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Protecting Law-abiding Firearms Businesses from Abusive Lawsuits

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EXECUTIVE SUMMARY

In the late 1990s, a gun prohibition organization adopted a strategy previously used by Jim Crow government officials against the free press: filing abusive lawsuits designed to cripple the businesses through the sheer cost of litigation against meritless claims.

In response, most states, Colorado included, enacted legislation against such misuse of the judicial process. Eventually, the U.S. Congress enacted similar national legislation.

In the late 1990s, a gun prohibition organization adopted a strategy previously used by Jim Crow government officials against the free press: filing abusive lawsuits designed to cripple the businesses through the sheer cost of litigation against meritless claims.

In 2014, the same organization that had cooked up the original suits convinced Sandy and Lonnie Philips to file a meritless lawsuit in Colorado. Although it was clear beyond doubt that the suit had no chance of success, the Philips say that the organization chose not to inform that Philips that if their case inevitably lost, they would be responsible for paying the attorney's fees of the defendants.

When the U.S. District Court did dismiss the plainly unlawful lawsuit and awarded attorney's fees, the gun prohibition organization, whose reported annual revenues are over 40 million dollars, refused to help the Philips.

Similarly the law firm that filed the bogus suit, Arnold & Porter, has refused to reimburse the Philips. The annual revenue of Arnold & Porter is over a billion dollars.

Part I of this Issue Paper describes the Jim Crow system of abusive tort litigation against the First Amendment.

Part II details how gun prohibition advocates copied and amplified the Jim Crow tactics, for use against the Second Amendment. In response, most states, including Colorado, enacted legislation and so did Congress.

Part III describes a new type of bill that has been introduced in Colorado and enacted in several states. The bill creates a new statute to authorize abusive suits. The bill provides no standards for what is lawful and unlawful. The bill is set up to destroy firearms manufacturers through the cost of litigation. The bill:

- Authorizes lawsuits against companies that supposedly do not have "reasonable controls," but does not specify any "reasonable control."
- Abolishes proximate cause.
- Authorizes suits against businesses in other states that comply with all the laws of their own state.
- Allows the Colorado Attorney General to designate a gun prohibition group to sue firearms businesses relentlessly on behalf of the Attorney General.
- Ensures that gun prohibition lawyers who win on a playing field heavily tilted in their favor, "shall" be paid by firearms businesses.
- Prevents victims of abusive lawsuits who prevail in court from recovering attorney's fees.
- Prohibits many programs that teach firearms safety to children.

A federal district court in New Jersey has issued a preliminary injunction against a similar law.

Part IV explains why manufacturers of the two physical items specifically protected at the beginning of the Bill of Rights—printing presses and arms—should not be sued for unlawful misuse of their products by third parties.

Finally, Part V described how the gun ban group that had cooked up the junk lawsuits, and the Arnold & Porter law firm, manipulated the Philips family.

I. JIM CROW VERSUS THE FIRST AMENDMENT: ABUSIVE TORT LAWSUITS

During Jim Crow days in the South, photographs of black people rarely appeared in the mainstream press, except in crime stories. The concerns and aspirations of black people got little attention.[1] The gap was filled by the black press, which almost always operated on a shoestring. When the black press exposed or criticized abuses by the white power structure, including illegal violence by law enforcement officers, retribution sometimes came as a libel suit.[2]

...South Carolina's *Lighthouse and Informer* was driven out of business in 1954 by a criminal libel prosecution.

Even when newspaper articles were impeccably accurate, there was a significant risk of enormous verdicts from all-white juries. Jurors were selected from voter rolls, and blacks were often prevented from registering.

Verdicts aside, the simple costs of legal defense threatened the existence of the newspapers. For example, notwithstanding Thurgood Marshall's legal defense, South Carolina's *Lighthouse and Informer* was driven out of business in 1954 by a criminal libel prosecution.[3] On advice of attorneys, including Thurgood Marshall, the *Sumter Daily Item* paid $10,000 to settle a non-meritorious libel suit.[4]

A 1954 suit against the *Lexington Advertiser* was eventually decided in the defendant's "favor, but not before a costly legal battle."[5] Another unsuccessful libel case against the *Lexington Advertiser* was brought in 1963. The cumulative effect of the two libel suits, plus the loss of advertising due to violent threats against advertisers, put the editor $100,000 in debt. [6]

When the *Oklahoma Black Dispatch* asked the national NAACP for help in a libel suit involving a shooting by police, NAACP attorney Robert Carter convinced the paper to settle, due to concerns about "the toll these libel suits were taking on the bank account of the organization."[7]

As civil rights became a growing national issue, "outsider" national media coverage in the South increased. So did libel suits. *New York Times Co. v. Sullivan* arose from a full-page advertisement in the *Times*, "Heed Their Rising Voices."[8] The ad included false information about L.B. Sullivan, who was an elected city commissioner in Montgomery, and in that capacity supervisor of the city police. The ad accused Sullivan

of misconduct at a certain event, when in fact Sullivan had not even been present. He sued the *New York Times*, and also four black civil rights leaders, whom the advertiser had listed as endorsers without their knowledge or consent.[9]

At least regarding the advertisement, Sullivan had a legitimate complaint about inaccuracy. Many other Jim Crow libel lawsuits were meritless.

For example, in 1960, the *Times* had sent Harrison Salisbury—winner of the Pulitzer Prize—to Birmingham. His facts were accurate. His analysis compared Birmingham to Johannesburg, and local police behavior to that of Nazi police.[10] In retaliation, Salisbury and the *Times* were sued in multiple cases by local officials, with millions sought in damages.[11]

For the next year, the *Times* kept its reporters out of Alabama, lest a reporter be served with process for the *Sullivan* suit, thereby eliminating the *Times'* argument that its small circulation in Alabama was insufficient for state court jurisdiction.[12] The *Times* killed two stories, one about Mississippi and another about voting in Birmingham; although the stories were accurate, the lawsuit risk was too great.[13]

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For coverage of the police-sanctioned mob assault against Freedom Riders on May 14, 1961, and the follow-up, the *Times* relied on CBS Television reports.[14] CBS was sued for that coverage, and for a November 1961 story about how voting registrars in Montgomery County, Alabama, impeded blacks from registering. Although none of the reporting had factual errors, CBS retracted both stories, apologized on air, fired the reporter (the award-winning Howard K. Smith), and settled the Montgomery case for an undisclosed amount.[15]

The *Montgomery Advertiser* hoped that "the recent checkmating of the *Times* in Alabama will impose a restraint upon other publications."[16]

Although the *Times* was far wealthier than any Southern black newspaper, "few people realized how financially vulnerable the *Times* was in 1960."[17] In the early 1960s, the paper "was barely making a profit and likely would not have able to survive" the multi-million-dollar damages.[18] According to the *Times'* Managing Editor, the paper's bank accounts "were coming out 'cleaned.' This is an expensive business."[19]

"No strategy for squelching the media's portrayal of conditions in the South . . . carried more potential for success than the creative use of the law of libel," explained law professor Rodney Smolla, a libel law expert.[20] As the *Washington Post's* executive editor observed, the southern libel suits "enormously increase the liability of the press for its defense against such suits in communities where jurors may be hostile to them…."[21] "The ability to report would be destroyed "if the costs of defending against bare allegations of error threaten the survival of the newspaper."[22]

The *Sullivan* case had been brought not just against the *Times* for publishing an inaccurate advertisement. Four prominent black Alabama ministers were also sued: Ralph Abernathy, Fred Shuttlesworth,[23] Joseph Lowery, and Solomon Seay.[24] As noted above, they explained that the advertiser had wrongly listed their names as endorsers even though they had neither seen nor approved the ad. The jury brought in a verdict

of half a million dollars against the ministers and the *Times*. "[T]he jury apparently found the four men guilty because of their civil rights work and not because they had defamed L.B. Sullivan."[25]

As Supreme Court Justice Hugo Black explained when the *Sullivan* case was before the Supreme Court, more "huge verdicts" were

> lurking just around the corner for the *Times* or any other newspaper or broadcaster which might dare to criticize public officials. In fact, briefs before us show that in Alabama there are now pending eleven libel suits by local and state officials against the *Times* seeking $5,600,000, and five such suits against the Columbia Broadcasting System seeking $1,700,000. Moreover, this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.[26]

According to the Southern Publishers Association, as of 1964 there were 17 pending libel suits against the media in southern courts, seeking total damages of $238,000,000.[27] For example, the Saturday Evening Post was being sued for coverage of the riots against integration of the University of Mississippi.[28]

The Supreme Court ruled in favor of the newspaper in *New York Times* v. *Sullivan*. To protect the freedom of speech and of the press, the Court set a new rule for libel cases involving public officials: a public official could win a libel suit only if he or she proved that the publisher of the allegedly libelous statement had acted with knowing or reckless disregard for the truth.[29]

While civil suits aimed at the First Amendment were limited by the Supreme Court in *Sullivan* and its follow-up cases, similar suits aimed at the Second Amendment were limited by the Colorado General Assembly, other state legislatures, and the U.S. Congress, which passed the Protection of Lawful Commerce in Arms Act ("PLCAA"). The circumstances that led to *Sullivan* are like those that led to PLCAA and the state reforms: decades of abusive suits, including litigation designed to coerce submission by driving up defendants' legal expenses.

Frustrated by legislative rejection of handgun bans, gun control advocates in the 1980s brought product liability suits against handgun manufacturers and retailers.

II. BEFORE LEGISLATIVE REFORMS, TORT LAW WAS OFTEN MISUSED AGAINST THE SECOND AMENDMENT

PRODUCT LIABILITY SUITS IN THE 1980S

American legislatures have always been able to enact gun control laws, provided that such laws comply with the federal and state constitutions. Frustrated by legislative rejection of handgun bans, gun control advocates in the 1980s brought product liability suits against handgun manufacturers and retailers.[30] The cases invented many novel theories. For example, guns that were well-suited for self-defense were said to be "defective," since such guns were also used by criminals. The mere manufacture of a

handgun was alleged to be "ultrahazardous activity"—akin to blasting with dynamite. As one district court judge observed, "the plaintiff's attorneys simply want to eliminate handguns."[31]

From the many cases, there was only one verdict for plaintiffs.[32] But all cases necessarily created attorney's fees for the defendants.

NEW AND COORDINATED TORT SUITS IN THE 1990S AND THEREAFTER

Starting in the mid-1990s, suits against firearms businesses were based on even more inventive grounds: negligent marketing (distribution),[33] public nuisance,[34] recovery of government medical expenses for crime victims, unfair trade practices, deceptive advertising, and so on. Starting in 1998, a coordinated series of lawsuits were filed by three dozen local governments, and by New York State Attorney General Elliot Spitzer. Further, Secretary of Housing and Urban Development Andrew Cuomo organized federally funded housing authorities to bring additional suits.[35]

Whatever the merits of suits against arms manufacturers, the suits against the industry associations assailed the freedom of speech. The suits retaliated against trade associations for their often-successful public advocacy.

Bridgeport, Connecticut, mayor Joseph Ganim described his lawsuit as "creating law with litigation."[36] "The Bridgeport suit named 12 American firearms manufacturers, three handgun trade associations, and a dozen southwestern Connecticut gun dealers, and asked for damages in excess of $100 million."[37]

1. Suits against the free speech of trade associations

Bridgeport's lawsuit was typical in that it sued the firearms trade associations. These trade associations did not manufacture or sell firearms. Instead, the National Shooting Sports Foundation and similar groups were typical trade associations: advocating for their industry, promoting best practices within the industry, and promoting hunting and recreational shooting sports activities.

Whatever the merits of suits against arms manufacturers, the suits against the industry associations assailed the freedom of speech. The suits retaliated against trade associations for their often-successful public advocacy.

2. Structuring and coordination of suits in order to destroy defendants via litigation costs

While coordinated libel multi-suits did not begin until the Alabama cases in the 1960s, the anti-gun lawsuits of the latter 1990s were coordinated from the start. Brought in as many jurisdictions as possible and well-designed to resist consolidation, they were organized to destroy, even if they could never win a verdict. "If twenty cities do bring suits, defending against them, according to some estimates, could cost the gun manufacturers as much as a million dollars a day," explained a *New Yorker* article.[38]

Plaintiffs' attorney John Coale aimed for "critical mass . . . where the costs alone of defending these suits are going to eat up the gun companies" said the *New York Times*.[39] As he put it, "the legal fees alone are enough to bankrupt the industry."[40] Secretary Cuomo threatened manufacturers with "death by a thousand cuts."[41]

As intended, some manufacturers did go bankrupt, including Sundance Industries, Lorcin Engineering, and Davis Industries.[42] Davis Industries was "one of the 10 largest makers of handguns."[43]

The most venerable manufacturers were driven to the brink. Colt's Manufacturing Company stopped producing handguns for the public. Facing "28 lawsuits from cities and counties hoping to punish gun makers . . . the company could no longer get loans to finance manufacturing because the lawsuits 'could be worth zero, or a trillion dollars.'"[44]

Owned by a British conglomerate, Smith & Wesson ("S&W") was ordered to accept the Cuomo demands, in exchange for immunity from some of the litigation.[45] "Smith & Wesson made it clear . . . that the company was driven to the agreement by the lawsuits. The settlement would ensure 'the viability of Smith & Wesson as an ongoing business entity in the face of the crippling cost of litigation,' the company said in a statement."[46]

"[T]he litigants vowed to press on until all the manufacturers joined." Indeed, "to get more aggressive."[47] Alex Panelas, mayor of Miami-Dade County, Florida, warned that the S&W deal would be "'a floor, not a ceiling' for any other gun maker that wants to sign on."[48]

Under the terms accepted by S&W, the company's practices would be perpetually controlled by a five-member Oversight Commission.[49] The cities, counties, and states that joined the litigation would select three members, while those that had declined to sue were excluded. The ATF would select one member, leaving gun manufacturers with only one member of their own.[50] In effect, corporate control would be removed from the stockholders and given to the new gun control committee.

No other company signed the agreement. Glock came closest. As the company was wavering, New York Attorney General Elliot Spitzer warned a Glock executive: "if you do not sign, your bankruptcy lawyers will be knocking at your door."[51] Spitzer and Connecticut Attorney General Blumenthal announced they would sue other manufacturers for shunning S&W, such as no longer sharing joint legal defense with S&W.[52] This would have been "the first antitrust action in history aimed at punishing smaller companies for not cooperating with the largest company in the market in an agreement restraining trade."[53] Blumenthal admitted he did not have evidence of illegal behavior; "the point was sheer intimidation," one observer noted.[54]

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Ultimately, the S&W consent decree never went into force. And many lawsuits against the companies continued. Although the cases tended to be dismissed eventually, litigation costs mounted ever higher.[55]

TO PROTECT FIRST AND SECOND AMENDMENT RIGHTS, COLORADO, OTHER STATES, AND CONGRESS PASSED REMEDIAL LEGISLATION.

Rep. Cliff Stearns (R-Fla.) decried "the government lawyers and private lawyers conspiring, conspiring to coerce private industry into adopting public policy changes through the threat of abusive litigation. The option? Adopt our proposals or you will go bankrupt."[56]

According to Protection of Lawful Commerce in Arms Act cosponsor Sen. Max Baucus (D-Mont.), the bill was "intended to protect law-abiding members of the firearms industry" from suits "that are only intended to regulate the industry or harass the industry or put it out of business."[57] Sen. Thomas Coburn (R-Okla.) called PLCAA necessary "to put a stop to the unmeritorious litigation that threatens to bankrupt a vital industry in this country."[58] The suits were designed "to constrict the right to bear arms and attack the Bill of Rights and attack the Constitution."[59]

As in the 1960s, plaintiffs in a single state could destroy a constitutional right nationally. By the time PLCAA was enacted in 2005, "33 State legislatures have acted to block similar lawsuits . . . . However, it only takes one lawsuit in one State to bankrupt the entire industry, making all those State laws inconsequential. That is why it is essential that we pass Federal legislation," said Senator Sessions (R-Ala.).[60]

The attempt to bankrupt the gun industry via litigation had—and still has—national security implications.

Among the bipartisan legislators who supported PLCAA were cosponsors Colorado Democratic Senator Ken Salazar[61] and Colorado U.S. Democratic Representative John Salazar.[62]

The attempt to bankrupt the gun industry via litigation had—and still has—national security implications. The Department of Defense "strongly support[ed]" PLCAA, to "safeguard our national security by limiting unnecessary lawsuits against an industry that plays a critical role in meeting the procurement needs of our men and women in uniform."[63]

Enacted by a bipartisan majority large enough to overcome an attempted filibuster, PLCAA found that imposing liability for third-party crimes violated the Second Amendment, violated "the rights, privileges, and immunities guaranteed" by the Fourteenth Amendment, and violated the rights of law-abiding firearms companies to engage in business.[64]

PLCAA also expressly protected the legislative branch: "The liability actions . . . attempt to use the judicial branch to circumvent the Legislative branch of government . . . thereby threatening the Separation of Powers doctrine."[65]

As PLCAA explained, the abusive suits were based on "theories without foundation in hundreds of years of the common law and jurisprudence of the United States." The suits attacked interstate comity, such as by suing in one state against commerce in another state that had been fully compliant with the laws of where the commerce actually took place.[66]

PLCAS repudiated making firearms businesses liable "for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended."[67]

The key section of PLCAA forbids lawsuits against firearms businesses or business associations that comply with gun control laws:

> A qualified civil liability action may not be brought in Federal or State Court. The term "qualified civil liability action" means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, 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, but shall not include an action in which a manufacturer or seller of a qualified product 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.[68]

Colorado in 1986 adopted legislation against the abusive product liability suits. After the next round of suits, based on different but still abusive tort theories, the General Assembly enacted additional legislation against the new suits.[69]

III. NEW STATUTES TO PROMOTE ABUSIVE LAWSUITS

Colorado in 1986 adopted legislation against the abusive product liability suits.

After PLCAA became law, the promoters of abusive lawsuits began arguing that PLCAA could be evaded if a statute authorized such suits. The District of Columbia Court of Appeals rejected this argument.[70] So did the Ninth Circuit.[71]

Nevertheless, former New York City Mayor Bloomberg in 2021 convinced the New York legislature to enact a state statute authorizing lawsuits against firearms businesses for conduct even outside of New York. The new statute provided no notice of what lawful conduct would subject a firearms business to a suit.

Later, similar laws were enacted in a New Jersey, Delaware, and California. A Bloomberg bill has been introduced in Colorado, Senate Bill 23-168.

Part III of this Issue Paper describes Colorado Senate Bill 23-168 in detail, as an exemplar of similar bills in other states.

PREEMPTED BY FEDERAL LAW?

Opponents of the Bloomberg bills say that the bills are preempted by the federal PLCAA statute. That was exactly what a federal district court in New Jersey recently held:

> Further, reading A1765 as being applicable to the sale or marketing of the product would directly conflict with the intention of Congress. "In the

> construction of statutes, it is the duty of the court to ascertain the clear intention of the legislature." *U.S. v. Fisk*., 70 U.S. 445, 447 (1865). Congress's intent here is clear. The PLCAA's purpose 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." 15 U.S.C. § 7901 (b)(1). A1765 does just the opposite. To read A1765 as fitting within the predicate exception would run afoul of the goals of the PLCAA and would, in fact, "gut the PLCAA" as NSSF suggests.
>
> A1765 would subject manufacturers, distributors, dealers, and importers of firearms or ammunition products and their trade associations to civil liability for the harm solely caused by the criminal or unlawful misuse of firearm or ammunition products by others. This is in direct conflict with the PLCAA's purpose.[72]

Further, said the court, a preliminary injunction was appropriate because the statute was directly aimed at thwarting the exercise of constitutional rights:

> In addition, the Third Circuit has recognized that "[i]n the absence of legitimate countervailing concerns, the public interest clearly favors the protection of constitutional rights[.]" *Council for Alt. Pol. Parties v. Hooks*, 121 F.3d 876, 883-84 (3d Cir. 1997). Here, Defendant asserts only broad public safety concerns. The Court is mindful that firearms are inherently dangerous and even more so in the wrong hands, but it is also mindful that the PLCAA embodies Congress's earnest effort to balance those dangers against the national interest in protecting access to firearms. Under the circumstances, the Court is therefore compelled to find that Defendant fails to show legitimate countervailing concerns and that the public interest favors granting Plaintiff's motion for a preliminary injunction.[73]

The new Bloomberg laws, including Colorado's Senate Bill 23-168, are plainly designed to eliminate American firearms businesses through litigation costs.

In contrast, a New York federal court dismissed a challenge to a similar New York State statute.[74] The case is presently on appeal to the Second Circuit.

In terms of whether these laws are preempted by PLCAA, the best evidence comes from the man who signed the first such law in the nation, in 2021. New York Governor Andrew Cuomo said at the signing ceremony that the new bill would "right the wrong done 16 years" earlier, when Congress enacted PLCAA.[75]

The new Bloomberg laws, including Colorado's Senate Bill 23-168, are plainly designed to eliminate American firearms businesses through litigation costs.

Mr. Bloomberg, after all, is wealthier than the entire American firearms industry combined. His net worth is over 76 billion dollars.[76] Before PLCAA was enacted, the combined costs of defending against a few dozen abusive lawsuits were already driving firearms manufacturers out of business. Mr. Bloomberg can easily afford to file lawsuits by the hundreds or thousands. Even if most or all of those lawsuits fail, the litigation costs alone will eliminate the firearms industry. This is particularly so if the victims of

the abusive suits are prevented from recovering attorney's fees when plaintiffs abuse the system.

VAGUENESS

Legitimate gun control statutes provide businesses with fair notice of what is lawful and what is not. In Colorado, as elsewhere, there are many laws prescribing the paperwork and procedures for sales, for inventory controls, what kinds of buyers are prohibited, what sorts of arms may be sold under what procedures, and so on.

Violating specific gun control statutes renders a firearms business vulnerable to a civil suit for any resulting harm. PLCAA did not change the situation.

Firearms are controlled by thousands of statutes, ordinances, and regulations. Firearms are among most regulated common consumer products in the United States. Legislators who believe that there should be more "reasonable controls" can enact legislation to create specific new controls.

Instead of enacting specific reasonable controls, SB23-168 authorizes suits for not having unspecified "reasonable controls."

The bill lists various objectives of "reasonable controls," such as: preventing straw purchases, possession by prohibited persons, possession by people who might harm themselves or others, and firearms theft.[77]

All these are laudable objectives; the thousands of gun control laws attempt to advance those objectives. A firearms business that complies with all the laws has no way of knowing what the gun control/gun prevention lobbies in future lawsuits will deem to be "reasonable controls."

SB23-168 is not a mechanism for creating "reasonable controls." Rather, SB23-168 would turn Colorado courts into a national vehicle for the destruction of the firearm industry—the "death by a thousand cuts" lawsuit abuse program touted by the lawsuit architects.

SB23-168 is not a mechanism for creating "reasonable controls." Rather, SB23-168 would turn Colorado courts into a national vehicle for the destruction of the firearm industry—the "death by a thousand cuts" lawsuit abuse program touted by the lawsuit architects.

The bill even authorizes suits against businesses in other states that do not have whatever a plaintiff claims to be "reasonable controls."[78] A law-abiding business in Pennsylvania would have to guess about what the Colorado Attorney General or other Colorado plaintiff might one day deem to be not "reasonable."

The *New York Times*'s petition for certiorari in the *Sullivan* case had explained that civil libel suits were in some ways worse than the Sedition Act of 1798, because liability could be based on vague and amorphous standards.[79] The anti-gun suits of the turn of the century demonstrated a similar problem. The lawsuits did not claim that the defendants had violated any gun control laws; violation of such laws was and is valid grounds for tort liability. Instead, the gun ban plaintiffs claimed that gun businesses should be held liable for not making and selling firearms in whatever ways the gun control/prevention lobbies disapproved.

ELIMINATION OF PROXIMATE CAUSE

Normally, a tort plaintiff may only win damages from an alleged tortfeasor if there is "proximate cause" between the defendant's alleged act and the harm suffered by the plaintiff. As defined by the Colorado Supreme Court, proximate cause "means a cause which in natural and probable sequence produced the claimed injury. It is a cause without which the claimed injury would not have been sustained."[80] "Unlawful conduct that is broken by an independent intervening cause cannot be the proximate cause of injury to another."[81]

SB23-168 repudiates the rule of proximate cause. Instead, a special, inescapable theory of liability is invented. It applies solely to firearms businesses. There is a "presumption" of "proximate cause" "notwithstanding any intervening act by a third party."[82]

SB23-168 erases proximate cause. The bill creates a "presumption" that every firearms business is liable. No matter how remote the circumstances.

Suppose a Massachusetts gun manufacturer sells a handgun to a Tennessee wholesaler who sells it to a California retailer. A California consumer buys the handgun, in compliance with all of the state's very strict laws. Ten years later, the gun is stolen during a burglary, even though the consumer complied with California storage laws. The stolen gun is transacted from one gang to another, and eventually ends up in Colorado. There, it is used in a liquor store robbery.

Normally, the liquor store owner could not sue the Massachusetts manufacturer. The manufacturer complied with all laws. The burglary, the illegal gang-to-gang resales, and the robbery are all "independent intervening causes." Because there is no proximate cause, the Massachusetts manufacturer is not required to pay for what the robber stole from the cash register.

SB23-168 erases proximate cause. The bill creates a "presumption" that every firearms business is liable. No matter how remote the circumstances.

According to the U.S. Supreme Court, the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees."[83]

It would not be constitutional to eradicate the common law of proximate cause just so that people could sue newspapers into bankruptcy. Doing the same to firearms businesses is an equally direct attack on the Constitution.

LETTING ANTI-GUN GROUPS SUE IN THE NAME OF THE STATE OF COLORADO

Suppose that in the example described above, the liquor store owner does not want to sue the Massachusetts handgun manufacturer, Smith & Wesson.

Under SB23-168, the decision of the actual victim does not matter. No matter what the victim wants, "The Attorney General, or the Attorney General's designee" can bring a suit.[84]

There are no limits on the Attorney General's "designee." The "designee" can be a gun prevention organization.

Every time a gun is used in a crime in Colorado, "the Attorney General's designee" can sue every firearms business remotely related. Even though the businesses rigorously followed all gun control laws.

The "Attorney General's designee" can sue relentlessly. Even if the "designee" rarely wins, litigation costs will eradicate one business after another.

NO MATTER WHAT, THE FIREARMS BUSINESS MUST PAY

Normally, each side in a legal case pays its own attorney's fees. Like other states, Colorado law tries to protect people from abusive or frivolous lawsuits. When someone deliberately misuses the courts, the misuser must pay the legal costs of the victim of the misuse.

For example, if a lawyer signs a pleading or motion "for any improper purpose, such as to harass," the court "shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee." Colorado Rule of Civil Procedure 11.

The "Attorney General's designee" can sue relentlessly. Even if the "designee" rarely wins, litigation costs will eradicate one business after another.

Colorado's 2000 abuse prevention statute applied that principle to firearms lawsuits. Legitimate suits, such as about a firearm that malfunctioned, would go on as usual. Harassment suits were specifically defined. Plaintiffs who brought harassment cases would have to pay for the injuries inflicted on the victims.

SB23-168 repeals the 2000 protection against harassment suits.

Instead, the bill provides that anyone who sues firearms businesses and win "shall" be awarded "attorney's fees." In other words, the firearms business must pay for both sides of the case: its own attorneys who defended the business, and for the other side's attorney who attacked the business.

What if the firearms business defeats the case brought by lawsuit mill of the Attorney General and his "designee" gun prevention organizations? There will no compensation for the lawsuit abuse victims.

The rule of SB23-168 is: the firearms business always loses.

PROHIBITING YOUNG PEOPLE FROM LEARNING FIREARMS SAFETY

The prohibitionist intent of SB23-168 is also effectuated its ban on all design, sales, or marketing "targeted at minors." "A firearms industry member shall not manufacture, distribute, import, or offer for wholesale or retail sale a firearm industry product that is: . . . . (b) Designed, sold or market in a manner that is targeted at minors."[85]

As the gun prohibition lobbies well understand, preventing young people from being introduced to the shooting sports will make future generations less interested in protecting Second Amendment rights.

In Colorado, minors are and have always been allowed to lawfully own long guns. In Colorado, a "youth small game hunting license" is available to persons under 18 who pass a hunter safety class. Youth "big game licenses" are available to persons 12 to 17.[86]

Yet SB23-168 the bill would outlaw, for example, selling low-powered .22 caliber rifles to programs that teach firearms safety, hunter safety, and target shooting to young people. These include programs such as those run by the Boy Scouts, 4-H, gun clubs, and by hunting mentors certified by the Colorado Department of Parks and Wildlife.[87]

Some of the above organizations, as well as some manufacturers, such as Winchester, publish booklets teaching children the rules of firearms safety. These booklets help children safely participate in the shooting sports, such as target practice. This "marketing" to children would become illegal under SB23-168.

As the gun prohibition lobbies well understand, preventing young people from being introduced to the shooting sports will make future generations less interested in protecting Second Amendment rights.

Some manufacturers make low power (.22 caliber) rifles specifically intended to teach firearms safety to children. For example, the .22 caliber "Chipmunk" has an ammunition capacity of one round; there is no magazine. The stock length and frame are smaller than for standard adult rifles, making the Chipmunk an excellent gun to introduce a supervised child to safe firearms handling.

Banning the safe instruction of young people in firearms safety is a gun prohibition program. It is the opposite of fostering gun safety.

IV. LIKE PRINTING PRESS MANUFACTURERS, ARMS MANUFACTURERS MAY NOT BE CIVILLY LIABLE FOR THIRD-PARTY MISUSE OF THEIR PRODUCTS.

Aggrieved by an advertisement in a newspaper, Montgomery, Alabama, Commissioner L.B. Sullivan did not sue the manufacturer of the printing presses that the *Times* negligently misused to publish an advertiser's false statements. Allowing lawsuits against press manufacturers for third-party misuse would seriously curtail "the freedom . . . of the press."[88]

Similar constitutional principles apply to arms manufacturers. As law professor Edward Lee writes, to "the Framing generation, the connection" between presses and arms was "commonsensical. The right to bear arms and the freedom of the press presented the exact same type of question for the Framers: can there ever be a natural right to a man-made device? In the case of arms and presses, the Framers believed so."[89]

Before the American Revolution, owners of presses and of arms had both been harassed by English governments.[90] "It is not hard to imagine why the Framers singled out only these two technologies for constitutional protection," writes Lee. "Madison and his contemporaries spoke about the two rights in the same breath, and often in similar ways describing them separately as private rights, the 'palladium of liberty,' and necessary or essential to a 'free state.'"[91] This is one reason why the First and Second

Amendments were placed next to each other. Both safeguard natural rights—at least according to the Founders. And also according to the Colorado Constitution.[92]

Imposing tort liability for third-party misuse would eliminate press manufacturers and arms manufacturers. It has always been known that presses and arms are sometimes misused. In the words of the U.S. Supreme Court, "As Madison said, 'Some degree of abuse is inseparable from the proper use of every thing.'"[93]

According to the U.S. Supreme Court, similar principles apply to the First and Second Amendments.[94] Both the First and Second Amendments secure fundamental rights. Reform statutes against abusive lawsuits protect both Amendments.

This is one reason why the First and Second Amendments were placed next to each other. Both safeguard natural rights—at least according to the Founders. And also according to the Colorado Constitution.

V. HOW THE BRADY LOBBY AND THE ARNOLD & PORTER LAW FIRM DECEIVED THE PHILIPS

In 2012, a criminal attacked patrons at an Aurora, Colorado, movie theater. Among the murder victims was Jessica Ghawi, daughter of Sandy and Lonnie Phillips.

The Aurora perpetrator had no prior criminal record. All of his firearms and ammunition purchases complied with the law. The crime might have been prevented if persons who knew about his danger had alerted law enforcement, but they did not.

The perpetrator's homicidal desires were known to his psychiatrist at the University of Colorado. While psychiatrists must ordinarily maintain patient confidentiality, there is an exception, the Tarasoff Rule, when the patient threatens violence. Pursuant to that rule, the psychiatrist had broken confidentiality and alerted the Threat Assessment Team at CU. However, the danger of the incipient Aurora killer was shared only within the University of Colorado system. After he dropped out of the university, CU lost interest in him, and did not inform law enforcement about the danger.[95] The perpetrator could have been involuntarily committed for a 72 hour mental observation if a petition had been filed in court.[96]

The abusive lawsuits against firearms businesses, described in Part II of this Issue Paper, were created by a D.C. organization called Handgun Control, Inc. Previously, the organization had supported a Massachusetts ballot initiative to confiscate all handguns.[97] The group's head had described to the *New Yorker* a three-step plan to eliminate handguns: first, reduce handgun production and sales; second, get them all registered; third, make possession "totally illegal."[98]

Since 2001, the group has used a variety of permutations of "Brady," such as "Brady Center."

With the help of the Denver office of the international corporate law firm Arnold & Porter, the Brady group convinced the Philips to file an obviously meritless lawsuit against firearms businesses.

The widely-respected U.S. District Senior Judge Richard P. Matsch granted the defendants' motion to dismiss. His order described the case as an "all conceivable claims attack on these internet sellers, attempting to destroy their legitimate businesses and invalidate the federal and state statutes protecting them."[99]

Judge Matsch noted the absurdity of what the lawsuit was asking for:

> The injunctive relief requested is to stop all the defendants' commercial activities until their business practices have been changed and approved by the court. There is nothing in the record to indicate that the plaintiffs or the Brady Center, the apparent sponsor of this case, made any attempt to persuade the defendants to make any alterations of those practices before bringing this highly publicized lawsuit. It would be highly unlikely that the defendants would seek to emasculate their businesses to conform to an undefined standard of care that would have prevented a purchaser of their products from using them in a barbaric assault on innocent people in an entertainment venue.

With the help of the Denver office of the international corporate law firm Arnold & Porter, the Brady group convinced the Philips to file an obviously meritless lawsuit against firearms businesses.

The case never had a good-faith hope of legal success. It was just a publicity stunt, Judge Matsch wrote:

> It is apparent that this case was filed to pursue the political purposes of the Brady Center and, given the failure to present any cognizable legal claim, bringing these defendants into the Colorado court where the prosecution of James Holmes was proceeding appears to be more of an opportunity to propagandize the public and stigmatize the defendants than to obtain a court order.

To discourage vexatious abuse of the courts, Colorado had enacted a reform statute in 2000 providing for attorney's fees to defendants targeted by lawsuit abuse. Judge Matsch followed the law and made a fee award.

As reported in the *Colorado Sun*, "the Phillipses say they didn't fully understand the risks when two years after their daughter, Jessica Ghawi, was killed in the 2012 Aurora theater shooting, they sued four businesses patronized by the gunman."[100] The Brady group insists that it fully informed the Philips of the legal risks.[101]

The law firm that handled the case was the Denver branch of the D.C. megafirm Arnold & Porter. Neither the Philips nor the Brady group have suggested that Arnold & Porter clearly informed the Philips that their suit was almost certain to result in an award of attorney's fees. If Arnold & Porter failed to inform, the failure would be an extreme dereliction of legal duty to clients.

When awarding the attorney's fees, Judge Matsch wrote: "It may be presumed that whatever hardship is imposed on the individual plaintiffs by these awards against them may be ameliorated by the sponsors of this action in their name."

Judge Matsch was wrong. The entities that had abused the legal system did not reimburse the Philips the harms caused by the entities' misconduct. The Brady group

said it did not have enough money to help the Philips. The attorney's fees award was $213,001.86.[102] Brady's most recent report indicates annual revenues of over $41 million.[103] According to the group, "Over the past 30 years Brady has won over $60 million for victims of gun violence."[104]

Arnold & Porter's annual revenues are over one billion dollars. Profits per partner are over 1.5 million per partner.[105] If Arnold & Porter had reduced per-partner profits by several hundred dollars for one year, the firm could have paid the attorney's fees award caused by the firm's reckless and irresponsible publicity stunt.

For decades the Brady lobby has been abusing the legal process with meritless suits, trying to use ruinous litigation costs to impose an extremist agenda that has been repeatedly rejected by legislatures.

To stop lawsuit abuses, including the long-running abuses by Brady in particular, the Colorado legislature enacted reform statutes in 1986 and 2000. In a fair system, the perpetrators—and not the victims—of meritless, vexatious lawsuits should pay for the unnecessary costs imposed by the perpetrators.

The strongest evidence against SB23-168 is the Brady website. That website lists the many Brady lawsuits against firearms businesses. As the website shows, some of these cases led to substantial verdicts or settlements in favor of the plaintiffs, including successes achieved after PLCAA was enacted. Thus, PLCAA and similar state laws do not prevent meritorious suits against gun businesses. The reform statutes only prevent the junk lawsuits.

In a fair system, the perpetrators—and not the victims—of meritless, vexatious lawsuits should pay for the unnecessary costs imposed by the perpetrators.

Conspicuously absent from the Brady website's list of cases is the Philips case.[106] A search of the Brady website for "Philips" returns no results. The organization's treatment of the Philips has been poor.

The Philips case was the only Colorado tort case involving guns where attorney's fees were awarded pursuant to the state's reform statute.

Meanwhile, legitimate tort cases continue. For example, currently pending in U.S. District Court in Colorado is a case against Kahr Arms; the plaintiff alleges that a Kahr handgun discharged when the gun was dropped.[107] Lawsuits against manufacturers of firearms that actually are defective have always been proper and lawful, in Colorado and nationally.

There is a word for Brady claiming that it is the victim of harm it inflicted on the Philips, and many other innocent persons, through abuse of the legal process. The word is *chutzpah*.

ENDNOTES

1 David Wallace, MASSIVE RESISTANCE AND MEDIA SUPPRESSION: THE SEGREGATIONIST RESPONSE TO THE DISSENT DURING THE CIVIL RIGHTS MOVEMENT 43–44 (2013).
2 Aimee Edmondson, IN SULLIVAN'S SHADOW: THE USE AND ABUSE OF LIBEL LAW ARISING FROM THE CIVIL RIGHTS MOVEMENT 17–71 (2019).
3 Edmondson, at 40–51.
4 *Id.* at 57–61.
5 Wallace, at 70–71, 92–94.
6 *Id.* at 95–101.
7 Edmondson, at 128.
8 376 U.S. 254, 256 (1964).
9 Kermit L. Hall & Melvin I. Urofsky, NEW YORK TIMES V. SULLIVAN 61–64 (2011).
10 Harrison Salisbury, *Fear and Terror Grip Birmingham*, N.Y. TIMES, Apr. 8, 1960.
11 Edmondson, at 99–120. After the *Sullivan* decision, the verdict based on the Salisbury article was overturned. *New York Times v. Connor*, 165 F.2d 567 (5th Cir. 1966).
12 Wallace, at 183–84.
13 *Id.* at 186–87.
14 Edmondson, at 121.
15 *Id.* 120–25.
16 Grover Hall, *State Finds Formidable Legal Club to Swing at Out-of-State Press*, MONTGOMERY ADVERT., May 22, 1960.
17 Hall & Urofsky, at 85.
18 Wallace, at 188; see also Anthony Lewis, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 107 (1992).
19 Edmondson, at 2.
20 Rodney Smolla, SUING THE PRESS 43 (1986).
21 Wallace, at 187.
22 *Id.* at 188.
23 *See Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (overturning conviction for loitering).
24 *New York Times Co. v. Sullivan*, 273 Ala. 656, 665 (1962); Hall, at 61–64.
25 Hall, at 69. Besides intimidating ministers, suing the four prevented removal of the state court case to federal court on diversity jurisdiction grounds. Lewis, at 13–14.
26 *Sullivan*, 376 U.S. at 294–95 (Black, J., concurring).
27 Wallace, at 174–75.
28 *Curtis Pub. Co. v. Birdsong*, 360 F.2d 344 (5th Cir. 1966) (reversing verdict for plaintiffs); Edmondson, at 146–53.
29 Even after *Sullivan* was decided, Supreme Court action was still necessary against libel abuse. *See e.g., Henry v. Collins*, 380 U.S. 356 (1965) (reversing libel verdicts for criticism of law enforcement misconduct); *Associated Press v. Walker*, 388 U.S. 130 (1967) (extending actual malice rule to public figures); Edmondson, at 136–46, 153–62 (discussing *Henry* and the many suits by Mississippi segregationist leader Edwin Walker).
30 *See* David Kopel & Richard Gardiner, *The Sullivan Principles: Protecting the Second Amendment from Civil Abuse*, 19 SETON HALL LEGISL. J. 737, 750 n.43 (1995) (listing 26 cases decided 1983–90, plus one from 1973).
31 Patterson v. Rohm Gesellschaft, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985).
32 *Kelley v. R.G. Indus.*, Inc., 304 Md. 124 (1985). The new legal theory was later overturned by statute. 1988 Md. Laws, ch. 533.
33 *E.g., Hamilton v Beretta* 264 F.3d 21 (2d. Cir. 2001).
34 *Cf. Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697 (1931) (voiding public nuisance case against newspaper).
35 *The HUD Gun Suit*, WASH. POST, Dec. 17, 1999.
36 Fred Musante, *After Tobacco, Handgun Lawsuits*, N.Y. TIMES, Jan. 31, 1999.
37 *Id.* (quotations omitted).
38 Peter Boyer, *Big Guns*, NEW YORKER, May 17, 1999.
39 Fox Butterfield, *Lawsuits Lead Gun Maker To File for Bankruptcy*, N.Y. TIMES, June 24, 1999.
40 Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASH. POST, Mar. 18, 2000.
41 Walter Olson, *Plaintiffs Lawyers Take Aim at Democracy*, WALL ST. J., Mar. 21, 2000.
42 Paul Barrett, *Lawsuits Trigger Gun Firms' Bankruptcy*, WALL ST. J., Sept. 13, 1999.
43 Butterfield, *supra.*
44 Mike Allen, *Colt's to Curtail Sale of Handguns*, N.Y. TIMES, Oct. 11, 1999.

45 *Agreement Between Smith & Wesson and the Departments of the Treasury and Housing and Urban Development, Local Governments and States*, U.S. DEPARTMENT OF HOUSING AND DEVELOPMENT (summary), https://archives.hud.gov/news/2000/gunagree.html. *See also* David Kopel, *Smith and Wesson's Faustian Bargain*, NAT'L REV. ONLINE, Mar. 20 & 21, 2000, https://www.davekopel.com/NRO/2000/Smith-and-Wesson's-Faustian-Bargain.htm.

46 Jonathan Wesiman, *Gun maker, U.S. reach agreement*, BALT. SUN, Mar. 18, 2000. It turned out to be a bad bargain for Smith & Wesson. Not even one of the lawsuits against the company was dismissed. Instead, the company was sued in more cases filed the next year.

47 *Id.*

48 Id.

49 *Agreement* (paragraph titled "Oversight Commission").

50 Walter Olson, THE RULE OF LAWYERS 125–26 (2003).

51 146 CONG. REC. H2017 (Apr. 11, 2000) (Rep. Stearns).

52 Olson, at 127.

53 *Id.*

54 *Id.* Ironically, Attorney General Blumenthal overlooked an actual illegal antitrust conspiracy that was taking place. Andrew Cuomo and Elliot Spitzer conspired with city governments for the cities to only buy guns for municipal law enforcement agencies from manufacturers that had acquiesced to the "code of conduct" giving city appointees control over the manufacturers. The conspiracy was terminated after an antitrust lawsuit was filed. *National Shooting Sports Foundation et al. v. Cuomo et al.*, No. 00-CV-1063 (N.D. Ga. Sept. 5, 2000). The antitrust violations having ceased, the plaintiffs voluntarily dismissed their case without prejudice.

55 One such case, brought by the government of Gary, Indiana, is still going on a quarter of a century later.

56 146 CONG. REC. H2017 (Apr. 11, 2000).

57 151 CONG. REC. S9087 (July 27, 2005).

58 *Id.* at S9059.

59 Id.

60 151 CONG. REc. S9063 (July 27, 2005) (Sen. Sessions, R-Ala.).

61 https://www.govtrack.us/congress/votes/109-2005/s219 (vote); https://www.govtrack.us/congress/bills/109/s397/cosponsors (cosponsors)

62 https://clerk.house.gov/evs/2005/roll534.xml (vote); https://www.congress.gov/bill/109th-congress/house-bill/800/cosponsors (cosponsor of similar House bill).

63 151 CONG. REC. S9395 (July 29, 2005).

64 15 U.S.C. § 7901(a)(2), (6), (7).

65 15 U.S.C. § 7901(a)(8). See also Glenn Reynolds, *Permissible Negligence and Campaigns to Suppress Rights*, 68 FLA. L. REV. FORUM 51, 57 (2016).

66 15 U.S.C. § 7901(a)(7)-(8).

67 15 U.S.C. § 7901(a)(5).

68 15 U.S.C. § 7903(5)(A)(iii).

69 C.R.S. §§ 13-21-501 to 505.

70 *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008). The court is the highest court for home rule District. It is not the same as the U.S. Court of Appeals for the District of Columbia Circuit.

71 *Ileto v. Glock*, Inc., 349 F.3d 1191 (9th Cir. 2003).

72 National Shooting Sports Foundation v. Platkin, No. 22-6646 (ZNQ)(TJB), 2023 WL 1380388 *7 (D.N.J. Jan. 13, 2023).

73 *Id.* at *9.

74 *National Shooting Sports Foundation, Inc. v. James*, 604 F.Supp.3d 48 (N.D.N.Y. 2022).

75 Gov. Andrew M. Cuomo, *Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York* at 35:00-38:15, YouTube (July 6, 2021), https://bit.ly/3UyZoSx.

76 Forbes magazine estimate, as of Feb. 27, 2023, https://www.forbes.com/profile/michael-bloomberg/?sh=54deec951417

77 SB23-168, to create C.R.S. § 6-27-104(4).

78 A lawsuit can be brought if any "firearms industry product" was used in Colorado, "and it was reasonably foreseeable that the product would be used or possessed in the state." SB23-168, to create C.R.S. § 6-27-104(1)(c). Since it is legal for consumers in one state to sell a firearm to someone in another state (by routing the sale through licensed dealers in both states), it is "reasonably foreseeable" that a firearm sold in one state could eventually end up in any other state. It is likewise foreseeable that a firearm sold in one state might one day be stolen from the lawful owner, enter the national black market, and end up in any other state.

79 Hall, at 122–26. PLCAA is not the only federal statute preempting tort suits involving speech. *See* Health Care Quality Improvement Act, 42 U.S.C. §11111–12 (peer review); Labor Management Relations Act, 29 U.S.C. §185 (speech that would require interpretation of the collective bargaining

agreement); Railway Labor Act, 45 U.S.C. §151a (same); Federal Election Commission Act, 52 U.S.C. §30107(c) ("disclosing information at the request of the Commission"). The Fair Credit Reporting Act creates an extensive regulatory scheme and shields compliant businesses from civil liability. 15 U.S.C. §1681. PLCAA does the same for businesses that comply with the vast panoply of gun control laws and regulations.

80 *People v. Stewart*, 55 P.3d 107, 116 (Colo. 2002).

81 Id. at 121.

82 SB23-168, to create C.R.S. § 6-27-105(4)(b).

83 *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010).

84 23-168, to create C.R.S. § 6-27-105(2).

85 SB23-168, to create C.R.S. § 6-27-104(3).

86 Colo. Rev. Stat. § 33-4-117.

87 The state government program is described here: https://cpw.state.co.us/learn/Pages/OutreachHuntsmaster.aspx.

88 U.S. Const., amend. I.

89 Edward Lee, *Guns and Speech Technologies: How the Right to Bear Arms Affects Copyright Regulations of Speech Technologies*, 17 WM. & MARY BILL OF RIGHTS J. 1037, 1049–50 (2009).

90 *Id.* at 1058–64.

91 *Id.* at 1070.

92 "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their lives and liberties; of acquiring, possessing and protecting property; and of seeking and obtaining their safety and happiness." Colo. Const., art. II, § 3.

93 *Sullivan*, 376 U.S. at 271 (citing 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 571 (1876)).

94 *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 784 (1950) (describing the First, Second, Fourth, Fifth, and Sixth Amendments as the "civil-rights Amendments."); *Konigsberg v. State Bar of California*, 366 U.S. 36, 51 n.10 (1961) (comparing "the commands of the First Amendment" to "the equally unqualified command of the Second Amendment."); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) ("'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments" are likely the same persons); *United States v. Cruikshank*, 92 U.S. 542, 551–52 (1875) (rights protected by the First and Second Amendments predate the Constitution); *McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees that we have held to be incorporated into the Due Process Clause.").

95 David B. Kopel & Clayton Cramer, *Reforming Mental Health Law to Protect Public Safety and Help the Severely Mentally Ill*, 58 HOWARD LAW JOURNAL 715, 765–69 (2015).

96 Colo. Rev. Stat. § 27-65-106 (2010).

97 Letter from Nelson T. Shields, III, Exec. Dir., Nat'l Council to Control Handguns (1976) (fundraising letter for campaign to support the initiative) (on file with author). Before adopting the name "Handgun Control, Inc." the group had called itself the National Council to Control Handguns.

98

> The first problem is to slow down the increasing number of handguns being produced and sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of all handguns and all handgun ammunition-except for the military, policemen, licensed security guards, licensed sporting clubs, and licensed gun collectors-totally illegal.

Richard Harris, A *Reporter at Large: Handguns*, NEW YORKER, July 26, 1976, at 58.

99 *Philips v. LuckyGunner*, No. 14-cv-02822-RPM (June 17, 2015).

100 Jesse Paul, *Colorado law makes it very difficult and financially perilous to sue the gun industry. That's likely to change*, COLO. SUN, Feb. 21, 2023.

101 Stephen Gutowski, *Aurora Victim's Family Says Gun-Control Group Misled Them on Risks of 'Meritless' Lawsuit That Drove Them into Bankruptcy*, THE RELOAD, Feb. 22, 2023, https://thereload.com/aurora-victims-family-says-gun-control-group-misled-them-on-risks-of-meritless-lawsuit-that-drove-them-into-bankruptcy/

102 For the three defendants, the amounts were, respectively, $111,971.10; $59,060.87; and $31,969.89. Total was $213,001.86.

103 "Total revenue $41,322,000." Of that, "contributed services" were said to be $30,000,000. Brady United Against Gun Violence, Annual Report Fiscal Year 2021, at 18, https://s3.amazonaws.com/brady-static/AR-FY21-v11.pdfs .

104 Brady spokesperson Mike Stankiewicz, quoted in Gutowski, *Aurora Victim's Family Says Gun-Control Group Misled Them*.

105 Law.com, https://www.law.com/law-firm-profile/?id=162319&name=Arnold-%26-Porter&slreturn=20230127183913. The firm's full name is Arnold & Porter Kaye Scholer, reflecting the firm's 2016 merger with a New York firm.
106 Brady Leading in the Courtroom, https://www.bradyunited.org/legal-cases.
107 *Heikkila v. Kahr Firearms Group*, No. 1:2020cv02705 (D. Colo., filed Sept. 4, 2020). Docket page: https://dockets.justia.com/docket/colorado/codce/1:2020cv02705/200610.

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ADDITIONAL RESOURCES on this subject can be found at: https://davekopel.org/2dAmendment.htm#Lawsuits.

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