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 Department of Public Safety; MINDY MCKAY, Administrator of Records, Communications, and Compliance in the Nevada Department of Public Safety,

Appellants,

v.

POLYMER80, INC.,

Respondent.

On Appeal from the Third Judicial District Court
Case No. 21-cv-00690

APPELLANTS' SUPPLEMENTAL BRIEF

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Appellants Joseph M. Lombard, Aaron Ford, George Togliatti and Erica Sousa (collectively, the "State") file this supplemental brief pursuant to this Court's August 9, 2023, order.[1]

INTRODUCTION

This Court ordered the parties to file supplemental briefs "on the question of whether it is appropriate to use federal law, including 27 C.F.R. § 478.12 (2022), to clarify the purportedly vague terms in the challenged statutes and whether the use of federal law clarifies the terms." Order Directing Supplemental Briefing 1. The answer is yes. Precedent and logic show that this Court can use federal law to clarify purportedly vague terms in Nevada statutes. Federal law is simply another definable source – like dictionary definitions and judicial constructions – that can dispel vagueness. Here, § 478.12's description of partially complete, dissembled and nonfunctional frames and receivers confirms the common meaning of AB 286's terms and helps ensure that the law provides notice and standards for enforcement.

ARGUMENT

I. This Court Can Look to Federal Law to Dispel Any Vagueness in AB 286.

"A law will be upheld against a vagueness claim if its terms can be made

[1] Governor Stephen Sisolak and Administrator Mindy McKay were originally named as Defendants in their official capacity. Since then, Lombardo has been sworn in as governor and Sousa has taken over McKay's position. Under Nevada Rules of Appellate Procedure 43(c)(1), the current public officers are "automatically substituted" as Appellants.

reasonably certain by reference to other definable sources." *Ransdell v. Clark County*, 124 Nev. 847, 859 (2008) (quotation marks omitted). One of those definable sources is other jurisdictions' laws, including federal law. For example, in *Silverwing Development v. State Contractors Board*, 136 Nev. 642 (2020), this Court relied on other states' legislation to help determine the "common meaning" of "subdivision site" in a Nevada statute. *Id.* at 646. That common meaning "provide[d] a person of ordinary intelligence fair notice" of what the statute proscribed, defeating the petitioner's vagueness challenge. *Id.*

Gallegos v. State, 123 Nev. 289 (2007), confirms that federal law is a permissible definable source that can provide the common meaning of a purportedly vague statutory term. The plaintiff there contended that the term "fugitive from justice" in NRS 202.360(1)(b) was unconstitutionally vague. *Gallegos*, 123 Nev. at 293-94. This Court "examined several sources, including *federal law*, [this Court's] jurisprudence, and nonlegal sources" to see if the term had "an ordinary and well-established meaning" to save the statute. *Id.* at 295 (emphasis added).

Gallegos ultimately concluded that federal law and the other sources it consulted did not supply a common meaning. 123 Nev. at 295-96. But that was because of two problems absent from this case.

First, the Nevada Legislature had "modeled NRS 202.360(1)(b) after a federal statute and excluded from its provisions the definition contained in that federal

statute." *Gallegos*, 123 Nev. at 295. That triggered the canon of construction that "when a Nevada statute is modeled after a federal statute, it must be presumed that the exclusion of a provision in the Nevada statute is deliberate and is intended to provide a different result from that achieved under the federal statute." *Id.* at 294 (cleaned up). Here, the Legislature didn't exclude any provision of federal law from AB 286, so that canon is irrelevant.

Second, federal law contained several contradictory definitions in statutes and caselaw. *Gallegos*, 123 Nev. at 295. Plaintiffs have pointed to no contradictory terms in federal law that would confuse the meaning of AB 286.

The answering brief's argument that federal law is irrelevant because AB 286 bans "conduct that existing federal law does not" (Ans. Br. 40-41) is meritless. The inquiry is whether a statute's text or another definable source can provide fair notice and standards for enforcement. *See Ransdell*, 124 Nev. at 859; *Sheriff of Washoe Cty. v. Martin*, 99 Nev. 336, 340 (1983). If referring to federal law can adequately define the purportedly vague term, then federal law is a permissible definable source, just like a dictionary or a judicial decision. *See Martin*, 99 Nev. at 340. And as discussed below, federal law now covers the same ground as AB 286 anyway.

II. Federal Law Confirms AB 286's Terms' Common Meaning.

This Court doesn't need to look to federal law to conclude that AB 286 is constitutional. Rep. Br. 6-8. AB 286's terms are clear on their face and gain

additional clarity from dictionary definitions. *Id.* But federal law shores up AB 286's constitutionality by building on those other definable sources and confirming the terms' common meaning.

A. AB 286 and the ATF Rule Both Address the Unfinished Frames and Receivers Used in Ghost-Gun Kits

Plaintiffs' challenge is based solely on the purported vagueness of the term "unfinished frame or receiver," as defined by NRS 202.253(9). Ans. Br. 31, 44. A 2022 regulation promulgated by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (the "ATF") similarly addresses the threat posed by unfinished frames or receivers, which it calls "[p]artially complete, disassembled, or nonfunctional frame[s] or receiver[s]." Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. 24,652, 24,663 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447-449).[2]

AB 286 and the ATF rule are both intended to reach ghost-gun kits that can quickly and easily yield a functioning gun. *Hearing on AB 286 Before the Senate Committee on Judiciary on May 11, 2021*, 81st Sess., at 6 (Nev. 2021), https://bit.ly/3Q1PgQl [hereinafter *Judiciary Committee Minutes*]; Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24,655-56

[2] A district court vacated the ATF rule, but the U.S. Supreme Court stayed the lower court's judgment, so the ATF rule is currently in force. *Garland v. VanDerStok*, No. 23A82, __ S. Ct. __, 2023 WL 5023383 (Aug. 8, 2023) (mem.).

. Under prior Nevada and federal law, those kits could be sold without a background check and without a serial number. *Judiciary Committee Minutes*, *supra*, at 3-4. At the same time, AB 286 and the ATF rule do not want to reach innocent items that are not intended to be included in ghost-gun kits or turned into functioning guns.

Under the ATF rule, the federal terms "frame" and "receiver" include:

> [A] partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit, that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver, i.e., to house or provide a structure for the primary energized component of a handgun, breech blocking or sealing component of a projectile weapon other than a handgun.

27 C.F.R. § 478.12(c). The ATF rule also disclaims coverage of certain items:

> The terms shall not include a forging, casting, printing, extrusion, unmachined body, or similar article that has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon (e.g., unformed block of metal, liquid polymer, or other raw material).

Id. Lastly, the ATF rule defines "[r]eadily" by establishing a set of factors to consider, including time, ease and required equipment. *Id.* § 478.11.

B. The ATF Rule Confirms and Adds Content to AB 286's Meaning

The ATF rule and NRS 202.253(9) show that the key to determining if an item is an "unfinished frame or receiver" is the amount and type of work left to consumer

to complete. NRS 202.253(9) sets the line of demarcation at the point when "most of the major machining operations have been completed." The ATF rule uses the similar phrase "may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." 27 C.F.R. § 478.12(c). Combining the two provides more guidance to those who might fall within AB 286's scope – even if you are not sure if most of the major machining operations are completed, you can tell whether an item can readily be assembled into a functioning gun.

The ATF rule and AB 286 also direct interested parties to review the item's purpose in determining whether it is within the scope of the law. The ATF rule asks whether the item was "designed to" ultimately be a functioning frame or receiver of a firearm; AB 286 similarly asks whether it was "intended to be turned into the frame or lower receiver of a firearm." *Compare*, 27 C.F.R. § 478.12(c), *with* NRS 202.253(9). Thus, federal law clarifies *whose* intent is relevant: the item's manufacturer.

Just as valuable is the ATF rule's self-imposed limitations. It provides that an item that "has not yet reached a stage of manufacture where it is clearly identifiable as an unfinished component part of a weapon" is not within the law's scope. That bright-line rule fleshes out AB 286's standard that an item is not an unfinished frame or receiver if it hasn't "been formed or machined to the point at which most of the major machining operations have been completed." NRS 202.253(9).

The ATF rule's definition of "readily" provides yet more guidance, especially on the enforcement end. As the State has explained, the fact that it might occasionally be difficult for a jury to determine whether a particular item has undergone most of the major machining operations is not a grounds for invalidating AB 286. Rep. Br. 11-12. Still, the jury might find the "readily" factors listed at § 478.11 to be helpful in making that determination. By that same token, those factors might help guide law enforcement and prosecutors in making investigatory and charging decisions.

The Legislature didn't have the benefit of referring to the ATF rule when it enacted AB 286, so it could not have expressly included its terms in AB 286. The governor signed AB 286 into law on June 7, 2021. The ATF didn't promulgate their ghost-gun rule until almost a year later. Definition of "Frame or Receiver" and Identification of Firearms, 87 Fed. Reg. at 24,652. But the ATF rule confirms the meaning of AB 286's prior enacted language.[3]

C. In the Alternative, This Court Can Adopt the ATF Rule's Definitions as a Limiting Construction

If this Court disagrees and concludes that the ATF rule does not inform the

[3] The ATF issued a notice of a proposed rulemaking on May 21, 2021, but there was no realistic way for the Legislature to adopt that notice's definition. Definition of "Frame or Receiver" and Identification of Firearms, 86 Fed. Reg. 27,720, 27,746 (proposed May 21, 2021) (to be codified at 27 C.F.R. pts. 447-479). The Nevada Senate passed AB 286 that same day. AB286, NELIS, https://tinyurl.com/yc5w6vfv (last visited Aug. 24, 2023).

meaning of AB 286 and that AB 286, on its own, is unconstitutionally vague, the ATF rule can still save AB 286. That is because "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Busefink v. State*, 128 Nev. 525, 534 (2012). Accordingly, this Court can interpret AB 286 as coextensive with federal law as a "limiting construction" that provides fair notice and standards for enforcement. *See Skilling v. United States*, 561 U.S. 358, 405-06 (2010). In *Skilling*, for example, the U.S. Supreme Court interpreted a federal statute to be consistent with and limited to the way it had been historically applied by federal appellate courts. *Id.* at 407-08. That interpretation defeated the petitioner's vagueness challenge. *Id.* at 408-09.

CONCLUSION

This Court should reverse the judgment below and remand with instructions to enter judgment for the State.

Dated this 1st day of September 2023.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify 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 2010 in 14 pt. font and Times New Roman; or

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3. 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 1st day of September 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document *Appellants' Supplemental Brief* in accordance with this Court's electronic filing system and consistent with NEFCR 9 on September 1, 2023.

Participants in the case who are registered with this Court's electronic filing system will receive notice that the document has been filed and is available on the court's electronic filing system.

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