

NATIONAL RIFLE ASSOCIATION OF AMERICA
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NRA

OFFICE OF THE DIRECTOR
STATE AND LOCAL AFFAIRS DIVISION

June 18, 2014

Members of the Assembly Committee on Public Safety
Legislative Office Building
1020 N. Street
Sacramento, California 95814

RE: Senate Bill 199 (De León)

Position: Oppose

Dear Members of the Assembly Committee on Public Safety:

On behalf of the National Rifle Association, I write to respectfully express our opposition to Senate Bill 199.

SB 199 would improperly ban the sale of existing traditional air guns, in direct violation of existing federal laws. This misguided legislation would also subject unsuspecting parents and business owners to risk of criminal liability for furnishing toys for children that have never before been regulated in the same manner as BB devices. Finally, SB 199 effectively increases safety risks associated with traditional and non-traditional air guns for both police officers and the public.

Senate Bill 199 is Preempted by Federal Law

Under current California law, the manufacture, purchase, sale, shipping, transport, distribution or receipt of imitation firearms is prohibited *unless* the imitation firearm is a non-firing collector's replica, a BB device or the entire exterior surface of the imitation firearm is brightly colored or translucent. California law defines an exempt BB device as "any instrument that expels a projectile, such as a BB or a pellet, not exceeding 6mm caliber, through the force of air pressure, gas pressure, or spring action, or any spot marker gun." This definition encompasses both traditional air guns, which fire metal projectiles, and what are commonly referred to as airsoft guns, which fire nonmetallic (usually plastic) projectiles.

SB 199 would remove the BB device exception from the imitation firearm prohibition. This would effectively prohibit the manufacture, purchase or sale anything that was previously considered a BB device (including traditional air guns) unless the entire exterior surface of the device is brightly colored or translucent.

Under federal law, airsoft guns are already subject to very specific marking requirements mandated by the federal imitation firearms law. Federal law requires such imitation firearms to have a blaze orange plug¹ inserted in the barrel no more than six millimeters from the muzzle.² This orange plug is intended to distinguish these toys from real firearms.

Traditional air guns that fire metallic projectiles are specifically exempt from the federal marking requirements. In contrast to the imitation firearms Congress chose to regulate, traditional air guns fire metallic projectiles at higher velocities and have a far greater potential for injury if mishandled. In creating this exemption, Congress recognized that traditional air guns are not toys, that they must be handled with additional care and that marking them to appear as toys would actually *increase* the risk of injury associated with air gun misuse. If SB 199 becomes law, a child who sees a brightly-colored or translucent air gun might well mistake it for a harmless toy, treat it as such and suffer injury as a result.

Under the Supremacy Clause in the U.S. Constitution, conflicts between state and federal law are resolved in favor of the federal law, such that the state law is preempted and void.³ The federal law governing the sale of imitation firearms contains two preemption provisions that raise serious preemption concerns with SB 199.

First, federal law explicitly preempts all state and local laws inconsistent with the federal marking requirements.⁴ Second, the law provides that “no State shall . . . 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.”⁵ Here, SB 199 effectively reverses the federal marking requirements as they pertain to traditional air guns. Moreover, it would render essentially all existing traditional air guns unsalable, as traditional air guns are not manufactured to look like translucent or brightly-colored toys.

The relevant legislative history concerning the federal imitation firearms law confirms that states cannot enact legislation that would operate to prohibit the sale of BB guns that have become commonplace in American society. An express consideration of the meaning of the terms “traditional B-B, paint-ball, or pellet firing air gun” appears in the statement of Senator Dole of Kansas:

“B-B or pellet firing air guns such as those made by the Daisy Manufacturing Co. and Crossman air guns are also exempted.”⁶

In the absence of any contrary indicia of congressional intent, it is clear that the exception carved out for air guns applied, *inter alia*, to *all* air guns made by Daisy and Crosman *at the time the legislation was enacted*.

These comments expressly identify BB guns that are currently sold in California as specifically exempt from regulations that would seek to prohibit their sale. Because SB 199 would, by its plain terms, operate to prohibit the sale of these types of traditional BB devices, it is preempted by federal law.

1

California law also prohibits anyone from changing, altering, removing, or obliterating the orange on the muzzle of any air soft gun.

2

15 U.S.C. § 5001(b)(1).

³ U.S. Const. Art. VI, cl. 2.

⁴ 15 U.S.C. § 5001(g).

⁵ 15 U.S.C. § 5001(g)(ii).

⁶ 134 Cong. Rec. S15531 (daily ed. October 11, 1988) (statement of Sen. Dole); *accord*, 134 Cong. Rec. H10071 (daily ed. October 12, 1988) (statement of Rep. Dingell).

Although a similar restriction was upheld in one state court case in NY, that decision *cannot* supersede the duty of California courts to follow congressional intent. It is a well-settled principle that out-of-state cases are not binding authority on state or federal courts in California.⁷ Moreover, if the reasoning of another state court decision on a statutory provision is unsound, the *California courts will not follow it, even though the language and context of the local statute are identical.*” *Acco Contractors, Inc. v. McNamara & Peepe Lumber Co.*, 133 Cal. Rptr. 717, 719 (Ct. App. 1976) (emphasis added).

With these concerns in mind, this very committee already rejected similar legislation from the author in 2011. As the committee noted in its analysis that year:

“One of the most famous BB guns is the Red Ryder BB Gun by Daisy Outdoor Products First introduced in 1938, the BB gun became an iconic symbol of American youth, and is still in production today.

Here, Congress expressly stated, "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." [15 USC 5001(g).] Because federal law requires only that BB devices have a "blaze orange plug inserted in the barrel" [15 USC 5001(b)(1)], the requirements in this bill that BB devices be entirely bright colored or translucent, as specified, are in conflict and would be preempted by federal law.

Additionally, the provision in this bill that prohibits the commercial sale of any non-conforming BB device is also in conflict with federal law. The relevant provisions state, "no State shall . . . 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." [15 USC 5001(g)(ii).] Because there is no provision in this bill that would exempt currently owned non-conforming BB devices, this bill prevents the re-sale of these devices, in violation of federal law.

Assembly Public Safety Committee, Bill Analysis, Senate Bill 798 (2011).

Given that SB 199 is ever broader than its predecessor and removes existing federal exemptions from California law, SB 199 is plainly preempted by federal laws concerning the sale of imitation firearms.

Senate Bill 199 Would Subject Business Owners and Parents to Criminal Liability

By removing the qualification that projectiles “be greater than 6mm,” to be regulated as a “bb device,” the proposed legislation would also drastically expand the current definition to encompass numerous common toys and paintball or “spotmarker” guns. The author of this legislation himself acknowledges that toys and paintball guns pose no legitimate public safety concern, as evidenced by SB 199’s exemption for “spotmarker guns” from this bill’s restrictions on imitation firearms. But by specifically including these items in the expanded definition of “bb device,” this legislation would impose criminal liability on any individual who sells or furnishes any toy that discharges a projectile of any size absent express consent from the minor’s legal guardian.

⁷ See, e.g., *Wilson v. Hinkle*, 136 Cal. Rptr. 731, 734 n.4(Ct. App. 1977); *US Ecology, Inc. v. State*, 28 Cal. Rptr. 3d 894, 908 (2005); *Spokane, P. & S. Ry. Co. v. Martin*, 80 F.2d 322, 325 (9th Cir. 1935).

This unwarranted expansion of the penal code would subject legitimate business owners to criminal liability for selling common toys that have never before required parental consent and could never be mistaken for an actual firearm. Perhaps worse, any parent who allows their children to play with these toys with their friends would likewise be subject to criminal liability for unlawfully furnishing a toy to a minor.

Senate Bill 199 Would Increase Risks for Police Officers and the Public

According to SB 199's author, its primary purpose is to protect against the accidental shooting of residents, especially minors and young adults, by law enforcement officers. This bill is apparently premised on the idea that a law enforcement officer will react differently when encountering an object that looks like a firearm, depending on whether or not it is translucent or brightly-colored. Police officers, however, cannot safely ignore the threat posed by a possible firearm based on its external appearance, especially considering documented cases of the criminal use of toy guns to hide real firearms, the availability of firearms that come brightly colored from the manufacturer and the ease with which firearms manufactured in normal colors can later be painted in bright colors (a simple can of spray paint is all that is needed to camouflage a real firearm as an apparently harmless "toy"). Police officers must therefore assume that any firearm-shaped object has the potential to be a real threat, regardless of its coloring.

While these issues were all very serious concerns with the author's previous legislation, Senate Bill 199 further adds to the confusion for law enforcement by exempting paint ball guns, but not other devices of similar appearance that discharge projectiles.

The bill's requirements would also lead to a false sense of security by the traditional air gun-using public. Citizens might erroneously assume that police officers can tell at a glance whether or not the object a person possesses is a real firearm, perhaps leading to insufficient care being taken when handling these firearms where police officers might see them.

Responsible behavior, both on the part of police officers and the air gun-using public, are the surest guarantees of safety and the avoidance of misunderstandings. Short cuts like markings that can be altered, misinterpreted, or intentionally used as camouflage cannot guarantee safety and only undermine caution, rather than enhancing it.

Conclusion

BB devices are widely used to teach the safe and responsible handling of firearms. In addition to the increased public safety risks identified above, SB 199 would criminalize innocent conduct and effectively ban many of the most popular tools that have been used for effective and essential safety training for American youth. By prohibiting the sale and transfer of these traditional BB devices, SB 199 is largely preempted by existing federal laws and would result in certain litigation against the state to result the conflicts.

For the foregoing reasons, the NRA respectfully requests your opposition to Senate Bill 199.

Sincerely,



Charles H. Cunningham
Director of State and Local Affairs