

No. 83999

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Oct 17 2023 03:35 PM
Elizabeth A. Brown
Clerk of Supreme Court

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

NOTICE OF SUPPLEMENTAL AUTHORITY

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Appellants Joseph M. Lombardo, Aaron Ford, George Togliatti and Erica Sousa (collectively, the “State”) file this notice of supplemental authority under Nevada Rule of Appellate Procedure 31(e).

This notice’s purpose is to update this Court on recent developments in the litigation challenging the Bureau of Alcohol, Tobacco, Firearms and Explosives’ (the “ATF”) ghost-gun rule, Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. 24,652 (Apr. 26, 2022) (codified at 27 C.F.R. pts. 447–449). Yesterday, the U.S. Supreme Court vacated a district-court decision that had enjoined enforcement of the rule and that Polymer80 relied on in its supplemental briefing. *Garland v. BlackHawk Mfg. Grp., Inc.*, __ S. Ct. __, No. 23A302, 2023 WL 6801523 (Oct. 16, 2023) (mem.). The Court’s order is relevant to the following pages of the parties’ supplemental briefs:

- Page 4, note 2 of the State’s supplemental brief; and
- Pages 2-3, 9-10, 21 and 32-33 of Respondent Polymer80, Inc.’s supplemental brief.

Two months ago, this Court directed the parties file supplemental briefs “on the question of whether it is appropriate to use federal law, including” a provision of the ATF’s ghost gun rule, “to clarify the purportedly vague terms in [AB 286] and whether the use of federal law clarifies the terms.” Order Directing Supplemental Briefing 1. The State’s supplemental brief explained that this Court may consider the rule in interpreting AB 286 and that the rule confirmed the meaning of the terms

used in the statute. Appellants’ Supplemental Br. 1. The supplemental brief also noted that a federal district court had “vacated the ATF rule, but the U.S. Supreme Court stayed the lower court’s judgment, so the ATF rule [was] currently in force.” *Id.* at 4 n.2.

As relevant here, Polymer80 responded that the rule had “been struck down in federal court as an unlawful exercise of the ATF’s rulemaking authority” and (despite the language quoted in the previous paragraph) that the State had “failed to mention, let alone address, the federal court decisions that have struck down the ATF’s regulations.” Respondent’s Supplemental Br. 2-3. To support that argument, Polymer80 relied on a decision that postdated the State’s supplemental brief and the U.S. Supreme Court’s stay. *Id.* at 9-10 (citing *VanDerStok v. Garland*, __ F. Supp. 3d __, No. 4:22-cv-691, 2023 WL 5978332 (N.D. Tex. Sept. 14, 2023), *vacated by BlackHawk Mfg.*, 2023 WL 6801523). That decision enjoined the United States from enforcing the rule against certain named plaintiffs during appellate proceedings. *VanDerStok*, 2023 WL 5978332, at *19.¹

¹ Polymer80 also cited a pre-stay decision by the same district judge enjoining enforcement of the rule against Polymer80. OB 9-10 (citing *Polymer80, Inc. v. Garland*, No. 4:23-cv-29, 2023 WL 3605430 (N.D. Tex. Mar. 19, 2023) (unpublished)). That decision was based on the district judge’s “earlier reasoning” in *VanDerStok*. *Id.* at *5 n.31, 8. The United States didn’t appeal that injunction; instead, it moved to vacate the injunction due to the U.S. Supreme Court’s stay order. Defendants’ Motion to Lift Stay, to Dismiss Action, and to Vacate Preliminary Injunction, at 1, *Polymer80*, No. 4:23-cv-29 (Aug. 18, 2023). Its motion is pending in the district court.

After supplemental briefing in this case closed, the United States filed an application in the U.S. Supreme Court to vacate the *VanDerStok* injunction. Application to Vacate Injunction Pending Appeal 3-4, *BlackHawk Mfg.*, No. 23A302 (Oct. 5, 2023). It argued that the Court’s “prior stay reflect[ed] an authoritative determination that the government should be allowed to implement the [r]ule during appellate proceedings.” *Id.* at 2.

The U.S. Supreme Court granted the United States’ application and vacated the injunction. *BlackHawk Mfg.*, 2023 WL 6801523. The result is that the rule is again enforceable. *See generally* Ariane de Vogue, *Supreme Court Allows Biden Administration to Continue Fully Enforcing Ghost Gun Regulations*, CNN (Oct. 16, 2023), <https://tinyurl.com/mu4jrwyv>.

DATED this 17th day of October 2023.

AARON D. FORD
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By: /s/ Kiel B. Ireland
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Deputy Solicitor General

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing in accordance with this Court's electronic filing system and consistent with NEFCR 9 on October 17, 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.

/s/ S. Messina _____
an employee of the
Office of the Attorney General