

# Brady Center



To Prevent Gun Violence

LEGAL ACTION PROJECT

**Testimony of Jonathan E. Lowy,  
Director of the Legal Action Project of the Brady Center to Prevent Gun Violence,  
in Support of Senate Bill 196, The Assault Weapon Responsibility Act**

**March 4, 2013**

## **Background and Expertise**

My name is Jonathan Lowy and it is my privilege to serve as the Director of the Legal Action Project of the Brady Center to Prevent Gun Violence. The Brady Center is a non-profit, non-partisan organization that for almost 40 years has worked to create an America free from gun violence, where all Americans are safe at home, at school, at work, and in our communities. For 24 years the Brady Center's Legal Action Project has been the nation's only public interest law program devoted to defending reasonable gun laws and representing victims and survivors of gun violence (pro bono), all with the goal of reducing gun violence. I personally have been involved in the litigation of most of the significant firearms cases, including gun industry liability and Second Amendment cases, of the past 15 years, appearing in state and federal courts, at the trial and appellate levels, throughout the country, arguing and/or filing briefs in more than half the states. In a case recently decided by the United States Court of Appeals for the 10<sup>th</sup> Circuit in Denver upholding Colorado's concealed firearms carrying law, *Peterson v. Martinez*, No. 11-1149 (decided February 22, 2013), I argued alongside the Colorado Attorney General's office, successfully contending that the law was permissible under the Second Amendment.

In firearms-related litigation the Legal Action Project has represented, among other clients, the NAACP, the cities of Boston, Massachusetts; Camden, New Jersey; Cincinnati, Ohio; Detroit, Michigan; the District of Columbia; Los Angeles, Oakland, Sacramento, San Francisco, and other California cities; Miami-Dade County, Florida; New York, New York; Pittsburgh, Pennsylvania; St. Louis, Missouri; victims of the D.C. sniper shootings; numerous police officers who have been wounded or killed in the line of duty; and many mothers and fathers whose children were killed with guns negligently made or supplied by irresponsible gun companies. Both before and after the enactment of the federal Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901 et. seq. ("PLCAA"), I have litigated cases throughout the country holding negligent gun companies accountable for their contribution to gun violence. In numerous cases I have litigated the meaning and scope of PLCAA.

In our work defending public safety laws to reduce gun violence, the Legal Action Project assists attorneys and officials at all levels of government in federal and state courts

throughout the nation, helping to defend gun laws that are attacked in the courts. We provide pro bono representation, litigation support, and file amicus briefs on Second Amendment and other firearms-related issues. Our briefs have been relied on by the Supreme Court, and they are often joined by law enforcement, including the International Brotherhood of Police Organizations, the Major Cities Chiefs Association, the Federal Law Enforcement Officers Association, the Hispanic American Police Command Officers Association, the International Association of Chiefs of Police, the National Association of Police Organizations, the National Black Police Association, the National Association of Black Law Enforcement Executives, the Police Executive Research Forum, the Police Foundation, as well as national associations dedicated to medicine, education, and public health.

This testimony is only made on behalf of and represents the views of the Brady Center.

### **The Need for and Efficacy of Proposed Assault Weapon Liability Legislation**

While the horrific shooting deaths of 20 children and 6 educators at Sandy Hook Elementary School has properly focused national attention on our epidemic problem of gun violence and, specifically, the threat posed by military-style assault weapons in civilian hands, the people and legislature of Colorado certainly did not need the Newtown tragedy to remind them. The shootings at Columbine High School and, more recently, at the movie theater in Aurora, demonstrated how assault weapons and high-capacity magazines are highly effective for mass killers bent on snuffing out as many lives as possible in a matter of seconds or minutes. Clearly, it is incumbent on state and federal legislatures to do all they can to reduce the broader gun violence problem by which about 100,000 people are shot every year in America, about 30,000 fatally. There are many effective actions that can be taken to reduce gun deaths and injuries that are fully consistent and compatible with the Second Amendment. SB 196 is one such measure.

While many of victims of gun violence are injured or killed by firearms other than assault weapons, horrific mass shootings like Columbine, Aurora, Sandy Hook and so many other names all demonstrate the toll taken by assault weapons. While assault weapons and high-capacity magazines are supremely useful for mass killers, they are not needed for legitimate self-defense or hunting. The question before this body should not be whether to take action to prevent assault weapons from being obtained by potentially dangerous people, but what action should be taken.

I am familiar with Senate Bill 196, the proposed legislation offered by Senator Morse that would impose liability on gun companies whose failure to exercise adequate care in the sale of assault weapons contributes to and causes gun deaths and injuries. In my opinion this legislation would help reduce deaths and injuries caused by assault weapons, and it is clearly compatible with federal law, including PLCAA and the Second Amendment.

The legislation would encourage gun companies to exercise the highest degree of care in the sale of assault weapons, thus minimizing the risk that those weapons would be obtained and used by dangerous persons. Fundamental principles of tort law require every person and business to use reasonable care to minimize the risk of foreseeable harm to others, and that degree of care is heightened when the degree of risk of harm is more substantial. Thus, those

who possess or sell lethal firearms -- particularly military-style assault weapons that are useful and used in mass shootings -- already are required to use -- and should use -- the highest degree of care in selling guns.

Today, even without Senate Bill 196, persons who own or sell assault weapons may be held accountable to victims of shootings if the defendants failed to use adequate care in the sale or possession of those guns, and their negligence proximately caused the shooter to obtain the gun. Without PLCAA, there would be no doubt that licensed gun dealers and manufacturers that sell assault weapons also may be liable for damages caused by their failure to use the highest degree of care in their sales. However, as PLCAA has been interpreted by some courts, licensed gun sellers may be immunized from negligence liability. Under this reading of PLCAA, if I, or any other person who is not a licensed gun dealer, negligently sold or stored an assault weapon, and thereby caused a shooter to obtain and use the gun, we could be sued and held liable. But if a licensed gun dealer engaged in precisely the same negligent conduct -- and even profited from it every day -- it would be held immune from the same duty to use reasonable care to which every other person and business in Colorado is subjected. If people were shot or their family members were killed as a result of a negligently-sold gun, they would have the same right to their day in court to prove their negligence case as anyone injured from any other negligent conduct -- unless the defendant were a licensed firearms dealer or manufacturer. Then, under this reading of PLCAA, the victims would be thrown out of court, and barred from recovery or proving their case.

The authors and chief Sponsors of PLCAA, including then Sen. Larry Craig, intended that negligent gun companies should remain fully accountable under state law, and that PLCAA should offer them no special protection. The legislative history makes clear that PLCAA was intended merely to prevent liability from being imposed on some gun companies where they did nothing wrong, but their guns were used in shootings. Senator Craig was clear that victims of negligent gun sellers should not lose their right to civil redress, stating, “[t]his bill will not prevent a single victim from obtaining relief for wrongs done to them by anyone in the gun industry.” 151 Cong. Rec. S9395 (July 29, 2005). Senator Craig elaborated:

As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . *If manufacturers or dealers break the law or commit negligence, they are still liable.*

151 Cong. Rec. S9099 (July 27, 2005) (emphasis added).

Other Sponsors of PLCAA were in accord. *See also* 151 Cong. Rec. S9077 (July 27, 2005) (sponsor Sen. Hatch) (“this bill carefully preserves the right of individuals to have their day in court with civil liability actions where negligence is truly an issue”); 151 Cong. Rec. S9107 (July 27, 2005) (sponsor Sen. Baucus) (“This bill . . . will not shield the industry from its own wrongdoing or from its negligence”); 151 Cong. Rec. S9389 (July 29, 2005) (sponsor Sen. Allen) (“This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [*sic*] the firearms dealer or manufacturer”); 151 Cong. Rec. S9065 (July 27, 2005) (Sen. Craig) (“It is not the gun industry immunity bill. It is important that we say that and say it again because it does not

protect firearms or ammunitions manufacturers, sellers or trade associations from any lawsuits based on their own negligence or criminal conduct”); 151 Cong. Rec. S9061 (July 27, 2005) (Sen. Craig) (“It is not a gun industry immunity bill because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct”); 151 Cong. Rec. S9099 (July 27, 2005) (Sen. Craig) (“If manufacturers or dealers break the law or commit negligence, they are still liable.”). Congressional intent was clear that the PLCAA “doesn't relieve you of duties that the law imposes upon you ...to carefully sell,” but Congress was “not going to extend it to a concept where you are responsible, after you have done everything right, for what somebody else may do who bought your product....” 151 Cong. Rec. S9226 (July 28, 2005) (Sponsor Sen. Graham).

However, that legislative intent has not stopped several courts from interpreting PLCAA to prevent negligent gun companies from being held accountable. See, e.g., *Ileto v. Glock*, 565 F. 3d 1126 (9<sup>th</sup> Cir. 2009). Because some courts have interpreted PLCAA to immunize licensed gun companies from negligence liability – and to deprive victims of negligent gun industry conduct of their day in court -- this legislation is needed, to place victims of negligent assault weapon sellers on some semblance of equal footing with others in society, and to provide some accountability for negligent sellers of assault weapons.

There are many examples of negligent business practices that could result in a dangerous person obtaining an assault weapon, which could then be used in a criminal shooting. If a person comes into a gun store and his behavior appears mentally unstable and dangerous, he may not fit within a prohibited category that would make a gun sale to him illegal (such as an involuntary commitment to a mental hospital, or a determination that he is dangerous because of mental illness), but it could still be unreasonable to sell him a gun. Terrorists are not prohibited from buying guns under current law, yet it could be negligent to sell a gun to someone who is evidently a terrorist whose possession of a gun could pose a danger to public safety. Under the *Ileto* view of PLCAA, these negligent gun sellers might be held to be immunized from liability under Colorado law. However, private, unlicensed gun sellers could be held liable for selling guns to such people under negligence law. This proposed legislation merely ensures that licensed gun companies are held to the same standards as other gun owners and gun sellers – and all other businesses and persons in society -- at least as to assault weapons they sell or possess.

It should be noted that this legislation will not increase the duty or accountability of most gun sellers, who are responsible business people and concerned citizens who already use the highest degree of care to prevent their weapons from being obtained by persons who pose to grave a danger to possess them. Data from the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") have found that about 86% of gun dealers sell no guns traced and recovered in crime in a given year. That vast majority of gun dealers will be unaffected by this legislation.

However, like any business, there are bad apples among gun dealers, and those irresponsible gun sellers supply most crime guns, causing a vast number of deaths and injuries. Not only do only 14% of gun dealers sell 100% of crime guns, but a mere 1.2% of dealer sell 57% of crime guns. This proposed legislation will only affect those in the gun industry who fail to do what they should already be doing -- exercising the highest degree of care when selling assault weapons.

Holding irresponsible gun companies accountable for their contribution to gun violence can make a huge difference in reducing gun deaths and injuries. Unfortunately, some companies will only reform their business practices to institute reasonable, feasible, safer practices when they face financial liability.

- The gun industry had historically refused to take any positive steps to prevent sales of guns to the criminal market -- until they were faced with lawsuits brought by victims of gun violence and cities affected by gun violence, represented by the the Legal Action Project and other attorneys. Then the firearms industry trade association, the National Shooting Sports Foundation ("NSSF"), with ATF, launched "Don't Lie For The Other Guy," a campaign to prevent dealers from engaging in straw purchases.
- After litigation brought by the Legal Action Project against a West Virginia gun dealer whose sale of 12 handguns to a trafficker led to the shooting of two police officers, several West Virginia dealers to stop engaging in multiple handgun sales.
- After litigation brought by the Legal Action Project against a gun manufacturer for refusing to include internal locks that would prevent children and other unauthorized persons from firing guns, several manufacturers began to include similar safety features.
- To settle litigation brought by several cities across the country in litigation brought by the Legal Action Project and others, Smith & Wesson agreed to reform its sales and design practices to minimize the risk of criminal and unintentional shootings.
- To settle litigation brought by victims of the Washington, D.C.-area sniper shootings, represented by the Legal Action Project, the manufacturer of the snipers' gun agreed to reform its distribution practices.

Similarly, the threat of liability as a result of this legislation will likely lead to more responsible, safer business practices that will minimize the risk that assault weapons will end up in the wrong hands.

### **The Legislation Is Compatible With Federal Law**

This legislation is fully compatible with federal law.

PLCAA specifically contemplates and embraces such legislation. Congress specifically included in PLCAA a provision that made clear that gun companies remain fully subject to civil liability laws when they knowingly violate laws applicable to the sale and marketing of firearms, and that violation proximately causes an injury. 15 U.S.C. §7903(5)(A)(iii). While there is some dispute about the breadth and scope of PLCAA's protections, there is no dispute that PLCAA provides no protection to gun companies who knowingly violate such laws. The proposed legislation fits precisely into this legislative scheme. Gun companies who knowingly violate the law requiring them to exercise the highest degree of care in the affected sales receive no special

protection from PLCAA, and are fully subject to the liability law imposed by Colorado statutory and common law.

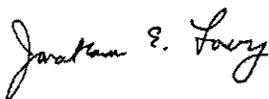
This legislation is also fully compatible with all other aspects of federal law, including the Second Amendment. Indeed, the Supreme Court has never held that there is a Second Amendment right to even possess or sell military-style assault weapons, and the Court made clear that certain firearms, including those that are “dangerous and unusual” may be prohibited. *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). Since *Heller*, the United States Court of Appeals for the D.C. Circuit upheld a ban on assault weapons and high-capacity magazines. *Heller v. District of Columbia (“Heller II”)*, 670 F.3d 1244 (D.C. Cir. 2011) (ban on assault weapons and high-capacity magazines did not violate Second Amendment and was Constitutional). Indeed, such a ban does not prevent law-abiding, responsible citizens from exercising their Second Amendment rights with a host of other common firearms – and imposing liability on negligent assault weapon sellers certainly does not. As a more restrictive assault weapon ban is Constitutional, this far less restrictive legislation is clearly Constitutional. In sum, there is no Constitutional right to sell assault weapons negligently, or to fail to exercise the highest degree of care when selling such weapons.

### **Conclusion**

The proposed legislation is supported by sound policy and the law. One would hope that legislators could come together on this reasonable bill. Indeed, even those who oppose bans on assault weapons should agree that the highest degree of care should be used when selling assault weapons, to minimize the risk that persons like the Aurora or Columbine shooters obtain the means to afflict mass carnage -- and those who knowingly fail to exercise such care should be held accountable.

I thank you for your time and consideration.

Respectfully submitted,



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