IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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| SHELLY PARKER, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>DISTRICT OF COLUMBIA, et al.,<br><br>Defendants. | ) | Case No. 03-CV-0213-EGS<br><br>**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONSOLIDATE AND IN SUPPORT OF MOTION FOR RECUSAL OF COUNSEL** |

**MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION TO CONSOLIDATE AND IN SUPPORT OF MOTION FOR RECUSAL OF COUNSEL**

**COME NOW** the Plaintiffs, Shelly Parker, Dick Anthony Heller, Tom G. Palmer, Gillian St. Lawrence, Tracey Ambeau, and George Lyon, by and through undersigned counsel, and submit their Memorandum of Points and Authorities in Opposition to the Motion to Consolidate and in Support of their Motion for Recusal of Counsel.

Dated: May 1, 2003

Respectfully Submitted,

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## PRELIMINARY STATEMENT

The motion to consolidate should be denied because it is untimely, ill-conceived and inappropriate. Allowing the Seegars plaintiffs to join this litigation would substantially and unnecessarily complicate what is presently a straightforward single-issue case. By adding a variety of extraneous claims to a case that is nearly ready for summary disposition, the Seegars plaintiffs would impede this court in resolving the narrow issue presented in the Parker litigation and substantially prejudice the Parker plaintiffs by delaying resolution of their claim.

As demonstrated below, the Seegars plaintiffs' attempt to participate in this case is motivated not by a bona fide desire to adjudicate their claims, but by the improper strategic goals of their sponsor, the National Rifle Association ("NRA"). See Exhibit A. Finally, as further documented below, the Seegars plaintiffs' counsel, Stephen Halbrook, has refused to recuse himself from this action, despite the fact that he is now taking a litigation position that is materially adverse to his own former clients, Parker counsel Robert Levy and the Parker plaintiffs.

## SUMMARY OF ARGUMENT

When asked why Seegars and its consolidation motion were filed, Mr. Halbrook admitted that the motivation is the NRA's desire to have its counsel share argument time in the Court of Appeals – clearly an improper purpose for filing litigation, and an attempt to subvert both the circuit court's rules governing the filing of *amicus curiae* briefs as well as plaintiffs' *absolute right* to their choice of counsel and litigation strategy. Given the disruption and delay to Parker

that consolidation would bring, the tactic is ever more questionable considering NRA counsel's former attorney-client relationships with Parker counsel and parties.

Counsel table is not a public forum. Rule 42 is not a soapbox by which every special interest group or lawyer with a filing fee may insert oneself into someone else's case. If the purpose of consolidation is to enhance judicial efficiency, such purpose is ill-served by encouraging sham litigation and deliberate interference with pending cases. There is no shortage of outside parties who would like to exert control over litigation of interest to them, but Rule 42 is not an end-run around the strictures of Rule 24, governing intervention.

This is not a case where various parties aggrieved by new government action filed suits that should be consolidated for the sake of efficiency. The NRA has had twenty-seven years to challenge the District of Columbia's gun laws. Plainly, there are profound disagreements between the Parker plaintiffs and the NRA about the manner in which to address the District's practices. Otherwise, the NRA action would not have been filed.

The delay and inefficiency to the Court and to plaintiffs, and the questionable circumstances surrounding this motion, argue strongly in favor of denial of the motion to consolidate. Parker will be ready for resolution on June 10, 2003, with the submission of plaintiffs' reply brief on their motion for summary judgment. Yet neither defendant in the NRA action would have to appear until June 9, 2003. The NRA case involves numerous (dubious) legal theories not raised in this action, and a federal defendant – the Attorney General of the United States – who does not appear to be a proper party to the litigation. The time and resources necessary to sort out these extraneous matters would only further delay this litigation.

Moreover, as defendants pointed out on their motion for enlargement of time, plaintiffs in this action exhaustively briefed the single legal question at the core of this litigation. With a forty-two page motion for summary judgment, thirty-eight page opposition to the motion to dismiss, and as-yet unwritten reply memorandum on the summary judgment motion, it is highly unlikely that the NRA would add substantively to the core Second Amendment issue already examined in detail in Parker – particularly as the NRA would need to divide its briefing among its wide assortment of theories. The NRA's participation in this litigation may aid the NRA's organizational interests, but it would harm, not help, the efficiency of litigation before this Court.

So eager were NRA and its counsel to insert themselves into the Parker litigation that they did so without so much as a courtesy phone call to Parker counsel – a substantial failure to obey Local Rule 7.1(m), which requires that counsel meet and confer prior to filing non-dispositive motions. Only the rejection of that motion as improperly filed in the wrong litigation allowed NRA counsel to certify, when they refiled the instant motion, that they had learned of plaintiffs' objection.

By the time this second motion to consolidate was filed, NRA counsel were made aware of plaintiffs' opposition, and also reminded that their participation in this case is barred by D.C. Bar Rules of Professional Conduct. A few months ago, Mr. Halbrook was retained by Parker counsel to conduct some preliminary research in that litigation. Now, by filing a motion to consolidate that would materially harm the interests of his former client, Mr. Halbrook has created for himself an obvious conflict of interest. Moreover, the attorney-client privilege is at stake, as knowledge gleaned from his former attorney-client relationship may now be used to gain advantage over Halbrook's former client, and for the benefit of third parties with adverse

interests.[1] These conflicts must be imputed to Mr. Gardiner as well, an office-mate and close confidant of Mr. Halbrook's.

## STATEMENT OF FACTS

On February 10, 2003, plaintiffs filed their challenge to various District of Columbia firearms statutes in Parker v. District of Columbia, 03-CV-213-EGS. Parker raises a single claim under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2200 – that the statutes violate plaintiffs' rights under the Second Amendment to the United States Constitution. Named as defendants are the District of Columbia, which maintains the unlawful acts; and its Mayor, Anthony Williams, who is charged with executing the contested acts.

On March 3, 2003, defendants in Parker timely filed a motion to dismiss addressed solely to the merits of plaintiffs' Second Amendment claim. Plaintiffs timely opposed the motion, and filed a cross-motion for summary judgment, on March 14, 2003. The case would have been fully briefed and ready for ruling on March 25, when the defendants' time to oppose the motion for summary judgment expired, but that deadline was extended by the Court through June 3, 2003. Parker will now be ready for final adjudication on June 10, 2003 with the filing of plaintiffs' reply to the opposition to summary judgment.

Meanwhile, on April 4, 2003, the National Rifle Association commissioned its long-time outside counsel file to file Seegars v. Ashcroft, 03-CV-0834-RBW, a challenge to the same statutes contested in Parker. Simultaneously, Seegars counsel moved for consolidation with Parker. The motion to consolidate, filed improperly in Seegars, did not contain the certification

[1]Interestingly, Mr. Halbrook recruited, as a Seegars plaintiff, Mr. Absalom Jordan, one of three originally intended Parker plaintiffs who, in the end, could not be represented by Parker counsel.

required by Local Rule 7.1(m) that counsel had conferred with opposing parties prior to filing the motion. No such consultation ever occurred; Parker counsel were advised late Friday afternoon that the action and motion had been filed, but the matter was presented as a *fait accompli*, not a matter for discussion. (Levy Decl., ¶ 2.)

Although Parker and Seegars both seek to overturn the same provisions of the D.C. Code, the similarities end there. In their action, the NRA did not sue the District of Columbia whose law is being challenged, but chose as their lead defendant the Attorney General of the United States, whose alleged role in enforcing the challenged provisions is unclear. While both actions argue that the Second Amendment bars the District's policies, the Second Amendment is the only issue in Parker, whereas, in the NRA litigation, it is buried among a host of other claims: a due process claim under the Fifth Amendment; an argument that the laws violate 42 U.S.C. § 1981; a theory that the laws are *ultra vires* under D.C. Code § 1-303.43; and a mixed due process/equal protection argument.

The difference in approach – and the fact that the NRA action was filed only after Parker appeared to be fully briefed – is not accidental.

The NRA has long been aware of the District's policies regarding guns, but has not been keen to litigate the matter. On October 23, 2002, Parker counsel Robert Levy retained Halbrook to conduct legal research into various substantive and strategic matters relating to the case that would become Parker. Halbrook completed his research on November 1, 2002, and was fully compensated for his efforts on November 11, 2002. (Levy Decl., ¶ 3.) Halbrook (and others within the NRA) were kept apprised of developments in Parker, and were decidedly unenthusiastic about the enterprise. Significant differences exist between Parker and NRA

counsel as to how, and whether, to proceed with a challenge to the D.C. gun bans. (Levy Decl., ¶ 4.)

On April 8, 2003, Levy asked Halbrook to recuse himself from Seegars. The interests of Levy and Halbrook, and the interests of their clients, had become materially adverse in various respects. The most obvious involved delay – Parker was fully briefed, but Halbrook sought to slow the case down with a consolidation involving a multiplicity of theories and a federal defendant who would have at least sixty days to appear. Halbrook requested a meeting to discuss the matter, and so on April 10, Levy and Parker lead counsel Alan Gura met with Halbrook to discuss the situation. (Levy Decl., ¶ 5.)

During the meeting, it became obvious that the two sides had numerous substantive differences about their approach to the litigation. For his part, Halbrook seemed unconcerned with delaying relief in Parker. Asked bluntly what benefit he saw to consolidation, Halbrook explained that the NRA wants him to argue this case, and this is a method of assuring him argument at the Court of Appeals. Halbrook stated that he and the NRA would not be satisfied with merely submitting an *amicus curiae* brief. According to Halbrook, the Circuit Court might ignore his *amicus* brief, but it would be forced to listen to him at argument if the cases were consolidated. Parker counsel requested that at a minimum, Halbrook and his associate Gardiner recuse themselves or withdraw the motion to consolidate, thereby minimizing their adversity to Parker. Halbrook requested more time to consider the matter, but has since refused. (Gura Decl., ¶ 4, Levy Decl., ¶ 6.)

## ARGUMENT

### I. NRA PARTIES AND COUNSEL CANNOT MEET THEIR BURDEN OF SHOWING CONSOLIDATION WOULD ENHANCE JUDICIAL EFFICIENCY. CONSOLIDATION IN THIS CASE WOULD BE INEFFICIENT, PREJUDICIAL, AND INVITE FURTHER MISCHIEF.

In support of their motion to consolidate, the NRA parties rely in part on Mylan Pharmaceuticals, Inc. v. Henney, 94 F. Supp.2d 36 (D.D.C. 2001) for the proposition that consolidation is "permitted as a matter of convenience and economy in administration," and that a court may order consolidation "if such consolidation will help it manage its caseload with 'economy of time and effort for itself, for counsel, and for litigants.'" Mylan, 94 F. Supp. 2d at 43 (citations omitted). Plaintiffs agree with these sentiments, but as Mylan was vacated on appeal *sub nom* Pharmachemie B.V. v. Barr Labs, Inc., 349 U.S. App. D.C. 284, 276 F.3d 627 (D.C. Cir. 2002), the Court should look to additional authority.

"The decision whether to consolidate cases under Rule 42(a) is within the broad discretion of the trial court." Stuart v. O'Neill, 225 F. Supp. 2d 16, 21 (D.D.C. 2001). "Consolidation is not warranted merely because two separate plaintiffs allege distinct claims under the same general theory of law or statute." Sidari v. Orleans County, 174 F.R.D. 275, 281 (W.D.N.Y. 1996) "The party moving for consolidation bears the burden of showing the commonality of factual and legal issues. The Court must examine . . . 'special underlying facts' with 'close attention' before ordering consolidation. " Id., at 281 (citing In Re Repetitive Stress Injury Litigation, 11 F.3d 368, 373 (2d Cir. 1993)).

Plainly, there are unique claims and legal issues in Seegars, unrelated to the claims and the single legal issue raised in Parker. The NRA has not established "commonality" that would

justify consolidation. "Finally, even where commonality is established, although consolidation may enhance judicial economy, considerations of convenience and economy must yield to a paramount concern for a fair and impartial trial." Sidari, 174 F.R.D. at 281 (citation omitted).

### A. Consolidation Would Prejudice Plaintiffs As It Would Delay Relief And Create Significant Distractions.

Plaintiffs have worked hard to craft a narrowly-focused case that would expeditiously move through the courts with a minimum of distractions. Even with defendants' need for additional time, Parker will be ready for a ruling in this Court on June 10, 2003. In Seegars, the defendants have until June 9 to file respond to the complaint. Thus, the Seegars case, if consolidated, will materially delay resolution of Parker.

Defendants in Parker raised only one issue in their motion to dismiss. By contrast, there are numerous distracting issues in the NRA litigation – issues that are of dubious validity and wholly extraneous to Parker.

To begin, there is the questionable decision to name Attorney General Ashcroft as a defendant. The Attorney General has no role in handgun registration, which is a function of the District of Columbia government. All of the criminal provisions challenged in both lawsuits – the possession of an unregistered handgun or functional firearm within the home, and carrying a pistol within the home – are misdemeanors. As the Seegars complaint recognizes, misdemeanors in the District of Columbia are prosecuted in the name of the District of Columbia by Corporation Counsel – *not* by the United States. Seegars Complaint, ¶ 20; D.C. Code § 23-101(a).

There is thus no basis for naming the Attorney General as a defendant in Seegars. Perhaps recognizing the tenuous nature of this claim, the NRA plaintiffs theorize that should they carry a pistol within their homes, they might nevertheless be charged by the Attorney General with a felony and be forced to prove the negative proposition that they did not carry their pistols in public. Seegars Complaint, ¶¶ 15-16. The theory is rather strained. In a criminal prosecution, the government carries the burden of proof on all essential elements of a crime. See, e.g. Bailey v. United States, 516 U.S. 137, 116 S. Ct. 501, 133 L. Ed. 2d 472 (1995) (convictions for using a gun during commission of a crime vacated absent proof of actual use). The theory proposed by NRA plaintiffs as a basis for suing the Attorney General would also be at odds with the Fifth Amendment right against self-incrimination, as no person could be forced to deny an element of a felony charge. Because the NRA plaintiffs do not claim a right to carry a handgun in public, Seegars Complaint, ¶ 27, they lack standing to complain about a possible prosecution by the Attorney General, who is not a proper defendant and would likely be dismissed. Plaintiffs should not be forced to wait out this process.

Apart from the decision to sue an improper federal defendant, the various claims raised by the NRA plaintiffs, but not raised in Parker, would also needlessly delay and frustrate resolution of the earlier case. In their second claim for relief, the Seegars plaintiffs contend that the District's statutes are not the "usual and reasonable" police regulations contemplated by Congress when it enacted D.C. Code § 1-303.43, empowering the District to enact such "usual and reasonable" regulations concerning firearms.

As a substantive matter, the claim will also likely be dismissed. Much has changed since 1906, when Section 1-303.43 was enacted. The challenged provisions were enacted by the D.C.

City Council in 1975, presumptively pursuant to the Home Rule Act of 1973, D.C. Code § 1-203.02, providing that "the legislative power of the District shall extend to all rightful subjects of legislation within the District." While the Parker plaintiffs agree that the challenged provisions are not "usual and reasonable," D.C. Code § 1-303.43, plainly the regulation of firearms is a "rightful subject of legislation." D.C. Code § 1-203.02. Whether the challenged regulations are beyond the grant of legislative authority in section 1-303.43 is therefore a moot question.

Even if Section 1-303.43 were the source of legislative authority for the challenged provisions, it is doubtful whether the term "usual and reasonable" would impose any substantive limitation on the District of Columbia's exercise of legislative authority that a court could enforce. For example, the "necessary and proper" clause of U.S. Const. art. I, sec. 8 has not been viewed as a substantive limitation on Congressional power since McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 4 L. Ed. 579 (1819). If every legislative enactment could be struck down as "unusual" or "unreasonable," the courts would be exercising legislative or executive veto authority. The Second Amendment, not D.C. Code § 1.303.43, affords a substantive check on gun legislation enacted by the D.C. government.

Aside from the delay engendered by resolving this claim, plaintiffs have another reason to distance themselves from the NRA theory. The term "reasonable and usual" may be similar to the "rational basis" standard under which some enactments are reviewed for constitutionality. Such a deferential test is not typically appropriate for rights enumerated in the Bill of Rights.[2] Although plaintiffs maintain the challenged laws could not survive even rational basis scrutiny, the use of a similar test in a case involving a fundamental constitutional right is needlessly

[2]Even the defendants do not claim otherwise.

confusing and prejudicial to Parker's core claim. Arguments on the "reasonableness" of the law would reduce the litigation to a mere policy debate, rather than the indispensable debate on the meaning of the Second Amendment and the constitutionality of the D.C. gun ban.

The most obviously deficient of the NRA plaintiffs' claims is their theory that the District's gun bans violate the Civil Rights Act of 1866, 42 U.S.C. § 1981. It is well-established that Section 1981 "is directed solely at racial discrimination." Lewis v. Green, 629 F. Supp. 546, 552 (D.D.C. 1986) (citation omitted). "[Section] 1981, like the Equal Protection Clause, can be violated only by purposeful discrimination." General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 391, 102 S. Ct. 3141, 73 L. Ed. 2d 835 (1982). Nothing in the Seegars complaint suggests that the challenged laws are enforced in a racially discriminatory fashion, a fact foreclosed by the diverse backgrounds of plaintiffs in both lawsuits. While the 1981 claim may be easy to address, plaintiffs in Parker should not have to wait for their more substantial claim to be addressed while such arguments are resolved.

Another unnecessary distraction is posed by Seegars' fourth claim for relief. Under this theory, defendants violate the Due Process Clause of the Fifth Amendment by requiring that all handguns be registered, while in practice refusing to register any handgun not registered by September 24, 1976. According to the NRA plaintiffs, "[w]hen the law authorizes the doing of an act on fulfillment of a condition precedent and threatens criminal penalties for failure to comply, fundamental fairness is violated when the law also prohibits the fulfillment of that condition precedent." Seegars Complaint, ¶ 59.

Mere frustration of an otherwise authorized act does not establish a due process violation. Cf. United States v. Bean, 123 S. Ct. 584, 154 L. Ed. 2d 483 (2002) (Congressional refusal to

appropriate funds for reviewing firearms disability does not permit review under Administrative Procedures Act). In reviewing a claim for a violation of due process, "the first step is to identify a property or liberty interest entitled to due process protections." Brock v. Roadway Express, Inc., 481 U.S. 252, 260, 107 S. Ct. 1740, 95 L. Ed. 2d 239 (1987) (citations omitted). "Only if the court first finds that a 'liberty' or 'property' interest is affected will it go on to a balancing of interests analysis to determine what level of procedural protection is appropriate." Mazaleski v. Treusdell, 183 D.C. App. 182, 562 F.2d 701, 709 (D.C. Cir. 1977); Washington Legal Clinic for the Homeless v. Barry, 323 D.C. App. 319, 107 F.3d 32, 36 (D.C. Cir. 1997).

If there were no liberty interest in possessing a handgun, the due process claim would fail. Yet, if the Court found a liberty interest in possessing a handgun, the due process claim would not be reached, as the refusal to register handguns would simply be a straightforward infringement of the Second Amendment. The D.C. Circuit has already declined to analyze firearm prohibitions under a substantive due process theory, where there is a textual constitutional right directly on point:

> We must confess . . . that we are mystified by the decision to advance a substantive due process claim based on an explicit Second Amendment right in preference to a simple assertion of the explicit right itself. It is not apparent how a claim might be strengthened by being tucked into the catch-all of substantive due process. In any event, the claim obviously requires us to consider the Second Amendment right. . .

Fraternal Order of Police v. United States ("FOP II"), 335 U.S. App. D.C. 359, 173 F.3d 898, 905-06 (D.C. Cir.), *cert. denied*, 528 U.S. 928, 120 S. Ct. 324, 145 L. Ed. 2d 253 (1999).

Although Seegars' fourth claim for relief appears based on procedural rather than substantive due process, it is, at best, superfluous to the core Second Amendment issue so thoroughly vetted in Parker. The ban on handguns is in the nature of a prior restraint, but prior

restraint cases are not typically presented as violations of procedural due process. There is no need to delay resolution of Parker to answer the unnecessary question of whether, if there is a right to possess handguns, a prohibition on registration of such firearms is not merely an infringement of the right to possess them, but a procedural due process violation as well.

The NRA plaintiffs' fifth claim for relief, brought under the guise of equal protection, is difficult to comprehend and is, in any event far removed from any argument asserted in Parker. Apparently, the NRA plaintiffs claim that the ban on handgun registration violates principles of equal protection because non-residents are allowed to travel through or to the District of Columbia with handguns, for the purpose of engaging in recreational activities, so long as the handguns are transported in accordance with District of Columbia law and the traveler's possession of the handgun is lawful in the traveler's home jurisdiction.

The law, on its face, does not make any distinction between residents and non-residents. Both may transport and use those firearms that are lawfully possessed in their home jurisdictions toward a recreational use in the District of Columbia. In theory,[3] this would allow non-residents to engage in recreational firearms uses that are, in effect, prohibited to District residents who cannot register a wider assortment of firearms, but it is unclear why Seegars plaintiffs would be harmed by non-residents' recreational shooting. In any event, Parker plaintiffs should not have their concise, direct, and as of June 10, completed case held up indefinitely to resolve this theory.

### B. Consolidation Would Not Assist The Court In Resolving Either Case, But Denial Of Consolidation Would Aid The Resolution Of The NRA Action.

As discussed *supra*, plaintiffs in Parker have thus far presented voluminous and

[3]It is practically impossible to engage in recreational shooting in the District of Columbia.

comprehensive argument on the core Second Amendment issue at stake in the litigation – and will submit additional argument as necessary on reply to the defendants' expected opposition. It appears unlikely that the Court would want, or require, additional argument on this question. With all due respect to Mr. Halbrook, there is nothing for him to add, even if the NRA does not approve of plaintiffs' choice of counsel. Moreover, it is unlikely that the Court would grant leave to file an oversize brief in Seegars. NRA counsel would have to dedicate at least some of their allotted pages to the various other theories they chose to raise.

Certainly, the denial of consolidation would not impede the NRA's ability to be heard on Parker's appeal in the same manner that interested parties are normally heard – as *amicus curiae*. Nor would denial of consolidation in any manner impact the Seegars plaintiffs' rights to present whatever theories they wish in their litigation. However, the denial of consolidation might actually aid the resolution of Seegars. With the core Second Amendment issue being resolved in Parker, the NRA plaintiffs would have greater leeway to address those numerous other issues that are unique to their case. In fact, the most efficient manner to handle the litigation would be to stay the proceedings in Seegars pending the outcome of Parker, which is far more advanced and more thoroughly addresses the only substantive issue at hand.

It is inefficient and prejudicial, however, to take an all-but-completed litigation comprehensively addressing an important question of law and set it back by months or years while other parties raise an array of distracting, conflicting, and largely insubstantial arguments addressed in part to an improper defendant. Nor is there any guarantee that Seegars would be the final attempt to interfere with Parker. The issue of gun control evokes strong emotions among many people. There may be no end to the number of parties who might take the NRA's lead,

each with their own pet theories to hitch onto Parker. Plaintiffs are entitled to an orderly, expeditious resolution of their claims without such distractions.

**C. Consolidation Would Invite Additional Frivolous Litigation.**

A complete annotation of appellate rules governing the filing of *amici curiae* briefs (D.C. Cir. Practice Rule 9.A.3, D.C. Cir. Rules 28(e), 29, Fed. R. App. P. 29) is not necessary. Nor is it necessary to visit the question of whether the Seegars plaintiffs would have been allowed to intervene in Parker permissively or as of right pursuant to Fed. R. Civ. P. 24. Suffice it to state that the federal courts have devised procedures allowing interested parties to seek permission to be heard on appeal or at the District Court level -- and these rules have been deliberately flouted by Seegars counsel.

The rules governing intervenors and *amici*, not Rule 42 governing consolidation, provide the proper means by which parties may seek to participate in someone else's litigation. That Mr. Halbrook would not be satisfied with what he and his institutional client perceive to be an unduly minimal role as *amici* does not entitle them to effect an end-run around the rules through consolidation.

Perhaps more than any other District Court, this Court routinely hears cases relating to profound issues of public policy. Permitting consolidation under these circumstances would invite every gadfly, every special interest group or individual with an axe to grind and a filing fee, to manufacture copy-cat litigation and raise the banner of "judicial efficiency" as a means of participating in existing litigation without adhering to the rules that normally govern outsider participation. The potential advantages – broad, non-staggered briefing and argument on appeal – would far exceed anything available under the normal operation of the rules.

Consolidation is a tool for efficiently handling legitimate cases raising common issues of fact and law, such as multiple victims of a single tort. It is not a tool for parties to *add* issues of law they feel should be raised in existing litigation, subvert another's choice of counsel or litigation strategy, or capitalize on a case that attracts the public's interest. Consolidation's goals of efficiency and judicial economy are best served by denying the instant motion to consolidate.

## II. SEEGARS' COUNSEL MUST BE RECUSED FOR VIOLATION OF D.C. BAR RULES OF PROFESSIONAL CONDUCT 1.6, 1.9, 1.10, AND 3.2.

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

D.C. Bar Rule of Professional Conduct 1.9.

There is no question that Mr. Halbrook represented Mr. Levy and, by extension, Levy's clients, in Parker. Accordingly, Halbrook is forbidden from representing the Seegars plaintiffs in the same matter (as he seeks to do by consolidating the cases), or even in a "substantially related matter," where the Seegars plaintiffs' interests are materially adverse to those of Levy or Levy's clients.

"Material adversity" is not limited to situations in which the attorney advocates directly against the ultimate relief sought by his former client. "The principles in Rule 1.7 determine whether the interests of the present and former client are adverse." D.C. Bar Rule of Professional Conduct 1.9, Comment 1. Rule 1.7 contains two prohibitions on conflicts of interest: an absolute prohibition on "advanc[ing] two or more adverse positions in the same matter," Rule 1.7(a), and a set of conditional prohibitions that may be waived by the adversely affected client, Rule 1.7(b).

Halbrook is disqualified under both provisions.

Adversity as defined in Rule 1.7(a)'s absolute bar on conflicts of interest depends on the *positions* taken within a matter, not the overall posture of the attorney in relation to the matter as a whole:

> The absolute prohibition of paragraph (a) applies only to situations in which a lawyer would be called upon to espouse adverse positions for different clients in the same matter. It is for this reason that paragraph (a) refers to adversity with respect to a "position taken or to be taken" in a matter rather than adversity with respect to the matter or the entire representation.

D.C. Bar Rule of Professional Conduct 1.7, Comment 4.

At times, this construction of Rule 1.7(a) permits attorneys to provide joint representation on non-adverse matters, then take an adverse position with respect to one client, provided that client provides the necessary consent. Comment 4, *supra*. However, Rule 1.7(a) also sensibly forecloses the argument that Mr. Halbrook would make – that he can interfere in his former client's representation of the Parker plaintiffs (who are also, by extension, entitled to the benefits of an attorney-client relationship with Halbrook), delaying resolution of the Parker claim indefinitely, clouding his former clients' arguments with unwanted extraneous and possibly harmful theories, bringing in an additional defendant to possibly oppose his former clients' claim, and even commandeering portions of his former clients' argument time on appeal – so long as he shares the same ultimate goal of overturning the challenged statutes.

If attorneys have a legitimate interest in serving their clients' needs, and if clients have a legitimate need to have their claims resolved expeditiously, the delay engendered by Halbrook's consolidation tactic alone constitutes material adversity. See D.C. Bar Rule of Professional Conduct 3.2(b) ("An attorney shall make reasonable efforts to expedite litigation consistent with

the interests of the client.") Certainly Halbrook also has a duty not to interfere in his former client's litigation of the case in which he was hired. And Levy, as an attorney, has an interest in utilizing his best judgment on behalf of his clients. Levy's best judgment is that consolidation with claims he specifically rejected, against a defendant he did not wish to sue, is harmful to his clients and his ability to represent them. It does not matter that Halbrook believes his litigation theories are superior. Rule 1.7 absolutely forbids Halbrook from foisting them on an unwilling former client.

The conditional prohibition on conflicts of interest set forth in Rule 1.7(b) is even less forgiving. Absent the client's consent,

> [A] lawyer shall not represent a client with respect to a matter if:
>
> 1. That matter involves a specific party or parties and a position to be taken by that client in that matter is adverse to a position taken or to be taken by another client in the same matter . . .

D.C. Bar Rule of Professional Conduct 1.7(b).

Just as in Rule 1.7(a), Rule 1.7(b) is carefully crafted to distinguish between a "matter" and a "position . . . in that matter." The rule is violated when a "position in that matter" is adverse. But the commentary to Rule 1.7(b) is even starker on the question of who decides for the client what is in the client's best interest:

> Although the lawyer must be satisfied that the representation can be wholeheartedly and zealously undertaken, if an objective observer would have any reasonable doubt on that issue, *the client has a right to disclosure of all relevant considerations and the opportunity to be the judge of its own interests*.

D.C. Bar Rule of Professional Conduct 1.7(b), Comment 7 (emphasis added).

Mr. Halbrook is also bound by D.C. Bar Rule of Professional Conduct 1.6(a), the attorney-client privilege, which provides in pertinent part:

> [A] lawyer shall not knowingly:
>
> 1. Reveal a confidence or secret of the lawyer's client;
>
> 2. Use a confidence or secret of the lawyer's client to the disadvantage of the client;
>
> 3. Use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person.

On this count, the ethical problem for Halbrook is also apparent. In the course of his retention by Levy, Halbrook gained unique insight to Levy's approach to this litigation – insight he is now using in a manner adversarial to Levy, and on behalf of other parties. Indeed, Halbrook's conduct betrays a failure to comprehend that he had any sort of duty to his former client. This should not be confused with a failure to recognize the adversity; had Halbrook sincerely believed that his conduct was not objectionable to Levy, he would have at least fulfilled his duties under Local Rule 7.1(m) and sought consent for the motion to consolidate. He may even had done so as a matter of professional courtesy.

Finally, plaintiffs would be remiss not to mention that Halbrook's disqualification must be imputed to his co-counsel, Richard Gardiner, under D.C. Bar Rule of Professional Conduct 1.10. Gardiner shares the same office with Halbrook and the two work together closely. Their corporate structure is irrelevant, as the two have conducted themselves as a firm for purposes of these actions. If the Seegers matter is to proceed, the NRA must find untainted counsel.

## CONCLUSION

The Court should see Seegars for what it is: an attempt by conflicted counsel and their organizational patron to do under the guise of enhancing judicial efficiency what the rules of this Court and the Court of Appeals prohibit as grossly *in*efficient – a self-serving intervention by another name, and improper argument by persons who, at most, would be *amicus curiae*. Consolidation must be denied, or at the very least, the conflicted counsel must be recused.

Plaintiffs respectfully urge that the motion to consolidate be denied and that counsel for plaintiffs in Seegars v. Ashcroft, 03-CV-0834, be recused.

Dated: May 1, 2003

Respectfully Submitted,

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By: _____
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Attorneys for Plaintiffs

## CERTIFICATE OF SERVICE

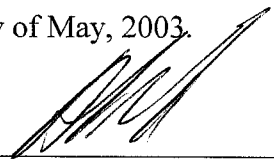
On this, the 1st day of May, 2003, I served a true and correct copy of the foregoing Motion for Recusal of Counsel and Memorandum of Points and Authorities in Opposition to Motion to Consolidate and In Support of Motion for Recusal on the following by depositing said copies in the U.S. Mail, first-class postage pre-paid, and addressed as follows:

Stephen Halbrook
10560 Main Street, Suite 404
Fairfax, VA 22030

John Ashcroft
Attorney General of the United States
10th and Constitution Avenue, N.W.
Washington, D.C. 20530

I declare under penalty of perjury that the foregoing is true and correct.

Executed this the 1st day of May, 2003.



Alan Gura