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SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue, Denver, CO 80203

On Petition for Writ of Certiorari to the Colorado Court of Appeals | Case No. 2017COA2304
Opinion by Rothenberg, J.; Harris, J., concurs; Webb, J., dissents.

Respondents:
SAMANTHA WAGNER, ASHLEY STEWART, and A.S., a Minor Child Acting Through Her Mother and Next Best Friend, Ashley Stewart, MANDY DAVIS and AMMAR LASKARWALA

v.

Petitioner:
ROCKY MOUNTAIN PLANNED PARENTHOOD, INC., a/k/a PLANNED PARENTHOOD OF THE ROCKY MOUNTAINS, INC.

▲ COURT USE ONLY ▲

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Case No. 2019SC251

BRIEF OF AMICUS CURIAE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI

Certificate of Compliance

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that

The amicus brief complies with the applicable word limit set forth in C.A.R. 53(g).

☒ It contains approximately **3,046** words, according to the word count of Microsoft Word, including headings, footnotes, and quotations, and excluding caption, tables, and certificates (does not exceed 3,150 words, see C.A.R. 53(g)).

The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c).

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/Margrit Parker
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Table of Contents

I. INTEREST OF THE AMICUS 1

II. ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI 2

a. The majority decision below upended settled law and tort principles on causation by failing to undertake the substantial factor and predominant cause analyses and by holding that a landowner can be liable for the premeditated acts of a mass shooter. 3

b. The majority misapplied the *Smith/Taco Bell* factors in evaluating the element of duty in the context of a mass shooting event, resulting in a decision that is inconsistent with the law 6

c. Public policy aligns with finding no landowner liability for the premeditated acts of a mass shooter. 9

III. CONCLUSION 14

Cases

Ann M. v. Pac. Plaza Shopping Ctr., 863 P.2d 207 (Cal. 1993)............................. 7

Axelrod v. Cinemark Holdings, Inc., 65 F.Supp.3d 1093 (D. Colo. 2014) 8, 10

Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC, 2015 COA 85 4

Castaldo v. Stone, 192 F.Supp.2d 1124 (D. Colo. 2001) 5

Ireland v. Jefferson County Sheriff's Dep't., 193 F.Supp.2d 1201 (D. Colo. 2002) 5

Johnson v. Liberty Mut. Fire Ins. Co., 648 F.3d 1162 (10th Cir. 2011)................. 6

Lopez v. McDonald's Corp., 238 Cal. Rptr. 436 (Cal. Ct. App. 1987) 7, 13

Marr v Yousif, 422 N.W.2d 4 (Mich. Ct. App. 1988).................................... 11, 12

N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct, 914 P.2d 902 (Colo. 1996) 4

Nola M. v. Univ. of S. Cal., 20 Cal. Rptr. 2d 97 (Cal. Ct. App. 1993) 12, 13

Nowlan v. Cinemark Holdings, Inc., 2016 WL 4092468, 2016 U.S. Dist. LEXIS 102599 (D. Colo. June 24, 2016) 5

Phillips v. Lucky Gunner, LLC, 84 F.Supp.3d 1216 (D. Colo. 2015) 5

Simpkins v. CSX Transp., Inc., 965 N.E.2d 1092 (Ill. 2012).................................. 7

Smith v. City and County of Denver, 726 P.2d 1125 (Colo. 1986)......................... 7

Taco Bell Inc. v. Lannon, 744 P.2d 43 (Colo. 1987) 7, 12

Vigil v. Franklin, 103 P.3d 322 (Colo. 2004) 6

Wagner v. Planned Parenthood, 2019 COA 26 .... 5, 6, 8, 11

Statutes

§ 13-21-115, C.R.S. 6, 8

Other Authorities

Mass Shootings: Definitions and Trends, Rand Corporation (last visited Apr. 11, 2019), https://www.rand.org/research/gun-policy/analysis/supplementary/mass-shootings.html... 9

William J. Krouse & Daniel J. Richardson, *Mass Murder with Firearms: Incidents and Victims, 1999–2013*, Washington, D.C.: Congressional Research Service, R44126 (2015), https://fas.org/sgp/crs/misc/R44126.pdf.... 10

Rules

C.A.R. 49.. 2

Treatises

Restatement (Second) of Torts § 431.. 4

Restatement (Second) of Torts § 433.. 4

I. INTEREST OF THE AMICUS

ATRA is a national, nonpartisan, nonprofit organization with a diverse membership of organizations, including nonprofit entities, small and large companies, as well as state and national trade, business, and professional associations. ATRA has affiliated coalitions in more than 40 states. Its members hail from across the United States, and many, if not most, are brick-and-mortar entities that serve people in facilities open to the public. ATRA is dedicated to improving the American civil justice system, including through public education and legislative efforts to bring greater fairness, predictability, and efficiency to the civil justice system.

The law in Colorado and the limited law around the country have long recognized the limitations of landowner and other third-party liability for premeditated mass shootings. The Court of Appeals' majority decision below sends Colorado in an unprecedented direction. Because Colorado appellate courts are one of the few state appellate courts to address landowner liability in these circumstances, the decision will have national influence.

Left intact, the majority's decision likely will have profound negative practical and legal implications for brick-and-mortar businesses and organizations nationwide, many of whom are members of ATRA. This negative impact, in turn,

would extend to the people they serve, whether it be in retail, services, or places of congregation. For example, the decision may:

- Effectively create third-party civil liability on the part of landowners for premeditated mass murderous acts of others;
- Effectively mandate security measures that are impossible to attain as a practical matter;
- Risk uninsurability of organizations that are potential targets of mass shooters;
- Expose organizations to catastrophically large uncovered liabilities;
- Limit or prevent people's ability to assemble and congregate due to these extraordinary expenses and liability risks.

As the Court evaluates whether to grant the Petition for Certiorari, ATRA respectfully requests that the Court consider this brief and the national implications of allowing the majority's decision to stand.

II. ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

The decision below establishes precedent that is contrary to reasoning of this Court and breaks new ground in Colorado (and in the nation) on questions of substance that this Court has not yet directly addressed. *See* C.A.R. 49(a) & (b). The decision is inconsistent with existing precedent and policy both inside and outside of Colorado addressing landowner and third-party liability in the context of mass shootings. *See id.* Indeed, the undersigned have found no other appellate decision in this country ruling that a landowner's alleged failure to secure property

could be a legal cause of injury in the face of a premeditated mass shooting, even if the act was foreseeable. This alone should impel review by this Court.

As to the majority's specific errors, the decision conflated and misapplied the law on two elements of the tort of negligence: causation and duty, each of which should be dispositive in favor of Petitioner PPRM. First, on causation, the decision rewrites settled Colorado law and the settled tort principles of substantial factor and predominant cause by concluding that it need not apply them. Second, in the course of failing to properly address causation, the majority also erred in its duty analysis by failing to properly apply the test for whether a landowner owes a duty in a given case. Third and importantly, public policy aligns with a finding of no landowner liability for the premeditated acts of a mass shooter. This case is important not just for the fact that the majority got the law wrong. Rather, this Court should review the case because the decision fundamentally resets and creates law in a manner and context that will have far-reaching repercussions.

a. The majority decision below upended settled law and tort principles on causation by failing to undertake the substantial factor and predominant cause analyses and by holding that a landowner can be liable for the premeditated acts of a mass shooter.

It is settled law in Colorado and elsewhere that a necessary component of legal causation is the test of whether one's conduct was a 'substantial factor' in

bringing about harm. *See, e.g.,* Restatement (Second) of Torts §§ 431, 433. A plaintiff must establish not only that a defendant was a 'but for' cause of the harm but also that the defendant was a 'substantial factor' in producing the harm. *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996). If "some other event" was also a contributing factor in producing the harm, that other event can have "such a predominant effect" such that the defendant's negligence (if any) is a legally insignificant cause and is prevented from being a substantial factor. *Id.*; Restatement (Second) of Torts § 433 cmt. d. In other words, a defendant who may have a causal connection to the harm may nevertheless not be a legal cause due to the predominant effect the other event had in bringing about the harm. *Id.* Under such circumstances, no reasonable mind may differ on the question of substantial factor and a court should find no causation as a matter of law. *See Boulders at Escalante LLC v. Otten Johnson Robinson Neff & Ragonetti PC*, 2015 COA 85, ¶ 30.

Here, that 'other event' was Robert Dear. Armed with SKS rifles, handguns, a shotgun, a rifle, and homemade explosive devices, Dear descended upon PPRM's Health Center and began shooting people indiscriminately in the parking lot before proceeding inside and engaging in a five-hour gun battle with police. (Petition at 3–5.) He killed three people, including a police officer, and wounded seven others.

(*Id.*) He had no other apparent motive but to kill. (*Id.* at 5.) Even if Plaintiffs could establish that PPRM was negligent as to its security measures, as a matter of law, Dear's "mass shooting at PPRM, involving several weapons and improvised bombs had such a predominant effect that it prevented PPRM's conduct from becoming a substantial factor." *Wagner v. Planned Parenthood*, 2019 COA 26, ¶65 (Webb, J. dissenting).

This is how the trial court ruled and how dissenting Judge Webb would have ruled, and this is consistent with all published cases applying Colorado law to address third-party causation for the premeditated acts of a mass shooter. (Petition at 7); *Nowlan v. Cinemark Holdings, Inc.*, 2016 WL 4092468, 2016 U.S. Dist. LEXIS 102599, at *8–11 (D. Colo. June 24, 2016) (landowner where shooting took place); *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1227–28 (D. Colo. 2015) (companies that sold ammunition and tactical gear to the shooter); *Ireland v. Jefferson County Sheriff's Dep't.*, 193 F.Supp.2d 1201, 1231–32 (D. Colo. 2002) (gun show organizer that sold a shotgun to the shooters); *Castaldo v. Stone*, 192 F.Supp.2d 1124, 1171 (D. Colo. 2001) (sheriff department and school district where shooting took place).

The majority's contrary decision contravenes established legal precedent by allowing a jury to find liability in the absence of legal causation. The majority

concluded that it need not apply the substantial factor and predominant cause analyses at all, not because of the facts of this case, but because they are always questions of fact for a jury. *See Wagner*, 2019 COA 26, ¶33. The majority thus abandoned the court's role in ensuring that legal prerequisites to tort liability are met before sending a case to the jury.

Not only is the majority's decision wrong, it establishes new law as the apparent first appellate court in the nation to send the question to the jury under these circumstances.

b. The majority misapplied the *Smith/Taco Bell* factors in evaluating the element of duty in the context of a mass shooting event, resulting in a decision that is inconsistent with the law.

Under the Colorado Premises Liability Act, a landowner retains a duty to an invitee akin to the common law duty of ordinary care: "to exercise reasonable care to protect against dangers of which he actually knew or should have known." § 13-21-115(3)(c), C.R.S.; *see Johnson v. Liberty Mut. Fire Ins. Co.*, 648 F.3d 1162, 1164 (10th Cir. 2011) (explaining that the common law analysis of whether damage was reasonably foreseeable requires demonstration that the defendant "knew or should have known" of it). In the absence of further statutory definition of that duty, the common law guides the determination of the boundaries of such a duty. *See Vigil v. Franklin*, 103 P.3d 322, 327 (Colo. 2004).

It is the boundaries of this duty to invitees that is at issue here: whether a landowner 'knew or should have known' of the dangers of a calculated and premeditated mass shooter.

In Colorado, as in other jurisdictions, several factors inform whether a landowner owes this duty of care, including:

(1) the risk involved,
(2) the foreseeability and likelihood of injury as weighed against the social utility of the defendant's conduct,
(3) the magnitude of the burden of guarding against injury or harm, and
(4) the consequences of placing the burden upon the defendant.

Taco Bell Inc. v. Lannon, 744 P.2d 43, 46 (Colo. 1987) (enunciating these factors and finding that a landowner could owe a duty to prevent a shooting injury during an armed robbery in a high crime area with numerous robberies in prior years); *Smith v. City and County of Denver*, 726 P.2d 1125, 1127 (Colo. 1986) (enunciating these factors and finding no landowner liability for injury from diving into shallow water); *see also, e.g., Lopez v. McDonald's Corp.,* 238 Cal. Rptr. 436, 447 (Cal. Ct. App. 1987) (discussing the same considerations and finding no landowner liability case for a mass shooting); *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 212 n.5 (Cal. 1993) (finding no landowner liability for a rape, referencing "the extent of the burden to the defendant and consequences to the community"); *Simpkins v. CSX Transp., Inc.*, 965 N.E.2d 1092, 1097 (Ill. 2012)

(applying the same factors and finding insufficient pleading of duty as to claims of injury from asbestos exposure).

The majority below cited this *Smith/Taco Bell* multi-factor analysis but did not fully apply it. *Wagner*, 2019 COA 26, ¶39. For reasons unexplained, it looked only at part of one of these factors to address foreseeability of the risk. *Id.* ¶¶ 40–42. It did not look squarely at the level of risk involved; it did not weigh foreseeability against the social utility of PPRM; it did not consider the magnitude of the burden of guarding against actions like Dear's; it did not consider the consequences of placing the burden upon PPRM. Foreseeability in this case is questionable for all the reasons explained by PPRM in its briefing below, but even if there was some level of foreseeability, the inquiry does not end there. Upon full inquiry, the result should be that, as a matter of law, no landowner duty existed in this case. *See infra* Part II(c).

The majority thus expanded landowner liability despite the express statutory purpose of limiting the duties owed to third parties. § 13-21-115(1.5), C.R.S. Moreover, courts have come down differently on the boundaries of duty and foreseeability in cases involving premeditated mass shootings. *Compare Axelrod v. Cinemark Holdings, Inc.*, 65 F.Supp.3d 1093, 1098–1102 (D. Colo. 2014) (finding disputed issue of fact whether the defendant "knew or should have known") *with*

Petition App'x B at 5 (Order re: PPRM's Mot. S.J.) (reaching the opposite conclusion). The extreme circumstances of this case warrant review by this Court of the duty analysis in addition to review of causation because the majority decision conflates the two and fails to conduct the appropriate analysis.

c. Public policy aligns with finding no landowner liability for the premeditated acts of a mass shooter.

Public policy supports the consistency with which courts hold as a matter of law that a third party is not legally responsible for the acts of a mass shooter bent on indiscriminate killing. *See supra* Part II.a. (listing cases). For many reasons, landowners—traditional brick-and-mortar organizations such as business, retail, social service organizations, nonprofits, places of worship—should not be made to bear responsibility for another's mass murderous acts. These include:

Risk. According to available analyses, the risk of a mass shooting is actually extremely low. While these terrible events garner substantial media attention, they are, in fact, very rare. *See Mass Shootings: Definitions and Trends*, Rand Corporation (last visited Apr. 11, 2019), https://www.rand.org/research/gun-policy/analysis/supplementary/mass-shootings.html; William J. Krouse & Daniel J. Richardson, *Mass Murder with Firearms: Incidents and Victims, 1999–2013*, Washington, D.C.: Congressional Research Service, R44126 (2015),

https://fas.org/sgp/crs/misc/R44126.pdf.[1] The profound tragedy of these events alone should not tip the scales in favor of holding that the absence of certain security measures can subject a landowner to liability for murderous acts of others. It is of particular concern that plaintiffs—and, at times, courts—appear to rely on the intensity of media coverage to conclude that the actual risk of such attacks has increased to such a degree that they become foreseeable and gives rise to a private duty to prevent. *See, e.g., Axelrod*, 65 F.Supp.3d at 1100–01 (concluding that in modern life, the history of such events makes them more foreseeable). The prospect of such an event does not amount to a risk substantial enough to create legal liability for failing to protect against its occurrence.

Social utility. Potential targets of mass shootings and potential defendants in cases like this are not limited to Planned Parenthood. Regardless of whether the jurists or those briefing this case support or oppose what Planned Parenthood stands for, entities that can be sources of political division, religious dissent, or other conflicts should not be unduly burdened by unreasonable liability for the carnage caused by a mass shooter.

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[1] Krouse et al. note, for example, that "familicides" occur twice as frequently as mass shootings but "do not garner the same level of media attention or public concern." *Id.* at 25.

Burden. Imposing liability premised on speculative claims that certain security measures might have prevented this specific kind of harm could result in de facto strict liability, creating a standard of care that may never be met by the landowner. *See Marr v Yousif*, 422 N.W.2d 4, 9 (Mich. Ct. App. 1988) ("Since such allegations [of yet another security measure that could have been taken] can be made in every case we would be imposing strict liability in the guise of negligence."). The absence of a practical limit to what security measures a plaintiff can argue should have been taken could lead to the absurd result that private enterprise may be required to engage government and military-level security forces, an arguably unbearable expense for private entities.

Further, how can brick-and-mortar organizations truly predict and prevent premeditated, armed, and indiscriminate violent attacks? Under the majority's analysis below, if located in Colorado, the Tree of Life – Or L'Simcha Congregation synagogue in Pittsburgh, Pennsylvania, and the Al Noor Mosque and Linwood Islamic Centre in Christchurch, New Zealand, could be held liable for the acts of those extremists by failing to foresee and guard against the threat of extremist violence. As the dissent in this case asked, "should landowners be expected to build fortresses?" *Wagner*, 2019 COA 26, ¶ 68 (Webb, J., dissenting).

Moreover, it is highly speculative whether fortresses or armed government-level security would even stop someone with extreme motives. Where armed government and military forces fail to prevent such acts, it makes little sense to suggest that a private actor can and then hold it liable for the failure to do so. *See* PPRM Ans. Br. at 14, 2017CA2304 (May 31, 2018) (noting the attacks at an Army base in Texas, a Navy yard in Washington, D.C., a TSA Security Checkpoint at the Los Angeles International Airport, and the Holocaust Memorial Museum in Washington, D.C., where armed personnel were present but did not prevent the attacks).

This is why as a matter of law landowners are not absolute insurers of public safety. *See Taco Bell*, 744 P.2d at 46–47; *see also Nola M. v. Univ. of S. Cal.,* 20 Cal. Rptr. 2d 97, 108 (Cal. Ct. App. 1993);[2] *Marr,* 422 N.W.2d at 7.

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[2] *Nola* discusses these public policy considerations in the context of evaluating the element of causation, as opposed to duty, and thus is a good example that these policy considerations are about liability generally, not just any one element of negligence. *Nola* involved the question of landowner causation of a rape on a university campus. In finding no causation, the court addressed the speculative nature of the type of security measures that allegedly should have been in place, and whether, short of a "Berlin wall," they would prevent the criminal conduct. *Id.* at 107–108. The court expressed concern that imposing liability for a landowner's nonfeasance would make the landowner "the insurer of the absolute safety of everyone who entered the premises" and expressed concern for the expense of this security and how that would impact or result in a decrease or loss of services, or

Consequences. The consequences of the burden that the majority opinion places on landowners likely are substantial and impact not only the brick-and-mortar institutions but also the public they serve, both economically and socially. By precluding summary judgment and forcing landowners to jury trial (or settlement), the majority decision, if left intact, could result in unmitigated expense and exposure to liability.

This potential expense could disproportionately affect institutions that embody socially sensitive issues or are otherwise the targets of outside dissent. Increased, unbounded security measures and significant increase in insurance premiums (and even the risk of uninsurability altogether) for catastrophically large liabilities may make such institutions, as well as other entities, prohibitively expensive or risky to keep open. *See Nola,* 20 Cal. Rptr. 2d at 108; *Lopez*, 238 Cal. Rptr. at 441 (including availability and cost of insurance as a factor to consider). In other words, the mass shooter would win yet again. The existence of important public services and spaces would be threatened. In turn, this threatens the curtailment of the rights of these entities (controversial or not) to exist and the rights of people to access them for goods, services, or congregation.

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force people out of business. *Id.* at 108. The court noted that police protection is a governmental obligation, not a private one. *Id.*

III. CONCLUSION

ATRA supports PPRM's petition and respectfully requests that the Court grant the Petition for Writ of Certiorari.

Respectfully submitted this 11th day of April 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 11, 2019, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITION FOR CERTIORARI** was filed electronically via Colorado Courts E-filing system, and served upon the following individual as indicated below:

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