Date: March 7, 2024
HB 2803, Hearing in the House Federal and State Affairs Committee
Richard Mack, founder of the Constitutional Sheriffs and Peace Officers Association
Proponent HB 2803, with written testimony
Graham County, Arizona

I am a former Graham County Arizona Sheriff, Richard Mack. I am the founder of the Constitutional Sheriffs and Peace Officers Association (CSPOA) and was involved in the Mack/Printz v. United States case that supported the 10th Amendment and the anti-commandeering doctrine.

Honorable Chairman Carpenter and members of the House Federal and State Affairs Committee, I support HB 2803.

HB 2803 the Kansas Gun Rights Preservation Act is based on solid foundation of the anti-commandeering doctrine and the 10th Amendment from my landmark Supreme Court case. That doctrine is more critical than ever today as the federal government's overreach continues to stomp upon the reserved powers of the states and the rights of the people.

The anti-commandeering doctrine provides a powerful tool to undermine overreaching, unconstitutional federal power. So, what is this doctrine? What is it based upon? And how can it be used as an effective tool to stop an out-of-control central government working outside of it's constitutional authority?

Most people assume the feds have the final say. When Uncle Sam says jump, states and local governments simply ask, "How high?" But given that the federal government was intended to limit its actions to constitutionally delegated powers and all other authority was left "to the states and the people" per the Tenth Amendment, how do we hold the federal government in check? How do we stop it from exercising powers not delegated?

This isn't a new question. In fact, those skeptical of the Constitution raised it during the ratification debates. James Madison answered it in *Federalist #46*.

In his blueprint for resisting federal power, Madison offered a number of actions, but most significantly, he suggested that a "refusal to cooperate with officers of the union" would impede federal overreach.

"Should an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps ***refusal to cooperate with officers of the Union****, the frowns of the executive magistracy of the State; the embarrassment created by legislative devices, which would often be added on such occasions,* ***would oppose, in any State, very serious impediments****; and were the sentiments of several adjoining States happen to be in Union,* ***would present obstructions which the federal government would hardly be willing to encounter****."* [Emphasis added]

Anti-commandeering is a longstanding Supreme Court doctrine. In a nutshell, the anti-commandeering doctrine prohibits the federal government from "commandeering" state personnel or resources for federal purposes.

In effect, the federal government is constitutionally prohibited from requiring states to use their personnel or resources to enforce federal laws or implement federal programs. State and local governments cannot directly block federal agents from enforcing federal laws or implementing federal programs, but they do not have to cooperate with the feds in any way. For instance, a local sheriff cannot block ATF agents from enforcing a federal gun law, but the ATF cannot force the sheriff's office to participate in the enforcement effort.

The anti-commandeering doctrine rests on five landmark cases, the first dating back to 1842.

Prigg v. Pennsylvania (1842), Justice Joseph Story held that the federal government could not force states to implement or carry out the Fugitive Slave Act of 1793. He said that it was a federal law, and the federal government ultimately had to enforce it:

The fundamental principle applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted*. The clause is found in the national Constitution, and not in that of any state. It does not point out any state functionaries, or any state action to carry its provisions into effect. The states cannot, therefore, be compelled to enforce them; and it might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or instrusted to them by the Constitution*

New York v. United States (1992) the Court held that the regulations in the Low-Level Radioactive Waste Policy Amendment Act of 1985 were coercive and violated the sovereignty of New York, holding that "because the Act's take title provision offers the States a 'choice' between the two unconstitutionally coercive alternatives–either accepting ownership of waste or regulating according to Congress' instructions–the provision lies outside Congress' enumerated powers and is inconsistent with the Tenth Amendment.

Sandra Day O'Connor wrote for the majority in the 6-3 decision:

As an initial matter, Congress may not simply "commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."

She later expounded on this point.

While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.

And then there is my case from 1997 that pushed back against the unconstitutional Brady Bill that was passed by Congress and signed into law by Bill Clinton. This law literally forced each sheriff to become a pawn for the federal government to do their bidding to promote gun control within our jurisdictions. This act contained a provision to have Sheriffs like me arrested if we failed to comply and assist in their unconstitutional gun control. I decided to file a case against the federal government to stop this abuse. Soon after more sheriffs joined me.

Printz v. United States (1997) serves as the lynchpin for the anti-commandeering doctrine. At issue was a provision in the Brady Gun Bill that required county law enforcement officers to administer part of the background check program. Sheriffs Jay Printz and Richard Mack sued, arguing these provisions unconstitutionally forced them to administer a federal program. Justice Antonin Scalia agreed, writing in the majority opinion "it is apparent that the Brady Act purports to direct state law enforcement officers to participate, albeit only temporarily, in the administration of a federally enacted regulatory scheme."

Citing the New York case, the court majority declared this provision of the Brady Gun Bill unconstitutional, expanding the reach of the anti-commandeering doctrine.

We held in New York that Congress cannot compel the States to enact or enforce a federal regulatory program.

Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.

Many more recent anti-commandeering cases prove that this doctrine is sound and bulletproof way to secure the reserved powers of our States and the rights of the people.

Independent Business v. Sebelius (2012), the Court held that the federal government cannot compel states to expand Medicaid by threatening to withhold funding for Medicaid programs already in place. Justice John Roberts argued that allowing Congress to essentially punish states that refused to go along violates constitutional separation of powers.

The legitimacy of Congress's exercise of the spending power "thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' " Pennhurst, supra, at 17. Respecting this limitation is critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system. That system "rests on what might at first seem a counterintuitive insight, that 'freedom is enhanced by the creation of two governments, not one.' " Bond, 564 U. S., at (slip op., at 8) (quoting Alden v. Maine, 527 U. S. 706, 758 (1999)). For this reason, "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." New York, supra, at 162. Otherwise the two-government system

established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer.

Murphy v. NCAA (2018), the Court held that Congress can't take any action that "dictates what a state legislature may and may not do" even when the state action conflicts with federal law. Samuel Alito wrote, "a more direct affront to state sovereignty is not easy to imagine." He continued:

The anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States … Conspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States. The anticommandeering doctrine simply represents the recognition of this limit on congressional authority.

Does this doctrine actually work to stop federal overreach?

The federal government relies heavily on state cooperation to implement and enforce almost all of its laws, regulations and acts. By simply withdrawing this necessary cooperation, states and localities can nullify many federal actions in effect. As noted by the National Governors' Association during the partial government shutdown of 2013, "states are partners with the federal government on most federal programs."

Partnerships don't work too well when half the team quits. By withdrawing all resources and participation in federal law enforcement efforts and program implementation, states, and even local governments, can effectively bring the federal actions to an end.

HB 2803 the Kansas Gun Rights Preservation Act was built on solid constitutional ground and 180 years of Supreme Court precedent. Kansas must immediately pass this bill into law and stop the continued abuse of the federal government upon your state and the rights of your people.

As a former law enforcement officer, I pledged and oath to support the Constitution and would not tolerate acts made outside of it that trampled on the rights of the citizens and the community I served. It is my hope that the legislature and law enforcement of Kansas will stand by their oaths and not tolerate the constant attempts by the federal government to violate your states reserved powers or the rights of your constituents to keep and bear arms.

In conclusion, I urge this committee to vote for HB 2803.

Respectfully submitted,

Richard Mack