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## Guns in the Sky: Nevada's Firearm Laws, 1 October, and Next Steps

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# GUNS IN THE SKY: NEVADA’S FIREARM LAWS, 1 OCTOBER, AND NEXT STEPS

*Nevada Law Journal Staff\**

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*“See the sound. It crashes in. All around. It gets in. Guns in the sky, child grows up to see guns in the sky, used to be on TV.”—INXS*

#### INTRODUCTION

“1 October,” the event and the memory, invoke numerous emotions for many Las Vegas locals. Since the latter months of 2017, thousands of vehicles around the Mojave Desert have displayed stickers showing “#VegasStrong.” The city came together in the aftermath of the sudden tragedy. Within a few days of the shooting, Las Vegas residents donated nearly 800 units of blood to local blood banks.<sup>1</sup>

On October 1, 2017, in a matter of only ten minutes,<sup>2</sup> Stephen Paddock unleashed a hail of over 1,000 rounds of ammunition from his hotel room.<sup>3</sup> He checked into a room on the 32nd floor of the Mandalay Bay Resort and seemed to have plotted to end the lives of as many people as possible before taking his own, but no motive was ever found.<sup>4</sup> At 10:05 p.m., Paddock hammered through the glass of his hotel room window and began shooting at a crowd of people attending the Route 91 Harvest Music Festival about 500 yards away.<sup>5</sup> Chaos ensued below as concertgoers ran and took cover.<sup>6</sup> The shooting stopped at 10:15 p.m., and Paddock was pronounced dead shortly thereafter.<sup>7</sup>

According to official reports, Paddock had no motive. But he did have twenty-four firearms, at least twelve of which were fitted with bump stocks.<sup>8</sup> Although he was deemed a “sober, healthy 64-year-old,” Paddock’s doctor

<sup>1</sup> *Mass Shootings Trigger Blood Donations*, SCIENCE DAILY (Oct. 29, 2018), <https://www.sciencedaily.com/releases/2018/10/181029130930.htm> [<https://perma.cc/8HD2-8PQX>].

<sup>2</sup> LVMPD CRIM. INVESTIGATIVE REP. OF THE 1 OCTOBER MASS CASUALTY SHOOTING, at 49 (2018).

<sup>3</sup> *See id.* at 106–07 (2018).

<sup>4</sup> LVMPD PRELIMINARY INVESTIGATIVE REP. 1 OCTOBER/MASS CASUALTY SHOOTING, at 7, 52 (2018).

<sup>5</sup> *The Las Vegas Shooter Had a Cheap Modification that Made His Rifles More Deadly*, PBS NEWS HOUR (Oct. 3, 2017), <https://www.pbs.org/newshour/nation/las-vegas-shooter-cheap-modification-made-rifles-deadly> [<https://perma.cc/9E4F-K5W8>].

<sup>6</sup> Sally Ho & Regina Garcia Cano, *‘I’m Going To Die’: Fear Grips Vegas Strip; Gunman Kills 59*, PHILLY.COM (Oct. 2, 2017, 10:10 PM), [http://www.philly.com/philly/news/nation\\_world/20171002\\_ap\\_4eeaf2efced49698855d13830de3327.html](http://www.philly.com/philly/news/nation_world/20171002_ap_4eeaf2efced49698855d13830de3327.html) [<https://perma.cc/6K66-JFM8>].

<sup>7</sup> *See Why Did It Take Police So Long To Breach Las Vegas Gunman’s Room? Here’s a New Timeline*, L.A. TIMES (Oct. 4, 2017, 8:34 PM), <https://www.latimes.com/nation/la-las-vegas-shooting-live-updates-carnage-concert-leaves-50-dead-100-injured-20171002-htmlstory.html#why-did-it-take-police-so-long-to-breach-las-vegas-gunmans-room-heres-a-new-timeline> [<https://perma.cc/X7P5-2J42>].

<sup>8</sup> Larry Buchanan, et al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES (Mar. 28, 2019), <https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html> [<https://perma.cc/QYF6-45EP>].

believed that he may have had bipolar disorder.<sup>9</sup> Potential mental conditions aside, he spent the final moments of his life wreaking physical and psychological havoc on hundreds of innocent people who have since suffered and will continue to suffer for years to come. All told, Paddock killed 60 and injured hundreds,<sup>10</sup> making 1 October the deadliest mass shooting in modern U.S. History.<sup>11</sup>

This atrocity led lawmakers to wonder: What was to be done? Historically, Nevada lawmakers had taken a laissez-faire approach to firearm regulation.<sup>12</sup> After all, Nevada is the epitome of the Wild West. But Nevadans eventually tired of unregulated firearm use and resolved to make a change.<sup>13</sup>

1 October was not the first tragedy of its kind. Mass shootings take place throughout the country in a variety of contexts. Some of the most well-known, recent mass shootings include the 2018 Parkland High School shooting; the 2016 shooting at Pulse nightclub in Orlando, Florida; and the 2012 shooting at Sandy Hook Elementary School.<sup>14</sup>

Following almost every mass shooting, a surge of support for gun reform swells and then fizzles out. Perhaps some form of legislation or regulation is passed, and the next several years are spent litigating its contours. In this White Paper, we will outline the various legislative provisions passed by Nevada lawmakers, including the omnibus bill following 1 October.<sup>15</sup> We will also analyze litigation that has proceeded as a result of the mass shooting. Finally, we will offer suggestions for lawmakers and jurists to solve present and future problems.

This paper proceeds in four parts. Part I will outline Nevada's history and initiatives to produce firearm legislation from the state's founding to just before the 1 October tragedy. Part II will discuss the executive and legislative actions following 1 October. Part III will discuss a case currently pending in the United

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<sup>9</sup> Amy B. Wang & Mark Berman, *Las Vegas Shooter Was Sober, Autopsy Finds, Leaving His Motives a Mystery*, WASH. POST (Feb. 10, 2018, 11:18 AM), <https://www.washingtonpost.com/news/post-nation/wp/2018/02/10/las-vegas-shooter-was-sober-autopsy-finds-leaving-his-motives-a-mystery/> [https://perma.cc/RS9B-UTES].

<sup>10</sup> Katelyn Newberg, *Sisolak: 'We Will Never, Never Forget' Those Killed in Oct. 1 Shooting*, LAS VEGAS REV. J. (Oct. 1, 2020, 5:39 AM), <https://www.reviewjournal.com/local/local-las-vegas/sisolak-we-will-never-never-forget-those-killed-in-oct-1-shooting-2134042/> [https://perma.cc/47QG-RGME]; Ricardo Torres-Cortez, *Sheriff Updates Number of People Injured in Strip Shooting to 851*, LAS VEGAS SUN (Jan. 19, 2018, 8:11AM), <https://lasvegassun.com/news/2018/jan/19/sheriff-to-provide-update-about-strip-mass-shootin/> [https://perma.cc/XX5W-9KQY].

<sup>11</sup> Kalhan Rosenblatt, *Las Vegas Shooting is Deadliest in Modern U.S. History*, NBC NEWS (Aug. 20, 2018, 3:56 PM), <https://www.nbcnews.com/storyline/las-vegas-shooting/las-vegas-shooting-deadliest-modern-u-s-history-n806486> [https://perma.cc/EZ7S-KP64].

<sup>12</sup> See *infra* Part I(A).

<sup>13</sup> See, e.g., *infra* Part I(B).

<sup>14</sup> *Deadliest Mass Shootings in the US Fast Facts*, CNN (Apr. 14, 2021, 2:32 PM), <https://www.cnn.com/2019/08/19/us/mass-shootings-fast-facts> [https://perma.cc/DG7F-GGDL].

<sup>15</sup> A.B. 291, 2019 Leg., 80th Sess. (Nev. 2019) (as introduced).

States District Court, District of Nevada, which arose out of the 1 October shooting. Part IV will then address the questions certified by the United States District Court to the Supreme Court of Nevada regarding statutes that immunize firearm manufacturers and criminalize the production and distribution of machine guns.

## I. NEVADA HISTORY AND FIREARMS LEGISLATION

This section outlines Nevada's history of regulating firearms prior to the 1 October shooting. Subsection A details Nevada's minimalist approach to firearms regulation in the 1800s. Subsection B focuses on modern firearms statutes in Nevada.

### A. *After Achieving Statehood, Nevada Began Regulating Weapons in the Wild West*

The United States was in the midst of the Civil War when President Lincoln signed an enabling act for Nevada statehood on March 21, 1864.<sup>16</sup> This Act provided that the residents of the territory of Nevada could form a state for admission into the Union if they wrote a constitution which contained several provisions, including that there be no slavery in the newly formed state.<sup>17</sup> In 1864, Lincoln was running for re-election and, because the residents of the Nevada territory were largely Republican and pro-Union, Congress pushed the Act through, looking for support for Lincoln and the abolition of slavery through the Thirteenth Amendment.<sup>18</sup>

The Nevada constitutional convention met and authored the state constitution and Nevada's voters approved it on September 7, 1864.<sup>19</sup> To save time, the constitutional convention telegraphed the constitution to Washington, D.C., and President Lincoln declared Nevada to be a state on October 31, 1864: just eight days before the presidential election.<sup>20</sup> This rush toward statehood during the tumultuous Civil War led Nevada to be dubbed the "Battle Born" state.<sup>21</sup>

Nevada's turbulent beginning produced an environment ripe for lawlessness. With its rich Comstock Lode, it is no wonder that after the war brave prospectors flocked to Nevada, the Wild West, where silver could be

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<sup>16</sup> Jerome Edwards, *Nevada Statehood*, ONLINE NEV. ENCYCLOPEDIA (Oct. 21, 2009), <https://www.onlinenevada.org/articles/nevada-statehood> [<https://perma.cc/8A7N-8D8M>].

<sup>17</sup> Act of Congress (1864) Enabling the People of Nevada to Form a Constitution and State Government, 13 Stat. 30–31, 38 Cong. Ch. 36, §§ 1, 4 (1864).

<sup>18</sup> *Utah-Nevada Territory*, NSLA, <https://nsla.nv.gov/utah-nevada-territory> [<https://perma.cc/4NXE-YV9A>].

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

mined from the ground and lawlessness was the norm.<sup>22</sup> The mines attracted all sorts of colorful characters: outlaws like A.J. “Smiling Jack” Davis, a mill owner turned stagecoach and train robber; John “Three-Fingered Jack” McDowell, a gang leader who served as a hired killer; and “Fighting Sam” Brown, who was said to enjoy killing so much that he shot a man in the back for sport.<sup>23</sup> These dangerous men may have inspired the new state legislature to rapidly enact legislation to regulate the use of firearms and bring Nevada under control.

The Nevada Constitution contained Nevada’s first firearm regulation. Nevada’s first legislative session was held from December 12, 1864, through March 11, 1865.<sup>24</sup> During that session, no legislation was passed regarding firearms.<sup>25</sup> However, the published statutes from that session contained the original Nevada state constitution.<sup>26</sup> The constitution provided the rules governing eligibility to hold office in the state and included the provision that no “person who . . . fought a duel with a deadly weapon . . . shall be allowed to hold any office.”<sup>27</sup> The constitution also provided that the “Legislature shall provide by law for giving force and effect to this section.”<sup>28</sup> Although this provision does not regulate firearms specifically or weapons in general, this is the first known Nevada legislation that mentioned deadly weapons.

The second legislative session brought a second mention of weapons, also with regard to dueling.<sup>29</sup> This legislation concerned officers who failed to prevent a duel<sup>30</sup>:

If any . . . officer . . . shall have knowledge of an intention . . . of any two persons, to fight with a deadly weapon or weapons, and such officer shall not use and exert his official authority to arrest the parties, and prevent the deed, every such officer shall be fined in a sum not exceeding one thousand dollars.<sup>31</sup>

This was the second piece of early Nevada legislation directed at dueling.<sup>32</sup> At this point in the state’s history, people who participated in duels were banned from the privilege of holding office, and officers who failed to intervene in duels could be punished with a monetary fine.

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<sup>22</sup> Ron Soodalter, *Stand and Deliver! Nevada’s Outlaws Earned Their Fearsome Reputations*, NEV. MAG. (July-Aug 2017), <https://nevadamagazine.com/issue/july-august-2017/4448/> [<https://perma.cc/T965-3FZG>].

<sup>23</sup> *Id.*

<sup>24</sup> See JOHN CHURCH, STATUTES OF THE STATE OF NEVADA PASSED AT THE FIRST SESSION OF THE LEGISLATURE, at Title Page (1864–65).

<sup>25</sup> See generally *id.* at iii-x (showing no reference to potential firearm legislation).

<sup>26</sup> See, e.g., *id.* at 41–43 (1864–65) (showing the Preamble and Article I—Declaration of Rights from the Nevada Constitution).

<sup>27</sup> NEV. CONST. art. XV, § 3, in JOHN CHURCH, STATUTES OF THE STATE OF NEVADA PASSED AT THE FIRST SESSION OF THE LEGISLATURE, at 61 (1864–65).

<sup>28</sup> *Id.*

<sup>29</sup> CHURCH, *supra* note 24, at 245 (Ch. CVIII, Sec. 70) (1866).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*; see also *supra* note 27 and accompanying text.

The first legislation passed in Nevada that resembles modern-day statutes was passed in the third legislative session and approved on February 27, 1867.<sup>33</sup> This legislation entitled, “An Act to prohibit carrying of Concealed Weapons,”<sup>34</sup> created Nevada’s first concealed carry statute. This Act provided that “[e]very person, not being a peace officer or traveler, who shall wear or carry any dirk, pistol, sword in a cane, slung-shot, or other dangerous or deadly weapon concealed, shall . . . be deemed guilty of misdemeanor.”<sup>35</sup> Although Nevada’s firearms statutes have gone through multiple revisions since they were initially penned, this statute has remained in a substantially similar format.<sup>36</sup> The current statute prohibits a person from “carry[ing] concealed upon his or her person any pistol, revolver or other firearm, or other dangerous or deadly weapon or pneumatic gun.”<sup>37</sup>

### *B. Modern Firearms Legislation, Pre-2019*

Firearms laws in Nevada are the exclusive domain of the state Legislature and are codified in NRS §§ 202.253–202.369.<sup>38</sup> Prior to 2015, Nevada law provided limited authority to Clark County to require registration of concealable firearms.<sup>39</sup> The Clark County ordinance required that “any resident of the county receiving title to a pistol . . . shall, within seventy-two hours . . . personally appear at the county sheriff’s office . . . for the purpose of registering the same.”<sup>40</sup> Upon registration, the owner was given a “blue card” as a receipt.<sup>41</sup> Normally, sellers would fill out the blue card for the purchaser and file the paperwork to the Sheriff as part of the registration process.<sup>42</sup>

On June 2, 2015, Nevada Governor Brian Sandoval signed Senate Bill 175 into law.<sup>43</sup> This bill preempted the county registration ordinance and “establish[ed] state control over the regulation of and policies concerning firearms . . . to ensure that such regulation and policies are uniform throughout

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<sup>33</sup> JOSEPH E. ECKLEY, STATUTES OF THE STATE OF NEVADA PASSED AT THE THIRD SESSION OF THE LEGISLATURE, 66 (1867).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See NEV. REV. STAT. § 202.350(1)(d)(3) (2021).

<sup>37</sup> *Id.* § 202.350(2)(d)(3).

<sup>38</sup> See NEV. REV. STAT. § 244.364(1)(b) (2021). There are multiple laws concerning firearms in the Nevada Revised Statutes and to provide an overview of them in their entirety would be beyond the scope of this paper. Some Nevada laws are provided above for background and informational purposes.

<sup>39</sup> NEV. REV. STAT. § 244.364(3) (2015).

<sup>40</sup> *Blue Cards: Clark County Handgun Registration*, NEVADA CARRY, <https://www.nevadacarry.org/blue-cards.html> [<https://perma.cc/4YRA-RJLL>] (showing that Clark County Code 12.04.110 was preempted by NRS 244.364).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> Sandra Chereb, *Sandoval Signs Gun, School Choice Bills Into Law*, LAS VEGAS REV. J. (June 3, 2015, 9:49 AM), <https://www.reviewjournal.com/news/politics-and-government/nevada/sandoval-signs-gun-school-choice-bills-into-law/> [<https://perma.cc/DZL4-PYF2>].

this State.”<sup>44</sup> Additionally, when this bill was signed, it provided that the “regulation of the . . . registration and licensing of firearms . . . is within the exclusive domain of the Legislature, and any other law, regulation, rule or ordinance to the contrary is null and void.”<sup>45</sup> At first glance, the preemption of the county registration requirement may seem overly lenient; however, as of 2019 only seven states and the District of Columbia required certain firearms to be registered, eight states expressly prohibited registration and the remaining states were silent on the matter.<sup>46</sup> In retrospect, this may have signified a nationwide trend toward leniency in firearm regulations prior to 2019.

Currently, Nevada law provides that a concealed firearm “permit is valid for any handgun which is owned or thereafter obtained by the person to whom the permit is issued.”<sup>47</sup> Between 2007 and 2013, the statute limited the concealed carry permit to “revolvers and semiautomatic firearms.”<sup>48</sup> This change indicates the legislature’s willingness to broaden Nevada residents’ ability to carry concealed firearms. When it comes to concealed firearm permits, Nevada is a “shall-issue” state.<sup>49</sup> At present, there are forty-one shall-issue states.<sup>50</sup> Taken together, these two laws demonstrate Nevada lawmakers’ permissive views on concealed carry.

In 2003, the Nevada legislature added a statute governing machine guns.<sup>51</sup> The “machine gun” statute, NRS 202.350(1)(b), provides that “a person within

<sup>44</sup> S.B. 175 § 8(1)(a), 2015 Leg., 78th Sess. (Nev. 2015).

<sup>45</sup> *Id.* § 8(1)(b).

<sup>46</sup> See *Firearm Registration Requirements by State*, BALLOTPEDIA, [https://ballotpedia.org/Firearm\\_registration\\_requirements\\_by\\_state](https://ballotpedia.org/Firearm_registration_requirements_by_state) [<https://perma.cc/5JG6-3WRH>] (the places requiring registration include California, Michigan, New York, Hawaii, Maryland, Connecticut, New Jersey, and D.C.; the states that prohibit registration are Florida, Georgia, South Dakota, Idaho, Pennsylvania, Delaware, Vermont, and Rhode Island).

<sup>47</sup> NEV. REV. STAT. § 202.3657(2) (2021).

<sup>48</sup> NEV. REV. STAT. § 202.3657(2) (prior to 2013 amendment).

<sup>49</sup> NEV. REV. STAT. § 202.3657(3) (2021) (“[T]he sheriff shall issue a permit to any person who is qualified to possess a handgun.”). Shall-issue state regulations still require carriers to apply for a permit, but the state has no discretion to determine whether the permit will be issued: as long as the applicant meets all of the requirements, such as the background check, the state will issue the permit. *May-Issue vs. Shall-Issue Concealed Carry States*, USCCA (Apr. 20, 2019), <https://www.usconcealedcarry.com/blog/may-issue-vs-shall-issue-concealed-carry-states/> [<https://perma.cc/B3Y9-A2LQ>]. This shall-issue requirement is less strict than a state with “may issue” regulations, where the state has discretion on the issuance of the permit, even if the applicant meets all of the specified requirements. *Id.*

<sup>50</sup> See *Shall Issue*, USCCA, <https://www.usconcealedcarry.com/resources/terminology/types-of-concealed-carry-licensure-permitting-policies/shall-issue/> [<https://perma.cc/ZDQ5-QK7Y>] (showing a map with 41 states highlighted in yellow; the nine “may-issue” states include California, Hawaii, New York, Vermont, Connecticut, New Jersey, Maryland, Delaware, Massachusetts).

<sup>51</sup> NEV. REV. STAT. § 202.350(1)(b) (2021). Section 202 of the Nevada Revised Statutes provides several laws under the general heading of “Weapons” which concern “Dangerous Weapons and Firearms.” See NEV. REV. STAT. § 202 (2021) (showing “Weapons” and “Dangerous Weapons and Firearms” as subsections). Statutes in this section refer to weapons

this state shall not . . . manufacture or cause to be manufactured, or import into the State, or keep, offer or expose for sale, or give, lend, possess or use a machine gun . . . unless authorized by federal law.”<sup>52</sup> The “machine gun” statute came from a bill sponsored by the Las Vegas Metropolitan Police Department with the intent to mirror federal law, allowing Nevada law enforcement to independently regulate these firearms without relying on federal involvement or oversight.<sup>53</sup> Nevada law defines a machine gun as “any weapon which shoots, is designed to shoot or can be readily restored to shoot more than one shot, without manual reloading, by a single function of the trigger.”<sup>54</sup> The “machine gun” statute has remained unchanged since it was enacted, and it has become an important element of lawsuits that have been filed in the wake of 1 October.<sup>55</sup>

## II. FIREARMS LEGISLATION IN NEVADA, POST-2019

At the time of the 1 October shooting in 2017, Nevada had relatively permissive gun laws.<sup>56</sup> For example, there was no law banning any number of firearms (rifles, shotguns, pistols and revolvers), even without a license and without registering them.<sup>57</sup> Additionally, Nevada’s laws allowed people to openly carry firearms, or carry them concealed with a permit.<sup>58</sup> Further, it was legal to possess a machine gun in Nevada as long as it was authorized by federal law.<sup>59</sup> Finally, Nevada law did not restrict high-capacity magazines or large-caliber firearms.<sup>60</sup>

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such as spring guns, explosives, incendiary devices, and hoax bombs. NEV. REV. STAT. §§ 202.255, 202.260, 202.263 (2021).

<sup>52</sup> NEV. REV. STAT. § 202.350(1)(b) (2021).

<sup>53</sup> *Hearing on S.B. 199 Before the Senate Comm. on Judiciary*, 2003 Leg., 72nd Sess. 6–7 (Nev. 2003) (statement of Stan Olson, Lobbyist, Las Vegas Metro. Police Dep’t).

<sup>54</sup> NEV. REV. STAT. § 202.253(4) (2019). Although Nevada lawmakers have changed the location of this definition within the code, the language and substance have stayed consistent. *Compare* NEV. REV. STAT. § 202.350(8)(c) (prior to 2019 amendment) *with* NEV. REV. STAT. § 202.253(4) (2019) (showing that the definition of “machine gun” moved from the body of the statute to a separate definitions section in 2019).

<sup>55</sup> *See, e.g.*, Defendant FN America’s Notice of Removal, Exhibit A, Complaint and Jury Demand at 29, *Parsons v. Colt’s Manufacturing Company LLC, et al.*, No. 2:19-cv-01189-APG-GWF (D. Nev. July 9, 2019), ECF No. 1 [hereinafter *Parsons Complaint*].

<sup>56</sup> Tanvi Misra, *Why Las Vegas Has Such Lax Gun Laws*, BLOOMBERG (Oct. 2, 2017, 3:15 PM), <https://www.bloomberg.com/news/articles/2017-10-02/why-las-vegas-has-such-lax-gun-laws> [<https://perma.cc/42RJ-HGPL>].

<sup>57</sup> Emily Shugerman, *Las Vegas Gun Laws: How Easy Is It to Buy Guns in Nevada? Very*, INDEPENDENT (Oct. 2, 2017, 3:18 PM), <https://www.independent.co.uk/news/world/americas/las-vegas-gun-laws-shooting-nevada-control-open-carry-conceal-automatic-weapons-rules-stephen-paddock-a7979196.html> [<https://perma.cc/K69G-SWHY>].

<sup>58</sup> NEV. REV. STAT. § 202.3657 (2020).

<sup>59</sup> NEV. REV. STAT. § 202.350(1)(b) (2020).

<sup>60</sup> Ray Rogers, *Nevada’s Gun Laws Are Some of the Most Relaxed in the Country*, BILLBOARD (Oct. 2, 2017), <https://www.billboard.com/articles/news/7982046/nevada-gun-laws-detailed> [<https://perma.cc/H32G-T25E>].

In 2014, the Nevada Secretary of State received an initiative petition, which proposed an amendment to the statutory requirements for background checks for firearm purchasers.<sup>61</sup> At the time of the petition's submission, federal statute required criminal background checks for every gun purchased from a licensed dealer, but none were required if a person bought a gun from an unlicensed dealer, including dealers at gun shows.<sup>62</sup> This initiative appeared on the ballot in the 2016 Nevada General Election as Question 1, proposing an amendment to NRS Chapter 202.<sup>63</sup> The amendment required non-licensed dealers to conduct a background check before selling or transferring a firearm to another unlicensed person; thus, closing the so-called "gun show loophole."<sup>64</sup> To conduct this background check, both the buyer and seller would have to appear in person with the firearm before a federally licensed firearms dealer.<sup>65</sup> The NRS amendment further required the background check to be conducted through the National Instant Criminal Background Check System administered by the Federal Bureau of Investigation (FBI).<sup>66</sup> In the 2016 election, Question 1 passed by a slim margin of 50.45% to 49.55%, with fewer than ten thousand votes making the difference.<sup>67</sup>

Because the initiative was approved by the voters, it was set to go into effect on January 1, 2017.<sup>68</sup> However, this law hit a roadblock when the FBI informed the Nevada Department of Public Safety (DPS) that it would not perform the background checks as requested as part of the Act.<sup>69</sup> The FBI stated in a letter to the Nevada DPS that "Nevada legislation regarding background checks for private sales cannot dictate how federal resources are applied," and that private party background checks are the "responsibility of Nevada."<sup>70</sup> At the time, Nevada was performing background checks through the federal system because Nevada was designated a "Point of Contact" state by the FBI.<sup>71</sup>

In addition to running purchasers through the federal database, Nevada used state databases to check mental health records and records of domestic

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<sup>61</sup> Letter from Barbara K. Cegavske, Nevada Sec'y of State to Nevadans (2016).

<sup>62</sup> 18 U.S.C. § 922(t)(1)(A) (2015); NEV. SEC'Y OF ST., STATE OF NEVADA BALLOT QUESTIONS 2016, 4 (2016), <https://www.nvsos.gov/sos/home/showdocument?id=4434> [<https://perma.cc/WSM2-VLQN>] [hereinafter NEVADA BALLOT QUESTIONS 2016].

<sup>63</sup> NEVADA BALLOT QUESTIONS 2016, *supra* note 62, at 2.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Nevada Background Checks for Gun Purchases, Question 1*, BALLOTPEdia [https://ballotpedia.org/Nevada\\_Background\\_Checks\\_for\\_Gun\\_Purchases,\\_Question\\_1\\_\(2016\)](https://ballotpedia.org/Nevada_Background_Checks_for_Gun_Purchases,_Question_1_(2016)) [<https://perma.cc/SMH5-Z29N>].

<sup>68</sup> NEVADA BALLOT QUESTIONS 2016, *supra* note 62, at 13 (showing the Background Check Initiative, Section 9).

<sup>69</sup> Nev. Off. of the Att'y Gen., Opinion Letter on Background Check Act, No. 2016-12 (Dec. 28, 2016) at 2.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.* at 2.

violence: records that the FBI did not possess.<sup>72</sup> Since the FBI would not perform the checks, the enforcement of the Act would bar Nevadans from privately buying and selling firearms.<sup>73</sup> As such, Nevada Attorney General Adam Laxalt stated in an opinion letter to the Director of the Nevada DPS that Nevadans were “excused from compliance with the Act’s background check requirement.”<sup>74</sup> The required private background checks were not conducted in 2017, even though they were required by Nevada law; in effect, the law existed only on paper.<sup>75</sup> Due to the Nevada Constitution preventing initiative measure amendment or repeal “within [three] years from the date it takes effect,” the background check requirement could not be updated until November 22, 2019.<sup>76</sup>

On September 25, 2017, just five days before the 1 October shooting, attorneys for Nevadans for Background Checks sent a letter and legal memo to then-Nevada Governor Brian Sandoval, urging him to initiate action to implement the background check requirement and threatening legal action to compel him to do so.<sup>77</sup> The fact that the background check initiative had been passed by voters but had not been implemented by the state was scrutinized again after 1 October, because people wondered whether Paddock had legally purchased his firearms.<sup>78</sup>

Shortly after the shooting, a lawsuit was filed against the state regarding the background check initiative implementation; however, it was later determined that Paddock had purchased his firearms legally.<sup>79</sup> The Eighth Judicial District Court dismissed the suit on August 20, 2018.<sup>80</sup> The case was appealed to the Nevada Supreme Court, but the parties agreed to postpone

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<sup>72</sup> *Id.* at 3.

<sup>73</sup> *Id.* at 4.

<sup>74</sup> *Id.* at 6–7.

<sup>75</sup> Riley Snyder, *Legislative Gun Law Changes Inspired By October 1 Have Seen Middling Adoption Over the Last Nine Months; Advocates Urge Patience*, NEV. INDEP. (Oct. 1, 2020, 2:00 AM), <https://thenevadaindependent.com/article/legislative-gun-law-changes-inspired-by-october-1-have-seen-middling-adoption-over-last-nine-months-advocates-urge-patience> [https://perma.cc/VR5R-RG4H].

<sup>76</sup> NEV. CONST. art. 19, § 2, para. 3.

<sup>77</sup> Letter from Mark Ferrario, Legal Counsel to Nevadans for Background Checks, Greenberg Traurig, to Brian Sandoval, Nevada Governor (Sept. 25, 2017).

<sup>78</sup> Riley Snyder & Megan Messerly, *Days Before Mass Shooting on Strip, Gun Control Group Threatened Lawsuit if State Took No Action on Stalled Background Checks Ballot Measure*, NEV. INDEP., (Oct. 3, 2017, 7:20 AM), <https://thenevadaindependent.com/article/days-before-mass-shooting-on-strip-gun-control-group-threatened-lawsuit-if-state-took-no-action-on-stalled-background-checks-ballot-measure> [https://perma.cc/798X-JQLL].

<sup>79</sup> Riley Snyder, *Indy Explains: The Seven-Year Battle to Implement Background Checks on Private Gun Sales*, NEV. INDEP. (Feb. 12, 2019, 2:30 AM), <https://thenevadaindependent.com/article/the-indy-explains-the-seven-year-battle-to-implement-background-checks-on-private-gun-sales> [https://perma.cc/VA23-EHPT].

<sup>80</sup> Order Denying Petition for Writ of Mandamus and Denying Alternative Request for Declaratory Relief, at 22, *Zusi v. Sandoval*, No. A-17-762975-W (Nev. Eighth Judicial District Ct. Aug. 20, 2018).

filing briefs until April 1, 2019.<sup>81</sup> The case was never heard because the Nevada Legislature introduced a bill in early 2019, repealing the provisions of the Background Check Act and reenacting them without the requirement that the FBI perform the checks.<sup>82</sup> The bill was passed into law and became effective on January 2, 2020.<sup>83</sup>

On April 3, 2019, another firearms bill was introduced.<sup>84</sup> Nevada Assembly Bill 272, as amended on April 11, 2019, required law enforcement agencies in Clark and Washoe counties to submit semiautomatic pistols and cartridge cases recovered from crime scenes or “reasonably believed to have been used in or associated with the commission of a crime” to a designated forensic laboratory for testing.<sup>85</sup> The bill’s sponsor stated that, if AB 272 was adopted, more leads could be provided to investigators, which could result in more arrests for gun crimes and a significant drop in gun violence.<sup>86</sup> This bill went into effect on October 1, 2019.<sup>87</sup>

The most significant changes in firearm laws after 1 October were introduced to the Nevada Legislature through an omnibus bill, Assembly Bill 291, on March 18, 2019.<sup>88</sup> As introduced, this bill contained a ban on bump stocks, which would make the import, sale, manufacture, transfer, receipt, or possession of these devices a felony.<sup>89</sup> At the time of AB 291’s introduction, the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) had already issued the “Final Rule” which clarified the definition of “machine gun” in the Gun Control Act<sup>90</sup> and National Firearms Act<sup>91</sup> to include bump stocks.<sup>92</sup> However, the supporters of AB 291 stated that having bump stocks banned in

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<sup>81</sup> Riley Snyder, *supra* note 79.

<sup>82</sup> S.B. 143 §§ 2, 3, 5, 9, 2019 Leg., 80th Sess. (Nev. 2019).

<sup>83</sup> *Id.* at § 10.

<sup>84</sup> *Minutes of the Assembly Committee on the Judiciary*, 2019 Leg., 80th Sess. 24 (Nev. Apr. 3, 2019).

<sup>85</sup> A.B. 272 § 1(1)(b), 2019 Leg., 80th Sess. (Nev. 2019). Upon receipt of the items, the forensic laboratory would be required to test fire the submitted firearms and input the test fired cartridge case into the National Integrated Ballistic Information Network (NIBIN). A.B. 272 § 1(1)(c)(1–2), 2019 Leg., 80th Sess. (Nev. 2019). Likewise, the lab would be required to input the evidence cartridge cases into NIBIN. *Minutes of the Assembly Committee on the Judiciary*, *supra* note 84. NIBIN is a database operated by the Bureau of Alcohol, Tobacco, Firearms and Explosives that allows shooting scenes to be linked together and, in turn, firearms to be linked to shooting scenes by comparing the information from the evidence and test-fired cartridge cases. *Id.* At the time of the bill’s introduction, only two states in the country had mandatory NIBIN-entry laws. *Id.* at 26.

<sup>86</sup> *Minutes of the Assembly Committee on the Judiciary*, *supra* note 84.

<sup>87</sup> A.B. 272, Bill History, 2019 Leg., 80th Sess. (Nev. 2019), <https://www.leg.state.nv.us/App/NELIS/REL/80th2019/Bill/6495/Overview> [<https://perma.cc/4A2A-3TMB>].

<sup>88</sup> A.B. 291, 2019 Leg., 80th Sess. (Nev. 2019) (as introduced).

<sup>89</sup> *Id.* at § 1–2, 2019.

<sup>90</sup> 18 U.S.C. § 923 (2018).

<sup>91</sup> 26 U.S.C. § 5861 (2018).

<sup>92</sup> Bump Stock Type Devices, 83 Fed. Reg. 66,514, 66,519 (Dec. 26, 2018) (to be codified at 27 C.F.R. 447, 478–79).

Nevada would add value to the federal ban by giving state law the authority to prosecute violations.<sup>93</sup> Additionally, the bill sought to reduce the allowable blood alcohol content for a person possessing a firearm from 0.10 to 0.08.<sup>94</sup> The bill also contained a provision to repeal the state firearm preemption, which restricted localities from enacting firearms laws or regulations.<sup>95</sup> This provision was seen as a way to untie “the hands of local government,” due to the state legislature only meeting every other year.<sup>96</sup> Nevadans believed this would be important in the aftermath of 1 October, because a locality may have been able to enact a bump stock ban more quickly than the state legislature.<sup>97</sup> When this bill was introduced, multiple speakers testified before the legislature, including a survivor of the 1 October shooting.<sup>98</sup>

Eleven days after the introduction of AB 291, an amendment was proposed.<sup>99</sup> The bill was changed significantly with this amendment in that the proposed repeal of state firearm preemption was removed.<sup>100</sup> A “red flag” provision was added into the bill.<sup>101</sup> This provision, also called an “extreme risk” law, had been enacted in fifteen other states prior to the amendment’s introduction.<sup>102</sup> The amendment also provided that negligent storage of a firearm could result in a misdemeanor charge where there is a substantial risk that a child could obtain the firearm and injure herself or another with it.<sup>103</sup> The legislature passed AB 291, and the “red flag,” bump stock ban, blood alcohol content, and safe storage provisions were enacted into law.<sup>104</sup> New definitions were also included in this bill, with one notable definition added: that of a “semiautomatic firearm.”<sup>105</sup> This definition, enacted on January 1, 2020, defines a “semiautomatic firearm” as any firearm that “uses a portion of the energy of a firing cartridge to extract the fired cartridge case and chamber the

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<sup>93</sup> *Minutes of the Joint Meeting of the Assembly Committee on Judiciary and the Senate Committee on Judiciary*, 2019 Leg., 80th Sess. 8 (Nev. Apr. 1, 2019).

<sup>94</sup> A.B. 291, § 3(1)(a), 2019 Leg., 80th Sess. (Nev. 2019) (as introduced).

<sup>95</sup> *Id.* § 6; see also *supra* notes 43–46 and accompanying text.

<sup>96</sup> *Minutes of the Joint Meeting of the Assembly Committee on Judiciary and the Senate Committee on Judiciary*, *supra* note 93.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *id.* at 23 (showing the testimony of Heather Sallan, a survivor of the 1 October shooting).

<sup>99</sup> *Minutes of the Senate Committee on the Judiciary*, 2019 Leg., 80th Sess. 3 (Nev. May 29, 2019).

<sup>100</sup> *Id.* at 28.

<sup>101</sup> *Id.* at 3. The law, if enacted, would allow law enforcement or family members to file a petition with the court outlining how a person exhibited high-risk behavior, demonstrating that he is a danger to himself or others. *Id.* at 4. A hearing would then be held and, if the person possessed firearms and was found to be a serious threat by clear and convincing evidence, the court could prohibit the person from having access to firearms and require law enforcement to take temporary possession of the person’s firearms. *Id.*

<sup>102</sup> *Id.* at 4.

<sup>103</sup> A.B. 291, § 28(5), 2019 Leg., 80th Sess. (Nev. 2019) (as enacted).

<sup>104</sup> See NEV. REV. STAT. §§ 33.500–33.670, 202.274, 202.257(5), 202.300(5)(a–b) (2021).

<sup>105</sup> A.B. 291, § 26(6), 2019 Leg., 80th Sess. (Nev. 2019).

next shell or round; requires a separate function of the trigger to fire each cartridge; and *is not a machine gun*.”<sup>106</sup>

### III. PARSONS V. COLT’S MANUFACTURING COMPANY, ET AL.

This section outlines the Parsons case. At the time that this paper is written, this is an active case in front of the United States District Court, District of Nevada. The case arises from the 1 October shooting. Subsection A outlines the claims alleged by the plaintiffs. Subsections B-E summarize the motions filed throughout the case and the arguments contained within them.

#### A. *Parsons’s Claims*<sup>107</sup>

The *Parsons* case was filed as a result of the 1 October shooting. Carolyn Parsons was just one of the fifty-eight victims shot and killed on 1 October.<sup>108</sup> In an attempt to hold someone responsible for their daughter’s death, Carolyn’s parents filed a complaint in Nevada’s Eighth Judicial District Court against the manufacturers and sellers of the semiautomatic rifles that Stephen Paddock fired into the festival’s audience.<sup>109</sup> Her parents claim that the manufacturers and sellers of Paddock’s rifles are responsible for their daughter’s death because they knowingly violated federal and state laws prohibiting the manufacture and sale of machine guns.<sup>110</sup> Parsons’s initial complaint included three causes of action: Death by Wrongful Act, Negligence Per Se, and Negligent Entrustment.<sup>111</sup>

Federal and state statutes provide enumerated lists of specific firearm-related acts that are unlawful.<sup>112</sup> For example, “it shall be unlawful for a licensed importer, licensed manufacturer, licensed dealer, or licensed collector

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<sup>106</sup> NEV. REV. STAT. § 202.253(6)(a–c) (2021) (emphasis added).

<sup>107</sup> The parties will be referred to using the Plaintiffs’ surname and the first named defendant (Colt’s). For consistency, they will be referred to with the pronoun “they” because there are multiple plaintiffs and defendants. Also, although the case is still pending, we italicize the named plaintiff when referring to the case for simplicity’s sake.

<sup>108</sup> See LVMPD CRIMINAL INVESTIGATIVE REPORT OF THE 1 OCTOBER MASS CASUALTY SHOOTING, 17, 19 (2018).

<sup>109</sup> Parsons Complaint, *supra* note 55, at 10. On July 9, 2019, Defendant firearm manufacturer FN America filed a Notice of Removal based on complete diversity between the plaintiffs and all defendants, and the case was removed to the United States District Court for the District of Nevada. Defendant FN America’s Notice of Removal, Parsons v. Colt’s Manufacturing Company LLC, No. 2:19-cv-01189-APG-GWF (D. Nev. July 9, 2019), ECF No. 1, at 2. Plaintiffs then filed a motion on August 8, 2019 to remand the case back to state court. Plaintiff’s Motion to Remand to State Court, Parsons v. Colt’s Manufacturing Company LLC, No. 2:19-cv-01189-APG-EJY (D. Nev. Aug. 9, 2019), ECF No. 50, at 1. The manufacturers and sellers filed a motion to dismiss on September 24, 2019. Defendants’ Motion to Dismiss the Complaint, Parsons v. Colt’s Manufacturing Company LLC, No. 2:19-cv-01189-APG-EJY (D. Nev. Sept. 24, 2019), ECF No. 80, at 1 [hereinafter Colt’s Motion to Dismiss].

<sup>110</sup> Parsons Complaint, *supra* note 55, at 31.

<sup>111</sup> *Id.* at 29, 33–34.

<sup>112</sup> See, e.g., 18 U.S.C. § 922(a)(1–9) (2018).

to sell or deliver to any person any . . . machine gun.”<sup>113</sup> The term “machine gun” as defined in federal statute is “any weapon which shoots, is designed to shoot, or can be readily restored to shoot, automatically more than one shot, without manual reloading, by a single function of the trigger.”<sup>114</sup> Nevada law provides that “a person within this state shall not manufacture or cause to be manufactured, or import into the state, or keep, offer or expose for sale, or give, lend, possess or use a machine gun . . . unless authorized by federal law.”<sup>115</sup> The definition of “machine gun” in Nevada law is materially identical to that of the federal statute.<sup>116</sup>

In the case of 1 October, there exists considerable argument surrounding whether Paddock’s AR-15s met the statutory definitions of “machine gun.”<sup>117</sup> Parsons’s complaint relies on portions of the machine gun definition, classifying a machine gun as “any weapon which . . . is designed to shoot . . . more than one shot . . . by a single function of the trigger.”<sup>118</sup> The complaint references an ATF interpretation of the “designed to shoot” language, which encompassed “those weapons which have not previously functioned as machine guns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts.”<sup>119</sup> Parsons alleges that, in selling the AR-15 rifles at issue, defendant manufacturers and sellers knowingly designed and sold firearms possessing design features that facilitated full-automatic fire by simple modification: bump stocks.<sup>120</sup>

Parsons’s first cause of action in the complaint is an action for death by wrongful act.<sup>121</sup> In a general sense, Nevada law permits such a cause of action: “[W]hen the death of any person . . . is caused by the wrongful act . . . of another, the heirs of the decedent . . . may each maintain an action for damages against the person who caused the death.”<sup>122</sup> Parsons alleges that Colt committed wrongful acts by manufacturing and selling AR-15s, which Parsons alleges are machine guns, in knowing violation of state and federal machine gun statutes.<sup>123</sup> Additionally, the complaint states that the AR-15s that Paddock

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<sup>113</sup> 18 U.S.C. § 922(b)(4) (2018).

<sup>114</sup> 26 U.S.C. § 5845(b) (2019).

<sup>115</sup> NEV. REV. STAT. § 202.350(1)(b) (2021).

<sup>116</sup> NEV. REV. STAT. § 202.253(4) (2021) (defining machine gun as “any weapon which shoots, is designed to shoot or can be readily restored to shoot more than one shot, without manual reloading, by a single function of the trigger”).

<sup>117</sup> See, e.g., Transcript of Telephonic Motion Hearing, *Parsons v. Colt’s Manufacturing Company LLC*, No. 2:19-cv-01189-APG-EJY (D. Nev. June 24, 2020), ECF No. 112, at 13, 16–18 [hereinafter Telephonic Hearing].

<sup>118</sup> 26 U.S.C. § 5845(b) (2019).

<sup>119</sup> Parsons Complaint, *supra* note 55, at 20 (quoting ATF ruling 82-2, 27 C.F.R. 179.11: Meaning of Terms).

<sup>120</sup> *Id.* at 30–31.

<sup>121</sup> *Id.* at 29.

<sup>122</sup> NEV. REV. STAT. § 41.085(2) (2021).

<sup>123</sup> Parsons Complaint, *supra* note 55, at 31.

modified by adding bump stocks increased the risk that Carolyn would be shot or killed, and that a bullet from one of the firearms fired by him killed her.<sup>124</sup> The complaint lastly presumes that the events of 1 October would not have occurred but for the gun manufacturers and sellers producing and distributing the firearms, and therefore their actions were a proximate cause of Carolyn's death.<sup>125</sup>

Parsons's second count in the complaint alleges negligence per se.<sup>126</sup> If established, negligence per se means that an actor's conduct is negligent "by itself" if the conduct "violates a statute that is designed to protect against the type of accident the actor's conduct causes and if the accident victim is within the class of persons the statute is designed to protect."<sup>127</sup> Parsons alleges that the federal and state machine gun statutes are intended to protect the public from physical injury and death from machine guns.<sup>128</sup> The complaint further alleges that Carolyn is a member of the class of people that the statutes were enacted to protect and that she suffered the type of harm that the statutes were intended to prevent.<sup>129</sup>

The complaint's third count alleges negligent entrustment.<sup>130</sup> Negligent entrustment is the "supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others."<sup>131</sup> Parsons alleges that the manufacturers and sellers knew or should have known that the sale of the AR-15s posed an unreasonable risk of physical injury to others.<sup>132</sup> The complaint further alleges that the manufacture and sale of these firearms constituted entrustments that posed an unreasonable risk of harm to others, including the victims of a foreseeable mass shooting.<sup>133</sup>

#### B. Defendant's Motion to Dismiss

Colt's claimed that it was shielded from a lawsuit by the Protection of Lawful Commerce in Arms Act ("PLCAA") in its motion to dismiss. On October 26, 2005, the PLCAA was signed into federal law.<sup>134</sup> In drafting the PLCAA, Congress found that "[l]awsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as

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<sup>124</sup> *Id.* at 31–32.

<sup>125</sup> *Id.* at 32.

<sup>126</sup> *Id.* at 33.

<sup>127</sup> RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 14 (AM LAW INST. 2010); *Per se*, BLACK'S LAW DICTIONARY (Bryan A. Garner, ed. 11th ed. 2019).

<sup>128</sup> Parsons Complaint, *supra* note 55, at 33.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 34.

<sup>131</sup> 15 U.S.C. § 7903(5)(B) (2018).

<sup>132</sup> Parsons Complaint, *supra* note 55, at 34.

<sup>133</sup> *Id.* at 34–35.

<sup>134</sup> 15 U.S.C. § 7901 (2018).

designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.”<sup>135</sup> The first stated purpose of the PLCAA is “to prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, 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.”<sup>136</sup>

The prohibition on filing suit against firearm manufacturers is not absolute; there are six exceptions listed in the PLCAA.<sup>137</sup> Included in these exceptions are actions “brought against a seller for negligent entrustment or negligence per se.”<sup>138</sup> Additionally, these exceptions permit actions “in which a manufacturer or seller . . . knowingly violated a state or federal statute applicable to the sale or marketing of the product and the violation was a proximate cause of the harm for which relief is sought.”<sup>139</sup> The statute further provides that “no provision of this Act shall be construed to create a public or private cause of action or remedy,” requiring a plaintiff’s asserted cause of action and requested remedy to arise from another state or federal statute.<sup>140</sup>

To assert a valid claim against a firearm manufacturer or seller under a state or federal statute that permits a cause of action, a complainant must prove that the action meets one of the enumerated PLCAA exceptions, because all other qualified civil actions are expressly prohibited.<sup>141</sup> Similar to the federal immunity provided to firearms manufacturers and sellers under the PLCAA, Nevada also has a statute which provides immunity to firearms manufacturers

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<sup>135</sup> 15 U.S.C. § 7901(a)(3) (2018). These lawsuits have been referred to as “Turley” suits after the large number of product liability suits filed against firearms manufacturers by one lawyer, Windle Turley, in the 1980s. Elaine Weiss, *Guns in the Courts*, THE ATLANTIC (May 1983), <https://www.theatlantic.com/magazine/archive/1983/05/guns-in-the-courts/489650/> [<https://perma.cc/GQT6-ZJBE>].

<sup>136</sup> 15 U.S.C. § 7901(b)(1) (2018). The PLCAA prohibits “qualified civil liability actions” in both federal and state courts. 15 U.S.C. § 7902(a) (2018). The statute defines a “qualified civil liability action” in part as a

civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

15 U.S.C. § 7903 (5)(A) (2018). A “qualified product” is defined in the statute as a “firearm” or “ammunition” or a “component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4) (2018).

<sup>137</sup> 15 U.S.C. § 7903(5)(A)(i-vi) (2018).

<sup>138</sup> 15 U.S.C. § 7903(5)(A)(ii) (2018).

<sup>139</sup> 15 U.S.C. § 7903(5)(A)(iii) (2018). This exception is known as the “predicate exception” as it requires the plaintiff to assert that the defendant manufacturer or seller knowingly violated a state or federal statute (a “predicate” statute). Vivian Chu, *The Protection of Lawful Commerce in Arms Act: An Overview of Limiting Tort Liability of Gun Manufacturers*, 4–5 (Dec. 20, 2012).

<sup>140</sup> 15 U.S.C. § 7903(5)(C) (2018).

<sup>141</sup> 15 U.S.C. § 7903 (2018).

and sellers.<sup>142</sup> To bring an action against the manufacturers and sellers of Paddock's AR-15s, Parsons not only has to prove that Colt's actions constitute an exception under the PLCAA, but that they also warrant piercing through Nevada's immunity statute. The Nevada statute provides for a "[l]imitation on basis of liability of manufacturers and distributors of firearms and ammunition."<sup>143</sup> This limitation is provided in the statute's first section, which states 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."<sup>144</sup> The statute further provides that the first section is "declaratory and not in derogation of the common law."<sup>145</sup> Unlike the PLCAA's six exceptions, the second section of the Nevada statute provides only one exception: for product liability.<sup>146</sup>

In *Parsons*, Colt's moved for dismissal, arguing that Parsons's claims do not meet the PLCAA exceptions and were additionally barred by the Nevada immunity statute.<sup>147</sup> Moreover, Colt's motion to dismiss stated that Parsons failed to establish negligent entrustment under Nevada law and that a Nevada negligence per se claim cannot be based on an alleged violation of a penal statute absent legislative intent to impose civil liability.<sup>148</sup> The motion also stated that the PLCAA only allows for negligence per se and negligent entrustment actions against firearms sellers, not manufacturers.<sup>149</sup> Colt's further argued that it did not knowingly violate federal and Nevada state machine gun statutes, because the AR-15s in question are not actually machine guns.<sup>150</sup> If these contentions are true, Parsons's entire claim must fail because each of the three causes of action are based on the defendant sellers' and manufacturers' assumed violation of the federal and state of Nevada machine gun statutes.<sup>151</sup>

### C. Plaintiffs' Opposition to Defendants' Motion to Dismiss

In rebuttal to Colt's motion, and in further clarification of their arguments, Parsons filed a response urging the court to deny the motion to dismiss.<sup>152</sup>

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<sup>142</sup> See NEV. REV. STAT. § 41.131 (2021).

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* § 41.131(1).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* § 41.131(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").

<sup>147</sup> Colt's Motion to Dismiss, *supra* note 109, at 3.

<sup>148</sup> *Id.* at 9, 11.

<sup>149</sup> *Id.* at 11.

<sup>150</sup> *Id.* at 12.

<sup>151</sup> Parsons Complaint, *supra* note 55, at 31, 33- 34.

<sup>152</sup> Plaintiffs' Opposition to Defendants' Motion to Dismiss, *Parsons v. Colt's Manufacturing Company LLC, et al.*, No. 2:19-cv-01189-APG-EJY (D. Nev. Nov. 22, 2019), ECF No. 88, at 1 [hereinafter Parsons's Opp.].

Parsons reiterated their arguments classifying the AR-15s fired by Paddock as machine guns.<sup>153</sup> Parsons did not claim that Paddock's AR-15s were machine guns based on the first and third definitions of machine gun as provided in the statutory scheme.<sup>154</sup> As stated in the complaint, Parsons relied only on the second part of the statutory definition of machine gun, which provides that a machine gun is "any weapon which . . . is designed to shoot . . . automatically more than one shot, without manual reloading, by a single function of the trigger."<sup>155</sup> In order to meet this definition, Parsons relied on the ATF ruling that provides that the "designed to shoot" definition includes "those weapons which have not previously functioned as machine guns but possess design features which facilitate full automatic fire by *simple modification or elimination of existing component parts*."<sup>156</sup>

Parsons reiterated their initial claims that the AR-15 rifle can be "shot automatically" with a shoestring or rubber band, and that the addition of a bump stock is a "simple modification" that "converted AR-15s into fully automatic machine guns."<sup>157</sup> Parsons asserted that one route to "simple modification" is through the use of bump stocks, but that "simple modification" is not confined to bump stocks.<sup>158</sup> To modify an AR-15 with a bump stock, the existing stock must be removed and a separate stock must then be attached in its place.<sup>159</sup> Once a bump stock is attached, pulling the trigger allows the bump stock to harness and direct the energy of the recoil of the firearm, sliding the firearm back and forth so the trigger "automatically reengages" by "bumping" the shooter's stationary finger without the shooter performing any additional trigger manipulation.<sup>160</sup>

Parsons also restated their claims for negligence per se and negligent entrustment under Nevada law.<sup>161</sup> Parsons stated that, under Nevada law, negligence per se occurs when there is a violation of a statute, the "injured party belongs to the class of persons that the statute was intended to protect, and the injury suffered is of the type the statute was intended to prevent."<sup>162</sup> They alleged again that Colt's manufactured and sold machine guns in violation of state and federal laws, and the purpose of those laws is to protect members of the public from physical injury and death, and that Parsons is a member of that class.<sup>163</sup> Parsons then quoted two Nevada cases (a case involving a truck driver injured when struck by a train and a case regarding

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<sup>153</sup> *Id.* at 3–5.

<sup>154</sup> *Id.* at 11.

<sup>155</sup> *Id.* at 10.

<sup>156</sup> *Id.* at 11 (quoting ATF ruling 1982-2, 27 C.F.R. 179.11: Meaning of Terms) (emphasis added).

<sup>157</sup> *Id.* at 17.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 23.

<sup>160</sup> *Id.* at 14 (quoting 83 Fed Reg 66,516(II)(B)).

<sup>161</sup> *Id.* at 19, 22.

<sup>162</sup> *Id.* at 19–20 (quoting *Vega v. E Courtyard Associates*, 24 P.3d 219, 221 (Nev. 2001)).

<sup>163</sup> *Id.* at 20 (quoting Parsons Complaint, Count II, para. 204, 206).

pedestrians killed by a drunk driver) where the court's opinions recognized that the violation of a criminal statute can constitute negligence per se.<sup>164</sup> Parsons distinguished two cases cited by Colt's in support of Colt's contention that, in the absence of legislative intent to create civil liability, the violation of a penal statute is not negligence per se, asserting that the aforementioned cases are only narrowly concerned with the negligent provision of alcohol.<sup>165</sup>

In support of their negligent entrustment claim, Parsons stated that Nevada common law provides that negligent entrustment occurs when an instrumentality is entrusted "in circumstances where [the entrustor] knows or should [know] that such use may create an unreasonable risk of harm to others."<sup>166</sup> Parsons further alleged that the manufacturers and sellers knew or should have known that entrustment of the AR-15s to Paddock created an unreasonable risk because they could "easily be modified for automatic fire."<sup>167</sup>

Parsons claimed that they have adequately alleged causation.<sup>168</sup> To establish a claim of negligence per se in Nevada, four elements must be shown: a statute or law exists to protect a class of people, the plaintiff was a member of the class, Colt's violated the statute or law, and Colt's violation proximately caused Parsons's injury or damage.<sup>169</sup> Parsons asserted that while criminal, third-party conduct typically severs the chain of causation, no severance occurs if the third party's act is reasonably foreseeable.<sup>170</sup> Parsons claimed that Paddock's criminal conduct, using AR-15s equipped with bump stocks to commit a mass shooting, was foreseeable.<sup>171</sup>

Finally, Parsons asserted that their claims were not barred by the Nevada firearm seller and manufacturer liability immunity statute.<sup>172</sup> Parsons stated that the statute only prohibits causes of action brought "merely because the firearm or ammunition was capable of causing serious injury, damage or death."<sup>173</sup> Parsons insisted that this is not their cause of action, but that their claim is based on the allegation that defendants knowingly violated federal and state laws by illegally manufacturing and selling machine guns.<sup>174</sup>

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<sup>164</sup> *Id.* at 20 (quoting *Southern Pacific Co. v. Watkins*, 83 Nev. 471 (1967) and *Hamm v. Carson City Nugget*, 85 Nev. 99 (1969)).

<sup>165</sup> *Id.* at 21 (citing *Hindegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091 (1993) and *Bell v. Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 98 Nev. 109 (1982)).

<sup>166</sup> *Id.* at 22 (citing *Mills v. Continental Parking Corp.*, 86 Nev. 724, 726 (1970)).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 23.

<sup>169</sup> *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690 (Nev. 1983).

<sup>170</sup> *Parsons Opp.*, *supra* note 152, at 24 (citing *Price v. Blaine Kern Artista, Inc.*, 893 P.2d 367, 370 (Nev. 1995)).

<sup>171</sup> *Id.* at 23.

<sup>172</sup> *Id.* at 24.

<sup>173</sup> *Id.* (quoting NEV. REV. STAT. § 41.131 (2021)).

<sup>174</sup> *Id.* at 24.

*D. Defendants' Reply in Further Support of Their Motion to Dismiss the Complaint and Analysis of Arguments*

In their reply, Colt's most robust argument asserted that Plaintiffs' allegations did not satisfy the predicate exception in the PLCAA.<sup>175</sup> Additionally, Colt's claimed that they could not knowingly violate the state and federal machine gun statutes because Paddock's AR-15s were not machine guns as defined in the National Firearms Act.<sup>176</sup> Parsons alleged that the AR-15s were machine guns due to the "designed to shoot automatically" definition, which they argued was further explained by the ATF Ruling, stating that firearms meet this definition when they "have not previously functioned as machine guns but possess design features which facilitate full automatic fire by simple modification or elimination of existing component parts."<sup>177</sup> Contesting this, Colt's asserted that the AR-15s do not meet this definition because in order to facilitate full automatic firing, the firearm *itself* must be modified, not an existing part.<sup>178</sup> The following five paragraphs will further discuss this subtle but important distinction.

The term "firearm" is defined as "any weapon (including a starter gun), which will, or is designed to or may readily be converted to expel a projectile by the action of an explosive [or] the frame or receiver of any such weapon."<sup>179</sup> A frame or receiver is the main housing of the firearm.<sup>180</sup> The frame or receiver holds the component parts of the firearm—items such as the hammer, bolt, breechblock, stock and barrel.<sup>181</sup> The frame or receiver of the firearm is where its serial number is imparted.<sup>182</sup> Because of these definitions, the frame or receiver constitutes the firearm itself, the other pieces of the firearm are unserialized component parts of the firearm.<sup>183</sup> This is similar to the chassis of a car, the car's "skeleton," upon which the mechanical parts of the car such as the tires, axles and engine are fastened.<sup>184</sup>

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<sup>175</sup> Defendants' Reply in Further Support of Their Motion to Dismiss the Complaint, Parsons v. Colt's Manufacturing Company LLC, et al., No. 2:19-cv-01189-APG-EJY (D. Nev. Dec. 20, 2019), ECF No. 92, at 3 [hereinafter Colt's Reply].

<sup>176</sup> *Id.* at 9 (quoting 26 U.S.C. § 5845(b) (2018)).

<sup>177</sup> *Id.* at 4 (quoting ATF ruling 1982-2, 27 C.F.R. 179.11: Meaning of Terms).

<sup>178</sup> *See id.*

<sup>179</sup> 18 U.S.C. § 921(a)(3) (2018).

<sup>180</sup> 27 C.F.R. § 478.11 (2018).

<sup>181</sup> *Id.*

<sup>182</sup> *Firearms Verification Overview*, ATF.GOV, <https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-firearms-verification-overview> [<https://perma.cc/Q8HW-FUJL>].

<sup>183</sup> *Gun Control Act Definitions: Firearm*, ATF.GOV, <https://www.atf.gov/firearms/firearms-guides-importation-verification-firearms-ammunition-gun-control-act-definitions> [<https://perma.cc/237M-CFLU>].

<sup>184</sup> *Difference Between Frame and Chassis*, DIFFERENCE BETWEEN, <https://whyisdifference.com/miscellaneous/difference-between-frame-and-chassis.html> [<https://perma.cc/65ZG-J22M>].

Parsons relies on the “designed to shoot automatically” definition to allege that Paddock’s AR-15s are machine guns, because it is the only definition that allows them to make that claim.<sup>185</sup> However, as Colt’s observes, to meet this definition, a firearm must be able to fire automatically when an *existing component part* is eliminated or simply modified.<sup>186</sup> The AR-15s would meet this definition if by merely eliminating the firearms’ existing stocks or modifying them, for example by grinding or filing on them, the rifles would shoot fully automatically. However, Parsons stated repeatedly in their complaint that the AR-15s possess design features which facilitate fully automatic fire by simple modification: *modification of the firearm* with a bump stock (removing the existing stock from the receiver *and* replacing it with a bump stock).<sup>187</sup> Here, Paddock did not perform a “simple modification or elimination of existing component parts” (removing the existing stock or modifying it as it remained on the receiver); instead, as conceded repeatedly by Parsons, he performed modifications of the firearms themselves by removing the existing stocks from the AR-15s and replacing them with bump stocks.<sup>188</sup> Colt’s argued that Parsons’s assertion does not meet the requirements of the law.<sup>189</sup> They contended that the AR-15s in question cannot meet the stated definition of a machine gun.<sup>190</sup> For the AR-15s to be considered machine guns, an alternate definition of machine gun would have to be created, defining a machine gun as “a weapon that can be modified to fire automatically . . . based on the replacement of existing parts with readily available parts.”<sup>191</sup>

This argument is quite persuasive. For Parsons’s interpretation to meet the current definition, the “designed to shoot automatically” definition would have to be altered in a subtle but meaningful way: through the addition of a single comma. It would have to state, “Firearms are considered machine guns if they have not previously functioned as machine guns but possess design features which facilitate full-automatic fire by simple modification, or elimination of existing component parts.” This rendering would allow “simple modification” to refer only to the firearm and “elimination” to refer only to the existing component parts. The definition as written does not include a comma, so “simple modification or elimination” refers only to “existing component parts.”

This is further explained in ATF Ruling 82-2, which identifies modification of an existing component part, rather than modification of the firearm itself, as a prerequisite for being considered a machine gun. The ATF Ruling concerns the KG-9 pistol, defining it as a machine gun, because it had an existing “component part” called a disconnecter that prevented more than

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<sup>185</sup> Colt’s Reply, *supra* note 175, at 3.

<sup>186</sup> *Id.* at 4 (emphasis added).

<sup>187</sup> Defendant FN America’s Notice of Removal, *Parsons v. Colt’s Manufacturing Company LLC, et al.*, No. 2:19-cv-01189-APG-GWF (D. Nev. July 9, 2019), ECF No. 1, at 29-31.

<sup>188</sup> Colt’s Reply, *supra* note 175, at 4.

<sup>189</sup> *Id.* at 4–5.

<sup>190</sup> *Id.* at 5.

<sup>191</sup> *Id.*

one shot from being fired with a single function of the trigger.<sup>192</sup> The ATF Ruling supports the interpretation that the “simple modification or elimination” language refers only to the existing component parts, because it states that “the disconnecter is designed in the KG-9 pistol in such a way that a simple modification to it, such as cutting, filing or grinding, allows the pistol to operate automatically.”<sup>193</sup> The ATF Ruling does not provide any examples of any firearms other than the KG-9 pistol, and it does not provide any examples where a firearm *itself*, rather than a component part, was modified.<sup>194</sup> The ATF’s interpretation is supported further in a case from the Eleventh Circuit, *S.W. Daniel, Inc. v. United States*, where the Court provided an explanation of the Ruling.<sup>195</sup> That court stated that if

parts A, B, and C are needed to make a machine gun. . . . [And a] firearm contains parts A, B, and E, and a simple modification of part E can transform it into part C, then . . . all the essential components from which a machine gun “can be assembled” are in the possession of the one person who holds the . . . weapon.<sup>196</sup>

Using this explanation, it is obvious that this is not what occurred with Paddock’s AR-15s. In order to turn the AR-15s into machine guns, the existing stocks (part E in this example) would need to be removed and replaced with bump stocks (part C). The existing stocks on the AR-15s (part E) are not *transformed* into bump stocks (part C).

Moreover, the United States District Court for the District of Nevada has previously held that a rifle stock is a component part.<sup>197</sup> Under the current definition of machine gun and the interpretation provided by the ATF Ruling, for Paddock’s AR-15s to be classified as machine guns, automatic fire must have been achieved by simply eliminating (removing) the existing stocks, which Plaintiffs did not assert.<sup>198</sup> Similarly, Parsons did not assert that a “simple modification” (cutting, filing or grinding) of the existing stocks would cause the AR-15s to fire automatically; they assert only that a “simple modification” of the AR-15s themselves (removing one component part from the receiver and replacing it with another) would transform the AR-15s into machine guns.<sup>199</sup> Therefore, Parsons’s assertions do not place Paddock’s AR-15s into the current definition of machine gun.

Current laws about bump stocks further support Colt’s view of the case. On March 26, 2019, the ATF Final Rule went into effect, clarifying that the

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<sup>192</sup> ATF ruling 82-2, 27 C.F.R. 179.11: Meaning of Terms.

<sup>193</sup> *Id.*

<sup>194</sup> *See id.*

<sup>195</sup> *S.W. Daniel, Inc. v. United States*, 831 F.2d 253, 254 (11th Cir. 1987).

<sup>196</sup> *Id.* (emphasis omitted) (quoting 26 U.S.C. § 5845).

<sup>197</sup> *Prescott v. Slide Fire Sols., LP*, 341 F. Supp. 3d 1175, 1189 (D. Nev. 2018).

<sup>198</sup> Colt’s Reply, *supra* note 175, at 4.

<sup>199</sup> *Id.*

definition of “machine gun” includes bump stocks.<sup>200</sup> On June 14, 2019, NRS 202.274 went into effect, providing for a ban on bump stocks.<sup>201</sup> That statute includes a provision that reads

a person shall not import, sell, manufacture, transfer, receive or possess: . . . [a]ny semiautomatic firearm that has been modified in any way that eliminates the need for the operator of the semiautomatic firearm to make a separate movement for each individual function of the trigger and: (1) [m]aterially increases the rate of fire of the semiautomatic firearm; or (2) [a]pproximates the rate of fire of a machine gun.<sup>202</sup>

When the Nevada legislature enacted the bump stock ban, it had the opportunity to enact further firearms legislation.<sup>203</sup> In that legislative session following 1 October, the legislature could have enacted further firearms bans such as an “assault weapons” ban on AR-15s or a ban on large caliber firearms or high-capacity magazines, but it did not do so. Similarly, it did not repeal state preemption for firearms laws, leaving the regulation of firearms within the “exclusive domain of the [State] Legislature.”<sup>204</sup> During that same legislative session, the definition of “semiautomatic firearm” was added to the NRS.<sup>205</sup> This definition provides that a “semiautomatic firearm” is any firearm that is “not a machine gun.”<sup>206</sup> Because the Nevada legislature has not banned AR-15s, they remain federally legal and legal in the state. AR-15s only become “machine guns” upon the installation of a bump stock, and that transformation which has only occurred since the bump stock ban was enacted on March 26, 2019.<sup>207</sup>

Colt’s further asserted that Parsons did “not have valid negligence per se” and negligent entrustment claims.<sup>208</sup> Colt’s stated that negligence per se requires a statute designed to protect a specific class of people, and Parsons’s interpretation that the machine gun statutes would be assumed to protect “members of the public” was too broad to qualify as a specific class.<sup>209</sup> Additionally, Colt’s asserted that Parsons incorrectly argued that violation of a penal statute is negligence per se in absence of legislative intent.<sup>210</sup> Colt’s

<sup>200</sup> Bump Stock Type Devices, 83 Fed. Reg. 66,514 (Dec. 26, 2018) (to be codified at 27 C.F.R 447, 478–79).

<sup>201</sup> NEV. REV. STAT. § 202.274 (2021).

<sup>202</sup> NEV. REV. STAT. § 202.274(1)(c)(1-2) (2021).

<sup>203</sup> See, e.g., *supra* notes 94–95, 102, and accompanying text.

<sup>204</sup> NEV. REV. STAT. § 244.364(1)(b) (2021).

<sup>205</sup> NEV. REV. STAT. § 202.253 (6)(a–c) (2021).

<sup>206</sup> NEV. REV. STAT. § 202.253(6)(c) (2021).

<sup>207</sup> Kyndell Kim & Steve Wolford, *Gov. Sisolak Signs ‘One October Bill’ Banning Bump Stocks in Nevada* (June 14, 2019), <https://news3lv.com/news/local/gov-sisolak-signs-one-october-bill-banning-bump-stocks-in-nevada> [https://perma.cc/7XF2-PPJ8]; Bill Chappell, *Bump Stock Ban Takes Effect As Gun Rights Groups Ask Supreme Court for Delay* (Mar. 26, 2019, 2:58 PM), <https://www.npr.org/2019/03/26/706905757/bump-stock-ban-takes-effect-as-gun-rights-groups-ask-supreme-court-for-delay> [https://perma.cc/Z9WA-X6ZL].

<sup>208</sup> Colt’s Reply, *supra* note 175, at 9–10.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 10.

further stated that the *Hamm* case, cited by Parsons, actually supported Colt's argument: the *Hamm* court did not allow negligence per se against a tavern keeper who provided alcohol to a driver that struck and killed pedestrians because the statutes at issue there were part of the statutory scheme regulating the sale of alcohol.<sup>211</sup> The machine gun statutes regulate the sale of firearms in a similar manner. Finally, Colt's stated that a negligent entrustment action should not be recognized because manufacturers and sellers relinquish the right to control the product at the time of sale.<sup>212</sup>

*E. Oral Arguments and Opinions on Motions and the Certification of Questions to the Nevada Supreme Court*

On March 18, 2020, the United States District Court for the District of Nevada heard oral arguments on *Parsons* for both the Motion to Remand and the Motion to Dismiss.<sup>213</sup> The court quickly denied the Motion to Remand.<sup>214</sup> Afterward, Parsons and Colt's each briefly argued their positions on the Motion to Dismiss.<sup>215</sup> Generally, Colt's reiterated their claim that Paddock's AR-15s were not machine guns while Parsons asserted that they were.<sup>216</sup> The court took the issue under advisement and subsequently issued an opinion on April 10, 2020.<sup>217</sup>

The court dismissed the negligent entrustment and negligence per se claims against the manufacturers, stating that the PLCAA only allows those claims against sellers who are "engaged in the business" as firearms dealers and are licensed to "engage in business" as firearms dealers.<sup>218</sup> The court stated that under Nevada law, a negligent entrustment claim only applies

where one who has the right to control [an instrumentality] permits another to use it in circumstances where he knows or should know that such use may create an unreasonable risk of harm to others, [but] it does not apply when the right to control is absent.<sup>219</sup>

Here, the manufacturers and sellers had no right to control the AR-15s after they manufactured and sold them.<sup>220</sup> Because negligent entrustment is based on the entrustor's knowledge of the trustee, not on his knowledge of the item entrusted, the claim failed: the manufacturers and dealers did not know that permitting Paddock to use AR-15s would create an unreasonable risk of

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Telephonic Hearing, *supra* note 117, at 4.

<sup>214</sup> *Id.* at 12.

<sup>215</sup> *See id.* at 13, 22.

<sup>216</sup> *See, e.g., id.* at 13–14, 17–18, 24.

<sup>217</sup> *Parsons v. Colt's Manufacturing Company*, 2020 U.S. Dist. LEXIS 65341, at \*1 (D. Nev. April 10, 2020).

<sup>218</sup> *Id.* at \*7.

<sup>219</sup> *Id.* at \*8 (modifications in original).

<sup>220</sup> *Id.* at \*8.

harm.<sup>221</sup> The court dismissed the negligence per se claim based on precedent that there is a presumption that a violation of a penal statute is not negligence per se absent legislative intent.<sup>222</sup>

The court held that Parsons properly alleged a wrongful death claim that is not precluded by the PLCAA.<sup>223</sup> Parsons's allegations survived the Motion to Dismiss when they asserted that Colt's knew that bump stocks allowed their AR-15s to fire automatically through simple modification, and therefore they knowingly manufactured and sold weapons "designed to shoot" automatically.<sup>224</sup> The court further held that a fact finder could conclude that Paddock's use of an AR-15 modified with a bump stock was reasonably foreseeable.<sup>225</sup> The court declined to make a decision on Colt's immunity from liability under the Nevada immunity statute, stating that Nevada courts had yet to interpret it.<sup>226</sup>

The court opted to certify the following questions to the Supreme Court of Nevada for interpretation:

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 or ammunition 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?

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"?<sup>227</sup>

After this opinion was published, Parsons moved for reconsideration of the court's order to dismiss the negligence per se claim.<sup>228</sup> Parsons argued that because two questions of law were certified to the Nevada Supreme Court, and that the negligence per se claim presented an open question of state law, that claim should also be certified.<sup>229</sup> Colt's argued that the negligence per se issue had already been decided and did not warrant reconsideration.<sup>230</sup> The court held that the Nevada Supreme Court had not addressed negligence per se in this context and that certification of the additional question would "save time,

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<sup>221</sup> *Id.* at \*8.

<sup>222</sup> *Id.* at \*10.

<sup>223</sup> *Id.* at \*16.

<sup>224</sup> *Id.* at \*15–16.

<sup>225</sup> *Id.* at \*17.

<sup>226</sup> *Id.* at \*19.

<sup>227</sup> Order Certifying Questions to the Supreme Court of Nevada, *Parsons v. Colt's Manufacturing Company LLC, et al.*, No. 2:19-cv-01189-APG-GWF (D. Nev. Apr. 20, 2020), at 1.

<sup>228</sup> See Order Granting Motion for Reconsideration, *Parson's v. Colt's Manufacturing Company*, 2020 U.S. Dist. LEXIS 81849, at \*1 (D. Nev. May 8, 2020).

<sup>229</sup> *Id.* at \*1.

<sup>230</sup> *Id.* at \*1–2.

energy and resources.”<sup>231</sup> Additionally, the court reasoned that the added question had important public policy ramifications for the state, so it amended its certification order to include the following question: “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?”<sup>232</sup> Although the court had initially dismissed the negligence per se claim against the manufacturers because the PLCAA only allowed that claim against sellers, the court stated that, if the Supreme Court of Nevada’s answer to the certified question allows the claim to proceed, it would allow Plaintiffs to amend their claim to plead that the manufacturers are subject to suit as sellers under the PLCAA.<sup>233</sup>

#### IV. CERTIFIED QUESTIONS

In the *Parsons* case, the United States District Court for the District of Nevada certified three questions to the Nevada Supreme Court.<sup>234</sup> This section will examine and analyze each question. Based on that analysis, recommendations for ruling on the questions will be made to the Nevada Supreme Court.

The Nevada Rules of Appellate Procedure Rule 5 (NRAP 5) provides a mechanism for federal courts to seek to receive a written opinion from the Nevada Supreme Court answering certified questions of Nevada state law.<sup>235</sup> The three questions certified to the Nevada Supreme Court in *Parsons* involved two issues of law: (1) whether a wrongful death claim premised on allegations that firearms manufacturers knowingly violated state and federal machine gun statutes was allowable under NRS 41.131 and (2) whether a negligence per se claim premised on the same allegations of criminal statute violations was permitted absent legislative intent to impose civil liability.<sup>236</sup>

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<sup>231</sup> *Id.* at \*2 (quoting *Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008)).

<sup>232</sup> *Id.* at \*5–6.

<sup>233</sup> *Id.* at \*6.

<sup>234</sup> Amended Order Certifying Questions to the Supreme Court of Nevada, *Parsons v. Colt’s Manufacturing Company LLC, et al.*, No. 2:19-cv-01189-APG-EJY (D. Nev. May 13, 2020), ECF No. 109, at 1.

<sup>235</sup> Nev. R. App. P. 5(h) (2021). NRAP 5 may be utilized if there is a case pending in a federal court, that case involves a question of Nevada law, the question may be determinative of the outcome of the case, and it appears to the certifying court that there is no controlling precedent in Nevada Supreme Court or Court of Appeals decisions. *Id.* NRAP 5 may be invoked directly by a federal court certification order or via a motion of any party to the pending case. NRAP 5(b). If the Nevada Supreme Court accepts certification of a question, the parties will brief the question unless the Nevada Supreme Court orders otherwise. Nev. R. App. P. 5(g)(2). The Court will decide whether it will hear oral arguments on the question. Nev. R. App. P. 5(g)(3). The Court will read the briefs, hear any permitted arguments, and issue an opinion to the federal court stating the law governing the question certified. Nev. R. App. P. 5(h).

<sup>236</sup> *See id.*

A. *Allegations of Machine gun Statute Violations, NRS 41.131, and Policy*

The United States District Court for the District of Nevada found that the plaintiffs' claim alleging wrongful death based on machine gun statute violations did not warrant dismissal under the PLCAA's predicate exception. However, for the claim to proceed, the district court still needs to decide if the claim is barred under NRS 41.131.<sup>237</sup> NRS 41.131 provides the following:

Limitation on basis of liability of manufacturers and distributors of firearms and ammunition

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.<sup>238</sup>

The district court declined to decide whether the wrongful death claim was barred under NRS 41.131.<sup>239</sup> Because the *Parsons* case is pending, it involves a question of Nevada law which may be determinative, and no controlling precedent was found, the court certified two questions about this statute to the Nevada Supreme Court for it to address (1) whether *Parsons* has a cause of action and (2) whether the declaratory nature of the statute is dispositive.<sup>240</sup>

The Nevada Supreme Court reviews statutory interpretation questions *de novo*.<sup>241</sup> In statutory interpretation cases, the Court normally starts by looking at the statute's plain language.<sup>242</sup> However, if the statute is ambiguous and could reasonably be interpreted multiple ways, the Court will look at "legislative history, reason, and public policy to discern legislative intent."<sup>243</sup>

Before going directly to the plain language, the statute's placement may provide helpful context for the reader, although the Court may decide not to consider the statute's placement. NRS 41.131 is located in the chapter of statutes regarding "Actions and Proceedings in Particular Cases Concerning Persons."<sup>244</sup> Within that chapter, the statute is listed under the section titled "Actions for Personal Injuries by Wrongful Act, Neglect or Default."<sup>245</sup> The

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<sup>237</sup> *Parsons v. Colt's Manufacturing Company*, 2020 U.S. Dist. LEXIS 65341, at \*15–16. (D. Nev. April 10, 2020).

<sup>238</sup> NEV. REV. STAT. § 41.131 (2021).

<sup>239</sup> *Parsons*, 2020 U.S. Dist. LEXIS 65341, at \*19.

<sup>240</sup> *Id.* at \*20; *see also supra* note 232 and accompanying text.

<sup>241</sup> *Guzman v. Second Jud. Dist. Ct.*, 460 P.3d 443, 447 (Nev. 2020) (citing *Mendoza-Lobos v. State*, 125 Nev. 634, 642 (2009)).

<sup>242</sup> *Id.* (citing *State v. Lucero*, 127 Nev. 92, 95 (2011)).

<sup>243</sup> *Id.* (quoting *Lucero*, 127 Nev. at 95).

<sup>244</sup> NEV. REV. STAT. § 41 (2021).

<sup>245</sup> Actions for Personal Injuries by Wrongful Act, Neglect or Default, NEV. REV. STAT. § 41 (2021).

first statute in this section regards liability for personal injury and provides that “[e]xcept as otherwise provided . . . whenever any person shall suffer personal injury by wrongful act, neglect or default of another, the person causing the injury is liable to the person injured for damages.”<sup>246</sup> This provision establishes that the default condition for a wrongful death is to hold the responsible party liable. The remaining statutes in this section provide limitations and conditions on that default liability.<sup>247</sup>

The first certified question seeks an answer to the meaning of the “merely because” language of the statute. Starting with the plain meaning of the statute, Parsons states that NRS 41.131, on its face, simply does not apply.<sup>248</sup> The plain language of 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.”<sup>249</sup> Appellant Parsons are not asserting a claim “merely because” the firearms at issue were *capable* of causing serious injury and did so; their claim asserts that the gun companies are liable because they committed a wrongful act, producing machine guns in violation of state and federal machine gun statutes, and should therefore be held liable for the wrongful death that resulted from the production of those illegal arms.<sup>250</sup> Parsons asserts that the statute is narrow, because “merely” means “simply” or “solely,” so it only bars no-fault claims—not a liability claim as is the default condition—the exemption in the statute is the sole allowable exception.<sup>251</sup>

Gun company Respondents assert that the plain language of NRS 41.131(1) is broad.<sup>252</sup> Respondents state that if the firearm operates as designed, then a claim is not allowed, regardless of “*who* caused the harm, what *type* of firearm was used, or which *theory of liability* is alleged.”<sup>253</sup> Colt’s asserts that this statute is protective of the gun companies and therefore should be liberally construed.<sup>254</sup> Colt’s further states that a narrow interpretation of the statute to preclude only strict liability claims would render the statute’s primary immunity provision meaningless and lead to an absurd result.<sup>255</sup>

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<sup>246</sup> NEV. REV. STAT. § 41.130 (2021).

<sup>247</sup> See NEV. REV. STAT. §§ 41.1305–41.1399 (2021).

<sup>248</sup> Appellants’ Opening Brief at 11, *Parsons v. Colt’s Manufacturing Company, LLC*, No. 81034 (Nev. July 21, 2020) [hereinafter *Parsons Opening Brief*].

<sup>249</sup> NEV. REV. STAT. § 41.131(1) (2021) (emphasis added).

<sup>250</sup> *Parsons Opening Brief*, *supra* note 248, at 12.

<sup>251</sup> *Id.* at 13.

<sup>252</sup> Respondents’ Joint Answering Brief at 10, *Parsons v. Colt’s Manufacturing Company, LLC*, No. 81034 (Nev. Sept. 21, 2020) [hereinafter *Colt’s Answering Brief*].

<sup>253</sup> *Id.* (emphasis in original).

<sup>254</sup> *Id.*; see also *Cote H. v. Eighth Jud. Dist. Ct.*, 124 Nev. 36, 40 (2008) (“Statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.”).

<sup>255</sup> *Colt’s Answering Brief*, *supra* note 252, at 10–11.

Additional questions regarding the wording of the statute arose during oral argument on the certified questions.<sup>256</sup> The Court asked Parsons’s counsel whether the phrase “any firearm” includes illegal firearms.<sup>257</sup> The Court further stated that if “any firearm” includes illegal firearms, then the subsequent analysis of the “merely because” language, and what the statute’s liability encompasses, may be unnecessary because blanket immunity—including for the manufacturing and sale of illegal firearms—would be provided.<sup>258</sup> This interpretation is consistent with Respondents’ argument and was particularly concerning to the United States District Court: that the statute provides immunity to all sellers and manufacturers and would immunize a defendant who “manufactured and sold Tommy guns or M-16 rifles to civilians.”<sup>259</sup> However, even if “any firearm” includes illegal firearms, the “merely because” language exists, which would require the statute to be read as “no person has a cause of action against the manufacturer or distributor of [an illegal] firearm merely because the firearm . . . was capable of causing serious injury, damage or death.”<sup>260</sup>

The second certified question regarding NRS 41.131 focuses on the language provided that the statute is “declaratory and not in derogation of the common law.”<sup>261</sup> Parsons asserts that this language “declare[s] the law to be what it already is” and “does not alter the common law;” that those who commit wrongful or negligent acts are responsible for the injuries they cause.<sup>262</sup> Under the narrow interpretation of this statute that Parsons argues, if there is a claim against gun companies solely based on the fact that a gun fired as designed, and not based on allegations of wrongful or neglectful conduct, that claim must fail.<sup>263</sup> Colt’s asserts that a “declaratory statute clarifies the existing common law”<sup>264</sup> and leaves it “more clearly in force.”<sup>265</sup> Colt’s further states that this expressed language acts to ensure that the statute would not be broadly construed to include causes of action arising from using non-defective firearms.<sup>266</sup>

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<sup>256</sup> See Oral Argument at 15:57, *Parsons v. Colt’s Manufacturing Company, LLC, et al.*, No. 81034 (Mar. 2, 2021), [https://nvcourts.gov/Supreme/Arguments/Recordings/81034-Parsons\\_vs\\_Colt\\_s\\_Manufacturing\\_Co\\_LLC/](https://nvcourts.gov/Supreme/Arguments/Recordings/81034-Parsons_vs_Colt_s_Manufacturing_Co_LLC/) [<https://perma.cc/M5RA-VVCY>].

<sup>257</sup> *Id.* at 19:15. Parsons’ counsel responded, “Yes, I think it does.” *Id.* at 19:30.

<sup>258</sup> *Id.* at 21:10.

<sup>259</sup> *Parsons v. Colt’s Manufacturing Company*, 2020 U.S. Dist. LEXIS 65341, at \*19. (D. Nev. April 10, 2020) (referring to Defendants’ concession during oral argument in front of the District Court).

<sup>260</sup> *Cf.* NEV. REV. STAT. § 41.131(1) (showing the actual language of the statute).

<sup>261</sup> Amended Order Certifying Questions to the Supreme Court of Nevada, *supra* note 234, at 3.

<sup>262</sup> Parsons Opening Brief, *supra* note 248, at 15–16.

<sup>263</sup> *Id.* at 16.

<sup>264</sup> Colt’s Answering Brief, *supra* note 252, at 17 (citing *State v. Babayan*, 106 Nev. 155, 169 (1990)).

<sup>265</sup> *Id.* (quoting *Deboer v. Fattor* 72 Nev. 316, 320 (1956)).

<sup>266</sup> *Id.*

Because statutory interpretation is often an exercise in discerning legislative intent, the Court will look at legislative history, reason, and public policy if the plain language is not dispositive.<sup>267</sup> NRS 41.131 was first introduced to the Nevada legislature in 1985 as Senate Bill 211.<sup>268</sup> As introduced, the bill summary stated that the bill “limits liability for manufacture of firearms and ammunition”:

Chapter 41 of NRS is hereby amended by adding thereto a new section to read as follows:

1. In an action for liability based on a defective product, a firearm or ammunition shall not be deemed defective in design on the basis that the benefits of the product do not outweigh the risk of injury posed by its capability to cause serious injury, damage or death when discharged[.]
2. For the purposes of this section:
  - (a) The capability of a firearm or ammunition to cause serious injury, damage or death when discharged does not make the product defective in design.
  - (b) Injuries or damages resulting from the discharge of a firearm or ammunition are not proximately caused by its capability to cause serious injury, damage or death but by the actual discharge of the product.
3. This section does not affect a cause of action based upon improper selection among alternative designs.<sup>269</sup>

In the initial testimony on the bill, one of its sponsors stated, “[T]his bill is the result of activity by the National Rifle Association to prevent harassment of gun dealers and gun manufacturers . . . [S]uits have been filed, claiming that there is a fault with the weapon, if it caused an injury or death.”<sup>270</sup>

To clarify the intent of the bill, the committee members testified that they wished to redraft the bill, “so that a gun in itself is not to be determined as at fault in case of a death or injury, unless the weapon is faulty in design, materials or workmanship” and “[w]hat is needed . . . is to say plainly that the fact that a firearm either causes or is capable of causing death or serious injury, does not make it defective in design, because, after all, it is meant to cause death or serious injury when used deliberately.”<sup>271</sup> Peter Chase Neuman of the Nevada Trial Lawyers Association stated that the bill should state the intent of the NRA, that “the *mere fact that an accident or injury or death occurs under circumstances involving the discharge of a firearm*, does not in itself constitute any evidence of defect”<sup>272</sup> and that the concern here is that

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<sup>267</sup> *Guzman v. Second Jud. Dist. Ct.*, 460 P.3d 443, 447 (Nev. 2020) (“Statutory interpretation concerns determining legislative intent, and the starting point is the statute’s plain language. . . . [W]hen the statutory language lends itself to two or more reasonable interpretations, the statute is ambiguous, and this court may then look to other tools such as legislative history, reason, and public policy to determine legislative intent.”) (internal citations omitted).

<sup>268</sup> S.B. 211, 1985 Leg., 63rd Sess. (Nev. 1985) (as introduced).

<sup>269</sup> *Id.*

<sup>270</sup> *Minutes of the Senate Committee on Judiciary*, 1985 Leg., 63rd Sess. 1 (Nev. Mar. 13, 1985).

<sup>271</sup> *Id.* at 2.

<sup>272</sup> *Id.* at 3 (emphasis added).

if someone gets injured or killed by a gun, then the manufacturer or vendor of that gun is somehow going to be automatically liable, just because they made the gun . . . it would be an abuse of the use of that product, and therefore *the manufacturer is not liable under present law*.<sup>273</sup>

After this testimony, the bill was amended, nearing the final language of NRS 41.131:

No person has a cause of action against the manufacturer or distributor of any firearms or ammunition merely because firearms and ammunition are capable, when the firearm is discharged, of causing death, substantial bodily harm or damage to property. This section is declaratory and not in derogation of the common law.<sup>274</sup>

It is evident that this amended version of the bill includes specific wording provided in the testimony in an attempt to memorialize the intent of the drafters to say that evidence of defect does not exist based on the “*mere fact that an accident or injury or death occurs under circumstances involving the discharge of a firearm,*” and that the manufacturer cannot be presumed liable simply for the manufacture of the gun is *what the law provided* at the time of this drafting.<sup>275</sup> The testimony provided after this amendment and before the bill passed in its final form is scant, but what it does provide is blunt: “What the [c]ommittee wants to convey is that if someone shoots a firearm and hurts somebody, you can’t sue the firearms manufacturer because it shoots.”<sup>276</sup> There is no discussion in the legislative history regarding any other type of immunity or that this statute was intended as something other than a products liability statute. Although the plain language of the statute may be construed multiple ways, the legislative history is very persuasive in favor of the Parsons’s narrow interpretation, that the statute is not intended to broadly immunize manufacturers and sellers from all causes of action but was intended to codify the existing laws of products liability.

If the Nevada Supreme Court uses the legislative history to interpret NRS 41.131, it should answer “no” to the first certified question. Plaintiffs asserting a wrongful death claim based on machine gun statute violations instead have a cause of action based on the alleged violation of criminal statutes, not a cause of action based strictly on manufacturing a product that was used in its intended manner, resulting in death.

Additionally, should the Court further rely on the legislative history in making its decision on the second certified question, it should answer in the affirmative. Plaintiffs’ asserted claim does not contradict the statute’s language providing that the statute was declaring the current law as it existed at the time. The legislative history of the statute supports the interpretation that the statute was codifying the products liability law that existed at the time of its writing, that a manufacturer is not liable just because it made a gun that was used in a

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<sup>273</sup> *Id.* (emphasis added).

<sup>274</sup> S.B. 211, 1985 Leg., 63rd Sess. (Nev. 1985) (first reprint).

<sup>275</sup> *Minutes of the Senate Committee on Judiciary*, *supra* note 270 (emphasis added).

<sup>276</sup> *Id.* at 12.

shooting. That is not what the Parsons are alleging; they are alleging a cause of action based on violation of state and federal statutes.<sup>277</sup> In the situation at hand, should the claim proceed, the question regarding whether the AR-15s used by Paddock were indeed “machine guns” will determine the course of the suit. If the answer to this question is in the negative, then the claims are baseless and must fail because no violations of the machine gun statutes could exist.

As stated by the United States District Court, because NRS 41.131 has never been interpreted, its interpretation here will have public policy implications for the state.<sup>278</sup> If plaintiffs in Nevada can state a civil cause of action against firearms manufacturers and sellers for statutory violations, large numbers of lawsuits could follow, resulting in a new “Turley” era.<sup>279</sup> This particular argument, that a certain decision will cause a “slippery slope” and open the “floodgates of litigation” is often used in policy arguments.<sup>280</sup> Here, if the Nevada legislature, which has “exclusive domain” over regulation and policies concerning firearms, desires to provide blanket manufacturer immunity, it would need to codify this in the NRS.<sup>281</sup> In order to clarify the legislature’s intent, NRS 41.131 should be amended to look more like the PLCAA, to expressly provide for manufacturer immunity except in specific situations.

*B. Allegations of Machine Gun Statute Violations, Negligence Per Se, and Policy*

Originally, the United States District Court dismissed Plaintiffs’ negligence per se claim against the gun companies.<sup>282</sup> The court stated that the Nevada Supreme Court had previously rejected these claims in two cases, holding that a penal statute violation, in the absence of “legislative intent to impose civil liability . . . is not negligence per se.”<sup>283</sup> Both cases noted by the District Court contained violations of alcohol laws, and in *Hinegardner v. Marcor Resorts, L.P.V.*, the Supreme Court inferred that the Legislature did not intend to impose civil liability via negligence per se because it was silent on the matter.<sup>284</sup> The District Court cited an additional Nevada Supreme Court decision rejecting a negligence per se claim based on a penal statute’s violation, because the

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<sup>277</sup> Parsons Opening Brief, *supra* note 248, at 33.

<sup>278</sup> See Amended Order Certifying Questions to the Supreme Court of Nevada, *supra* note 234, at 4.

<sup>279</sup> See Elaine Weiss, *supra* note 135.

<sup>280</sup> See Marin K. Levy, *Judging the Flood of Litigation*, 80 UNIV. CHI. L. REV. 1007, 1060, 1073 (2013).

<sup>281</sup> NEV. REV. STAT. § 244.364 (1)(b) (2021).

<sup>282</sup> Parsons v. Colt’s Manufacturing Company, 2020 U.S. Dist. LEXIS 65341, at \*10. (D. Nev. April 10, 2020).

<sup>283</sup> *Id.* at \*9 (quoting *Hinegardner v. Marcor Resorts, L.P.V.*, 108 Nev. 1091 (Nev. 1992)) (internal citation omitted).

<sup>284</sup> *Id.* (citing *Hinegardner*, 108 Nev. at 1091).

legislature had provided for civil liability in the section of the statute immediately preceding the one at issue.<sup>285</sup> Although the District Court stated that one could argue that there is a presumption that negligence per se claims are not permitted absent legislative intent, or that a negligence per se claim is allowed without contradictory legislative intent, the court held that neither the state or federal machine gun statutes exhibited legislative intent to impose civil liability and dismissed the claim.<sup>286</sup> Upon reconsideration, the court decided to certify the negligence per se question to the Nevada Supreme Court to “save time and judicial resources.”<sup>287</sup> The final certified question states, “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?”<sup>288</sup>

A statutory violation “may constitute negligence per se only if the injured party belongs to the class of persons that the statute was intended to protect, and the injury is of the type that the statute was intended to prevent.”<sup>289</sup> Whether a statute “provides a standard of conduct in the particular situation presented by the plaintiff is a question of statutory interpretation and construction for the court.”<sup>290</sup> In Nevada cases, there are instances where negligence per se was permitted based upon a duty in the statute, and where it was not permitted when a penal statute was violated.<sup>291</sup> This illustrates that this claim weighs heavily on the interpretation of the statute.

Federal statute provides that “[i]t shall be unlawful for a licensed importer, licensed manufacturer, licensed dealer, or licensed collector to sell or deliver to any person any . . . machine gun.”<sup>292</sup> Nevada statute provides that “a person within this state shall not manufacture or cause to be manufactured, or import into the state, or keep, offer or expose for sale, or give, lend, possess or use a machine gun . . . unless authorized by federal law.”<sup>293</sup> Plaintiffs filed a claim

<sup>285</sup> *Id.* (citing *Hamm v. Carson City Nugget*, 85 Nev. 99 (Nev. 1969)).

<sup>286</sup> *Id.* at \*10.

<sup>287</sup> Amended Order Certifying Questions to the Supreme Court of Nevada, *supra* note 234, at 3.

<sup>288</sup> *Id.* at 1 (listed as the first certified question in the Amended Order).

<sup>289</sup> *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208 (1983); *see also* RESTATEMENT (SECOND) OF TORTS § 286 (AM LAW INST. 1965) (“The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results”).

<sup>290</sup> *Sagebrush Ltd.*, 99 Nev. at 208(citing *Sobrio v. Cafferata* 72 Nev. 145, 150, 297 P.2 828, 830).

<sup>291</sup> *See, e.g., Hinegardner*, 196 Nev. at 1096; *Bell v Alpha Tau Omega Fraternity, Eta Epsilon Chapter*, 98 Nev. 111, (1982); *Vega v. Eastern Courtyard Assocs.*, 117 Nev. 436, 441 (2001); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 828–29 (2009).

<sup>292</sup> 18 U.S.C § 922(b)(4) (2015).

<sup>293</sup> NEV. REV. STAT. § 202.350(1)(b) (2021).

for negligence per se based on the alleged violation of these two statutes.<sup>294</sup> Both statutes are criminal statutes and neither explicitly states that civil liability may be imposed if the statute is violated.<sup>295</sup> Because civil liability is not addressed in the plain language of the statute, the Court may look to the legislative history to determine if legislature intended to impose such liability. The Restatement (Second) of Torts provides examples of where a court will not allow negligence per se based on the statute's purpose.<sup>296</sup> For example, courts that follow the Restatement will not allow negligence per se when the statute's purpose exclusively "secure[s] to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public."<sup>297</sup> The Nevada Supreme Court often looks to the Restatement when ruling on a negligence per se action;<sup>298</sup> however, the Court has not cited this specific provision.<sup>299</sup>

Federal statutes and their legislative history may help courts determine a state legislature's purpose for passing laws that mirror federal law. The bill that became the "National Firearms Act" was originally titled "Taxation of Manufacturers, Importers, and Dealers in Certain Firearms and Machine Guns" and was introduced on June 13, 1934.<sup>300</sup> The bill's original intent, as stated at the legislative session where it was introduced, was "to stop gangsters from buying machine guns."<sup>301</sup> The St. Valentine's Day Massacre, where members

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<sup>294</sup> Parsons Complaint, *supra* note 55, at 33.

<sup>295</sup> See 18 U.S.C § 922(b)(4) (2015); NEV. REV. STAT. § 202.350(1)(b) (2021).

<sup>296</sup> RESTATEMENT (SECOND) OF TORTS § 288 (AM LAW INST. 1965). Here is the referenced provision from the Restatement:

The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively

- (a) to protect the interests of the state or any subdivision of it as such, or
- (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public, or
- (c) to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public, or
- (d) to protect a class of persons other than the one whose interests are invaded, or
- (e) to protect another interest than the one invaded, or
- (f) to protect against other harm than that which has resulted, or
- (g) to protect against any other hazards than that from which the harm has resulted.

*Id.*

<sup>297</sup> *Id.* at § 288(b).

<sup>298</sup> See, e.g., *Brannan v. Nev. Rock & Sand Co.*, 108 Nev. 23, 25, 26–27, 823 P.2d 291, 292–93 (1992) (citing the Restatement and NRS to show what could constitute negligence per se liability).

<sup>299</sup> The court has, however, looked to the RESTATEMENT (SECOND) OF TORTS § 288A. See *Gordon v. Hurtado*, 96 Nev. 375, 379 (1980).

<sup>300</sup> 78 CONG. REC. H11,398 (daily ed. June 13, 1934).

<sup>301</sup> 78 CONG. REC. H12,548 (daily ed. June 18, 1934) (statement of Mr. Blanton).

of one criminal gang allegedly killed seven members of another gang for control of bootlegging in Chicago, inspired the introduction of this legislation.<sup>302</sup> The legislative session testimony on this bill stated that “this country has been at the mercy of the gangsters, racketeers and professional criminals. The rapidity with which they can go across state lines has become a real menace to *the law-abiding people of this country*.”<sup>303</sup> The legislation provided for a tax on machine guns, which was expected to prevent “gangsters”—members of organized professional criminals—from purchasing machine guns and transporting them across state lines to commit criminal acts.<sup>304</sup> This legislative history illustrates that this bill was intended to provide for a tax to be paid to the government, to make it difficult for gangsters to acquire machine guns, to protect “the law-abiding people” of the United States. The Nevada machine gun statute was specifically intended to “mirror federal law” to allow Nevada law enforcement to enforce these laws independent of federal involvement.<sup>305</sup>

To assert a valid negligence per se claim, an injured party must belong to the class of persons “the statute was intended to protect.”<sup>306</sup> The machine gun statutes, per their legislative history, were intended to protect the “law-abiding people” of the United States, in other words, the public at large.<sup>307</sup> For a successful negligence per se claim, the statute must intend to protect a particular class of people, and the Restatement specifically exempts statutes intended “to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public.”<sup>308</sup> While other negligence per se cases have determined that the actor owed a duty of care to the “general public,” it was limited by the facts of the case, such as where a railroad owes a duty to the general public “to maintain a reasonably safe crossing.”<sup>309</sup> If the federal and state machine gun statutes at issue here were allowed to be used as a basis for negligence per se, the Court would have to determine that the gun companies had a duty to protect the entire public at large, which is a class of people far too broad to include. Therefore, when examining legislative history for the third certified question, the Court should determine a plaintiff may not

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<sup>302</sup> Edward McClelland, *When a Mass Shooting Begat Gun Control*, CHI. MAG. (Aug. 9, 2019, 1:28 PM), <https://www.chicagomag.com/news/august-2019/when-a-mass-shooting-begat-gun-control/> [https://perma.cc/E7RC-T56S].

<sup>303</sup> 78 CONG. REC. H11,400 (daily ed. June 13, 1934) (statement of Mr. Doughton) (emphasis added).

<sup>304</sup> *Id.* (statement of Mr. Connery).

<sup>305</sup> *Minutes of the Senate Committee on Judiciary*, 2003 Leg., 72nd Sess. 21 (Nev. Mar. 10, 2003).

<sup>306</sup> *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208 (1983).

<sup>307</sup> 78 CONG. REC. H11,400 (daily ed. June 13, 1934) (statement of Mr. Doughton); *see also* *Maryland v. King*, 569 U.S. 435, 462 (2013) (alluding to “the public at large” being generally regarded as “law-abiding citizens”).

<sup>308</sup> RESTATEMENT (SECOND) OF TORTS § 288 (AM LAW INST. 1965).

<sup>309</sup> *Southern Pac. Co. v. Watkins*, 83 Nev. 471, 483 (1967).

assert a negligence per se claim predicated on violations of criminal federal and state machine gun prohibitions.

The decision on this third certified question will carry public policy implications for the State of Nevada. If the Court decides that the negligence per se claim can persist, many suits could follow, alleging that violations of criminal statutes may include civil actions under the theory of negligence per se. To clarify this issue, the Legislature would need to codify its intent in the NRS. This could be done by amending each specific statute, including the machine gun statute, to explicitly state whether civil liability is allowed. More efficiently, the entire NRS would benefit from a blanket provision, stating that civil liability is not allowed for negligence per se claims pursuant to criminal statutes without express legislative language to that effect.

#### CONCLUSION

In Nevada's nascent days, legislators had to make many decisions. There was a myriad of policy issues to address, each issue shaping Nevada's future in its own way. Issues such as slavery and mining regulation were at the forefront of the Nevada founders' minds, and firearm regulation was not a predominant social topic. However, the Wild West, with its wide-open spaces and promises of wealth, quickly drew the interest of outlaws, and the outlaw gunfighters brought their firearms. Early Nevada legislators faced the challenge of writing a constitution and enacting a body of law where laws had never existed. In some ways, these challenges have not abated. The legislature of today also has a difficult job because it is faced with the challenge of amending the existing body of law, and enacting new laws, to contend with challenges that have never existed before.

Laws are never enacted in a vacuum; they frequently arise in response to a significant event, often a tragedy, when lawmakers realize that new or updated legislation is needed to properly address a previously non-existent situation. However, reactive laws end up representing a "snapshot" of a moment in time, and future courts then have the complex and puzzling task of determining what the drafters intended when the law was written. This task can be daunting when trying to apply old laws to novel situations. Questions about how to interpret statutes may seem simple on the surface, but it would be irresponsible of legislators and judges to not consider current events, novel happenings, and policy implications when making their decisions.

Since the 1 October shooting, lawmakers and judges have grappled with how to interpret Nevada laws in a new Nevada. At the time of the writing of this White Paper, the *Parsons* case is pending, awaiting the Nevada Supreme Court's ruling on the certified questions. If the Supreme Court rules as this Paper has suggested, the Parsons's district court wrongful death claim will proceed and the negligence per se claim will be dismissed. Then it will be up to the district court to decide if Paddock's AR-15's meet the statutory definitions of "machine gun." If the district court rules that they do not, as this White

Paper has suggested, the wrongful death claim will then also be dismissed. The Nevada legislature will then determine if the NRS needs to be amended to clarify firearms manufacturer liability, negligence per se or the machine gun statute.

The new post-1-October Nevada is quite different from the Wild West days of the state's beginning. However, current legislators and judges are faced with decisions like those faced by the original Nevada lawmakers. They must figure out how to forge the future in a new world. It is our hope that this White Paper may provide some insights for the judges, legislators, and citizens when considering the issues that have emerged since the 1 October shooting.