

In the  
State of Wisconsin  
Court of Appeals  
District I

Yasmeen Daniel, Individually, and as Special Administrator  
of the Estate of Zina Daniel Haughton,

*Plaintiff-Appellant,*

Travelers Indemnity Company of Connecticut,  
as Subrogee for Jalisco's LLC,

*Intervening Plaintiff,*

v.

ARMSLIST, LLC, an Oklahoma Limited Liability Company,  
Brian Mancini and Jonathan Gibbon,

*Defendants-Respondents,*

Broc Elmore, ABC Insurance Co., the fictitious name for an unknown  
insurance company, DEF Insurance Co., the fictitious name for an unknown  
insurance company and Estate of Radcliffe Haughton, by his Special

Administrator Jennifer Valenti,

*Defendants,*

Progressive Universal Insurance Company,

*Intervening Defendant.*

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On Appeal from the Circuit Court of Milwaukee County,  
Civil Division, No. 2015CV008710.

The Honorable Glenn H. Yamahiro, Presiding Judge.

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**BRIEF OF *AMICUS CURIAE* EVERYTOWN FOR GUN SAFETY IN  
SUPPORT OF PLAINTIFF-APPELLANT**

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## **PRELIMINARY STATEMENT**

*Amicus curiae* Everytown for Gun Safety (“Everytown”) is the nation’s largest gun violence prevention organization, with supporters in all fifty states fighting for public safety measures that respect the Second Amendment and help save lives. Everytown was founded in 2014 as the combined effort of Mayors Against Illegal Guns, a national, bipartisan coalition of mayors combating illegal guns and gun trafficking, and Moms Demand Action for Gun Sense in America, which was formed in the wake of the murders of twenty children and six adults at an elementary school in Newtown, Connecticut.

A critical part of Everytown’s mission is advocating for comprehensive, consistent enforcement of federal and state laws that are designed to prevent individuals convicted of felonies and domestic violence crimes, and other prohibited persons, from having access to guns. Over the past several years, Everytown has conducted investigations in multiple states documenting how such prohibited persons routinely turn to Armslist.com (“Armslist”) and other websites to purchase guns they are not legally permitted to possess.

To be clear, Everytown does not contend that online gun sales are always a threat to public safety. But the tragedy underlying this case epitomizes the critical importance of holding accountable online marketplaces like Armslist that irresponsibly and by design enable prohibited people to obtain guns. On October 18, 2012, Zina Haughton (“Zina”) obtained a restraining order against her husband Radcliffe (“Haughton”) that prohibited him from approaching her or possessing a firearm for four

years. The court found there was “clear and convincing evidence” that if he had a firearm, he might use it to harm her and endanger public safety. That order and Wisconsin law made it a crime for Haughton to contact Zina or buy a firearm. Federal law also prohibits people subject to such orders from possessing a firearm.

Two days after the court signed the order, Haughton accessed Armslist’s online marketplace, which connects gun sellers and prospective purchasers, including people like Haughton who are not permitted to buy or own guns. Haughton connected with a stranger on Armslist and arranged to buy a handgun and three high-capacity magazines in a McDonald’s parking lot for \$500 with no questions asked and no background check. The next day, Haughton walked into the spa where Zina worked, used the handgun to murder her and two co-workers and injure four others, and then killed himself.

These facts are heart-breaking. Tragically, they are not unique. Countless deaths from gun violence have been traced to illegal on-line gun sales. Everytown’s extensive empirical research, reviewed below, shows that criminals and other prohibited persons flock to online sites to illegally purchase firearms. Not surprisingly criminals and terrorists trumpet the ease with which they can obtain guns in this country through such online sources, with no questions asked and no background check. The Islamic State recently encouraged recruits in the U.S. to seek out gun shows and online sales for easy access to firearms.<sup>1</sup>

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<sup>1</sup> Derek Hawkins, *Islamic State Magazine Steers Followers to U.S. Gun Shows for ‘Easy’ Access to Weapons*, WASH. POST (May 5, 2017), <https://www.washingtonpost.com/news/morning->

Armslist poses an unacceptable risk to public safety because it is designed to undermine state and federal gun laws by facilitating unlicensed, no-questions-asked gun sales to a population that foreseeably includes a significant percentage of individuals who are legally prohibited from purchasing the guns. At a minimum, with the freedom to profit from such an online marketplace should come the responsibility to bear the costs of the resulting foreseeable harm. The Communications Decency Act (the “CDA”) should not be interpreted to abrogate Wisconsin’s common law of negligence by giving Armslist a free pass.

## **ARGUMENT**

### **I. ARMSLIST POSES AN UNACCEPTABLE THREAT TO PUBLIC SAFETY**

Like the Armslist marketplace Haughton used to obtain the gun he fired to murder Zina and her co-workers, online gun sales with no questions asked and without background checks have armed numerous criminals who have taken countless innocent lives, including the lives of many children. For just a few examples:

- On December 1, 2015, a convicted felon fatally shot his ex-girlfriend and three others, before killing himself. His conviction for abduction of an intimate partner with use of a firearm barred him from possessing a firearm. But he was able to buy his handgun online from an unlicensed seller.<sup>2</sup>

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[mix/wp/2017/05/05/islamic-state-magazine-steers-jihadists-to-u-s-gun-shows-for-easy-access-to-weapons/?utm\\_term=.d52ab5a332fa](http://www.wisconsin.gov/2017/05/05/islamic-state-magazine-steers-jihadists-to-u-s-gun-shows-for-easy-access-to-weapons/?utm_term=.d52ab5a332fa) (quoting the Islamic State’s propaganda magazine: “In most U.S. states, anything from a single-shot shotgun all the way up to a semi-automatic AR-15 rifle can be purchased at showrooms or through online sales—by way of private dealers—with *no background checks, and without requiring either an ID or a gun license.*”) (emphasis added).

<sup>2</sup> Merris Badcock, *Morgantown Shooter Previously Convicted of Abduction, Use of Firearm*, WHAG (Dec. 3, 2014), <http://www.your4state.com/news/morgantown-shooter-previously-convicted-of-abduction-use-of-firearm/203056312>.



- On August 8, 2015, a man shot and killed his former domestic partner, her husband and their six children. He was able to buy his handgun online, even though his lengthy criminal history prohibited him from possessing firearms and meant he could not pass a background check.<sup>3</sup>
- On December 22, 2014, a man shot and wounded his ex-girlfriend, and killed her ten-year-old daughter and himself. He was prohibited from possessing firearms due to a conviction for carrying a firearm without a license. But he was able to obtain his murder weapon in an unlicensed online sale where no background check was required.<sup>4</sup>

These and many other tragedies may have been avoided if irresponsible online marketplaces had not facilitated gun sales that foreseeably included a significant percentage of illegal sales to people prohibited from buying firearms.<sup>5</sup>

Under federal and Wisconsin law, several classes of individuals are prohibited from purchasing or possessing a firearm, including felons and certain domestic abusers. *See* 18 U.S.C. § 922(g); Wis. Stat. § 941.29(1m). Licensed gun dealers are required to conduct background checks on prospective gun purchasers, *see* 18 U.S.C. § 922(t); Wis. Stat. § 175.35(2), and such dealers and private sellers are barred from selling firearms to prohibited purchasers. *See* 18 U.S.C. § 922(d); Wis. Stat. § 941.29(4). However, neither federal nor Wisconsin law requires background checks for sales by unlicensed private sellers, including sales to strangers they meet online, even though

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<sup>3</sup> Miya Shay, *Exclusive: Family Massacre Suspect Reportedly Details How Killings Were Planned and Executed*, KTRK (Aug. 11, 2015), <http://abc13.co/1h3S4Ln>.

<sup>4</sup> Katherine Loy, *Accused shooter of ten-year-old had violent history*, WDTN (Dec. 23, 2014), <http://wdtn.com/2014/12/23/child-killed-in-preble-county-shooting/>.

<sup>5</sup> Recognizing these known and grave dangers of online gun sales, Craigslist and Facebook made the responsible business decision to prohibit them. *See, e.g.*, Vinu Goel & Mike Isaac, *Facebook Moves to Ban Private Gun Sales on Its Site and Instagram*, N.Y. TIMES (Jan. 29, 2016), <https://www.nytimes.com/2016/01/30/technology/facebook-gun-sales-ban.html>.

studies show gun homicides are significantly reduced when background checks are required.<sup>6</sup>

Everytown's studies have found that online gun marketplaces are extensive and attract buyers who are legally barred from possessing a gun. We review below the results of four of these investigations—in Nevada, Oregon, Washington and New Mexico—which demonstrate the enormous threat to public safety posed by websites that facilitate unlicensed gun sales with no questions asked and no background checks.

#### **A. Nevada**

Everytown's investigation between 2014 and 2016 showed the online market for guns in Nevada is very large. Unlicensed sellers posted an estimated 35,862 unique gun ads annually on four websites, including Armslist.<sup>7</sup>

Between August 24, 2015 and September 17, 2015, Everytown investigators posted 19 unlicensed private sale ads on Armslist and Facebook offering firearms for sale in Nevada. They received 394 responses. The investigators used the information the would-be buyers provided (including names, telephone numbers, and email addresses) to identify the buyers with reverse lookup telephone data or other

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<sup>6</sup> See *Connecticut Handgun Licensing Law Associated With 40 Percent Drop in Gun Homicides*, Johns Hopkins Bloomberg School of Public Health (June 11, 2015), <http://www.jhsph.edu/news/news-releases/2015/connecticut-handgun-licensing-law-associated-with-40-percent-drop-in-gun-homicides.html>; *Repeal of Missouri's Background Check Law Associated with Increase in State's Murder*, Johns Hopkins Bloomberg School of Public Health (Feb. 17, 2014), <http://www.jhsph.edu/news/news-releases/2014/repeal-of-missouris-background-law-associated-with-increase-in-states-murders.html>.

<sup>7</sup> *The Wild Wild Web, Investigating Online Gun Markets in Nevada*, Everytown for Gun Safety, 3, 7–9 (Jan. 2016), <https://everytownresearch.org/reports/the-wild-wild-web/>.

sources.<sup>8</sup> They searched publicly available court records to determine whether these individuals were prohibited from possessing a gun.

The results were extremely troubling, but not unexpected.<sup>9</sup> To take just a few examples, within the less-than-one-month investigative period, Everytown investigators received inquiries from:

- A 23-year old who contacted investigators on Armslist about a handgun listing, even though he was prohibited from possessing firearms due to a conviction for shooting three people.
- A 21-year-old who responded to six advertisements on Armslist, even though he was prohibited from possessing firearms due to a conviction for felony possession of a stolen pistol.
- A 24-year-old who responded to two ads on Armslist, even though he was prohibited from possessing firearms due to convictions for felony breaking and entering and assault with a dangerous weapon.
- A 44-year-old who answered an Armslist ad for a handgun, even though he had a history of domestic violence that barred him from buying guns.
- A 26-year-old who sought a handgun on Armslist, even though he was prohibited from possessing firearms because of a conviction for robbery with a deadly weapon.<sup>10</sup>

In total, Everytown's Nevada investigation showed that online gun shoppers who sought to purchase guns in unlicensed private sales were more than six times more likely to be prohibited from possessing firearms than were people who try to buy guns at licensed dealers (8.9% versus 1.3%). The disparity strongly suggests that

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<sup>8</sup> *The Wild Wild Web*, *supra* n.7 at 8–15.

<sup>9</sup> As early as December 2011, New York City published the results of an undercover investigation of online gun sales which showed that 62% of private online gun sellers (including 54% on Armslist) agreed to sell a firearm to a buyer who said he probably could not pass a background check. *Point, Click, Fire, An Investigation of Illegal Online Gun Sales*, Everytown for Gun Safety, 3, 10–11 (Dec. 2011), <https://everytownresearch.org/reports/point-click-fire/>.

<sup>10</sup> *The Wild Wild Web*, at 8–15.

criminals flock to online gun sales to take advantage of the absence of background checks and even minimal safeguards. Everytown's investigation estimated that at these rates, in just a single year, Armslist and the other three websites in Nevada could have put as many as 3,100 guns into the hands of the 8.9% of online purchasers who were felons, domestic abusers or otherwise barred from possessing firearms.

## **B. Oregon**

Oregon's online market for guns is also vast. Everytown investigated four websites, including Armslist, which in the 2014-2015 period were estimated to include approximately 25,000 ads for guns by unlicensed Oregon sellers each year. That dwarfs the number of unlicensed sales at Oregon gun shows, which averaged 417 annually between 2000 and 2013 according to the Oregon State Police.<sup>11</sup>

In 2013, Oregon gun dealers conducted 274,302 background checks, of which 3,982, or 1.45%, revealed that the potential purchasers were prohibited from buying guns. In stark contrast, Everytown's investigation revealed that the percentage of people who are prohibited from possessing a firearm but nevertheless tried to buy a gun in an unlicensed online sale in Oregon was *nearly four times higher*, or 5.4%. As in Nevada, the far higher concentration of prohibited purchasers in Oregon seeking guns

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<sup>11</sup> Oregon closed the gun show loophole in 2000 in response to the Columbine shooting, but did not prohibit online sales.

online indicates that criminals use unlicensed, no-questions-asked online gun sales to evade background checks that are required elsewhere.<sup>12</sup>

Based on the results of the Oregon investigation, Everytown estimated that Armslist and the three other Oregon websites could be enabling prohibited purchasers to illegally acquire as many as 1,360 guns annually.<sup>13</sup> The investigation also showed that the share of would-be gun buyers in Oregon with a history of domestic abuse is particularly high. More than a quarter of the prohibited gun-seekers in Everytown's investigation had been convicted of a domestic violence crime or were subject to a restraining order. That is particularly frightening because the presence of a gun in a domestic violence situation makes it five times more likely that the woman will be murdered.<sup>14</sup>

### **C. Washington**

Washington state's online market for guns is even bigger than Nevada's and Oregon's. Everytown's 2013/2014 investigation in Washington determined that, on an annual basis, unlicensed private sellers posted more than an estimated 40,000 gun sale ads on just five websites, including Armslist. More than 1 in 10 people seeking a firearm from an unlicensed online seller in Washington was prohibited from possessing a gun. At these rates, gun sales on the five tested websites could have put as many as 4,400 guns in the hands of felons and domestic abusers in Washington in a single year.

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<sup>12</sup> *No Questions Asked, How Oregon's Meth Users and Domestic Abusers Shop Online for Guns*, Everytown for Gun Safety, 3, 4 & n.4, 6, 9 (Apr. 2015), <https://everytownresearch.org/reports/no-questions-asked/>.

<sup>13</sup> *Id.* at 9.

<sup>14</sup> *Id.*

The proportion of would-be online Washington gun buyers with a history of domestic abuse was also strikingly high. The people seeking guns online in Everytown’s investigation were *41 times* more likely to have a domestic violence history that prohibits them from possessing a firearm than were people seeking guns from licensed dealers in Washington (nearly 4% versus fewer than 0.1%).

Would-be online gun buyers in Washington included individuals with lengthy criminal histories who have committed violent crimes that bar them from purchasing weapons, including:

- An individual convicted of felony car theft, misdemeanor domestic violence, and assaulting a police officer. His wife’s request for a restraining order said he threatened to “go buy a gun so he could knock me off and not have to worry about where I was or what I was doing.”
- A man who was convicted of domestic violence assault, which prohibited him from possessing a firearm, and charged with raping a woman he had intimidated with a handgun.
- A 27-year-old who was convicted of felony residential burglary and signed a document affirming his ineligibility to possess firearms.
- A man seeking a lower receiver for an assault rifle who had previously been convicted of felony robbery and sentenced to 10 years in prison.<sup>15</sup>

#### **D. New Mexico**

Everytown’s 2015–2016 investigation in New Mexico showed that unlicensed New Mexico gun sellers posted more than 4,000 unique gun ads annually on Armslist and another website. The individuals who tried to purchase a gun online in an unlicensed sale by Everytown investigators (most of them on Armslist) were *four times*

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<sup>15</sup> *Online and Off the Record, Washington State’s Vast Internet Gun Market*, Everytown for Gun Safety, 3, 5, 8 (Sept. 2014), <https://everytownresearch.org/reports/online-and-off-the-record/>.

*more likely* to have a criminal record that made it illegal for them to purchase a gun—including convictions for child abuse, domestic violence, heroin distribution, and attempted kidnapping—than were would-be purchases from New Mexico’s licensed dealers (6.7% versus 1.5%).<sup>16</sup>

\* \* \*

While Everytown’s research demonstrates the tremendous risk that unlicensed, no-questions-asked online gun sales pose in the states it has studied, this case shows that Wisconsin is no exception. As Armslist has done for years and continues to do across the country, it provided Haughton with a platform designed to facilitate the kind of no-questions-asked, no-background-check purchase of a gun that undercuts the purpose of Wisconsin’s gun laws and all too often—and foreseeably—leads to an illegal sale, violence, and tragedy.

## **II. THE CDA SHOULD NOT BE CONSTRUED TO ABROGATE WISCONSIN’S COMMON LAW OF NEGLIGENCE**

The CDA should not be construed to abrogate Wisconsin’s common law of negligence, which protects Wisconsinites from the foreseeable risk of harm resulting from Armslist’s choice to create, and profit from, its online marketplace for unlicensed, no-questions-asked gun sales without background checks.

Tort law has long offered compensation for injuries from intrinsically dangerous conduct that causes foreseeable harm to the public. As the Wisconsin Supreme Court explained fifty years ago, the “policy of our law is to provide

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<sup>16</sup> *Danger in The Land of Enchantment, Investigating Online Gun Sales in New Mexico*, Everytown for Gun Safety, 3, 5 (Feb. 2017), <https://everytownresearch.org/reports/danger-land-enchantment/>.

compensation to a person when he has been negligently injured. The reasons for this policy are manifold. Among them are that the wrongdoer should bear the cost of an injury because of his causal fault . . . , and that to the extent that damages in a negligence action are punitive, it is hoped that the burden of a judgment may deter like conduct by others.” *Wilcox v. Wilcox*, 26 Wis. 2d 617, 631–32 (1965); see *Bielski v. Schulze*, 16 Wis.2d 1, 11 (1960) (courts “apply principles of common law to new situations as the need ar[ises]”).

Wisconsin has long protected the public from a defendant’s use of dangerous means to accomplish a lawful end, *Kellogg v. Chi. & N. R. Co.*, 26 Wis. 223, 233 (1870), and required that such conduct “pay its way.” Restatement of Torts § 519, comment d; see also *Fortier v. Flambeau Plastics Co.*, 164 Wis. 2d 639, 667 (1991); Prosser & Keeton, *Law of Torts* 536 (5th ed. 1984). For example, the common law protects the public from “damages . . . caused by high explosives” used in construction, even though that use is legal, because “those who carry on ultrahazardous activities . . . have thereby for their own purposes created a risk which is not a usual incident of the ordinary life of the community.” *Brown v. L.S. Lunder Const. Co.*, 240 Wisc. 122, 128 (1942).

Wisconsin prohibits the possession of firearms by individuals convicted of felonies or crimes of domestic violence and other prohibited persons, whether the gun is purchased from a private individual or a licensed firearms dealer. Wis. Stat. § 941.29(1m). The policies embodied in the CDA do not support the abrogation of Wisconsin’s tort law, which should protect the public from the enormous and foreseeable



risk created by Armslist's online marketplace—a marketplace that by design makes it easy for legally prohibited and dangerous individuals to buy firearms illegally with no questions asked and no background check.

### CONCLUSION

The Court should reverse the order dismissing the Complaint against Armslist.

Dated this 3rd day of August, 2017.

Respectfully submitted,

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## FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Section 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,993 words, exclusive of the Cover Sheet, Table of Contents, and Table of Authorities.

Dated at Appleton, Wisconsin this 3rd day of August, 2017.

/s/ Crystal N. Abbey

Crystal N. Abbey

*Counsel for Amicus Curiae Everytown for Gun Safety*

**CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this brief, excluding any appendix, that complies with the requirements of Wis. Stat. § 809.19(12).

The content, text, and format of the electronic copy of the brief are identical to the original paper copy of the brief filed with the Court on today's date.

A copy of this certification was included with the paper copies of this brief filed with the Court and served on all parties and counsel of record.

Dated at Appleton, Wisconsin this 3rd day of August, 2017.

/s/ Crystal N. Abbey

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## CERTIFICATION OF MAILING

I hereby certify that on August 3, 2017, I deposited this Brief in the United States mail for delivery by first class mail to the following:

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