Kansas Peace Officers' Association

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Written testimony to the Committee on Federal and State Affairs
In Opposition of House Bill 2025

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Members of the Committee on Federal and State Affairs:

The Kansas Peace Officers Association respectfully opposes House Bill 2025.

The elements of HB2025 are detrimental, not only to officers of the Kansas Department of Wildlife, Parks and Tourism, and all Kansas law enforcement officers, but to the safety of the public. The reasoning for our opposition to HB2025 and some examples are below.

Some criminal investigations are relatively simple. Complex investigations are more time consuming and involve use of other investigative methods and tools. Surveillance is one tool, and case law has long established that any person, including a government official, is allowed to lawfully view what can be seen from a public venue. In a typical case, investigative tools, including surveillance are used to develop probable cause to obtain a search warrant. An investigation doesn't start with a search warrant, as the probable cause hasn't been developed.

Referring to Section 1, Physical Surveillance, it is common for an officer on patrol to observe something that invites further investigation. It could be a KDWPT officer observing a pickup truck parked in an area where there have been reports of poaching. Or who observes a vehicle parked at an abandoned farmhouse. Or who sees a number of cars parked at a house where alcohol and drugs are supplied to juveniles. KDWPT are sworn law enforcement officers with jurisdiction across Kansas. Each of these examples requires surveillance to determine what, if any, criminal activity is taking place. That is our job. None of these examples has enough probable cause that a crime is taking place to be immediately granted a search warrant, but each example demands investigation. HB2025 would cripple, if not prohibit, the ability of officers to investigate these examples.

The wording in HB2025 Section 1, lines 10 and 11, can be interpreted in different ways. Is the intent of HB2025 not to allow surveillance of private property by a KDWPT officer who is on public property? Or is the intent of HB 2025 not to allow surveillance of private property by an officer who is on private property owned by another? If the second is the case, does that mean, as a private landowner, I cannot give permission to a KDWPT officer to be on my property while they are conducting surveillance? This applies in both the rural setting under crimes such as game law violations, as well as in a city, where an officer might ask a homeowner or business owner for permission to be on their property to watch a suspected drug house. In either example, it would be detrimental for any law enforcement officer to have to obtain a search warrant to conduct surveillance. And, again, that is based on the assumption there is enough probable cause to obtain a search warrant.

Concerning Section 1 Electronic Surveillance, advances in technology can be used not only for investigative purposes, but also for safety purposes. Aerial video and photographs from law enforcement airplanes, helicopters, and more recently drones, can provide useful information without altering evidence. Images taken at intervals can show changes over time. A common practice is to video and or photograph a house, structure, field, etc. to attach to the affidavit for a search warrant, not only to document the location but as a tactical advantage for the officers serving the search warrant. HB2025 would eliminate the ability to video or photograph any private property prior to a search warrant being issued.

HB2025 Section 2 specifically prohibits a "tracking device" being placed on a utility pole to conduct surveillance on private property absent a search warrant, or consent. It is doubtful that the target of a criminal investigation is going to provide consent for surveillance. As noted above, video cameras mounted on utility poles, and other stationary locations, can be used to develop probable cause so a search warrant may be obtained, if applicable. These cameras may be utilized in rural or urban settings.

There are locations and investigations where it isn't practical or safe to have officers physically present. This could be due to an open area where there is no place to discretely park a vehicle, or an investigation where long-term observation is required. A camera that may be remotely monitored, either in real time or reviewing video or photographs at a later date, is useful in these situations.

The wording in HB2025 Section 2 is also open to different interpretations. For example, if a traffic video camera monitored in police dispatch is mounted on a utility pole, but the peripheral view of the camera shows private property, does that mean law enforcement may not view the camera? What if a crime takes place on private property and is captured on said video? Is the video fruit of the poisonous tree? Most modern traffic light systems use video cameras to sense vehicles and change signals. These cameras are mounted on traffic signal posts and can be monitored by law enforcement. If one of these cameras records a crime occurring on private property what are the legalities?

In summary, law enforcement strives to utilize technology to better investigate crimes and in doing so, serve the public. This has been proven over the years by investigative changes such as fingerprints, and DNA. Technological advances in security video and other "tracking devices" have become useful tools and are used within boundaries of case law. Juries have come to expect photographs and / or video during a case presentation.

KPOA's stance is that HB2025 would be a detriment to KDWPT officers and other law enforcement officers at the Federal, State and Local level to perform their daily duties, and lessen our ability to serve the public.

Case law notes:

"Open Fields".—In Hester v. United States,337 the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court's announcement in Katz v. United States338 that the Amendment protects "people not places" cast some doubt on the vitality of the open fields principle, but all such doubts were cast away in Oliver v. United States.339 Invoking Hester's reliance on the literal wording of the Fourth Amendment (open fields are not "effects") and distinguishing Katz, the Court ruled that the open fields exception applies to fields that are fenced and posted. "[A]n individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home."340 Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside.341 Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace.342 Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy.343 And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.344

337 265 U.S. 57 (1924). See also Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 86 (1974).

338 389 U.S. 347, 353 (1967). Cf. Cady v. Dombrowski, 413 U.S. 433, 450 (1973) (citing Hester approvingly).

339 466 U.S. 170 (1984) (approving warrantless intrusion past no trespassing signs and around locked gate, to view field not visible from outside property).

340 466 U.S. at 178. See also California v. Greenwood, 486 U.S. 35 (1988) (approving warrantless search of garbage left curbside "readily accessible to animals, children, scavengers, snoops, and other members of the public").

341 United States v. Dunn, 480 U.S. 294 (1987) (space immediately outside a barn, accessible only after crossing a series of "ranch-style" fences and situated one-half mile from the public road, constitutes unprotected "open field").

342 California v. Ciraolo, 476 U.S. 207 (1986). Activities within the curtilage are nonetheless still entitled to some Fourth Amendment protection. The Court has described four considerations for determining whether an area falls within the curtilage: proximity to the home, whether the area is included within an enclosure also surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to shield the area from view of passersby. United States v. Dunn, 480 U.S. 294 (1987) (barn 50 yards outside of fence surrounding home, used for processing chemicals, and separated from public access only by a series of livestock fences, by a chained and locked driveway, and by one-half mile's distance, is not within curtilage).

343 Florida v. Riley, 488 U.S. 445 (1989) (view through partially open roof of greenhouse).

344 Dow Chemical Co. v. United States, 476 U.S. 227 (1986) (suggesting that aerial photography of the curtilage would be impermissible).