

SECOND AMENDMENT PRESERVATION ACT

2013 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Brian M. Greene

Senate Sponsor: _____

LONG TITLE

General Description:

This bill declares that the regulation of firearms is reserved completely to the state and provides penalties for the prosecution of anyone attempting to enforce federal laws to the contrary.

Highlighted Provisions:

This bill:

- ▶ affirms that it is the exclusive authority of the Legislature to adopt and enact any and all laws, orders, rules, or regulations regarding the manufacture, transfer, possession, ownership, and use of firearms exclusively within this state;
- ▶ provides that any federal action that attempts to impose limitations on firearms contrary to the Second Amendment of the Constitution of the United States, or the Constitution or laws of the State of Utah, is unenforceable in this state;
- ▶ creates a penalty for any enforcement of federal laws contrary to Utah laws or the United States or Utah Constitutions; and
- ▶ allows the attorney general to defend state officers, employees, and citizens prosecuted under certain federal laws.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.



28 This bill provides revisor instructions.

29 **Utah Code Sections Affected:**

30 ENACTS:

31 **53-5c-101**, Utah Code Annotated 1953

32 **53-5c-102**, Utah Code Annotated 1953

33 **53-5c-103**, Utah Code Annotated 1953

34 **53-5c-104**, Utah Code Annotated 1953

35 **53-5c-105**, Utah Code Annotated 1953



37 *Be it enacted by the Legislature of the state of Utah:*

38 Section 1. Section **53-5c-101** is enacted to read:

39 **CHAPTER 5c. SECOND AMENDMENT PRESERVATION ACT**

40 **53-5c-101. Title.**

41 This chapter is known as the "Second Amendment Preservation Act."

42 Section 2. Section **53-5c-102** is enacted to read:

43 **53-5c-102. Legislative authority.**

44 (1) In addition to the provisions of Sections 53-5a-102 and 76-10-500, the Legislature
45 declares that it is the exclusive authority of the Legislature to adopt and enact any and all
46 measures it considers necessary to prevent the enforcement of any federal acts, laws, orders,
47 rules, or regulations that violate the Second Amendment to the Constitution of the United
48 States, or the Constitution or laws of this state.

49 (2) All laws, orders, rules, and regulations pertaining to firearms, firearm accessories,
50 or ammunition enacted or authorized by the Legislature shall enjoy legal primacy within this
51 state over any and all conflicting federal acts, laws, orders, rules, and regulations pertaining to
52 firearms, firearm accessories, or ammunition.

53 (3) Any federal act, law, order, rule, regulation, or tax created on or after the effective
54 date of this chapter is unenforceable within the borders of Utah if the act, law, order, rule,
55 regulation, or tax:

56 (a) prohibits or restricts the manufacture, ownership, possession, sale, or transfer of any
57 specific type of firearm, firearm accessory, or ammunition;

58 (b) requires enhanced criminal background checks or waiting periods in connection

59 with the purchase or transfer of any firearm, firearm accessory, or ammunition;

60 (c) requires the ownership, possession, sale, or transfer of any firearm, firearm
61 accessory, or ammunition to be registered in any manner; or

62 (d) requires the disclosure or sharing of personal information connected with the
63 ownership, possession, sale, or transfer of any firearm, firearm accessory, or ammunition with
64 the federal government or other states without the written consent of the individual to whom
65 the personal information pertains.

66 Section 3. Section **53-5c-103** is enacted to read:

67 **53-5c-103. Prohibition of federal deputization of state officers -- Immunity of state**
68 **and local officers and employees.**

69 (1) An officer or employee of this state, or of any political subdivision, may not accept
70 permanent or temporary deputization or other official status from the federal government for
71 the purposes of conducting activities prohibited by this chapter.

72 (2) An officer or employee of this state, or of any political subdivision, is immune from
73 prosecution by the federal government for refusal to enforce any act, law, order, rule, or
74 regulation of the federal government relating to a personal firearm, a firearm accessory, or
75 ammunition that is owned or manufactured commercially or privately in Utah while the same
76 remains exclusively within the borders of Utah.

77 Section 4. Section **53-5c-104** is enacted to read:

78 **53-5c-104. Offenses and penalties.**

79 (1) An officer or employee of this state, or any political subdivision, may not enforce
80 or attempt to enforce any act, law, order, statute, rule, or regulation of the federal government
81 relating to a personal firearm, a firearm accessory, or ammunition owned or manufactured
82 commercially or privately in this state while it remains exclusively within the borders of Utah.

83 (2) An official, agent, or employee of the federal government may not enforce or
84 attempt to enforce any act, law, order, rule, or regulation of the federal government upon a
85 personal firearm, a firearm accessory, or ammunition owned or manufactured commercially or
86 privately in this state while it remains exclusively within this state. Violation of this
87 Subsection (2) is a third degree felony.

88 Section 5. Section **53-5c-105** is enacted to read:

89 **53-5c-105. Defense of officers, employees, and citizens.**

90 (1) Officers and employees of this state and its political subdivisions shall affirmatively
91 act to preserve, protect, and defend the inalienable right of self-preservation of all citizens,
92 including the right to keep and bear arms and to use those arms for all legal purposes, including
93 the defense of self, family, others, property, and the state.

94 (2) The attorney general shall develop and maintain a program to provide for the
95 defense of an officer, employee, or citizen of this state who is prosecuted by the United States
96 government for violation of a federal act, law, order, rule, or regulation relating to the
97 manufacture, sale, transfer, or possession of a firearm, a firearm accessory, or ammunition
98 when the activity is contained exclusively within the borders of Utah. A person facing
99 prosecution may apply to the attorney general for assistance.

100 **Section 6. Effective date.**

101 If approved by two-thirds of all the members elected to each house, this bill takes effect
102 upon approval by the governor, or the day following the constitutional time limit of Utah
103 Constitution Article VII, Section 8, without the governor's signature, or in the case of a veto,
104 the date of veto override.

105 **Section 7. Revisor instructions.**

106 The Legislature intends that the Office of Legislative Research and General Counsel, in
107 preparing the Utah Code database for publication, replace the language in Subsection
108 53-5c-102(3) from "the effective date of this chapter" with the bill's actual effective date.

Legislative Review Note
as of 2-1-13 6:25 PM

As required by legislative rule and practice, the Office of Legislative Research and General Counsel provides the following legislative review note to assist the Legislature in making its own determination as to the constitutionality of the bill. The note is based on an analysis of relevant state and federal constitutional law as applied to the bill. The note is not written for the purpose of influencing whether the bill should become law, but is written to provide information relevant to legislators' consideration of this bill. The note is not a substitute for the judgment of the judiciary, which has authority to determine the constitutionality of a law in the context of a specific case.

This bill provides that: (1) the regulation of firearms, including their manufacture, transfer, possession, sale, and use within this state, is not subject to federal regulation; (2) an officer,

employee, or agent of the federal government who enforces any federal act, law, order, rule, regulation, or tax on a Utah firearm that is manufactured and remains within the state of Utah is guilty of a third degree felony; (3) the federal government is prohibited from deputizing local law enforcement officers for the purposes of enforcing federal firearms laws; (4) any federal act, law, order, rule, or regulation that requires any registration of, or the sharing of, personal information connected with the ownership, possession, sale, or transfer of any firearm, magazine, accessory, or ammunition is unenforceable in this state; and (5) Utah's attorney general shall create a program to provide for the defense of any state officers, employees, or citizens prosecuted under a federal act relating to firearms manufacture, use, sale, or possession, including the possession of ammunition, when the activity is contained exclusively within this state.

As drafted, these provisions raise issues relating to the United States Constitution's Supremacy Clause, contained in Article VI, Section 2, of the United States Constitution, which provides: "This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Under existing standards of jurisprudence, and particularly the United States Supreme Court case of *Marbury v. Madison*, 5 U.S. 137 (U.S. 1803), the United States Supreme Court has the final say on the meaning and interpretation of provisions of the United States Constitution. Consequently, the determinations of the United States Supreme Court, and direct extrapolations from those opinions, provide the only objective basis for evaluating the constitutionality of legislation. Consequently, this note relies on United States Supreme Court opinions in analyzing the constitutionality of this legislation.

The United States Supreme Court has "long recognized that state laws that conflict with federal law are 'without effect,'" *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008), quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), and has further held that an individual cannot be guilty of a state crime if the individual was acting necessarily and properly under the authority of the laws of the United States. *Cunningham v. Neagle*, 135 U.S. 1, 75 (1890).

Federal firearms laws currently impose restrictions on firearms including: sale and transfer (18 U.S.C. §922(b)); possession (18 U.S.C. § 922(g) and (n)); and that every manufacturer have a federal license (18 U.S.C. § 923(a)). Additionally, the federal laws include a provision declaring the federal law as controlling if a state law "direct[ly] and positive[ly]" conflicts with the federal law. (18 U.S.C. § 927) These provisions, coupled with the United States Constitution's Supremacy Clause, suggest that there is a high probability that this legislation would be held unconstitutional.

While this legislation limits itself to wholly intrastate conduct, it is not beyond the reach of Congress's power under the Commerce Clause of the United States Constitution. Judicial interpretation of federal firearms laws has held that Congress has the power to regulate wholly intrastate conduct. See, e.g. *United States v. Leberman*, 464 F.2d 68, 71 (5th Cir. 1972) (stating that "Congress intended to and had the authority, under its commerce power, to regulate the intrastate transactions at issue here."). This interpretation by the United States Supreme Court

of federal firearms laws is consistent with the United States Supreme Court's rationale for allowing regulation of other wholly intrastate conduct. See, e.g. *Wickard v. Filburn*, 317 U.S. 111, 128-29 (1942) (holding that Congress may regulate wholly intrastate conduct if the failure to regulate that conduct would "have a substantial effect in defeating and obstructing" Congress's purpose in regulation of other, interstate conduct). This long-standing interpretation of the Commerce Clause has been sustained by the United States Supreme Court in *Gonzales v. Raich*, 545 U.S. 1 (2005). A federal circuit court directly applied this interpretation to firearms, stating: "The Congressional purpose, set forth in the legislative history, is to assist the states effectively to regulate firearms traffic within their borders. Illegal intrastate transfer of firearms is part of a pattern which affects the national traffic and Congress can validly enact a comprehensive program regulating all transfers of firearms." *United States v. Petrucci*, 486 F.2d 329, 331 (9th Cir. 1973) (citations omitted).

Congress has provided a comprehensive system for regulating firearms, including broad licensing requirements. Congress has also provided that contrary state laws are invalid. Existing judicial interpretations of Congress's power to regulate intrastate conduct allow the manufacture, possession, and sale of firearms to be restricted by federal law, while allowing some room for state laws, but only if they are not directly contrary to federal law.

The provision making the enforcement of federal firearms laws a third degree felony would likely be held to have a chilling effect on federal officers' authority. The Supreme Court, in *Tennessee v. Davis*, 100 U.S. 257 (U.S. 1880), addressed this issue briefly in its review of whether a federal agent being prosecuted by a state for carrying out his federal duties can require removal of the case to a federal court. In the midst of a 40-plus page opinion, the Court noted:

[The general government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offence against the law of the State. . . the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government.... We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it. *Id.* at 262-263

From this rationale, there is a high probability that a court, if faced with a federal officer charged under this legislation, would reaffirm the supremacy of federal law and declare this

portion of the law unenforceable.

The issue of deputization of state officers for federal purposes has not been directly addressed in an arena where criminal laws are being enforced. However, in *City of New York v. United States*, 179 F.3d 29 (2d Cir. N.Y. 1999), on the question of the enforcement of civil provisions of federal immigration law vis-a-vis the Tenth Amendment, the court stated "[a] system of dual sovereignties cannot work without informed, extensive, and cooperative interaction of a voluntary nature between sovereign systems for the mutual benefit of each system. The operation of dual sovereigns thus involves mutual dependencies as well as differing political and policy goals. . . The potential for deadlock thus inheres in dual sovereignties, but the Constitution has resolved that problem in the Supremacy Clause, which bars states from taking actions that frustrate federal laws and regulatory schemes. We therefore hold that states do not retain under the Tenth Amendment an untrammelled right to forbid all voluntary cooperation by state or local officials with particular federal programs." *Id.* at 35 (citations omitted).

In conclusion, this legislation purports to limit the reach of the federal law and is inconsistent with existing federal firearms provisions. Based on the federal statutes and case law described above, there is a high probability that a court will find that this bill violates the Supremacy and Commerce Clauses to the extent that it conflicts with current federal regulation of firearms and establishes a criminal penalty for federal government agents who attempt to enforce federal law.

Office of Legislative Research and General Counsel