



March 5, 2020

WRITTEN TESTIMONY OF MARK W. PENNAK, PRESIDENT, MSI, IN OPPOSITION TO SB 968 and HB 1160

I am the President of Maryland Shall Issue (“MSI”). Maryland Shall Issue is an all-volunteer, non-partisan organization dedicated to the preservation and advancement of gun owners’ rights in Maryland. It seeks to educate the community about the right of self-protection, the safe handling of firearms, and the responsibility that goes with carrying a firearm in public. I am also an attorney and an active member of the Bar of Maryland and of the Bar of the District of Columbia. I recently retired from the United States Department of Justice, where I practiced law for 33 years in the Courts of Appeals of the United States and in the Supreme Court of the United States. I am an expert in Maryland firearms law, federal firearms law and the law of self-defense. I am also a Maryland State Police certified handgun instructor for the Maryland Wear and Carry Permit and the Maryland Handgun Qualification License (“HQL”) and a certified NRA instructor in rifle, pistol and personal protection in the home and outside the home and in muzzle loader. I appear today as President of MSI in opposition to SB 968 and HB 1168.

The Bills:

These bills would create a new section 4-111 in the Criminal Law Article of the Maryland Code to provide that A PERSON MAY NOT SELL, OFFER TO SELL, OR DISPLAY AN IMITATION FIREARM, which the bills define to mean “A TOY, A DEVICE, OR AN OBJECT THAT SUBSTANTIALLY DUPLICATES OR CAN REASONABLY BE PERCEIVED TO BE A FIREARM.” The bills apply only to the City of Baltimore.

The Bills Are Preempted By Federal Law:

The bills effectively ban the sale of imitation guns the sale of which are expressly protected by federal law (15 U.S.C. § 5001), and federal regulations (15 C.F.R. § 272.2, et seq.). That federal law establishes a system by which imitation firearms are marked and preempts any State regulation of sales, providing in 15 U.S.C. § 5001(g):

The provisions of this section shall supersede any provision of State or local laws or ordinances which provide for markings or identification inconsistent with provisions of this section **provided that no State shall—**

(i) **prohibit the sale** or manufacture of any look-alike, nonfiring, collector replica of an antique firearm developed prior to 1898, **or**

(ii) prohibit the sale (other than prohibiting the sale to minors) of traditional B-B, paint ball, or pellet-firing air guns that expel a projectile through the force of air pressure.

See also 15 C.F.R. § 272.5.

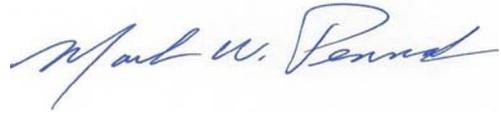
These bills obviously violate this preemption provision by banning the sale of “an imitation firearm,” including replicas of antique firearms as well as B-B guns, paint ball and pellet guns, to the extent that these toys “substantially duplicates or can reasonably be perceived to be a firearm.” This test is so broad and sweeping that it includes the very imitation guns that federal law preempts from State regulation. Stated simply, the State may not ban the sale of non-firing replicas of antique firearms or ban the sale of “B-B, paint ball, or pellet-firing air guns” **regardless** of how closely these toys “duplicate” or “imitate” a real firearm. Tellingly, these bills contain no exemption for these federally protected “B-B, paint ball, or pellet-firing air guns” or “replicas of antique firearms.” See *Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 608 (D. N.J. 1990) (“the public interest is served in ensuring that congressional regulation of interstate commerce supercedes conflicting and contradictory state regulations”).

It is also well established that a state law is preempted where the law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Where, as here, Congress has expressly protected the “sale” of these toys from State regulation, the State may not seek to avoid or override that prohibition. See also *Arizona v. United States*, -- U.S. --, 132 S.Ct. 2492, 2500-01 (2012) (noting that a State-law provision will be preempted if it conflicts with federal law, either because (1) “compliance with both federal and state regulations is a physical impossibility” or because the provision (2) “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of” federal law). In banning the sale of these imitation guns, these bills are just asking for an expensive federal lawsuit in which the State and local law enforcement in Baltimore will end up paying substantial attorneys’ fees and costs, not only in the defense of these bills, but also to plaintiffs under 42 U.S.C. §1988.

The bills are vague:

These bills are also hopelessly vague and subjective and thus a violation of the Due Process Clause of the Fourteenth Amendment. Citizens simply have no way of knowing if the toy can be “reasonably be perceived to be a real firearm.” The same is true of the bills’ coverage of any toy that “substantially duplicates” a real firearm. There are no definitions for these phrases and no safe harbor provisions. The bills will be enforced in an ad hoc, arbitrary manner and thus would effectively sanction discriminatory seizures by law enforcement personnel. Such bills are flatly unconstitutional. See *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (“Vague statutes threaten to hand responsibility for defining crimes to relatively unaccountable police, prosecutors, and judges, eroding the people’s ability to oversee the creation of the laws they are expected to abide.”); *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, (1972) (“A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis”). We urge an unfavorable report.

Sincerely,

A handwritten signature in blue ink that reads "Mark W. Pennak". The signature is fluid and cursive, with the first name "Mark" and last name "Pennak" clearly legible.

Mark W. Pennak
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