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## MEMORANDUM IN SUPPORT OF AMENDING GUN IMMUNITY LAW

*We urge support for two PLCAA amendments to ensure gun manufacturer accountability*

### Introduction

The Protection of Lawful Commerce in Arms Act (PLCAA) passed in 2005.<sup>1</sup> PLCAA immunizes gun “manufacturers, distributors, dealers, and importers”<sup>2</sup> from liability for gun violence due to a firearm’s “criminal or unlawful misuse.”<sup>3</sup> Accordingly, individuals have been barred from seeking compensation for their injuries, while cities have been unable to recover economic and public health costs or obtain injunctive relief. Recently marking the anniversary of the Parkland, Florida school shooting, President Biden called for “eliminating immunity for gun manufacturers who knowingly put weapons of war on our streets.”<sup>4</sup>

While PLCAA does not bar all lawsuits against gun manufacturers, causes of action are limited to six extremely narrow categories.<sup>5</sup> Although repealing PLCAA may be politically difficult, a few word changes to the existing exceptions could restore some accountability and help victims. One amendment would add manufacturers to the negligent entrustment exception that currently only covers sellers. The second would ensure that violation of state public nuisance laws would establish a predicate state law violation allowing manufacturer public nuisance suits to go forward.

### Urgent Problems to Which PLCAA Has Contributed

#### *Manufacturer Sales to Distributors Illegally Trafficking Arms*

Before PLCAA, gun manufacturers could be sued under common law negligent entrustment theories for “supply[ing] weapons to distributors” who they “know or, should know .... facilitate

<sup>1</sup> Vernick, Jon S., Rutkow, Lainie, Salmon, Daniel A. “Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicles.” *American Journal of Public Health*, vol. 97, no. 11, December 2007, [www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374).

<sup>2</sup> 15 USCS § 7901(b)(1).

<sup>3</sup> 15 USCS § 7903(5)(A).

<sup>4</sup> Briefing Room. “Statement by the President Three Years After the Parkland Shooting.” The White House, 14 Feb. 2021, <https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/14/statement-by-the-president-three-years-after-the-parkland-shooting/>.

<sup>5</sup> 15 USCS § 7902(a), 7903(5)(A)(i-vi).

unlawful sales.”<sup>6</sup> Manufacturers’ negligent practices have included: distribution to gun sellers who demonstrate a “failure to keep required records,” conducting “transfers to prohibited persons,” “making false record book entries,” and performing “illegal out-of-state [gun] transfers”<sup>7</sup>; and distribution to manufacturers who facilitate straw purchasing.<sup>8</sup> Some national surveys estimate that more than 30,000 straw purchases are attempted each year, and approximately “2,000 firearms dealers and pawnbrokers knowingly sell firearms illegally.”<sup>9,10</sup> Gun manufacturer distribution practices have significantly enabled illegal gun trafficking. Nevertheless, because PLCAA’s negligent entrustment exception only covers gun sellers, suits against manufacturers for negligent distribution practices are barred.<sup>11</sup>

### *Oversupply of Local Criminal Markets*

Firearm manufacturers will sometimes knowingly distribute guns to a jurisdiction beyond the market’s capacity, aware that the guns will be trafficked to states with stricter gun laws.<sup>12</sup> Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) data indicates that gun oversupply is a continuing problem. New York data showed that 79% of crime guns were traced to states like Georgia, Virginia, and South Carolina<sup>13</sup> that were “net exporters” of trafficked guns.<sup>14, 15</sup>

Before PLCAA, suits targeting manufacturer oversupply of criminal markets could be brought under different theories. For example, in the 1990s, family members of six who were killed and one who was injured by a handgun sued 25 handgun manufacturers for “indiscriminate marketing and distribution practices” creating an “underground market”<sup>16</sup> of oversupplied guns.<sup>17</sup> This case could not be brought today under PLCAA.

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<sup>6</sup> ARTICLE: IN GUNS WE ENTRUST: TARGETING NEGLIGENT FIREARMS DISTRIBUTION, 11 Drexel L. Rev. 421, 454, 464.

<sup>7</sup> “Following the Gun: Enforcing Federal Laws Against Firearms Traffickers,” Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms, June 2000, x-xi. <http://www.nfaoa.org/documents/ATF-%20Following%20the%20Gun,%20Enforcing%20Federal%20Laws%20Against%20Firearms%20Traffickers.pdf>.

<sup>8</sup> A “straw purchase” involves a “prohibited purchaser” “direct[ing]” an individual who is legally eligible to purchase a gun, to do so on their behalf: Vernick, Jon S., and Daniel W. Webster. “Policies to Prevent Firearm Trafficking.” *Inj Prev*, vol. 13, no. (2), 2007, [www.ncbi.nlm.nih.gov/pmc/articles/PMC2610592](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2610592).

<sup>9</sup> “Trafficking & Straw Purchasing.” *Giffords*, 1 Dec. 2020, [giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing](http://giffords.org/lawcenter/gun-laws/policy-areas/crime-guns/trafficking-straw-purchasing).

<sup>10</sup> Wintemute, Garen J. “Firearms Licensee Characteristics Associated with Sales of Crime-Involved Firearms and Denied Sales: Findings from the Firearms Licensee Survey.” *The Russell Sage Foundation Journal of the Social Sciences*, vol. 3, no. 5, 2017, 59–60. *JSTOR*, <https://www.jstor.org/stable/pdf/10.7758/rsf.2017.3.5.03.pdf?refreqid=excelsior%3A60ddbd014e58788db391c764988a1045>.

<sup>11</sup> 15 USCS § 7903(5)(A)(ii).

<sup>12</sup> ARTICLE: IN GUNS WE ENTRUST: TARGETING NEGLIGENT FIREARMS DISTRIBUTION, 11 Drexel L. Rev. 421, 429.

<sup>13</sup> U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives. “New York Data Source: Firearms Tracing System January 1, 2019 - December 31, 2019.” *ATF.gov*, 24 Aug. 2020. [www.atf.gov/file/147286/download](http://www.atf.gov/file/147286/download).

<sup>14</sup> Suplina, Nicholas, Kelley, Lacey, McCarron, Meredith. “Target on Trafficking New York Crime Gun Analysis.” *AG.NY.gov*, 24 Oct. 2016, [targettrafficking.ag.ny.gov](http://targettrafficking.ag.ny.gov).

<sup>15</sup> U.S. Department of Justice Bureau of Alcohol, Tobacco, Firearms and Explosives. “Number of Firearms Sourced and Recovered in the United States and Territories.” *ATF.gov*, 24 Aug. 2020. <https://www.atf.gov/resource-center/firearms-trace-data-2019>.

<sup>16</sup> *Hamilton v. Accu-Tek*, 62 F. Supp. 2d 802, 808, 829 (1999).

<sup>17</sup> ARTICLE: IN GUNS WE ENTRUST: TARGETING NEGLIGENT FIREARMS DISTRIBUTION, 433.

One specific state theory that has been used to challenge the oversupply of criminal markets is “public nuisance.” In recent years, cities and states have used public nuisance theories to address a variety of major public health and safety crises, like the opioid epidemic.<sup>18</sup> Since PLCAA was enacted, cities have tried to fit claims within PLCAA’s “predicate exception,” which allows suits against manufacturers if they violate other state laws.<sup>19</sup> However, judges have viewed these cases skeptically and have usually dismissed them under PLCAA, finding the predicate exception as currently written to be inadequate to confer liability.<sup>20</sup>

## What We Support

We support amending two of PLCAA’s exceptions. First, PLCAA’s “negligent entrustment exception,” 15 USC § 7903(5)(a)(ii), should be amended by adding modified text underlined:

- an action brought against a seller or manufacturer for negligent entrustment or negligence per se.

Second, PLCAA’s “predicate exception,” 15 USC § 7903(5)(a)(iii), should be amended with modified text underlined:

- 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 – including ... (III) any case in which a manufacturer or seller’s distribution practices violated a state’s public nuisance laws.

Adopting these amendments would push manufacturers to conduct closer oversight of the sellers they supply, to ensure they are not engaged in practices likely to fuel the illegal firearms market. While it may be profitable for manufacturers to sell to any licensed distributor and avoid scrutiny of their distribution practices, the threat of litigation would be a powerful incentive for manufacturers to pay closer attention. Manufacturers demanding better practices from gun sellers will leave sellers no choice but to improve their own practices to stay in business. As a result, illegal gun trafficking and subsequent injuries and deaths would be reduced nationwide.

## Why Opponents Are Mistaken

The NRA argues that without PLCAA, manufacturers and sellers would be driven out of business from litigation costs.<sup>21</sup> However, this did not happen for the many years that such lawsuits were permitted before PLCAA’s passage. Two changes to PLCAA’s exceptions, which

<sup>18</sup> Brady. “Tobacco Kills People. Opioids Kill People. But Guns Don’t?” *Medium*, 4 Sept. 2019, [bradyunited.medium.com/tobacco-kills-people-opioids-kill-people-but-guns-dont-7852c288d496](https://bradyunited.medium.com/tobacco-kills-people-opioids-kill-people-but-guns-dont-7852c288d496).

<sup>19</sup> 15 USC § 7903(5)(a)(iii).

<sup>20</sup> See, e.g., *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 389 (2008). See also, Giffords. “Gun Industry Immunity.” *Giffords*, 14 Dec. 2020, [giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/](https://giffords.org/lawcenter/gun-laws/policy-areas/other-laws-policies/gun-industry-immunity/); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374/>.

<sup>21</sup> Ouimet, Jason. “Protecting PLCAA.” *NRA America’s 1<sup>st</sup> Freedom*, 27 Nov. 2020, [www.americas1stfreedom.org/articles/2020/11/27/protecting-the-plcaa](https://www.americas1stfreedom.org/articles/2020/11/27/protecting-the-plcaa).

would return some measure of accountability to an industry that has otherwise enormous liability protections, would certainly not destroy the gun industry. As others have written, the inability to sue gun manufacturers engaged in practices that increase gun trafficking, both “deprives [gun violence] victims” of redress in “courtrooms” and misses opportunities “to incentivize [the] industry … to act responsibly.”<sup>22</sup>

## **Expected Supporters**

We expect our proposed amendments to receive widespread support from many state and local governments, particularly cities. Cities have been the epicenter of illegal gun trafficking and suffered greatly from resulting violence. PLCAA foreclosed many opportunities for cities to obtain injunctive relief and restitution for their gun violence epidemics, due to the law’s limited exceptions.

Additional supporters would likely include gun safety groups and other progressive-leaning organizations, such as: The Violence Policy Center, Everytown for Gun Safety, the Coalition to Stop Gun Violence, the Giffords Law Center to Prevent Gun Violence, New Yorkers Against Gun Violence, and the Center for American Progress.

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<sup>22</sup> “Immunizing the Gun Industry: The Harmful Effect of the Protection of Lawful Commerce in Arms Act.” *Center for American Progress*, 15 Jan. 2016, [www.americanprogress.org/issues/guns-crime/reports/2016/01/15/128949/immunizing-the-gun-industry-the-harmful-effect-of-the-protection-of-lawful-commerce-in-arms-act](http://www.americanprogress.org/issues/guns-crime/reports/2016/01/15/128949/immunizing-the-gun-industry-the-harmful-effect-of-the-protection-of-lawful-commerce-in-arms-act).

## APPENDIX: VICTIM STORIES

### Lilian S. Ileto

Lilian S. Ileto sued Glock, among others, on behalf of her son Joseph, a postal worker killed in a mass shooting. The killer shot Ileto's son while fleeing the North Valley, California JCC, having shot and injured several children and an adult.<sup>23</sup> Ileto said that "reckless marketing strategies" led to the killer obtaining a firearm, and that "the defendants intentionally produced more firearms than the legitimate market demands," to facilitate sales to "illegal purchasers."<sup>24</sup> Ileto also claimed that "the defendants' marketing and distribution policies" created a "public nuisance."<sup>25</sup> The District Court dismissed Ileto's claims under PLCAA, holding that the "predicate exception" is only triggered by "violation of statutes specifically applicable to the sale and marketing of firearms."<sup>26</sup>

### District of Columbia

The District of Columbia, injured victims, and survivors of deceased victims, sued Beretta, among numerous others, for compensation.<sup>27</sup> The victims included paralyzed Bryant Lawson, a 19-year-old, who was shot in Northeast Washington with a semiautomatic firearm, and 17-year-olds Andre Wallace and Natasha Marsh, both of whom were killed with a machine gun "while unloading groceries."<sup>28</sup> The plaintiffs sued the defendants for "supplying the unlawful flow of firearms into the district ... used to commit crimes...."<sup>29</sup> Ruling that violation of the District's "Strict Liability Act" did not trigger PLCAA's "predicate exception," and no other exceptions applied, the court found for the defendants.<sup>30</sup>

### Jacquione Johnson

Before PLCAA's passage, 18-year-old Jacquione Johnson sued Bryco Arms and gun dealers after he was shot in the head and gravely hurt during a robbery at a New York Wendy's. Five others were lined up and killed. Johnson's claims included "public nuisance" and "negligence."<sup>31</sup> The gun was made in California, traveled through several states, was resold in a straw purchase, and trafficked to New York City before it was sold to the killers. The case was filed before PLCAA's enactment, proceeded.<sup>32</sup> Today, however, PLCAA would likely bar any lawsuits involving similar facts.

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<sup>23</sup> Ileto v. Glock, Inc., 421 F. Supp. 2d 1274, 1278-1280 (2006).

<sup>24</sup> Id. at 1280.

<sup>25</sup> Id. at 1304.

<sup>26</sup> Id. at 1296.

<sup>27</sup> District of Columbia v. Beretta U.S.A. Corp., 2006 D.C. Super. LEXIS 8, 1-3, 5-7.

<sup>28</sup> Id. at 5, 7.

<sup>29</sup> Id. at 1-3, 5-7.

<sup>30</sup> Id. at 58, 59.

<sup>31</sup> Johnson v. Bryco Arms, 304 F. Supp. 2d 383, 388, 389 (2004).

<sup>32</sup> Id. at 389.