CASE NO. 83999

IN THE SUPREME COURT OF THE STATE OF NEVADA

STEPHEN SISOLAK, Governor of Nevada;
AARON FORD, Nevada Attorney General;
GEORGE TOGLIATTI, Director of the Nevada Department of Public Safety;
MINDY MCKAY, Administrator of the Records, Communications and Compliance Division of the Nevada Department of Public Safety,

Appellants,

v.

POLYMER80, INC.,

Respondent.

Appeal from the *Findings of Fact, Conclusions of Law, and Order Granting Summary Judgment in Favor of Plaintiff, Polymer80, Inc.*
Entered by the Third Judicial District Court on December 10, 2021

RESPONDENT'S ANSWERING BRIEF

Brad M. Johnston
Nevada Bar No. 8515
SIMONS HALL JOHNSTON PC
22 State Route 208
Yerington, Nevada 89447
Telephone: 775-463-9500
Facsimile: 775-463-4032

Attorneys for Respondent Polymer80, Inc.

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel for Respondent Polymer80, Inc. hereby certifies that Polymer80, Inc. is not owned by a parent corporation or company and that no publicly-held company owns ten percent (10%) or more of any of its stock.

The undersigned counsel for Respondent Polymer80, Inc. hereby further certifies that Brad M. Johnston and his firm, Simons Johnston Hall PC, are the only attorney and law firm expected to appear in this Court on behalf of Respondent

Polymer80, Inc.

The undersigned counsel for Respondent Polymer80, Inc. hereby further certifies that Polymer80, Inc. was represented by Brad M. Johnston of Simons Johnston Hall PC and James McGuire and Mark Doerr of Greenspoon Marder LLP in the District Court proceedings preceding this appeal.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Respectfully submitted this 5th day of August, 2022.

/s/ Brad M. Johnston
Brad M. Johnston
Nevada Bar # 8515
Simons Hall Johnston PC
22 State Route 208
Yerington, NV 89447
Telephone: 775.463.9500

Attorney for Respondent Polymer80, Inc.

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INTRODUCTION

Nevada Governor Stephen Sisolak signed Assembly Bill 286 ("AB 286") into law on June 7, 2021, criminalizing the mere possession or transfer of an "unfinished frame or receiver," unless one of two limited, statutory exceptions applied. The question law-abiding Nevada citizens then had to answer was, what is an "unfinished frame or receiver"? The wrong answer to that question would subject a Nevadan to criminal penalties, including a jail or prison sentence. In drafting AB 286, the legislature claimed to have provided an answer. But, as the District Court found, it failed to do so. That failure, to be clear, violates the Nevada Constitution's Due Process Clause because no Nevadan could understand what AB 286 criminalized. Indeed, what is an "unfinished frame or receiver"?

In attempting to answer that question, AB 286 pronounced a definition of "unfinished frame or receiver" that is, in a word, vague. It is also, therefore, unconstitutional. The definition of "unfinished frame or receiver" found in AB 286 states that it is:

> [A] blank, a casting or a machined body that is intended to be turned into the frame or lower receiver of a firearm with additional machining and which has been formed or machined to the point at which most of the major machining operations have been completed to turn the blank, casting or machined body into a frame or lower receiver of a firearm even if the fire-control cavity area of the blank, casting or machined body is still completely solid and unmachined.

Yet, AB 286 (and the rest of Nevada law) does not define or in any meaningful fashion explain what a "blank," "casting," and/or "machined body" is, and, compounding that problem, AB 286 then prescribes a nebulous and unknowable machining test for determining when such an undefined "blank," "casting," or "machined body" has reached a sufficient stage of completion to turn the "blank, casting, or machined body" into, ironically, an "unfinished frame or receiver;" to-wit, when the object "has been formed or machined to the point at which most of the major machining operations have been completed."

Thus, AB 286 criminalizes the possession of an undefined something (a blank, casting, or machined body) that is, with some unprescribed amount of additional "machining," intended to be turned into some other object (the frame or receiver of a firearm), but which object has already undergone most of the major machining operations, which are also undefined. AB 286 accordingly leaves the hypothetical Nevada citizen of ordinary intelligence – but in reality, all Nevadans – in the dark as to what the law means while subjecting those same Nevadans to criminal charges and discriminatory enforcement. Because the Due Process Clause of the Nevada Constitution prohibits such legislative action, Respondent Polymer80, Inc. ("Polymer80") filed this lawsuit, facially challenging AB 286 as void for vagueness.

The District Court granted summary judgment in favor of Polymer80. The District Court concluded that AB 286 violates the Nevada Constitution because "the

text of AB 286 does not provide fair notice of whatever it criminalizes" and "is so standardless … that it authorizes and/or encourages arbitrary and discriminatory enforcement." APP at 0010704, 001078.[1] In reaching these conclusions, the District Court noted that "this Court asked on multiple occasions during oral argument … what those terms as used in AB 286 mean. Tellingly, the Defendants could not in any manner explain their meaning(s)." APP at 001074. The District Court accordingly held, correctly, that portions of AB 286 are unconstitutionally vague. Its judgment in favor of Polymer80 should be affirmed.

Indeed, just as Appellants could not explain what the terms of AB 286 mean when they were in the District Court, they cannot explain what they mean now on appeal to this Court. The Attorney General cannot explain it because no Nevadan can. Appellants ignore what AB 286 actually says and, instead, assert that the Nevada Legislature passed AB 286 to ban Polymer80's so-called "buy, build, shoot" kits. *See, e.g.,* Appellants' Opening Brief at p. 25. Based on this assertion, Appellants argue that AB 286 passes constitutional muster because Polymer80 must know what that means. Yet, nothing in the text of AB 286 refers to any type of kit that could build a firearm, nor does any legislative intent tell us what AB 286 actually means to criminalize. Thus, Appellants only try to defend AB 286 by ignoring the

[1] Citations to "APP" in this brief are to the Joint Appendix.

statutory language that was actually adopted and emphasizing in its stead standards and phrases that are found nowhere in AB 286 or elsewhere in Nevada law.

Reduced to its core, Appellants' argument is that, because the legislature targeted Polymer80, the products of Polymer80 – and similar (yet undefined) products possessed by anyone in Nevada – must fall under the prohibitions of AB 286. Thus, appellants say, the statute is saved from a facial void-for-vagueness challenge and the law rightfully applies to all Nevadans, not just Polymer80. But, again, Appellants fail to explain what the law means or why and/or how this law will be applied to all Nevadans because they cannot in the face of AB 286's inherently vague language. And, more importantly, Appellants fail to address the fundamental issue before this Court on appeal; namely, whether vagueness so permeates the text of AB 286 that it cannot meet the "fair notice" and "discriminatory enforcement" requirements in most applications, rather than as AB 286 might be applied to a specific product in a particular instance. Accordingly, Appellants remain unable to tell anyone what AB 286 actually criminalizes in response to Polymer80's facial challenge, underscoring that the District Court correctly ruled in favor of Polymer80 and that its judgment should be affirmed.

ROUTING STATEMENT

This Court should retain jurisdiction pursuant to NRAP 17(a)(12) because this case involves, as a principal issue, a question of statewide public importance;

namely, whether the Nevada Legislature can adopt a criminal statute that (1) fails to provide individuals of ordinary intelligence fair notice of what is proscribed, and (2) permits, even encourages, seriously discriminatory enforcement.

Appellants suggest that the Nevada Legislature can adopt such a law, so long as it does so in the name of public safety. *See Appellants' Opening Brief* at p. 3 ("This Court should retain jurisdiction under NRAP 17(a)(12) because the order below invalidated an important public-safety statute."). But the due process guarantees of the Nevada Constitution do not yield to the whims of the Nevada Legislature, even when that body purports to act in the area of public safety. Accordingly, this Court should retain jurisdiction to review the constitutionality of AB 286 because that issue is a question of statewide public importance given the constitutional defects that permeate the legislation and subject all Nevadans to potential criminal penalties and discriminatory enforcement.

ISSUES ON APPEAL

1. Does a company, like Polymer80, have standing to facially challenge a criminal statute on constitutional vagueness grounds, when, as here, the statute seeks to criminalize the company's products through impermissibly vague (and consequently) unconstitutional language?

2. Is AB 286 void for vagueness under the Due Process Clause of the Nevada Constitution when it fails to provide a person of ordinary intelligence fair

notice of what is prohibited and is so standardless that it authorizes and encourages seriously discriminatory enforcement?

STATEMENT OF THE CASE

Polymer80 began this lawsuit in the Third Judicial District Court on June 22, 2021, by way of a *Verified Complaint*, seeking declaratory and injunctive relief. *See* APP 00001-15. Polymer80 asked the District Court to declare that Sections 3, 3.5, and 6.9 of AB 286 are void for vagueness in violation of the Nevada Constitution's Due Process Clause and enjoin their enforcement. *See id.* Three days after this lawsuit was filed, Polymer80 sought a preliminary injunction, asking the District Court to preliminarily enjoin enforcement of Sections 3, 3.5, and 6.9 of AB 286 until final adjudication of Polymer80's claims.

Defendants-Appellants Stephen Sisolak, Governor of Nevada, Aaron Ford, Attorney General of Nevada, George Togliatti, Director of the Nevada Department of Public Safety, and Mindy McKay, Administrator of the Records, Communications, and Compliance Division of the Nevada Department of Public Safety ("Appellants"), filed their opposition to Polymer80's preliminary injunction motion on July 6, 2021. Polymer80's motion for a preliminary injunction was then fully briefed and heard before the District Court on July 14, 2021. *See* APP at 000031. The District Court issued its *Order Granting Preliminary Injunction* on July 16, 2021. *See* APP at 000106. The District Court found:

> [A]t this juncture, that AB 286 fails to provide a person of ordinary intelligence fair notice of what AB 286 criminalizes and encourages discriminatory, criminal enforcement because the definition of 'Unfinished Frame or Receiver' in Section 6.9 of AB 286 is inherently vague due to the use of undefined terms, such as 'blank', 'casting', and 'machined body', and amorphous words and phrases – that are similarly not defined – such as 'additional machining' and 'machined to the point at which most of the major machining operations have been completed.'[2]

APP at 000108. The District Court preliminarily enjoined the enforcement of Section 3.5, which had taken effect, but took no action with respect to Section 3 because that provision would not take effect until January 1, 2022. APP at 000110.

The District Court issued its *Case Management and Trial Scheduling Order* on July 15, 2021, setting this matter for a bench trial on November 30, 2021. *See* APP at 001065. After discovery was completed, Appellants and Polymer80 separately filed motions for summary judgment on November 8, 2021. *See id.* The parties then stipulated that they would file their respective oppositions on November 18, 2021, and forego reply briefs, with a hearing on the summary judgment motions to be held on November 23, 2021. *See id.* The parties filed their respective

[2] Appellants filed an appeal from the District Court's order granting Polymer80 a preliminary injunction and then sought a stay of the District Court proceedings pending that appeal. The District Court denied Appellants' request for a stay, and this case accordingly proceeded to a final judgment in the District Court. *See* APP at 001065. Consequently, Appellants' appeal from the District Court's order granting Polymer80's preliminary injunction was rendered moot and voluntarily dismissed.

oppositions on November 18, 2021, as agreed, and the District Court held a hearing on the parties' summary judgment motions on November 18, 2021, as scheduled. *See id.* The District Court thereafter issued its *Findings of Fact, Conclusions of Law, ad Order Granting Summary Judgment in Favor of Plaintiff, Polymer80, Inc.* on December 10, 2021. APP at 001063. In doing so, the District Court correctly declared that "Section 3 and Section 3.5 [of] AB 286 are unconstitutionally vague and violate the Due Process Clause of the Nevada State Constitution" and permanently enjoined Appellants "from enforcing Section 3 and Section 3.5 of AB 286." *Id.* at 001079. This appeal followed. The District Court's decision should be affirmed.

STATEMENT OF FACTS

A. Polymer80

Polymer80 is headquartered in Dayton, Nevada and is a leading manufacturer of gun-related products, components, and aftermarket accessories. APP at 00009. Polymer80 is in the business of manufacturing and distributing innovative products, many of which are not – and are not required to be – serialized under federal law because they are not firearms. *See id.* A core principle of Polymer80's business is the empowerment of its customers to exercise their inalienable right to bear arms and to engage lawfully with the company's products. *See id.* Indeed, a material part of Polymer80's business is the sale of

components "that provide ways for [their] customer[s] to participate in the build process, while expressing their right to bear arms." *Id.*

Owing to Polymer80's prominent position in the marketplace, it has become the target of an onslaught of politically expedient attacks. *See id.* AB 286 is an example of such an attack. *See id.* It is transparently directed at Polymer80 and its products, given that Nevada legislators and officials have made clear that the new enactment is directed to outlawing Polymer80's business. *See id.*; *see also* APP at 000616 (statement of AB 286's sponsor).

Examples of such targeting abound. For one, in discussing AB 286 and the purported reasons for its passage, Nevada Assemblywoman and co-sponsor of the legislation, Ms. Sandra Jauregui, stated that: "In 2020, federal ATF agents raided a Nevada-based company, Polymer80, one of the nation's largest manufacturers of ghost guns. Polymer80 was illegally manufacturing and distributing firearms, failing to pay taxes, shipping guns across state lines and not conducting background checks." APP at 00009. For another, the Nevada Senate Committee on Judiciary at a hearing made several comments about Polymer80's products in connection with AB 286, including that "[s]adly, Nevada is home to one of the largest dealers of ghost guns in the U.S. – Polymer80". APP at 00009. While these allegations are demonstrably false and/or misleading, they illustrate that AB 286's drafters designed it – as its enforcers will undoubtedly apply it – with

Polymer80's products in mind. *See id.* at 00009-10. Yet, which of Polymer80's products, if any, are prohibited and subject to AB 286's criminal sanctions remains unknowable and unknown owing to the statute's unintelligible and unconstitutionally vague text. As a consequence, Assemblyman Jim Wheeler, at the March 17, 2021 meeting of the Assembly Judiciary Committee, recognized that AB 286, if permitted to stand, would "drive a company in my district [Polymer80] out of business." APP 00388.

One of Polymer80's founders and its current Chief Executive Officer – Mr. Loran Kelley – confirmed to the District Court the observations Assemblyman Wheeler made in the Legislature. *See* APP at 000351-353. Specifically, he stated that the harm Polymer80 would endure if AB 286 was enforced would be real and irreparable. *See id.* at 000352-53. And, according to Mr. Kelley, the adoption of AB 286's vague and indecipherable terms injured Polymer80's business because it was impossible for Polymer80 and other industry participants, including consumers, to even attempt to conform their conduct to the new law because it is so unclear what AB 286 purports to prohibit. *See id.* If Sections 3, 3.5, and 6(9) of AB 286 were to withstand constitutional scrutiny and be enforced against Polymer80, Mr. Kelley estimated that the company's annual revenue would be cut in half or as much as three-fourths. *Id.*

Accordingly, with the enactment of AB 286 and the remarks of Nevada legislators, Polymer80 was put in an untenable position. *See* APP at 00010. On the one hand, Polymer80 could terminate a majority of its business to negate the possibility that AB 286's vague proscriptions and serious criminal sanctions would be imposed on it, with the resulting devastating impact such action would have on the company and its employees. On the other hand, Polymer80 could continue in its business – which it staunchly believes is lawful – while risking criminal prosecution and exposure to a felony conviction under AB 286's murky mandates. Elementary principles of Due Process embodied in the Nevada Constitution mandate that neither Polymer80 nor any Nevadan be subjected to such a dilemma.

B. The Statutory Framework

On June 7, 2021, Governor Stephen Sisolak signed AB 286 into law. APP 00005; APP 00018-23. AB 286 is touted as a law that "[p]rohibits certain acts relating to firearms" and declares that it is "AN ACT relating to crimes; prohibiting a person from engaging in certain acts relating to unfinished frames or receivers under certain circumstances." *Id.* at 00018. By and through AB 286, the Nevada Legislature amended NRS Chapter 202, adding the following provisions pertinent to this case.

AB 286 Section 3(1) criminalizes the possession, purchase, transportation, and receipt of an unfinished frame or receiver, and provides as follows:

> A person shall not possess, purchase, transport or receive an unfinished frame or receiver unless: (a) The person is a firearms importer or manufacturer; or (b) The unfinished frame or receiver is required by federal law to be imprinted with a serial number issued by a firearms importer or manufacturer and the unfinished frame or receiver has been imprinted with the serial number.

APP 00019.

In a similar vein, AB 286 Section 3.5(1) criminalizes the sale and transfer of an unfinished frame or receiver, and provides as follows:

> A person shall not sell, offer to sell or transfer an unfinished frame or receiver unless: (a) The person is: (1) A firearms importer or manufacturer; and (2) The recipient of the unfinished frame or receiver is a firearms importer or manufacturer; or (b) The unfinished frame or receiver is required by federal law to be imprinted with a serial number issued by an importer or manufacturer and the unfinished frame or receiver has been imprinted with the serial number.

APP 00019.

AB 286 Section 6.9, in turn, amends NRS 202 to add the term "[u]nfinished frame or receiver" to Nevada law, which term NRS 202.253 now defines as follows:

> [A] blank, a casting or a machined body that is intended to be turned into the frame or lower receiver of a firearm with additional machining and which has been formed or machined to the point at which most of the major machining operations have been completed to turn the blank,

> casting or machined body into a frame or lower receiver of a firearm even if the fire-control cavity area of the blank, casting or machined body is still completely solid and unmachined.

APP 00021.

Separately, AB 286, in Sections 4 and 5, which are not at issue in this case, criminalized the manufacturing, assembling, possession, sale, purchase, and transfer of firearms that are not imprinted with a serial number issued by a firearms importer or firearms manufacturer in accordance with federal law. *See* APP at 00019-20. Accordingly, AB 286 did not only criminalize "unfinished frames and receivers," it also criminalized certain firearms. The Legislative History of AB 286 accordingly exists in this broader context.

In drafting and passing AB 286, the Nevada legislature failed to define terms in the statute, including those terms that are most material to what constitutes an "[u]nfinished frame or receiver." *See* APP at 00019-23. Nowhere does AB 286 or other Nevada law define the terms "blank," "casting," "machined body," "frame," "receiver," or "lower receiver." *See id.* Although Section 6 of AB 286 purports to define an *unfinished* "frame" or "receiver," that enactment, as with Nevada law as a whole, does not anywhere define what the end product – a finished "frame," "receiver," or "lower receiver" – is. Nor does AB 286 define "blank," "casting," or "machined body," the threshold terms used to delineate

what an *unfinished* "frame" or "receiver" is. *Id*.

Compounding this inherent and foundational vagueness and ambiguity, Section 6.9 further conceives an amorphous test for determining when an entirely undefined "blank," "casting," or "machined body" has reached a sufficient stage of completion to be deemed, ironically, an "[u]nfinished frame or receiver". That test is that the object "has been formed or machined to the point at which most of the major machining operations have been completed." APP 00021. Neither AB 286 nor Nevada law more generally provides any standards or guidelines for assessing when "most" of the "major" machining operations are completed, nor even what such "machining operations" are. *See id*.

Crucially, the Nevada Legislature was on notice of the grave ambiguities that permeate the text of AB 286 ***before*** the legislation was adopted. *See* APP 000682. During hearings on AB 286, a former Las Vegas Metro Police Sergeant submitted written comments to the Legislature in opposition to AB 286. *See id*. at 000682-83. The former law enforcement official said "[t]he definition provided in the proposed legislation at Sec. 6, part 9, of what would constitute an unfinished receiver is ***vague***." *Id.* at 000682 (emphasis added). Further, he opined on the vague machining test, asking "How much additional machining would be required to render the item an unlawful unfinished frame or receiver?" *Id.* The legislative record is devoid of any response to these statements, and the definition of

"unfinished frame or receiver" was not changed to address its vagueness. Accordingly, the legislative history reveals that the unconstitutional ambiguities permeating AB 286 were identified during the legislative process but never addressed through legislative action or any other clarification.

The entire legislative history of AB 286, in fact, contains nothing that speaks to, let alone clarifies, the vagueness that permeates the statute's text. *See* APP 000354-759. The legislative history fails to address in any manner the definition of "unfinished frame or receiver" or the undefined and amorphous concepts of "blank," "casting," "machined body," and/or "additional machining" found in AB 286. Similarly, the Legislative History reveals no discussion of AB 286's machining test, whereby a "blank," "casting," or "machined body" purportedly becomes an unfinished frame or receiver. Thus, the Legislative History, far from illuminating any of these concepts and/or tests, underscores that the Nevada Legislature failed to even acknowledge or consider the exceptional vagueness that permeates AB 286.

Nevertheless, AB 286 imposes serious criminal penalties for violations. A first offense is a gross misdemeanor, punishable by imprisonment in jail for up to 364 days, a fine up to $2,000, or both. *See* APP at 00019; *see also* NRS 193.140 (penalties for gross misdemeanor). Second and subsequent violations are "Category D" felonies, punishable by imprisonment for at least one year and up to four years,

as well as a fine up to $5,000, and, of course, all of the collateral consequences that stem from a felony conviction. *See* APP at 00019; *see also* NRS 193.130 (default penalty for Category D felony). And any second or subsequent violation would also trigger a lifetime ban of an individual's right to keep and bear arms in the United States under extant federal law. *See* APP 00008 (citing 18 U.S.C. § 922(g)(1)).

C. Nobody Knows What AB 286 Criminalizes.

Just as the Legislative History of AB 286 sheds no light on the statute's meaning, the factual record developed during discovery in the District Court (and submitted on summary judgment) provides no answers on the meaning of AB 286. To the contrary, the evidentiary record reveals that not even the parties to this action understand AB 286. This is true despite the fact that the District Court allowed the parties to seek discovery and identify expert witnesses before this case reached a final adjudication on the merits.

Appellant Mindy McKay, who has been employed by the Nevada Department of Public Safety for over twenty years and serves as its CJIS Systems Office, testified that she had some familiarity with firearms and had fired handguns on a number of occasions. *See* APP at 000271, 273-279. Despite that professional and personal experience, she unequivocally testified that she had no understanding of the meaning of AB 286's undefined terms. *See* APP at 000279-281. Additionally, she could not explain what an unfinished frame or receiver is, including in the context of Section

6.9's amorphous machining test. *See id.* Notwithstanding this testimony, Ms. McKay acknowledged the importance of clarity in criminal laws, so the public can be fully informed of the conduct sought to be criminalized. *See id.* at 000282.

Similarly, Appellant George Togliatti, the present and former (2004 to 2007) Director of the Nevada Department of Public Safety, and former FBI agent with some five decades of experience and training in firearms, could not shed any light on the meaning or mechanics of AB 286. *See* APP 000285-297. Indeed, despite Director Togliatti's expertise and years of experience and training, he was unable to provide workable definitions or explanations of the collection of undefined terms and tests set forth in AB 286. *See id.* at 00294-296. However, he, too, acknowledged the importance of citizens being able to clearly understand a criminal statute in order to know what it prohibits. *See id.* at 000297.

Appellants offered the Chief of the Training Division of the Nevada Department of Public Safety – Mr. Scott Stuenkel – as a Rule 30(b)(6) witness. *See* APP at 000300, 317. His testimony corroborated the unassailable conclusion that AB 286 is indecipherable. Mr. Stuenkel, with his years of military and law enforcement training and experience in the Marine Corps and the Nevada Highway Patrol, had no prior understanding of the terms in AB 286, *see* APP at 000317, and contacted the Federal Bureau of Alcohol, Tobacco, and Firearms before his deposition to develop his understanding AB 286. *See id.* at 000310, 311-314, 325-

328. And even then, the ATF was unable to shed light on the meanings of the terms AB 286 employs. *See* APP at 000310-311, 000325-328. But once more, Mr. Stuenkel reiterated the importance of a criminal statute providing clear notice of its strictures and penalties. *See* id. at 000318. And on this point, Mr. Stuenkel could not explain how a Nevadan of ordinary intelligence would be capable of understanding AB 286.

Polymer80's designated witness, Executive Vice President Daniel Lee McCalmon, testified that neither he nor Polymer80 understands the terms "blank," "casting," or "machined body" as used in AB 286. *See* APP at 000331, 333, and 334. Furthermore, Mr. McCalmon explained in his sworn declaration to the District Court that he and Polymer80 have no understanding of the meaning of "unfinished frame or receiver," as those ambiguous words are used in Section 6(9) of AB 286. *See* APP at 000337-38. Moreover, Mr. McCalmon further declared that the phrases "is intended to be turned into the frame or lower receiver of a firearm with additional machining," "which has been formed or machined to the point at which most of the major machining operations have been completed, and "to turn the blank, casting or machined body into a frame or lower receiver of a firearm even if the fire-control cavity area of the blank, casting or machined body is still completely solid and unmachined," which attempt to illuminate what an "unfinished frame or receiver" is, are indecipherable from his own and Polymer80's perspective. APP at 000338.

This is particularly true, where there is no way to know when "most" of the "major machining operations have been completed."

SUMMARY OF ARGUMENT

The intent of AB 286, as Appellants acknowledge, is to drive Polymer80 out of business or at least out of Nevada. Despite this stated legislative intent, Appellants see fit to claim that the specific target of AB 286 – Polymer80 itself – has no standing to mount a facial challenge to the constitutionality of this new law. That claim is nonsensical. If the identified target of unconstitutional legislation has no standing to challenge its validity, no other citizen, in Nevada or elsewhere, would because standing is rooted in whether a plaintiff has a sufficient interest in the litigation to prosecute its case vigorously and effectively. Polymer80 easily satisfies this standard as AB 286's identified target. Polymer80's standing cannot, therefore, be seriously questioned.

Furthermore, just as the stated intent of AB 286 proves that Polymer80 has standing to challenge its constitutional validity, it also proves that AB 286 is unconstitutional on its face because it fails the void-for-vagueness test under Nevada's Due Process Clause. The Nevada Legislature, with the intent of driving Polymer80 out of business in Nevada, knowingly and intentionally adopted an impermissibly vague criminal statute to achieve its goal, so that, without the courts' involvement, Polymer80, while believing its business was lawful under AB 286, was

left, untenably, to either close its doors or guess whether its business conformed, did not conform, or could conform to the new law's nebulous strictures under the threat of arbitrary and discriminatory criminal prosecution. Such legislative action in the criminal realm, as is the case here, violates every fundamental tenant of due process. In this light, the District Court correctly ruled in favor of Polymer80 and committed no error, and this Court should hold, as the District Court did, that Sections 3, 3.5, and 6.9 of AB 286 are unconstitutionally vague.

Polymer80, after identifying the applicable standards of review immediately below, will first address the issue of standing and why the District Court correctly found that Polymer has standing to challenge AB 286. Polymer80 will then demonstrate why the District Court was correct when it found that AB 286 is unconstitutionally vague. In doing so, Polymer80 will first address the appropriate legal standards that exist in determining when a criminal statute is void-for-vagueness and then show that AB 286 fails under both because it (1) fails to provide adequate notice of what it criminalizes, and (2) lends itself to arbitrary and discriminatory enforcement. Polymer80 then shows later that neither legislative intent and history, Polymer80's purported understanding of AB 286, federal firearm laws, nor any element of *scienter* save AB 286 from its constitutional defects. In concluding its argument, Polymer80 shows why the District Court did not err in

raising unanswered questions (or hypotheticals) in assessing the constitutionality of AB 286.

ARGUMENT

A. Standards of Review.

Standing is a question of law this Court reviews *de novo*. *See, e.g., Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

The constitutionality of a statute is a question of law this Court reviews *de novo*. *See, e.g., Cornella v. Churchill County*, 132 Nev. 587, 591, 377 P.3d 97, 101 (2016).

This Court reviews a district court's decision to grant summary judgment and its conclusions of law *de novo*. *See, e.g., Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005); *Pressler v. City of Reno*, 118 Nev. 506, 509, 50 P.3d 1096, 1098 (2002).

B. Polymer80 Has Standing to Challenge AB 286.

The District Court found that Polymer80 "has standing to mount a facial vagueness challenge to the constitutionality of AB 286" because "[l]ike the Plaintiffs in *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 508–09 (2009), Polymer80 could be subject to criminal prosecution stemming from its ongoing conduct." APP 001092. The District Court did not err on this point, and its finding that Polymer80 has standing should be affirmed.

"'The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation. The primary purpose of this standing inquiry is to ensure the litigant will vigorously and effectively present his or her case against an adverse party.'" *Morency v. State Dep't of Educ.*, 137 Nev. Adv. Rep. 63, 496 P.3d 584, 588 (2021) (quoting *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016)). A plaintiff accordingly has standing to challenge the constitutionality of a statute if, as here, the plaintiff will suffer injury that can be fairly traced to the statute and the injury can be redressed by invalidating the statute. *See id.* (citing *Elley v. Stephens*, 104 Nev. 413, 416, 760 P.2d 768, 770 (1988)).

Polymer80 has standing because AB 286 targeted its business but did so in an unconstitutional manner. Appellants acknowledge this point because they maintain "[t]he plain language of AB 286 applies to Polymer80's products." Appellants' Opening Brief at p. 14. Polymer80 was accordingly faced with a Hobson's Choice in the face of AB 286 – continue its business under the threat of criminal prosecution or shut down its business altogether – knowing not what AB 286 actually criminalized. APP 000351-53. Thus, it is beyond dispute that Polymer80 would suffer injury in the face of AB 286 directly attributable to that statute and that injury is redressed by invalidating the statute. *Id.* The District Court did not, therefore, err when it found that Polymer80 has standing to challenge AB 286 on constitutional grounds.

Tellingly, Appellants do not argue that Polymer80 has no interest in this lawsuit or that it will suffer no injury if AB 286 stands. Instead, they claim that AB 286 does target Polymer80 but Polymer80 lacks standing because "no plaintiff 'who has engaged in conduct that is clearly proscribed [may] complain of the vagueness of the law as applied to the conduct of others.'" Appellants' Opening Brief at p. 13 (quoting *Sheriff of Washoe County v. Martin*, 99 Nev. 336, 662 P.2d 634 (1983)). In support of this argument, Appellants cite to and quote from *Sheriff of Washoe County v. Martin*, 99 Nev. 336, 662 P.2d 634 (1983). That case, however, is inapposite and does not stand for the proposition for which Appellants cite it.

Martin involved a *post-enforcement* challenge – not a pre-enforcement challenge like this one – to a criminal statute that prohibited cheating "at any gambling game." *Martin*, 99 Nev. at 339, 662 P.2d at 636. The defendant argued the term "cheat" was unconstitutionally vague, although he was caught crimping cards at a blackjack table. *See Martin*, 99 Nev. at 338–342, 662 P.2d at 636–638. This Court found that the gambling statute was not unconstitutionally vague on its face or as applied to the defendant by its use of the term "cheat," and that the intentional act of "crimping" or bending cards at a blackjack table was, unsurprisingly, cheating in violation of the statute. It was in this context that this Court said "[a] challenger who has engaged in conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others."

Id. at 340, 637. This statement accordingly sheds no light on the issue of standing in this case. In fact, this Court did not address standing in *Martin.*

Moreover, in contrast to the term "cheat" and the defendant's conduct in *Martin*, which "did alter a crucial characteristic of the game", the undefined terms and machining test set forth in AB 286 ***are*** impermissibly vague on their face, such that conduct cannot be deemed "clearly proscribed" thereunder, in contrast to the conduct and cheating statute in *Martin*. Polymer80 and all Nevadans are left to surmise what AB 286 purports to proscribe such that no conduct can be clearly proscribed. And the mere fact, as Appellants maintain, that AB 286 targets Polymer80 does not alter this conclusion or shed any light on what AB 286 actually does or does not criminalize. It does, however, acknowledge that Polymer80 does have standing to lodge a facial challenge to AB 286, and *Martin* does not instruct otherwise.

Appellants also quote *Martin* without citing to the prior sentence in that opinion that provides additional context for the language they do quote; namely, this Court's preceding statement in *Martin* that "[i]f an enactment does not implicate constitutionally protected conduct, the court may strike it down as vague on its face only if it is impermissibly vague in all its applications." *Martin*, 99 Nev. at 340, 662 P.2d at 637. This omission by Appellants is material because they fail to acknowledge that this Court, in a subsequent decision after *Martin – Flamingo*

Paradise Gaming, 125 Nev. at 502, 217 P.3d at 546 – held that a ***criminal statute***, whether or not addressing "constitutionally protected conduct", must be deemed facially invalid where "vagueness so permeates the text that the statute cannot meet [the two-part vagueness test] ***in most applications***." *See Flamingo*, 125 Nev. at 512–13, 217 P.3d at 553–54 (emphasis added). And this Court further held in *Flamingo* that it is only "[i]n making this [latter] showing [in the ***civil*** context], [that] '[a] complainant who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Id.*, 125 Nev. at 512, 217 P.3d at 553 (citing *Hoffman*, 455 U.S. at 495, 102 S. Ct. at 1191). Accordingly, the "clearly proscribed" admonition Appellants lift from *Martin* does not apply in a facial challenge to a ***criminal statute*** like this one. Appellants' attempt to challenge Polymer80's standing based upon *Martin* should be rejected because *Martin* is inapposite and *Flamingo* controls.

Appellants further argue that Polymer80 lacks a cause of action under the due process clause of the Nevada Constitution, negating its standing. *See* Appellants' Opening Brief at pp. 15–16. In support of this newfound proposition, Appellants cite *State Farm Auto Insurance Company v. Jafbros, Inc.*, 109 Nev. 926, 860 P.2d 176 (1993), and *Doe v. Bryan*, 102 Nev. 523, 728 P.2d 443 (1986). Neither case, however, is applicable, and neither decision supports the point for which Appellants cite them. *Doe* did not involve a vagueness challenge. It

involved a declaratory relief action where the plaintiffs sought to challenge a criminal statue on substantive due process grounds where the threat of prosecution was only imaginary or speculative. *Doe*, 102 Nev. at 524-26; 728 P.2d at 444-45. This Court accordingly held plaintiffs lacked standing because there was no case or controversy for the Court to decide. Critically, however, the Court did instruct that standing does exist to challenge a criminal statute on constitutional grounds where the threat of criminal prosecution is real, rather than imaginary or speculative. *See id.* That is precisely the case here because, as Appellants acknowledge, AB 286 targeted Polymer80. Thus, if a threat of prosecution is necessary in this case, which it is not, Polymer80 faced an actual threat of criminal prosecution – and Appellants do not (and cannot) claim otherwise – establishing its standing to bring this constitutional challenge to AB 286. *See Doe*, 102 Nev. at 525, 728 P.2d at 444 (a plaintiff may seek declaratory relief, declaring a criminal statute unconstitutional, when there is immediate danger of injury as a result of enforcement).

This Court's decision in *State Farm* does not alter this conclusion because it is also inapposite. In fact, *State* Farm, like *Doe*, did not involve a facial due process challenge. In that case, the district court issued a permanent injunction prematurely against an insurance company before any finding of liability had been made and before a trial occurred, notwithstanding the fact that the plaintiff dismissed its claims for damages. *See State Farm*, 109 Nev. at 928, 860 P.2d at 178. Thus, there

was no finding that the insurance company's conduct was tortious, and there was no claim for relief that supported a permanent injunction. In this context, this Court said, "an injunction will not issue to restrain an act which does not give rise to a cause of action." *Id.* at 928, 178. Appellants' reliance on *State Farm* is accordingly misplaced, as they quote that decision out of context and for an inapposite point.

At bottom, this Court has held that a declaratory judgment action pursuant to NRS 30.040 is a proper legal claim to facially challenge a statute on constitutional grounds. *See, e.g., Falcke v. Douglas County*, 116 Nev. 583, 586, 3 P.3d 661, 663 (2000). Polymer80 brought just such a claim, and it has standing to bring this claim because (1) Polymer80 faced a real, imminent threat of criminal prosecution, and (2) it has a legitimate interest in the outcome of this case. This Court should accordingly affirm the District Court's finding that Polymer80 has standing to challenge AB 286 on constitutional grounds and reject Appellants' arguments to the contrary.

C. AB 286 Is Unconstitutionally Vague.

The Due Process Clause of the Nevada Constitution states that "No person shall be deprived of life, liberty, or property, without due process of law." Nev. Const., Art. 1, Sec. 8(2). Rooted in the constitutional guarantee of due process is the void-for-vagueness doctrine, which holds a statute cannot withstand constitutional scrutiny when it is impermissibly vague. *See, e.g., Flamingo Paradise Gaming,* 125

Nev. at 502, 217 P.3d at 546; *see also Scott v. First Jud. Dist. Ct. of Nev.*, 131 Nev. 1015, 1021, 363 P.3d 1159, 1164 (2015) ("The void-for-vagueness doctrine is predicated upon a statute's repugnancy to the Due Process Clause of the Fourteenth Amendment to the United States Constitution").

In determining whether a criminal statute like AB 286 is impermissibly vague in violation of the Due Process Clause, this Court has firmly established a two-part test. *See Flamingo*, 125 Nev. at 512–13, 217 P.3d at 553–54. "A criminal statute can be invalidated for vagueness (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Scott*, 131 Nev. at 1021, 363 P.3d at 1164. These two tests, as Appellants concede, "are independent of one another and failing either test renders the law unconstitutionally vague." Appellants' Opening Brief at p. 17 (citing *State v. Castaneda*, 126 Nev. 478, 482, 245 P.3d 550, 553 (2010) ("Vagueness may invalidate a criminal law for either of two independent reasons") (quotations and citations omitted)).

Additionally, this Court has held that, while the dual "fair notice" and "discriminatory enforcement" prongs of the void-for-vagueness test apply to both criminal and civil statutes, criminal statutes are held to a more exacting standard and must be adjudged "facially vague when vagueness permeates the text of the statute." *Scott*, 131 Nev. at 1021, 363 P.3d at 1164. Under this higher standard appliable to

AB 286, the question is whether vagueness so permeates the text of the statute that it cannot meet the "fair notice" or "discriminatory enforcement" requirements in most applications. *See Flamingo Paradise Gaming*, 125 Nev. at 512–13, 217 P.3d 554–55 (2009). When examined under these standards, AB 286, as the District Court correctly found, falls far short of satisfying both the "fair notice" and "discriminatory enforcement" tests. This Court should accordingly affirm the District Court's decision granting summary judgment in favor of Polymer80.

Appellants argue that a void-for-vagueness analysis in this matter "is cabined by an important limiting principle that keeps faith with the rule of constitutional avoidance. Courts reviewing a vagueness challenge should first examine the plaintiff's conduct prior to launching into 'hypothetical applications of the law.'" Appellants' Opening Brief at p. 17 (quoting *Ransdell v. Clark County.*, 124 Nev. 847, 192 P.3d 756 (2008)). Appellants are wrong in this regard. *Ransdell* involved a civil action to recover money damages and principles of sovereign immunity. In that civil context, this Court stated: "In order to succeed on a facial challenge to a law on vagueness grounds, the plaintiff must demonstrate that the law is impermissibly vague ***in all of its applications***. Under that analytical framework, a reviewing court should examine the plaintiff's conduct before analyzing other hypothetical applications of the law because a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to

the conduct of others." *Ransdell*, 124 Nev. at 859 (quotations and citations omitted, emphasis added). That is not the standard here.

Here, in contrast to *Ransdell*, the issue is not whether AB 286 – a criminal statute – is impermissibly vague "***in all its applications***," but, rather, whether vagueness so permeates the statute that it cannot meet the "fair notice" or "discriminatory enforcement" requirements ***in most applications***. *See Flamingo Paradise Gaming*, 125 Nev. at 512–13, 217 P.3d 554–55 (2009). To engage in this inquiry, *i.e.*, whether a criminal statute passes constitutional muster ***in most applications***, which this Court must, the analysis cannot begin or end by examining the plaintiff's conduct because ***most applications***, not a singular application, is the focus of the inquiry. Appellants accordingly misstate the law when they say constitutional review of AB 286 begins with Polymer80's conduct because even Appellants later acknowledge in their opening brief that "[a] statute's vagueness permeates the text where it would be void ***in most circumstances.***" Appellants' Opening Brief at p. 23 (emphasis added).

1. *AB 286 Fails to Provide Fair Notice of What it Criminalizes.*

Turning to the first prong of this Court's void-for-vagueness test, AB 286 fails because it does not provide a person of ordinary intelligence fair notice of what is criminalized. To be sure, AB 286 says that it is unlawful to, among other things, possess, purchase, transport, sell, transfer, or receive an unfinished frame or receiver,

but the statute fails to provide adequate notice of what an unfinished frame or receiver actually is. This is true, despite AB 286's definition of unfinished frame or receiver, because that definition uses a litany of undefined terms (*i.e.,* blank, casting, and machined body) and further employs an indecipherable machining test that is to be applied to those undefined terms (*i.e.,* the point where most of the major machining operations have been completed to turn the blank, casting or machined body into a frame or lower receiver of a firearm). Accordingly, the text of AB 286 does not survive the first prong of this Court's void-for-vagueness test.

This Court has, in fact, repeatedly held that when a statute fails to define material terms, as AB 286 does here, the failure invalidates the statute on vagueness grounds. *See, e.g., Flamingo*, 125 Nev. at 514, 217 P.3d at 554 (Nevada Clean Indoor Air Act void for vagueness because the Act failed to define terms that had no plain meaning, including "smoking paraphernalia" and "large room"); *Gallegos v. State*, 123 Nev. 289, 294, 163 P.3d 456, 459 (2007) (statute failed first prong of void-for-vagueness test because it did not define the term "fugitive from justice"); *Cunningham v. State*, 109 Nev. 569, 570–71, 855 P.2d 125, 126 (1993) (statute criminalizing telephone solicitation unconstitutionally vague because it failed to adequately define "seller," "salesman," and "telephone solicitation"); *Eaves v. Board of Clark County Comm'rs*, 96 Nev. 921, 924, 620 P.2d 1248, 1249–50 (1980)

(ordinance criminalizing escort services unconstitutionally vague where ordinance failed to adequately define "direct or indirect social companions" or "escorts").

If statutes failing to adequately define terms such as "smoking paraphernalia," "fugitive from justice," "salesman," "telephone solicitation," and "escorts," which have at least some common meanings and understandings, fail to pass constitutional muster as they did in the aforementioned cases, AB 286's palpable and indisputable absence of definitions for "blank," "casting," "machined body," and "additional machining" compels the same fate for AB 286.

This Court's decision in *Gallegos* is on all fours and underscores this conclusion. In that case, this Court determined that the Nevada Legislature's failure to define the term "fugitive from justice" in a criminal statute, which was modeled after a federal statute, rendered the statute void for vagueness. *Gallegos*, 123 Nev. at 294, 163 P.3d at 459. This Court noted that "[u]nlike Congress, the Nevada Legislature had not defined 'fugitive from justice.' By failing to adopt the federal definition of 'fugitive from justice' or include any other definition of that phrase … the Legislature failed to provide the public with statutory notice what that term means." *Id.* at 294, 459. In reaching this conclusion, this Court emphasized that the first prong of the void-for-vagueness test guarantees that citizens will receive fair notice of the conduct that is prohibited and offer them an opportunity to conform their conduct to the law. *See id.* at 293, 459. AB 286 does neither, and if a statute's

failure to define the term "fugitive from justice" renders that statue impermissibly vague, AB 286 must meet the same demise. Indeed, "fugitive from justice" is far more knowable than an "unfinished frame or receiver" that amounts to:

> [A] blank, a casting or a machined body that is intended to be turned into the frame or lower receiver of a firearm with additional machining and which has been formed or machined to the point at which most of the major machining operations have been completed to turn the blank, casting or machined body into a frame or lower receiver of a firearm even if the fire-control cavity area of the blank, casting or machined body is still completely solid and unmachined.

This Court also stressed in *Gallegos* that the term "fugitive from justice" had no well-established ordinary meaning nor an established meaning under Nevada case law. The same defect exists in these premises because there are no well-established meanings of the terms AB 286 employs that can be found anywhere in Nevada law. Indeed, Appellants do not dispute this fact, and they tellingly fail to identify what a "blank," "casting," or "machined body" actually are. *See* Appellants' Opening Brief at pp. 24–27. This omission alone demonstrates that AB 286 is unconstitutionally vague because fundamental components of the statute – a "blank," "casting," or "machined body" that is intended to become a framer or receiver – are not defined or knowable.

AB 286 fares no better as to its machining test for defining when the undefined and unknown "blank," "casting," or "machined body" becomes an "unfinished frame or receiver". AB 286 does not define or explain what machining operation it is

referring to nor does it define or explain what the "most" or "major" machining operations are. The absence of such definitions and/or explanations further render AB 286 unconstitutionally vague.

Appellants incomprehensibly say, based on dictionary definitions, that "most of the major machining operations have been completed" when the "greatest quantity" ***or*** "majority" of the "important, serious, or significant" machining operations are completed." This explanation, however, only leads to more confusion and unconstitutional ambiguity. Does AB 286 criminalize a blank when a majority of the significant machining has occurred, or does it criminalize a blank when the greatest quantity of important machining occurs? No answer to this question can be found in Appellants' brief or in the text of AB 286. In fact, Appellants, through their dictionary analysis, suggest that AB 286 may criminalize a blank, casting, or machined body in both circumstances, further demonstrating AB 286 does not provide adequate notice of what it proscribes. Thus, Appellants' suggestion that giving the words of AB 286 their ordinary meanings cures the ambiguities that permeate the statute rings hollow and is self-defeating.

The first prong of the void-for-vagueness test asks whether the law "offers citizens the opportunity to conform their own conduct to that that law." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006) ("Without adequate notice, citizens would be frustrated in their attempts to conform their

conduct to the contours of the statute."). Yet, Appellants offer nothing to explain how Nevadans (or Polymer80) can conform their conduct to comply with AB 286. Far from demonstrating that AB 286 is thus constitutional, it demonstrates that AB 286 is so intentionally amorphous, with ambiguities permeating its text, that neither Polymer80 nor an ordinary Nevada citizen can conform its conduct to AB 286. This further shows that AB 286 is impermissibly vague.

Rather than explain to this Court what AB 286 actually means, Appellants argue that AB 286 is constitutional because its intent and legislative history cure any ambiguities; Polymer80 purportedly knows what AB 286 means (even if no one else does); and as a purported gap filler to federal law, the statute is not vague. These arguments are misplaced and, singularly and collectively, fail to save AB 286 from its unconstitutional fate. Polymer80 addresses them in turn below.

a. Legislative Intent and History Do Not Save AB 286.

Turning first to the legislative intent and history underlying AB 286, neither provides any clarity on what Sections 3, 3.5, and 6.9 of AB 286 mean. To be sure, certain Nevada Legislators, including AB 286's sponsor, targeted Polymer80. But that intent alone does not and cannot tell this Court, Polymer80, or anyone else what the undefined and amorphous terms in AB 286 actually criminalize. This is confirmed by the legislative history of AB 286 that provides no clarity or information whatsoever on what an "unfinished framer or receiver" means.

Appellants cite statements made during a Senate committee hearing on AB 286, but those statements reveal nothing that is germane to the issue before this Court. *See* Appellants' Opening Brief at p. 25. During that committee hearing, the sponsor of AB 286 made the following comment:

> "Assembly Bill 286 deals with the rising epidemic of unmarked, untraceable guns also known as ghost guns. Ghost guns are growing in popularity because they circumvent background checks and are untraceable. ***This type of gun is sold online as kits that are then easily assembled at home.***

JA at 00616 (emphasis added). The bill's sponsor did not, therefore, speak to anything related to an "unfinished frame or receiver" but rather focused on kits from which an entire firearm could be built. A supporter of AB 286 (which Appellants reference in their opening brief) then said "[t]he Polymer80 kit that could be purchased before the ATF raid was called a 'Buy, Build, Shoot' kit. ***Every piece needed to put the firearm together was in this kit.***" JA at 00618. This comment similarly failed to speak to the possession or transfer of an "unfinished frame or receiver" or what that term means within AB 286. Instead, the statements from both the bill's sponsor and supporter referenced kits that contained all of the parts needed to build a firearm. To the extent these statements can be tied to any portion of AB 286, they seemingly address Sections 4 and 5 of AB 286, which are not at issue here and criminalize the manufacturing, assembly, and sale of a firearm that is not imprinted with a serial number under federal law. The statements offer no guidance

or information on what a "blank," "casting," or "machined body" mean, and they offer no explanation as to what "most" of the "major" machining operations are. Thus, when Appellants cite the legislative history of AB 286, they cite legislative history that is not related to the statutory text at issue in this case.

To the extent the legislative history of AB 286 does reference the term "unfinished frame or receiver," it was a statement in opposition to the bill that noted "[t]he definition provided in the proposed legislation at Sec. 6, part 9, of what would constitute an unfinished receiver is ***vague***." APP 000682 (emphasis added). The opposition statement elsewhere asked, "How much additional machining would be required to render the item an unlawful unfinished frame or receiver?" *Id.* The Nevada Legislature was accordingly on notice of the vagueness that impermissibly permeates AB 286 ***before*** the legislation was passed. Yet, it did nothing to clarify or address those ambiguities, because the bill's sponsor and supporters could not. Thus, the Legislative History of AB 286 does not cure any constitutional defects in the legislation; it confirms that AB 286 is unconstitutionally vague.

b. Polymer80's Purported Understanding of AB 286 Is of No Moment.

Appellants argue that Polymer80 knows what AB 286 means; therefore, the statute survives void-for-vagueness analysis. Appellants are wrong. Any alleged knowledge on Polymer80's part is utterly irrelevant, as a matter of law, because AB

286 is a criminal statute subject to a facial challenge under the heightened standard of whether "vagueness permeates the text" and so is unconstitutionally indefinite as to *the public at large*. Appellants effectively concede this point by emphasizing Polymer80's purported knowledge rather than that of an average Nevadan.

Appellants must acknowledge that the law in Nevada, as applied to criminal statutes like AB 286, only requires that "vagueness so permeate[] the text that the statute cannot meet [the void-for-vagueness] requirements in most applications; and, thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances." *Flamingo,* 125 Nev. at 513, 217 P.3d at 554. In short, any knowledge allegedly imputed to Polymer80 is and must be inconsequential in regard to this facial attack that AB 286's vagueness "permeates the text," and that the statute as a whole is unduly and unlawfully uncertain, when evaluated in most situations and from the standpoint of a Nevadan of ordinary knowledge and intelligence.

Furthermore, any use of certain of the terms at issue by Polymer80 can in no way save AB 286 from its vagueness. A party's *subjective* understanding of the same or similar terms used in a statute cannot inform or provide an *objective* definition wholly lacking in the statute itself. Put another way, neither Polymer80 nor Nevada residents can or should be put in a position of guessing whether their

subjective understandings of crucial terms comport with the statutory meanings of the undefined verbiage in this criminal statute. Neither should the law's enforcers or finders of fact. This is the nub of AB 286's Nevada Constitutional malady. Absent objective and discernable definitions, the enactment cannot give adequate notice of the conduct that is forbidden.

To avoid grappling with AB 286's inherent vagueness under controlling law, Appellants turn to the testimony of Daniel Lee McCalmon, Polymer80's Executive Vice President and Corporate Representative, in rejiggering their "knowledge" argument. However, Mr. McCalmon unequivocally testified that neither he nor Polymer80 have any understanding of the terms/tests at issue as they are used in AB 286. APP at 000337-39; APP 000331-34. There is no contrary evidence in the Record. Moreover, contrary to Appellants' mischaracterization of his testimony, Mr. McCalmon never stated that Polymer80 knows AB 286's meanings. To the contrary, he generally testified as to the use of certain terms by ATF and others in the industry under federal law, not Polymer80's use, not under Nevada law, and certainly not under AB 286. *See* APP at 000860-68. Additionally, Polymer80's subjective understanding of "unfinished frames" and "unfinished receivers" as parts "[i]ncapable of accepting additional components to be completed into a functioning firearm" does nothing in the way of defining those terms under AB 286. APP at 00864. And Mr. McCalmon never testified that Polymer80's understanding equates

to a same meaning under Nevada law. He simply asserted that Polymer80 had no reason to understand that those terms mean something different under AB 286, which is totally consistent with his testimony that Polymer80 does not know what those terms mean under AB 286. *Id*. at 000863-64. As to the term "80 percent," Mr. McCalmon additionally testified that the Company does not have an independent understanding of what that term means and explained that the term is from the federal regime and derived from ATF actions and interpretations. *Id*. at 864-66. Thus, nothing in the Record shows that Polymer80 knows what AB 286 means even if such knowledge is relevant.

c. Federal Law Does Not Address or Cure the Ambiguities in AB 286.

Appellants appear to suggest that, because AB 286 is intended to criminalize what federal law does not, AB 286 is not impermissibly vague if viewed in reference to federal law and Polymer80's dealings thereunder. Appellants are again mistaken.

Even if Polymer80's subjective understanding of certain terms is relevant (and it is not), the use thereof in the federal arena would mean nothing in the context of AB 286. Neither Polymer80's use of terms in communications with ATF in the context of federal law, nor ATF's use of those terms in the same context, can possibly equate to Polymer80 understanding their meaning within the confines of AB 286, nor explain the meaning of AB 286's inherently vague machining test.

This reality largely stems from the pervasive disconnect between the federal firearms regime and AB 286.

To be clear, Sections 3, 3.5, and 6.9 of AB 286 do not reference federal terms or definitions. This failure to reference, much less incorporate, federal terms and definitions is dispositive as to the inapplicability of federal terms to the instant inquiry. *See Gallegos v. State*, 123 Nev. 289, 163 P.3d 456 (2007). On this point, *Gallegos* again deserves a closer look. There, this Court, as discussed above, declared a statute unconstitutionally vague for failing to define the term "fugitive from justice," where (as in analogous circumstances present here) there was no common meaning of that salient term. This Court so held notwithstanding the fact that the Nevada law mirrored a federal provision containing arguably relevant definitions. Upon this background, this Court stated as follows:

> The definitions found in the statutes and in the federal cases differ significantly. Our Legislature made no effort to tie NRS 202.360(1)(b) to either of those definitions. Furthermore, the fact that the Legislature modeled NRS 202.360(1)(b) after a federal statute and excluded from its provisions the definition contained in the federal statute indicates to us that the Legislature intended another meaning – a meaning that it failed to define.

Id., 123 Nev. at 295, 163 P.3d at 460.

In this case, as Appellants state, AB 286 sought to criminalize conduct that existing federal law does not and, thus, did not incorporate federal law. So, Appellants' effort to reference terms under federal law – which terms are not

referenced or incorporated in AB 286 – should meet the same fate as the similar attempt did in *Gallegos*. Otherwise put, AB 286 tries to criminalize that which federal law allows, making it incongruous for Appellants to rely upon the use of terms in the federal realm to attempt to eliminate or obfuscate AB 286's unconstitutional vagueness. Notably, federal law does not provide any insight into what AB 286 criminalizes, even if the Court were to seek some form of clarification from federal terms and definitions, which, as described next, the Court should not do.

The legislature could have incorporated federal definitions and tests into AB 286. It did not. Because AB 286 sought to criminalize products not so treated under federal law, AB 286 could not incorporate federal definitions and tests to achieve that end. Accordingly, Appellants attempt to inject the federal regime into AB 286 to cure its infirmities is vacuous and should be rejected. Numerous statements by Nevada lawmakers and officials, and admissions by Appellants themselves, show that AB 286's intention and goal are to specifically target Polymer80 and drive it out of business. Hence, the Nevada legislature enacted a hopelessly vague statute that might well be employed to ban products designated as wholly lawful under federal law. AB 286 must be adjudged unconstitutional, without reference to federal law, for failing to provide adequate notice of the conduct it criminalizes and all but guaranteeing discriminatory. This second standard is discussed next.

2. *AB 286 Encourages Seriously Discriminatory Enforcement.*

AB 286 violates the Due Process Clause of the Nevada Constitution because, as shown above, it fails to satisfy the first prong of this Court's void-for-vagueness test. Separately, and independently, AB 286 violates Nevada's Due Process Clause because it also fails to satisfy the second prong of this Court's void-for-vagueness test; namely, AB 286 "is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Scott*, 131 Nev. at 1021, 363 P.3d at 1164. Thus, there is an additional, independent ground upon which this Court should affirm the District Court's decision in favor of Polymer80, declaring Sections 3, 3.5, and 6.9 of AB 286 impermissibly vague.

AB 286's "machining" test offers no standard or guidance to assess when "most of the major machining operations have been completed." This renders AB 286 unconstitutionally vague under a litany of cases from this Court that have repeatedly held that the lack of discernible standards or guidelines is constitutionally fatal. *See, e.g.*, *Scott*, 131 Nev. at 1022, 363 P.3d at 1164 (invalidating criminal statute that failed lacked specific standards for determining when an individual could be guilty of hindering a law enforcement officer); *Silvar*, 122 Nev. at 294–95, 129 P.3d at 686 (criminal statute prohibited loitering for the purpose of prostitution unconstitutionally vague because it provided inadequate guidelines for evaluating an individual's explanations for their conduct); *T.R. v. State,* 119 Nev. 646, 653, 80

P.3d 1276, 1281 (2003) (statute the required finding of rehabilitation unconstitutionally vague because it failed to provide standards for determining when rehabilitation existed); *State v. Richard*, 108 Nev. 626 629, 836 P.2d 623, 624 (1992) (vagrancy statute unconstitutionally vague because it lacked articulable standards and failed to provide law enforcement with proper guidelines to avoid arbitrary and discriminatory enforcement).

Before this Court now is not a loitering, vagrancy, rehabilitation, or obstruction statute that lacks guidelines and standards, although such statutes are certainly more knowable than AB 286. Before this Court is a scrambled and unworkable statute that criminalizes "unfinished framers and receivers" by employing an undefined machining test that provides zero standards or guidelines for determining when "most of the major machining operations have been completed." AB 286, in fact, does not even define what machining operations are, let alone what most or major machining operations are, or where on that vague continuum of machining operations "most" of the "major" "machine operations" are completed so as to render the object illegal. Accordingly, this Court should adjudge AB 286 impermissibly vague on its face under the second prong of this Court's void-for-vagueness test.

This Court has, in fact, emphasized that the second prong of the void-for-vagueness test is "more important [than the first prong] because absent adequate

guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to 'pursue their personal predilections." *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (quotations omitted). As written, AB 286 permits and encourages just such a repugnant, standardless sweep because it leaves open to the personal feelings and views of police officers, prosecutors, judges, and jurors as to what major machining operations are and when most of them (whatever they may be) have been completed. As this Court found in *Silvar*, such rudderless statutes cannot withstand constitutional scrutiny.

In *Silvar*, this Court held that a prostitution loitering statute was unconstitutional under the void-for-vagueness doctrine because it failed to enumerate the circumstances in which a person could be arrested, leaving it to the discretion of the enforcing officer to decide whether particular conduct provided probable cause for arrest. *See id.* at 293-94, 685. This is true although the loitering statute provided the following examples of conduct that may justify an arrest:

> It is unlawful for any person to loiter … under circumstances manifesting the purpose of … prostitution. Among the circumstances which may be considered in determining whether such purpose is manifested are that such person repeatedly beckons to, stops, attempts to stop or engages persons passing by in conversation, or repeatedly stops or attempts to stop motor vehicle operators by hailing, waving of arms or any other bodily gesture.

Id. at 292, 684. Notwithstanding the fact that the statute identified some circumstances that could be considered in making an arrest, this Court held that the

statute gave officers too much discretion. Here, far worse than the statute in *Silvar*, AB 286 enumerates no standards or circumstances whatsoever with respect to its machining test. *A fortiori*, AB 286 violates the second prong of the void-for-vagueness test and is unconstitutional.

Appellants contend that Nevadans are not at risk of arbitrary enforcement under AB 286 because "[t]he text of the statute tells the court that [the statute applies] when [a blank, casting, or machined body] is majority completed towards a firearm." Appellants' Opening Brief at p. 31. This argument misses the mark because AB 286 does not use the term majority; to the contrary, it says when "most of the major machining operations have been completed." Most and majority have different meanings, and "majority completed" is not synonymous with "major machining operations." Thus, Appellants' proffered explanation of AB 286 is again self-defeating because it demonstrates wholesale that Nevadans are at risk of arbitrary enforcement due to the vagueness that permeates the law. Law enforcement officers, prosecutors, and juries could, in the words of Appellants, find criminal liability, not when the actual words of AB 286 are followed, but simply "when [a blank, casting, or machined body] is majority completed towards a firearm." Even if that proffered phrase has a knowable meaning, that is not what AB 286 says and, therefore, Appellants demonstrate, through their own interpretive gloss, that AB 286 violates

the second prong of the void-for-vagueness test because it will subject Nevadans to discriminatory enforcement and the whims of law enforcement.

Appellants finally suggest that the District Court ran afoul of this Court's decision in *Slinkard v. State*, 106 Nev. 393, 793 P.2d 1330 (1990), when the District Court incorrectly remarked that "it cannot determine when an unfinished frame or receiver comes into existence." Appellants' Opening Brief at p. 31 (citing APP 001023–24). This suggestion on Appellants' part is erroneous.

First, the District Court's remark was not what Appellants state in their brief. The District Court actually said: "At its most basic, there is no clear standard for law enforcement to use to determine when an 'unfinished frame or receiver' comes into existence. … The most any court can glean from the definition is that it is something less than a firearm and more than a block of raw material. … Nevada has established no authority at all to determine when an 'unfinished frame or receiver' actually comes into existence." APP 001023–24. In light of the AB 286's vague text, these observations were correct and accurate.

Second, in *Slinkard*, this Court found that Nevada's DUI statute provided sufficient notice of the prohibited conduct because "a substantial amount of liquor is required to yield a blood alcohol level of 0.10 percent, and, a person who consumes a substantial amount of liquor and then drives is on notice that he may be in violation of the DUI statutes." *Slinkard*, 106 Nev. at 394, 793 P.2d at 1331. In

this context, the Court said "[t]he DUI statutes are not unconstitutional because a person cannot know which sip of liquor will bring him past the 0.10 percent limit." *Id.*

Slinkard accordingly has no bearing on whether AB 286 encourages discriminatory enforcement because *Slinkard* involved the first prong of the void-for-vagueness test, not the second. Moreover, individuals can know when they have consumed alcohol to the point where their operation of a vehicle will violate the law. But nobody can discern when on the "machining" continuum a "blank," "casting," or "machined body" (whatever those may actually be) is an "unfinished frame or receiver" because "most" of the "major" "machining operations" have been completed, given the amorphous machining test AB 286 employs. This compels the conclusion that AB 286, on its face, subjects Nevadans to arbitrary and discriminatory enforcement in violation of Nevada's Due Process Clause. AB 286 cannot, therefore, stand.

3. *Any Element of Scienter Fails to Save AB 286 from Its Ambiguities.*

Appellants argue that "any vagueness concerns are alleviated by this Court's jurisprudence that implies a scienter requirement into criminal statutes to avoid constitutional concerns." Appellants' Opening Brief at p. 29 (citing *Ford v. State*, 127 Nev. 608, 262 P.3d 1123 (2011), and *City of Las Vegas v. District Court*

(Krampe), 122 Nev. 1041, 146 P.3d 240 (2006)). This argument is unavailing for at least two reasons. First, AB 286 stands in stark contrast to the statutes this Court addressed in *Ford* and *Krampe*, so there is no implied specific-intent scienter requirement. Second, even if AB 286 imposed a scienter requirement, which it does not, it does not inoculate the legislation from being void for vagueness under the Nevada Constitution.

a. There is No Implied Specific-Intent Scienter Requirement in AB 286

"*Scienter*" means "[a] degree of knowledge that makes a person legally responsible for the consequences of his or her act of omission." Black's Law Dictionary, *Scienter* (11th ed. 2019). Section 6.9 of AB 286 speaks to an item that is "intended to be turned into the frame or lower receiver of a firearm with additional machining." The "intended to" language attempts to define and qualify what an "unfinished frame or receiver" is and in no way illuminates the state of mind of a prospective defendant possessing, selling, or transferring an unfinished frame or receiver.

In fact, Section 6.9's definition requires no knowledge on the part of a defendant but purports to criminalize an item (*i.e.*, a "blank," "casting," or "machined body") that is "intended to be turned into the frame or lower receiver of a firearm with additional machining," whether or not the *defendant* intended that the

item be turned into the frame or lower receiver of a firearm. In fact, a defendant need not engage in any machining to be criminally liable under AB 286; mere possession or transfer suffices. Thus, the phrase "intended be turned into the framer or lower receiver" requires no specific conduct, such as machining, or intent on the part of a defendant. The supposedly contrary authority upon which defendants rely is inapposite because this Court, in those cases, found an intent element by reference to similar laws, legislative history, and statutory text employing verbs. *See Ford*, 127 Nev. at 615–618, 262 P.3d at 1127-1130; *City of Las Vegas v. Dist. Court (Krampe)*, 122 Nev. at 1049–1051, 146 P.3d at 245–247. Appellants cannot and do not allude to any similar basis for their bereft *scienter* contentions.

In sum, it cannot seriously be doubted that AB 286 seeks to criminalize the possession and/or transfer of an "unfinished frame or receiver," even in a situation where an individual gifts such an "unfinished frame or receiver" to someone else, irrespective of the intent of the recipient or the giver. Sale, possession, and transfer of the prohibited item are all criminalized regardless of a defendant's intent. In other words, nothing in AB 286 or elsewhere in Nevada law requires specific intent for a prosecution under AB 286 and none can be implied in the face of AB 286's language.

b. Any Implied Scienter Does Not Salvage AB 286.

Even if AB 286 contains an element of specific intent, Section 6.9's definition fails to provide a discernible standard or guideline for determining when, in the

machining process, "most" of the "major machining operations have been completed" such that a "blank, casting, or machined body" becomes an unfinished frame or receiver and subjects a Nevadan to criminal prosecution. Motion at 9, 10. This ambiguity allows for arbitrary and discriminatory enforcement irrespective of any intent on the part of a defendant. Put another way, and contrary to Appellants' protestations, Section 6.9 "would allow the police, prosecutors, and juries to 'pursue their personal predilections.'" *Silvar*, 122 Nev. at 293, 129 P.3d at 685 (citation omitted). *See also*, *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402–03, 86 S. Ct. 518, 520-21 (1966) ("[I]t is established that a law [also] fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case."); *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 393, 46 S. Ct. 126, 128 (1926) ("The dividing line between what is lawful and unlawful cannot be left to conjecture."); *Id.* ("The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions" by the fact finder); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S. Ct. 298, 300 (1921) (when a law fails to provide an ascertainable standard of guilt "[i]t leaves open . . . the widest conceivable inquiry, the scope of which no one can . . . foreshadow or adequately guard against."). A *scienter* requirement that would, at bottom, still allow Appellants and

law enforcement officials – and they alone – to separately determine under AB 286's "machining test" where along the manufacturing continuum an object becomes criminally vulnerable, irrespective of a defendant's intent, would certainly not cure or diminish that demonstrable defect.

4. *The District Court Did Not Err In Raising Hypotheticals.*

Appellants argue that "[t]he district court's reliance on hypotheticals led it to erroneously finding vagueness in AB 286's language." Appellants' Opening Brief at pp. 27–28. It is unclear, however, what hypotheticals Appellants are referring to because they do not identify them. *See id.* Perhaps Appellants are referring to the questions the District Court pointedly set forth in its written order, questioning "When does the machining process start? When does raw material because machined and through what processes? What constitutes 'major machining operations' versus machining itself? Would the 'fire-control cavity' be considered a 'major machining operation' or is it excluded? What additional machining need to be completed?" APP at 001078. If so, these questions do not demonstrate any error by the District Court. Instead, they illuminate the impermissible vagueness that permeates AB 286, consistent with the same exercise this Court has employed in similar cases. *See, e.g., Gallegos*, 123 Nev. at 294, 163 P.3d at 461 (employing hypotheticals to declare criminal statute void for vagueness, noting "we can imagine a wide variety of other situations in which [the statute] would be susceptible to

arbitrary and discriminatory enforcement"); *Silvar*, 122 Nev. at 295, 129 P.3d at 686 (in evaluating prostitution loitering statute, court posited hypotheticals concerning cheerleaders advertising a carwash fundraiser and effusive tourists celebrating a holiday, to show a vague statute can lead to absurd results). Accordingly, the District Court made no error when it struck down aspects of AB 286 on vagueness grounds, and its decision should be affirmed.

The District Court, like this Court is now, was tasked with determining whether vagueness so permeates AB 298 that it cannot meet the "fair notice" or "discriminatory enforcement" requirements of the Due Process Clause ***in most applications***. That task cannot be completed without engaging in some identification of how AB 286 might be applied or questioning what it might mean. And tellingly, Appellants do not offer any explanation as to how this Court (or any other court) can evaluate the constitutionality of AB 286 in most applications without conducting such an exercise. Accordingly, Appellants' criticism of the District Court is unfounded and contrary to the well-settled law that applies in this case.

CONCLUSION

AB 286 is unconstitutionally vague, and the District Court correctly found so. Its judgment in favor of Polymer80 should be affirmed, and Appellants have offered nothing to show otherwise. In fact, Appellants can only attempt to save AB 286 by

trying to convert Polymer80's facial challenge to that law into a hypothetical as-applied challenge and, additionally, conflating the void-for-vagueness tests that separately apply to civil and criminal statutes. Appellants compound these errors inherent in their analysis by then referencing matters, such as federal law and Polymer80's purported knowledge of AB 286, that have no bearing on whether vagueness so permeates the text of AB 286 that it fatally fails to provide fair notice of what it criminalizes and, separately and equally fatally, authorizes seriously discriminatory enforcement. The District Court's judgment in favor of Polymer80, declaring Sections 3 and 3.5 of AB 286 unconstitutional and permanently enjoining their enforcement, should be affirmed.

DATED this 5th day of August, 2022.

/s/ Brad M. Johnston

Brad M. Johnston (Nev. Bar No. 8515)
Simons Hall Johnston PC
22 State Route 208
Yerington, Nevada 89447

Attorneys for Respondent Polymer80, Inc.

Rule 28.2 Certification.

The undersigned hereby certifies pursuant to NRAP 28.2 that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because:

> This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 13,337 words.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of August, 2022.

/s/ Brad M. Johnston

Brad M. Johnston
Nevada Bar No. 8515
Simons Hall Johnston PC
22 State Route 208
Yerington, Nevada 89447
Telephone: 775-463-9500
Facsimile: 775-463-4032

Attorneys for Respondent Polymer80, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on this date, pursuant to NRAP 25(a), I electronically filed the foregoing *Respondent's Answering Brief* with the Clerk of the Court by using the ECF system which served the following parties electronically:

Aaron Ford, Nevada Attorney General
Steven Shevorski, Chief Litigation Counsel

Attorneys for Appellants

Dated this 5th day of August, 2022.

/s/ Brad M. Johnston
Brad M. Johnston