

CASE NO. 83999

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 SUPPLEMENTAL BRIEF

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Respondent Polymer80, Inc. (“Polymer80”) hereby submits its supplemental brief pursuant to this Court’s August 9, 2023 *Order Directing Supplemental Briefing* and its September 5, 2023 *Order Granting Telephonic Extension*, which granted Polymer80 until September 29, 2023 to file and serve this Supplemental Brief.

INTRODUCTION

This Court has posed two questions for the parties to answer in supplemental briefing: (1) whether it is appropriate to use federal law, including 27 C.F.R. § 478.12, which the ATF adopted in 2022, to clarify any of the vague terms found in AB 286, which was enacted a year earlier in 2021, and if so, (2) whether the use of federal law clarifies the vague terms in AB 286. The answer to both of these questions is no for several reasons.

First, there is no authority that supports the proposition that a federal regulation adopted in 2022 can be used to interpret a state statute that was signed into law *a year earlier*, when, as here, the Nevada legislature did not incorporate any federal law into AB 286 to define what qualifies as a proscribed “unfinished frame or receiver.” Indeed, the adoption canon of statutory interpretation and this Court’s existing precedent soundly reject the notion that it would be appropriate to use federal law to clarify the unconstitutionally vague terms found in AB 286 and particularly the unknowable meaning of “unfinished frame or receiver” that the Nevada Legislature sought to define on its own terms.

Second, the Nevada Legislature sought to address the unconstitutional infirmities embedded in AB 286 during its 2023 legislative session. Even then, however, the Nevada Legislature did not seek to broadly incorporate federal law or the ATF's new regulations into an amended version of AB 286.¹ Thus, this Court cannot do it now under the guise of statutory interpretation because doing so would run contrary to the acquiescence canon of statutory interpretation and the legislative action that occurred in Nevada in 2023.

Third, Governor Lombardo, on May 17, 2023, vetoed the Nevada's Legislature's recent attempt to amend and broaden AB 286.² This Court should not engage in an exercise of statutory interpretation, relying on federal regulations adopted after the passage of AB 286, that would effectively override the Governor's veto of legislation that sought but failed to amend AB 286.

Fourth, the ATF regulations that were adopted in 2022, specifically 27 C.F.R. §§ 478.11 and 478.12, have been struck down in federal court as an unlawful exercise of the ATF's rulemaking authority.³ Polymer80 is unaware of any authority

¹ See Assembly Bill No. 354 – Assemblywoman Jauregui, 82nd (2023) Nevada Legislative Session, as introduced [AB354 Text \(state.nv.us\)](#) and as enrolled [AB354 Text \(state.nv.us\)](#).

² https://gov.nv.gov/uploadedFiles/gov2022nvgov/content/Newsroom/vetos/2023-05-17_Veto_AB354.pdf.

³ See, e.g., *Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D. Tex. March 19, 2023)

suggesting an unlawful federal regulation can be used as a tool to interpret a state statute that does not reference the unlawful federal regulation. And tellingly, Appellants failed to mention, let alone address, the federal court decisions that have struck down the ATF's regulations or offer any authority suggesting unlawful regulations are a proper source for statutory guidance.

Fifth, even if all of the foregoing is ignored and the ATF's regulations are examined for guidance, those regulations provide no clarity with respect to the unconstitutionally vague terms found in AB 286 because the ATF has not defined "unfinished frame or receiver," which is what AB 286 criminalizes. *See* NRS 202.3625 and NRS 202.363. Instead, the ATF defined the terms "frame" and "receiver" in the context of the federal gun control act, and said those defined terms also include partially complete, disassembled, and nonfunctional frames and receivers, including frame and receiver parts kits.⁴ Accordingly, the ATF defined items that it considers to be frames and receivers and governed by the federal gun control act, whereas AB 286 sought to criminalize "unfinished frames and receivers" that are not governed by federal law. It is incongruous to take what the ATF defined as a "frame or receiver" to mean the equivalent of what AB 286 calls an "unfinished frame or receiver." Thus, even if it would be proper to look to federal law for guidance, it provides none.

⁴ *See* 27 C.F.R. § 4781.11 and § 478.12.

Sixth, the issue before this Court is whether vagueness so permeates the text of AB 286 that the text fails to either (1) provide sufficient notice, in most applications, to enable persons of ordinary intelligence to know what the statute criminalizes, or (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement in most applications.⁵ Neither of these tests can be met if AB 286 is so vague that it requires an exercise in statutory interpretation that includes examination of federal regulations that are (1) not referenced in the statute itself, (2) premised on an entirely different regulatory scheme, and (3) the subject of successful legal challenges in federal court. Accordingly, any need to reference federal law to understand AB 286's prohibitions only confirms that AB 286, as the District Court found, is unconstitutionally vague.

To provide the proper context for these arguments and demonstrate why this Court should not look to federal law in an attempt to save AB 286 from its unconstitutional ambiguity, Polymer80 begins with the appropriate timeline of events that Appellants did not include in their supplemental brief.

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⁵ See *Scott v First Jud. Dist. Ct.*, 131 Nev. 1015, 1021, 363 P.3d 1159, 1164 (2015).

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

I. AB 286 Is Enacted In 2021 And This Litigation Ensues.

On June 7, 2021, AB 286 was signed into law. Sections 3 and 3.5 of that law criminalized the possession, purchase, transportation, receipt, sale, offering to sell, and transfer of an “unfinished frame or receiver.” *See* NRS 202.363 and NRS 202.3625. AB 286 defined that term, albeit ambiguously, as follows:

“Unfinished frame or receiver” means a blank 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 machining 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.

NRS 202.253(9). The Nevada Legislature did not, however, define “blank, casting, or machined body” or “frame or lower receiver” or “most of the major machining operations.” *See id.* Nor did the Legislature identify how a “blank, casting, or machined body” can be identified as an “unfinished frame or receiver.” And when the Nevada Legislature drafted and passed AB 286, criminalizing the possession, purchase, sale, and transfer of an “unfinished frame or receiver,” it did not incorporate the federal gun control act or any regulations adopted thereunder to help define or otherwise identify what constituted an unlawful “unfinished frame or receiver.” *See id.*

Rather, to the extent the Nevada Legislature did reference federal law in AB 286, it did so on a limited basis to specifically define the term “firearms importer or manufacturer”⁶ and exclude items from the prohibitions of AB 286. *See* NRS 202.3625(1)(b) and 202.363(1)(b). In this latter regard, Sections 3.1.(b) and 3.5.1.(b) provided that AB 286 did not proscribe any “unfinished frame or receiver [that] is required by federal law to be imprinted with a serial number issued by a firearms importer or manufacturer [if] the unfinished frame or receiver has been imprinted with the serial number.” *See* NRS 202.3625(1)(b) and 202.363(1)(b). Thus, Sections 3 and 3.5 of AB 286 referenced federal law to define persons and items exempted from the law’s prohibitions, not to define what the law actually proscribed.

Separately, AB 286, as enacted in 2021, criminalized, in Sections 4 and 5 (which are not at issue in this case) the manufacturing, assembly, possession, purchase, sale, and transfer of “a firearm that is not imprinted with a serial number issued by a firearms importer or manufacturer *in accordance with federal law and*

⁶ Section 3 of AB 286 provided that “1. A person shall not possess, purchase, transport or receive an unfinished frame or receiver unless: (a) The person is a firearms importer or manufacturer.” NRS 202.3625. Section 3.5 provided further that “1. 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.” NRS 202.363. Section 6.5 then defined “Firearms importer or manufacturer” as “a person licensed to import or manufacture firearms pursuant to 18 U.S.C. Chapter 44.” *See* NRS 202.253(5).

any regulations adopted thereunder unless” certain exceptions found in AB 286 applied. *See* NRS 202.3635 and NRS 202.364 (emphasis added). These exceptions included firearms that are considered antiques, collector items, and curios as defined and/or determined by federal law. *See, e.g.,* NRS 202.3635(1)(b) and (c); NRS 202.253(1) (“Antique firearm” has the meaning ascribed to it in 18 U.S.C. § 921(a)(16)). Accordingly, the Nevada Legislature made broad references to federal law – and regulations adopted thereunder – when addressing unserialized firearms in Sections 4 and 5 of AB 286, but it made no similar references to federal laws and regulations when addressing “unfinished frames and receivers” in Sections 3, 3.5, and 9 of AB 286.

On June 22, 2021, Polymer80 filed this lawsuit, challenging the constitutionality of Sections 3 and 3.5 of AB 286 because the Legislature’s chosen definition of “unfinished frame or receiver” found in Section 9 of AB 286 was unconstitutionally vague. Thereafter, on December 10, 2021, the District Court declared that “Section 3 and Section 3.5 [of] AB 286 are unconstitutionally vague” and enjoined enforcement of those portions of AB 286. This appeal followed.

The Notice of Appeal was filed in the District Court on December 20, 2021, and this appeal was docketed in this Court on December 30, 2021. The parties’ briefing was completed on October 20, 2022, and oral argument was set for and held on March 2, 2023.

II. The ATF Adopts Regulations In 2022 That Have Benn Found Unlawful.

In the interim period between the filing of this appeal and oral argument on March 2, 2023, the ATF published regulations on April 26, 2022, that became effective August 22, 2022. *See* 27 C.F.R. §§ 478.11 and 478.12. Those regulations defined certain terms in the context of the federal gun control act. These defined terms included “frame” and “receiver” but did not include terms found in AB 286 such as “unfinished frame or receiver.” *See id.* To the contrary, the ATF said “a partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit” *is* a frame or receiver and consequently *is* a firearm under federal law. *See* 27 C.F.R. §§ 478.11 and 478.12(c).

In particular, the ATF included “partially complete, disassembled, or nonfunctional frame or receiver, including a frame or receiver parts kit” within the definition of “frame” or “receiver” in the context of the federal gun control act. *See* 27 C.F.R. § 478.12(c). That law defines the term “firearm” not only as “any weapon ... which will or is designed to ... expel a projectile by the action of an explosive” but also as “*the frame or receiver of any such weapon.*” 18 U.S.C. § 921(a)(3) (emphasis added). Thus, a frame or receiver is a firearm under 18 U.S.C. § 921(a)(3), and the ATF’s 2022 rulemaking purported to classify any partially complete, disassembled, or nonfunctional frame or receiver not simply as a frame or receiver but actually as a “firearm” as that term is defined in 18 U.S.C. § 921(a)(3).

The ATF said, however, that the terms “frame” and “receiver” and “a partially complete, disassembled, or nonfunctional frame or receiver” do 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.” *See* 27 C.F.R. § 478.12(c). The ATF’s definition of “frame or receiver,” which encompasses partially completed frames and receivers, accordingly stands in stark contrast to AB 286’s definition of “unfinished frame or receiver.” The former amounts to a firearm under federal law and excludes castings that are not identifiable parts of a weapon; while the latter, by definition, does not cover firearms and encompasses undefined items that have undergone “most” of their “major machining operations” irrespective of the item being “identifiable as an unfinished component part of a weapon.”

Although the ATF’s new regulations do not shed light on the meaning of AB 286, it is important to note that a federal district court has found that the ATF exceeded its rulemaking authority when it promulgated 27 C.F.R. §§ 478.11 and 478.12 because the ATF had no authority to include in its regulatory definition of “frame or receiver” a firearm part (i.e., “a partially complete, disassembled, or nonfunctional frame or receiver”) that is designed to be or may one day become the frame or receiver of a firearm. *See, e.g., Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D. Tex. March 19, 2023); *see also*

Vanderstok v. Blackhawk Mfg. Grp. Inc., Case No. 4:22-cv-00691-O, 2023 WL 5978332, 2023 U.S. Dist. LEXIS 163103 at *55 (N.D. Tex. September 14, 2023). Consequently, injunctive relief has been issued out of the Northern District of Texas, enjoining enforcement of 27 C.F.R. §§ 478.11 and 478.12 against Polymer80 and others. *See id.*; *see also Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D. Tex. March 19, 2023). The preliminary injunction in favor of Polymer80 was issued on March 19, 2023, and it currently stands in effect as of the date of this brief. An injunction most recently issued in *Vanderstok* on September 14, 2023. *Vanderstok v. Blackhawk Mfg. Grp. Inc.*, Case No. 4:22-cv-00691-O, 2023 WL 5978332, 2023 U.S. Dist. LEXIS 163103 at *55 (N.D. Tex. September 14, 2023).

III. The Nevada Legislature Seeks To Amend AB 286 In 2023.

The ATF's unlawful rulemaking was not the only government action that occurred after the District Court found portions of AB 286 unconstitutional and Appellants filed this appeal. After the publication of the ATF's new (albeit unlawful) regulations found at 27 C.F.R. §§ 478.11 and 478.12 on April 26, 2022, after a federal district court preliminarily enjoined enforcement of the ATF's new regulation against Polymer80 on March 19, 2023, and long after Appellants filed this appeal, the Nevada Assembly and the Nevada Senate voted to pass Assembly Bill 354 ("AB

354”) on April 25, 2023, and May 15, 2023, respectively.⁷ That legislation, as introduced in 2023, sought to change the definition of unfinished frame or receiver that was originally included in AB 286 and found to be unconstitutional.⁸

Specifically, AB 354, as introduced in 2023, struck the definition of “unfinished frame or receiver” that was found to be unconstitutionally vague and proposed to replace it with the following:

Unfinished framer or receiver means a market frame or receiver or ready frame or receiver. As used in this subsection: (a) “Market frame or receiver” means an object that is marketed or sold to the public to become or to be used as the frame or receiver of a firearm once completed, assembled or converted. (b) “Ready frame or receiver means a forged, cast, printed, extruded or machined body or similar article that has an identifiable fire control cavity, even if that cavity has not been indexed or machined in any way.”⁹

AB 354 did not seek to incorporate any definitions from the ATF’s new regulations defining frames and receivers or partially completed frames or receivers, although that regulatory language was available to the Nevada Legislature.

⁷ AB 354 passed the Assembly by a vote of 28 to 14 and passed the Senate by a vote of 12 to 8. *See* [AB354 Votes \(state.nv.us\)](https://legis.nv.gov/legislation/assembly/bills/2023/AB354/Votes)

⁸ *See* Assembly Bill No. 354 – Assemblywoman Jauregui, 82nd (2023) Nevada Legislative Session, as introduced [AB354 Text \(state.nv.us\)](https://legis.nv.gov/legislation/assembly/bills/2023/AB354/Text).

⁹ *See* Assembly Bill No. 354 – Assemblywoman Jauregui, 82nd (2023) Nevada Legislative Session, as introduced [AB354 Text \(state.nv.us\)](https://legis.nv.gov/legislation/assembly/bills/2023/AB354/Text).

Through amendments, AB 354 was drafted to retain the unconstitutional definition of “unfinished frame and receiver,” separately add the definitions of “ready frame or receiver” and “market frame or receiver” to Nevada law, and then criminalize the possession, sale, or transfer of any one of those three items (i.e., an “unfinished frame or receiver,” a “ready frame or receiver,” or a “market frame or receiver”).¹⁰ AB 354 as amended, however, again did not incorporate the ATF’s newly-adopted regulations. While AB 354 ultimately passed both the Nevada Assembly and the Nevada Senate, Governor Lombardo vetoed the bill.¹¹ As a result, the terms “ready frame or receiver” and “market frame or receiver” and prohibitions concerning the same did not become law in the State of Nevada. And AB 286 remained as it was in 2021, when the District Court found portions of it unconstitutional, because the Nevada Legislature considered changing but ultimately did not amend the unconstitutional term “unfinished frame or receiver” during its 2023 legislative session.

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¹⁰ See Assembly Bill No. 354 – Assemblywoman Jauregui, 82nd (2023) Nevada Legislative Session, as enrolled [AB354 Text \(state.nv.us\)](#).

¹¹ https://gov.nv.gov/uploadedFiles/gov2022nvgov/content/Newsroom/vetos/2023-05-17_Veto_AB354.pdf

ARGUMENT

I. Federal Law Cannot Be Used To Save AB 286 From Its Unconstitutional Ambiguity.

The Nevada Legislature made general and specific references to federal law when it passed AB 286, but it did not reference federal law to define the term “unfinished frame or receiver.” Under the reference canon of statutory interpretation and this Court’s established precedent, this Court should not, therefore, look to federal law to decipher AB 286’s vague terms. Similarly, the acquiescence canon makes clear that this Court should not look to federal law in an attempt to clarify AB 286 because the Nevada Legislature’s actions in 2023 demonstrate that federal law does not guide any analysis of AB 286. These two canons of statutory interpretation are addressed separately below.

a. The Reference Canon Precludes Using Federal Law As Guidance.

There are two ways a legislative body can reference a separate body of law – generally or specifically – to define a statute’s scope and terms. *See Jam v. International Fin. Corp.*, 139 S. Ct. 759, 769 (2019). And whether a legislative body references a separate body of law generally or specifically determines how the reference canon of statutory interpretation applies. *See id.* When a statute refers to another body of law generally, the statute adopts that separate body of law as it exists at any given moment in time whenever a question arises under the referring statute. *See id.* “In contrast, a statute that refers to another statute by specific title or section

number in effect cuts and pastes the referenced statute as it existed when the referring statute was enacted, without any subsequent amendments.” *Id.* *A fortiori*, when a statute is adopted in the face of a separate body of law and the statute does not reference that separate body of law – specifically or generally – to define a statutory term, a court may not look to the separate body of law to define or decipher the statutory term. *See Gallegos v. State*, 123 Nev. 289, 293-95 (2007) (“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 that federal statute indicates to us that the Legislature intended another meaning – a meaning it failed to define.”). This is because a legislature’s failure to reference another body of law precludes courts from doing what the legislature could have done but failed to do. *See id.* These principles of statutory interpretation preclude using federal law as a guide to determine what the Nevada Legislature actually meant when it sought to criminalize “unfinished frames and receivers” through the adoption of AB 286 in 2021.

The Legislature used specific references to existing federal and state statutes eight times in AB 286 to set criminal penalties and define, by reference, terms such as “law enforcement agency,” “antique firearm,” “firearms importer or manufacturer,” and “collector’s item, curio, or relic.” *See* NRS 202.253(1); NRS 202.3625; NRS 202.363; NRS 202.3635; and NRS 202.364. Thus, when the

Legislature wanted to employ specific definitions from other statutes, it did so explicitly in AB 286 by enacting specific statutory references.

Additionally, the Legislature used general statutory references four times in AB 286 to say what was not criminalized under Sections 3 and 3.5, *see* NRS 202.3625(1)(b) and NRS 202.363(1)(b), and to say what was criminalized under Sections 4 and 5. *See* NRS 202.3635(1) and NRS 202.364(1). In this regard, the Legislature first said the criminal prohibitions in Section 3 and 3.5 do not apply if “[t]he unfinished frame or receiver is required by federal law to be imprinted with a serial number ... and ... has been imprinted with the serial number.” NRS 202.3625(1)(b); NRS 202.363(1)(b). The Legislature then separately criminalized conduct concerning firearms in Sections 4 and 5 if the firearm was “not imprinted with a serial number ... in accordance with federal law and any regulations adopted thereunder.” NRS 202.3635; NRS 202.364. Thus, when the Legislature wanted to employ general references to other statutes and federal law generally, it did so explicitly in specific provisions of AB 286. The Legislature did not, however, use any reference to any specific statute, to “federal law” generally, or to “federal law and any regulations adopted thereunder” to define “unfinished frame or receiver” in AB 286. *See* NRS 202.253(9).

To the contrary, the Legislature adopted its own definition of “unfinished frame or receiver” in Section 9 of AB 286 without any reference whatsoever to

federal law. *See id.* And it did the same for other terms found in AB 286. For instance, the Legislature separately adopted its own definitions of “assemble” and “manufacture” without any reference to any other laws, *see* NRS 202.3635(3)(a) and (b), and the Legislature maintained its own definitions of “firearm,” “machine gun,” and “semi-automatic firearm” without reference to any other body of law. *See* NRS 202.253. Accordingly, the Legislature’s decision to define “unfinished frame or receiver” on its own without any general or specific reference to federal law was intentional because the Legislature referenced federal law when it wanted terms and provisions in AB 286 to be defined and/or governed by federal law. “Unfinished frame or receiver” was not, to be clear, one of those terms.

In fact, the Legislature incorporated specific federal statutes when it saw fit to do so and made general references to federal law elsewhere in AB 286 when, in the Legislature’s judgment, a general reference was appropriate. And in this legislative context, the Legislature did not reference any federal law or statute in defining “unfinished frame or receiver.” As a result, this Court should not look to federal law for guidance to decipher that ambiguous term because if the Legislature wanted this Court to do that, it would have used federal law to define “unfinished frame or receiver,” but it consciously chose not to do so. This Court should not override the Legislature’s decision to adopt legislative language that purported to define “unfinished frame or receiver” without reference to federal law. Indeed, to do so

would run contrary to the reference canon of statutory interpretation and this Court's decision in *Gallegos v. State*, 123 Nev. 289, 163 P.3d 456 (2007).

In that case, the Nevada Legislature made it a crime for a person to own or possess a firearm if the person was a "fugitive from justice." *See id.* at 294, 459. Although the law mirrored a federal law prohibiting the same conduct, the Nevada Legislature did not itself define the term "fugitive from justice" or reference or incorporate the analogous federal definition of that term. This Court consequently determined that the Nevada Legislature's failure to define the term "fugitive from justice" rendered the statute void for vagueness. *See Gallegos*, 123 Nev. at 294, 163 P.3d at 459. This Court emphasized 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. This Court further rejected the notion that the federal definition of the term "fugitive from justice" that was included in the analogous federal statute could be grafted into the Nevada statute, stating: "Our Legislature made no effort to tie NRS 202.360(1)(b) to either of those [federal] definitions. 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.* at 295, 460.

Here, the Legislature’s actions were the same. It purported to define the term “unfinished frame or receiver” without reference to federal law. It did so, as this Court made clear in *Gallegos*, because the Legislature intended “unfinished frame or receiver” to mean something that is not defined or proscribed by federal law. Thus, federal law cannot serve as a guide to determine what the term “unfinished frame or receiver” means. And there is certainly no evidence that the Legislature intended the term to mean something that could only become knowable in the future by referencing a federal regulation that did not exist until 2022. Simply put, if it is improper to look to federal law for the meaning of the term “fugitive from justice” when the Nevada Legislature mirrored a state statute after an existing federal statute, as this Court squarely held in *Gallegos*, it is improper to look to a federal law that did not exist when the Nevada Legislature adopted AB 286 in an attempt to decipher the meaning of “unfinished frame or receiver” that federal law does not define.

Gallegos tellingly does not stand alone. In other cases, this Court did not examine federal laws in analogous areas (or even similar state statutes) in an attempt to decipher unconstitutionally vague criminal statutes. *See, e.g., Sheriff v. Burdg*, 118 Nev. 853, 59 P.3d 484 (2002) (no mention of federal drug laws in examining Nevada law banning possession of ingredients to manufacture controlled

substances); *see also* *Cunningham v. State*, 109 Nev. 569, 855 P.2d 125 (1993) (examining California law regulating telephone solicitations not to clarify Nevada law but to demonstrate infirmities in Nevada law). For instance, in *Sheriff v. Burdg*, this Court found that a state statute criminalizing the possession of a “majority of the ingredients” required to manufacture a controlled substance was unconstitutionally vague. This Court so held because the statute failed to list the items that might be considered “ingredients” and consequently failed to provide a person of ordinary intelligence adequate notice of what the statute proscribed or provide law enforcement with adequate guidance for enforcement. *See Burdg*, 118 Nev. at 857-58, 59 P.3d at 487. Although a federal body of law certainly existed concerning controlled substances at the time the Nevada law was adopted, there was no suggestion whatsoever in *Burdg* that federal drug laws could serve as a guide to determine the meaning of or otherwise save the unconstitutionally vague statute. Accordingly, this Court should similarly refrain from looking to any federal law for guidance as to the meaning of “unfinished frame or receiver.” And if “majority of ingredients” is unconstitutionally vague in the realm of controlled substances governed by federal law, undefined terms like “blank,” “casting,” “machined body,” and “most of the major machining operations” are equally vague, and federal gun laws cannot be referenced to save them from their ambiguity.

Appellants argue, citing *Gallegos* and *Ransdell v. Clark County*, 124 Nev. 847, 192 P.3d 756 (2008), that this Court can look to federal regulations adopted in 2022 to interpret AB 286 because the new federal regulations are a “definable source.” Neither *Gallegos* nor *Ransdell* support this proposition. In *Gallegos*, this Court only looked to federal law, among other sources, to determine whether the term “fugitive from justice” had “an ordinary and well-established meaning, that would mitigate the Legislature’s failure to define that term.” *Gallegos* 123 Nev. at 295, 163 P.3d at 295. This Court determined there was no ordinary and well-established meaning under available sources and squarely rejected the notion that a federal statute defining the term could be used as guidance or otherwise incorporated into Nevada’s statute. *See id.* Similarly, in *Ransdell*, this Court merely found that the term “inoperative vehicle” was not impermissibly vague in the civil context because those words are knowable. *See Ransdell*, 124 Nev. at 859, 192 P.3d at 764. Thus, *Gallegos* and *Ransdell* do not suggest that this Court can look to federal law to decipher the meaning of “unfinished frame or receiver” when the Nevada Legislature did not reference federal law to define that term and instead sought to define the term itself. The Court could only look to other sources to determine if the term “unfinished frame or receiver” has a common meaning, and it plainly does not.

Appellants also try to equate federal law with a dictionary or judicial decision, citing *Sheriff of Washoe County v. Martin*, 99 Nev. 336, 662 P.2d 634 (1983). That

case, however, dealt with the term “cheating” and noted that “[e]ven trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid.” *Id.* at 340 (quotations omitted). *Martin*, which was decided 24 years before *Gallegos*, accordingly does not suggest that federal regulations adopted after a state statute becomes law can be used as a reference to determine the meaning of a prohibited item like an “unfinished frame or receiver,” which has no ordinary meaning or judicial construct. And *Martin* does not suggest that federal regulations can be used as guideposts when the Nevada Legislature consciously chose not to employ federal law when it sought to criminalize “unfinished frames and receivers.”

Appellants also fail to explain how the ATF’s new regulations are a permissible definable source when the regulations post-date the enactment of AB 286 and the regulations have been struck down as an unlawful exercise of the ATF’s rulemaking authority. *See, e.g., Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D. Tex. March 19, 2023); *see also Vanderstok v. Blackhawk Mfg. Grp. Inc.*, Case No. 4:22-cv-00691-O, 2023 WL 5978332, 2023 U.S. Dist. LEXIS 163103 at *55 (N.D. Tex. September 14, 2023). Dictionary definitions that have been abandoned and judicial decisions that have been overturned are not proper resources. Thus, the ATF’s new regulations are not proper resources because they have been determined to be invalid.

The reference canon of statutory interpretation along with precedent from this Court make clear that when a statute does not reference or incorporate a federal statute or a body of federal law, federal law does not serve as a guide for interpreting the statute or a cure for unconstitutional ambiguity. Here, the Nevada Legislature chose to criminalize certain conduct related to “unfinished frames and receivers,” and it chose to adopt its own unconstitutionally vague definition of that term without reference to any federal statutes or regulations. In light of that Legislative choice, this Court should not look to an unlawful federal regulation that was adopted after the fact in an attempt to determine what “unfinished frame or receiver” actually means.

b. The Acquiescence Canon Precludes Using Federal Law As Guidance.

Under the acquiescence canon of statutory interpretation, a legislative body is presumed to be aware of prior judicial constructions of statutory language, especially when the legislative body seeks to amend the area of law that was judicially construed. *See, e.g. Wadhwa v. Aurora Loan Servs., LLC*, Case No. S-11-1784 KJM KJN, 2012 WL 762020, 2012 U.S. Dist. LEXIS 31035 at *47 and n.8 (E.D. Cal. March 7, 2012). A legislature may therefore be presumed to have acquiesced in court decisions if it does not amend statutory language that has been judicially construed, especially when some legislative action occurs after judicial construction. *See id.* This principle of statutory interpretation reinforces the conclusion that this

Court should not look to federal law for guidance to decipher the vague terms in AB 286.

In the face of the District Court’s decision finding Sections 3 and 3.5 of AB 286 unconstitutional and with the ATF’s new regulations adopted in 2022, the Legislature introduced a bill – AB 354 – during its 2023 legislative session that first proposed to strike from Nevada law the unconstitutional term “unfinished frame or receiver” and replace it with new terms; to-wit, that an “unfinished frame or receiver” would mean a “market frame or receiver” and a “ready frame or receiver.” *See* note 8, *supra*. The proposed legislation defined those new terms as follows:

(a) “Market frame or receiver means an object that is marketed or sold to the public to become or to be used as the frame or receiver of a firearm once completed, assembled or converted. (b) “Ready frame or receiver means a forged, cast, printed, extruded or machined body or similar article that has an identifiable fire control cavity, even if that cavity has not been indexed or machined in any way.”

AB 354 was then amended during the legislative session to retain the original definition of “unfinished frame and receiver” that the District Court found unconstitutional, separately add the terms “ready frame or receiver” and “market frame or receiver” to Nevada law, and then criminalize the possession, sale, or transfer of any one of those three items. *See* note 9, *supra*. In other words, the Nevada Legislature abandoned its attempt to modify the term “unfinished frame or receiver” in the wake of it being found unconstitutional in favor of criminalizing two different items – “ready frames and receivers” and “market frames and receivers” –

that the Legislature chose to define separately. Although the ATF's new regulations took effect in August 2022, the Legislature did not seek to incorporate those regulations into AB 354, although the term "market frame and receiver" somewhat resembled the ATF's new regulation.

The Nevada Assembly and the Nevada Senate voted on and passed AB 354 on April 25, 2023, and May 15, 2023, respectively. *See* note 7, *supra*. As passed, AB 354 retained the unconstitutional term "unfinished frame or receiver" without change and criminalized acts related to "ready frames and receivers" and "market frames and receivers." AB 354 was, however, vetoed; thus, the Legislature's attempt to criminalize "ready frames or receivers" and "market frames or receivers" failed, but the Legislature acquiesced in the District Court's judicial construction of "unfinished frame or receiver" because the Legislature did not alter that term. Additionally, the Legislature did not seek to incorporate federal law or the ATF's new regulations into Nevada law when it retained the term "unfinished frame or receiver" without amendment. Because the Nevada Legislature had the opportunity to modify the term "unfinished frame or receiver" in 2023 and declined to do so and because it did not seek to otherwise incorporate federal law into the term "unfinished framer or receiver," this Court should not look to ATF regulations adopted in 2022 for guidance.

Further demonstrating that this Court should not look to federal law for guidance in interpreting AB 286 is the principle of statutory interpretation that provides a statute's use of different terms evidences the legislature's intent that different meanings apply to those terms. *See, e.g., Aerogrow Int'l, Inc. v. Eighth Jud. Dist. Ct.*, 137 Nev. Adv. Rep. 76, 499 P.3d 1193, 1198-99 (2021). The Nevada Legislature, after the District Court found portions of AB 286 unconstitutional, believed it was necessary in 2023 to add the terms "ready frame or receiver" and "market frame or receiver" to Nevada law but retain the term "unfinished frame or receiver" that was found to be unconstitutional. This evidences not only acquiescence in the District Court's finding of unconstitutionality, but also demonstrates that the Legislature's intent was to broaden Nevada law beyond "unfinished frames and receivers" to encompass "ready frames and receivers" and "market frames and receivers" which are different items. *See id.*

The Legislature's definition of "market frame or receiver" bears a resemblance to the ATF's definition of a "partially complete frame or receiver" because both terms encompass objects that are intended to become a frame or receiver of firearm once completed, assembled, or converted. Consequently, because the Nevada Legislature defined a "market frame or receiver" as something similar to the ATF's "partially complete frame or receiver" but necessarily distinct from and different than an "unfinished frame or receiver," the meaning of an

“unfinished frame or receiver” cannot be gleaned from the ATF’s regulations. Accordingly, the term “unfinished frame or receiver” remains unconstitutionally vague in light of the Nevada Legislature’s decision to retain that term without change, notwithstanding the District Court finding it unconstitutional, and the Legislature’s attempt to criminalize other objects – “market frames and receivers” and “ready frames and receivers” – without reference to the ATF’s 2022 regulations.

Finally, to extent this Court were to look to ATF regulations as a guide for deciphering AB 286, it would effectively override the Governor’s veto of AB 354 because the Court would necessarily expand the term “unfinished frame or receiver” to encompass what the Nevada Legislature coined “market frames or receivers” and “ready frames or receivers” (and the Governor vetoed) due to some similarities between those vetoed terms and the ATF’s 2022 regulations. This Court, through an exercise of judicial review of AB 286 that was passed into law in 2021, should not, however, transform that law into that which was vetoed in 2023. Yet, that is precisely what the Appellants invite this Court to do, although they fail to mention the Legislature’s actions in 2023 and the Governor’s veto. This further confirms that it would be improper to look to federal law for guidance in attempting to decipher AB 286’s unconstitutional ambiguities.

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II. Even If Federal Law Can Be Used As A Guide, It Does Not Cure The Unconstitutional Ambiguity In AB 286.

Appellants argue that because AB 286 and the ATF's new regulations were both designed to prohibit ghost-gun kits, the ATF's regulations explain the meaning of AB 286. *See* Appellants' Supplemental Brief at p. 4. This argument misses the mark because AB 286 and the ATF's regulations do not employ the same terms, AB 286 never mentions the words "kit" or "ghost gun," and the ATF did not adopt its regulations to define what AB 286 criminalizes or otherwise explain the meaning of "unfinished frame or receiver." Instead, the ATF adopted its regulations – albeit unlawfully – to equate something that might become part of a firearm with an actual firearm under the federal gun control act. That regulatory action provides no guidance whatsoever to interpreting AB 286. Furthermore, a federal court, as noted, has determined that the ATF's regulatory action was unlawful. And an unlawful federal regulation cannot serve as a guide to interpret an unrelated state statute.

The federal gun control act defines the term "firearm" as "any weapon ... which will or is designed to ... expel a projectile by the action of an explosive" or the "*the frame or receiver of any such weapon.*" 18 U.S.C. § 921(a)(3) (emphasis added). Thus, a frame or receiver is a firearm under 18 U.S.C. § 921(a)(3). However, there is no definition of "frame," "receiver," or "unfinished frame or receiver" in 18 U.S.C. § 921(a). Accordingly, the starting point of federal firearms

law provides no guidance with respect to the meaning of the term “unfinished frame or receiver” that is found in AB 286. Nor does the ATF’s 2022 rulemaking.

In the context of the federal gun control act, the ATF adopted 27 C.F.R. § 478.11 in 2022, which defined “firearm” to mean “[a]ny weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of any explosive; [or] the frame or receiver of any such weapon.” The ATF accordingly reiterated that a frame or receiver is a firearm under federal law in accordance with 18 U.S.C. § 921(a)(3). The ATF said further that the term firearm “shall include a weapons parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile by the action of an explosive.” 27 C.F.R. § 478.11. Accordingly, the ATF equated frames, receivers, and weapons parts kits with actual firearms in the context of federal law. The term “unfinished frame or receiver” found in AB 286 plainly does not because a prohibited “unfinished frame or receiver” under AB 286 is not a firearm under any definition, including the Nevada Legislature’s definition of firearm. *See* NRS 202.253(3). For this reason alone, any ATF definition of “frame” or “receiver” sheds no light on what AB 286 calls an “unfinished frame or receiver.”

In addition to defining the term “firearm” in 27 C.F.R. § 478.11 and encompassing frames, receivers, and weapons parts kits in that definition, the ATF separately said in the same regulation that “[t]he term ‘frame or receiver’ shall have

the same meaning as in § 478.12.” That regulation, 27 C.F.R. § 478.12(a)(1) and (2), in turn, separately defined the terms “frame” and “receiver.” The ATF then went a step further and said the 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, or internal sound reduction component of a firearm muffler or firearm silencer, as the case may be.

27 C.F.R. § 478.12(c). This definition of what constitutes a partially complete frame or receiver (and thus also a frame or receiver and a firearm under 18 U.S.C. § 921(a)(3)) does not reference in any way or otherwise explain what an “unfinished frame or receiver” might be under ABA 286.

The term “unfinished frame or receiver” in AB 286, unlike the ATF’s regulations, does not speak to something that can be “readily completed” “to house or provide a structure for the primary energized component of a handgun” or a “frame or receiver parts kit” or something that is “nonfunctional” or “disassembled.” Rather, AB 286 speaks to a “blank, casting, or machined body” that has undergone an unknowable amount of machining (i.e., most of the major machining operations have been completed) but requires more machining, although it may have a completely solid and unmachined fire-control cavity. That language is no more

knowable in light of the ATF's regulations because it does not use the same regulatory language or framework as the ATF's regulations.

The ATF's regulatory framework begins with the definition of a firearm and that definition includes frames, receivers, and weapons parts kits. Nevada's definition of firearm does not. *See* NRS 202.253(3). The ATF's regulations then progress to define the terms "frame" and "receiver" (which Nevada law does not define) and then go another step to say those terms include "a partially complete, disassembled, or nonfunctional frame or receiver ... that is designed to or may readily be completed, assembled, restored, or otherwise converted to function as a frame or receiver." The ATF did not stop there, however, because it reiterated that a partially complete frame or receiver must ultimately function "to house or provide a structure for the primary energized component of a handgun, [or] breech blocking or sealing component of a projectile weapon other than a handgun ..." There is no similar context or progression to be found in AB 286 to decipher the term "unfinished frame or receiver" because that term stands alone in AB 286.

Furthermore, the ATF's regulations state that the terms "frame" and "receiver" and, thus, partially complete frames and receivers, do 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)."

27 C.F.R. § 478.12(c). Accordingly, the ATF clarified that an object is not a frame or receiver or a partially complete frame or receiver if it has not been manufactured to the point where it is identifiable as unfinished part of a weapon. AB 286 uses no similar language and provides no such guidance. It uses an unknowable machining test referencing (but not explaining) “most of the major machining operations have been completed” without reference to any stage of completion or identifying characteristics. Thus, the ATF’s regulations cannot clarify in any respect what AB 286 criminalizes. The term “unfinished frame or receiver” is, in fact, so different from anything found in the ATF’s regulations, the only conclusion that can be drawn is that an “unfinished frame or receiver” is an unknowable something that is not a frame, receiver, or a partially completed frame or receiver as the ATF defines those items.

Appellants claim the ATF’s regulations confirm the meaning of AB 286’s prior enacted language, noting “[t]he 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.” Appellants’ Supplemental Brief at p. 7. Appellants are wrong on this point for at least three reasons. First, the ATF’s regulations don’t confirm the meaning of AB 286 because those regulations were not intended to provide any meaning with respect to Nevada law and did not, in any way, embrace the concept or otherwise define what AB 286 calls an “unfinished frame or receiver.” Second,

Nevada’s term “unfinished frame or receiver” was on the books when the ATF adopted its regulations; yet, the ATF did not use that term in its regulatory scheme, so the ATF itself did not equate a “partially completed frame or receiver” with an “unfinished frame or receiver.” Third, the Nevada Legislature had the benefit of the ATF’s regulations during the 2023 legislative session and expressly chose not to reference those regulations when it retained the term “unfinished frame or receiver” and sought to add “ready frames and receivers” and “market frames and receivers” to Nevada law. If, as Appellants suggest, the ATF’s regulations provided meaning to the unconstitutional term “unfinished frame or receiver,” the Legislature would have adopted the ATF’s definitions. The Legislature did not do so, however, choosing instead to retain the unconstitutional term “unfinished frame or receiver” and adopt two new terms in lieu of any new federal guidelines or terms. As a result, it cannot be said, as Appellants suggest, that the ATF’s regulations provide meaning to AB 286, when the Legislature took action in the face of the ATF’s rulemaking directly contrary to that thesis.

Appellants also fail to acknowledge that a federal court, as noted above, has determined that the ATF exceeded its regulatory authority under the federal gun control act when it adopted 27 C.F.R. §§ 418.11 and 478.12, and injunctions have issued prohibiting their enforcement against certain parties. *See, e.g., Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D.

Tex. March 19, 2023); *see also Vanderstok v. Blackhawk Mfg. Grp. Inc.*, Case No. 4:22-cv-00691-O, 2023 WL 5978332, 2023 U.S. Dist. LEXIS 163103 at *55 (N.D. Tex. September 14, 2023). If, as a federal district court has found, the ATF exceeded its rulemaking authority in adopting its new regulations and those regulations are unlawful, they cannot serve as a guide to interpret AB 286. But even if they can, the litigation striking down the ATF’s regulations further demonstrates that the context in which the ATF adopted its regulations – the federal gun control act that regulates firearms – provides no guidance with respect to a state statute, like AB 286, that seeks to criminalize “unfinished frames and receivers” that are not, by definition or any stretch of statutory interpretation, firearms or frames and receivers of firearms. *See Polymer80, Inc. v. Garland*, Case No. 4:23-cv-00029-O, 2023 U.S. Dist. LEXIS 91311 (N.D. Tex. March 19, 2023) (the gun control act does not regulate firearm parts, let alone parts kits or items that may be assembled into firearms).

Appellants finally suggest that this Court “can interpret AB 286 as coextensive with federal law as a ‘limiting construction’ that provides fair notice and standards for enforcement.” Appellants’ Supplemental Brief at p. 8. An unlawful federal regulation, such as the ATF’s new regulations, cannot, however, serve as a “limiting construction” to save AB 286 from its constitutional demise. More importantly, however, Appellants’ suggestion concerning a limiting instruction runs contrary to

the standard this Court has adopted for determining when a criminal statute is unconstitutionally vague.

A criminal statute must 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 v. First Jud. Dist. Ct. of Nev.*, 131 Nev. 1015, 1021, 363 P.3d 1159, 1164 (2015). These tests cannot be met if, as Appellants suggest, a criminal statute like AB 286 must be interpreted coextensively with federal regulations that are not referenced in the statute itself, post-date the statute, and subject to successful legal challenges in federal courts. In fact, the mere suggestion that that meaning of “unfinished frame or receiver” may only be knowable upon consultation of unlawful federal regulations that were adopted after AB 286 was passed into law (and that the Nevada Legislature has not embraced), demonstrates AB 286 does not provide a person of ordinary intelligence fair notice of what it prohibits or set any standards to prevent discriminatory enforcement. AB 286 is, therefore, vague and consequently unconstitutional.

CONCLUSION

The District Court correctly found that the term “unfinished frame or receiver” is unconstitutionally vague. In the face of that decision, this appeal, and the ATF’s new regulations, the Nevada Legislature retained the term “unfinished frame or

receiver” without change in 2023 and did not seek to incorporate the ATF’s concept of “partially completed frames and receivers” into Nevada law. Instead, the Legislature – after a federal court determined the ATF’s regulations were unlawful – sought to criminalize what it coined “market frames and receivers” and “ready frames and receivers.” The Governor vetoed that legislative action, so that Nevada law did not expand to the criminalization of “market frames and receivers” and “ready frames and receivers.” In these circumstances, there is no basis to examine federal laws in an attempt to know what “unfinished frames and receivers” actually are and subject all Nevadans to criminal penalties. The District Court’s decision should be affirmed.

DATED this 29th day of September, 2023

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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)(i) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it contains 8,467 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 29th day of September, 2023

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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:

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Dated this 29th day of September, 2023

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