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.	)	
	)	

MOTION TO INTERVENE

On behalf of the State of Kansas, Attorney General Derek Schmidt moves to intervene in this case solely to defend the constitutionality of the Kansas Second Amendment Protection Act, K.S.A. 50-1201, et seq.

Nature of the Case

The United States has charged Defendant Shane Cox with violating the National Firearms Act, 26 U.S.C. § 5801, et seq., for allegedly unlawful manufacturing, possessing, selling, and transferring firearm silencers in violation of the Act. Defendant Jeremy Kettler faces charges for possession of an unregistered silencer in violation of the Act and for making false statements during a federal investigation. The two Defendants are also charged with conspiracy to violate the National Firearms Act. First Superseding Indictment (Dkt. 27).

On November 10, 2015, Kansas Attorney General Derek Schmidt sent a letter to the presiding judge, the Honorable J. Thomas Marten, stating that the Attorney General had recently become aware that this case had the potential to call into question the constitutionality of the Kansas Second Amendment Protection Act, K.S.A. 50-1201, et seq. On or about that same date, the letter was deposited in the United States mail, first class, postage prepaid and addressed to

"Honorable J. Thomas Marten, Chief Judge, United States District Court, 401 N. Market, Suite 232, Wichita, KS 67202." Although not legally required, the letter, attached as Exhibit A, was sent as a courtesy to remind the Court of its obligation to notify the Attorney General if the constitutionality of a Kansas statute were called into question. *See* 28 U.S.C. § 2403(b). The Attorney General has received no notice from the Court that the constitutionality of the Kansas Second Amendment Protection Act has been called into question in this case.

On November 3, 2016, the Attorney General was informed by a third party that the Court recently held a motions hearing at which Chief Judge Marten ruled from the bench that the Defendants were prohibited from mentioning the Second Amendment Protection Act at their upcoming trial, which is currently scheduled to begin tomorrow, November 8, 2016. The Attorney General's Office promptly contacted Chief Judge Marten's chambers the next day, asking about the ruling and whether a written order would follow. The Attorney General's Office was informed that the Court did not intend to issue a written order and also that Chief Judge Marten's staff did not recall receiving the Attorney General's November 2015 letter.

Defendant Kettler's pretrial proffer, filed Friday, November 4, 2016, which Defendant Cox joined (Dkt. 50), says the "Court's ruling is clear that Federal law preempts State law as it applies to the need to register certain 'firearms' at issue in this case." Dkt. 48 at 1. To the knowledge of the State of Kansas, this is the first filing in this case that has plainly stated the Court has addressed the constitutionality of the Kansas statute. But it is unclear from the minute entry for the hearing what exactly the Court ruled and what was the basis for its ruling. *See* Dkt. 46.[1]

[1] Kansas fully appreciates that the timing of this motion is likely not ideal from the Court's or the Government's standpoints, but Kansas has acted as expeditiously as possible to protect its settled federal statutory right to intervene and to fulfill the Attorney General's duties and obligations by

Given this new information that the Second Amendment Protection Act's constitutionality apparently has in fact been drawn into question, indeed perhaps even ruled upon by the Court, the Attorney General moves to intervene in this case for presentation of evidence and argument, as appropriate, on the question of the Second Amendment Protection Act's constitutionality, including to clarify, and if necessary to seek reconsideration of, the Court's ruling on the United States' motion in limine. The Attorney General does not seek to intervene in regard to any matter other than the legal validity of the Second Amendment Protection Act, and seeks only to vindicate the State's interest in defending a duly enacted Kansas statute.

Grounds for Intervention

The Attorney General on behalf of the State of Kansas moves to intervene as of right under 28 U.S.C. § 2403(b), which states:

> In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality.

See also Oklahoma ex rel. Edmondson v. Pope, 516 F.3d 1214, 1215 (10th Cir. 2008) (under a companion statutory provision the U.S. Attorney General had a "right to intervene"); *Johnston v. Cigna Corp.*, 14 F.3d 486, 487 n.1 (10th Cir. 1993) (noting the United States' intervention "as a matter of right" under 28 U.S.C. § 2403(a)).

The Kansas Second Amendment Protection Act, which involves protection of the right to keep and bear arms guaranteed by both the Kansas and Federal constitutions, is plainly a state statute "affecting the public interest." Once such a statute's constitutionality is "drawn into

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filing this motion on the first business day after Kansas had substantial reason to believe that this Court may have found the Kansas Second Amendment Protection Act to be unconstitutional.

question," the certification to the state attorney general required by 28 U.S.C. § 2403(b) is mandatory without regard to the merits of the challenge. "Certification is thus a duty of the court that should not be ignored, even if the claim is obviously frivolous or may be disposed of on other grounds." *Merrill v. Town of Addison*, 763 F.2d 80, 82 (2d Cir. 1985). Under these circumstances, notification of the state attorney general is "not . . . discretionary." *Id.*

In this case, although certification that the Kansas Second Amendment Protection Act was being called into question would have been proper earlier in the proceeding, such certification and intervention by the Attorney General is now essential in light of the uncertainty of the basis for the Court's oral ruling this past week and the characterization by the Defendants that the Court's ruling is "clear" that the federal law "preempts" the Kansas Act. Dkt. 48; Dkt. 50. Under these circumstances, "belated certification, while not ideal, is sufficient to honor the purpose of section 2403," *Merrill*, 763 F.2d at 83, provided the Attorney General is also now afforded the opportunity to intervene to represent the State's interest.

Although the Federal Rules of Criminal Procedure do not have a specific rule that allows intervention, it is well established that § 2403 gives states the right to intervene in federal criminal prosecutions that could result in a state statute being held unconstitutional. *See Maine v. Taylor*, 477 U.S. 131, 136-37 (1986) (holding the Court had jurisdiction where "the only appellant before th[e] Court is the State of Maine—only an intervenor in the District Court—not the United States, which brought the original prosecution"); *see also* Fed. R. Crim. P. 57(b) ("A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."). Allowing Kansas to intervene at this stage in the proceeding also promotes judicial economy. If this case reaches the appellate court in a posture that presents the question of the constitutionality of the Kansas Second Amendment Protection Act without Kansas being a

party, the Tenth Circuit would be required at that time to certify the matter to the Kansas Attorney General and permit intervention on appeal. *See* Fed. R. App. P. 44(b). Although in such a situation "the appellate court has discretion to respond in different ways," one possibility would be a remand to the district court for the purpose of allowing the Attorney General to present a defense of the statute in question. *Pope*, 516 F.3d at 1216.

There is no doubt that the United States is eager for this Court to address the Kansas Second Amendment Protection Act's constitutional validity. In the present case, the United States has repeatedly sought to call the Act's validity into question. The United States has argued that the Second Amendment Protection Act is "clearly preempted by federal law," Gov't Mot. in Limine (Dkt. 39) at 3, and "invalid," Gov't Reply (Dkt. 41) at 3; *see also* Gov't Resp. to Defs.' Mots. to Dismiss (Dkt. 33) at 15. To date, Kansas has not been afforded any opportunity to meet the arguments of the United States.

The purpose of § 2403 is to afford the State "the time to make its views known and the opportunity to intervene." *Tonya K. v. Bd. of Educ. of City of Chicago*, 847 F.2d 1243, 1247 (7th Cir. 1988). That is important because "[t]he public interest is not well served when a . . . statute is challenged and potentially invalidated in litigation . . . in the absence of input from the institution that has the responsibility and expertise to defend" the statute's constitutionality. *Pope*, 516 F.3d at 1216. Under Kansas law, the Attorney General has that responsibility. *See, e.g.*, K.S.A. 2016 Supp. 75-702. Strong but unasserted defenses against the repeated insistence by the United States that the Court in this case should invalidate the Second Amendment Protection Act certainly are available, including two that have been publicly advanced in the United States District Court for the District of Kansas.

First, in *Brady Campaign to Prevent Gun Violence v. Brownback*, D. Kan. Case No. 4-CV-2327-JAR/KGG, the Attorney General argued 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. *See* Mot. to Dismiss (Dkt. 13) at 21, *Brady Campaign to Prevent Gun Violence v. Brownback*, D. Kan. Case No. 4-CV-2327-JAR/KGG. Such a conclusion would avoid any Supremacy Clause issues and leave the state statute intact. In that suit, however, the Court dismissed the case for lack of standing and never considered this argument on the merits.

Second, by the Act's own plain terms, it is only concerned with federal statutes enacted under the Commerce power, which is not the source of power underlying the federal statute at issue here. *See* K.S.A. 50-1204(a) ("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*." (emphasis added)). Instead, the National Firearms Act by its express terms—and as this Court has already held, *see* Dkt. 34, 4-8—was enacted by Congress under the Taxing power, not the Commerce power. *See, e.g.*, *United States v. Roots*, 124 F.3d 218 (Table), 1997 WL 465199 at *2 (10th Cir. 1997) (unpublished) ("We agree with the district court that [*United States v. Lopez*, 514 U.S. 549 (1995)] does not undermine the constitutionality of § 5851(d) because that provision was promulgated pursuant to Congress's power to tax, *see* U.S. Const. art. I, § 8, cl. 1, not pursuant to the Commerce Clause."). Thus, on its own terms, the Kansas Second Amendment Protection Act is inapplicable to the National

Firearms Act and thus to this case, meaning there is no constitutional question to consider or resolve. *See id.*[2]

The repeated invitations by the United States for this Court in this case to address the constitutionality of the Kansas Second Amendment Protection Act should be declined. But if the Court does decide to address the Act's constitutionality, then Kansas must be allowed to intervene and present a defense of its statute because the current parties are unlikely to address and preserve the full range of issues related to available defenses. In particular, the Defendants in this case have not raised, and are unlikely to raise, the full range of defenses to the United States' claims for invalidating the statute, particularly constructions of the statute that would render it inapplicable to their prosecutions here. It is unclear from the current record whether this Court has accepted or declined the invitation of the United States to rule on the state statute's constitutionality, but the Defendants on November 4 for the first time represented that the Court has done so. If this Court has agreed, or were to agree, with the United States, there could be a conclusive adjudication that the Act is unconstitutional in some respect, which would greatly

[2] A third possible defense of the Act also possibly arises on the specific facts of this case. The prosecution here involves the handling of silencers in violation of the National Firearms Act. Under Kansas law, it is a state crime to possess a silencer, *see* K.S.A. 21-6301(a)(4), *unless* the person who possesses the silencer is in compliance with all requirements of the National Firearms Act, *see* K.S.A. 21-6301(h). Thus, when the Kansas Legislature declared in the Kansas Second Amendment Protection Act that "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," and *prohibited* state and local officials from enforcing the same, *see* K.S.A. 50-1206, the Legislature was aware of the preexisting Kansas law that *requires* state and local officials to insist upon compliance with the National Firearms Act in the handling of silencers. *See* K.S.A. 21-6301(h). Since courts should interpret potentially conflicting statutes in a manner that preserves the effectiveness of each absent a clear intent by the Legislature to repeal the earlier statute, *Wyatt v. Alaska*, 451 U.S. 259, 267 (1981), it logically follows that the Kansas Legislature did not consider the provisions of the National Firearms Act governing silencers to be within the scope of the Kansas Second Amendment Protection Act. This conclusion is buttressed by the reasonable belief that the Kansas Legislature would not require the State's citizens to comply with an unconstitutional federal law in order to avoid state criminal liability for possessing silencers.

affect the State's interest "in the continued enforceability of its own statutes." *Maine*, 477 U.S. at 137. Accordingly, the Kansas Attorney General, on behalf of the State of Kansas, is entitled to intervene as a matter of right under 28 U.S.C. § 2403.

Conclusion

For the foregoing reasons, Kansas Attorney General Derek Schmidt, on behalf of the State of Kansas, moves to intervene in this case or, in the alternative, respectfully requests this Court make clear on the written record that it has not ruled on the constitutionality (including preemption) of the Kansas Second Amendment Protection Act and that the Act's validity is not called into question in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 7th day of November, 2016, the foregoing Motion to Intervene 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/ Dwight R. Carswell
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November 10, 2015

Honorable J. Thomas Marten
Chief Judge
United States District Court
401 N. Market, Suite 232
Wichita, KS 67202

Re: *United States v. Shane Cox*, 15-CR-10150-JTM-1 (D.Kan.)

Dear Judge Marten:

It has been brought to my attention that *United States v. Shane Cox*, 15-CR-10150-JTM-1 (D. Kan.), which is pending in your Court, has the potential to call into question the constitutionality of the Kansas Second Amendment Protection Act, K.S.A. 2015 Supp. 50-1201, *et seq*. To my knowledge, no such question has been presented as the case is postured at this time. However, in the event a Kansas statute's constitutionality is called into question in this case, I respectfully request the Court notify me as required by 28 U.S.C. § 2403(b) and allow the State of Kansas the opportunity to defend the constitutionality of its law.

Thank you for your attention to this matter.

Sincerely,

Derek Schmidt

Derek Schmidt
Kansas Attorney General