

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	15-cr-10150-01/02-JTM
)	
SHANE COX and JEREMY KETTLER,)	
)	
Defendants.)	
<hr/>)	
)	
STATE OF KANSAS,)	
ex rel. DEREK SCHMIDT,)	
in his official capacity as Attorney General)	
of the State of Kansas,)	
)	
Intervenor.)	
<hr/>)	

**BRIEF OF THE STATE OF KANSAS
IN RESPONSE TO DEFENDANT COX’S MOTION TO DISMISS
AND DEFENDING THE CONSTITUTIONALITY OF THE
SECOND AMENDMENT PROTECTION ACT**

Kansas is a strong supporter of the right to keep and bear arms protected by the Second Amendment to the United States Constitution. That support is validly reflected, *inter alia*, in the Second Amendment Protection Act (SAPA), K.S.A. 50-1201 *et seq.*, which is a constitutional and effective exercise of the police power reserved to the State of Kansas by the Tenth Amendment to the United States Constitution. No court, including this Court, has ruled to the contrary. As explained in its order granting the State’s motion to intervene, as of November 8, 2016, this Court had “not been called upon, and has not ruled upon, the constitutionality of the Kansas Second Amendment Protection Act.” (Dkt. 58).

In enacting the SAPA by large bipartisan majorities, the Kansas Legislature declared—through the text of the statute itself—its fundamental purpose:

Any act, law, treaty, order, rule or regulation of the government of the United States which violates the second amendment to the constitution of the United States is null, void and unenforceable in the state of Kansas.

K.S.A. 50-1206(a). That declaration in the statute is indisputably true and correct, see *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) (“an act of the legislature, repugnant to the constitution, is void”), and the Kansas Legislature’s enactment embracing that well-settled principle is beyond question a permissible exercise of the state’s police power.

Defendant Cox’s Motion to Dismiss (Dkt. 63), which the State understands the Court has taken under advisement, argues that the National Firearms Act—or at least its application to this case—cannot be supported by Congress’s taxing authority and requests the Court to reconsider its prior ruling on that question. Although not advanced by Defendant Cox, a similar argument could be made that the Second Amendment itself limits the exercise of an otherwise valid federal power (such as the Taxing power or Commerce power) if the effect of exercising that power is to impermissibly infringe upon the constitutional right to keep and bear arms. See *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (Second Amendment prevents government from prohibiting possession of a firearm in certain circumstances).

If, through its ruling on Defendant Cox’s motion to dismiss or otherwise, this Court were to find the constitutionality of the Second Amendment Protection Act to be at issue here, the Court should hold that the Kansas Act is constitutional because it merely regulates what the federal government may not regulate, *i.e.*, to the extent any federal law may conflict with the Act, that very federal law is based on an unconstitutional assertion of federal authority and is itself invalid, as the State argued in *Brady Campaign to Prevent Gun Violence v. Brownback*, D.

Kan. Case No. 4-CV-2327-JAR/KGG. A copy of the State's Motion to Dismiss in the *Brady Campaign* case is attached.

The intent of the Second Amendment Protection Act is to reaffirm the constitutional limits on Congress's authority to regulate firearms, firearms accessories and ammunition under the Constitution and thereby protect the rights reserved to Kansas and its citizens under the Second, Ninth, and Tenth Amendments. *See* K.S.A. 50-1202. "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," *see* K.S.A. 50-1204(a), does not fall within Congress's authority to regulate the channels of interstate commerce, the instrumentalities of interstate commerce, or activities that substantially affect interstate commerce. *See United States v. Lopez*, 514 U.S. 549, 558-59, 567 (1995); *see also Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 194 (1824) ("It is not intended to say that these words [of the Commerce Clause] comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.").

A state statute like the Second Amendment Protection Act that codifies in state law the federal constitutional limits on congressional authority—whether those limits are imposed by the Commerce Clause, the Taxing Clause, the Second Amendment, the Tenth Amendment or otherwise—does not violate the Supremacy Clause. "The very enumeration of the right [to keep and bear arms] takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Heller*, 554 U.S. at 634.

The Kansas Second Amendment Protection Act is constitutional.

Respectfully submitted,

OFFICE OF ATTORNEY GENERAL
DEREK SCHMIDT

s/ Derek Schmidt

Derek Schmidt, KS Sup. Ct. No. 17781

Kansas Attorney General

Jeffrey A. Chanay, KS Sup. Ct. No. 12056

Chief Deputy Attorney General

Stephen R. McAllister, KS Sup. Ct. No. 15845

Solicitor General of Kansas

Dwight R. Carswell, KS Sup. Ct. No. 25111

Assistant Solicitor General

Bryan C. Clark, KS Sup. Ct. No. 24717

Assistant Solicitor General

Memorial Bldg., 2nd Floor

120 SW 10th Avenue

Topeka, Kansas 66612-1597

Tel: (785) 296-2215

Fax: (785) 291-3767

E-mail: jeff.chanay@ag.ks.gov

steve.mcallister@trqlaw.com

dwight.carswell@ag.ks.gov

bryan.clark@ag.ks.gov

Attorneys for Intervenor State of Kansas

CERTIFICATE OF SERVICE

I certify that on the 15th day of November, 2016, the foregoing Brief was electronically filed with the Clerk of the Court using the Court's CM/ECF system, which will send a notice of electronic filing to all counsel of record.

s/ Derek Schmidt