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January 31, 2017

Honorable Jeff Sessions
Attorney General of the United States-Nominee
326 Russell Senate Office Building
Washington, DC 20510

Honorable Dana Boente
Acting Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Senator Sessions and Acting Attorney General Boente:

The Department of Justice is prosecuting two individuals in Kansas for violations of the National Firearms Act. *See United States v. Cox*, No. 15-10150-01-JTM (D. Kan.); *United States v. Kettler*, No. 15-10150-02-JTM (D. Kan.). Both individuals, Mr. Shane Cox and Mr. Jeremy Kettler, have been convicted by a federal jury in Wichita, Kansas, and await sentencing on February 6. Mr. Cox was convicted of, among other things, unlawfully making and transferring unregistered firearms suppressors, and Mr. Kettler was convicted solely of possessing an unregistered firearms suppressor. According to the defendants, the firearms suppressors at issue were manufactured in Kansas and kept solely in Kansas without crossing any state line. Particularly in relation to Mr. Kettler, the United States did not allege that his possession of Kansas-made suppressors had even a speculative interstate implication. These defendants have not been convicted or even accused of harming any person or property, or otherwise misusing the unregistered Kansas-made suppressors. I also would note Congress is actively questioning whether, as a matter of public policy, the NFA requirements for suppressors should be repealed. *See, e.g.,* S. 59, 115th Congress, 1st session (proposing to enact the "Hearing Protection Act of 2017").

In their defense, these individual defendants argued they reasonably relied on the Kansas Second Amendment Protection Act, K.S.A. 50-1201 *et seq*. Enacted by the Kansas Legislature in 2013, this statute, *inter alia*, asserts the authority of the State of Kansas to protect the Second Amendment rights of its citizens in firearms matters that fall outside the constitutionally permissible scope of federal law. The state statute is plainly intended to assert state primacy in the regulation of firearms that are made and kept solely within the borders of Kansas. I emphasize that although the State of Kansas is vigorously defending the validity of its law in

court, the State has taken no action, either civil or criminal, that attempts to attach liability to any federal agent or official in connection with this matter.

One day after the Second Amendment Protection Act took effect, then-U.S. Attorney General Eric Holder wrote to Kansas Governor Sam Brownback to declare that, although no court had so held, he considered the state statute unconstitutional. In an unusual move, the then-U.S. Attorney for the District of Kansas simultaneously issued a public statement criticizing the state law, including his unsolicited opinion that it was "bad policy." *See, e.g.*, *U.S. Attorney General Holder tells Brownback new gun law is unconstitutional*, Lawrence Journal World, May 2, 2013, http://www2.ljworld.com/news/2013/may/02/us-attorney-general-holder-tells-brownback-new-gun/. Governor Brownback responded forcefully, asserting the importance Kansas places on Second Amendment rights for our citizens. The federal charges against Mr. Cox and Mr. Kettler came less than two years after that public exchange between the U.S. Department of Justice and our Governor.

The federal district court has ruled that on the specific facts of the pending cases, the Kansas Second Amendment Protection Act by its own terms does not apply; nevertheless, the United States persists in attempting to challenge it in this case. Earlier this week, Mr. Kettler, through counsel, acknowledged the Kansas statute is not drafted in a manner that squarely applies it to this case, writing in his Sentencing Memorandum and Request for a Variance (Dkt. 83):

> At the heart of this case lies the Kansas Second Amendment Protection Act. The offense of conviction was substantially caused by Kansas legislation that attempted to exempt the type of sound suppressor Mr. Kettler was found by the jury to have possessed. Therefore, the nature of this offense is not violent, it is not harmful to the community, it was not even committed with any guilty mind or heart whatsoever. *The possession of the accessory in question was caused by a good faith misunderstanding of the nuanced interaction between state and federal law. This nuance escaped the entirety of the framers of the Kansas law itself.* (Emphasis added.)

Mr. Cox and Mr. Kettler have asserted defenses related to the Kansas Second Amendment Protection Act, such as arguing that their reasonable reliance on the state statute justified their actions even if the statute as written does not squarely apply. Because throughout this case the validity of a Kansas statute has been a potential issue, the State of Kansas on my relation took the unusual step of intervening in this federal criminal prosecution as allowed by federal law. *See* 28 U.S.C. § 2403(b). We filed a post-trial brief conditionally defending the validity of the Kansas statute in the event the Court reached that question. The United States subsequently filed a response disputing our arguments and, once again, gratuitously asserting its view that the Kansas statute is invalid.

Senator Sessions, this federal prosecution was preceded by a plainly political dispute between the then-Attorney General of the United States and the Governor of the State of Kansas on subject matter relevant to these defendants' conduct. The United States has alleged no actual harm to anybody caused by these defendants' actions. The defendants' undisputed testimony

demonstrates they acted in sincere reliance on Kansas law, even if that reliance ultimately were to prove legally misplaced or ill-advised.

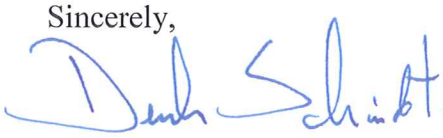
The highly unusual nature of this federal prosecution is underscored by the absence of *state* criminal charges against Mr. Kettler or Mr. Cox for possessing suppressors unlawfully.[1] *See* K.S.A. 21-6301(a)(4) and (h). It is not apparent to me why this case warrants the vigorous federal prosecution it has received. This case also presents (both in the district court and potentially on appeal) important constitutional questions related to the Second Amendment, the Ninth Amendment and the Tenth Amendment. The State of Kansas, as intervenor, has significant sovereign interests in how questions about state authority may be presented and addressed if this case proceeds.

For all of those reasons, I request you personally review the Government's actions to date in prosecuting this case and make a fresh determination whether this prosecution is appropriate and should continue. It appears the United States went out of its way to prosecute this case that ordinarily would not have warranted federal attention. If so, it is truly unfortunate these individual defendants have been caught up in what has every appearance of a political dispute between the prior leadership at the U.S. Department of Justice and the Governor and Legislature of the State of Kansas. The Second Amendment Protection Act may have been inartfully drafted, but the United States should not express its displeasure with state law by prosecuting individual defendants who relied on it in good faith.

If the United States and the State of Kansas must proceed in this litigation to test the boundaries of federal and state power, I would find it comforting to know at least that we are doing so because you have made a personal determination that the interests of the United States justify this continued prosecution. It would seem a shame to march ahead solely under the legacy of your predecessors' philosophical approaches to gun rights and to the role of the States in our federal system—philosophies that I doubt you share.

Thank you for your prompt attention to this matter.

Sincerely,



Derek Schmidt
Kansas Attorney General

Cc: David J. Freund, Steven Kent Gradert, and Timothy J. Henry, counsel for Shane Cox
Ian M. Clark, counsel for Jeremy Kettler
Debra L. Barnett and Richard L. Hathaway, counsel for the United States

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[1] Under Kansas law, the authority to commence criminal prosecution on these facts rests with the county attorney, not with the attorney general. The Attorney General's Office is not aware of any State proceeding begun or contemplated by the Neosho County Attorney but cannot speak on behalf of the county attorney.