IN THE SUPREME COURT OF THE STATE OF NEVADA

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, LLC; 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, INC.; GUNS AND GUITARS, INC.

Respondents.

Supreme Court No. 81034

Certified Question from the U.S. District Court for the District of Nevada in Case No 2:19-cv-01189-APG-EJY

[*continued on following page*]

CERTIFIED QUESTIONS
From the U.S. District Court for the District of Nevada
The Honorable Andrew P. Gordon

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NRAP 26.1 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 so the Justices of this Court may evaluate possible disqualification or recusal.

The following have an interest in the outcome of this case or are related to entities interested in the case:

- Christensen Arms:
  - TJD, Inc. d/b/a Christensen Arms, sued herein as Christensen Arms, has no parent corporation, and no publicly held company owns 10 percent or more its stock.
  - Evans Fears & Schuttert LLP, Renzulli Law Firm, LLP, and Dorsey & Whitney, LLP have represented Christensen Arms in this matter.
- Colt's Manufacturing Company LLC:
  - Colt Defense LLC and New Colt Holding Corp. own Colt's Manufacturing Company LLC.
  - Evans Fears & Schuttert LLP and Renzulli Law Firm, LLP have represented Colt's Manufacturing Company LLC in this matter.
- Colt Defense LLC:
  - CDH II HoldCo Inc. wholly owns Colt Defense LLC.
  - Evans Fears & Schuttert LLP and Renzulli Law Firm, LLP have represented Colt Defense LLC in this matter.
- Daniel Defense, LLC:
  - M.C. Daniel Group, Inc. wholly owns Daniel Defense, LLC.

- Snell & Wilmer L.L.P. has represented Daniel Defense, LLC in this matter.

- DF&A Holdings, LLC:
  - DF&A Holdings, LLC has no parent corporation, and no publicly held company owns 10 percent or more its stock.
  - The Amin Law Group, Ltd., The Chiafullo Group, LLC, and Hejmanowski & McCrea LLC have represented DF&A Holdings, LLC in this matter.
- Discount Firearms and Ammo LLC:
  - DF&A Holdings, LLC wholly owns Discount Firearms and Ammo LLC.
  - The Amin Law Group, Ltd., The Chiafullo Group, LLC, and Hejmanowski & McCrea LLC have represented Discount Firearms and Ammo LLC in this matter.
- FN America:
  - FN America, LLC has the following corporate parents/grandparents: FN America, Inc., FN Herstal, S.A and Herstal, S.A.; no publicly held company owns 10 percent or more its stock.
  - Spencer Fane LLP, Williams Mullen, and Hejmanowski & McCrea LLC have represented FN America in this matter.
- Guns and Guitars Inc.:
  - Guns & Guitars, Inc. has no parent corporation, and no publicly held company owns 10 percent or more its stock.
  - Murchison & Cumming, LLC, and Swanson, Martin & Bell LLP have represented Guns and Guitars Inc. in this matter.
- Lewis Machine & Tool Company:
  - Lewis Machine & Tool Company, Inc., sued herein as Lewis Machine & Tool Company, has no parent corporation, and no publicly held company owns 10 percent or more its stock.

- Evans Fears & Schuttert LLP and Renzulli Law Firm, LLP have represented Lewis Machine & Tool Company in this matter.

- LWRC International LLC:
  - Riftech LLC and RB Acquisitions LLC own LWRC International LLC.
  - Evans Fears & Schuttert LLP and Renzulli Law Firm, LLP have represented LWRC International LLC in this matter.
- Maverick Investments, LP:
  - Maverick Investments, LP has no parent corporation, and no publicly held company owns 10 percent or more its stock.
  - The Amin Law Group, Ltd., The Chiafullo Group, LLC, and Hejmanowski & McCrea LLC have represented Maverick Investments, LP in this matter
- Noveske Rifleworks, LLC:
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  - Lincoln and Gustafson & Cercos and Pisciotti Malsch have represented Noveske Rifleworks, LLC in this matter.
- Patriot Ordnance Factory:
  - Patriot Ordnance Factory, Inc., sued herein as Patriot Ordnance Factory, has no parent corporation, and no publicly held company owns 10 percent or more its stock.
  - Evans Fears & Schuttert LLP, Renzulli Law Firm, LLP, and Snell & Wilmer L.L.P. have represented Patriot Ordnance Factory in this matter.
- Sportsman's Warehouse, Inc.:
  - Sportsman's Warehouse Holdings, Inc. as the parent corporation of Sportsman's Warehouse, Inc.

- T. Rowe Price Associates, Inc. holds 10% or more of Sportsman's Warehouse, Inc.
- Snell & Wilmer L.L.P. has represented Sportsman's Warehouse, Inc. in this matter.

There are no other known interested parties.

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I. Introduction

On October 1, 2017, after selecting a hotel suite overlooking the Route 91 concert and amassing a stockpile of firearms, a Shooter fired into the crowd below. He killed 58 people and injured many more before taking his own life. Plaintiffs' daughter was one of the Shooter's victims. The Parsons' loss is tragic, but they seek to hold the wrong parties accountable. Rather than sue the Shooter's estate, the person who intentionally caused their daughter's death, they sue companies that allegedly manufactured or sold the semi-automatic AR-15 type rifles ("Subject Rifles") the Shooter modified and used (the "Companies"), claiming the semi-automatic rifles they lawfully manufactured and sold were illegal, fully automatic machineguns.

Conceding that Nevada law precludes claims premised on a firearm's alleged dangerousness, Op. Br. 19, the Parsons instead posit that AR-15 type rifles—which have always been classified as legal, *semi*-automatic rifles—are actually fully automatic machineguns, notwithstanding a well-established consensus to the contrary.[1] Based on

[1] The AR-15 type rifle "entered the civilian market in 1963[,] . . . remains today the most popular rifle in American history[,]" and "traditionally

this objectively erroneous claim, the Parsons assert that the Companies violated state and federal statutes prohibiting the manufacture and sale of machineguns.

The Parsons' theory improperly extends tort liability well beyond the bounds of Nevada law, and the certified questions must be answered in the negative. **First**, NRS 41.131 codifies the principle that a firearms manufacturer or distributor is not liable for harm caused by a third-party's misuse of the product it sells. The statute immunizes firearms companies against suit regardless of who caused the harm, what type of firearm was used, or which theory of liability is alleged. NRS 41.131 thus precludes all claims in this action.

Second, the alleged violation of the statutes prohibiting the manufacture and sale of certain machineguns cannot give rise to negligence per se because that claim requires an underlying common-law duty or a clear intent by the legislature to create civil liability. Like most jurisdictions, Nevada common law recognizes that, absent a special relationship, there is no duty to protect the public from the harm caused

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ha[s] been widely accepted as lawful." *See Duncan v. Becerra*, 970 F.3d 2233, 2020 WL 4730668, at *9 (9th Cir. 2020).

by a third-party. And all the evidence demonstrates that the legislature did *not* intend to create civil liability through the penal statutes at issue. Thus, the Parsons' negligence per se theory cannot stand.

Accordingly, this Court should answer all three certified questions in the negative.

II. Statement of the Case[2]

A. Nature of the Case

This proceeding involves questions of state law certified to this Court pursuant to NRAP 5 by the U.S. District Court for the District of Nevada.

B. Legislative Background

1. The United States and Nevada regulate—but do not prohibit—the sale and possession of machineguns.

In 1934, Congress enacted the National Firearm Act, which defined and taxed machineguns, but did not ban their manufacture, sale, or possession. JA2, 6 ¶¶3, 39–41, 7 ¶46. The Gun Control Act of 1968 supplemented that definition, which remains in effect today: "[A]ny

[2] The Parsons imply that the district court made factual findings. Op. Br. 5. It did not. As with any motion to dismiss, the court relied only on the complaint's *allegations* and noted that they "are not factual findings." JA192 n.3.

weapon which [1] shoots, [2] is designed to shoot, or [3] can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger." 26 U.S.C. § 5845(b); JA10, ¶¶68–70. Each definition hinges on the firearm being capable of fully automatic fire—i.e., firing more than one round "by a single function of the trigger."[3] JA7, ¶47. The Firearm Owners Protection Act of 1986 modified the Gun Control Act and placed restrictions on the sale or other transfer of some machineguns, but exempts machineguns manufactured before the Act took effect. JA 11, ¶78; 18 U.S.C. § 922(o)(2)(B); 27 C.F.R. §§ 478.36(b), 479.105(b). Federal law thus makes it unlawful for a federally licensed firearms manufacturer or dealer to sell or deliver a machinegun "except as specifically authorized by the Attorney General . . . ." 18 U.S.C. § 922(b)(4).

Nevada law mirrors federal law, prohibiting only the sale and possession of machineguns not "authorized by federal law . . . ."

[3] Other firearms, by contrast, require a separate function of the trigger between each round being fired. JA7, ¶48. For instance, the Subject Rifles use "a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the next round," and require a separate function of the trigger "to fire each cartridge." 18 U.S.C. § 921(a)(28); NRS 202.253(6).

NRS 202.350(1)(b). These two laws—referred to collectively as the "Machinegun Statutes"—are the penal statutes at issue in these certified questions.

2. Nevada's Legislature consistently protects the public's firearms rights and manufacturers and distributors' immunity from suit, including in the aftermath of 1 October.

In 1979, the Nevada Legislature proposed a state constitutional amendment to strengthen the right to keep and bear arms, which was approved in the next legislative session. The amendment passed by a wide margin and is now Article I, Section 11 of the Nevada Constitution.

Three years later, the Legislature further protected firearms manufacturers and distributors by immunizing them from suit. The statute was designed to ensure "that a gun in itself is not to be determined as at fault in case of a death or injury. . . . [Rather] the liability would be on the handler on the gun." Hearing on S.B. 211 Before the S. Comm. on Judiciary, at 4–5, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985). Indeed, it was the sponsoring senator's "intent to *not* have a firearms manufacturer sued by his heirs if he were murdered." Hearing on S.B. 211 Before the Assemb. Comm. on Judiciary, at 16, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (emphasis added). The Legislature

ultimately enacted this broad immunity in NRS 41.131, the statute at issue in two of these certified questions.

In 2015, concerned that other governmental entities might interfere with these rights and immunities, the Legislature amended NRS 268.418 to "ensure the protection of the right to bear arms, which is recognized by the United States Constitution and the Nevada Constitution." NRS 268.418(a). Thus, the Legislature declared that:

> The regulation of the transfer, sale, purchase, possession, carrying, ownership, transportation, storage, registration and licensing of firearms, firearm accessories and ammunition in this State and the ability to define such terms is within the ***exclusive domain of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void***.

NRS 268.418(b) (emphasis added).

Finally, in the aftermath of the 1 October shooting, the Legislature did not limit the immunity afforded by NRS 41.131, create civil liability, or ban AR-15 type rifles. Rather, it proscribed the manufacture, sale, and possession of bump stocks, which the Shooter used to commit his crimes. NRS 202.274; Op. Br. 20. Had the Legislature wished to alter Nevada's

historic protections and immunities related to firearms, it—and it alone—could have done so. It did not.

C. Factual and Procedural History

The Parsons asserted three claims against the Companies: (1) wrongful death, (2) negligence per se, and (3) negligent entrustment. JA20–26. They allege that the Companies either manufactured or sold the Subject Rifles that the Shooter used to commit his crimes. JA21–22, ¶¶184–95. The Parsons premise their theory of the case on the alleged inherent dangerousness of the Subject Rifles. *See* JA3, ¶¶9–14. Attempting to avoid the broad preclusion of suits against firearms manufacturers and distributors, the Parsons package their claims within an erroneous legal theory: that AR-15 type rifles are not semi-automatic rifles but are instead machineguns that violate the Machinegun Statutes. JA20, ¶¶172–76.

The Parsons erroneously claim that the "designed to shoot" definition of a machinegun is satisfied if a firearm was "not manufactured to have automatic firing capabilities when sold but ha[s] design features that facilitate easy modification to fully automatic capabilities." JA103. Specifically, the Parsons claim that all AR-15 type rifles are fully

automatic machineguns because the rifles' stocks can be removed by their owners and replaced with a bump stock.

The Companies moved to dismiss, challenging the Parsons' claim that AR-15 type rifles are machineguns and arguing that NRS 41.131 precludes this theory of liability. JA76–87; JA136–40. Although granting the motion except as to the wrongful-death claim, the district court held that the Parsons plausibly alleged that the Companies "knowingly manufactured and sold weapons 'designed to shoot' automatically because [the Companies] were aware their AR-15s could be easily modified with bump stocks to do so."[4] JA201.

Regarding NRS 41.131, the Court recognized that the statute's "text appears to provide broad immunity to firearms manufacturers and distributors," but concluded that the statute is "open to multiple reasonable interpretations." JA203. Finding no case law interpreting NRS 41.131, the district court certified two questions to this Court regarding the statute's scope, framing those questions in terms of the sole-remaining cause of action: wrongful death. JA203–06.

[4] The Companies have filed a motion seeking certification of this issue to the Ninth Circuit Court of Appeals.

After dismissal of their negligence per se claim, the Parsons moved to certify a third question to this Court: whether alleged violations of the Machinegun Statutes can give rise to negligence per se. JA213. The district court granted the motion and reinstated the negligence per se claim. JA236–47. In May 2020, this Court accepted all three questions and directed briefing. The Nevada Justice Association ("NJA") moved for and was granted leave to appear as amicus curiae on behalf of the Parsons.

III. Summary of the Argument

A. NRS 41.131

Two of the certified questions ask whether NRS 41.131 allows a claim premised on allegations that firearms manufacturers and distributors knowingly violated federal and state machinegun prohibitions. These questions address whether a plaintiff has a claim merely because a firearm was capable of and subsequently caused serious injury, damage, or death; or because NRS 41.131 is declaratory and not in derogation of the common law. These questions should be answered in the negative. The statute provides that "[n]o person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of

causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death." NRS 41.131(1). This plain language broadly precludes suit regardless of *who* caused the harm, what *type* of firearm was used, or which *theory of liability* is alleged. If the firearm operates as designed—i.e., shooting ammunition—NRS 41.131 immunizes the manufacturer and distributor from suit. This broad scope is confirmed by the fact that the statute is both protective of manufacturers and distributors and declaratory of the common law, thus requiring a liberal construction of its text in the Companies' favor. The legislative history buttresses this analysis.

The Parsons acknowledge that the Subject Rifles functioned as designed. To avoid the statute's preclusive effect, however, the Parsons narrowly construe the statute and argue that it does not apply where there are allegations of illegal conduct.[5] They contend that the statute precludes *only* no-fault, strict-liability claims that assert a firearm is defective because it is inherently dangerous. Beyond lacking textual support, this argument violates a central canon of statutory construction

[5] Their claims are thus legally indistinguishable from those brought by any plaintiff harmed by his negligent hunting companion or a violent criminal.

by rendering the statute's primary provision meaningless. The Parsons' and NJA's remaining arguments comparing NRS 41.131 to Nevada's dram-shop statute and California's immunity statute are similarly misplaced.

Accordingly, this Court should reject the Parsons' attempt to circumvent the Nevada Legislature's intent to immunize firearms manufacturers and distributors from suit and answer both certified questions regarding NRS 41.131 in the negative.

B. Negligence Per Se

The remaining certified question asks whether Nevada law allows a negligence per se claim predicated on violations of criminal federal and state machinegun prohibitions absent evidence of legislative intent to impose civil liability. This question should be answered in the negative. Negligence per se is available only where the claim is supported by an existing common-law duty, or if a plaintiff demonstrates that the legislature intended to impose civil liability by creating a *new* private right of action. This Court has repeatedly recognized that not all statutory violations can support a negligence per se theory. *Hamm v. Carson City Nugget, Inc.*, 85 Nev. 99, 102, 450 P.2d 358, 360 (1969).

Indeed, "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.*, 108 Nev. 1091, 1096, 844 P.2d 800, 803 (1992). While the Parsons claim this Court's analysis in *Hamm* cannot be applied except in alcohol cases, this Court has never so limited its holding. Rather, the Court's analysis establishes that the alleged violation of the Machinegun Statutes is not negligent per se.

Here, the Parsons cannot meet either predicate for negligence per se. As this Court has recognized, absent a special relationship, "no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct." *Sanchez ex rel. Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). The Companies likewise lacked a common-law duty to control the Shooter's actions. Neither the Nevada Legislature nor Congress intended to create private rights of action under the Machinegun Statutes and, significantly, the Parsons have not argued to the contrary. Therefore, the alleged violation of these statutes cannot give rise to negligence per se and this Court should answer the remaining certified question in the negative.

IV. Argument

The Parsons inappropriately seek to impose firearms regulation through litigation, inviting this Court to legislate from the bench. In an analogous context, this Court stated:

> Clearly, a decision whether to abrogate such a fundamental rule as the one under consideration is the function of the legislative, not the judicial, branch of government. Where, as here, the issue involves many competing societal, economic, and policy considerations, the legislative procedures and safeguards are well equipped to the task of fashioning an appropriate change, if any, to the settled rule."

Hinegardner, 108 Nev. at 1096. The Court should decline the Parsons' invitation, especially given the Legislature's historic and ongoing attention to firearms.

A. The two certified questions based on NRS 41.131 must be answered in the negative as the statute precludes the Parsons' claims.

1. NRS 41.131's plain text grants firearms manufacturers and distributors broad immunity from suit.

a. NRS 41.131 precludes suit regardless of who caused the harm, what type of firearm was used, or which theory of liability is alleged.

As its title conveys, NRS 41.131 creates a "[l]imitation on [the] basis of liability" for firearms manufacturers and distributors. The statute's two subsections succinctly lay out its broad scope:

> 1. No person has a cause of action against the manufacturer or distributor of any firearm or ammunition merely because the firearm or ammunition was capable of causing serious injury, damage or death, was discharged and proximately caused serious injury, damage or death. This subsection is declaratory and not in derogation of the common law.
>
> 2. This section does not affect a cause of action based upon a defect in design or production. The capability of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.

The first subsection prohibits a plaintiff from suing a manufacturer or distributor because its firearms are "capable of causing serious injury, damage or death" and were in fact used to cause such harm to a plaintiff.

Stated differently, if a person is harmed by a firearm that functioned as designed, he cannot sue the company that made or sold it. This broad immunity precludes suit regardless of *who* harms the plaintiff and whether he is injured through negligent or intentional misuse. If a firearm operated as designed—i.e., discharging ammunition when the trigger is pulled—the plain text of NRS 41.131 prohibits suit against its manufacturer or distributor, regardless of whether the harm stems from a hunting accident or an intentional crime.

Similarly, the text makes no distinction regarding the *type* of firearm at issue. Whether the firearm is a bolt-action rifle, a shotgun, a handgun, an AR-15 type rifle, or a fully automatic machinegun such as the "Tommy Gun", the result is the same: a plaintiff "has no cause of action . . . merely because the firearm was capable of causing [and subsequently caused] serious injury, damage or death . . . ." NRS 41.131(1).

Aside from an express exception discussed below, the statute does not limit immunity based on the *theory of liability* alleged. NRS 41.131 immunizes parties from suit regardless of whether a firearm is alleged to be excessively dangerous or allegedly manufactured or sold in

violation of the law. The only exception is set forth in the statute's second subsection, which exempts claims for design or manufacturing defects. Significantly, this subsection's final sentence confirms the exception's narrow application—declaring that a firearm's ability to injure a person by discharging ammunition is not a manufacturing or design defect.

b. As a protective, declaratory statute, NRS 41.131 is entitled to liberal construction.

The protective purpose of NRS 41.131 mandates a liberal construction. This Court has repeatedly held that: "Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *State Dep't of Bus. & Indus. v. Dollar Loan Ctr., LLC*, 134 Nev. 112, 115, 412 P.3d 30, 33 (2018); *accord Colello v. Adm'r of Real Estate Div.*, 100 Nev. 344, 347, 683 P.2d 15, 17 (1984). The statute must therefore be liberally construed to ensure that firearm manufacturers and distributors are not subject to suit based on theories of liability for which the Legislature has declared "[n]o person has a cause of action . . . ." NRS 41.131(1).

Indeed, Nevada's Legislature communicated its intent that the statute be broadly interpreted to achieve its purpose by classifying it as

a "declaratory" statute. A declaratory statute clarifies the existing common law. *See State v. Babayan*, 106 Nev. 155, 169, 787 P.2d 805, 816 (1990). It "is passed in order to put an end to a doubt as to what is the common law . . . and *declares what it is and ever has been . . . .*" *Pers. Fin. Co. of Braddock v. United States*, 86 F. Supp. 779, 784 (D. Del. 1949) (emphasis added). A declaratory statute thus leaves the common law "more clearly in force." *See Deboer v. Fattor*, 72 Nev. 316, 320, 304 P.2d 958, 960 (1956); *cf. Orr Ditch & Water Co. v. Justice Court of Reno Twp.*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947) (holding that a statute in derogation of the common law is strictly construed). Thus, by expressly providing that NRS 41.131 declares and is not in derogation of Nevada's common law, the Legislature also ensured the statute would not be strictly construed against manufacturers and distributors for causes of action arising from the use of non-defective firearms.[6]

[6] The NJA agrees that, as a declaratory statute, NRS 41.131 should not be construed strictly. NJA Br. 15. Oddly, the NJA then summarily concludes that the statute should be narrowly construed against the Companies. *Id.*

c. A cause of action based on alleged violations of the Machinegun Statutes falls squarely within NRS 41.131's broad parameters.

Attempting to avoid the preclusive effect of NRS 41.131, the Parsons argue that the immunity does not apply when there are allegations of statutory violations against firearms manufacturers or distributors. Op. Br. 8, 11. As discussed above, the immunity applies regardless of the theory of liability alleged, including whether the firearms violated the law. Simply put, the Parsons' claims are precluded because they are premised on allegations that AR-15 type rifles, whether in their as-designed or modified conditions, are "capable of causing serious injury, damage or death."

The Parsons plainly allege that the Subject Rifles functioned as they were designed by discharging ammunition. *See, e.g.*, JA22, ¶197. The Nevada Legislature enacted NRS 41.131 to make clear that liability for such injury cannot be extended to a firearm manufacturer or distributor. This policy serves to avoid the specter of limitless liability by allocating liability to those in the best position to protect against the risk of harm. *See infra* § IV.B.2.

Accordingly, the Parsons' claims are precluded as a matter of law.

2. The legislative history of NRS 41.131 underscores the statute's sweeping immunity.

While the certified questions regarding NRS 41.131 can be answered by relying on the statute's text alone, its legislative history strongly supports the Companies' interpretation.

The bill's sponsor, Senator Robinson, explicitly departed from California Civil Code § 1714.4, which was the model for the first iteration of SB 211. Hearing on S.B. 211 Before the S. Comm. on Judiciary, at 4–5, 1985 Leg., 63rd Leg. Sess. (Nev. Mar. 13, 1985) ("S. Comm"). He believed that Nevada "could do more explicitly what was intended": ensuring "that a gun in itself is not to be determined as at fault in case of a death or injury. . . . [Rather] the liability would be on the handler on the gun." *Id*. The parallel Assembly Committee described the bill's purpose similarly: "[I]f someone shoots a firearm and hurts somebody, you can't sue the firearms manufacturer because it shoots." Hearing on S.B. 211 Before the Assemb. Comm. on Judiciary, at 18, 1985 Leg., 63rd Leg. Sess. (Nev. Apr. 17, 1985) (emphasis added) ("Assemb. Comm.").

The Parsons mischaracterize certain portions of the legislative history, highlighting, for instance, the statement that "[t]he bill wouldn't relieve the seller or the manufacturer of the gun from liability if the gun

is defective or causes injury *due to some fault of the manufacturer or the seller*." Op. Br. 18 (quoting Assemb. Comm. at 15). The Parsons imply that NRS 41.131 does not preclude claims alleging that a manufacturer or distributor was somehow "at fault" for the harm caused. But the context of the Committee's discussion makes clear that the reference to "fault" was a manufacturing or design defect. The quoted material comes from the Chairman's synopsis of Senator Robinson's comments, in which the Senator emphasized that the only exception to immunity would be if "the weapon is faulty in design, materials or workmanship." S. Comm. at 5. Likewise, the Chairman immediately went on to explain "that if the weapon itself causes injury to the person shooting it . . . because it was manufactured improperly, the manufacturer could still be sued for manufacturing a defective product." Assemb. Comm. at 15. The Chairman also clarified that the exclusion of manufacturing and design defect claims from NRS 41.131's protections ensured that the statute was declaratory and not in derogation of the common law. *Id.*

The Parsons also rely on legislative history that is incomplete and out of context. They reference Assemblyman Sader's comment that "[n]ormally when you say something is declaratory it means it has no

legal effect." Op. Br. 18. But the Chairman soundly *rejected* this premise, stating that "it could be said that this section is not in derogation of the common law *but not* that it is declaratory *and has no force and effect* other than a declaration of legislative intent. Assemb. Comm. at 15. (emphasis added). It was at this point that the Chairman emphasized that Senator Robinson did not want "a firearms manufacturer sued by his heirs if he were murdered." *Id*. at 16.

This legislative history thus demonstrates the sweeping immunity the Legislature intended to confer.

3. A narrow reading of NRS 41.131 is belied by the statute's text, the external sources the Parsons cite, and the canons of statutory construction.

Despite NRS 41.131's broad application, the Parsons narrowly construe the statute's text, contending that it precludes only no-fault, strict-liability claims. The NJA advances a similar argument. But these statutory constructions are fundamentally flawed and internally inconsistent.

a. The Parsons' "no fault" construction of NRS 41.131 renders the primary provision meaningless, is without textual support, and is undermined by their other citations to NRS Chapter 41.

Despite the single exception to NRS 41.131's broad immunity for manufacturing or design defect claims, the Parsons advance precisely the opposite interpretation. They argue that the statute bars *only* a claim "that alleges no fault, i.e. one that asserts that a firearm 'is capable of causing serious injury, damage or death . . . .'" Op. Br. at 12–13. In their view, NRS 41.131 applies *only* to strict, product-liability claims premised on the novel theory that a firearm is defective because it is inherently dangerous.[7] Op. Br. 19. Under this interpretation, all a plaintiff must do to avoid NRS 41.131 is allege that a manufacturer or distributor acted negligently or maliciously in how it manufactured or sold a firearm.

But this no-fault theory violates a central canon of statutory construction by rendering the primary provision of NRS 41.131 superfluous. *See S. Nevada Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) ("When interpreting a statute,

[7] And the NJA similarly asserts that the statute was designed to immunize only against what are commonly called "Turley suits," which allege that a firearm is defective because its risk of injury outweighs its utility. NJA Br. 10–11.

this court must give its terms their plain meaning, considering its provisions as a whole so as to read them in a way that would not render words or phrases superfluous or make a provision nugatory." (internal quotation marks and citation omitted)). Although the Parsons concede that NRS 41.131 immunizes manufacturers and distributors from strict-liability theories alleging that a firearm is inherently dangerous, the statute accomplishes this through its second subsection alone by declaring that "[t]he capability of a firearm or ammunition to cause serious injury, damage or death when discharged *does not make the product defective in design*." NRS 41.131(2) (emphasis added). This sentence bars any product-liability theory that does not exclusively allege a true manufacturing or design defect—e.g., a firearm exploding in a user's hands or discharging without the trigger being pulled.

The Parsons and the NJA nonetheless contend that NRS 41.131 is *solely* designed to preclude inherent-dangerousness theories.[8] Op. Br. 13, 19; NJA Br. 14. But that argument impermissibly renders the first half of the statute meaningless. Because NRS 41.131(2) immunizes firearms

[8] As discussed below, the California Supreme Court rejected a similarly narrow reading of Civil Code § 1714.4. *See infra* § IV.A.3.b.

manufacturers and distributors from these types of novel product-liability theories,[9] construing NRS 41.131 *as a whole* to only preclude such claims would strip 41.131(1)—the statute's primary provision—of any function.

Beyond rendering the principal portion of the statute meaningless, the Parsons' no-fault theory lacks textual support. Had the Nevada Legislature intended to craft such a narrow statute—precluding only a small set of novel product-liability claims—it would have used express, clear language to convey this limited intent. Similarly, in the same manner that the statute explicitly preserves claims for manufacturing or design defects, NRS 41.131 would have expressly stated that it permits claims alleging negligent or willful misconduct—encompassing the vast majority of tort theories, including those raised by Senator Robinson.[10]

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[9] The Parsons highlight that the Restatement (Third) of Torts cites NRS 41.131 as an example of "legislation that prohibits actions against firearm manufacturers for injuries resulting from the weapon's inherent danger." Op. Br. 19 (quoting Restatement (Third) of Torts: Prod. Liab. § 2 (1998)). The Companies agree NRS 41.131 has that effect, but the Restatement does not conclude that inherent dangerousness is the only theory of liability that the statute precludes. After all, that volume addresses *only* product liability.

[10] Likewise, had the Nevada Legislature intended to exclude unlawful sales from NRS 41.131's protections, it would have included express exceptions to NRS 41.131 for violations of state and federal law.

Likely recognizing this flaw, the Parsons argue that the word "merely" in the statute's first sentence *implicitly* conveys that it is limited to no-fault claims. Op. Br. 13. But the use of "merely" simply places emphasis on a firearm's ability to injure when it is functions as designed. In such circumstances, as here, there can be no liability on the part of its manufacturer or distributor.

Without textual support for their position, the Parsons turn to purported textual clues from neighboring sections of Chapter 41. They assert, for instance, that their no-fault reading is imputed to NRS 41.131 through the name of the subchapter in which the statute is located: "Actions for Personal Injuries by Wrongful Act, Neglect or Default." Op. Br. 12. But it is well-established that "headings and titles [of statutes] are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis." *Bhd.*

Narrower immunity statutes across the country include such *explicit* limitations to their scope. *See, e.g.*, 15 U.S.C. § 7903(5)(A)(iii) (expressly exempting from its immunity "an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing" of firearms); Colo. Rev. Stat. § 13-21-504.5(4) (same); Alaska Stat. § 09.65.155 ("A civil action . . . may not be brought against a person who manufactures or sells firearms or ammunition if the action is based on the *lawful* sale, manufacture, or design of firearms or ammunition." (emphasis added)).

of R. R. Trainmen v. Baltimore & O. R. Co., 331 U.S. 519, 528 (1947). The title of the subchapter in which a statute is located is thus even less persuasive.

Moreover, the Parsons' argument is severely undercut by the fact that, unlike many other statutes within that same subchapter, the entire purpose of NRS 41.131 is to preclude liability—not to recognize new causes of action. *See, e.g.*, NRS 41.134 (creating a cause of action for domestic violence); NRS 41.1395 (creating a cause of action for elder abuse). Nothing in the comparable wording and structure of NRS 41.131 limits its immunity to no-fault claims against firearms manufacturers and distributors.

Additionally, while the Parsons cite NRS 41.1305, like NRS 41.131, it precludes civil liability *regardless of the theory of liability* alleged. NRS 41.1305 codifies the common-law rule that this Court first recognized in *Hamm v. Carson City Nugget, Inc.*, that "[a] liquor vendor [is] not responsible to innocent third persons for injury or death due to the inebriated person's conduct." 85 Nev. 99, 100, 450 P.2d 358, 359 (1969); *see infra* §§ IV.A.4, B.1.c. A plaintiff cannot side-step this immunity by raising alcohol's inherent ability to impair, or that a

bartender negligently or even intentionally overserved the patron. Similarly, NRS 41.131's unequivocal immunity is not conditioned on the properties of the goods sold or the theory of liability asserted.

b. The NJA's comparison between NRS 41.131 and California's immunity statute is deeply flawed.

There is also no merit to the NJA's assertion that NRS 41.131 precludes *only* a narrow range of strict-product-liability claims known as Turley suits. Its position is solely premised on the fact that Nevada's bill was *initially* modeled after California's since-repealed immunity statute, California Civil Code § 1714.4. NJA Br. 12–13. This argument fails in several respects.

First, the California statute used vastly different wording than NRS 41.131. There can be little doubt that section 1714.4 was primarily designed to preclude Turley suits because its leading provision stated that, "[i]n a products liability action, no firearm or ammunition shall be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its potential to cause serious injury, damage, or death when discharged." *Merrill v. Navegar, Inc.*, 28 P.3d 116, 124 (Cal. 2001) (quoting Cal. Civ. Code § 1714.4(a) (1998)). But critically, this language, which the NJA asserts limits the California

statute's scope, is absent from NRS 41.131. This is not surprising as the Nevada Senate re-drafted its bill to "more explicitly" immunize firearms manufacturers and distributors from suit.[11] S. Comm. at 4–5. Section 1714.4 thus provides no insight on NRS 41.131's scope and purpose.

Moreover, the California Supreme Court rejected the narrow reading the NJA now attempts to ascribe to section 1714.4 and, by analogy, to NRS 41.131. In *Merrill*, the court held that section 1714.4 precluded a claim against a firearms company that manufactured the firearm used in a shooting. 28 P.3d at 119. The *Merrill* plaintiffs alleged that the defendant had "acted negligently by manufacturing, marketing, and making available for sale to the general public" the handgun at issue. *Id.* at 121. Like the Parsons and the NJA, the *Merrill* plaintiffs contended that section 1714.4 was a no-fault statute that precluded only a narrow set of strict-liability claims that assert that a firearm is defective because it is excessively dangerous—an interpretation that *Merrill* rejected. And though the NJA argues that *Merrill* was wrongly

[11] The Parsons acknowledge, as they must, that the Senate Bill was amended several times. Op. Br. 17.

decided,[12] NJA Br. 13, the California Supreme Court—not the NJA—decides the meaning of California law.

This Court should also decline the NJA and the Parsons' invitation to judicially amend NRS 41.131 by imputing limitations to the statute that are not only unsupported by its text but render the first half of the statute superfluous.

4. Criminal statutes can and do penalize conduct without creating civil liability.

The Parsons contend that the protective purpose of various *penal* statutes, including those outlawing bump stocks and some machineguns, are undermined if NRS 41.131 precludes *civil* liability. Op. Br. 20–21.

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[12] The NJA cites to legislative history for the repeal of section 1714.4, claiming that the California legislature stated that it "did not intend to bar negligence claims against gun makers" by enacting section 1714.4. *Id*. This quote is *not*, however, a legislative finding; rather it was a statement made by an anti-firearms advocacy group during public comment. A.B. 496, Sen. Judiciary Comm., at 12 (5/14/2002) (2001–02 Reg. Sess.), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200120020AB496 ("05/15/02 Senate Committee"). Similarly, the NJA misleads by citing a law-review article that ostensibly *quotes* from the legislative history of the 1982 California bill *enacting* section 1714.4 for the proposition that the statute would not preclude suits involving "statutorily-banned" firearms. NJA Br. 12. But that article includes no direct quotes on this point from the 1982 legislative history, which the NJA does not provide and which, unlike the 2002 legislative history, is not publicly available—making the NJA's implied request for judicial notice of the later history improper.

But this argument fails to acknowledge that both this Court and the Nevada Legislature regularly recognize civil immunity from suit for conduct that results in criminal liability. For example, Nevada criminalizes serving alcohol to minors, but this Court's precedent and a statute precludes civil liability for the same conduct. *Compare Hinegardner*, 108 Nev. at 1096, 844 P.2d at 803, *and* NRS 41.1305, *with* NRS 202.055. In enacting both the alcohol statutes and NRS 41.131, the Nevada Legislature made policy decisions to impose criminal penalties but preclude civil liability. Thus, contrary to the Parsons' position, Nevada's choice to grant firearms manufacturers and distributors broad immunity from civil suits, while also imposing criminal penalties for illegally selling firearms and ammunition, is neither unusual nor contradictory.[13]

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[13] The Parsons also assert the slippery-slope argument that, if the Companies reading of NRS 41.131 is correct, then the illegal manufacture and sale of devices such as bazookas and grenade launchers would also be immunized. This is incorrect. While NRS 41.131 extends to both firearms and ammunition, the projectiles that grenade launchers expel are "[e]xplosive or incendiary device[s]" under NRS 202.253 and are accordingly separately regulated under federal and Nevada explosive laws. Therefore, NRS 41.131's immunity would not apply to these projectiles.

B. The remaining certified question must be answered in the negative as the Machinegun Statutes cannot give rise to negligence per se.

1. In the absence of an underlying common-law duty of care, a statute can only support a negligence per se theory if the legislature intended to create civil liability.

The Parsons' arguments are based on the false premise that any statutory violation gives rise to a negligence per se claim. Rather, negligence per se requires a plaintiff to demonstrate either (1) the defendant owed him a common-law duty, or (2) the legislature intended to create a *new* duty by establishing a new private right of action.

a. Violation of a statutory standard *of care is relevant only if a defendant owes the plaintiff a common-law* duty *of care.*

The Parsons contend that penal statutes are conducive to negligence per se theories because they "set standards of conduct[.]" Op. Br. 26. While the same is true of any statue, this view conflates a *duty* of care with a *standard* of care. The distinction between these two concepts is the crux of why not all statutory violations give rise to negligence per se.

Traffic laws provide a prime example. In Nevada, the violation of a speed limit is generally a misdemeanor. *See* NRS 484A.900;

NRS 484B.620. If the plaintiff asserts a negligence per se theory based on the traffic-law violation, the statutory standard of care—the speed limit—replaces the ordinary prudent person standard. *See Cuyler v. United States*, 362 F.3d 949, 952 (7th Cir. 2004). Violation of that speed limit is thus a per se violation of the standard of care. Stated otherwise, the jury need not determine how a prudent person would have behaved because the traffic law has already determined what maximum speed was reasonable. Dan B. Dobbs, et al., *The Law of Torts* § 146 (2d ed.). But that traffic violation potentially results in negligence per se *only* because the driver had an underlying common-law duty that extended to the injured plaintiff. *Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995) (stating that in cases in which there is "an underlying common law cause of action . . . violation of a duty imposed by statute is negligence per se in that the statutory duty is the standard of conduct of a reasonably prudent person" (quoting *Bob Godfrey Pontiac, Inc. v. Roloff*, 630 P.2d 840, 844 (Or. 1981)).

Conversely, as is well established, "violation of a statute *has no negligence per se effect* in cases where the common law recognized no duty of care at all." Dan B. Dobbs, et al., *The Law of Torts* § 158 (2d ed.)

(emphasis added); *Parker v. Carilion Clinic*, 819 S.E.2d 809, 824 (Va. 2018) ("[T]he violation of a statute does not, by that very fact alone, constitute actionable negligence or make the guilty party negligent per se. . . . [T]he doctrine applies only where there is a common-law cause of action. . . . The absence of an underlying common-law duty renders the presence of a statutory standard of care irrelevant.").[14]

The Seventh Circuit explained this no-duty principle in *Cuyler*, addressing the difficult case of a child who died from injuries inflicted by his babysitter, a woman that had previously abused a different child who

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[14] *Accord* Dan B. Dobbs, et al., *The Law of Torts* § 158 (2d ed.) ("[T]he defendant must be under a duty to use reasonable care; if he is not, violation of the statute cannot not prove breach of duty."); *Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995) ("[W]e first inquire whether . . . the defendant owe[d] a common law duty of due care to the plaintiff? If no common law duty exists, the plaintiff cannot maintain a negligence action, even though the defendant has violated a statutory duty."); *Faber v. Ciox Health, LLC*, 944 F.3d 593, 599 (6th Cir. 2019); *Steward v. Holland Family Props., LLC*, 726 S.E.2d 251, 254 (Va. 2012) ("When the standard of care is set by statute, an act which violates the statute is a per se violation of the standard of care. A cause of action based on such a statutory violation is designated a negligence per se cause of action and requires a showing that the tortfeasor had a duty of care to the plaintiff . . . ." (citation omitted)); *Estate of Johnson ex rel. Johnson v. Badger Acquisition of Tampa LLC*, 983 So. 2d 1175, 1182 (Fla. Ct. App. 2008) ("We agree that the violation of a statute may be evidence of negligence, but such evidence only becomes relevant to a breach of a standard of care after the law has imposed a duty of care.").

was taken to a hospital for treatment. 362 F.3d at 951. Because certain medical personnel had failed to report the earlier, non-fatal abuse as required under Illinois' mandatory-reporting statute, the decedent's parents sued those personnel, asserting that the statutory violation was negligent per se. *Id.*

In upholding dismissal of this claim, the court explained that a statutory standard of care "does not come into play unless the tort plaintiff establishes that the defendant owes a duty of care to the person he injured . . . , because tort liability depends on the violation of a duty of care to the person injured by the defendant's wrongful conduct." *Id.* The court emphasized that this principle is not arbitrary; absent the requirement of an underlying common-law duty, "every statute that specified a standard of care would be automatically enforceable by tort suits for damages—every statute in effect would create an implied private right of action—which clearly is not the law." *Id.*

Applying this no-duty principle, the Seventh Circuit concluded that the medical personnel did not owe a duty of care towards the decedent or his parents. *Id.* at 953. It explained that "tort law imposes on people only a duty to take reasonable care to avoid injuring other people, and

not a duty to rescue others from injuries by third parties . . . ." *Id.* The court thus ultimately concluded that the violation of the mandatory-reporting statute, although punishable as a misdemeanor, could not give rise to negligence per se. *Id.*

Numerous other state supreme courts and federal courts of appeal have also precluded negligence per se theories premised on violations of both criminal and civil statutes when the defendant owed no duty to the plaintiff. *E.g.*, *Faber v. Ciox Health, LLC*, 944 F.3d 593, 599 (6th Cir. 2019) ("Because the [plaintiffs] hadn't shown that the inspectors owed the miners a common-law duty of care, their negligence per se claim failed." (discussing *Myers v. United States*, 17 F.3d 890, 899 (6th Cir. 1994)). This principle has been applied to a wide variety of statutes, including other mandatory-reporting laws, *Marquay*, 662 A.2d at 278, mine-safety regulations, *Myers*, 17 F.3d at 899, and various provisions of HIPPA, *Parker*, 819 S.E.2d at 825; *Faber*, 944 F.3d at 599.

These authorities demonstrate that not all statutory violations give rise to a negligence per se theory—nor are they intended to, as this Court concluded in *Hamm*. *See infra* § IV.B.1.c. Without an underlying duty, statutory prohibitions and mandates cannot be enforced through private

suit under a negligence per se theory. To hold otherwise would effectively transform every penal statute and every government regulation into an implied right of action, "which clearly is not the law." *Cuyler*, 362 F.3d at 952; *see also Faber*, 944 F.3d at 599 n.5.

b. For a statute to create a duty that did not exist at common law, a plaintiff must show that the legislature intended that statute to create civil liability through a new private right of action.

Courts have made clear that to impose a duty where one did not previously exist, a legislature must have intended to create civil liability through a new private right of action. *See Cuyler,* 362 F.3d at 951, 954 (finding that the reporting statute did not create a new duty because "the statute contains no reference to damages or other tort-type remedies," it imposes criminal and disciplinary sanctions only, and "[n]othing in the statute's text indicates that the legislature meant to expand the scope of tort liability to encompass people who fail to report child abuse"); *Marquay*, 662 A.2d at 277 (stating that, where "there is no underlying common law cause of action . . . [t]he court must undertake . . . an examination of the statute to determine whether there exists any explicit

or implicit legislative intent that a violation of a statute should give rise to a tort cause of action" (quoting *Roloff*, 630 P.2d at 845)).[15]

These holdings underscore the fact that legislatures do not intend every wrong to be remedied through civil suit. In instances where the common law does not allow for civil liability, statutory liability is limited to the enforcement mechanisms intended by the legislature.

c. This Court has declined to apply negligence per se where there was no underlying common-law duty and no evidence the Legislature intended to extend civil liability.

Contrary to what the Parsons assert, the holding in *Hamm*—that a violation of the alcohol statute at issue was not negligence per se— is not limited to the alcohol context. Rather, this Court's reasoning, including its acknowledgment of two prior negligence per se opinions, fully aligns with the no-duty principle addressed above.

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[15] *Accord Parker*, 819 S.E.2d at 825 ("This distinction between the duty of care and the standard of care explains the very existence of statutory rights of action. When a statute *creates a duty* of care a*nd sets the standard* by which a breach is measured, the statute no longer gives rise [only] to a negligence per se claim but rather creates a right of action."); *Johnson*, 983 So. 2d at 1181–82 (rejecting negligence per se theory and stating: "[The defendant] contends the absence of a private cause of action indicates that the legislature did not contemplate the enforcement for an individual harm. We agree.").

Hamm stemmed from a wrongful-death claim against a tavern that allegedly over served a motorist. 85 Nev. at 99, 450 P.2d at 358. The plaintiff in *Hamm* argued it could "assert a claim for relief based upon a violation of a criminal statute" making it a crime "to sell or give . . . any intoxicating liquor to any person who is drunk, or to any person known" by the bartender "to be an habitual drunkard . . . ." *Id.* at 101, 450 P.2d at 359 (quoting NRS 202.100(1)). This Court found that liquor vendors were "not responsible to innocent third persons for injury or death due to the inebriated person's conduct." *Id.* at 100, 450 P.2d at 359. This Court thus re-affirmed that there was no duty running between a tavern and individuals injured by an inebriated patron. *Id.* at 100–01, 450 P.2d at 359.

This Court rejected the plaintiff's argument while also acknowledging that, "in other contexts [it] [had] recognized that a violation of a penal statute is negligence per se." *Id.* (citing *S. Pac. Co. v. Watkins*, 83 Nev. 471, 435 P.2d 498 (1967); *Ryan v. Manhattan Big Four Mining Co.*, 38 Nev. 92, 145 P. 907 (1914)). But this Court distinguished NRS 202.100 from the statutes in these prior cases by concluding that

the Nevada Legislature did not intend for the drunkard statute to create civil liability. *Id.*

This Court has consistently upheld its decision in *Hamm*, each time re-affirming 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*, 108 Nev. at 1095–96, 844 P.2d at 803 (citing *Bell v. Alpha Tau Omega Fraternity*, 98 Nev. 109, 111, 642 P.2d 161, 162 (1982)); *see also Snyder v. Viani*, 110 Nev. 1339, 1344 n.1, 885 P.2d 610, 613 n.1 (1994).

Contrary to Parsons reading of the case, *Hamm* and its progeny did not pose an "unusual question" limited to alcohol. Rather, *Hamm* and its progeny are part of a wide array of decisions affirming dismissal of a negligence per se theory in the absence of either an underlying common-law duty or legislative intent to create a private right of action.[16]

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[16] Contrary to the Parsons' argument, Op. Br. 30, the *Hamm* and *Hinegardner* doctrines have been applied to a number of cases not involving alcohol. *See Richardson Const., Inc. v. Clark County School Dist.*, 123 Nev. 61, 156 P.3d 21 (2007); *Mazzeo v. Gibbons*, 649 F. Supp. 2d 1182 (D. Nev. 2009); *Sanchez*, 125 Nev. 818, 221 P.3d 1276 (2009); *Harlow v. LSI Title Agency, Inc.*, No. 2:11–cv–01775–PMP–VCF, 2012 WL 5425722 (D. Nev. Nov. 6, 2012); *Conboy v. Wynn Las Vegas, LLC*, No. 2:11–CV–1649 JCM-CWH, 2012 WL 5511616 (D. Nev. Nov. 14, 2012).

In contrast, the statutes in the two cases that *Hamm* distinguished both involved underlying common-law duties. In *Watkins*, the court held that an alleged violation of a statute making it a misdemeanor for a train engineer to not ring a bell a certain distance from a crossing supported a negligence per se jury instruction. 83 Nev. at 491 n.5, 435 P.2d at 511 n.5. However, the negligence per se theory was based on the common law duty that "[a] railroad owes . . . to the general public . . . ." *Id.* at 483, 435 P.2d at 506. In *Ryan*, the plaintiff alleged that a mine operator violated a statute requiring use of "iron-bonneted safety cages" to protect its employees in shafts over a certain depth. 145 P. at 910. But this Court also recognized that the mine operator owed a common-law duty to protect its employees from harm. 145 P. at 911; *see also Myers*, 17 F.3d at 899 ("[T]he relationship between the mine owners and the miners, as employer-employee, is sufficient to create a duty of care at common law.").[17] Both these pre-*Hamm* cases demonstrate that a common-law

[17] The different relationships at issue in this Court's decision in *Ryan* and the Sixth Circuit's decision in *Myers* readily distinguish their holdings and provide prime examples of the no-duty principle. The former case involved a common-law duty running between the mine-operator and the miners, while the latter *lacked* a duty between the federal inspectors and the miners. *Faber*, 944 F.3d at 599 ("Because the [plaintiffs in *Myers*]

duty must first exist between a plaintiff and defendant before the relevant criminal statute's standard can serve as a basis for negligence per se.[18]

This no-duty principle similarly explains the application of negligence per se in the two cases the Parsons cite. Op. Br. 30. *Atkinson v. MGM Grand Hotel, Inc.*, involved a statute that "requires excavators to erect a substantial fence or safeguard around their work to prevent persons and animals from falling into the excavation." 120 Nev. 639, 642, 98 P.3d 678, 680 (2004) (citing NRS 455.010). But it is well-established that a landowner owes a common-law duty to protect even trespassers from "an artificial condition [on the land] which involves a risk of death or serious bodily harm." Restatement (First) of Torts § 337 (1934); *Moody v. Manny's Auto Repair*, 110 Nev. 320, 331, 871 P.2d 935, 942 (1994), *superseded by statute on other grounds*. Likewise, the common-law duty

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hadn't shown that the inspectors owed the miners a common-law duty of care, their negligence per se claim failed.").

[18] *Hamm* and its progeny have presented this Court with the opportunity to address the no-duty principle only in the context of criminal statutes. But because the Machinegun Statutes are unquestionably penal, this case does not require this Court to apply the no-duty principle more broadly.

owed by all drivers to their fellow motorists is the counterpart to the statute in *Brannan v. Nevada Rock & Sand Co.*, which "requires that all brakes on vehicles be maintained in good working order." 108 Nev. 23, 25, 823 P.2d 291, 292 (1992) (citing NRS 484.597).

2. The Companies did not have a common-law duty to protect the public from third-party criminal conduct.

It is well-established that, "under common-law principles, no duty is owed to control the dangerous conduct of another or to warn others of the dangerous conduct." *Sanchez ex rel. Sanchez v. Wal-Mart Stores,* Inc., 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). "An exception to this general rule arises . . . when (1) a special relationship exists between the parties or between the defendant and the identifiable victim, *and* (2) the harm created by the defendant's conduct is foreseeable." *Id.*, 221 P.3d at 1280–81 (emphasis added).[19] These conditions are conjunctive; even if the ultimate harm is foreseeable, the defendant cannot be found liable

[19] *Accord* Restatement (Second) of Torts § 314 (1965); *Vesely v. Armslist LLC*, 762 F.3d 661, 665 (7th Cir. 2014); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1227 (D. Colo. 2015); *Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055, 1061 (N.Y. 2001); *Delahanty v. Hinckley,* 564 A.2d 758, 762 (D.C. 1989); *Bloxham v. Glock Inc.*, 53 P.3d 196, 201 n.5 (Ariz. Ct. App. 2002) (citing cases); *Valentine v. On Target, Inc.*, 686 A.2d 636, 639 (Md. Ct. App. 1996).

absent a recognized special relationship giving rise to a duty to protect the plaintiff from a third-party. *See id.*[20] Most authorities recognize only four special relationships,[21] which are indisputably inapplicable to this case.

Applying these principles, this Court held in *Sanchez* that no duty exists when a defendant sells a third-party a good that she then tortiously uses to harm the public. There, the victims of a car accident caused by a third-party "driving under the influence of controlled substances" sued the pharmacies that had recently dispensed the driver her opioid prescription. *Sanchez*, 125 Nev. at 822, 221 P.3d at 1279. Notably, the "Prescription Controlled Substance Abuse Prevention Task Force" had sent the defendant pharmacies a letter *prior to the accident* warning them that the driver had, over the course of a single year, "obtained

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[20] *Accord Hamilton*, 750 N.E.2d at 1060 ("Foreseeability, alone, does not define duty—it merely determines the scope of the duty once it is determined to exist."); *Bloxham*, 53 P.3d at 202 ("[I]n the absence of an existing duty, foreseeability is inconsequential. Because foreseeability of harm does not in itself give rise to a duty, the Bloxhams still failed to allege the elements of negligence."); *Valentine*, 686 A.2d at 639.

[21] For instance, the Restatement (Second) of Torts § 314A enumerates: a common carrier and his passenger; an innkeeper and his guest; a possessor of land or a business and its invitees; and a custodian and his ward.

approximately 4,500 hydrocodone pills at 13 different pharmacies." *Id.*, 221 P.3d at 1279.

Upholding the lower court's dismissal, this Court concluded that, despite the pharmacies' knowledge of the driver's prior conduct, their "acts of dispensing prescription drugs to [the driver] did not create a legal duty" towards the victims. *Id.* at 825–26, 221 P.3d at 1281–82. This Court reasoned that the victim "was an anonymous member of the driving public and was therefore not a known or identifiable third-party. The pharmacy had no control over whether its customer would take the medication and then drive, or even take the medication at all." *Id.* at 825, 221 P.3d at 1281. "Therefore, a finding that [the victim] was a known or identifiable third-party to whom the pharmacy owed a legal duty 'under those circumstances would create a zone of risk [that] would be impossible to define.'" *Id.*, 221 P.3d at 1281 (quoting *Dent v. Dennis Pharmacy, Inc.*, 924 So. 2d 927, 929 (Fla. Ct. App. 2006)).

Many other courts "have almost uniformly" applied this same principle in dismissing suits against entities that either manufactured or sold the firearm that a third-party criminal used to harm a plaintiff. *Bloxham v. Glock Inc.*, 53 P.3d 196, 201 & n.5 (Ariz. Ct. App. 2002) (citing

cases). For instance, in *Hamilton v. Beretta,* New York's highest court held that firearm manufacturers do not owe victims of gun crimes a duty in the "distribution of the handguns they manufacture[.]" 750 N.E.2d 1055, 1059 (N.Y. 2001). The court explained that the special-relationship requirement recognizes that defendants who hold one of the recognized relationships with either the victim or tortfeasor are in "the best position to protect against the risk of harm." *Id.* at 1061. Absent that requirement, there would exist a "specter of limitless liability" for a defendant. *Id.*; *accord Delahanty v. Hinckley*, 564 A.2d 758, 759, 762 (D.C. 1989) (affirming dismissal of claims against firearm manufacturer because the plaintiff "alleged no special relationship with the gun manufacturers");[22] *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1227 (D. Colo. 2015) (same).

Here, the Parsons have not alleged that the Companies had a duty to protect the public from the Shooter's heinous, criminal acts. Indeed, the word "duty" does not appear in their complaint. JA1–27. Instead, the Parsons base their negligence per se action exclusively on alleged

[22] *See also District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 641 (D.C. 2005) (declining "th[e] invitation to overrule *Delahanty*").

violations of the Machinegun Statutes without regard to the threshold question of whether the Companies owed an underlying common-law duty to the Parsons.

3. The Machinegun Statutes were not intended to create civil liability.

Because the Companies have no common-law duty to the Parsons, the Parsons must establish that either Congress or the Nevada Legislature intended to create new private rights of action under the Machinegun Statutes. *See supra* § IV.B.1.b. But the district court correctly determined that the Parsons failed to highlight any evidence on this point and that no such legislative intent exists. JA197–98.

Statutes that create new causes of action almost always do so *expressly*, stating either that a class of harmed individuals may bring "an action for damages," or that the tortfeasor "is liable for damages" caused by the prohibited conduct. *Compare* NRS 41.134, *and* NRS 41.139(1), *with* NRS 41.1395(1). The Machinegun Statutes do not include such language. 18 U.S.C. § 922(b)(4); NRS 202.350(1)(b).

And though this Court has recognized that select statutes can implicitly create a new private right of action, it has reiterated that "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." *Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 959 & n.11, 194 P.3d 96, 101 & n.11 (2008) (emphasis added). "Without this intent, . . . 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.'" *Id.*, 194 P.3d at 101 (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286–87 (2001)).

There is no indication in the Machinegun Statutes that either Congress or the Nevada Legislature intended to create a private right of action. As with the reporting statute in *Cuyler*, these statutes "contain[] no reference to damages or other tort-type remedies" and the only sanction is criminal. 362 F.3d at 954; NRS 202.350(2)(b); 18 U.S.C. § 924 (penalties for violating § 922).

Moreover, there is ample evidence of a legislative intent *not* to create civil liability. Both the Nevada Legislature and Congress have, for instance, precluded rather than extended civil liability for firearms manufacturers and distributors by enacting NRS 41.131 and the Protection of Lawful Commerce in Arms Act, a comparable federal

immunity statute. 15 U.S.C. § 7901, et seq. The Legislature also passed NRS 202.274, a penal statute prohibiting bump stocks, in direct response to the 1 October Shooting. Op. Br. 20. Had the Legislature desired to create parallel civil liability or limit NRS 41.131, it could have easily done so. It did not. This legislative inaction is thus compelling evidence of an intent *not* to impose civil liability. *See, e.g.*, *Hinegardner*, 108 Nev. at 1096, 844 P.2d at 803 ("[T]he legislature amended the penal statute which Vendors allegedly violated, NRS 202.055. As Vendors properly assert, . . . the legislature could have added a civil liability component to NRS 202.055. We infer from the legislature's inaction that it did not intend to impose civil liability for violations of this penal statute.").

* * *

In sum, the Parsons cannot show that the Companies owed a common-law duty to protect them from the Shooter's criminal conduct. Absent this duty, the allegation that the Companies violated the Machinegun Statutes—even if accepted as true—cannot give rise to negligence per se unless there is evidence that Congress or the Nevada Legislature intended to create a new private right of action. Because all evidence points to the contrary, the Parsons' negligence per se theory

cannot stand. This Court should therefore answer the remaining certified question in the negative.

V. Conclusion

Based on the foregoing, this Court should answer all three questions certified by the U.S. District Court in the negative.

DATED: September 21, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that the **RESPONDENTS' JOINT ANSWERING BRIEF** complies with the typeface and type style requirements of NRAP 32(a)(4)-(6), because this brief has been prepared in a proportionally spaced typeface using a Microsoft Word 2010 processing program in 14-point Century Schoolbook type style. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because it contains approximately 10,189 words.

Finally, I hereby certify that I have read the **RESPONDENTS' JOINT ANSWERING BRIEF**, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On September 21, 2020, I caused to be served a true and correct copy of the foregoing **RESPONDENTS' JOINT ANSWERING BRIEF** upon the following by the method indicated:

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/s/ Maricris Williams
An Employee of Snell & Wilmer L.L.P.

4827-6670-5356.1