

FEDERALISM OF THE HIGHEST CALIBER: COUNTERACTIVE LEGISLATION AND THE IDAHO FIREARMS FREEDOM ACT

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ABSTRACT

Counteractive legislation is a phenomenon that has been prevalent throughout almost the entirety of U.S. history. The Idaho Firearms Freedom Act, passed in 2010, provides a unique opportunity to survey one piece of counteractive legislation from start to finish. The continued presence of this law in Idaho has the potential to result in detrimental reliance by citizens who believe they are lawfully exercising their right to bear arms, despite being in violation of federal law. This comment provides a close look at the Idaho Firearms Freedom Act and examines the history of counteractive legislation in Idaho and at the national level, as well as its potential side effects.

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I. INTRODUCTION

On April 8, 2010, Second Amendment enthusiasts in Idaho declared victory when Governor Butch Otter signed the Idaho Firearms Freedom Act (IFFA) into law.¹ From its inception, it was clear that the IFFA was problematic, as it was not only in direct conflict with multiple federal laws, but also explicitly deemed said laws ineffective—a seemingly unconstitutional and fruitless exercise of states’ rights

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1. Idaho Code § 18-3315A (2019); Michael Boldin, *Idaho Legislature Passes the Firearms Freedom Act*, Tenth Amend. Ctr. (Apr. 3, 2010), <https://blog.tenthamendmentcenter.com/2010/04/idaho-legislature-passes-the-firearms-freedom-act/>.

under the Supremacy Clause.² Despite the apparent clarity that the law would be null and void, the Idaho Legislature passed the IFFA.³ The IFFA's unconstitutionality was settled after an almost identical Montana law was challenged in federal court and found to be unconstitutional.⁴ As of February 2019 the IFFA remains codified law in Idaho, creating the potential for detrimental reliance by Idaho citizens who believe their conduct is legal when in all actuality, they are in violation of federal law.

The IFFA is not a legislative anomaly in the state of Idaho. Idaho Legislators have passed and continue to propose a host of legislation that claims to invalidate federal law, expresses dissent against federal law and policy, or directly contradicts governing federal law.⁵

This predicament is not unique to Idaho. Throughout the history of the United States, state legislatures have enacted legislation that attempts to nullify or counteract federal law, a phenomenon I have deemed "counteractive legislation."

Counteractive legislation was first introduced in 1798.⁶ The first piece of identifiable counteractive legislation codified a state's attempt at nullification and was almost immediately condemned by the federal government.⁷ Despite the initial lack of success, states have continued to pass counteractive legislation.⁸ There are a variety of goals states hope to achieve by passing counteractive legislation, as well as an array of negative consequences that can spawn from it.

This comment addresses the concept of counteractive legislation. Part I provides further explanation of counteractive legislation, as well as the benefits and drawbacks of passing it. Part II examines Idaho's passage of the IFFA, the potential negative repercussions it may have, and other counteractive legislation passed by the Idaho Legislature. Part III provides a summary of counteractive legislation at the national level. Part IV provides a brief approach to counteractive legislation moving forward, both locally in Idaho and at the national level.

II. COUNTERACTIVE LEGISLATION

2. *House State Affairs Committee: Hearing on H.B. 589*, 2010 Leg., (Idaho 2010) (statement of Rep. Harwood), <https://legislature.idaho.gov/sessioninfo/2010/standingcommittees/HSTA/>.

3. Boldin, *supra* note 1.

4. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 978 (9th Cir. 2013).

5. See generally Idaho Code § 39-9003 (2019); Idaho Code § 18-3315B (2019); H.R. Res. 461, 2018 Leg. (Idaho 2018); Mike Price, *Idaho Legislators Seek to Make Abortion Murder*, EAST IDAHO NEWS.COM (Jan. 30, 2019, 6:00 PM), <https://www.eastidahonews.com/2019/01/idaho-legislators-seek-to-make-abortion-murder/>.

6. James Madison & Thomas Jefferson, *The Virginia and Kentucky Resolutions*, BILL RTS. INSTITUTE, <https://billofrightsinstitute.org/wp-content/uploads/2011/12/VirginiaKentuckyResolutions.pdf> (last visited Feb. 3, 2019).

7. Andrew Jackson, *Proclamation Respecting the Nullifying Law of South Carolina*, Proclamation No. 43, 11 Stat. 771 (Dec. 10, 1832), <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=011/llsl011.db&recNum=816>.

8. See *infra* notes 145, 172, and 178

Counteractive legislation, as I have defined it, refers to state legislation that seeks to nullify or counteract federal law, or results in an outcome that is incompatible with federal law. Within counteractive legislation, one could identify a variety of subcategories.⁹ However, for purposes of this article, I have chosen to examine the topic of counteractive legislation from a broad perspective.

A. The Goals of Counteractive Legislation

A primary motivation for passing counteractive legislation may be an attempt to formalize social norms, especially when a disconnect exists between such norms and existing federal law. Proponents of counteractive legislation hope that Congress will recognize social norms as they become codified in state legislation and respond accordingly—that is, by enacting or amending federal law to reflect these norms. Others believe that counteractive legislation can provide an opportunity for the United States Supreme Court to overturn existing precedent.

For example, a large number of states have legalized marijuana usage, a policy decision that contradicts with the federal government's continued criminalization of marijuana possession and use.¹⁰ As more and more states permit medical and recreational marijuana use, which in turn may allow for more research on the drug and its side effects, Congress may feel increased pressure to reevaluate marijuana's drug scheduling or overall legality.

The hope that counteractive legislation will prompt action by Congress or the Supreme Court is less persuasive in other contexts. Multiple states have enacted counteractive legislation targeting different issues including firearms and abortion.¹¹ It is unlikely that these pieces of legislation will sway the actions of Congress or the Supreme Court, considering that both branches of government have had multiple opportunities to revisit these issues but seem hesitant to do so.

Additionally, counteractive legislation is arguably a means of exerting political pressure on members of Congress who support the targeted federal legislation or regulation. Notwithstanding the possibility that counteractive legislation can serve as a codified record of distaste for a particular politician's actions, it is difficult to

9. For illustrative purposes, I have identified three subcategories I feel are most comprehensive: nullification legislation, expressive legislation, and contradictory legislation. Nullification legislation refers to state legislation that either expressly or impliedly purports to nullify federal law. Expressive legislation is state legislation that is ordinarily passed to convey a state's viewpoint on a decision made at the federal level, be it newly enacted legislation, a Supreme Court opinion, or a policy decision made by a presidential administration. Contradictory legislation is state legislation that is either contradictory or inconsistent with federal law or Supreme Court precedent. One piece of counteractive legislation may encompass multiple subcategories, depending on its desired purpose.

10. Jeremy Berke & Skye Gould, *Legal Marijuana Just Went on Sale in Illinois*, BUS. INSIDER (Jun. 25, 2019, 1:52 PM), <https://www.businessinsider.com/legal-marijuana-states-2018-1>.

11. Alaska, Arizona, Idaho, Kansas, Montana, South Dakota, Tennessee, Utah, and Wyoming have all passed laws attempting to circumvent federal firearm legislation. See *State By State*, FIREARMS FREEDOM ACT, <http://firearmsfreedomact.com/state-by-state/> (last visited Feb. 3, 2019); see also *infra* note 21.

know when or if counteractive legislation has a direct impact on members of Congress and their decision-making. This reasoning is also less persuasive in states like Idaho, whose members of Congress are customarily aligned with the state legislature and are therefore more likely to vote in line with the majority of the Idaho legislative body.¹²

Some who support the concept of counteractive legislation also argue that it functions as an effective method of increasing public understanding about the federal law or policy at issue.¹³ The hope is that counteractive legislation will draw attention to the federal action that the state is responding to.¹⁴

While this may be true in certain scenarios, when counteractive legislation like the IFFA is not enacted in clear and direct response to widely known federal law or policy, this function seems unlikely to be served. Furthermore, the cost and confusion caused by counteractive legislation seems a high price to pay for the chance of increasing public discourse on any given topic.

Counteractive legislation may be enacted with the hope that a lawsuit will ensue between the state and federal government, providing a forum for the courts to revisit an issue the state feels was wrongly decided. The problem with this, as demonstrated by the Montana Firearms Freedom Act (MFFA), is that even if a lawsuit ensues, there is never a guarantee that the desired outcome will occur.¹⁵ Furthermore, lawsuits in which a state itself is a party can cost taxpayers hundreds of thousands of dollars, if not more.¹⁶

B. Consequences of Counteractive Legislation

Counteractive legislation can potentially create a variety of problems, ranging from general confusion about the law to criminal prosecution of citizens who are misled by counteractive legislation.

The confusion that can amount from the codification of counteractive legislation should arguably persuade lawmakers that the legislation is not worth its perceived benefits. However, additional negative consequences should dissuade legislators in Idaho and throughout the country from using legislation as a mere form of political expression.

12. *United States Congressional Delegations from Idaho*, Ballotpedia, https://ballotpedia.org/United_States_congressional_delegations_from_Idaho#2000s (last visited Feb. 3, 2019). Idaho has had only one Democratic congressman in the last 20 years. Adam Cotterell, *How Idaho Became a One Party State*, BOISE ST. PUB. RADIO (May 13, 2014), <https://www.boisestatepublicradio.org/post/how-idaho-became-one-party-state#stream/0>. Similarly, for the past 20 years, and throughout its history, the Idaho Legislature has been overwhelmingly Republican. *Id.*

13. Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-Based Dissent to Federal Health Reform*, 39 Hofstra L. Rev. 111, 163 (2010).

14. *Id.*

15. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975 (9th Cir. 2013).

16. See James Dawson, *Is Idaho's Constitutional Defense Fund a Backstop for Shaky Legislation?*, BOISE ST. PUB. RADIO (Sep. 12, 2019) <https://www.boisestatepublicradio.org/post/idahos-constitutional-defense-fund-backstop-shaky-legislation#stream/0>.

Nearly all forms of counteractive legislation open the door for detrimental reliance. Of particular import is counteractive legislation that purports to allow activity that is prohibited under federal law. This type of legislation is likely to confuse citizens about their obligations under state and federal law and does not provide those who rely on it with a mistake of law defense in the event that they are criminally prosecuted.

Citizens are presumed to know the law.¹⁷ An actor's lack of awareness that their conduct is illegal is not a defense to criminal prosecution.¹⁸ A mistake of law defense, often deemed entrapment by estoppel, is available only when an actor can prove they reasonably relied on a misstatement of the law that came from a government agent who was responsible for interpreting the law.¹⁹ Any individual who relies on state law when engaging in conduct that is illegal under federal law cannot assert a mistake of law defense, because state officials who enact counteractive legislation are not responsible for interpreting *federal* law.²⁰

Counteractive legislation can also put a stop to legal conduct that individuals might otherwise engage in. Consider abortion—a policy area frequently targeted by counteractive legislation. Multiple states have passed laws regulating abortion that are preempted by federal law.²¹ These state laws often purport to create restrictions around abortion that are clearly impermissible under long-standing federal precedent.²² Some go as far as criminalizing abortion altogether.²³

Although the restrictions these abortion laws claim to mandate are often inoperative, they can still have a dramatic chilling effect on women and health care providers alike. Those who support this type of legislation would likely see the potential for such a chilling effect as a positive; however, these laws could have other dramatic repercussions.²⁴

17. *Cheek v. United States*, 498 U.S. 192, 199 (1991).

18. *United States v. Freed*, 401 U.S. 601, 612 (1971) (Brennan, J., concurring); *Cheek*, 498 U.S. at 199.

19. *United States v. Hardridge*, 379 F.3d 1188, 1192 (10th Cir. 2004).

20. *United States v. Cox*, 906 F.3d 1170, 1194 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 2690 (2019), *and cert. denied sub nom.*, *Kettler v. United States*, 139 S. Ct. 2691 (2019). (“A state legislature’s statement about the reach of federal law is hardly an ‘official’ statement of federal law, and to rely on such a statement is not reasonable.”).

21. *Abortion Policy in the Absence of Roe*, Guttmacher Institute <https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe> (last visited Feb. 3, 2019).

22. *Id.*

23. *Id.*; see also *infra* note 133.

24. See Rachel Benson Gold, *Lessons From Before Roe: Will Past Be Prologue?*, GUTTMACHER INSTITUTE (March 1, 2003), <https://www.guttmacher.org/gpr/2003/03/lessons-roe-will-past-be-prologue>; Sarah Kramer, *The GOP’s New Abortion Plans Could Lead to Some Chilling Consequences*, *Bus. Insider* (July 26, 2016, 9:26 AM), <https://www.businessinsider.com/anti-abortion-womens-health-effects-2016-7>. It is well known that prior to the legalization of abortion, the procedure was still performed, often under high-risk circumstances. *Id.* In 1965, the number of deaths due to illegal abortion

Recognizing negative consequences that may result when a specific piece of counteractive legislation is passed or proposed is an easier task than recognizing the problems of counteractive legislation as a whole. Generally speaking, perhaps the most predominant problem posed by counteractive legislation is the potential it creates for a misunderstanding of the relationship between state and federal law that may be difficult to undue.

The average citizen may not have a dynamic understanding of the Supremacy Clause, or the effect it has on state laws that purport to nullify or circumvent federal law.²⁵ Citizens might follow a piece of counteractive legislation as it becomes codified law and assume that the law and others like it are valid. Unless the law is repealed or something of consequence occurs that draws attention to the law's ineffectiveness—such as a high-level prosecution involving the law at issue—citizens may never become aware that their state legislature lacks the power to challenge federal law in this manner.

Furthermore, if citizens do become aware of a law's ineffectiveness following its codification, it could lead to distrust in the state legislature and its members. It is reasonable for citizens to assume that legislators would not pass a law that is in effect meaningless, never mind a law which, if relied upon, could put citizens at risk of federal criminal prosecution.

III. IDAHO'S HISTORY WITH COUNTERACTIVE LEGISLATION

Idaho has passed multiple laws that conflict with federal law.²⁶ The Idaho Firearms Freedom Act (IFFA) provides a useful case study of how and why counteractive legislation has been and continues to be passed in Idaho. Because the IFFA can mislead Idaho citizens into believing they can legally engage in various conduct prohibited by federal law, the consequences of it remaining codified law are somewhat unique. Although a legal scholar may recognize that the IFFA cannot do what it claims—that is, totally exempt certain firearms from federal prosecution—the average citizen may not. So long as the IFFA remains codified law in Idaho, the majority of citizens may have no knowledge of its practical ineffectiveness and could detrimentally rely on it due to a mistaken belief that it effectively exempts them from federal law. Despite these potential repercussions, Idaho legislators have not only allowed the IFFA to remain current law but have also continued to propose and pass additional pieces of counteractive legislation.²⁷

C. Idaho Firearms Freedom Act

accounted for seventeen percent of all deaths related to pregnancy and childbirth. *Id.* Women and practitioners who fear prosecution may revert to obtaining and performing the procedure under similar risky circumstances. *Id.*

25. U.S. Const. art. VI, § 1, cl. 2. ("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.").

26. *See infra* Section II.B.

27. *See infra* Section II.B.

The right to bear arms has long been considered a liberty interest of the utmost importance to Idahoans.²⁸ The Idaho Constitution reiterates the right to keep and bear arms, as promised in the United States Constitution.²⁹ The Idaho Constitution goes further in its support of the right to bear arms by prohibiting laws imposing “licensure, registration or special taxation on the ownership or possession of firearms or ammunition.”³⁰ It also prohibits laws that would allow for the confiscation of firearms other than those used in the commission of a felony.³¹

In 2010, Idaho took an additional step in attempting to protect the right to bear arms by passing the Idaho Firearms Freedom Act (IFFA).³² While the IFFA’s primary purpose seems to be to nullify federal gun regulations, it is also a declaration from Idaho Legislators of their “intention of Idaho becoming the freest state in the Union.”³³ The IFFA states, in no uncertain terms, that any firearm, firearm accessory, or ammunition that is manufactured commercially or privately in Idaho is not subject to federal regulation.³⁴ “It is declared by the legislature that those items have not traveled in interstate commerce,” meaning, in theory, that they cannot be subject to federal regulation.³⁵ The IFFA goes further in attempting to exempt these firearms from federal regulation by saying that certain “insignificant parts” that may be used to manufacture firearms do not subject the firearm to federal regulation, even if those parts have traveled through interstate commerce.³⁶ This language directly conflicts with the long-standing ability of the federal government to regulate firearms within the United States.³⁷

Congress has the power, under the Commerce Clause, to regulate a commodity so long as there is a rational basis for concluding that regulated activity, when taken in the aggregate, will have a substantial effect on interstate

28. Idaho Const. art. I, § 11.

29. *Id.*

30. *Id.*

31. *Id.*

32. Boldin, *supra* note 1.

33. Idaho Firearms Freedom Act, ch. 244, § 2(7), 2010 Idaho Sess. Laws 627, 628 (2010). “In enacting this law, the Idaho legislators are declaring their intention of Idaho becoming the freest state in the Union.” *Id.* The law is titled “Prohibition of federal regulation of certain firearms.” *Id.* § 3.

34. Idaho Code § 18-3315A (2016).

35. *Id.*

36. *Id.*

37. See *National Firearms Act*, ATF, <https://www.atf.gov/rules-and-regulations/national-firearms-act> (last visited Feb. 3, 2020). In 1934, Congress enacted the National Firearms Act (NFA) as part of the Internal Revenue Code. *Id.* Congress amended NFA with the Federal Firearms Act of 1938 (FFA) which required a federal license requirement for individuals in the business of selling firearms. See *Key Federal Acts Regulating Firearms*, Giffords L. Ctr., <https://lawcenter.giffords.org/gun-laws/federal-law/other-laws/key-federal-acts-regulating-firearms/> (last visited Feb. 3, 2020). The Gun Control Act of 1968 (GCA) revised the NFA and FFA, regulating interstate and foreign commerce in firearms. See *Gun Control Act*, ATF, <https://www.atf.gov/rules-and-regulations/gun-control-act> (last visited Feb. 3, 2020). The Brady Handgun Violence Prevention Act, passed in 1993, amended the GCA, imposing a background check requirement on individuals purchasing a handgun. See *Brady Law*, ATF, <https://www.atf.gov/rules-and-regulations/brady-law> (last visited Feb. 3, 2020).

commerce.³⁸ Federal courts have held that Congress has a rational basis for concluding that firearms, firearm accessories, and ammunition, even when manufactured purely intrastate, will have a substantial effect on interstate commerce.³⁹

The federal government has used its commerce power to pass numerous regulations on firearms, most notably the Gun Control Act, passed in 1968; the Firearms Owners' Protection Act, passed in 1986; and the Brady Handgun Violence Prevention Act, passed in 1993.⁴⁰ This history of federal regulation of firearms, coupled with Commerce Clause jurisprudence, makes clear that Congress has the power to regulate certain commodities, including firearms, regardless of their actual entry into interstate commerce.⁴¹

It seems highly unlikely that Idaho legislators were unaware of Congress's power in this arena when they passed the IFFA. At minimum, Idaho legislators should have been skeptical of the IFFA's effectiveness following its passage, not only because of Congress's well-known commerce power, but also because of Idaho's active involvement in litigation involving an almost identical Montana law, the Montana Firearms Freedom Act (MFFA).

The MFFA⁴² was the first piece of legislation of its kind, and many states, including Idaho, went on to model similar pieces of legislation off of the MFFA.⁴³ It was passed primarily as "a Tenth Amendment challenge to the powers of Congress under the 'commerce clause,' with firearms as the object."⁴⁴ The language of the IFFA mirrors the MFFA almost exactly.⁴⁵

Following the passage of the MFFA, the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives distributed a letter stating that the MFFA conflicted with federal firearms laws and was necessarily superseded by federal law.⁴⁶ Despite this

38. *Gonzales v. Raich*, 545 U.S. 1, 22 (2005).

39. *See* *United States v. Stewart*, 451 F.3d 1071, 1077 (9th Cir. 2006), *overruled on other grounds* by *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008) (The Ninth Circuit held that Congress had a rational basis for concluding that the possession of homemade machine guns could substantially affect the interest market in machine guns.).

40. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (1968); Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (1986); Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

41. *See* *Gonzales v. Raich*, 545 U.S. 1 (2005); *United States v. Stewart*, 451 F.3d 1071, 1076 (9th Cir. 2006), *overruled on other grounds* by *District of Columbia v. Heller*, 554 U.S. 570, 594–95 (2008); *see also* *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (wherein the Supreme Court stated that "the commerce power is not confined in its exercise to the regulation of commerce among the states").

42. Mont. Code Ann. § 30-20-104 (2019).

43. *The Firearms Freedom Act (FFA) Is Sweeping the Nation.*, FIREARMS FREEDOM ACT (Jun. 3, 2010), <http://firearmsfreedomact.com/>.

44. *Id.*

45. *Compare* Idaho Code § 18-3315A (2019), *with* Mont. Code Ann. § 30-20-104 (2019).

46. U.S. Dep't of Justice, Bureau of Alcohol, Tobacco, Firearms & Explosives, Open Letter to all Montana Federal Firearms Licensees (July 16, 2009), <https://www.atf.gov/firearms/docs/open-letter/montana-july2009-open-letter-guidance-regarding-montana-firearms-freedom/download>.

letter, the Montana law remained in statute and many states, including Idaho, enacted similar legislation.⁴⁷

In 2013, the Ninth Circuit found the MFFA to be unconstitutional.⁴⁸ A Montana citizen named Gary Marbut, joined by the Montana Shooting Sports Association and the Second Amendment Foundation, filed suit seeking a declaratory judgment that Congress lacked the power to regulate the activities contemplated by the MFFA and injunctive relief preventing the federal government from bringing civil or criminal actions under federal firearms law against Montana citizens acting in compliance with the MFFA.⁴⁹ Marbut owned a firearm equipment manufacturing business and sought to manufacture and sell firearms and ammunition under the MFFA without complying with applicable federal firearms regulations.⁵⁰ Marbut stated that he had several interested buyers, but that these potential customers did not want and would not buy his firearms if they were manufactured by a federal firearms licensee.⁵¹ His suit made its way to the Ninth Circuit, after a federal district court dismissed the case, finding that Marbut lacked standing.⁵²

On appeal, the Ninth Circuit found that Marbut did in fact have standing, as he faced potential economic injury by being unable to manufacture his firearms and ammunition as desired.⁵³ Marbut argued that the manufacture and sale of his firearms was outside the scope of the Commerce Clause and, therefore, federal licensing laws did not apply.⁵⁴ He advocated for an extremely narrow interpretation of the Commerce Clause, arguing that the current understanding of Congress's commerce power was inconsistent with dual sovereignty.⁵⁵ In his opening brief, Marbut recognized that existing Commerce Clause jurisprudence was against him, and that, to an extent, the court's hands were tied.⁵⁶ Based on his recognition of the district and circuit courts' limited ability to provide a remedy, it seems plausible that Marbut was hoping to take his case to the Supreme Court, where he could directly challenge the Court's existing Commerce Clause precedent.

Marbut was correct in his prediction that the court would be able to provide little remedy. The Ninth Circuit quickly found that Congress's commerce power extended to Marbut's manufacture and sale of his firearms, regardless of any state

47. See *The Firearms Freedom Act (FFA) Is Sweeping the Nation.*, *supra* note 443; Associated Press, *Gun-Rights Activists Ask Supreme Court to Uphold 'Firearms Freedom Act'*, FOX NEWS (Nov. 26, 2013), <https://www.foxnews.com/politics/gun-rights-activists-ask-supreme-court-to-uphold-firearms-freedom-act>.

48. *Mont. Shooting Sports Ass'n v. Holder*, 727 F.3d 975, 978 (9th Cir. 2013).

49. *Id.* at 978–79.

50. *Id.* at 978.

51. *Id.*

52. *Id.* at 979.

53. *Id.*

54. *Mont. Shooting Sports Ass'n*, 727 F.3d at 981.

55. *Id.*

56. *Id.*

law to the contrary.⁵⁷ The court found that Congress's regulation of firearms, even in the intrastate context, was a constitutional exercise of its commerce power.⁵⁸ "Congress could have rationally concluded that the manufacture of unlicensed firearms, even if initially sold only within the State of Montana, would in the aggregate substantially affect the interstate market for firearms."⁵⁹ The court also found that, because the MFFA claimed that such conduct was outside the reach of federal law, the MFFA itself was invalid.⁶⁰ Marbut appealed the Ninth Circuit's decision, but the Supreme Court denied his petition for certiorari, turning down an opportunity to reexamine Congress's firearm regulations and power under the Commerce Clause.⁶¹

Idaho filed an amicus brief in support of Marbut's challenge to the federal government.⁶² Based on Idaho's public support of the suit while pending, it is highly unlikely that the Idaho legislature was unaware of the Ninth Circuit's ruling that the MFFA is unconstitutional. In fact, the majority of the legislators who supported passing the IFFA appear to have been aware of its unconstitutionality and ineffectiveness, as well as the potential for resultant litigation against the federal government.

When the IFFA was first introduced in the Idaho House of Representatives in March 2010, its primary sponsor, Representative Dick Harwood, was aware of the then-pending lawsuit involving the nearly identical MFFA.⁶³ When testifying in support of the IFFA at its initial introduction, Representative Harwood acknowledged that the MFFA had made its way to the court in Montana and that with it came the possibility of a fight at the Supreme Court.⁶⁴

The IFFA, from its inception, appears to have been a calculated way for Idaho and other states to fight for states' rights to regulate firearms and other commodities. During the initial hearing on the IFFA, Representative Harwood acknowledged that the IFFA and other firearms laws like it were tools that would ideally be used to narrow the federal government's commerce power.⁶⁵ When Representative Harwood later presented the bill to the Senate State Affairs Committee, he further acknowledged that it was a challenge to the federal

57. *Id.* at 981–82.

58. *See id.*

59. *Id.* at 982.

60. Mont. Shooting Sports Ass'n, 727 F.3d at 982–83.

61. Mont. Shooting Sports Ass'n v. Holder, 571 U.S. 1131 (2014);
Petition for Writ of Certiorari, Mont. Shooting Sports Ass'n v. Holder, 571 U.S. 1131 (2014) (No. 13-634), <http://www.firearmsfreedomact.com/MSSA%20cert%20petition%20112113.pdf>.

62. Brief of the States of Utah, et al. as Amici Curiae in Support of Appellants and Reversal, Mont. Shooting Sports Ass'n v. Holder, 727 F.3d 975 (2013) (No. 10-36094), 2011 WL 2452499.

63. *House State Affairs Committee: Hearing on H.B. 589*, 2010 Leg. (Idaho 2010) (statement of Rep. Harwood), <https://legislature.idaho.gov/sessioninfo/2010/standingcommittees/HSTA/>.

64. *Id.* Representative Harwood further recognized the potential for litigation around the IFFA when he noted the existence of various legal organizations who would be willing to represent Idaho in the matter, seemingly suggesting that he had already contacted or been contacted by law firms about the IFFA.

65. *Id.*

government's commerce power.⁶⁶ Additionally, he seemed to argue that the federal government, through its federal gun regulations, was limiting, or at least had the potential to limit, the supply of parts necessary to manufacture firearms, and that the IFFA would solidify Idaho's ability to manage the supply of these parts on its own.⁶⁷

Representative Phil Hart, another supporter of the IFFA, opined that it was part of a larger scheme of states trying to challenge Congress's broad Commerce Clause power.⁶⁸ Despite his acknowledgment that the IFFA was part of a nationwide attempt to challenge Congress's power under the Commerce Clause, Representative Hart also insisted that it was not the supporters' intent to set up a legal case.⁶⁹ However, when pressed about the true purpose of the IFFA, Representative Hart admitted that it was the goal of the IFFA's drafters and supporters to bring a case to the Supreme Court focusing "on the issues of the federalism of the Second Amendment," as well as the Ninth and Tenth Amendments.⁷⁰

Another state senator, Monty Pearce, professed that the IFFA was one of several pieces of legislation intended to push back against the federal government.⁷¹ "This simply challenges the power of the federal government to regulate everything in the state of Idaho under the guise of interstate commerce."⁷² Pearce also said the IFFA would be friendly to businesses that want to manufacture firearms in Idaho free of federal regulation, although he knew of only one such business.⁷³ An additional supporter of the IFFA, Representative Marv Hagedorn, said he wanted to "put the federal government's back to the wall and ask them to explain why they need to get into commerce between myself and a family member."⁷⁴

66. *Senate State Affairs Committee: Hearing on H.B. 589, 2010 Leg. (Idaho 2010)* (statement of Rep. Harwood), <https://legislature.idaho.gov/sessioninfo/2010/standingcommittees/SSTA/>.

67. *Id.* Representative Harwood appears to have argued that the disallowance of the federal government from regulating firearms and the parts used to manufacture them was necessary in order to prevent the government from restricting or prohibiting access to firearms and their necessary parts. Harwood argued that if the government were to impose such restrictions, it would effectively eliminate citizens' right to own a firearm.

68. *Id.* (statement of Rep. Hart), <https://legislature.idaho.gov/sessioninfo/2010/standingcommittees/SSTA/>.

69. *Id.*

70. *Id.* Representative Hart did not expound on exactly how he and the IFFA's drafters and supporters hoped to use the IFFA to challenge to the Ninth and Tenth Amendments.

71. *Senate Approves Made-in-Idaho Gun Law*, IDAHO FREEDOM FOUND. (March 29, 2010), <https://idahofreedom.org/senate-approves-made-in-idaho-gun-law/>.

72. *Id.*

73. *Id.*

74. Michael Boldin, *Idaho Legislature Passes the Firearms Freedom Act*, TENTH AMEND. CTR. (Apr. 3, 2010), <https://blog.tenthamendmentcenter.com/2010/04/idaho-legislature-passes-the-firearms-freedom-act/>.

Elliot Werk, one of only seven senators opposed to the IFFA, publicly took issue with the goal of initiating a lawsuit with the federal government.⁷⁵ Senator Werk was also concerned by the lack of background checks required under IFFA for Idaho-made guns.⁷⁶ Without background checks, citizens prohibited from purchasing firearms could theoretically purchase an Idaho-made firearm with no questions asked.⁷⁷

Despite the IFFA's practical ineffectiveness and the valid concerns of Senator Werk and others, the Idaho legislature passed the IFFA in 2010.⁷⁸ Idaho has allowed the IFFA to remain in statute, with language almost identical to that of the MFFA.⁷⁹ It is therefore almost a foregone conclusion that the IFFA, like the MFFA, would be found unconstitutional were it be challenged in court.

D. Consequences of the IFFA

Supporters of the IFFA were well aware of its potential negative effect on state citizens. Many who ultimately supported its passage voiced concerns about the possibility that Idaho citizens could end up defending themselves in federal court

75. *Senate Approves Made-in-Idaho Gun Law*, *supra* note 71.

76. *Id.*

77. *Id.*

78. Idaho Code § 18-3315A (2010).

79. *Compare* Idaho Code § 18-3315A (2019) ("It is declared by the legislature that generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories or ammunition, and their importation into Idaho and incorporation into a firearm, a firearm accessory or ammunition manufactured in Idaho does not subject the firearm, firearm accessory or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories and ammunition under interstate commerce as if they were actually firearms, firearms accessories or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories and ammunition made in Idaho from those materials. Firearms accessories that are imported into Idaho from another state and that are subject to federal regulation as being in interstate commerce do not subject a firearm to federal regulation under interstate commerce because they are attached to or used in conjunction with a firearm in Idaho."), *with* Mont. Code Ann. § 30-20-104 (2019) ("A personal firearm, a firearm accessory, or ammunition that is manufactured commercially or privately in Montana and that remains within the borders of Montana is not subject to federal law or federal regulation, including registration, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory, or ammunition that is manufactured in Montana from basic materials and that can be manufactured without the inclusion of any significant parts imported from another state. Generic and insignificant parts that have other manufacturing or consumer product applications are not firearms, firearms accessories, or ammunition, and their importation into Montana and incorporation into a firearm, a firearm accessory, or ammunition manufactured in Montana does not subject the firearm, firearm accessory, or ammunition to federal regulation. It is declared by the legislature that basic materials, such as unmachined steel and unshaped wood, are not firearms, firearms accessories, or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories, and ammunition under interstate commerce as if they were actually firearms, firearms accessories, or ammunition. The authority of congress to regulate interstate commerce in basic materials does not include authority to regulate firearms, firearms accessories, and ammunition made in Montana from those materials.").

due to reliance on the IFFA.⁸⁰ Interestingly, the IFFA as initially proposed anticipated this possibility.⁸¹ It provided that moneys from the Idaho Constitutional Defense Fund, which is funded by taxpayer dollars, could be used to defend Idaho citizens in any legal matter that arose due to compliance with the IFFA.⁸² This provision was ultimately removed, not after any assurance that Idaho citizens would not be subject to federal prosecution, but after senators voiced their concerns over the potential fiscal implications.⁸³

Consequently, Idaho citizens will be left to fund their own defense, should their actions in reliance on the IFFA result in federal prosecution.⁸⁴ More important than this potential fiscal implication is the simple fact that citizens who rely on the IFFA may be unknowingly risking the possibility of federal criminal prosecution and incarceration.⁸⁵ As of February 25, 2019, the IFFA remains codified law in Idaho, leaving open the potential for detrimental reliance by Idaho citizens who are unaware of its invalidity.⁸⁶

At a broader level, the potential for detrimental reliance on firearms freedom legislation has been recognized since its origination in Montana. The Montana Shooting Sports Association, the organization that joined Gary Marbut in his suit seeking to validate the MFFA, urged citizens not to rely on the law while the case was still pending.⁸⁷ The Association immediately recognized the potential for citizens who relied on the law to be subject to federal prosecution.⁸⁸

It is useful to note that although Idaho has no public record of detrimental reliance on the IFFA, the federal government may still have encountered Idaho citizens who incorrectly believed they were legally possessing firearms based on the IFFA.⁸⁹ Moreover, the federal government has prosecuted individuals from other

80. *Senate State Affairs Committee: Hearing on H.B. 589, 2010 Leg.* (Idaho 2010), <https://legislature.idaho.gov/sessioninfo/2010/standingcommittees/SSTA/>.

81. Idaho Code § 67-6301 (2019).

82. *Id.*

83. *Id.*; *Senate State Affairs Committee: Hearing on H.B. 589, supra* note 80; S. Amendment to H.B. No. 589, 2010 Leg., <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2010/legislation/H0589A2.pdf>. This amendment struck the provision that provided for the use of Idaho Constitutional Defense Fund moneys. *Id.*

84. S. Amendment to H.B. No. 589, *supra* note 83.

85. 26 U.S.C. § 5861 (2019); 26 U.S.C. § 5871 (2019) (possessing a firearm in violation of federal law is punishable by up to ten years in federal prison).

86. Idaho Code § 18-3315A (2019).

87. *Gun Groups File Lawsuit to Validate Montana Firearms Freedom Act*, FIREARMS FREEDOM ACT (Oct. 1, 2009), <http://firearmsfreedomact.com/2009/10/01/gun-groups-file-lawsuit-to-validate-montana-firearms-freedom-act/>.

88. *Id.*

89. Although there have been no federal prosecutions of Idahoans who detrimentally believed that the IFFA exempted them from federal regulation and thereby federal prosecution, it is certainly possible that federal agents have encountered such individuals. It is within the government's discretion to choose not to prosecute these individuals but rather inform them that they are violating federal law and encourage them to rethink their actions.

states who, due to their state's firearms freedom legislation, believed they were acting lawfully when in fact they were violating federal law.⁹⁰

For example, Kansas, a state whose firearms freedom legislation closely parallels both the IFFA and MFFA, has seen two state citizens prosecuted due to their reliance on a state law that led them to believe they were exempt from federal firearms laws.⁹¹ In 2014 Shane Cox, a Kansas citizen, began manufacturing and selling silencers without registering them with the federal government—a requirement under federal law.⁹² With each silencer sold, he handed out copies of the Second Amendment Protection Act, Kansas's firearms freedom legislation.⁹³ In 2016 Cox was found guilty for the manufacture, sale, and possession of unregistered firearms and silencers, a crime under the National Firearms Act.⁹⁴ Cox was sentenced to two years' probation.⁹⁵

One of Cox's customers, Jeremy Kettler, also a Kansas citizen, was thrilled with the silencer he purchased from Cox, so much so that he posted a video about it on Facebook.⁹⁶ In 2016 Kettler was found guilty for possessing an unregistered silencer.⁹⁷ At trial, Kettler told the jury that he bought the silencer "because of a piece of paper signed by the governor saying it was legal."⁹⁸ Kettler also criticized Kansas, saying the state had set up its "'citizens to be prosecuted' by the federal government."⁹⁹ Kettler was sentenced to one year's probation.¹⁰⁰

90. Associated Press, *Kansas Gun Case Pits Federal Law Against States' Rights*, DENVER POST (Nov. 22, 2016, 7:40 AM), <https://www.denverpost.com/2016/11/21/kansas-gun-case-pits-federal-law-against-states-rights/>.

91. Roxana Hegeman, *Kansas Man's Homemade Gun Silencers Clash With Federal Law*, ASSOCIATED PRESS, (Nov. 22, 2016, 5:42 PM), <https://www.mcclatchydc.com/news/nation-world/national/article116514673.html>; Kan. Stat. Ann. § 50-1204(a)–(b) (West 2019) ("A personal firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in Kansas and that remains within the borders of Kansas is not subject to any federal law, treaty, federal regulation, or federal executive action, including any federal firearm or ammunition registration program, under the authority of congress to regulate interstate commerce. It is declared by the legislature that those items have not traveled in interstate commerce. This section applies to a firearm, a firearm accessory or ammunition that is manufactured commercially or privately and owned in the state of Kansas. Component parts are not firearms, firearms accessories or ammunition, and their importation into Kansas and incorporation into a firearm, a firearm accessory or ammunition manufactured and owned in Kansas does not subject the firearm, firearm accessory or ammunition to federal regulation. It is declared by the legislature that such component parts are not firearms, firearms accessories or ammunition and are not subject to congressional authority to regulate firearms, firearms accessories and ammunition under interstate commerce as if they were actually firearms, firearms accessories or ammunition.").

92. Hegeman, *supra* note 91.

93. *Id.*

94. *Id.*

95. *United States v. Cox*, 906 F.3d 1170, 1178 (10th Cir. 2018).

96. Hegeman, *supra* note 91.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Cox*, 906 F.3d at 1178.

Kettler's criticism of Kansas is not without merit, as the state knew its legislation was unconstitutional immediately after it took effect, if not before.¹⁰¹ Following the passage of Kansas's Second Amendment Protection Act, then-U.S. Attorney General Eric Holder sent a letter advising the Governor of Kansas that the legislation was unconstitutional.¹⁰² The letter pointed out that Kansas's firearms freedom legislation directly conflicted with multiple federal firearms laws.¹⁰³ It also alerted the Governor that the Bureau of Alcohol, Tobacco, Firearms, and Explosives, along with the Federal Bureau of Investigation, the Drug Enforcement Administration, and the United States Attorney's Office for the District of Kansas, would continue to enforce all federal firearms laws.¹⁰⁴ Despite this notice from Attorney General, the Second Amendment Protection Act remained codified law in Kansas.¹⁰⁵

Cox and Kettler jointly appealed their convictions to the Tenth Circuit.¹⁰⁶ In their appeal, neither Cox nor Kettler denied that they violated the National Firearms Act.¹⁰⁷ Instead, they argued that the National Firearms Act, at least as applied to their conduct, was unconstitutional.¹⁰⁸ The pair first challenged the constitutionality of the NFA by arguing that it was not a valid exercise of Congress's taxing power.¹⁰⁹ Cox and Kettler also argued that the NFA violated the Second Amendment.¹¹⁰ Both challenges to the NFA were rejected by the court.¹¹¹

Notably, Cox and Kettler also claimed that their reliance on Kansas's Second Amendment Protection Act should have been a defense to their violation of federal firearms laws.¹¹² The Tenth Circuit declined to allow for a mistake-of-law defense for either defendant.¹¹³ In declining to allow a mistake-of-law defense, the court noted that both Cox and Kettler had already received a benefit from their reliance on the Second Amendment Protection Act, as it was taken into account during their sentencing.¹¹⁴

101. Letter from Eric Holder, U.S. Att'y Gen., to Sam Brownback, Governor of Kan. (Apr. 26, 2013), <https://www.documentcloud.org/documents/695506-attorney-general-holder-letter-to-kans-gov>.

102. *Id.*

103. *Id.*

104. *Id.*

105. Kan. Stat. Ann. § 50-1204(a)-(b) (West 2019).

106. *United States v. Cox*, 906 F.3d 1170, 1174 (10th Cir. 2018).

107. *Id.* at 1178.

108. *Id.* at 1178-79.

109. *Id.* at 1179.

110. *Id.* at 1183.

111. *Id.* at 1183, 1188.

112. *Cox*, 906 F.3d at 1189.

113. *Id.* at 1190.

114. *Id.* at 1195. *See generally* Petition for Writ of Certiorari, *Cox*, 906 F.3d 1170 (No. 18-936) (procedural history involves joint defendants, Petition also found under *Kettler v. United States*, No. 18-936, 2019 U.S. WL 277233 (Jan. 16, 2019)); Brief for Kansas, et al. as Amici Curiae Supporting Petitioner, *Cox*, 906 F.3d 1170 (No.18-936) (procedural history involves joint appellants, Petition also found under,

It is unknown whether Idaho legislators are aware of these somewhat recent prosecutions in Kansas or the defendants' unsuccessful appeal. And although no Idaho citizens have been prosecuted for similar crimes, the possibility of prosecution presumably persists so long as the IFFA remains codified law in Idaho. Based on the Tenth Circuit's holding, as well as general principles surrounding the availability of a mistake-of-law-defense, Idahoans who detrimentally rely on the IFFA will likely have no reliance-based defense, should they be subject to federal prosecution.¹¹⁵

This is only one of many potential negative repercussions generated by the IFFA. As mentioned above, the mistaken belief that firearms made in Idaho are not subject to federal regulation could result in individuals who are otherwise prohibited from possessing firearms gaining possession of a firearm that is made in Idaho.¹¹⁶

E. Other Counteractive Legislation in Idaho

The Idaho Firearms Freedom Act is not the only legislation passed or proposed by Idaho legislators that challenges federal law.¹¹⁷

In 2014, Idaho legislators successfully passed another piece of counteractive legislation pertaining to the regulation of firearms.¹¹⁸ Unlike the IFFA, the 2014 law, titled the "Idaho Federal Firearm, Magazine and Register Ban Enforcement Act"

Kettler v. United States, No. 18-936, 2019 U.S. WL 932011 (Feb. 19, 2019)). Idaho joined an amicus brief filed by the state of Kansas in support of Mr. Kettler. *Id.* at 1. In it, amici argue that any regulations of firearms accessories, such as silencers, invoke Second Amendment protection and therefore must be subject to Second Amendment scrutiny. *Id.* at 4. Amici do not attempt to defend the Kansas Firearms Freedom Act, nor do they argue that states have the right to enact laws like it that attempt to nullify federal law. *Id.* at 2-3.

115. See *supra* notes 112-113 and accompanying text; see also Mary D. Fan, *Legalization Conflicts and Reliance Defenses*, 92 Wash. U. L. Rev. 907, 949 (2015) (noting that reliance on firearms nullification laws is unreasonable and does not provide a mistake-of-law defense because of the longstanding federal regulations which impose clear obligations and give citizens no reason to think sanctions will be not forthcoming).

116. For example, under federal law, anyone convicted of a misdemeanor crime of domestic violence is prohibited from possessing a firearm. 18 U.S.C. § 922(g)(9) (2019). However, it is not difficult to imagine a scenario where an individual convicted of such an offense gains possession of a firearm stamped "made in Idaho," either because they believe the IFFA exempts the firearm from federal jurisdiction, or because they know they will not be subjected to a background check that might reveal their disqualification. This possibility is especially troubling given the increase in gun related deaths perpetrated by domestic abusers. See Tommy Simmons, *Domestic Violence Deaths Are on the Rise in Idaho—Especially Murder-Suicides*, IDAHO PRESS (July 9, 2018), https://www.idahopress.com/meridian/news/domestic-violence-deaths-are-on-the-rise-in-idaho/article_a1ad2a97-1282-561d-b2dc-272c7edb61c0.html.

117. Idaho Code § 39-9003 (2019).

118. Emma Roller, *Idaho Has Declared It Won't Obey New Federal Gun Laws*, THE ATLANTIC (Mar. 25, 2014), <https://www.theatlantic.com/politics/archive/2014/03/idaho-has-declared-it-wont-obey-new-federal-gun-laws/455652/>; Debbie Bryce, *Nullifying Federal Gun Laws in Idaho: Gov. Butch Otter Signs Senate Bill 1332 Into Law*, IDAHO ST. J. (Mar. 25, 2014), https://www.idahostatejournal.com/members/nullifying-federal-gun-laws-in-idaho-gov-butch-otter-signs/article_97429e26-b3f0-11e3-8581-001a4bcf887a.html.

(The Act), does not purport to nullify any federal regulations.¹¹⁹ Instead, the law seeks to prevent Idaho law enforcement officers from assisting federal agents in the confiscation of illegal firearms or ammunition.¹²⁰

The Act was enacted to “protect Idaho law enforcement officers from being directed, through federal executive orders, agency orders, statutes, laws, rules, or regulations”¹²¹ The Act created a civil penalty for any state employee who enforces any unconstitutional federal regulation related to firearms, firearm accessories, or ammunition.¹²² Notably, “unconstitutional” in the context of the Act, refers to federal regulations that violate the *Idaho* Constitution.¹²³

Interestingly, the Act did not identify which federal regulations were unconstitutional.¹²⁴ Instead, at least according to the Act’s sponsor, Senator Steve Vick, it is up to each state law enforcement officer or employee to individually determine which laws violate the Idaho Constitution.¹²⁵ Idaho was one of several states to pass counteractive legislation that attempts to limit the ability of state agents to enforce federal firearm regulations.¹²⁶

In 2018, legislators attempted to pass a law that purported to give Idaho the power to nullify *all* federal laws.¹²⁷ HB-461 declared that Idaho lawmakers have the power to void federal laws and court decisions.¹²⁸ Despite an opinion from the Idaho Attorney General’s Office stating that the law was unconstitutional, legislators moved forward with an attempt to pass the law.¹²⁹ While some

119. Idaho Code § 18-3315B (2019).

120. *Id.*

121. See S.B. 1332, 62nd Leg., 2d Reg. Sess. (Idaho 2014).

122. Idaho Code § 18-3315B (2019).

123. *Id.*

124. *Id.*

125. Relating to Firearms to Protect Idaho Law Enforcement Officers from Being Directed Through Federal Orders to Violate Their Oath of Office or Idaho Citizens’ Rights Under the Idaho Constitution: Hearing on S. 1332 Before the S. State Affairs Comm., 2014 Leg. 4 (Idaho 2014) (statement of Sen. Steve Vick), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2014/standingcommittees/SSTamin.pdf>.

126. Roller, *supra* note 118.

127. Betsy Z. Russell, *Idaho Lawmakers Advance Federal Nullification Bill*, SPOKESMAN-REV. (Feb. 14, 2018, 10:21 AM), <http://www.spokesman.com/blogs/boise/2018/feb/14/idaho-lawmakers-advance-federal-nullification-bill/>; H.R. 461, 64th Leg., 2d Reg. Sess. (Idaho 2018), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/H0461.pdf>.

128. H.R. 461, 64th Leg., 2d Reg. Sess. (Idaho 2018), <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2018/legislation/H0461.pdf> (“The Idaho Legislature hereby declares that the state of Idaho, on behalf of its citizens, is the final arbiter of whether an act of Congress, a federal regulation or a court decision is unconstitutional and may declare that the federal laws, regulations or court decisions are not authorized by the Constitution of the United States and violate its meaning and intent, and further, are null, void and of no effect regarding any Idaho citizen residing within the borders of the state of Idaho.”).

129. Letter from Lawrence G. Wasden, Att’y Gen., State of Idaho, to Paul E. Shepherd, Representative, State of Idaho (Jan. 27, 2017), <https://media.spokesman.com/documents/2018/02/AG-opinion-nullification-bill.pdf>; Russell, *supra* note 127.

supporters of the law acknowledged its ineffectiveness, others appear to have believed that the state of Idaho possessed the power to nullify federal law or declare it to be unconstitutional.¹³⁰

In 2018, Idaho joined other states in taking a stand against the Affordable Care Act.¹³¹ Rather than simply declaring the ACA null and void as many other states had done, Idaho took a different approach. Idaho declared that it would allow the sales of insurance plans that did not comply with the requirements of the ACA.¹³²

Most recently, on Tuesday, January 22, 2019, Idaho legislators released the draft of a proposed law that would treat abortion as murder.¹³³ The proposed Idaho Abortion Human Rights Act (IAHRA), introduced by two republican representatives, would repeal the current state law that exempts women and those who perform abortions or assist in performing abortions from being charged with murder.¹³⁴ Representative Heather Scott, one of the two Idaho legislators who introduced the IAHRA, cited prior counteractive legislation in Idaho as justification for the IAHRA.¹³⁵

The intent of the law is to “nullify [Roe v. Wade] by exercising the state's legitimate interest in enforcing its own murder laws and protecting all Idahoans, including the preborn.”¹³⁶ The IAHRA would make abortion at any period, even in the first trimester, a criminal offense chargeable as murder.¹³⁷ It makes no exceptions for circumstances involving rape, incest, an unviable fetus, or threat to the life of the mother.¹³⁸

The IAHRA states that Idaho law enforcement officers, prosecutors, the Idaho Legislature, the executive branch, and Idaho's judicial branch are each violating their oath of office as well as the rights of Idaho citizens by allowing

130. Betsy Z. Russell, *Idaho House Panel Backs Bill to Declare That State Lawmakers Can Overturn Federal Laws, Court Decisions*, SPOKESMAN-REV. (Feb. 14, 2018, 10:07 PM), <http://www.spokesman.com/stories/2018/feb/14/idaho-house-panel-backs-bill-to-declare-that-state/>. Representative Christy Zito acknowledged that the state did not have the power to overrule a decision made by the federal government but chose to support the bill because she believed it was a powerful means of speaking out against a decision made by the federal government that she disagreed with. *Id.* In contrast, Representative Paul Shepard, the bill's primary sponsor, said that he believed that each state has the power to declare a federal law unconstitutional, thereby making it “void” and unenforceable in that state. *Id.*

131. *See infra* note 172.

132. Dylan Scott, *Idaho's Brazen Plan to Unravel Obamacare, Explained*, VOX (Feb. 21, 2018, 8:30 AM), <https://www.vox.com/policy-and-politics/2018/2/21/17029822/obamacare-trump-idaho>.

133. Mike Price, *Idaho Legislators Seek to Make Abortion Murder*, EAST IDAHO NEWS.COM (Jan. 30, 2019, 6:00 PM), <https://www.eastidahonews.com/2019/01/idaho-legislators-seek-to-make-abortion-murder/>.

134. *Id.*; Idaho Code § 18-4016 (2019).

135. Heather Scott, *Guns & Babies! Part 1*, (Jan. 24, 2019, 4:20 PM), <https://www.facebook.com/RepHeatherScott/videos/1084729788376554/>. (Representative Scott cited the Idaho Federal Firearm, Magazine and Register Ban Enforcement Act, questioning why Idaho legislators would “stand up for firearms but not for a human life.”)

136. Heather Scott, *Idaho Abortion Human Rights Act (AHRA) Frequently Asked Questions: What About Roe v. Wade and Other Federal Court Cases?*, REP. HEATHER SCOTT, <https://repheatherscott.com/abortion/> (last visited Feb. 3, 2020).

137. Heather Scott, Idaho Abortion Human Rights Act Final Draft (Aug. 2019), <https://repheatherscott.com/wp-content/uploads/2019/09/RCB019FINAL-AHRA.pdf>.

138. *Id.*

abortions.¹³⁹ However, the oath of office taken by all Idaho legislators involves a pledge to uphold the United States Constitution, which guarantees the right to an abortion, at least until a certain point during pregnancy.¹⁴⁰

The explicit goal of the legislation is to end abortion in Idaho.¹⁴¹ This is in direct contradiction with the constitutionally protected right to an abortion.¹⁴² If the IAHRA is passed, legislators will be unable to uphold both state and federal law.

The legislators backing the IAHRA seem to be aware of the conflict between the proposed law and federal law protecting abortions.¹⁴³ These same legislators also appear to be operating under the mistaken belief that states have the power to nullify federal law.¹⁴⁴

IV. COUNTERACTIVE LEGISLATION ON THE NATIONAL LEVEL

Idaho is neither the first nor the only state to enact some form of counteractive legislation.¹⁴⁵ At the national level, the phenomenon of counteractive legislation has been alive and well for over 200 years.¹⁴⁶ Upticks in counteractive legislation have occurred in response to various policy shifts, but the underlying motivator in most, if not all attempts at passing counteractive legislation, appears to be the perception of government overreach.¹⁴⁷

Counteractive legislation was first introduced in 1798, in response to the passage of the Alien and Sedition Acts.¹⁴⁸ The Virginia and Kentucky Resolutions (the Resolutions), authored by Thomas Jefferson and James Madison respectively,

139. *Id.* Idaho Code § 59-401 (2019). All members of the Idaho legislature take an oath of office in which they proclaim their support of the Idaho Constitution. § 59-401. When taking the oath, they also pledge their support for the US Constitution. *Id.*

140. Idaho Code § 59-401 (2019); Nathan Brown, *Lawmakers Propose Bill to Nullify Roe v. Wade*, IDAHO ST. J. (Jan. 24, 2019), https://www.idahostatejournal.com/news/local/lawmakers-propose-bill-to-nullify-roe-vv-wade/article_0be13c9d-25d9-52d8-a09c-42985e91ff60.html; see, e.g., *Roe v. Wade*, 410 U.S. 113, 113 (1973), *holding modified by* *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

141. Scott, *supra* note 137.

142. *Id.*

143. James Dawson, *Idaho Lawmakers Drafting Bill to Ban Abortions*, BOISE ST. PUB. RADIO (Jan. 23, 2019), <https://www.boisestatepublicradio.org/post/idaho-lawmakers-drafting-bill-ban-abortions#stream/0>.

144. *Id.* (Representatives Scott and Green stated that “Idaho is a sovereign state and ‘has the fundamental duty and right to act as a check-and-balance to the federal government any time it errs on constitutional issues.’”); Idaho Code § 59-401 (2019); Brown, *supra* note 140. Representative Scott and Green believe the U.S. Supreme Court precedents legalizing abortion are themselves unconstitutional, and therefore the state shouldn’t abide by them. Dawson, *supra* note 143.

145. See John Dinan, *Contemporary Assertions of State Sovereignty and the Safeguards of American Federalism*, 74 Alb. L. Rev. 1637, 1638 (2011).

146. *Virginia and Kentucky Resolutions*, BILL RTS. INST., <https://billofrightsinstitute.org/founding-documents/primary-source-documents/virginia-and-kentucky-resolutions/> (last visited Sept. 11, 2019).

147. Dinan, *supra* note 145.

148. *Virginia and Kentucky Resolutions*, *supra* note 146.

argued that the federal government exceeds its constitutional parameters anytime it exercises power not expressly given to it in the Constitution.¹⁴⁹ The Kentucky Resolution was the first of its kind to assert that states had the power to nullify federal laws they deemed unconstitutional.¹⁵⁰

Both Jefferson's and Madison's propositions were rooted in the idea that states *together* had the power to challenge federal law.¹⁵¹ While neither resolution was a direct attempt at nullifying a specific federal law, they were the first formalized decrees against the federal government's exercise of its power.¹⁵² The Virginia and Kentucky Resolutions laid the groundwork for numerous pieces of counteractive legislation proposed and passed over the next 200 years.¹⁵³

In 1798, *Marbury v. Madison* had not been decided, meaning that at that time the states were unable to rely on legal precedent permitting them to challenge federal laws in court.¹⁵⁴ The Resolutions were perhaps the only meaningful forum to challenge contested government action. However, when *Marbury* was decided in 1803, the Supreme Court established the doctrine of judicial review, clarifying that the federal judiciary has the duty of resolving challenges to federal law that are believed to be unconstitutional.¹⁵⁵

Despite the Court's establishment of judicial review, states have continued to enact counteractive legislation rather than using the courts to challenge legislation.¹⁵⁶ In fact, less than 30 years after the opinion in *Marbury* was announced, states continued on the path laid by the Resolutions, enacting counteractive legislation in lieu of bringing direct challenges in federal court.¹⁵⁷

In 1832, likely inspired by the Resolutions, John Calhoun mounted his own attack against the federal government, asserting the right of South Carolina to avoid federally imposed tariffs.¹⁵⁸ Similar to the position argued in the Resolutions, Calhoun asserted that states had the ability to declare a federal law null and void.¹⁵⁹ However, distinct from Jefferson's and Madison's views, Calhoun argued that the

149. *Id.*

150. *Id.* ("[T]he several states who formed that instrument, being sovereign and independent, have the unquestionable right to judge of its infraction; and that a nullification, by those sovereignties, of all unauthorized acts done under colour of that instrument, is the rightful remedy . . .").

151. *Id.*

152. *Id.*

153. *Nullification Crisis*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/nullification-crisis> last visited Oct. 9, 2019).

154. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) (establishing the doctrine of judicial review, which established that the federal courts are the proper forum for resolving laws believed to be unconstitutional).

155. *Id.* at 177 ("It is emphatically the province and duty of the judicial department to say what the law is.").

156. See Dinan, *supra* note 145.

157. *Nullification Crisis*, *supra* note 153.

158. *Id.*

159. *The South Carolina Nullification Controversy*, USHISTORY.ORG, <http://www.ushistory.org/us/24c.asp> (last visited Oct. 9, 2019); Albert L. Samuels, *All But Overturned: America's Nullification of Brown v. Board of Education*, SSRN (Nov. 6, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2350799###. Calhoun was a long-time defender of state's rights. *Id.*

states *individually* had the power to nullify federal law.¹⁶⁰ Calhoun packed a seemingly harder punch than Jefferson and Madison; he threatened South Carolina's secession from the Union if the federal government acted to enforce the tariffs.¹⁶¹ South Carolina accepted Calhoun's proposition and adopted the "Ordinances of Nullification."¹⁶²

Responding to the Ordinances of Nullification and South Carolina's threat of secession, President Andrew Jackson issued a proclamation against South Carolina and any attempts at nullification or secession.¹⁶³ The proclamation declared that states do not have the power to nullify federal law, and that no state possessed the right to secede from the Union.¹⁶⁴ Following President Jackson's proclamation, as if to further affirm the Union's stance against the idea of state nullification, Congress passed the Force Act, which authorized the use of military force against states that resisted the federal tariff.¹⁶⁵ After South Carolina's attempt at nullification and its ultimate secession, there was not another attempt at pure nullification by a state for over one hundred years.¹⁶⁶

Following the Supreme Court's 1954 decisions in *Brown v. Board of Education* and *Bolling v. Sharpe*, many states adopted counteractive legislation that conflicted with the Court's decisions regarding segregation in schools.¹⁶⁷ The states that

160. See *The South Carolina Nullification Controversy*, *supra* note 159; Samuels, *supra* note 159; see also Cody Carlson, *This Week in History: John C. Calhoun and the Nullification Crisis*, DESERET NEWS (Dec. 17, 2012, 3:17 PM), <https://www.deseretnews.com/article/865568961/This-week-in-history-John-C-Calhoun-and-the-Nullification-Crisis.html>.

161. Carlson, *supra* note 160.

162. *Id.*; see Mike Maharrey, *Understanding Madison's Notes on Nullification*, TENTH AMEND. CTR. (Jan. 21, 2014), <https://tenthamendmentcenter.com/2014/01/21/understanding-madisons-notes-on-nullification/>. Despite Calhoun's reliance on Jefferson's and Madison's Resolutions, Madison ultimately condemned South Carolina's attempt at nullification. *Id.*

163. Andrew Jackson, *A Proclamation Respecting the Nullifying Laws of South Carolina*, Proclamation No. 43, 11 Stat. 771 (Dec. 10, 1832).

164. *Id.*; see *The Secession of South Carolina*, U.S. House Representatives: Hist., Arts & Archives, <https://history.house.gov/Historical-Highlights/1851-1900/The-secession-of-South-Carolina/> (last visited Nov. 6, 2019). Despite President Jackson's proclamation declaring the absence of a right to secession, South Carolina ultimately achieved its goal of seceding from the Union in December of 1860. *Id.*

165. *Primary Documents in American History: Nullification Proclamation*, LIBR. CONGRESS, <https://www.loc.gov/rr/program/bib/ourdocs/nullification.html> (last visited Oct. 9, 2019).

166. See *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that states do not have the power to nullify federal law).

167. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Board of Education Timeline*, NAT'L ARCHIVES, (last updated Aug. 15, 2016), <https://www.archives.gov/education/lessons/brown-v-board/timeline.html> ("State legislatures in Alabama, Georgia, Mississippi, South Carolina, and Virginia adopted resolutions of 'interposition and nullification' that declared the Court's decision to be 'null, void, and no effect.'").

opposed the Court's rulings claimed they had authority to invalidate *Brown*, viewing it as an illegal intrusion on states' rights.¹⁶⁸

Unsurprisingly, this attempt to bypass federal law was quickly rejected by the Court in *Cooper v. Aaron*.¹⁶⁹ The Court's condemnation of the attempted nullification was express: "[i]f the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery."¹⁷⁰

This decision likely did not come as a shock to most of the states who adopted the counteractive legislation. Similar to the Idaho legislators who passed the IFFA, many of the legislators who supported the Southern nullification laws were made aware of the laws' inevitable ineffectiveness long before the Court announced its decision in *Cooper*.¹⁷¹

After the Court's rejection of nullification in *Cooper*, there was a relative lull in counteractive legislation. The next uptick happened in response to federal health care reform. Almost immediately after the Affordable Care Act (ACA) was passed in 2010, a large number of states introduced legislation in opposition to various portions of the ACA.¹⁷² The ACA included an individual mandate which required all individuals living in the United State to purchase health insurance.¹⁷³ Between 2010 and 2011, fifteen states adopted statutes or constitutional amendments that aimed to limit the effectiveness of the individual mandate.¹⁷⁴ Some state legislatures went as far as asserting their sovereign powers and explicitly challenging the federal government's individual mandate.¹⁷⁵

168. Judith A. Hagley, *Massive Resistance—The Rhetoric and the Reality*, 27 N.M. L. Rev. 167, 193 (1997). The states opposing the Court's ruling in *Brown v. Board of Education* viewed it not as an interpretation of the Constitution, but rather as an amendment to the Constitution. *Id.* Had this viewpoint been correct, the states' opposition and resulting legislation would have been much more well-founded.

169. See *Cooper*, 358 U.S. at 4. The Court in *Cooper* unanimously rejected the nullification doctrine and dismissed an attempt by Arkansas to nullify *Brown v. Board of Education*. *Id.* In doing so, the Court relied on longstanding precedent, including *Marbury v. Madison* and the Supremacy Clause. *Id.* at 18.

170. *Id.* at 18 (quoting *United States v. Peters*, 9 U.S. 115, 136 (1809)).

171. Ryan Card, Note & Comment, *Can States "Just Say No" to Federal Health Care Reform?* The Constitutional and Political Implications of State Attempts to Nullify Federal Law, 2010 BYU L. Rev. 1795, 1812–13 (political leaders including attorneys general, law professors, and school superintendents recognized the futility in nullification legislation).

172. Richard Cauchi, *Archive Report: 2009 – 2010 State Legislation and Actions Challenging Certain Health Reforms*, NAT'L CONF. ST. LEGISLATURES (Jan. 1, 2018), <http://www.ncsl.org/research/health/state-legislation-challenging-ppaca-2009-10.aspx>.

173. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5000A, 124 Stat. 119, 244 (2010).

174. Richard Cauchi, *State Laws and Actions Challenging Certain Health Reforms*, NAT'L CONF. ST. LEGISLATURES (Dec. 17, 2018), <https://www.ncsl.org/research/health/state-laws-and-actions-challenging-ppaca.aspx>.

175. See Idaho Code § 39-9003 (2019) ("The power to require or regulate a person's choice in the mode of securing health care services, or to impose a penalty related thereto, is not found in the Constitution of the United States of America, and is therefore a power reserved to the people pursuant to the Ninth Amendment, and to the several states pursuant to the Tenth Amendment. The state

At the same time, many states were beginning to pass their versions of firearms freedom acts. The Montana Firearms Freedom Act, the first of its kind, was passed in 2009.¹⁷⁶ As previously discussed, Idaho and many other states followed suit in 2010.¹⁷⁷ The surge in firearms freedom legislation does not appear to have been prompted by any specific change in national policy. As examined above, this attempt at challenging the federal government was rather unsuccessful.

Perhaps the most recent example of counteractive legislation is the state legalization of recreational or medicinal marijuana usage by many states across the country.¹⁷⁸ Although most state laws that allow the use of marijuana do not actually purport to nullify federal law, these laws likely represent the most well-known examples of state legislation that is in direct contradiction with federal law. Interestingly, the majority of states that allow marijuana usage aim to make their citizens well aware of the potential for federal prosecution, regardless of the state laws.¹⁷⁹ The majority of states that enacted legislation allowing for medicinal and recreational usage of marijuana did so with the knowledge that the federal government was unlikely to prosecute individuals for using small amounts of marijuana.¹⁸⁰

V. MOVING FORWARD

of Idaho hereby exercises its sovereign power to declare the public policy of the state of Idaho regarding the right of all persons residing in the state of Idaho in choosing the mode of securing health care services free from the imposition of penalties, or the threat thereof, by the federal government of the United States of America relating thereto.”); *see also* Mont. Code § 50-4-902 (2019) (“The state or federal government may not mandate or require a person or entity to purchase health insurance coverage . . . or impose a penalty, tax, fee, or fine of any type if a person or entity declines to purchase health insurance coverage.”).

176. Mont. Code § 30-20-104 (2019).

177. *State by State*, FIREARMS FREEDOM ACT (June 26, 2019), <http://firearmsfreedomact.com/state-by-state/>.

178. *Deep Dive: Marijuana*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/bookstore/state-legislatures-magazine/marijuana-deep-dive.aspx> (last visited Feb. 3, 2020); *State Medical Marijuana Laws*, NAT'L CONF. ST. LEGISLATURES (Oct. 16, 2019), <http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx>.

179. *See Federal Implications*, Colorado.gov, <https://www.colorado.gov/pacific/marijuana/federal-implications> (last visited Feb. 3, 2020); *Legal Use, Marijuana Nev.*, <http://marijuana.nv.gov/Legal/FederalImplications/> (last visited Feb. 3, 2020); *Responsible Consumer Alaska: What You Need To Know About Using Marijuana In Alaska 2* (2018), <http://dhss.alaska.gov/dph/Director/Documents/marijuana/ResponsibleConsumerFactBook.pdf>; *The Facts on DC Marijuana Laws*, DC.gov, <https://mpdc.dc.gov/marijuana> (last visited Feb. 3, 2020).

180. David Stout & Solomon Moore, *U.S. Won't Prosecute in States That Allow Medical Marijuana*, N.Y. TIMES (Oct. 19, 2009), <https://www.nytimes.com/2009/10/20/us/20cannabis.html> (Then-Attorney General Eric Holder announced that “It will not be a priority to use federal resources to prosecute patients with serious illnesses or their caregivers who are complying with state laws on medical marijuana.”); *see also Jeff Sessions Says Prosecutors Won't Pursue “Small Marijuana Cases,”* CBS NEWS (Mar. 10, 2018, 12:34 PM), <https://www.cbsnews.com/news/jeff-sessions-doj-prosecutors-will-not-pursue-small-marijuana-cases/>.

In Idaho specifically, the convictions of Mr. Cox and Mr. Kettler in Kansas support the need for action by either the legislature or Idaho citizens in response to the IFFA. So long as the IFFA remains codified, there is the potential for detrimental reliance by Idahoans that could ultimately result in federal convictions. There are a variety of ways Idaho could choose to handle the IFFA, the most straightforward being to repeal the law. On its face, the process of repealing a law is not a simple one. In order for the legislature to repeal the IFFA itself, a bill would need to be introduced by a member of either the House or the Senate.

It seems unlikely that any legislator would feel confident in proposing a bill to remove the IFFA, which is seen by many as protection against an increasing cry for gun control.¹⁸¹ Internal repeal would be made more difficult due to the fact that many of IFFA's original supporters remain in the Idaho Legislature.¹⁸² Furthermore, Idaho Legislators have historically been hesitant to repeal unconstitutional laws, even after being directed to do so by a federal judge.¹⁸³

The law could also be repealed by a ballot initiative.¹⁸⁴ An initiative to abolish the IFFA may be just as, if not more, difficult than attempting to persuade the legislature to repeal the law themselves.¹⁸⁵ The process of getting an initiative on

181. Molly Messick, *State Gun Laws Aim at Dodging Federal Regulation*, NPR (April 12, 2010), <https://www.npr.org/templates/story/story.php?storyId=125715159>; Justine McDaniel, Robby Korth & Jessica Boehm, *Gun Wars: Eight States Have Passed Law Voiding Federal Firearms Regulations*, NEWS 21 (Aug. 16, 2014), <http://gunwars.news21.com/2014/eight-states-have-passed-laws-voiding-federal-firearms-regulations/>.

182. H.B. 589, 60th Leg., 2d Reg. Sess. (Idaho 2010); *House Membership*, Idaho Legislature, <https://legislature.idaho.gov/house/membership/> (last visited Feb. 3, 2020); *Senate Membership*, Idaho Legislature, <https://legislature.idaho.gov/senate/membership/> (last visited Feb. 3, 2020). The sponsors of the IFFA, Monty Pearce and Dick Harwood, have since retired. Dick Harwood, the initial proponent of the IFFA, said of his time in the legislature that he was most proud of his time spent fighting against the federal government. See Betsy Z. Russell, *Rep. Harwood Won't Seek Re-election*, THE SPOKESMAN-REV. (Feb. 23, 2012, 4:27 PM), <http://www.spokesman.com/blogs/boise/2012/feb/23/rep-harwood-wont-see-re-election/>.

183. Betsy Z. Russell, *Repealing Illegal Laws in Idaho Not Always Certain*, THE SPOKESMAN-REV. (Feb. 3, 2017, 11:32 AM), <http://www.spokesman.com/blogs/boise/2017/feb/03/repealing-illegal-laws-idaho-not-always-certain/>.

184. An initiative, rather than a referendum, would be necessary to repeal the IFFA, as a referendum must be filed within 60 days after the final adjournment of the session of the Idaho legislature which passed the bill sought to be repealed. Idaho Code § 34-1803 (2019).

185. The process of getting an initiative on the ballot in Idaho is a lengthy one and is only the first step in getting a law repealed. The first step in attempting to pass an initiative requires a citizen or organization to obtain signatures in favor of the proposed initiative from not only six percent of registered voters but six percent of registered voters in at least 18 of Idaho's 35 legislative districts. Idaho Code § 34-1805 (2019). Once the necessary signatures are obtained, the initiative is not guaranteed a spot on the ballot. Instead, it makes its way to the Secretary of State for consideration. *Id.* § 34-1804. The Secretary of State then forwards a copy of the measure to the Attorney General, who reviews the measure for any substantive issues. *Id.* The Attorney General makes any recommendations she sees fit, and then returns the measure to the petitioner, who is free to accept or reject the recommendations. *Id.* § 34-1809. The petitioner then files the final measure with the Secretary of State, who assigns the measure a ballot title. *Id.* § 34-1805. Once the ballot title is finalized, arguments for or against the initiative may be filed with the Secretary of State. *Id.* § 34-1812A. If multiple arguments in favor of or against the measure are filed, the Secretary of State will select one argument to be printed in the voters' pamphlets. Idaho Code § 34-1812A (2019). The voters' pamphlet is sent to every household in the state

the ballot in Idaho is a lengthy one and is only the first step in getting a law repealed. Even if an initiative to repeal the IFFA made its way onto the ballot, the likelihood that electors would vote in favor of a proposal seems unlikely.

Considering that the IFFA remains codified law in Idaho, it is a fair assumption that the majority of Idahoans, and perhaps the majority of Idaho Legislators, are unaware of the law's unconstitutionality. Simply stating that the law is unconstitutional would likely not be enough to persuade Idahoans that the law is worth repealing. Without a detailed explanation of the IFFA's problems as well as its potential repercussions on Idahoans, it seems unlikely that a strong Second Amendment state would vote to remove a law that purports to strengthen gun rights.

Given the various hurdles in repealing the IFFA, perhaps Idaho's best course of action is to follow the approach used by the Montana Shooting Sports Association in relation to the MFFA. As discussed above, the Montana Shooting Sports Association warned citizens not to rely on the MFFA until the lawsuit was resolved.¹⁸⁶ Following the Ninth Circuit's finding that the law was invalid, the Association continued to warn citizens that reliance on the law could result in federal prosecution.¹⁸⁷

Be it the legislature or a private entity, someone could take up the cause of simply warning Idaho citizens of the potential consequences of relying on the IFFA. Doing so could change the way Idaho citizens view the IFFA and might ultimately motivate them to encourage their legislators to repeal the law and refrain from passing similar laws in the future.

At the national level, increasing awareness of counteractive legislation and its implications may be the best approach to confronting problems created by such legislation. Moving forward, legislators throughout the country should be hesitant to enact or even propose counteractive legislation. From the author's perspective, the obvious dangers that counteractive legislation poses to citizens often outweigh its potential benefits. Moreover, time spent on drafting, proposing, assessing, and passing counteractive legislation could be dedicated to laws that bring about meaningful and effective change in the state.

VI. CONCLUSION

The phenomenon of counteractive legislation began not long after the founding of the United States. A close look at the Idaho Firearms Freedom Act provides a useful survey of a single piece of counteractive legislation from proposal to codification. Based on the historical existence of counteractive legislation and its

of Idaho and includes arguments in favor of and against each measure sought to be passed. *Id.* § 34-1812C.

186. Gary Marbut, *It's Over – MSSA v. Holder*, MONT. SHOOTING SPORTS ASS'N (Aug. 25, 2014), <http://www.mtssa.org/?p=76>.

187. *Id.*

continued use today, it is unlikely that this phenomenon will cease to exist anytime in the near future. While counteractive legislation can provide a forum for codifying a state's displeasure with distinct federal action, it comes at a high cost. Legislators should proceed with caution if they encounter proposed counteractive legislation in the future, and perhaps should consider repealing existing legislation of its kind.