¶ 10 n.5; 47 n.32; 50 n.43; 52 n.44, n.45; 77 n.83, n.86; 121
20 n.114. 80% Arms represents itself and its customers, including but not limited to its right to sell
21 and its customers’ right to purchase Non-Firearm Objects. 80% Arms has expended and diverted
22 resources in furtherance of the lawful production, sale, and distribution of its products and will be
23 adversely and directly harmed if this Court were to grant Petitioners the relief they seek—including
24 but not limited to the potential prohibition of 80% Arms’ current business practices or significant
25 increases in its regulatory compliance costs.

26 Firearms Policy Coalition, Inc. is a nonprofit organization incorporated under the laws of
27 Delaware with its principal place of business in Sacramento, California. FPC’s purposes include
28 defending and promoting the People’s rights—especially but not limited to First and Second

1 Amendment protected rights—advancing individual liberty, and restoring freedom. FPC serves
 2 its members and the public through legislative advocacy, grassroots advocacy, litigation and legal
 3 efforts, research, education, outreach, and other programs. FPC has members across the United
 4 States, including Applicants Fort, Barton, and 80% Arms. FPC represents itself as an owner and
 5 possessor of Non-Firearm Objects³ and its members—who include the named Applicants,
 6 producers, retailers, purchasers, and possessors of Non-Firearm Objects; individuals who have
 7 manufactured firearms for individual use from Non-Firearm Objects; and individuals who wish to
 8 continue to purchase Non-Firearm Objects to manufacture them into firearms. FPC seeks
 9 intervention to represent these legally protected interests of itself and its members as FPC and its
 10 members will be adversely and directly harmed if this Court grants Petitioners the relief they seek.

11 ARGUMENT

12 I. APPLICANTS ARE ENTITLED TO INTERVENE AS OF RIGHT

13 Applicants meet, and indeed exceed, each element of this Circuit’s test to evaluate
 14 intervention as of right, pursuant to Federal Rule of Civil Procedure 24(a). Applicants timely seek
 15 intervention in this matter prior to any substantive filings (aside from Petitioners’ Complaint), prior
 16 to the lodging of the administrative record, and prior to any briefing schedule being set. Applicants
 17 have a legally protectable interest in the continued production, sale, purchase, possession, and
 18 individual manufacture of Non-Firearm Objects, which interest will be directly impacted should
 19 this Court rule for Petitioners.⁴ Finally, Applicants’ interests are not adequately represented by
 20 the ATF, which, as a federal agency, is obligated to consider a wide spectrum of views, many of
 21 which conflict with the particular interests of Applicants, their customers, and their members.
 22 Accordingly, this Court should grant Applicants intervention as of right in this matter.

23 Federal Rule of Civil Procedure 24(a) establishes the criteria for intervention as of right:

24
 25 ³ See Combs Decl. at ¶¶ 9–10.

26
 27 ⁴ The extent of Petitioners’ argument in this matter will determine the extent of the potential adverse impacts on
 28 Applicants. At the very least, should this Court rule in favor of Petitioners, Applicants will be prohibited from
 engaging in the currently lawful practice of producing, selling, shipping, purchasing, and receiving Non-Firearm
 Objects without the use of a Federal Firearms Licensee or federal background check. That change will fundamentally
 and negatively impact Applicants’ currently legal business and personal practices.

1 On timely motion, the court must permit anyone to intervene who . . . claims an
2 interest relating to the property or transaction that is the subject of the action, and
3 is so situated that disposing of the action may as a practical matter impair or impede
4 the movant's ability to protect its interest, unless existing parties adequately
5 represent that interest.

6 Fed. R. Civ. P. 24(a), (a)(2).

7 This Circuit employs a four-part test to evaluate intervention as of right: (1) the applicant's
8 motion must be timely; (2) the applicant must assert an interest relating to the transaction or
9 property that is the subject of the action; (3) the applicant must demonstrate that its interest may
10 be impaired by the action; and (4) the interests of the applicant must not be adequately represented
11 by the parties already involved in the action. *Sw. Ctr. for Biological Diversity v. Berg*, 268 F.3d
12 810, 817–18 (9th Cir. 2001); *Sierra Club v. U.S. Env'tl. Prot. Agency*, 995 F.2d 1478, 1481 (9th
13 Cir. 1993). This intervention test is “broadly construed in favor of proposed intervenors.” *United*
14 *States ex rel. McGough v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992); *see Sw. Ctr.*
15 *for Biological Diversity*, 268 F.3d at 818 (“In general, we construe Rule 24(a) liberally in favor of
16 potential intervenors.”); *United States v. Los Angeles*, 288 F.3d 391, 397–98 (9th Cir. 2002) (“A
17 liberal policy in favor of intervention serves both efficient resolution of issues and broadened
18 access to the courts.”).

19 **A. Applicants' Motion Is Timely**

20 The Ninth Circuit considers three factors when evaluating the timeliness of a motion to
21 intervene: (1) the stage of the proceedings; (2) the prejudice to the other parties; and (3) the reason
22 for and length of any delay. *Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317, 1319 (9th
23 Cir. 1997); *Empire Blue Cross & Blue Shield v. Janet Greeson's A Place For Us, Inc.*, 62 F.3d
24 1217, 1219 (9th Cir. 1995). Here, Petitioners filed their Complaint on September 29, 2020, and
25 Defendants have yet to file an answer or other response. *See* ECF No. 1 (filed September 29,
26 2020); *see generally* Docket. The administrative record has not yet been lodged, no briefing
27 schedule has been established, and no dispositive motions have been filed. Indeed, this case
28 remains in its infancy. Accordingly, the existing parties will not be prejudiced by Applicants'
intervention and this Motion is timely.

B. Applicants Have Significant, Protectable Interests

Applicants and their customers and members have significant, protectable interests in the production, sale, purchase, and possession of Non-Firearm Objects, all of which directly implicate constitutionally and statutorily protected property and/or activities. Applicants have a significant interest in ensuring they can continue to engage in personal and business activities as they do now, without involvement of Federal Firearms Licensees and federal background checks, which will, at a minimum, further restrict Applicants' ability to engage in lawful, constitutionally protected conduct and significantly increase the cost of producing and purchasing Non-Firearm Objects and manufacturing those items into "firearms" as defined by the GCA.

To intervene as a matter of right, an applicant must establish "a 'protectable interest' in the outcome of the litigation of sufficient magnitude to warrant inclusion in the action." *Smith v. Pangilinan*, 651 F.2d 1320, 1324 (9th Cir. 1981). Rule 24(a)(2) does not require a specific type of legal or equitable interest to support intervention. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818. "Rather, it is generally enough that [1] the interest is protectable under some law, and [2] that there is a relationship between the legally protected interest and the claims at issue." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1179 (9th Cir. 2011) (quoting *Sierra Club v. EPA*, 995 F.2d at 1484). A prospective intervenor "has a sufficient interest for intervention purposes if it will suffer a practical impairment of its interests as a result of the pending litigation." *Id.* (quoting *California ex rel. Lockyer v. United States*, 450 F.3d 436, 441 (9th Cir. 2006)).

Various types of interests have supported intervention. For example, the Ninth Circuit has held that "[a]n applicant demonstrates a 'significantly protectable interest' when 'the injunctive relief sought by the plaintiffs will have direct, immediate, and harmful effects upon a third party's legally protectable interests.'" *Sw. Ctr. for Biological Diversity*, 268 F.3d at 818 (quoting *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1494 (9th Cir. 1995), *abrogated on separate grounds by Wilderness Soc'y*, 630 F.3d at 1177–80). In addition, an economic interest that is "concrete and related to the underlying subject matter of the action" may support intervention under Rule 24(a)(2). *United States v. Alisal Water Corp.*, 370 F.3d 915, 919–20 (9th

1 Cir. 2004). “A non-speculative, economic interest may be sufficient to support a right of
2 intervention.” *Id.* (citing *Arakaki v. Cayetano*, 324 F.3d 1078, 1088 (9th Cir. 2003)).

3 The outcome of the instant litigation poses a direct and substantial threat to the
4 constitutionally and statutorily protected property rights of Applicants, their customers, and their
5 members. Applicants Fort, Barton, and FPC have purchased and would continue to purchase the
6 Non-Firearm Objects that are at issue in this case. Applicant Fort has individually manufactured
7 at least one Non-Firearm Object into a “firearm” as defined by the GCA for personal use using his
8 own effort and expertise. Applicants Fort and Barton also intend to individually manufacture Non-
9 Firearm Objects into “firearms” as defined by the GCA for personal use in the future, using their
10 own effort and expertise. Applicant FPC has and would continue to purchase Non-Firearm Objects
11 in furtherance of its mission and advocacy for the natural and individual right to keep and bear
12 arms. Applicants’ purchases were conducted without involvement of a Federal Firearms License
13 and without need for a federal background check, which practice Applicants seek to continue.
14 Because Petitioners seek to make illegal, or significantly restrict, Applicants Fort, Barton, and
15 FPC’s currently legal property, activities, and/or practices Applicants Fort, Barton, and FPC have
16 a legally protectable interest sufficient to support intervention as of right under Rule 24(a). *See*
17 *Sw. Ctr. for Biological Diversity*, 268 F.3d at 817–18 (9th Cir. 2001) (granting intervention based
18 upon a determination that the proposed intervenor had a reliance interest that would be affected if
19 the challenge agreement were invalidated).

20 Applicant 80% Arms is a producer and seller of the Non-Firearm Objects at issue in this
21 matter. Applicant 80% Arms is explicitly implicated in this matter by Petitioners’ Complaint.
22 ECF 1, at ¶¶ 10 n.5; 47 n.32; 50 n.43; 52 n.44, n.45; 77 n.83, n.86; 121 n.114. Moreover, Applicant
23 80% Arms seeks to represent the interests of its customers, who are too numerous to conveniently
24 intervene in this matter and who, due to the nature of the property in question, are chilled from
25 coming forward to represent their own interests, due to the degrading and vitriolic abuse they may
26 suffer for exercising their constitutionally protected rights—including, but not limited to,
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1 harassment, SWATing, and doxing.⁵ Accordingly, Applicant 80% Arms asserts a legally
2 protectable interest on behalf of its customers sufficient to support intervention as of right under
3 Rule 24(a).

4 Applicant 80% Arms also has significant financial interests in this matter. This lawsuit
5 calls into question Applicant 80% Arms' continued ability to produce, sell, and distribute its
6 products, as it currently does, across the United States. If this Court were to grant Petitioners the
7 relief they request, the outcome would, at minimum, expose Applicant 80% Arms to significant
8 increases in its operation and compliance costs and, at worst, could put Applicant 80% Arms out
9 of business. Because this case attempts to make illegal Applicant 80% Arms' current business
10 practices by, at the very least, restricting the production, sale, and delivery of Non-Firearm Objects,
11 Applicant 80% Arms has a legally protectable interest sufficient to support intervention as of right
12 under Rule 24(a).

13 Finally, Applicant FPC represents itself, and the interests of its members across the nation.
14 Numerous FPC members are producers, sellers, purchasers, and possessors of Non-Firearm
15 Objects, including Applicants Fort, Barton, and 80% Arms. Because this case attempts to make
16 illegal and/or severely restrict the currently lawful individual and business practices of Applicant
17 FPC's members, Applicant FPC and its members have a legally protectable interest sufficient to
18 support intervention as of right under Rule 24(a).

21 ⁵ See Fernando Alfonso III, *Lawyer Doxes 50 Journalists Who Doxed Gun Owners*, DAILY DOT (Mar. 2, 2020, 11:25
22 PM), <https://www.dailydot.com/unclick/christopher-fountain-journal-news-gun-owners/> (last visited Nov. 2, 2020);
23 John Cook, *Here Is a List of All the Assholes Handsome Law-Abiding Citizens Who Own Guns Some People in New
24 York City* [sic], GAWKER (Jan. 8, 2013, 3:10 PM), <https://gawker.com/5974190/here-is-a-list-of-all-the-assholes-who-own-guns-in-new-york-city>
25 (last visited Nov. 2, 2020); Editorial Staff, *Gawker Posts Full List Of All New York City
26 Licensed Gun Owners*, THE WASHINGTON EXAMINER (Jan 9, 2013, 9:06 AM)
27 [https://www.washingtonexaminer.com/red-alert-politics/gawker-posts-full-list-of-all-ahole-new-york-city-licensed-
28 gun-owners](https://www.washingtonexaminer.com/red-alert-politics/gawker-posts-full-list-of-all-ahole-new-york-city-licensed-gun-owners) (last visited Nov. 2, 2020); K.C. Maas and Josh Levs, *Newspaper Sparks Outrage for Publishing Names,
Addresses of Gun Permit Holders*, CNN (Dec. 27, 2012, 10:23 AM), [https://www.cnn.com/2012/12/25/us/new-york-
gun-permit-map/index.html](https://www.cnn.com/2012/12/25/us/new-york-gun-permit-map/index.html) (last visited Nov. 2, 2020); Perry Chiaramonte, *Gun Control Groups Accused of
'Swatting' Open-Carry Permit Holders, Putting Lives at Risk*, Fox News (Sept. 1, 2015, Updated Jan. 12, 2017),
[https://www.foxnews.com/us/gun-control-groups-accused-of-swatting-open-carry-permit-holders-putting-lives-at-
risk](https://www.foxnews.com/us/gun-control-groups-accused-of-swatting-open-carry-permit-holders-putting-lives-at-risk) (last visited Nov. 2, 2020); Bob Owens, *Gun Control Group Tells Followers to "SWAT" Gun Owners*, Bearing
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gun-owners/](https://bearingarms.com/bob-o/2015/12/15/gun-control-groups-tells-followers-swat-gun-owners/) (last visited Nov. 2, 2020).

1 **C. Applicants' Interests Will Be Impaired by the Relief Sought**

2 Applicants', their customers', and their members' interests in the production, sale,
3 purchase, and possession of Non-Firearm Objects will be significantly impaired if the Court grants
4 Petitioners the relief they seek, as it would likely render illegal the otherwise entirely lawful and
5 constitutionally protected property, activities, and/or business practices of Applicants, and of their
6 customers and members.

7 The third element in the four-part test, impairment, "follows from the factors" related to
8 Applicants' protectable interest. *See Sierra Club v. EPA*, 995 F.2d at 1486. The applicant's burden
9 here is minimal. The Advisory Committee Notes for Rule 24 provide that, "[i]f an absentee would
10 be substantially affected in a practical sense by the determination made in an action, he should, as
11 a general rule, be entitled to intervene." Advisory Committee's Notes, Fed. R. Civ. P. 24 (1966);
12 *see also Forest Conservation Council*, 66 F.3d at 1498 (quoting Advisory Committee's Notes). A
13 prospective intervenor "has a sufficient interest for intervention purposes if it will suffer a practical
14 impairment of its interests as a result of the pending litigation." *Wilderness Soc'y*, 630 F.3d at
15 1178 (quoting *Lockyer*, 450 F.3d at 441). Accordingly, where the proceeding has the potential to
16 subject the movant to governmental regulation or to significantly change how the movant does
17 business, the prospective intervenor has a protectable interest that will be impaired by the relief
18 sought. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992); *Fund for Animals,*
19 *Inc. v. Norton*, 322 F.3d 728, 735 (D.C. Cir. 2003); *Military Toxics Project v. U.S. Evtl. Prot.*
20 *Agency*, 146 F.3d 948, 954 (D.C. Cir. 1998).

21 In the present case, an invalidation of the ATF's determination concerning Non-Firearm
22 Objects would significantly impair Applicants' interests. Applicants, their customers, and their
23 members include individuals and businesses that produce, sell, purchase, and possess Non-Firearm
24 Objects, all of whom would be directly and adversely affected by the invalidation of the ATF's
25 longstanding rule. Depending on the extent of Petitioners' argument, this Court's ruling, and the
26 ATF's decision, Applicants could be exposed to criminal liability based on continued performance
27 of previously legal activities; could be forced to disclose the existence of certain constitutionally
28 protected property to the federal government; and would be prohibited from engaging in otherwise

1 lawful and constitutionally protected activities, including but not limited to the direct purchase of
2 Non-Firearm Objects and, potentially, the unregulated manufacture of those objects into firearms.
3 Additionally, Applicant 80% Arms and those similarly situated would be forced to comply with
4 substantial additional legal and regulatory burdens, not only causing significant financial stress but
5 potentially putting them out of business.

6 Furthermore, because adjudication of this case may impact certain Non-Firearm Objects or
7 firearms in Applicants', their customers', and their members' possession, Applicants'
8 constitutionally protected right to keep and bear arms may be impaired. Applicants have produced,
9 sold, purchased, and currently possess Non-Firearm Objects, and would continue to engage in
10 those lawful practices in the future. In addition, Applicants, their customers, and their members
11 have and possess individually manufactured firearms from Non-Firearm Objects for personal use.
12 All of this has been in reliance on years of ATF precedent. If this Court were to reverse the ATF's
13 determination regarding Non-Firearm Objects, depending on the extent of this Court's ruling and
14 the ATF's decision, Applicants' currently constitutionally protected, lawful practices will be
15 adversely affected, and their Second Amendment protected rights could be unconstitutionally
16 impaired.

17 Thus, the third element for intervention as of right is met.

18 **D. The Existing Parties Will Not Adequately Represent Applicants' Interests**

19 Applicants' interests are not adequately represented by the ATF, which does not speak
20 directly for individual owners and purchasers of Non-Firearm Objects, for businesses engaged in
21 the production or sale of the same, nor for organizations seeking to preserve and restore
22 individuals' constitutionally protected rights—including the individual right to manufacture arms
23 for the lawful purpose of, *inter alia*, self-defense.

24 The fourth prong of the test for intervention as of right is a showing that the proposed
25 intervenors' interests will not be adequately protected by the existing parties. The burden under
26 this prong is "minimal," that is, a party seeking to intervene need only show that representation of
27 its interest "may be inadequate." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10
28 (1972). The Ninth Circuit considers numerous factors to determine whether the applicant for

1 intervention's interests will be adequately represented by an existing party, including: "(1) whether
2 the interest of a present party is such that it will undoubtedly make all the intervenor's arguments;
3 (2) whether the present party is capable and willing to make such arguments; and (3) whether the
4 would-be intervenor would offer any necessary elements to the proceedings that other parties
5 would neglect." *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). Although
6 the applicant for intervention bears the burden of demonstrating that the existing parties may not
7 adequately represent its interest, it is sufficient for applicants to show that, because of the
8 difference in their interests, it is likely that the parties will not advance the same arguments as
9 would the proposed intervenor. *Sw. Ctr. for Biological Diversity*, 268 F.3d at 823.

10 Here, because the ATF is litigating on behalf of the general public, it is obligated to
11 consider a wide spectrum of views, many of which may conflict with the particular interests of
12 Applicants and their customers. *See Forest Conservation Council*, 66 F.3d at 1494 (9th Cir. 1995),
13 *abrogated on separate grounds by Wilderness Soc'y*, 630 F.3d at 1177–80 (the government will
14 not adequately represent petitioners when petitioners seek to raise issues broader than the scope of
15 the government's argument) (citing *Sierra Club v. Espy*, 18 F.3d 1202, 1208 (5th Cir. 1994)).
16 Representation is inadequate when a proposed intervenor would be damaged by the adjudication
17 of its interest, but the agency being sued would not. *See S.E.C. v. Everest Management Corp.*, 475
18 F.2d 1236, 1239 (2d Cir. 1972) (S.E.C. inadequately represents an intervenor who seeks damages).

19 Applicants seek to protect and defend their, their customers', and their members' right to
20 produce, sell, purchase, and possess Non-Firearm Objects; their Second Amendment protected
21 rights; and their justifiable reliance on the ATF's long held legal position. By contrast, the ATF's
22 interest in this suit is limited to defending the legitimacy of its rulemaking process and enforcement
23 orders. Petitioners' arguments encapsulate issues and narratives outside the ATF's narrow focus
24 on its classification of Non-Firearm Objects, which issues and narratives can and will be addressed
25 by Applicants. Moreover, because the ATF must consider a wide spectrum of views, at least some
26 of their interests in the suit will necessarily differ from Applicants' interest in continuing their
27 currently lawful individual activities and business practices. When, like here, a party has private
28 interests, as opposed to the government's public interests, this difference is sufficient to warrant

1 intervention. *Sierra Club v. Espy*, 18 F.3d at 1208; *Fresno County v. Andrus*, 622 F.2d 436, 438–
2 39 (9th Cir. 1980). Thus, Applicants’ interests are not adequately represented by the existing
3 parties.

4 Additionally, Defendants will not adequately represent or protect Applicants’ economic
5 interests. As fully demonstrated above, the outcome of this litigation could have a substantial
6 monetary effect on Applicant 80% Arms business practice, as well as the individual practices of
7 other Applicants and their members. The ATF does not share the same real and immediate
8 economic interests of Applicants and has no duty, nor reason, to protect Applicants’ economic
9 interests. Applicants could be required to cease lawful practices, report the existence of
10 constitutionally protected property to the federal government, or even lose their businesses, but the
11 ATF only seeks to uphold its determination as to Non-Firearm Objects. Accordingly, Applicants
12 interests are not sufficiently represented.

13 Overall, Applicants more than satisfy the Ninth Circuit’s four-part test and this Court
14 should grant Applicants intervention as of right pursuant to Rule 24(a).

15 16 **II. ALTERNATIVELY, THIS COURT SHOULD GRANT APPLICANTS PERMISSIVE INTERVENTION**

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

18 On timely motion, the court may permit anyone to intervene who . . . has a claim
19 or defense that shares with the main action a common question of law or fact. . . . In
20 exercising its discretion, the court must consider whether the intervention will
unduly delay or prejudice the adjudication of the original parties’ rights.

21
22 Fed. R. Civ. P. 24(b)(1), (b)(3). Under Rule 24(b), the possibility of impairment of a significant
23 protectable interest is not required. Instead, all that is necessary for permissive intervention is that
24 intervenor’s “claim or defense and the main action have a question of law or fact in common.”

25 Fed. R. Civ. P. 24(b); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1110–11 (9th
26 Cir. 2002) (permissive intervention was granted even though intervenors did not have a direct
27 interest in the government rulemaking because the intervenor had an asserted interest in the use
28 and enjoyment of the subject of the rule). Rule 24(b) “plainly dispenses with any requirement that

1 the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation.”
2 *Sec. & Exch. Comm’n v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 459 (1940).

3 In this case, Applicants have defenses to the claims asserted by Petitioners and to the relief
4 being sought, which is a challenge to the ATF’s determination that Non-Firearm Objects are not
5 firearms pursuant to the GCA, upon which Applicants, their customers, and their members have
6 relied.

7 Rule 24(b) also requires the court to consider whether permissive intervention would cause
8 undue delay or would prejudice adjudication of the rights of the original parties. *Spangler v.*
9 *Pasadena City Bd. of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977). In this case, there would be
10 neither prejudice nor undue delay. The case is still in its infancy, as Defendants have yet to file an
11 answer or otherwise respond, the only material pleading is the Complaint, and no record has been
12 lodged. Applicants have demonstrated their interests, a legal position they seek to advance, a
13 probable relation to the case, that their interests are not adequately represented, and that
14 intervention will not burden other parties. *See supra*, Argument, Section I; *see also Spangler*, 552
15 F.2d at 1329 (setting forth relevant factors in granting permissive intervention). Thus, at a
16 minimum, this Court should grant Applicants permissive intervention because Applicants’
17 defenses to the claims asserted by Petitioners raise common questions of fact and law.

18 CONCLUSION

19 For the foregoing reasons, Applicants respectfully request that this Court grant them
20 intervention as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). In the alternative,
21 Applicants requests this Court exercise its discretion and grant permissive intervention pursuant
22 to Federal Rule of Civil Procedure 24(b).

1 DATED this 24th day of November, 2020.

2 Respectfully Submitted,

3
4 /s/ George M. Lee

5 George M. Lee [Cal. SBN 172982]

6 **SEILER EPSTEIN LLP**

7 275 Battery Street, Suite 1600

8 San Francisco, CA 94111

9 Tel. (415) 979-0500

10 Fax (415) 979-0511

11 gml@seilerepstein.com

12 Cody J. Wisniewski*

13 *Pro Hac Vice application forthcoming

14 **MOUNTAIN STATES LEGAL FOUNDATION**

15 2596 S. Lewis Way

16 Lakewood, CO 80227

17 Tel. (303) 292-2021

18 Fax (303) 292-1980

19 cody@mslegal.org

20 *Attorneys for Applicants in Intervention*