

Representative Brian M. Greene proposes the following substitute bill:

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; and
- ▶ creates a penalty for any enforcement of federal laws contrary to Utah laws or the United States or Utah Constitutions.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides an immediate effective date.



26 This bill provides revisor instructions.

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **63C-4-102**, as last amended by Laws of Utah 2012, Chapters 324 and 377

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

36 **63C-4-105.5**, Utah Code Annotated 1953



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

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

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

41 **53-5c-101. Title.**

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

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

44 **53-5c-102. Legislative authority.**

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

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

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

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

59 (b) requires enhanced criminal background checks or waiting periods in connection
60 with the purchase or transfer of any firearm, firearm accessory, ammunition, or ammunition
61 component;

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

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

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

69 **53-5c-103. Prohibition of federal deputization of state officers -- Immunity of state**
70 **and local officers and employees.**

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

74 (2) An officer or employee of this state, or of any political subdivision, is immune from
75 prosecution by the federal government for refusal to enforce any act, law, order, rule, or
76 regulation of the federal government relating to the ownership, possession, sale, or transfer of a
77 personal firearm, a firearm accessory, ammunition, or ammunition component while the same
78 remains exclusively within this state.

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

80 **53-5c-104. Offenses and penalties.**

81 (1) An officer or employee of this state, or any political subdivision, may not enforce
82 or attempt to enforce any act, law, order, statute, rule, or regulation of the federal government
83 relating to the ownership, possession, sale, or transfer of a personal firearm, a firearm
84 accessory, ammunition, or ammunition component while the same remains exclusively within
85 this state.

86 (2) An official, agent, or employee of the federal government may not enforce or
87 attempt to enforce any act, law, order, rule, or regulation of the federal government relating to

88 the ownership, possession, sale, or transfer of a personal firearm, a firearm accessory,
89 ammunition, or ammunition component while it remains exclusively within this state.

90 Violation of this Subsection (2) is a third degree felony.

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

92 **53-5c-105. State officers and employees to act affirmatively.**

93 Officers and employees of this state and its political subdivisions shall affirmatively act
94 to preserve, protect, and defend the inalienable right of self-preservation of all citizens,

95 including the right to keep and bear arms and to use those arms for all legal purposes, including
96 the defense of self, family, others, property, and the state.

97 Section 6. Section **63C-4-102** is amended to read:

98 **63C-4-102. Duties.**

99 (1) The Constitutional Defense Council is a council to assist the governor and the
100 Legislature on the following types of issues:

101 (a) the constitutionality of federal mandates;

102 (b) when making recommendations to challenge the federal mandates and regulations
103 described in Subsections (1)(f)(i) through (v), the rationale for and effectiveness of those
104 federal mandates or regulations;

105 (c) legal and policy issues surrounding state and local government rights under R.S.
106 2477;

107 (d) legal issues relating to the rights of the School and Institutional Trust Lands
108 Administration and its beneficiaries;

109 (e) a disagreement with another state regarding the use or ownership of water; and

110 (f) the advisability, feasibility, estimated cost, and likelihood of success of challenging:

111 (i) federal court rulings that:

112 (A) hinder the management of the state's prison system and place undue financial
113 hardship on the state's taxpayers;

114 (B) impact a power or a right reserved to the state or its citizens by the United States
115 Constitution, Amendment IX or X; or

116 (C) expand or grant a power to the United States government beyond the limited,
117 enumerated powers granted by the United States Constitution;

118 (ii) federal laws or regulations that reduce or negate water rights or the rights of owners

119 of private property, or the rights and interest of state and local governments, including
120 sovereignty interests and the power to provide for the health, safety, and welfare, and promote
121 the prosperity of their inhabitants;

122 (iii) conflicting federal regulations or policies in land management on federal land;

123 (iv) federal laws or regulations that infringe upon the fundamental rights of Utah's
124 citizens protected under the Constitution of the United States or the Constitution of Utah;

125 [~~(iv)~~] (v) federal intervention that would damage the state's mining, timber, and
126 ranching industries;

127 [~~(v)~~] (vi) the authority of the Environmental Protection Agency and Congress to
128 mandate local air quality standards and penalties; and

129 [~~(vi)~~] (vii) other issues that are relevant to this Subsection (1).

130 (2) The council shall:

131 (a) provide advice to the governor, state planning coordinator, and the public lands
132 policy coordinator concerning coordination of:

133 (i) state and local government rights under R.S. 2477; and

134 (ii) other public lands issues;

135 (b) approve a plan for R.S. 2477 rights developed in accordance with Section
136 63C-4-104; and

137 (c) review, at least quarterly:

138 (i) financial statements concerning implementation of the plan for R.S. 2477 rights;

139 and

140 (ii) financial and other reports from the Public Lands Policy Coordinating Office
141 concerning its activities.

142 (3) The council chair may require the attorney general or a designee to provide
143 testimony on potential legal actions that would enhance the state's sovereignty or authority on
144 issues affecting Utah and the well-being of its citizens.

145 (4) The council chair may direct the attorney general to initiate and prosecute any
146 action that the council determines will further its purposes, including an action described in
147 Section 67-5-29.

148 (5) (a) Subject to the provisions of this section, the council may select and employ
149 attorneys to implement the purposes and duties of the council.

150 (b) The council chair may, in consultation with the council, direct any council attorney
151 in any manner considered appropriate by the attorney general to best serve the purposes of the
152 council.

153 (c) The attorney general shall negotiate a contract for services with any attorney
154 selected and approved for employment under this section.

155 (6) The council chair may, only with the concurrence of the council, review and
156 approve all claims for payments for:

157 (a) legal services that are submitted to the council;

158 (b) an action filed in accordance with Section 67-5-29; and

159 (c) costs related to a constitutional defense plan approved in accordance with Section
160 63C-4-104 that are submitted by:

161 (i) the Public Lands Policy Coordinating Office;

162 (ii) the School and Institutional Trust Lands Administration; or

163 (iii) the Office of the Attorney General.

164 (7) Within five business days' notice, the council chair may, with the concurrence of
165 the council, order the attorney general or an attorney employed by the council to cease work to
166 be charged to the fund.

167 (8) (a) At least 20 calendar days before the state submits comments on the draft
168 environmental impact statement or environmental assessment for a proposed land management
169 plan of any federal land management agency, the governor shall make those documents
170 available to:

171 (i) members of the council; and

172 (ii) any county executive, county council member, or county commissioner of a county
173 that is covered by the management plan and that has established formal cooperating agency
174 status with the relevant federal land management agency regarding the proposed plan.

175 (b) (i) Council members or local government officials receiving the documents may
176 make recommendations to the governor or the governor's designee concerning changes to the
177 documents before they are submitted to the federal land management agency.

178 (ii) Council members or local government officials shall submit recommendations to
179 the governor or the governor's designee no later than 10 calendar days after receiving the
180 documents under Subsection (8)(a).

181 (c) Documents transmitted or received under this Subsection (8) are drafts and are
182 protected records pursuant to Subsection 63G-2-305(21).

183 (9) The council shall submit a report on December 1 of each year by electronic mail
184 that summarizes the council's activities to each legislator.

185 Section 7. Section **63C-4-105.5** is enacted to read:

186 **63C-4-105.5. Firearm policy and regulation.**

187 The council shall study the following issues regarding firearm regulation:

188 (1) the strength of the state's position with regard to federal regulation of intrastate
189 activity;

190 (2) the indemnification or defense of state officers or employees enforcing state law
191 regarding firearms; and

192 (3) the policy for asserting state law vis-a-vis federal law and the state's response when
193 state and federal policies conflict.

194 Section 8. **Effective date.**

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

199 Section 9. **Revisor instructions.**

200 The Legislature intends that the Office of Legislative Research and General Counsel, in
201 preparing the Utah Code database for publication, replace the language in Subsection
202 53-5c-102(3) from "the effective date of this chapter" with the bill's actual effective date.

Legislative Review Note
as of 2-13-13 9:31 AM

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; and (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.

As drafted, these provisions raise issues relating to the Supremacy Clause, contained in Article VI, Section 2 of the United States Constitution which provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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. This note, therefore, 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 (9th Cir. 1973), cert. denied 416 U.S. 937, 94 S. Ct. 1937, 40 L. Ed. 2d 287 (1974).

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