

Case No. 83999

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**IN THE SUPREME COURT OF THE STATE OF NEVADA**

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

Appellants,

v.

POLYMER80, INC.,

Respondent.

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ON APPEAL FROM THE THIRD JUDICIAL DISTRICT COURT  
CASE No. 21-CV-00690

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**APPELLANTS' OPENING BRIEF**

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## INTRODUCTION

Polymer80 sold “buy, build, shoot” kits that allow the purchaser to assemble a fully functioning firearm in 20 to 40 minutes. Polymer80’s kits, such as the “buy, build, shoot” products, are sold without any background check, and the resulting firearm does not have a serial number, meaning that it is untraceable if used in a crime.

The Legislature passed Assembly Bill 286 to ban Polymer80’s kits and others like them. Polymer80 does not dispute that. It acknowledges in its verified complaint that it knows its products—including its “buy, build, shoot” kits—are the subject of Assembly Bill 286. Despite this, it pursued a pre-enforcement facial vagueness challenge based on the claim that it cannot tell what products are subject to AB 286.

The district court granted summary judgment to Polymer80, ignoring the context in which AB 286 was passed, Polymer80’s own knowledge of the terms used in AB 286’s definition of “unfinished frame or receiver,” and the Department of Public Safety’s testimony as to what AB 286 criminalizes. The district court instead based its ruling on a hypothetical application of AB 286, finding potential vagueness where none actually exists.

Because AB 286’s definition of an “unfinished frame or receiver” is not impermissibly vague in most applications and does not encourage seriously discriminatory enforcement, this Court should reverse the district court order granting Polymer80 summary judgment and remand with instructions to enter summary judgment in favor of the State.

### **STATEMENT OF JURISDICTION**

Appellants Stephen Sisolak, Governor of Nevada; Aaron D. Ford, Nevada Attorney General; George Togliatti, Director of Nevada Department of Public Safety; and Mindy McKay, Administrator of Records, Communications, and Compliance in the Nevada Department of Public Safety (collectively, the “State”) appeal from an order granting Plaintiff-Respondent, Polymer80, Inc. (“Polymer80”) summary judgment and a permanent injunction, which the district court entered on December 10, 2021. Notice of the district court’s order was filed on December 13, 2021. The State filed a timely notice of appeal on December 20, 2021. This Court has jurisdiction under Nevada Rule of Appellate Procedure (“NRAP”) 3A(b)(1) and NRAP 3A(b)(3).

## **ROUTING STATEMENT**

This Court should retain jurisdiction under NRAP 17(a)(12) because the order below invalidated an important public-safety statute. AB 286 concerns the build process of untraceable firearms. Using the vagueness doctrine of Nevada's Procedural Due Process Clause, the district court enjoined sections 3 and 3.5 of AB 286, which restrict the possession, purchase, transport, and reception of unfinished frames or receivers lacking a serial number imprinted under federal law and provide criminal penalties for violating these sections.

## **STATEMENT OF THE ISSUES**

1. Can Polymer80 challenge AB 286 on vagueness grounds where the plain language of AB 286 clearly proscribes Polymer80's conduct?
2. Even if Polymer80 can bring its vagueness challenge, does vagueness so permeate AB 286's definition of "unfinished frame or receiver" that it is void in most circumstances?
3. Is AB 286's definition of "unfinished frame or receiver" so standardless that it authorizes or encourages seriously discriminatory enforcement?

## STATEMENT OF THE CASE

### I. Background Facts

#### A. Polymer80 Manufactures and Sells Components for Building 80% Completed, Untraceable Firearms.

Polymer80 is a business headquartered in Lyon County. Joint Appendix (App.) at APP 000148, ¶32. It is a “leading manufacturer of innovative gun-related products, components, and aftermarket accessories.” *Id.* at ¶33. Polymer80’s customers seek it out to participate in the process of building a firearm. *Id.*, ¶34. The complaint quotes the Legislature’s description of Polymer80: “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.” *Id.* at ¶36.

Polymer80’s products take center stage in its verified complaint and in this case. “Nevada legislators and officials have made clear that the purpose of AB 286 is to criminalize Polymer80’s business.” *Id.* The Nevada Senate Committee on the Judiciary specifically discussed

Polymer80's products. *Id.* ¶37. In fact, this is how one of Polymer80's kits was described:

The 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. All the purchaser needed was a Dremel tool or a regular drill and 20 to 40 minutes depending on skill levels. The real problem begins when the product switches from the AR-15 platform to handguns, as handguns are used far more frequently in crimes.

APP 000619. Hearing before the Senate Committee on Judiciary on Assembly Bill 286, 81st Regular Session at 27 (May 11, 2021) (statement of Steve Lindley, Program Manager, Brady Campaign to Prevent Gun Violence).

When Polymer80 developed products, it sought from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") assurances that its product would not be classified as a firearm under the Federal Gun Control Act, 18 U.S.C. §921(a)(3). APP 00864-65, 59:11-60:9; *see also* 86 Fed. Reg. at 27726.1. During discovery, Polymer80 described its products and the concept of "80 percent" completion in reference to them to avoid being classified as a firearm under federal law:

Q. What does Polymer80 assert that 80 percent means when it uses that term?

A. It asserts that it means the product in question is no more or less than 80 percent completed, meaning there is an additional process relative to time, money, knowledge, experience, tools required to finish the product.

APP 000868, at 63:9-17. Polymer80 acknowledged that the term “80 percent frame” is used by Polymer80’s competitors and the consumers that buy such products. APP 000866, 61:12-19.

**B. Polymer80 Knows the Meaning of “Unfinished Frame or Receiver.”**

AB 286, §6(9)’s definition of unfinished frame or receiver has three principal components. First is the item or product being considered, *i.e.*, the blank, unfinished frame or receiver, or casting. Second is the state of completion of the product, *i.e.*, “most of the major machining operations have been completed,” in the build process to draw that item within AB 286’s prohibitions. Third are the terms used to describe fabrication methods such as “additional machining,” “machining,” and “major machining operations.”

Polymer80 testified as to the meanings of the products described in AB 286. An unfinished frame and unfinished receiver are synonymous

and mean, “one that is not capable of accepting components to be manufactured into a complete firearm.” APP 000862-63 at 57:14-17 and 58:22-59:4. Polymer80’s understanding of an unfinished frame is “based on the product’s ability to be completed into a fully functioning working firearm.” APP 000862-63, 57:25-58:3. Polymer80 also understands that others in its industry use the term “blank” synonymously with the term unfinished frame or receiver. APP 000869, 64:9-13. Likewise, the terms casting and machined body are used synonymously by the ATF. APP 000871, 66:17-24. Polymer80 has no reason to believe that the meaning of casting is any different in AB 286. APP 000871-72, 66:25-67:3.

Captain Stuenkel of the Department of Public Safety (“DPS”) testified in deposition as to the meaning of AB 286. Captain Stuenkel described what AB 286 criminalizes.

Q. What is your understanding, if any, based upon that review and your reading through the bill and the other work you did in preparation for today’s deposition, of what it is that AB 286 criminalizes?

A. The possession or selling or transportation of an unfinished product of a firearm, a receiver, or – basically, criminalizes if you’re in possession of a – of a major component of a firearm that has had most of the major machining so it’s – it’s basically in the process of becoming a firearm or component



of a – a major component of a firearm. To the extent where most of the major machining has been complete. So my interpretation of most would be majority. Majority meaning more than 50 percent, or 50 percent of that component has been machined to become a firearm, and the intent of that component is to make a firearm.

APP 000918-19, at 120:21-121:11.

Polymer80's letters to the ATF also show how Polymer80 used commonly understood terms such as "machined" to describe aspects of the fabrication process to complete the firearm build. For example, in one letter, Polymer80 seeks clarification from ATF that a P80 AR-15 type casting is not a firearm under federal law. APP 000183. Polymer80 contends that P80 AR-15 casting is a "raw material" because it would require further "milling, drilling, and other fabrication to be usable as a frame or a receiver." APP 000184. In other words, Polymer80 argues that its casting is not a frame or receiver until further fabrication methods such as drilling and milling, which Polymer80 later in the letter asserts are synonymous with machining. APP 000184-85. Notably, Polymer80 uses the term "machined" not in a federally defined sense, but synonymously with the commonly understood process of "milling, drilling, and other fabrication." APP 000184.

## II. Procedural Facts

Polymer80 brought its pre-enforcement suit in its home county in June 2021. APP 000140 and APP000148, ¶32. It alleged that AB 286 is facially vague because the terms “blank,” “casting,” and “machined body, and “major machining operations” are not defined in section 6(9)’s definition of “unfinished frame or receiver.” APP 000146-147, ¶¶27-28. Polymer80 contends that neither it nor a person of ordinary intelligence can determine AB 286’s meaning. APP 000141 at ¶6. Polymer80’s sole cause of action arises under Nevada’s procedural due process clause. *Id.* at ¶¶2-3.

The district court granted in part Polymer80’s motion for preliminary injunction. APP 000106. The district court held that the term “unfinished frame or receiver” is impermissibly vague and federal law could not be incorporated to “fill holes” to cure its ills. APP 000107-08. The district court never confronted Polymer80’s knowledge of AB 286.

The parties then conducted limited discovery. After which, they filed cross-motions for summary judgment. The district court granted Polymer80’s motion for summary judgment and granted a permanent injunction. APP 001009. The district court’s ruling echoed its prior order.

APP 001019-20. The district court never considered the testimony of Polymer80 and DPS as to the meaning of AB 286's definition of unfinished frame or receiver in section 6(9). *Id.* Notice of the district court's order was filed on December 13, 2021. APP 001027. The State filed a timely notice of appeal on December 20, 2021. APP 001049.

## STANDARDS OF REVIEW

### I. Summary judgment standard

Summary judgment is warranted “when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602–03, 172 P.3d 131, 134 (2007). This Court reviews *de novo* an order granting summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

This Court need not consider the standard of review for injunctive relief. This is so because the plaintiff must actually demonstrate success on the merits of his cause of action. *Chateau Vegas Wine, Inc. v. Southern Wine and Spirits of America, Inc.*, 127 Nev. 818, 265 P.3d 680 (2011).

Because Polymer80 cannot do so under this Court’s de novo review of the cause of action, this Court need not consider whether the district court abused its discretion in ordering the injunctive relief remedy.

## **II. Principles of statutory construction**

This Court construes statutes, “if reasonably possible, so as to be in harmony with the constitution.” *State v. Glusman*, 98 Nev. 412, 419, 651 P.2d 639, 644 (1982). Polymer80 has the burden of establishing the statute's invalidity. *Flamingo Paradise Gaming v. Att’y General*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009). “[Q]uestions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.” *City of Reno v. Reno Gazette–Journal* 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003).

### **SUMMARY OF ARGUMENT**

AB 286 is not unconstitutionally vague. The district court’s entry of summary judgment and issuance of a permanent injunction on that basis suffers from numerous flaws and must be reversed. The State is entitled to summary judgment in the district court.

First, this Court’s precedent forecloses Polymer80’s vagueness challenge. A plaintiff cannot invalidate a law for vagueness where its

conduct is clearly prohibited. *Sheriff of Washoe Cty. v. Martin*, 99 Nev. 336, 340, 662 P.2d 634, 637 (1983). Polymer80 never confronts this contradiction at the heart of its case. It makes little sense for Polymer80 to complain that AB 286's purpose is to "criminalize Polymer80's business" if Polymer80 is supposedly oblivious to what AB 286 criminalizes. APP 000148, ¶36.

Second, even if Polymer80 has standing, AB 286 passes constitutional muster. The law gives a person of ordinary intelligence fair notice of what is prohibited. Accepting the ordinary meaning of AB 286's language in the context of the firearm build process obviates any constitutional concerns, both about the hypothetical meanings of such as "blank," "casting," "machined body," and "unfinished frame or receiver" and about the degree of completeness in the build process.

Third, AB 286 presents no danger of arbitrary enforcement. Mathematical precision regarding the percentage completeness of an "unfinished frame or receiver" is not necessary to ensure consistent enforcement. Giving AB 286's language its ordinary meaning is sufficient.

## ARGUMENT

### I. **Polymer80 Lacks Standing to Challenge AB 286 as Unconstitutionally Vague Because AB 286's Plain Language Clearly Proscribes Polymer80's Conduct.**

The district court never addressed Polymer80's knowledge and understanding of AB 286's plain language and its application to the products that Polymer80 sells. *Id.* Had it done so, it would have been compelled to find that Polymer80 lacked standing to bring its constitutional challenge. This is 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." *Martin*, 99 Nev. at 340, 662 P.2d at 637.

Contrary to the district court's finding, this Court did not abandon *Martin* in *Flamingo Paradise Gaming v. Attorney General*, 125 Nev. 502, 217 P.3d 546 (2009). *See* App. 1011 n.7. *Flamingo Paradise Gaming* does establish a higher standard of vagueness where the statute is criminal in nature. 125 Nev. at 512, 217 P.3d at 553. But that does not mean anyone can bring a vagueness challenge to a criminal statute nor that the reviewing court should immediately launch into a hypothetical analysis of the statute's test. That is so because the first element that a party must

overcome still “deals with the person whose conduct is at issue...” *Scott*, 131 Nev. at 1021, 363 P.3d at 1164. This Court has never retreated from this principle, and, in fact, has repeatedly reaffirmed it. *Shue v. State*, 133 Nev. 798, 807, n.10, 407 P.3d 332, 339 n.10 (2017); *Rimer v. State*, 131 Nev. 307, 325-26, 351 P.3d 697, 710-11 (2015); *Castaneda*, 126 Nev. at 491, 245 P.3d at 559.

The plain language of AB 286 applies to Polymer80’s products and Polymer80 knows it. Section 3.5 applies to persons who sell, offer to sell or transfer an unfinished frame or receiver. AB 286, §3.5. Unfinished frames or receivers are, for example, blanks that have reach a point in the build process where “most” of the major machining operations have been completed to turn the blank into the frame or lower receiver of a firearm. AB 286, §6(9). Polymer80’s understanding of the term “unfinished frame” is based on degree of completeness prior to becoming a firearm. APP 000168-69, 57:25-58:3. An 80 percent complete frame or lower receiver has reached a state of completeness where “most” (*i.e.*, a majority) of the major machining operations have been completed to turn the blank into the frame or lower receiver of a firearm. In fact, Polymer80

never pointed to any product it sells that would not meet definition of an unfinished frame or receiver under AB 286, §6(9).

In order to correctly resolve Polymer80's vagueness challenge, the district court should have analyzed whether Polymer80's products are in fact governed by the plain language of AB 286. It did not. Instead, the court erred by relying on hypothetical ambiguities as to isolated terms within the definition of an "unfinished frame or receiver" and found those isolated terms to be vague. This error led the court to hold that sections 3 and 3.5 fail to provide a person of ordinary intelligence notice of the conduct AB 286 prohibits, in particular when the build process has gone through the major machining operations to reach the point where it is the frame or lower receiver of a firearm. APP 01012-13. An examination of the actual language of AB 286 and the products Polymer80 makes and sells leaves no doubt as to AB 286's application to those products.

This Court has never permitted a party to seek permanent injunctive relief absent an underlying cause of action. *State Farm Mut. Auto. Ins. Co. v. Jafbros, Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993). "[T]he existence of a right violated is a prerequisite to the granting of an injunction." *Id.* (quoting 43 C.J.S. § 18 Injunctions (1978)). This principle



applies also to declaratory relief actions that accompany requests for permanent injunction. *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986). Because Polymer80 lacks a cause of action under the procedural due process clause to bring a vagueness challenge, the issue of whether it has standing to seek the remedies of declaratory relief and injunctive relief need not be resolved.

## **II. Even if AB 286 Did Not Clearly Proscribe Polymer80's Conduct, AB 286 Is Constitutional.**

### **A. Nevada's Due Process Clause**

The Due Process Clause of the Nevada Constitution prohibits the State from depriving any person “of life, liberty, or property, without due process of law.” Nev. Const. art. 1, § 8(5). The void-for-vagueness doctrine applicable to this case is rooted in due process. *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013).

An ambiguity in a statute is not the same as vagueness. More is required. A statute is unconstitutionally vague if it is “so standardless that it authorizes or encourages seriously discriminatory enforcement.” *Ford v. State*, 127 Nev. 608, 612, 262 P.3d 1123, 1125 (2011) (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

“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 v. State*, 131 Nev. 1015, 1021, 363 P.3d 1159, 1164 (2015). The key difference between the two tests is that the first test deals with the person whose conduct is at issue, while the second deals with those who enforce the laws, such as police officers. *Id.* The two tests are independent of one another and failing either test renders the law unconstitutionally vague. *State v. Castaneda*, 126 Nev. 478, 482, 245 P.3d 550, 553 (2010).

This Court has recognized that vagueness analysis 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.” *Ransdell v. Clark Cty.*, 124 Nev. 847, 192 P.3d 756 (2008) (quoting *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)). A plaintiff “who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to others.” *Id.*

## **B. Statutory Framework of Firearm Regulations**

### **1. Federal law does not regulate guns assembled from unfinished frames and receivers.**

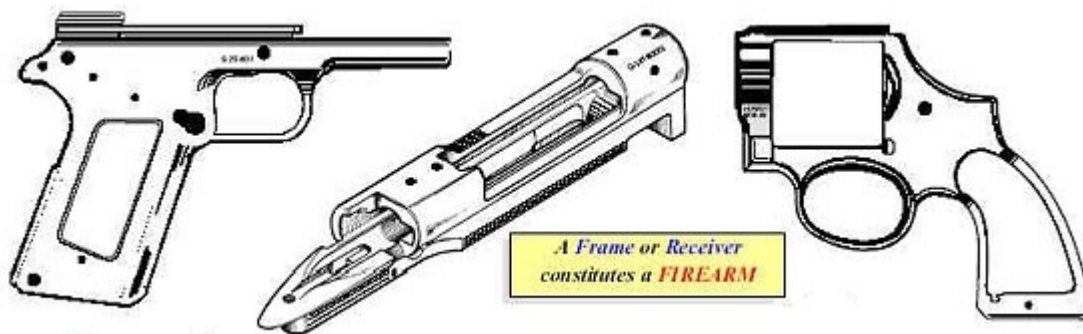
AB 286 was enacted because companies such as Polymer80 had thus far evaded regulation under The Gun Control Act. That is so because gun kits like those sold by Polymer80 were not considered firearms subject to federal proscriptive measures.

The Gun Control Act of 1968, Pub. L. 90-351, 82 Stat. 197, is the key federal statute regulating firearms in this country. Its “twin goals” are “to keep guns out of the hands of criminals and others who should not have them, and to assist law enforcement authorities in investigating serious crimes.” *Abramski v. United States*, 573 U.S. 169, 180 (2014).

To keep guns out of the hands of those who should not have them, the Gun Control Act criminalizes possession by certain individuals (for example, felons). 18 U.S.C. § 922(g). To assist law-enforcement investigations, it requires that each firearm built by a licensed manufacturer contain a serial number unique to that firearm. 18 U.S.C. § 923(i). It also establishes recordkeeping requirements on federal

firearm licensees so that a gun found on the street can be traced, through its serial number, to its point of sale. *Abramski*, 573 U.S. at 173.

The Gun Control Act's provisions do not apply to every gun component. With some exceptions not relevant here, only a gun's "frame or receiver" is considered a "firearm" subject to the Gun Control Act's prescriptions and proscriptions. 18 U.S.C. § 921(a)(3). The "[f]rame or receiver" is the part of the gun that receives the other essential components of the gun, like the barrel and the firing pin. See 27 C.F.R. 478.11, 479.11. That is, other gun components are attached to the frame or receiver to create the complete gun. The graphic below shows receivers in three types of guns:



*Firearms Verification*, ATF, <https://bit.ly/2UJeryz> (last visited June 26, 2021). Because the frame or receiver is the statutory "firearm," it must contain the serial number. Definition of "Frame or Receiver" and

Identification of Firearms, 87 Fed. Reg. 24652, 24654 (Apr. 26, 2022) (to be codified at 27 C.F.R. pts. 447-449).

However, only a sufficiently *finished* frame or receiver is considered a “firearm.” *Id.* at 24663 & n.47. Federal law determines whether a frame or receiver is sufficiently finished to be considered a firearm. *See id.* Since an unfinished frame receiver is not a “firearm” under federal law, it can be sold without a background check and it does not need a serial number. *See id.* And if an individual then finishes the frame or receiver and assembles a working gun from it, the gun does not need to have a serial number. *Id.* In other words, an individual can buy an unfinished frame or receiver without a background check and assemble it into an unserialized working gun without violating federal law.<sup>1</sup>

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<sup>1</sup> The Bureau of Alcohol, Tobacco, Firearms and Explosives recently promulgated a regulation to clarify “*when* an object becomes a frame or receiver such that it is a regulated” firearm. Definition of “Frame or Receiver” and Identification of Firearms, 87 Fed. Reg. at 24663. That is, to clarify the line between unfinished and finished frames and receivers under federal law. While the new regulation supplements AB 286, it does not affect the merits of Polymer80’s pre-enforcement facial vagueness challenge.

**2. AB 286 fills the gap in federal law by prohibiting unfinished frames and receivers that lack a serial number.**

The Legislature passed AB 286 in 2021. APP00127. It targets unserialized guns by banning the guns themselves as well as unserialized unfinished receivers that can be used to assemble unserialized guns.

This appeal concerns AB 286's sections 3, 3.5, and 6(9). APP 000134-36. Section 3 addresses the lack of federal regulation of unfinished receivers by prohibiting individuals from acquiring or possessing them in the first place:

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 000134.

Section 3.5 builds on that restriction by only allowing transfers of unfinished receivers under certain circumstances:

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.

*Id.*

Section 6(9) defines unfinished frame or receiver for purposes of sections 3 and 3.5:

“Unfinished frame or receiver” means a blank, a casting or a machined body that is intended to be turned into a 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 000134.

A first violation of sections 3 or 3.5 is a gross misdemeanor. AB 286 sec. 3(2)(a), 3.5(2)(a); APP 000134. Any subsequent offense of either section is a category D felony. AB 286 sec. 3(2)(a), 3.5(2)(a), APP 00128.

Section 3.5 became effective upon AB 286’s passage, while section 3 did not become effective until January 1, 2022. *Id.*

**C. AB 286 Gives Fair Notice of What It Prohibits.**

**1. Proper application of canons of statutory construction supports AB 286's constitutionality.**

A statute's vagueness permeates the text where it would be void in most circumstances. *Scott*, 131 Nev. at 1021, n. 5, 363 P.3d at 1164 n. 5. A plaintiff overcomes this hurdle where the statute lacks sufficient notice of what it prohibits "to enable persons of ordinary intelligence to understand" the conduct it reaches. *Flamingo Paradise Gaming, LLC*, 125 Nev. at 512, 217 P.3d at 553.

Here, a proper analysis reveals that, far from being void in most circumstances, AB 286's language can be given its ordinary meaning, and applied to Polymer80's products, without any confusion whatsoever.

This Court should start its analysis with the actual circumstances of this case: the products Polymer80 actual sells and manufacturers and the plain language of AB 286. The hypotheticals relied on by the district court are of no use in determining AB 286's vagueness. *U.S. v. Nat'l. Dairy Prod. Corp.*, 372 U.S. 29, 32 (1963) (quoting *U.S. v. Raines*, 362 U.S. 17, 22 (1960) ("The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical



cases”). Finding an ambiguity in a statute through hypothetical analysis—as the district court did here—does not make it constitutionally infirm. This Court can and should supply sufficient meaning to overcome vagueness in order to avoid a constitutional collision. *State v. Hughes*, 127 Nev. 626, 628, 261 P.3d 1067, 1069 (2011). “[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality.” *Castaneda* 126 Nev. at 481, 245 P.3d at 552 (quoting *Hooper v. Cal.*, 155 U.S. 648, 657 (1895)).

Polymer80 has not identified any uncertainty as to the application of AB 286 to any product it produces. Polymer80 has likewise never identified any of its competitors’ products where AB 286’s application is a mystery. On this basis alone, the district court’s judgment must be reversed.

**2. Giving AB 286’s language its ordinary meaning avoids unconstitutional vagueness.**

In deciding this appeal, this Court should give AB 286’s words their ordinary meaning. *Id.* Here, that means looking to the evidence introduced at summary judgment—which established that ordinary meaning. When “the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of

the statute, unless it is clear that this meaning was not intended.” *State v. Quinn*, 117 Nev. 709, 713, 30 P.3d 1117, 1120 (2001). Where plain meaning is absent because of ambiguity, the legislature’s intent “becomes the controlling factor in statutory construction.” *Harvey v. Dist. Ct.*, 117 Nev. 754, 770, 32 P.3d 1263, 1274 (2001). Under either analysis, Polymer80’s claim fails.

There was never any dispute that an 80 percent kit such as the Buy Build, and Shoot and any similar 80 percent kit would be criminalized under AB 286’s plain language defining an unfinished frame or receiver in section 6(9). The legislative history demonstrates that the legislature enacted AB 286 specifically because it was concerned by the 80 percent receiver kits (such as Polymer80’s Buy, Build, Shoot kit) that could be assembled as quickly as 20-40 minutes. APP 000619. Polymer80 testified that the term 80 percent, within the accessory industry and the end consumers, has a definite meaning. APP 000174, at 63:9-17; *see also* APP 000172, 61:12-19.

The district court’s assertion, (APP 01013), that isolated words within the definition of “unfinished frame or receiver” (such as blank, casting, machined body, frame, or lower receiver) have no fixed meaning

is at odds with the State’s briefing, DPS’s deposition where these terms were defined, and Polymer80’s own deposition testimony. APP 000812-16, APP 000123-25. Polymer80 itself testified that it has no reason to believe its understanding of the terms unfinished frame, receiver, blank, or casting, machined body than if this Court interpreted the plain meaning of those terms as used in AB 286. APP 000168-69 and 000177-78.

The district court’s concern that the definition of “unfinished frame or receiver” lacks a sufficient guidepost as to “when” in the firearm build process AB 286’s prohibitions come into effect is no concern at all under the plain language of AB 286. APP 001019-20. AB 286 applies in the build process “at the point when most of the major machining operations have been completed to turn the frame or lower receiver into a firearm...” AB 286, §6(9). The question of “when” is answered by the easily understood adjectives of “most” and “major.”

These terms have commonly understood definitions. The word “most” when used as an adjective, such as in section 9 of AB 286, means “greatest in quantity, extent or degree” or “the majority of.” The New Oxford American Dictionary, 2nd Ed. 2005. The word “major” when used

as an adjective means as “important, serious, or significant.” *Id.* No due process challenge based on vagueness is maintainable where the words and phrases have an easily ascertainable meaning. *Martin*, 99 Nev. at 340-41, 662 P.2d at 637-38 (using Webster’s Third New International Dictionary to deny a vagueness challenge).

To be sure, AB 286 could have used a mathematical percentage of completion in its definition of unfinished frame or receiver, but the law does not require it. *Castaneda*, 126 Nev. at 482, 245 P.3d at 553. Even if there are close cases in the future regarding when in the build process AB 286 applies, that is not vagueness issue. Close cases are addressed by the “requirement of proof beyond a reasonable doubt.” *U.S. v. Williams*, 553 U.S. 285, 306 (2008).

**3. The district court’s reliance on hypotheticals led it to erroneously find vagueness in AB 286’s language.**

This Court should reject the district court’s erroneous finding of hypothetical vagueness, where none existed in the firearm build context. Specifically, with regard to terms such as “machining,” that pertain to aspects of fabricating, the court incorrectly opined that it could not imply federal definitions into AB 286. *See* APP 001021 (citing *Gallegos v. State*,

123 Nev. 289, 294-95, 163 P.3d 456, 459 (2007)). The district court's analysis misapprehends the proper analysis, however. The point is not whether AB 286 incorporates definitions from the federal Gun Control Act into AB 286. Rather, Polymer80's own letters to the ATF demonstrate that the phrases related to fabrication in the build process are commonly understood without reference to specific provisions of the Gun Control Act.

A review of Polymer80's letters shows exactly that. For example, Polymer80 wrote that "frame or receiver" could be defined by "ordinary nomenclature." APP 000879. The phrase means "the finished part which is capable of being assembled with other parts to put together a firearm." *Id.* (quoting Glossary of the Association of Firearm and Toolmark Examiners (2nd ed. 1985), 111.)). Likewise, "drilling, milling, and machining" are means of fabricating, which Polymer defined by reference to an online dictionary. *Id.* Polymer80 used "unfinished lower receiver," "receiver blanks," "casting," "lower receiver blank," "unmachined," "machined," and "machine work" without reference to any specialized definition. APP 00877-881.

**4. Express scienter language is not required to avoid a finding of unconstitutional vagueness.**

Finally, any vagueness concerns are alleviated by this Court's jurisprudence that implies a scienter requirement into criminal statutes to avoid constitutional concerns. *Ford*, 127 Nev. at 621, 262 P.3d at 1132 (citing *City of Las Vegas v. District Court (Krampe)*, 122 Nev. 1041, 1051, 146 P.3d 240, 247 (2006)).

The district court erred in believing that express scienter language is required. In the district court's view, the absence of express language of intent in sections 3 and 3.5 means AB 286 contains no scienter requirement. APP 01015. But in *Krampe* this Court implied a specific-intent scienter requirement because of the ordinance's purpose to prohibit patrons and dancers from engaging in the prohibited activity. 122 Nev. at 1049-50, 146 P.3d at 245-46.

Here too the statute's purpose means that there is an implied specific-intent scienter requirement. During the Legislature's consideration of AB 286, its sponsor explained that ghost guns that are the product of a build process facilitated by companies like Polymer80 are a public safety threat for two reasons: they circumvent background checks and they are virtually impossible to trace if used in a crime. May

11 Senate Hearing, *supra*, at 1:14:07 to 1:14:36 (statement of Assemb. Jauregui). Because AB 286 targets the build process of untraceable firearms, intent is clearly implied. People do not assemble or facilitate the assembly of an unserialized firearm by selling gun kits inadvertently.

AB 286 targets the build process to curb the negative effects of unserialized firearms that so far had evaded regulation by the federal Gun Control Act. AB 286 gives both facilitators of unserialized firearms and end consumers fair notice of what it prohibits. The district court's conclusion—that even if it implies intent, the statute's definition of unfinished frame or receiver is still too vague—continues to ignore the context in which AB 286 arose.

Polymer80 may vigorously disagree with the Legislature's view that unserialized firearms lead to negative societal effects but quibbles over the wisdom of a law cannot serve to nullify it. *Village of Hoffman Estates*, 455 U.S. at 505.

**D. AB 286 Presents No Danger of Arbitrary Enforcement.**

Polymer80 has the heavy burden to show that AB 286 is so vague that it lacks sufficient standards and encourages arbitrary enforcement. *Silvar*, 122 Nev. at 293, 129 P.3d at 685. Statutes like AB 286 only lack

sufficient standards where they would allow “juries to ‘pursue their personal predilections.’” *Id.* (quoting *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)). Nothing in AB 286 even approaches that threshold.

AB 286 has sufficient guideposts to inform enforcement decisions. The definition of unfinished frame or receiver and the inputs for products describe their degree of completion and means of fabricating are sufficiently clear based on the common understanding of those terms in the build process. That is what the testimony of Polymer80, the letters of Polymer80 to ATF<sup>2</sup>, and the testimony of DPS shows. Based on this background, Nevadans are not at risk of arbitrary enforcement.

The text of the statute tells the court that it is when it is majority completed towards a firearm. AB 286, §6(9). The district court’s remark that it cannot determine when an unfinished frame or receiver comes into existence is thus incorrect. APP 001023-24. In fact, this Court has had

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<sup>2</sup> Prior to AB 286’s enactment, Polymer80 engaged in substantial written correspondence with the ATF to attempt to demonstrate that its products were not firearms under the Gun Control Act. In its sustained campaign, Polymer80 relied on the ordinary meaning of the terms it now says are vague and indecipherable to argue its position. *See e.g.*, APP 000877-81.



little trouble disposing of similar challenges to Nevada's DWI statutes. *Slinkard v. State*, 106 Nev. 393, 395, 793 P.2d 1330, 1331 (1990).

Here, there is even less danger of arbitrary enforcement against Polymer80 or anyone who buys its products than the defendant in *Slinkard*. AB 286 has a scienter requirement. *Ford*, 127 Nev. at 621, 262 P.3d at 1132. Whether an entity such as Polymer80 or a consumer had the requisite specific intent to violate AB 286 is a question of fact in a possible, future enforcement action, not a reason to ditch AB 286 on vagueness grounds. *Ford*, 127 Nev. at 621-22, 262 P.3d at 1132.

### CONCLUSION

This Court should reverse the district court's order with instructions to enter summary judgment in favor of the State.

Dated this 2nd day of June, 2022.

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Dated this 2nd day of June, 2022.

AARON D. FORD  
Attorney General

By: /s/ Steve Shevorski  
Steve Shevorski  
Chief Litigation Counsel

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court by using the electronic filing system on the 2nd day of June, 2022, and e-served the same on all parties listed on the Court's Master Service List.

*/s/ R. Carreau* \_\_\_\_\_  
R. Carreau, an employee of  
the office of the Nevada Attorney General