

Case No. 81034

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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JAMES PARSONS, INDIVIDUALLY AND AS SPECIAL ADMINISTRATOR  
OF THE ESTATE OF CAROLYN LEE PARSONS; ANN-MARIE PARSONS,  
Appellants,

vs.

COLT'S MANUFACTURING COMPANY LLC; COLTS DEFENSE LLC;  
DANIEL DEFENSE INC.; PATRIOT ORDNANCE FACTORY; FN AMERICA;  
NOVESKE RIFLEWORKS LLC; CHRISTENSEN ARMS; LEWIS MACHINE &  
TOOL COMPANY; LWRC INTERNATIONAL LLC; DISCOUNT FIREARMS  
AND AMMO LLC; DF&A HOLDINGS, LLC; MAVERICK INVESTMENTS,  
LP; SPORTSMAN'S WAREHOUSE; GUNS AND GUITARS INC.,  
Respondents.

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**MOTION TO FILE *AMICUS CURIAE* BRIEF OF NATIONAL SHOOTING  
SPORTS FOUNDATION IN SUPPORT OF RESPONDENTS**

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Pursuant to Rule 29 of the Nevada Rules of Appellate Procedure, the National Shooting Sports Foundation moves this Court for leave to file the accompanying *amicus curiae* brief in support of the Respondents.

The National Shooting Sports Foundation (“NSSF”) is the trade association for the firearms industry. Founded in 1961, NSSF is a non-profit corporation with a membership of more than 9,000 federally licensed firearms manufacturers and sellers, public and private shooting ranges, gun clubs, sportsmen’s organizations,

publishers, and individuals. NSSF files *amicus curiae* briefs in federal and state court cases on issues of importance to the firearms industry.

NSSF's mission is to promote, protect, and preserve hunting and shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members' commitment to the safe and responsible sale and use of their products; and promoting a political environment supportive of America's traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF has a strong interest in the continued vitality of the hunting and shooting sports industry. It has developed an expertise in federal and state legislative efforts to protect firearms industry members from lawsuits based on theories of liability that are without basis in the law. These lawsuits have most typically assigned blame to firearm industry members for damages caused when criminals misuse lawfully sold, non-defective firearms. The burden of litigating these lawsuits poses a threat to the hunting and shooting sports industry and to the constitutionally-protected right of access to firearms by law-abiding citizens.

NSSF seeks leave to submit the accompanying *amicus curiae* brief because the case at bar threatens to impose broad new tort liability against the manufacturers and sellers of lawful firearms that were criminally misused in a horrific act of violence after they were lawfully sold following completion of

federally mandated background checks. The case implicates fundamental issues of tort law and public policy that impact the entire firearms industry, for which NSSF is well-suited to address. The accompanying brief seeks to assist the Court by providing a national perspective on these issues and why the Court should answer the certified questions in the negative.

For these reasons, NSSF respectfully asks the Court to grant this motion and accept the accompanying brief.

DATED this 25th day of September, 2020.

SHOOK, HARDY & BACON L.L.P.

By: /s/ Jenn O. Hatcher

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(c), I hereby certify that on the 25th day of September, 2020, I electronically filed the foregoing Motion with the Clerk of the Court by using the CM/CMF system which will send a notice of electronic filing and service upon the Court's Service List for the above-referenced case.

*/s/ Jenn O. Hatcher*  
JENN O. HATCHER

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Elizabeth A. Brown  
Clerk of Supreme Court

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Certified Questions from the United States District Court for the District of Nevada  
Judge Andrew P. Gordon, Case No. 2:19-cv-01189-APG-EJY

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***AMICUS CURIAE BRIEF OF NATIONAL SHOOTING SPORTS  
FOUNDATION IN SUPPORT OF RESPONDENTS***

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**September 25, 2020**

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## NRAP 26.1 DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Nevada Rules of Appellate Procedure, *Amicus Curiae* National Shooting Sports Foundation submits this Disclosure Statement:

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal:

1. *Amicus Curiae* National Shooting Sports Foundation has no parent corporations, and there are no publicly held companies that own 10% or more of the organization's stock.

2. Counsel for *Amicus Curiae* National Shooting Sports Foundation are:

Jenn O. Hatcher, Shook, Hardy & Bacon L.L.P.

Victor E. Schwartz, Shook, Hardy & Bacon L.L.P.

3. *Amicus Curiae* National Shooting Sports Foundation is not using a pseudonym for the purpose of this brief.

DATED this 25th day of September, 2020.

SHOOK, HARDY & BACON L.L.P.

By: /s/ Jenn O. Hatcher  
JENN O. HATCHER (NV Bar # 14248)

and

VICTOR E. SCHWARTZ (*Pro Hac pending*)

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## **INTEREST OF AMICUS CURIAE**

The National Shooting Sports Foundation (“NSSF”) is the trade association for the firearms industry. Founded in 1961, NSSF is a non-profit corporation with a membership of more than 9,000 federally licensed firearms manufacturers and sellers, public and private shooting ranges, gun clubs, sportsmen’s organizations, publishers, and individuals. NSSF files *amicus curiae* briefs in federal and state court cases on issues of importance to the firearms industry.

NSSF’s mission is to promote, protect, and preserve hunting and shooting sports by providing trusted leadership in addressing industry challenges; advancing participation in and understanding of hunting and shooting sports; reaffirming and strengthening its members’ commitment to the safe and responsible sale and use of their products; and promoting a political environment supportive of America’s traditional hunting and shooting heritage and Second Amendment freedoms.

NSSF has a strong interest in the continued vitality of the hunting and shooting sports industry. It has developed an expertise in federal and state legislative efforts to protect firearms industry members from lawsuits based on theories of liability that are without basis in the law. These lawsuits have most typically assigned blame to firearm industry members for damages caused when criminals misuse lawfully sold, non-defective firearms. The burden of litigating

these lawsuits poses a threat to the hunting and shooting sports industry and to the constitutionally-protected right of access to firearms by law-abiding citizens.

NSSF submits this brief as *amicus curiae* because the case at bar threatens to impose broad new tort liability against the manufacturers and sellers of lawful firearms that were criminally misused in a horrific act of violence after they were lawfully sold following completion of federally mandated background checks. The case implicates fundamental issues of tort law and public policy that impact the entire firearms industry, for which NSSF is well-suited to address.

### **ISSUES PRESENTED**

1. Under Nevada law, can a plaintiff assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions absent evidence of legislative intent to impose civil liability?

2. Does a plaintiff asserting a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly violated federal and state machine gun prohibitions have “a cause of action against the manufacturer or distributor of any firearm . . . merely because the firearm . . . was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death[,]” under Nevada Revised Statutes § 41.131?

3. Does Nevada Revised Statutes § 41.131 allow a wrongful death claim premised on allegations that firearms manufacturers and dealers knowingly

violated federal and state machine gun prohibitions because the statute is “declaratory and not in derogation of the common law”?

### **STATEMENT OF THE CASE AND FACTS**

*Amicus curiae* adopts Respondents’ Statement of the Case and Facts to the extent relevant to the arguments in this brief.

### **SUMMARY OF ARGUMENT**

This case emanates from a tragedy of unspeakable proportions, the deadliest mass shooting by an individual in American history. The horrific killing of 58 people, including Plaintiffs’ daughter, and wounding of hundreds of others has become ingrained in the hearts and minds of the nation and has caused legislators to focus greater attention on how to prevent such tragedies in the future. The terrible circumstances of this case, however, should not blind this Court to straightforward applications of state and federal statutory law and tort law principles that preclude subjecting firearm manufacturers or sellers to liability for the heinous acts of someone who criminally misuses firearms to kill and injure others.

Thirty-five years ago, the Nevada Legislature enacted Nev. Rev. Stat. (“NRS”) § 41.131 to make it clear that Nevada does not recognize a cause of action against a firearm manufacturer or distributor merely because a firearm is capable of causing serious injury or death, including when unlawfully misused to commit a crime. Firearms have known, inherent risks and are lawfully owned by

millions of Nevadans and other Americans for lawful uses, namely for sport, hunting and personal protection. Under traditional tort law, there is no liability for making a product, whether a gun, knife or other instrument, that could be improperly used or misused as a deadly weapon. The Legislature long ago clarified that the person who pulls the trigger, not the manufacturer or seller of the firearm, is to blame for a shooting, including a mass shooting of this proportion.

This legislative enactment accurately states the broad understanding of tort law, in Nevada and around the country, as there have been many attempts to subject the firearms industry to liability for the criminal misuse of non-defective products. By-and-large, courts, even in states without Nevada's statutory support, have rejected these claims. *See, e.g., Delahanty v. Hinckley*, 564 A.2d 758, 760-62 (D.C. 1989); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d 1099, 1118 (Ill. 2004); *City of Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d 415, 421 (3d Cir. 2002). These courts have explained that balancing the harm and utility of firearms is a policy question suited for the legislature, not the courts. *See City of Chicago*, 821 N.E.2d at 1121 (“We are reluctant to interfere in the lawmaking process in the manner suggested by plaintiffs, especially when the product at issue is already so heavily regulated by both the state and federal governments.”). In 2005, the U.S. Congress enacted bi-partisan legislation, the Protection of Lawful Commerce in Arms Act (“PLCAA”), to respond to these litigation attempts by clarifying that

manufacturers and sellers of firearms are not subject to liability for the acts of those who criminally misuse these products. *See* 15 U.S.C. §§ 7901–7903.

Here, Plaintiffs have creatively sought ways to circumvent these laws and tort law principles, prompting the District Court to certify questions to this Court. The gravity of the mass shooting leading to this lawsuit, though, must not obscure the clarity of the law that should be applied to this case. As this brief explains, allowing a victim of a criminal shooting to bring a wrongful death action against the manufacturer or seller of the firearm involved would render NRS § 41.131 meaningless. Further, allowing a wrongful death action predicated on a negligence per se theory for an alleged violation of penal laws would subject a firearm manufacturer or seller to new civil liability absent any legislative intent. Each statute Plaintiffs invoke has its own enforcement provisions. None of them include a private right of action, suggest noncompliance is the basis for a civil tort action, or seek to overturn NRS § 41.131.

*Amicus* respectfully urges this Court to uphold the express will of the Nevada Legislature and traditional tort law principles by answering the certified questions in the negative. This Court should not distort well-settled law that the criminal who unlawfully shoots the firearm, not the manufacturer or seller who made or sold it, is liable for the injuries he or she causes with that instrument.

## ARGUMENT

### **I. NRS § 41.131 WAS ENACTED TO FORECLOSE THE TYPE OF LITIGATION BROUGHT BY PLAINTIFFS, NOT ENABLE A NOVEL PATH TO SUE FOR WRONGFUL DEATH**

The Legislature enacted NRS § 41.131 with an unambiguous objective in mind: to declare that “No person has a cause of action against the manufacturer or distributor of any firearm” based on the harm a firearm is capable of causing. The plain language of this law is reinforced by a similarly unambiguous legislative history. *See, e.g.*, Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985) (“a gun in itself is not to be determined as at fault in the case of a death or injury . . . the liability would be on the handler of the gun.”); Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (“[I]f someone shoots a firearm and hurts somebody, you can’t sue the firearms manufacturer because it shoots.”).

Nevada was one of the early states to adopt legislation that “prohibits actions against firearm manufacturers for injuries resulting from the weapon’s inherent danger.” Restatement (Third) of Torts: Prod. Liab. § 2 Reporters’ Note IV.D. (1998) (discussing “Rejection by a Majority of Jurisdictions of Liability Based on Nondefective Products That Are Nevertheless Egregiously Dangerous”). Since then, “a number of states [have] enacted legislation seeking to protect makers and sellers of firearms” from liability resulting from others’ improper use of the

products. 2 Owen & Davis on Prod. Liab. § 10:10 (4th ed. 2014-20).<sup>1</sup> These state immunity statutes vary in scope and design, but the common thread is to foreclose tort liability where an injury is caused by a non-defective firearm.

For example, the Indiana Supreme Court, in *KS&E Sports v. Runnels*, 72 N.E.3d 892, 896 (Ind. 2017), held that the “plain terms” of Indiana’s statute, which is similar to NRS § 41.131, “immunizes a firearms seller from a damages suit for injuries caused by another person’s misuse of a firearm, *regardless of whether the sale was lawful.*” (emphasis added). In doing so, the court rejected a lawsuit against a firearm seller arising from the firearm’s use in the shooting of a police officer. *See id.* at 897; *see also id.* at 901 (“[Plaintiff] cannot avoid [seller’s] entitlement to immunity by arguing he seeks relief only for [seller’s] own misconduct and not that of [criminal] third parties. . . .”).

The unmistakable legislative aim, in Nevada and these other states, is to preclude the exact type of lawsuit filed here, whereby the victim of an intentional

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<sup>1</sup> *See also* Alaska Stat. § 09.65.155 (1999); Cal. Civ. Code § 1714.4 (1985, repealed 2002); Colo. Rev. Stat. §§ 13-21-501 to -505 (originally adopted 1986); Fla. Stat. Ann. § 790.331 (2001); Idaho Code Ann. § 6-1410 (1986); Ind. Code Ann. §§ 34-12-3-1 et seq. (originally adopted 2001); La. Rev. Stat. Ann. § 9:2800.60 (1999); Mont. Code Ann. § 27-1-720 (originally adopted 1987); N.C. Gen. Stat. Ann. § 99B-11 (originally adopted 1987); N.D. Cent. Code § 32-03-54 (2001); Okla. Stat. Ann. tit. 76, § 52.1 (2013); S.C. Code Ann. § 15-73-40 (2000); S.D. Codified Laws §§ 21-58-1 to 21-58-4 (1999); Tenn. Code Ann. § 39-17-1314 (originally adopted 1989); Tex. Civ. Prac. & Rem. Code Ann. § 82.006 (1993); Wash. Rev. Code Ann. § 7.72.030(1)(a) (1988).

criminal shooting seeks to subject the manufacturer or the seller of the firearm to civil liability because they manufactured or sold the instrumentality the shooter used to perpetrate the crime. Nevada’s statute expressly states that no cause of action may be brought unless a defect exists in the “design or production” of a firearm. NRS § 41.131(2). Thus, the statute identifies only these two traditional product liability exceptions, a design or manufacturing defect, in order to not derogate from the Legislature’s understanding of Nevada common law.<sup>2</sup> The statute also clarifies that the “capability of a firearm . . . to cause serious injury, damage or death when discharged does not make the product defective in design.” *Id.* This is true regardless of the type of firearm sold.

In 2005, the U.S. Congress enacted federal legislation on the same topic via the PLCAA. The PLCAA’s express purpose is to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended,” regardless of the legal theory or cause of action, novel or otherwise, advanced by a plaintiff. 15 U.S.C. § 7901(b)(1). The PLCAA also does not bar

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<sup>2</sup> In 1999, the Nevada Legislature adopted a law providing that the State is the only governmental entity that may bring a lawsuit “relating to the lawful design or manufacture of a firearm.” NRS § 12.107(1).

traditional product liability actions for harms “resulting directly from a defect in design or manufacture of the product.” 15 U.S.C. § 7903(5)(A)(v). And, it also makes clear that “where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage.” 15 U.S.C. § 7903(5)(A)(v). The PLCAA contains several additional exceptions to its bar on liability,<sup>3</sup> making NRS § 41.131 broader in its liability protections than the PLCAA. Both laws though are intended to bar the instant action because it arises out of a criminal’s intentional misuse of a firearm.<sup>4</sup>

The escape hatch Plaintiffs seek from NRS § 41.131 simply does not exist. They ask this Court to read exceptions into NRS § 41.131 to allow a victim of a crime involving the criminal misuse of a non-defective firearm to bring a wrongful death action against the manufacturer and seller of the firearm if they knowingly

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<sup>3</sup> See 15 U.S.C. § 7903(5)(A)(i)-(vi).

<sup>4</sup> Compare Hearing on S.B. 211 Before the S. Comm. on Judiciary, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (statement by Senate Committee Chairman clarifying bill sponsor’s “intent to not have a firearms manufacturer sued by [a crime victim’s] heirs if he were murdered”) *with* Protection of Lawful Commerce in Arms Act, 151 Cong. Rec. S9217-02, S9220 (July 28, 2005) (“the misuse of a gun is not caused by the manufacturer of a gun; it is caused by the person who is misusing the gun”) (statement of Senator Kay Baily Hutchison).

violated a statute regulating the firearm.<sup>5</sup> Violating a statute, knowingly or otherwise, does not make one liable for another’s criminal misconduct under the language of NRS § 41.131 or traditional tort law principles.<sup>6</sup> Again, NRS § 41.131 is clear that a person cannot subject a manufacturer or seller of a firearm to liability “because the firearm or ammunition was capable of causing serious injury, damage or death.” That is exactly the allegation here, regardless of the type of firearm or whether the manufacturer or seller violated a statute related to the sale of firearms.<sup>7</sup>

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<sup>5</sup> For example, Plaintiffs’ argument that NRS § 41.131 only provides immunity for a “no-fault claim,” and allows any claim asserting wrongful conduct, *see* App. Br. at 13, is belied by the statute’s express provision stating the law “does not affect a cause of action based upon a defect in design or production.” NRS § 41.131(2); *see also* *KS&E Sports*, 72 N.E.3d at 899 (“Unlike Indiana, other jurisdictions have expressly denied immunity to firearms sellers that violate the law. . . . These passages reflect a clear legislative judgment to subject firearms sellers that violate the law to tort liability—which is notably absent from Indiana’s statute.”).

<sup>6</sup> *See McDonald v. City of Chicago*, 561 U.S. 742, 923 (2010) (Breyer, J., dissenting) (recognizing that “countless gun regulations of many shapes and sizes are in place in every State and in many local communities”).

<sup>7</sup> Commonly owned semiautomatic rifles (modern sporting rifles) such as the AR-15 are not considered to be “machine guns” in any jurisdiction, including Nevada, or by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in applying the Gun Control Act. If it were so, as Plaintiffs suggest, it would convert thousands of law abiding Nevadans and millions of Americans into felons overnight. *See* *Bump Stocks*, Bureau of Alcohol, Tobacco, Firearms and Explosives, at <https://www.atf.gov/rules-and-regulations/bump-stocks> (recognizing that ATF amended definition of “machinegun” to include bump stocks allowing “a shooter of a semiautomatic firearm to initiate a continuous firing cycle,” and that “[c]urrent possessors of bump-stock-type devices must divest themselves of possession as of the effective date of the final rule (March 26, 2019)”).

“It is well settled in Nevada that words in a statute should be given their plain meaning unless this violates the spirit of the act.” *McKay v. Bd. of Supervisors*, 730 P.2d 438, 441 (Nev. 1986). Therefore, the Court must “avoid construing” NRS § 41.131 in ways that would render this provision “meaningless.” *In re Estate of Thomas*, 998 P.2d 560, 562 (Nev. 2000) (citing *Bd. of County Comm’rs v. CMC of Nevada*, 670 P.2d 102, 105 (Nev. 1983)); *see also State Dep’t of Bus. & Indus., Fin. Inst. Div. v. Dollar Loan Ctr., LLC*, 412 P.3d 30, 33 (Nev. 2018) (“statutory interpretation must ‘not render any part of the statute meaningless,’ or ‘produce absurd or unreasonable results’”) (quoting *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 245 P.3d 527, 531 (Nev. 2010)). Further, this Court has consistently held that statutes with a protective purpose, such as NRS § 41.131, “should be liberally construed in order to effectuate the benefits intended to be obtained.” *Colello v. Adm’r of Real Estate Div. of State of Nev.*, 683 P.2d 15, 17 (Nev. 1984); *see also Cote H. v. Eighth Jud. Dist. Ct.*, 175 P.3d 906, 908 (Nev. 2008) (same).

Here, the Legislature acted to make it clear that Nevada law forecloses the type of action at bar. The Court should give effect to the plain language of the statute and the clear intent of the Legislature in enacting it, both of which align to ensure that manufacturers and sellers of firearms are not to be subjected to civil liability for a person’s criminal misuse of a firearm.

## **II. THE COURT SHOULD REJECT IMPLYING A CIVIL PRIVATE RIGHT OF ACTION UNDER A NEGLIGENCE PER SE THEORY FOR ALLEGED VIOLATIONS OF PENAL STATUTES THAT REGULATE FIREARMS**

In addition to seeking to circumvent NRS § 41.131, Plaintiffs ask the Court to adopt a negligence per se theory based solely on the alleged violation of a statute. The statutes Plaintiffs reference are NRS § 202.350(1)(b) and 18 U.S.C. § 922(b)(4), which are penal laws prohibiting the sale of machine guns not otherwise authorized by law.<sup>8</sup> Neither statute, in its terms or legislative history, indicates any intent to subject a firearm manufacturer or seller to tort liability in a wrongful death action caused by the criminal misuse of a firearm (including a machine gun) even if such a violation occurred. The Court should not create a right of action where none exists.

To this end, the Court has been clear that “in the absence of evidence of legislative intent to impose civil liability, a violation of a penal statute is not negligence per se.” *Hinegardner v. Marcor Resorts, L.P.V.*, 844 P.2d 800, 803 (Nev. 1993) (rejecting implied civil right of action for alleged violation of statute

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<sup>8</sup> See *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 7 (D.C. Cir. 2019), *cert. denied*, 140 S. Ct. 789 (2020) (18 U.S.C. § 922 “imposes . . . criminal prohibitions on specified firearms transactions”); *Bump-Stock-Type Devices*, 83 Fed. Reg. 66,514, 66,525 (Dec. 26, 2018) (stating that the revised regulation “makes clear that individuals are subject to criminal liability only for possessing bump-stock-type devices after the effective date of regulation, not for possession before that date”).

prohibiting sale of alcohol to minors); *see also Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 642 P.2d 161, 162-63 (Nev. 1982) (“absent evidence of legislative intent to impose civil liability we shall not conclude that the violation of a [penal] statute is negligence per se”). The enforcement provision for NRS § 202.350(1)(b) makes no mention of civil liability, only criminal punishment (e.g. prison terms) pursuant to NRS § 193.130. *See* NRS § 202.350(2)(b). Over the years, NRS § 202.350 has also been amended multiple times, including recently in 2019, and the Nevada Legislature has never demonstrated any intent for a violation of the statute to create civil liability for firearm manufacturers or sellers for the criminal acts of third parties. Further, enforcement of this penal law is the province of government prosecutors, not private individuals in tort litigation.

The same is true with respect to 18 U.S.C. § 922(b)(4). Federal courts have been clear that allowing civil liability based on statutory or regulatory violations “would short-circuit the very remedial process the government has established to address non-compliance with those regulations.” *United States ex rel. Wilkins v. United Health Group, Inc.*, 659 F.3d 295, 314 (3d Cir. 2011) (explaining why regulatory violations are not enforced through False Claims Act litigation). The U.S. Supreme Court has repeatedly determined that individuals do not have private rights of action to enforce statutes or regulations unless Congress expressly intended to create one. *See, e.g., Astra USA Inc. v. Santa Clara County*, 563 U.S.

110, 120 (2011) (finding Congress reserved enforcement of federal law governing pricing of drugs sold to certain healthcare facilities to U.S. Department of Health and Human Services and that private lawsuits would undermine the agency's efforts to administer the law); *Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-90 (2002) (finding plaintiff cannot use 42 U.S.C. § 1983 to create a private right of action under the Family Educational Rights and Privacy Act's nondisclosure provisions, which are enforceable by the Secretary of Education). Presenting the claim as negligence per se does not change these dynamics or create a backdoor right of action.

Any such determination by this Court would also violate the general rule against creating implied rights of action in a statute or regulation. *See Baldonado v. Wynn Las Vegas, LLC*, 194 P.3d 96, 101-04 (Nev. 2008) (rejecting alleged implied right of action by casino dealers to enforce Nevada labor law). Consistent with the Court's approach to negligence per se, "the absence of an express provision providing for a private cause of action to enforce a statutory right strongly suggests that the Legislature did not intend to create a privately enforceable judicial remedy." *Id.*<sup>9</sup> The U.S. Supreme Court similarly views implied private rights of

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<sup>9</sup> *See also Allstate Ins. Co. v. Thorpe*, 170 P.3d 989, 996 (Nev. 2007) (rejecting implied private right of action for medical providers against insurers based on "statutory scheme" of Nevada's "prompt-pay" statute).

action with skepticism. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009) (“implied causes of action are disfavored”); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 718 (1979) (Rehnquist, J., concurring) (courts “should be extremely reluctant to imply a cause of action absent . . . specificity on the part of the Legislative Branch”). When statutes “focus on the [entity] regulated rather than the individuals protected,” which is the case with both 18 U.S.C. § 922(b)(4) and NRS § 202.350(1)(b), “no implication of an intent to confer rights on a particular class of persons” exists. *Alexander v. Sandoval*, 532 U.S. 275, 289 (2001).<sup>10</sup>

The Court should follow its precedent and the sound reasoning of the U.S. Supreme Court. It should reject this attempt to create a private right of action based on alleged violations of penal statutes where there is no legislative intent to impose such civil liability. Also, the Nevada Legislature has left no ambiguity for the Court to rule otherwise. As discussed in the first section of this brief, the Legislature’s overriding declaration is that manufacturers and sellers of firearms are not subject to liability for the criminal acts of third parties.

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<sup>10</sup> In addition, some states “assert flatly that no private actions can be implied from penal statutes.” John H. Bauman, *Implied Causes of Action in the State Courts*, 30 Stan. L. Rev. 1243, 1244 (1978). Other states limit recognition of an implied private right of action “only in cases where the statute would be ineffective, as a practical matter, unless such an action were implied.” *Fisher v. Lexington Health Care, Inc.*, 722 N.E.2d 1115, 1120 (Ill. 1999).

### **III. “DEEP POCKET JURISPRUDENCE” AND “REGULATION THROUGH LITIGATION” ARE NOT LEGITIMATE PATHS TO DEVELOP TORT LAW**

Attempts to subject firearm manufacturers and sellers to civil liability based on a criminal’s intentional misuse of the product have been tried for decades, both to compensate victims of crimes involving the intentional misuse of a firearm by going after perceived “deep pockets” and to use the threat of liability to effectively regulate the firearms industry. As discussed, the Nevada Legislature adopted NRS § 41.131 in response to such lawsuits in the past and purposefully sought to foreclose this type of litigation.

From a compensation perspective, firearm manufacturers and sellers have been sued many times over the years, both to pay damages to victims as here and to pay for alleged costs associated with the criminal misuse of firearms. *See, e.g., Merrill v. Navegar, Inc.*, 28 P.3d 116, 119 (Cal. 2001) (rejecting negligence per se claim by mass shooting victim); *City of Chicago*, 821 N.E.2d at 1105, 1138 (rejecting lawsuit by Chicago and Cook County seeking more than \$433 million “to recoup some of the expenses that flow from gun crimes”). Such claims have generally failed, as courts have refused to change liability law merely to open pockets to pay claims. *See* Victor E. Schwartz et al., *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 376-88 (2017) (discussing litigation against firearm manufacturers over criminal violence). In

these cases, courts recognized that third parties were responsible for the unlawful acts and resulting injuries. *See id.* at 359.

The same has been true in cases against manufacturers of other inherently harmful products, including pharmaceuticals and fossil fuels. *See id.* (discussing examples); *see also Huck v. Wyeth, Inc.*, 850 N.W.2d 353, 380 (Iowa 2014) (“Deep-pocket jurisprudence is law without principle.”).<sup>11</sup> Liability law should remain principled and focused on the wrongdoer who engaged in the unlawful act that directly caused a harm, not shifted to others because they may have the ability to pay compensation. Liability requires more than aggrieved plaintiffs, such as the Parsons; a claim must be brought against the proper defendant.

Attempts to subject the firearms industry to liability for criminal acts of third parties have also been filed “with the intent to bankrupt the firearms industry,” or to regulate it through the threat of tort liability. Protection of Lawful Commerce in Arms Act, 151 Cong. Rec. S9377 (July 29, 2005) (statement of Senator John Thune). Such claims against the industry were repeatedly filed in the late 1990s and early 2000s in hopes that some courts in some states would allow them to

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<sup>11</sup> *See* Victor Schwartz et al., *Can Governments Impose a New Tort Duty to Prevent External Risks? The “No-Fault” Theories Behind Today’s High-Stakes Government Recoupment Suits*, 44 Wake Forest L. Rev. 923, 923 (2009) (discussing rise of litigation in which “companies are targeted solely because their products have created external costs that others have borne”).

proceed. Congress adopted the PLCAA to end this “trend of using the courts . . . as a conduit around the legislative process in an attempt to make public policy or implement social change outside the democratic process.” 151 Cong. Rec. at S9374-01, S9378.

Former Labor Secretary Robert Reich coined the phrase “regulation through litigation” to describe such efforts, identifying the firearms industry as a major target. Robert B. Reich, *Don’t Democrats Believe in Democracy?*, Wall St. J., Jan. 12, 2000, at A22. He explained that these attempts amount to “faux legislation, which sacrifices democracy.” *Id.*

If this Court allows Plaintiffs’ wrongful death action to proceed, it would undermine the democratic process. Both Congress and the Nevada Legislature have adopted laws specifically to prevent this type of lawsuit. In addition, after the Las Vegas shooting, the federal Bureau of Alcohol, Tobacco, Firearms and Explosives, acting pursuant to Congressional authority, adopted regulations reclassifying bump stocks as machine guns to prohibit their manufacture, sale and possession after the regulation’s effective date. *See Bump-Stock Type Devices*, 83 Fed. Reg. 66,514-54 (Dec. 26, 2018) (codified at 27 C.F.R. §§ 447.11, 478.11 & 479.11 (eff. Mar. 26, 2019)). Thus, the democratic process has functioned according to its design. This Court has long held that it is “not within the province of the courts to assume the powers or functions which properly belong to the

Legislature....” *State v. Brodigan*, 141 P. 988, 989 (Nev. 1914).<sup>12</sup> It should not depart from that fundamental principle here.

There is no doubt that the case at bar involved a crime of horrifying violence for which the nation joins in grieving for the Plaintiffs’ loss. It also involves the straight-forward application of statutes and tort law principles. The Court should uphold the law and answer the certified questions in the negative.

### **CONCLUSION**

For these reasons, *amicus curiae* respectfully urge the Court to answer the certified questions in the negative.

DATED this 25th day of September, 2020.

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<sup>12</sup> See also *Matthews v. State ex rel. Nevada Tax Comm’n*, 428 P.2d 371, 373 (Nev. 1967) (Zenoff, J., concurring) (“The question of the wisdom, justice or expediency of legislation is for the legislative body and not for the courts.”).

## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28.2 of the Nevada Rules of Appellate Procedures, I, Jenn O. Hatcher, certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionally spaced, has a typeface of 14 points, and contains 4,734 words.

I hereby certify that I have read this *amicus* brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 25th day of September, 2020.

SHOOK, HARDY & BACON L.L.P.

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**CERTIFICATE OF SERVICE**

Pursuant to NRAP 25(c), I hereby certify that on the 25th day of September, 2020, I electronically filed the foregoing **AMICUS CURIAE BRIEF OF THE NATIONAL SHOOTING SPORTS FOUNDATION IN SUPPORT OF RESPONDENTS** with the Clerk of the Court by using the CM/CMF system which will send a notice of electronic filing and service upon the Court's Service List for the above-referenced case.

*/s/ Jenn O. Hatcher* \_\_\_\_\_  
JENN O. HATCHER