**Testimony of**
**Kris W. Kobach**
**Kansas Secretary of State**

**Committee on Federal and State Affairs**
**Kansas Senate**

**March 16, 2017**

**Introduction**

Mr. Chairman and Members of the Committee, I come before you today in my capacity as a former professor of constitutional law at UMKC Law School and in my capacity as former counsel to Attorney General John Ashcroft at the United States Department of Justice. As an attorney who has long sought to protect the Second Amendment rights of Kansans and other United States citizens, I believe that it is important that our laws allow Kansans to exercise their right to keep and bear arms to the maximum extent possible. Unfortunately, the Kansas statutes currently contains several provisions that operate to deny this right unjustly. These statutory problems create unwarranted infringements on the right to keep and bear arms that 99% of Kansas attorneys are completely unaware of. Indeed, it is likely that these statutory problems were never intended by the Kansas Legislature when the relevant laws were adopted in the past. But ambiguous wording in the statutes, combined with anti-gun interpretations by government officials that construe the language in the worst possible way, has resulted in significant denials of the right to keep and bear arms.

S.B. 121 operates to clarify Kansas law and restore its original intent in three critical areas – expungement of crimes, lifetime prohibitions on firearms possession, and concealed carry rights. In so doing, it significantly enhances the right to keep and bear arms in Kansas. It should be noted that this is a right that Kansans value more than the citizens of any other state value it. In 2010 when Kansans approved our state constitutional amendment to protect the right to keep and bear arms, an astounding 88.2% voted in favor. That is a higher majority than any other state witnessed in the approval of equivalent constitutional provisions. Second place goes to West Virginia in 1986, with 83.6% voting in favor.

**I. In Kansas, an Expungement is Not an Expungement When it Comes to the Right to Keep and Bear Arms**

When a crime is expunged, the crime is erased from an individual's record. "After the order of expungement is entered, the petitioner shall be treated as not having been … convicted of the crime ...." K.S.A. 21-6614(i). Expungement is an extraordinary form of relief that the vast majority of convicted persons cannot obtain. After the required number of years (usually 5) has elapsed, a petition for expungement requires the original convicting court to revisit the case and notify the prosecutor that the individual is seeking expungement. It requires the court to find that the individual has maintained a clean record, the individual's circumstances and behavior warrant expungement, and that expungement is consistent with the public welfare. As a practical matter, expungement does not normally occur unless both the prosecutor and the court to agree that it is appropriate.

However, Kansas law contains some exceptions to expungement that allow the conviction to still "exist" in some sense. Most are related to individuals seeking employment in law enforcement or the gaming industry. *See* K.S.A. 21-6614(i)(2). But four provisions of the Kansas expungement statute mention firearms. *See* K.S.A. 21-

6614(i)(2)(K), 21-6614(k)(2), and 21-6614(l)(16), and 21-6614(l)(17). Those provisions Kansas law are somewhat ambiguous. But they have been interpreted by the U.S. Division of Criminal Justice Information Services as not fully restoring the rights of a Kansas citizen to keep and bear arms. *Consequently, when a Kansan whose conviction has been expunged seeks to purchase a firearm, he will be denied by the federal government through the NICS background check*. As a result, an expungement in Kansas is not really an expungement when it comes to the right to keep and bear arms. S.B. 121 fixes this problem by amending this language and making clear that under Kansas law the individual "shall be deemed to have had such person's right to keep and bear arms fully restored."

**II. In Kansas, Merely Possessing a Firearm (or Being Said to Possess One) During a Felony Can Lead to a Lifetime Ban on the Possession of Firearms**

Kansas law bars certain convicted individuals from ever possessing a firearm again. However, the statutory language is somewhat ambiguous. It requires that the individual "was found to have been in possession of a firearm at the time of the commission of the crime." K.S.A. 21-6304. To most lawyers, the use of the word "found" refers to a judicial finding; and the fact that the phrase is in the past tense indicates that the finding was made in the past – at the time of the conviction. Unfortunately, the Office of the Attorney General has adopted a different interpretation of the language: that the finding can be made by an attorney at the OAG (not a judge), on a cold record (without any cross examination), years after the fact. In other words, an attorney at the OAG can look at the reports and evidence submitted to the court (but never tested in court) to see if there is any mention of a firearm. It does not matter that the judge never made any finding regarding the existence or use of a firearm. The individual is *forever barred from possessing a firearm in Kansas*. Even worse, an expungement cannot restore the individual's right to keep and bear arms.

S.B. 121 solves this problem by clarifying that any such "finding" must be made by the convicting judge, and that the finding must be that defendant *used* the firearm in the commission of the crime. It also clarifies that an expungement serves to set aside any lifetime ban on the possession of firearms.

**III. In Kansas, Concealed Carry License Holders Are at Risk of Forever Losing Their Right to Carry**

The current OAG interpretation of the lifetime prohibition language in K.S.A. 21-6304 particularly jeopardizes Kansans who exercise their right to concealed carry. If such an individual is carrying, but not using, a firearm when he is involved in a relatively minor felony, the fact that he merely possessed a firearm at the time is interpreted by the OAG as triggering the lifetime prohibition. If the individual had not been carrying at the time, he would be fine. But ironically, by exercising his right to keep and bear arms, he puts his right to keep and bear arms at risk.

S.B. 121 solves this problem by clarifying that merely possessing (but not using) a firearm does not trigger the lifetime bar. In this way, S.B. 121 removes the risk that the current statutory language creates.