STATE OF MICHIGAN

IN THE COURT OF APPEALS

GUY BOYD,
Plaintiff-Appellee,

vs.

NOT AN LLC d/b/a JSD SUPPLY,
Defendant-Appellant,

And KYLE THUEME,
Defendant.

Court of Appeals No.372372
Lower Court Case No. 2024-000304-NP
22nd Circuit Court Washtenaw County

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CROSS-APPELLEE NOT AN LLC d/b/a JSD SUPPLY'S RESPONSE TO GUY BOYD'S OMNIBUS BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

PAGE NOS.

INDEX OF AUTHORITIES

Constitutional Authority: **Pages**

Statutes and CFRs:

Cases:

Court Rules

Treatises:

COUNTER-JURISDICTIONAL STATEMENT

Cross-Appellee Not An LLC, d/b/a JSD Supply ("JSD") agrees that Cross-Appellant Guy Boyd's ("Boyd") jurisdictional statement is complete and correct except that Boyd incorrectly states JSD filed its Application for Leave to Appeal on "September 6, 2025". JSD filed its Application on September 6, 2024. JSD incorporates the jurisdictional statement contained in its Brief on Appeal. *See* MCR 7.212(D)(2).

COUNTER-STATEMENT OF QUESTIONS INVOLVED

I. Whether Boyd Ignores All Subsequent Case Law Which Holds That *Moning* is the Narrowly Construed Exception That Only Applies Where Products Are "Marketed Directly To Children"?

JSD answers: "Yes".
Trial Court answered: "No".
This Court should answer: "Yes".

II. Whether Merely Marketing and Selling a Legal Product Exposes a Retailer to Liability for Unforeseeable, Criminal Acts?

JSD answers: "No".
Trial Court answered: "Yes".
This Court should answer: "No".

III. Whether The ATF's "Newly Expanded" Rule, Which Became Effective on August 24, 2022, Can Apply Retroactively In the Absence of Congressional Authority?

JSD answers: "No".
Trial Court answered: "No".
This Court should answer: "No".

IV. Whether The Incomplete Kits Theume Purchased From JSD Included a Magazine and Ammunition Like the "Buy Build Shoot" Kits In *VanDerStok v Bondi*?

JSD answers: "No".
Trial Court answered: "N/A".
This Court should answer: "No".

V. Whether Applying The ATF's "Newly Expanded" Rule Retroactively to Transactions That Occurred Prior To That Rule's Existence Constitutes *an Ex Post Facto* Law Because That New Rule Changes the Consequences of Such Sales?

JSD answers: "Yes".
Trial Court answered: "N/A".
This Court should answer: "Yes".

VI. Whether Willful Blindness is Sufficient to Establish Negligent Entrustment?
JSD answers: "No".

Trial Court answered: “Yes”.
This Court should answer: “No”.

VII. Did Boyd Sufficiently Allege JSD Proximately Caused Theume to Consume Drugs and Alcohol and Then Recklessly Shoot Boyd In the Face Where All JSD Did Was Lawfully Advertise and Sell the Incomplete Kits to the General Public?

JSD answers: “No”.
Trial Court answered: “Yes”.
This Court should answer: “No”.

VIII. Whether Proximate Cause is a Question for the Jury When MCL §600.2947(2) Provides That The Question of “Whether There Was Misuse of a Product and Whether Misuse Was Reasonably Foreseeable Are Legal Issues To Be Resolved By the Court”?

JSD answers: “No”.
Trial Court answered: “Yes”.
This Court should answer: “No”.

IX. Whether the Rule of Lenity Prevents Retroactive Application of the ATF’s “Newly Expanded” Regulation to JSD’s Sales of the Kits Because the ATF’s New Rule Changes the Consequences of Such Sales and the ATF Has “Flip Flopped” Its Position Regarding The Requirements for Such Sales?

JSD answers: “Yes”.
Trial Court answered: “NA”.
This Court should answer: “Yes”.

COUNTER-STATEMENT OF FACTS

This case arises out of Kyle Thueme's ("Thueme") decision to deliberately aim a loaded handgun at Guy Boyd's ("Boyd") face and pull the trigger, which Thueme "hoped" was empty, while the two of them were admittedly drunk and high as a result of their illegal consumption of alcohol and drugs. For the sake of brevity and to avoid repetition, JSD incorporates the Statement of Facts in its Application for Leave to Appeal and its accompanying Brief. While much of this Response focuses on legal arguments, JSD will highlight some limited facts which are relevant to factual arguments raised in Boyd's Omnibus Response.

Specifically, Boyd relies heavily upon the US Supreme Court's recent decision in *VanDerStok v Bondi,* 145 S Ct 857 (2025) which involved the sale of a "Buy Build Shoot" kit. *Id.* That kit, which is depicted in a photograph contained in the US Supreme Court's opinion, was sold in a single transaction and included both a magazine and ammunition, items *not sold* by JSD. *Id.*

On the other hand, Boyd admits that these incomplete Kits Theume purchased from JSD were sold in two separate transactions but included neither a magazine nor ammunition. (JSD's Appendix, pg. 016, Complaint, ¶63-67). Instead of including these complete kit items like the seller in *VanDerStok*, Theume had to separately seek out and purchase a magazine and ammunition from another source. *Id.* This factual distinction is discussed in detail below.

ARGUMENT

Standard of Review

A trial court's ruling on summary disposition is reviewed *de novo* on appeal. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint by the pleadings alone. *Patterson v Kleiman*, 447 Mich 429, 432; 526 NW2d 879 (1994). Under subrule (C)(8), the court accepts all

well-pleaded factual allegations as true. *See Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

Summary of Argument

This Court should reverse the trial court's order denying JSD's Motion for Summary Disposition because: a) Boyd ignores all of the subsequent case law which holds that *Moning* is the narrow exception, not the rule, and only applies where products are "marketed directly to children"; b) merely advertising and selling a lawful product cannot give rise to liability for unforeseeable, criminal acts; c) the ATF's "newly expanded" rule, which became effective on August 24, 2022, cannot be applied retroactively the transactions at issue here without Congressional authority; d) *VanDerStok v Bondi* is factually distinguishable because the Kits Theume purchased from JSD did not include a magazine or ammunition; e) applying the ATF's "newly expanded" rule retroactively, which changes the consequences of selling even incomplete gun part kits, is an *ex post facto* law; f) willful blindness is insufficient to support negligent entrustment; g) Boyd did not sufficiently allege JSD proximately caused Theume to shoot Boyd in the face while drunk and high merely by lawfully advertising and selling JSD's previously ATF approved unregulated Kits; h) proximate cause is a question for the court, not the jury; and i) the rule of lenity prevents Boyd from seeking to hold JSD liable under the ATF's "newly expanded" regulation.

I. Boyd Ignores All of the Subsequent Case Law Which Holds That *Moning v Alfono* Is the Narrowly Construed Exception To the Rule That There Must Be a Special Relationship Between JSD and Theume In Order to Create a Common Law Duty of Care

Sometimes what a person doesn't say is more telling than what a person does say. In this case, **Boyd completely ignores all of the subsequent case law which holds that *Moning v Alfono*, 400 Mich 425 (1977) is the narrowly construed exception, not the rule**, and **only**

imposes a duty where a seller "directly markets its products to children". (Although Boyd goes to great lengths to "spin" the term "marketing", keep in mind the phrase "marketed directly to children" is quoted verbatim from *Moning*). JSD cited numerous published and unpublished cases, all of which hold that *Moning* is the exception, not the rule, and only applies where products are marketed "directly to children". (JSD's Appendix pp. 257-259 and 269, Exhibit D, and Exhibit F. pg. 274).

Instead of following these cases under *stare decisis*, as it was required to do, the trial court simply ignored them. Boyd now adopts the same "bury your head in the sand" approach by pretending as though these subsequent cases simply do not exist. Indeed, **Boyd makes no mention of them in his Omnibus Brief,** let alone any effort to distinguish them. Instead, he focuses solely upon *Moning* in a vacuum and ignores years of subsequent precedent which holds that ***Moning* is the exception, not the rule**. *Id*.

This case is **not** about imposing a common law duty of negligence upon a retailer that sold a product to directly to a consumer (which would obviously involve a direct relationship). Instead, Boyd is attempting to impose of a duty of care upon JSD in favor of himself, in his capacity as a bystander and a member of the general public, in the absence of **any** relationship between the two.

But such a duty is the narrow exception, not the rule, and this limiting language appears in *Moning* over and over again. "**By marketing slingshots directly to children**, the defendants effectively created the risk that Alfono would use the slingshot". *Moning* at 441 (emphasis added). "Alfono's shooting pellets toward a tree and a ricochet into Moning's eye was within the 'recognizable risk of harm' created **by marketing slingshots directly to children**". *Id* (emphasis added). **Even the plaintiff himself did not argue that marketing slingshots to the general public was negligent**, rather, the only issue in *Moning* was whether marketing them "directly to

children" was. *Id* at 443 ("*Moning* does not, however, contend that manufacturing and marketing slingshots is negligence *per se*. His contention, rather, is that **marketing them directly to children** creates an unreasonable risk of harm")(emphasis in original). The entire point of the "special rule" set forth in *Moning* was to impose a duty upon retailers who market products "directly to children" in favor of strangers/bystanders, which is not remotely the case here.

After misconstruing *Moning*, and ignoring all of the subsequent cases interpreting it as the "narrow exception" to imposition of a common law duty of care to a stranger, Boyd then inexplicably argues that offering a product for sale to the general public **is the same** as "directly marketing it to children". At paragraph 43 of his Complaint, Boyd admits JSD only marketed its products to the general public, not "directly to children". (JSD's Appendix pg. 012, Exhibit A, Complaint, ¶s 26-42). And in paragraph 44, Boyd alleged JSD's website was "accessible to all internet users, including teenagers" *Id*.

But offering a product for sale to everyone is not tantamount to targeting a specific group, i.e. children. Boyd's argument impermissibly expands the narrow "exception" into the "general rule", which is exactly the opposite of what *Moning* and every case decided since 1977 stands for. (JSD's Appendix pp. 257-259 and 269, Exhibit D, and Exhibit F. pg. 274).

Unfortunately, Boyd keeps falsely equating marketing products to the general public with marketing them "directly to children". *See* Boyd's Omnibus Brief, pg. 9 ("Here, JSD marketed its potentially dangerous products (Gun Building Kits) directly to minors by placing them on the market, by making them directly available **to the general public**" (emphasis added). *Moning* and progeny are clear: retailers like JSD only owe a duty of care to strangers/bystanders like Boyd if they market products directly to children, which is not the case here. Boyd implicitly acknowledges this as evidenced by his herculean efforts to impermissibly change his factual

allegations on appeal. Boyd's claim the JSD's website did not have a "You must be 18 to enter" likewise, cannot twist the site into a marking directly to children either. If anyone can enter, that means its not marketed "directly" to anybody, let alone children.

II. Boyd's Common Law Negligence Claim Fails Because *Moning* Is Inapplicable, There Is No "Special Relationship" Between JSD and Boyd That Gives Rise to a Duty of Care And Merely Marketing and Selling a Lawful Product Does Not Create Liability

In addition to the foregoing arguments, Boyd cites a few new cases and unsuccessfully attempts to distinguish the cases cited by JSD in its Application and Brief on Appeal. Boyd's reliance upon *Lelito v Monroe*, 273 Mich App 416, 422-23; 729 NW2d 563 (2006) for the proposition that "Michigan law specifically recognizes 'a general duty to keep children from possessing firearms' is a red herring. Of course, **JSD did not sell a "firearm" to Theume as that term was defined by federal law in effect in 2021**. (JSD's Appendix pp. 59-85). AFT said the Polymer80 lowers were not firearms (being only 80% machined). And as discussed throughout, the ATF's "newly expanded" regulation cannot be applied retroactively to events that occurred before that amended regulation even existed. *Bowen; Landgraf, infra.*

Because *Moning* is inapplicable here (since Boyd does not, and cannot, allege JSD marketed its products "directly to children"), Boyd unsuccessfully attempts to distinguish *Buczkowski*, *Resteiner*, *Carter*, *Graves* and *Groover*, *infra*. All of these cases set forth the general rule that in order to impose a duty of care on a retailer in favor of **a bystander/third party**, Boyd must plead the existence of a special relationship, which he has failed to do here. This is precisely why Boyd goes to such great lengths to expand the "special", "narrow rule" set forth in *Moning*.[1]

[1] *See Buczkowski v McKay*, 441 Mich 96 (1992)("we find that the retailer did not have a legal duty to protect plaintiff, a member of the general public, from the criminal act of the defendant"); *Resteiner v Strum, Ruger & Co*, 223 Mich App 374; 566 NW2d 53 (1997)("Plaintiffs first

There was no "special relationship" between JSD and Boyd and the trial court erred by declining to dismiss Boyd's common law negligence claim.

In addition to the foregoing cases, the US Supreme Court recently held that merely marketing firearms is insufficient as a matter of law to impose liability on a manufacturer or retailer. *See Smith & Wesson Brands, Inc, et al v Estados Unidos Mexicanos*, 605 US _____ (2025). The facts of that case are as follows. Mexico sued various gun manufacturers and distributors alleging that "the defendant companies participated in the unlawful sale or marketing of firearms". *Id* at slip op 1. (These allegations are nearly identical to those here). Specifically, the US Supreme Court considered whether "Mexico's Complaint plausibly pleads that conduct. We conclude it does not". *Id*.

To be more specific, the Mexican government asserted several theories. First, it attempted to avoid the defendants' statutory immunity under PLCAA by arguing that those defendants aided and abetted "another person…in making a false statement about a gun sale's legality". *Id* at 2. Of

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contend that Sturm, Ruger was negligent for marketing its Redhawk revolver to members of the general public, such as Walker. We conclude the case is controlled by *Buczkowski v McKay* [441 Mich 96 (1992)]…and *King v R G Industries, Inc.* [182 Mich. App. 343, 451 N.W.2d 874 (1990)] ….Summary disposition was therefore proper"); *Carter v Loveday*, unpublished decision of the Michigan Court of Appeals, Docket No. 204783, decided April 6, 1999 (JSD's Appendix pp. 311-313)("Nor did defendant have any special relationship to the shooter, his younger brother. A familial relationship alone is not enough to impose a special obligation"); *Graves v Warner Bros*, 253 Mich App 486; 656 NW2d 195 (2002)(producer of daytime talk show did not owe duty to decedent who was shot and killed by another guest on talk show "in the absence of a special relationship" even though producer singlehandedly created embarrassing and stressful situation where decedent expressed his same sex love interest for decedent); *Karen Jo Groover, Pers. Representative Of The Estate Of James Tourtellotte v. Weber,* No. 206229, (Ct. App. Jan. 29, 1999) (JSD's Appendix pp. 315-318) (defendants did not owe duty of care to decedent even though defendants admittedly loaned a shotgun and ammunition to the shooter who they knew was recently in jail).

course, this is one of Boyd's key arguments in this case. Indeed, Boyd alleges that JSD falsely represented the legality of its sale of the Kits. (JSD's Appendix pg. 013, Complaint, ¶48).

The second type of argument the Mexican government asserted was "that the manufacturers supply firearms to retail dealers whom they know illegally sell to Mexican gun traffickers". *Id* at 4. Similarly, in this case, Boyd alleges JSD markets and sells its kits to minors and other individuals JSD knows, or should know, will misuse its products. (JSD's Appendix, pg. 014, Complaint, ¶50). And just like Boyd here, the plaintiff in *Smith & Wesson* alleged "the manufacturers make 'design and marketing decisions' intended to stimulate cartel members' demand for their products". *Id* at 6. (Here, Boyd alleges JSD encourages minors and other prohibited persons to purchase the kits). (JSD's Appendix, pg. 014, Complaint, ¶50).

But the US Supreme Court has repeatedly held that merely advertising, marketing and selling a product, **even where the retailer has actual knowledge of misuse**, is insufficient to impose liability on a retailer.

> **We have little doubt that, as the complaint asserts, some such [illegal] sales take place – and that the manufacturers know they do**. But still, Mexico has not adequately pleaded what it needs to: that the manufacturers 'participate in' those sales 'as in something that [they] wish to bring about', and "seek by [their] action to make' succeed. *Id* at 10 (internal citations omitted).

"To survive, the charge must be backed by plausible allegations of 'pervasive, systemic and culpable assistance". *Twitter, Inc v Taamneh*, 598 U.S. 471, 502 (2023). In the *Twitter* case, the US Supreme Court declined to hold Twitter liable even though **it "knew that among their customers were ISIS supporters, whom they could have done more to identify and remove. Still, we decided that 'nonfeasance' was not enough to hold the companies responsible for the terrorists' unlawful acts**". *Twitter*, 598 US at 489 (emphasis added).

> And the same is true here, for the same reasons. Mexico's plausible allegations are of 'indifference', rather than assistance. They are of the manufacturers merely

> allowing some unidentified 'bad actors' to make illegal use of their wares'. *Id* at 503.

Similarly, in this case, Boyd alleges that JSD knows, or should know, that some purchasers of its products may ultimately misuse such products. (JSD's Appendix, pg. 014, Complaint, ¶50). This is insufficient as a matter of law to impose liability. *Smith & Wesson; Twitter, Id*.

Finally, turning to Boyd's marketing theory, and his *ad nauseum* attempts to spin the word "market", the *Smith & Wesson* court soundly rejected this argument as well, and for good reason. Mexico argued the defendants in that case "produced and marketed 'military style' assault weapons, among which it includes the AR-15 rifles, AK-47 rifles and .50 caliber sniper rifles". *Id* at 14. Similarly, in this case Boyd alleges JSD markets the Kits (with no magazine or ammunition) in a way that may appeal to prohibited persons who could misuse them. (JSD's Appendix, pg. 014, Complaint, ¶50). But again, the Supreme Court held that marketing and selling such products, **even where the sellers knew their products were being purchased by drug cartels, who in turn committed heinous crimes, was insufficient to impose liability**. They key reason: the products were perfectly legal to manufacture and sell, even if some those products sometimes appealed to criminals, because many lawful purchasers also sought out such products.

> The manufacturers cannot be charged with assisting in criminal acts just because Mexico cartel members like those guns too. Those guns may be 'coveted by the cartels', as Mexico alleges; but they also may appeal, as the manufacturers rejoin, to 'millions of law-abiding…Americans". *Id* at 14.

The allegations in *Smith & Wesson* are identical to those alleged here: JSD markets and sells its products in a way that encourages some prohibited persons, including minors, to purchase its

products and JSD has actual knowledge of such transactions[2]. (JSD's Appendix, pg. 014, Complaint, ¶50). But of course, it was perfectly legal for JSD to sell the incomplete Kits without any background checks or age verification under prevailing law because the product sold were not defined as "firearms". (JSD's Appendix, pp. 059-085, Official ATF Letter Rulings). And just like the sellers in *Smith & Wesson*, many law-abiding citizens also purchase JSD's products and Boyd's allegations regarding how JSD markets and sells its products are insufficient as a matter of law to impose liability. *Smith & Wesson; Twitter; Id*.

III. The ATF's New Regulation Which Expanded The Term "Firearm" and Became Effective on August 24, 2022, Cannot Apply Retroactively To These Transactions Which Occurred More Than a Year Earlier In April, 2021

Next, this Court should affirm the trial court's dismissal of Boyd's negligence *per se* theory. The trial court correctly held "[t]here has been no showing that Defendant, JSD, violated any federal or state law or aided and abetted in any violation of law". (JSD's Appendix, pp. 263-264). Boyd now argues that the US Supreme Court's recent decision in *Bondi v VanDerStok*, 145 S Ct 857 (2025) retroactively redefines the definition of a "firearm" to the beginning of time, even before the ATF's "newly expanded" rule was created. Of course, the ATF's revised regulation, which became effective on August 24, 2022, **did not exist**, and therefore cannot be applied retroactively, to the transactions here which occurred on April 9, 2021 and April 27, 2021. (JSD's Appendix, pp. 016-017; 059-085).

It is well settled that an agency such as the ATF may not promulgate "retroactive" regulations absent express authorization from Congress. *Bowen v Georgetown Univ Hosp*, 488 US

[2] JSD vehemently denies these allegations and, as noted throughout, Boyd does not in fact allege JSD markets its products "directly to children". Nonetheless, these allegations are viewed in a light most favorable to Boyd for purposes of MCR 2.116(C)(8).

204, 208; 109 S Ct 468 (1988)(court affirmed lower court's decision invalidating the promulgation of retroactive cost-limit rules, as there was no express statutory authorization of retroactive rulemaking). A regulation is "retroactive" if it "attaches new legal consequences to events completed before its enactment." *Landgraf v USI Film Prods*, 511 US 244, 269-70; 114 S Ct 1483 (1994); *see also Republic Nat'l Bank of Miami v United States*, 506 US 80, 100; 113 S Ct 554 (1992). Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. *Greene v United States*, 376 US 149, 160 (1964); *Claridge Apartments Co v Commissioner*, 323 US 141, 164 (1944); *Miller v United States*, 294 US 435, 439 (1935); *United States v Magnolia Petroleum Co*, 276 US 160, 162-163 (1928).

Here, Boyd does not, and cannot, allege that Congress expressly granted the ATF "express authorization" to promulgate retroactive regulations. Even when the AFT has subsequently changed the status of a particular firearm, such as from a shotgun to a destructive device for instance, an amnesty period was afforded for owners to register and retain possession of their now NFA Title II firearms. This is a forward-looking remedy, not a retroactive one. Accordingly, the ATF's "newly expanded" regulation, which redefined the term "firearm" to include certain unfinished receivers and kits, does not apply retroactively to these transactions which occurred more than a year before that rule became effective. (Complaint, ¶63-67); 28 CFR §478.11 and §478.12; *Bowen; Landgraf, Id.*

Moreover, Boyd attempts to stretch the narrow holding of *VanDerStok* far beyond its four corners. *VanDerStok* involved a *facial challenge* to the specific "Buy, Build Shoot" kits at issue there (which are different from the Kits here, more on that later). The litigants in *VanDerStok* did not argue whether the Gun Control Act of 1968 "expressly authorized" to the ATF to apply its

amendments to 28 CFR §478.11 and §478.12 retroactively. Indeed, nothing in the Gun Control Act indicates that Congress allowed the ATF to apply its regulations retroactively. *See generally* 18 USC §921 *et seq*. The ATF cannot apply its "newly expanded" regulation retroactively in the absence of express, congressional authority. *Bowen; Landgraf, Id.*

In fact, the *VanDerstok* opinion uses the term "new rule" dozens of times throughout its opinion when describing the amendments to 28 CFR §478.11 and §478.12. Beginning on page 3 of its opinion, the Supreme Court stated, "**In 2022**, the Bureau of Alcohol, Tobacco, Firearms and Explosives adopted **a new rule**". *VerDerStok* at 864 (emphasis added). The Supreme Court went on to recognize:

- "in its **new rule**, ATF **interpreted** this language to embrace weapons parts kits"; *Id* at 864;
- "in its **2022 rule**, ATF sought to **expand** this definition" *Id*;
- "**now**, the agency said, a 'frame or receiver' subject to subsection (B) of §921(a)(3), should be understood to encompass as well 'a partially complete, disassembled, or nonfunctional frame or receiver'" *Id*;
- "before ATF's **new rule** took effect and ATF could **begin** efforts to enforce its new rule…"; "besides these changes, ATF's new rule included a number of others. For instance, where the agency's old regulations defined frames and receivers as those parts housing all of a firearm's key components, 43 Fed. Reg. 13537, ATF's new rule redefined those terms"; *Id* at 865, footnote 1;
- As presented to us, this case **does not ask us to resolve** whether ATF's new regulations in §478.11 and §478.12 may be lawfully applied to particular weapons parts kits or unfinished frames or receivers; *Id*; (emphasis added)
- "without question, ATF's new rule seeks to regulate a greater variety of unfinished frames and receivers than the agency has in the past"; *Id* at 873;

Indeed, the *VanDerStok* court recognized that the technology to machine a completed firearm at home simply did not exist until recently. *VanDerStok, Id* at 862 ("recent years, however, have witnessed profound changes in how guns are made and sold. When Congress adopted the

GCA in 1968, [the equipment was]…far too expensive for individuals to make firearms practically or reliably on their own").

This is further evidence that the ATF's amended regulations were not intended to apply retroactively because the products at issue here simply did not exist in the past and therefore could not possibly be "regulated". The ATF's amendments to 28 CFR §478.11 and §478.12 cannot be applied retroactively to these transactions absent express Congressional authority, which does not exist here. *Bowen; Landgraf, Id.* Accordingly, the trial court correctly dismissed Boyd's negligence *per se* claim and this Court should affirm because the ATF's "newly expanded" rule cannot be applied retroactively. *Bowen; Landgraf, Id.*

IV. *VanDerStok* is Factually Distinguishable Because The "Buy, Build Shoot" Kits Were Sold in One Transaction and Included a Magazine and Ammunition, Unlike the Incomplete Kits Theume Purchased From JSD

Boyd's reliance upon *VanDerStok* is also misplaced because that case is factually distinguishable. The *VanDerStok* court began its analysis as follows: "Take a weapon parts kit featured prominently in the record before us: Polymer80's 'Buy Build Shoot' kit. **The first picture below shows the kit**; the second depicts the gun the kit yields". *VanDerStok* at 866 (emphasis added).

The *VanDerStok* court went on to state "now, assess whether the 'Buy Build Shoot' kit meets subsection (A)'s two tests, and start with the question whether Polymer80's offering qualifies a 'weapon'". *Id* at 867. And even though *VanDerStok* only involved a facial challenge, and therefore did not decide whether any particular (or all) weapons parts kits fall within the ATF's amended regulations, they used the 'Buy Build Shoot' kit as an example, which is materially different from the Kits JSD sold here.[3] In this regard, the *VanDerStok* court stated "as we see it, the 'Buy Build Shoot' kit satisfies that test, too". *Id* at 869.

[3] A facial challenge does not involve application of a given law or regulation to a specific product. Rather, under *United States v Salerno*, 481 US 739, 107 S. Ct. 2095 (1987), a plaintiff can only succeed in a facial challenge by "establish[ing] that no set of circumstances exists under which the Act would be valid," i.e., that the law is unconstitutional in all of its applications. *Id*. The US Supreme Court did not, and could not, decide whether the ATF's "newly expanded"

The Supreme Court recognized that "future cases may present other and more difficult questions about ATF's regulations. **But we take cases as they come and today resolve only the question posed to us**". *Id* at 869 (emphasis added). To reiterate, the "only" question before the *VanDerStok* court was whether the particular "Buy Build Shoot" kit depicted in the photograph above, which included a magazine and ammunition, fell within the ATF's "newly expanded" definition. And in case there were any further doubt regarding the only type weapons kit the *VanDerStok* court considered, it stated:

> The GCA embraces, and thus permits ATF to regulate, some weapon parts kits and unfinished frames or receivers, **including those we have discussed**. *Id* at 877 (emphasis added).

The *VanDerStok* court could not have been any clearer that it only analyzed the ATF's new regulation under a facial challenge, not an "as applied" challenge. *Id* at 865. This means the *VanDerSto*k court did not (and could not) decide whether an entire class of gun part kits are now regulated under the ATF's "newly expanded" rule. That question was never before the court. *Id*. Moreover, the only specific example the Supreme Court considered was the "Buy Build Shoot" kit depicted in the photo above which included both a magazine and ammunition, unlike the incomplete Kits JSD sold here.

The above-referenced "Buy Build Shoot" kit, which the *VanDerStok* court opined satisfies the ATF's new test, included a magazine and ammunition. On the other hand, the Kits JSD sold to Thueme did not include any magazines or ammunition. (JSD's Appendix, p. 018, Complaint, ¶82). In order to ultimately create a working firearm that would actually discharge a projectile, Theume had to affirmatively (and illegally) go out of his way to separately purchase a magazine

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regulation applied to the Kits JSD sold to Theume because that question was never before the Court.

and ammunition from another source. *Id*. Boyd does not allege, nor could he, that JSD sold Theume a magazine and ammunition because JSD does not sell such products. *Id*.

Moreover, unlike the "Buy Build Shoot" kit in *VanDerStok*, the Kits at issue here were sold as separate components. (JSD's Appendix, pp. 016-017, Complaint, ¶s 63-67). Accordingly, even if the ATF's "newly expanded" regulation could apply retroactively, which it cannot, *VanDerStok* is factually distinguishable and inapplicable here because the "Buy Build Shoot" kit was sold in one transaction and included a magazine and ammunition, unlike the Kits here.[4]

The Polymer80 frame, jig and drill bits which were part of JSD's incomplete Kit, were first classified as non-firearms by AFT letter rulings (JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). JSD sold its kits and these Polymer80 frames to codefendant Thueme in 2021. Then the ATF promulgated a new rule reclassifying the Polymer80 frame, jigs and bits when sold together, as firearms in 2022. *VanderStock* followed by affirming that the 2022 Rule was within the rulemaking authority of the ATF as a firearm. This historical progression still fails to aid Plaintiff's argument here. It fails because these Polymer80 frames arguably now subject to ATF's rulemaking authority, were not so regulated when sold in 2021. . There was no such Rule in 2021.

[4] To the extent Boyd now argues the unfinished, Polymer80 frame itself is a "firearm" based upon its reading of *VanDerStok*, such an argument fails for several reasons. First, as noted above, the ATF's "newly expanded" regulation cannot be applied retroactively to the transactions at issue here because Congress did not authorize such application. The *VanDerStok* decision did not address this issue at all in its decision. Second, the ATF expressly advised JSD that the unfinished frames it sold were not firearms under the then-existing regulations in effect at that time. (JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). Third, the *VanDerStok* case was a facial challenge and as such Boyd reads too much into that case by concluding the US Supreme Court's decision is binding precedent with respect to specific products. *United States v Salerno, Id.*

The Rule came in 2022, The Supreme Court said the Rule was a valid exercise of the ATF's authority over firearms in 2025.

Finally, Boyd's reliance upon various state law cases is misplaced because those cases involved different statutes with completely different language. For example, the statute at issue in *People v Peals*, 476 Mich 636 (2006) involved a criminal statute which used the phrase "[from which a projectile] may be propelled". That language is markedly different from the federal statutes (and regulations) at issue here. Likewise, Boyd's reliance upon *United States v Fein*, No. 1:24-cr-58, 2025 LX 156761 (W.D. Mich. Apr. 7, 2025) is misplaced. That case, which was decided nearly four years after the transactions at issue here, was based solely upon the ATF's "newly expanded" regulation which did not become effective until August 24, 2022. *See Fein* at 7 ("the rule, **which took effect on August 24, 2022**, also provides that 'a weapon parts kit that is designed to or may readily be completed, assembled, restored, or otherwise converted to expel a projectile…is a 'firearm'")(emphasis added). *Fein* cannot be applied retroactively to the facts of this case any more than the ATF's underlying regulation can be, which is to say not at all.

V. Boyd's Negligence *Per Se* Claim Fails Because Retroactively Applying the ATF's Newly Expanded Regulation Would Constitute an *Ex Post Facto* Law

Boyd's negligence *per se* claim also fails because applying the ATF's new regulation retroactively, as Boyd argues for here, would constitute an *ex post facto* law. Both the Michigan and United States Constitutions prohibit *ex post facto* laws. US Const, art I, § 10; Const 1963, art 1, § 10.12 A law is considered *ex post facto* if it: "(1) punishes an act that was innocent when the act was committed; (2) makes an act a more serious criminal offense; (3) increases the punishment for a [committed] crime; or (4) allows the prosecution to convict on less evidence." *People v Earl*, 495 Mich 33, 37; 845 NW2d 721 (2014).

The prohibitions on *ex post facto* laws "assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning" as well as prevent the government from imposing arbitrary and vindictive legislation. *Weaver v Graham*, 450 US 24, 28-29; 101 S Ct 960; 67 L Ed 2d 17 (1981). *See also* The Federalist No. 44 (Madison) (Rossiter ed, 1961), p 282 (stating that "ex post facto laws . . . are contrary to the first principles of the social compact and to every principle of sound legislation"); The Federalist No. 84 (Hamilton) (Rossiter ed, 1961), pp 511-512 (observing that *ex post facto* laws have historically been "the favorite and most formidable instruments of tyranny").

In this case, Boyd explicitly alleges that JSD's sale of the Kits was in 2021 was "unlawful" under the ATF's "newly expanded" regulation which did not become effective until August 24, 2022. Boyd's circular reasoning is as follows:

> In sum, Boyd has sufficiently alleged that JSD's sales of Kits to Theume **violated** 18 USC §922(a)(1) and (x) and 923(a) and MCL §28.422(5) (Ex. 9) and 750.2233(1) (Ex. 10). Consequently, the Circuit Court's conclusion that '[t]here has been no showing that Defendant, JSD, violated any federal or state law or aided and abetted in any violation of law' is incorrect. (Boyd's Omnibus Brief, pg. 34)(emphasis added).

Recall that **the ATF expressly advised JSD (and all other similarly situated retailers) that the Kits were not "firearms" as defined under federal law**. (JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). JSD was obviously entitled to reasonably rely upon such official guidance. Its prior sales, including those to Theume in 2021, were perfectly legal based upon the law (and the ATF's official guidance) **in effect at that time**. If this Court were to adopt Boyd's flawed logic that JSD's sales in 2021 are now "illegal" or "unlawful" based upon a regulation that **did not even exist in 2021**, such retroactive application would constitute an impermissible *ex post facto* law.

Indeed, neither the US Supreme Court nor the ATF can retroactively make prior acts illegal that were previously legal based upon the law in effect at that time. US Const, art I, § 10; Const 1963, art 1, § 10.12; *see also Kellogg v Shoemaker*, 46 Fed 503 (1995)(remanded to trial court on the *ex post facto* claim because new regulations could not be applied retroactively to conduct which occurred prior enactment of such regulations). Nor has the ATF given any indication of a retroactive application.

VI. Willful Blindness Is Insufficient to Establish Negligent Entrustment

Next, the trial court erred by allowing Boyd to proceed on a negligent entrustment theory because JSD did not market it products "directly to children", JSD did not sell Theume a "firearm" and JSD did not violate any state or federal states in effect at the time of such transactions. These arguments are addressed at length in JSD's Brief on Appeal and will not be repeated again here. Rather, JSD will address the new arguments raised by Boyd on this theory.

Boyd misconstrues *Moning v Alfono*, 400 Mich 425 (1977) in an effort to confuse this Court. Specifically, Boyd cites *Moning* for the proposition that negligent entrustment can be based upon entire "classes of persons", such as minors, instead of a given individual. (Boyd's Omnibus Brief, pg. 37). He cites *Fredericks v General Motors Corporation*, 411 Mich 712 (1981) for the proposition that negligent entrustment can succeed where a defendant offers "potentially dangerous products for sale to *classes of persons* unfit to handle them". *Id.* Boyd then cites the actual language from *Fredericks* as follows: negligent entrustment can be "shown either through proof that the defendant seller '**knew** all job shops were unsafe' or 'that defendant had **special knowledge** of [the shop] which would put defendant on notice'". *Id*. (emphasis added). (Either way, actual knowledge is required, not willful blindness, which is the opposite of actual knowledge).

But Boyd's painful attempt to twist the language in *Moning* and *Fredericks* misses the mark completely. The issue raised by JSD in its Application (and Brief) is whether JSD was required to have actual knowledge of Theume's status as a minor or, alternatively, if willful blindness is sufficient. (Boyd seems to be intentionally trying to confuse the issues of whether JSD marketed its kits "directly to a class of minors" with the scienter/knowledge requirement of whether JSD knew of Theume's unique characteristics of abusing drugs and alcohol, which are two different things).

Willful blindness does not equal knowledge, in fact, every court that has considered the issue has held the exact opposite: a seller does not have any affirmative duty to inquire about a purchaser's status and a seller's failure to inquire cannot give rise to a negligent entrustment claim. *See Buschlen v Ford Motor Co (On Remand)*, 121 Mich App 113, 117; 328 NW2d 592 (1982)("**the *Fredericks* court did not recognize an affirmative duty to inquire on the part of the entrustor** to ensure that the chattel being entrusted was being used in a safe manner. **Instead, the entrustor must first have special notice of the peculiarities of the entrustee** sufficient to put the entrustor on notice before the entrustor is under any further duty to ensure an entrusted chattel's safe use.

Yet this is literally the only "factual allegation" Boyd included in his Complaint, i.e. he **admits** JSD did not know of **any** of Thueme's peculiarities (his age, his propensity to illegally consume drugs and alcohol and his reckless use of firearms) but says "willful" blindness is enough to state a claim because JSD **should have inquired**. **This is not the law in Michigan, nor has it ever been**. *See Fredericks v. GM Corp.,* 411 Mich. 712, 719*,* 311 N.W.2d 725, 727 (1981)*; Buschlen, Id.*[5]

[5] JSD also cited at least two unpublished decisions in its trial court pleadings, both of which held that there is no affirmative duty to inquire regarding an entrustee's status and the fact that a potential product may be used during an event does not constitute notice a product will necessarily

In his Omnibus Brief, Boyd continues his misguided effort to misinterpret the facts and law as follows. For example, Boyd alleges "JSD may be liable for negligent entrustment because it distributed, offered for sale, and entrusted its potentially dangerous products to minors *as a class*" (Boyd's Omnibus Brief, pg. 38)(emphasis in original). **This was never alleged in Boyd's Complaint as filed**. Rather, Boyd candidly admits JSD marketed its products to the general public, not a specific "class of minors" or any minor in particular. (JSD's Appendix, pg. 012, Complaint, ¶44). It is apparent that Boyd is now impermissibly attempting to "amend his Complaint on appeal" far beyond the bounds of what is contained within the four corners of his Complaint. If Boyd now wishes to amend his Complaint to allege JSD marketed its products "directly to children" or to "classes of minors", he cannot do so here on appeal.

Next, Boyd's reliance upon *McKenna v Beesley*, 67 Cal App 5th 552 (2021) is inapposite because the scienter requirement in that case ("should have known") is exactly the opposite of the law in Michigan under *Fredericks* and *Buschlen.* The trial court ignored published, binding law by holding Boyd stated a claim for negligent entrustment where he only alleged JSD "knew, or reasonably should have known" **based solely upon JSD's alleged "willful blindness**". Moreover, this allegation does not make sense: either JSD had actual knowledge or it did not, and positive, actual knowledge cannot be equated with "willful blindness" under *Buschlen*.

Boyd's negligent entrustment claim is defective based upon the allegations of "willful blindness" contained within the four corners of his Complaint because "willful blindness" is not

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be used in an unsafe and/or criminal manner. *See Burlingame v. Nationsrent, Inc*., unpublished decision of the Michigan Court of Appeals, Docket No. 291312, decided January 25, 2011 (Appendix, pg. 287) and *Flowers v. Williams*, unpublished decision of the Michigan Court of Appeals, Docket No. 301175, decided January 17, 2012. (Appendix, pg. 292). JSD cited these decisions because they are relevant, specific fact patterns that are helpful in explaining the negligent entrustment doctrine. *See* MCR 7.215(C).

akin to actual knowledge nor did JSD have any duty to make further inquiry. *See Fredericks; Buschlen; Burlingame;* and *Flowers, Id.*

VII. Boyd Did Not Sufficiently Allege JSD Proximately Caused Thueme to Shoot Boyd In the Face Merely By Advertising Its Products to the General Public

Next, Boyd did not sufficiently allege JSD proximately caused Thueme to illegally consume drugs and alcohol and shoot Boyd in the face **merely by advertising its products for sale to the general public, which was perfectly lawful based upon the law in effect at that time**.

Boyd's allegations regarding causation, even when accepted as true and viewed in a light most favorable to him under MCR 2.116(C)(8), were insufficient as matter of law. "Proximate cause is an essential element of a negligence claim." *Ray v Swager*, 501 Mich 52, 63; 903 NW2d 366 (2017). Proximate cause should not be confused with cause in fact, or factual causation, which means that a plaintiff's injury would not have occurred "but for" the actions of a defendant. *Ray*, *Id.* 501 Mich at 63.

Boyd is attempting to re-frame JSD's conduct as being "negligent" and "illegal" and therefore argues that the mere act of offering the Kits for sale to the general public "proximately caused" Theume to shoot Boyd in the face while the two were drunk and high. But Boyd's entire proximate causation analysis puts the proverbial cart before the horse. In order for this theory to succeed, the threshold issue of whether JSD's conduct was "negligent" or "illegal" **at the time those transactions occurred in 2021 must be resolved first.**

If JSD's marketing and sale of the Kits to the general public was not "negligent" or "illegal" at the time those transactions occurred in 2021, then those mere acts cannot be said to have "proximately caused" Theume to shoot Boyd in the face while the two were drunk and high. Indeed, every case cited by Boyd in his proximate cause analysis is based upon the threshold

issue/incorrect conclusion that JSD's acts in 2021 were illegal under the prevailing law at the time. *See Cluney v Brownells, Inc*, 777 F. Supp. 3d 1, 20 (D. Me. 2025)("It is reasonably foreseeable that a minor coming into possession of products they are **legally forbidden** to buy…")(emphasis added)(April 5, 2025, Order p. 14); *see also* Boyd's Omnibus Response, pg. 44 ("none [of the cases cited by JSD] arises out of the sale of potentially dangerous products to minors or the illegal transfer of firearms in violation of gun laws")(emphasis added).

As noted throughout, **JSD's sale of the Kits to Theume in 2021 was perfectly legal under prevailing law in effect at the time**. ((JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). Doing something that is lawful cannot be the "proximate cause" of harm under these circumstances. To hold otherwise would mean that any retailer who sells a "potentially dangerous" product, such as a kitchen knife, a hammer, a power tool, a tire iron or similar object will be **the** "proximate cause" subject to liability if the purchaser then takes such a product, misuses it while drunk and high and inflicts harm upon someone. This is not the law in Michigan.

Either JSD's sales of the Kits in 2021 were illegal under the law in effect at that time, or they were not. As noted throughout JSD's Application and Brief, the ATF expressly excluded the Polymer80 frames contained in JSD's incomplete Kits from its definition of a "firearm" and no age verification, background check or serialization was required. (JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). JSD was not required to perform any of these steps because it did not sell Theume any "firearms" as that term was defined by applicable law in 2021.

Additionally, to the extent Boyd claims that the Kits were "potentially dangerous" under *Moning*, any child can walk into Home Depot and purchase a saw, hammer, box cutter, knife or other "potentially dangerous" object without any background check, age verification or similar requirement. (Of course, a minor can readily purchase such products online from Amazon, have

them delivered the same or the next day and then misuse such products to inflict great bodily harm on someone).

Moreover, unlike the Kits at issue here, any number of products available from Home Depot or similar retailers are not "potentially dangerous", but rather, readily dangerous. A box cutter, for example, does not require any additional steps such as machining or purchasing a magazine or ammunition from another source. Rather, it can be used to inflict serious bodily harm or death without any modification.

Recall, the only thing Boyd pled here was that JSD "proximately caused" Thueme to recklessly shoot Boyd in the face while the two were drunk and high, merely by selling products to the general public, which was lawful. *See* Complaint, generally; *see also Black v Shafer,* 499 Mich 950 (2016)("defendant's conduct [of handing shotgun to his friend who was drinking and smoking marijuana] did not constitute a proximate cause of the plaintiff's injury, as [his friend]'s subsequent actions in picking up the shotgun…cycling a shell in the chamber…and pulling the trigger constituted an intervening cause of the plaintiff's injury, which broke the chain of causation and relieved the defendant of any liability"). Boyd's theory of proximate causation, as pled, is far too broad because any retailer who sells any "potentially dangerous" product is now deemed to be the "proximate cause" of any resulting harm.[6]

[6] Boyd's efforts to distinguish *Lowy v Daniel Defense, LLC,* Civil Action No. 1:23-cv-1338, 2024 LX 82765 (E.D. Va. July 24, 2024) and the other proximate causation cases cited by JSD because those cases involved sales of products to adults, not minors, is unavailing. For example, Boyd attempts to distinguish *City of Philadelphia v Beretta* because it involved the "otherwise legal distribution of handguns to adult 'lawful purchasers' in a manner prescribed by statute". But the same is true with JSD's sales of the Kits to Theume. It was perfectly legal for JSD to sell the 80 percent frame and part to Theume without verifying his age or performing a background check. Although Boyd may find it morally questionable or unpalatable, the fact remains that

Next, Boyd's argument that proximate causation is solely a question for the jury fails. *See* MCL §600.2947(2)("whether there was misuse of a product and whether misuse was reasonably foreseeable **are legal issues to be resolved by the court**")(emphasis added). Although Boyd does not assert a products liability claim here, MCL §600.2947(2) applies equally to both products liability and negligence claims. *Croskey v BMW of N Am, Inc*, 532 F3d 511, 520 (6th Cir 2008)("This statute's purpose is to limit a non-manufacturer seller's liability **whether a plaintiff sues under a negligence standard or an implied warranty standard**")(emphasis added). Whether Boyd sufficiently pled proximate cause, when all he alleged was that JSD lawfully marketed and sold products to the general public, is a question for the court, not a jury. [7] *Id*; *see also Holton v A+ Ins Assocs*, 255 Mich App 318, 326; 661 NW2d 248 (2003)(causation is generally a matter for the trier of fact, but if there is no issue of material fact, then the issue is one of law for the court).

VIII. The Rule of Lenity Prevents Retroactive Application of the ATF's "Newly Expanded" Regulation to JSD's Sales of the Incomplete Kits Which Occurred Before That Rule Became Effective

Finally, the rule of lenity prevents retroactive application of the ATF's "newly expanded" regulation to sales of the Kits which occurred before that rule became effective. The rule of lenity holds that deference to a regulation is not warranted where the government has taken inconsistent

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Theume was a "lawful purchaser" of the Kits, just like the adult who lawfully purchased the firearms in *City of Phila. v. Beretta U.S.A. Corp*., 277 F.3d 415 (3d Cir. 2002).

[7] MCL §600.2947(2) is also instructive as to foreseeability, especially in this case. JSD did not, and could not, reasonably foresee Theume's particular misuse of the Kits, i.e. recklessly aiming a loaded firearm at Boyd while the two were illegally under the influence of drugs and alcohol. *See Iliades v Dieffenbacher N Am Inc*, 501 Mich 326, 340. 2018 ("the wording of MCL 600.2947(2), which specifically asks whether "the misuse" of the product was reasonably foreseeable.27 In other words, the question for purposes of foreseeability is whether Dieffenbacher knew or should have known of Iliades's particular misuse…").

positions and any ambiguity is resolved in a criminal defendant's favor. *United States v Granderson*, 511 US 39, 54 (1994). "In sum, it is not enough to conclude that a criminal statute **should** cover a particular act. The statute must **clearly** and **unambiguously** cover the act*"*. *Cargill v Garland*, 57 F4th 447, 473 (5th Cir, 2023)(emphasis in original) *Affd.*, 602 U.S. 406 (2024).

Although the rule of lenity is often applied in criminal cases, the 6th Circuit Court of Appeals recently applied the rule of lenity in a civil case. See *Hardin v ATF*, 65 F.4th 895 (2023). The issue in *Hardin* was whether a bump stock was a machinegun part. The *Hardin* court began its analysis by recognizing that "for over a decade, the ATF, to which Congress has delegated the authority to administer the National Firearms Act and the Gun Control Act, maintained that a bump stock is not a machinegun part". *Id* at 897. But the ATF reversed its position by promulgating a new rule. *Id*. The appellant in *Hardin* owned several bump stocks and brought a civil action challenging the Rule as exceeding the ATF's statutory authority. *Id*. Hardin argued "the statutory definition of a machinegun unambiguously excludes bump stocks, whereas the ATF argues that the best reading of the statute compels the opposite conclusion.

The 6th Circuit recognized there were various conflicting judicial opinions as all as "the ATF's own flip-flop in its position". *Id* at 897. The facts in *Hardin* are identical to those here. For many years the ATF expressly excluded Polymer80 frames and the Kits from the GCA's definition of a firearm. (JSD's Appendix, pp. 059-085, ATF Official Letter Rulings). However, in 2022, the ATF "flip flopped" and suddenly decided that Polymer80 frames (and the Kits) now fell within the GCA's definition of a firearm, as of August 24, 2022, the effective date of that new rule. *Id.*

The *Hardin* court first held that Chevron *deference*, i.e. the doctrine that a court should defer to an agency's interpretation of a rule, was inapplicable to the Gun Control Act of 1968 because "the statutory scheme is predominantly criminal in scope and because of the nature of the

actions that it criminalizes". *Id* at 899. Similarly, in this case Boyd argues that JSD's sales of the Kits was "illegal". (JSD's Appendix, pp. 005-029). The *Hardin* court declined "to afford *Chevron* deference to the ATF's construction of the term "machinegun"' because the GCA can impose criminal penalties and the ATF does not possess any particular expertise in interpreting criminal statutes". *Id.* In such instances, the ATF was entitled to zero deference.

The 6th Circuit then applied the rule of lenity to resolve any ambiguity over whether bump stocks are machinegun parts in favor of Hardin. *Id*. In this case, it is important to note that *VanDerStok* did not address the retroactive application of the ATF's "newly expanded" rule, nor could it, because that issue was never before that court.[8] Even if the ATF's new rule could be applied retroactively, which it cannot, the rule of lenity prevents Boyd from seeking to hold JSD liable, especially where Boyd alleges such sales were "illegal" and the ATF "flip flopped" on its position that the Kits were not firearms. Any ambiguity must be resolved in favor of JSD.

[8] Even though the *VanDerStok* court briefly discussed the rule of lenity near the end of its decision, it did not do so in the context of retroactive application of the ATF's new rule, nor could it, because that case only involved a facial challenge.

CONCLUSION AND RELIEF REQUESTED

JSD respectfully requests that this Court reverse the trial court's order denying JSD's Motion for Summary Disposition and award JSD any other relief this Court deems appropriate.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2025, I electronically filed the foregoing Defendant/Appellant JSD's Brief on Appeal with the Clerk of the Court using the MiFILE system, which will send the same to the attorneys of record.

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