Statement of
Kris W. Kobach

Before the Federal and State Affairs Committee
Kansas Senate

Regarding H.B. 2199

March26, 2013

Mr. Chairman and Members of the Committee, I come before you today in my personal capacity to provide legal testimony in support of H.B. 2199, the Second Amendment Protection Act. Prior to becoming Kansas Secretary of State, I taught Constitutional Law at the University of Missouri—Kanas City. During 2001-2003, I served as White House Fellow and Counsel to U.S. Attorney General John Ashcroft at the United States Department of Justice.

I provided assistance to Representative Rubin in the drafting of H.B. 2199. It was drafted with the intent to assert Kansas's authority as a co-equal sovereign under the United States Constitution to regulate a subject matter outside of Congress's jurisdiction under the interstate commerce clause of Article I, Section 8. It was also drafted to stave off unconstitutional legislation pending in Congress that not only infringes upon the Second Amendment rights of Kansas citizens, but also exceeds Congress's constitutional power to regulate interstate commerce.

During the past 80 years, Congress has used the interstate commerce power as a conduit for asserting regulatory authority over numerous specific subjects that have nothing to do with interstate commerce. With respect to firearms, Congress has used contemporaneous incidents of gun violence to justify an expansion of federal regulation of firearms. While some federal regulations of firearms are permissible exercises of the interstate commerce power, others clearly are not. However, Members of Congress often act without any regard to whether or not the United States Constitution permits the specific regulations at issue.

Such congressional disregard of the limits imposed by the Constitution have none gone completely unchecked. In the years since 1995, the United States Supreme Court has issued several opinions that have declared certain acts of Congress to be invalid exercises of the interstate commerce power. Those opinions are directly relevant to H.B. 2199.

In 1995, the Supreme Court in the case of *United States v. Lopez* struck down a provision of the federal Gun-Free School Zones Act of 1990. In so doing, the Court noted that the federal regulation of firearms must normally have some connection to the movement of the firearm across state lines:

> The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; *there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce*. To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States

United States v. Lopez, 514 U.S. 549, 567 (1995) (emphasis added). These words would weigh heavily in any legal challenge to H.B. 2199. Like the unconstitutional federal provision at issue in *Lopez*, a federal attempt to regulate the Kansas firearms described in H.B. 2199 would have no concrete tie to

interstate commerce.

The recent decision of the Supreme Court in *National Federation of Independent Businesses v. Sebelius* also supports the constitutionality of H.B. 2199. It does so by undermining an argument that might be used to support a legal challenge to H.B. 2199—the argument that the federal regulation of firearms that are manufactured and possessed solely within a single state is "necessary and proper" to the federal regulation of interstate commerce in firearms. The Court rejected such an expansive reading of the Necessary and Proper Clause:

> [S]uch a conception of the Necessary and Proper Clause would work a substantial expansion of federal authority. No longer would Congress be limited to regulating under the Commerce Clause those who by some preexisting activity bring themselves within the sphere of federal regulation. Instead, Congress could reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it. Even if the individual mandate is "necessary" to the Act's insurance reforms, such an expansion of federal power is not a "proper" means for making those reforms effective.

Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2592 (2012). This is one of the most important holdings to emerge from that case—one that will likely serve to protect the states from illegitimate exercises of federal power in the future.

In conclusion, not only would the Founding Fathers have rejected the notion that Congress could use the interstate commerce power regulate things that have never travelled in interstate commerce, recent decisions of the Supreme Court indicate that the Court is returning to that understanding. Of course, future appointments to the Supreme Court may either reverse or reinforce that trend. But the original understanding of the interstate commerce power is clear and unchanging, and H.B. 2199 is plainly consistent with that understanding.