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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.

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

v.

Respondents/Cross-Petitioners:
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

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Case No. 2019SC251

BRIEF OF AMICUS CURIAE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER ROCKY MOUNTAIN PLANNED PARENTHOOD, INC.

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. 29(d).

☒ It contains approximately 2952 words (does not exceed 4,750 words), according to the word count of Microsoft Word, including headings, footnotes, and quotations, and excluding caption, tables, and certificates.

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
Margrit Lent Parker

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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. Owing to a lack of appellate court decisions addressing landowner liability in these circumstances, this Court's decision may well have national influence.

Unless this Court reverses the Court of Appeals, there likely will be 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, if this Court's decision does not reverse the Court of Appeals, 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.

ATRA respectfully requests that the Court consider this brief and the national implications of allowing the majority decision of the Court of Appeals to stand.

II. ARGUMENT IN SUPPORT OF PETITIONER

ATRA supports the position of Petitioner Rocky Mountain Planned Parenthood, Inc. (PPRM) with respect to the first issue presented in the Amended Order of Court (Sept. 12, 2019).

The majority decision below misapplied the law of causation, rewriting settled Colorado law and the settled tort principles of substantial factor and predominant cause by concluding that it need not apply them. The decision

effectively eliminated the element of causation. Public policy aligns with the settled law and a finding of no landowner liability for the premeditated acts of a mass shooter under the circumstances presented here.

This Court's decision may well have far-reaching national legal implications, given the limited number of cases involving mass shootings and the seemingly growing number of mass shootings nation-wide. If left intact, the majority's decision below is likely to create a negative ripple effect of risk and exposure to liability that brick-and-mortar organizations cannot practically sustain. Law and policy impel this Court to reverse the Court of Appeals' majority decision below.

As discussed first below, the Court of Appeals' majority decision effectively ignored settled law on the substantial factor and predominant cause, and as such reached a conclusion contrary to legal precedent. Next, this brief discusses the importance of the substantial factor and predominant cause analysis being addressed as a matter of law under a Rule 56 or Rule 12 motion. Third, this brief addresses the myriad of Colorado public policy reasons that compel reversal. Finally, this brief addresses how these public policy reasons extend throughout the nation.

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 under the circumstances presented.

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.*, *N. Colo. Med. Ctr., Inc. v. Comm. on Anticompetitive Conduct*, 914 P.2d 902, 908 (Colo. 1996) (quoting *Smith v. State Comp. Ins. Fund*, 749 P.2d 462, 464 (Colo. App. 1987)); *Lopez v. McDonald's Corp.*, 238 Cal. Rptr. 436, 449 (Cal. Ct. App. 1987); Restatement (Second) of Torts §§ 431, 433. A plaintiff must establish not only that (i) the defendant was a 'but for' cause of the harm, but also that (ii) the defendant was a 'substantial factor' in producing the harm. *N. Colo. Med. Ctr.*, 914 P.2d at 908. 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.* 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. 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 the parking lot of PPRM's Health Center and began shooting people indiscriminately before shooting his way inside and engaging in a five-hour gun battle with police. (Pet'r Opening Br. 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.*) 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. (R., CF p. 2521 (trial court order)); *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); *Wagner*, ¶ 65 (Webb, J., dissenting).

Summary judgment on the basis that Dear was the predominant cause is also consistent with law in other jurisdictions in the context of a mass shooting. *See Lopez*, 238 Cal. Rptr. at 449–50 (even if it failed to provide certain security measures, the defendant restaurant was not a substantial factor in causing the harm from a shooting by a "demented, mentally unbalanced man" who was unconcerned with detection, heavily armed, and whose only apparent motive was killing, with no effort to rob, make demands for money, or take hostages). The undersigned has found no case on point, inside or outside of Colorado, that reaches the same result on causation as the majority opinion below.

There is no dispute between the majority and the dissent below that causation is an element Plaintiffs must prove in this case. *See Wagner*, ¶¶ 17–18, 51; *see also* § 13-21-115(3)(c), C.R.S. (causation required for landowner liability); CJI-Civ. 12:3 (same). However, after reciting the causation element, the majority

opinion failed to correctly perform the "substantial factor" part of the causation analysis, instead conflating its analysis with the separate question of foreseeability. *Wagner*, ¶¶ 19–44. It further improperly concluded that it need not apply the substantial factor analysis at all, not because of the facts of this case, but because they are always questions of fact for a jury, without regard to the undisputed facts here regarding Dear's attack. *See id*. at ¶ 33. To uphold this decision would effectively read the element of causation out of the CPLA (or any tort claim for that matter). *See Wagner*, ¶¶ 19–44 (relying largely on an analysis of whether a duty exists and the evidence proffered in support of a breach of that duty to conclude that there are facts in dispute as to causation).

The substantial factor analysis is a question of legal causation to prevent casual and unsubstantial causes from becoming actionable. *N. Colo. Med. Ctr.*, 914 P.2d at 908. Plaintiffs do not truly dispute the material facts related to Dear's motives, intent, and premeditation; the fact that he was heavily armed; and as dissenting Judge Webb noted, his lack of concern for personal safety given that some of Dear's devices, if used, would have taken his life as well. *See Wagner*, ¶ 69 (Web, J., dissenting). And, even if Plaintiff's allegations that PPRM was negligent were correct, as Judge Webb explained, these facts far outpace the alleged negligent failures of PPRM to undertake additional security measures, even

if the allegations were true. *See id.* at ¶ 68. Thus, no material fact is in dispute and summary judgment is the only appropriate outcome on the facts presented.

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

b. Summary judgment is the appropriate procedural vehicle for courts to determine that a landowner was not a predominant cause.

As discussed above, as a matter of law, it was Dear's actions that were the substantial factor in causing the harm. If cases such as this one are not decided as a matter of law by the courts, the practical implications for landowners is to face the costs, expenses, time-delays, and risks (even if minimal) of a trial. As this Court has recognized, part of the "purpose" of summary judgment is to "save the time and expense connected with trial." *Peterson v. Halsted*, 829 P.2d 373, 375 (Colo. 1992). In the often cited *Celotex* case, the United States Supreme Court explained that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed.R.Civ.P. 1 and interpreting analogous federal rules).

There are few cases more ripe for a determination as a matter of law than the present case. Here, the overwhelming and predominant cause was the acts of a mentally unbalanced shooter intending to inflict maximum damage. *See Nowlan*, 2016 U.S. Dist. LEXIS 102599 (granting summary judgment for landowner movie theater in lawsuit from the Aurora movie theater mass-shooting); *Phillips*, 84 F. Supp. 3d 1216 (granting motion to dismiss gun shops from lawsuit arising from the Aurora movie theater mass-shooting); *Castaldo*, 192 F. Supp. 2d 1124 (granting motion to dismiss school officials and others from lawsuit arising from the Columbine mass-shooting); *see also Smith*, 749 P.2d at 464 (affirming summary judgment where defendant admitted improper conduct, but that conduct was not a "substantial factor" in producing the harm).

If not reversed, the Court of Appeals' majority opinion may effectively eliminate the possibility of summary judgment in all mass shooting cases in Colorado. This will result not only in negative repercussions in Colorado, but potentially around the nation. Landowners – whether houses of worship, museums, restaurants, or a myriad of others that have suffered from or may face mass shootings – would be forced to a jury trial on civil liability or to a settlement after any mass-shooting.

c. Public policy and the impacts to landowners of a contrary result align 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. Under the majority's analysis below, such landowners would face liability by failing to take extraordinary measures to guard against the threat of extremist violence. (See Pet'r Opening Br. at 13 (listing many types of organizations and places that have fallen victim to mass shootings.) As the dissent in this case asked, "should landowners be expected to build fortresses?" *Wagner*, ¶ 68 (Webb, J., dissenting).

In fact, it is highly speculative whether even fortresses or armed government-level security would 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 prevent such attacks. (*See* Pet'r Opening Br. at 13-14) (noting the attacks at numerous venues of many types, including

several where heightened security measures or armed personnel were present but did not prevent the attacks).

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 could never be met and thus would always be breached by and create liability for the landowner. The absence of a practical limit to what security measures a plaintiff can argue should have been taken by the landowner could lead to the absurd result that private enterprise would be required to engage government and military-level security forces. As such, landowners will face *de facto* strict liability.

Landowners cannot reasonably be made absolute insurers of public safety. The consequences of the burden that the majority opinion places on landowners are substantial and impact not only the brick-and-mortar institutions but also the public they serve.

The impact on the public served by landowners, both economically and socially, would be profound. Without reversal, landowners would have to subject their customers (or their guests, their patients, their congregants, their supporters, etc.) to TSA style security simply to enter their premises. Having to go through security simply to shop, to eat, to visit, to receive health care, to worship, to

congregate, etc. places an unreasonable burden not only on the landowners but also on their invitees and licensees. And this TSA-style security burden, in any event, would do little good in cases such as the present one, in which Dear's killing spree began in a parking lot.

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. *Cf. Nola,* 20 Cal. Rptr. 2d at 108 (analyzing public policy under the duty element); *Lopez*, 193 Cal. App. 3d at 505, 238 Cal. Rptr. at 441 (same). 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.

The calculus should not change based on the degree to which a landowner or entity is the source of political division, religious dissent, or other conflict.

Potential targets of mass shootings and potential defendants in cases like this are not limited to Planned Parenthood. Such organizations cannot fairly be disproportionately burdened by unreasonable liability for the carnage caused by a mass shooter. Such individuals create the threat and then make it a reality, thereby achieving their goals in the form of such massive risk and liability that the existence of such organizations is threatened. Public policy compels reversal.

d. The negative public policy impacts on brick-and-mortar organizations extend nationally and amplifies the destructive effect of the majority opinion below.

There is not a vast body of law scrutinizing mass shooting events and third-party liability for them, much less landowner liability. But, all cases on point reached a result opposite to that of the majority opinion below. *See supra* Part II.a. This Court's decision will be one of the few judicial decisions on this subject, made at time of seemingly increased mass shootings nationwide and heightened national concern. If this Court affirms the majority decision below, its effects will be felt nationwide, not only legally speaking but practically speaking. The public policy implications described above and in the Petitioner's Opening Brief are not limited to Colorado organizations. This fact serves only to amplify the magnitude of the destructive ripple effect that affirming the decision below would of risk and exposure to liability that brick-and-mortar organizations, locally and nationally,

cannot practically sustain. Law and policy impel this Court to reverse the Court of Appeals majority decision below.

III. CONCLUSION

ATRA supports PPRM's position and respectfully requests that the Court reverse the opinion and order of the Court of Appeals as to Plaintiffs' claims against PPRM and reinstate the trial court's order granting summary judgment.

Respectfully submitted this 21st day of October 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of October 2019, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER ROCKY MOUNTAIN PLANNED PARENTHOOD, INC.** was filed electronically via Colorado Courts E-Filing system, and served upon the following:

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