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**Testimony Regarding SB 297, Concerning K.S.A. 8-1001(k)
Submitted by Aaron Breitenbach, Assistant District Attorney
On Behalf of Marc Bennett, District Attorney, Eighteenth Judicial District,**

Honorable Chairman Rick Wilborn and Members of the Senate Judiciary Committee:

Thank you for the opportunity to testify in opposition to Senate Bill 297. On behalf of Marc Bennett, District Attorney, Eighteenth Judicial District, I have had the privilege of working with the Kansas County and District Attorneys Association and prosecutors from across the State over the past two years to develop Senate Bill 374 to, in part, address a series of judicial decisions which have combined to make our current administrative and criminal DUI laws confusing and ineffective.

While I share many of the concerns raised by the proponents of this bill, I oppose its language because it addresses only a small portion of the legal infirmities of K.S.A. 8-1001 and, more importantly, it misstates the law, which could potentially jeopardize every DUI investigation in the State. Let me state that again: every DUI investigation, from non-injury traffic stops to multiple fatality crashes, is potentially at risk if this statute is not amended appropriately this session.

To the extent this bill seeks to bring K.S.A. 8-1001 into compliance with existing case law, it fails to address many of the provisions that have already been found to be unconstitutional. I respectfully direct the committee to my written testimony in support of Senate Bill 374 to illustrate the breadth of judicial action in relation to this statute. Failure to remedy this statute's infirmities could, at some point, lead a court to find the legislature has failed to exercise due diligence in responding to Constitutional infirmities and may threaten the entire statute.

Delaying a larger cure for the sake of an expedient remedy to one wound would leave behind a very ill proverbial patient. However, this proposal does more than address one wound. It also creates more severe ones.

As a reminder, driving is a privilege, not a right. By operation of K.S.A. 8-1001(a), Kansas law requires those who operate vehicles on public roadways to submit to testing of their breath, blood, urine, or other bodily substances when there is probable cause to

believe that person has driven under the influence. The purpose of the advisories in (k) is to provide a suspect with the information needed to make an informed decision as to whether to submit to testing. The current language repeatedly and purposefully stresses the need to submit to test requests as a matter of public policy as well as to avoid adverse consequences for the driver. The proposed language in (k)(1) incorrectly characterizes the test request as a “take it or leave it” proposition. It also unnecessarily limits the use of evidence obtained to determining someone’s degree of intoxication. Once lawfully in law enforcement’s custody, it may also be used for DNA comparison to determine someone’s presence in a vehicle during a crash.

Under both current law and this bill, if a person chooses not to submit to a test, his or her driving privileges may be revoked. In accordance with the United States Constitution, he or she may also be criminally punished for refusing such tests, depending on various circumstances. If, as this bill suggests in (k)(2), a person had a right to refuse blood or urine testing, the Department of Revenue would be unable to suspend a person’s driving privileges for such refusal. The absence of any amendments to the balance of the administrative penalties in K.S.A. 8-1001 et seq. indicates the proponents still believe such administrative penalties are appropriate. I doubt they would intentionally support penalizing someone’s assertion of a constitutional right. In summary, this bill’s language goes beyond advising a driver of current law, it statutorily establishes a “right” never before recognized in statute or case law.

Further, as the current language in K.S.A. 8-1001(b) requires law enforcement to request a test when there is reasonable grounds (i.e. probable cause) of DUI and K.S.A. 8-1001(k) requires the reading of these advisories, this bill would create extreme confusion when an officer attempts to obtain a blood draw under the authority of a search warrant (which requires the same level of suspicion: probable cause). When a search warrant has been obtained, a person has no right to obstruct or interfere with its execution. Such an act is already prohibited under law, including K.S.A. 21-5904.

This bill’s reference to being “lawfully arrested” further confuses matters as not all test requests occur in the context of an arrest. Many requests occur in hospital rooms while suspects are receiving medical treatment for injuries sustained in crashes. Again, the purpose of these advisories is to inform and incentivize testing. Inviting drivers to question the lawfulness of their arrest (perhaps while intoxicated) serves no purpose.

Due to the scarcity of space in this written testimony, I encourage this committee to compare Section 6 of Senate Bill 374 to Section 1 of this bill. Like comparing an external photograph to an X-Ray or MRI Scan, that process should better reveal the relative poor health of K.S.A. 8-1001 and the need for more dramatic intervention to save it and preserve the thousands of DUI investigations across the State that depend on it.

Thank you for your time, attention and consideration in this matter.

Respectfully submitted,



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