



KANSAS JUSTICE INSTITUTE

Testimony to the Senate Committee on Agriculture and Natural Resources

SB 308: “AN ACT concerning agriculture; relating to milk, cream and dairy products; on-farm retail sale of milk; labeling and advertising requirements; amending K.S.A. 65-771 and repealing the existing section.”

By: Samuel G. MacRoberts

Litigation Director and General Counsel
Kansas Justice Institute

Chairman Kerschen and Members of the Committee:

- Kansas *already* requires raw milk labeling: “Each container in which any unpasteurized milk is sold or offered for sale shall be clearly labeled as ungraded raw milk.”
- Kansas *already* prevents false or misleading advertisements.
- There is no legal or factual basis for imposing additional labeling or advertising requirements, especially those proposed in Senate Bill 308.

Senate Bill 308, as written, violates the free speech clauses of the First Amendment to the United States Constitution and Section 11 of the Kansas Constitution Bill of Rights. As such, Kansas Justice Institute¹ opposes SB 308. KJI submits this testimony to provide the Committee with information regarding government mandated speech regulations, so it can carefully consider the potential legal ramifications of enacting SB 308, as proposed.

The predominant focus of this testimony is centered on the bill’s attempt to compel the use and size of certain words in both labels and advertisements, particularly with respect to the sections that require the statements to “be in letters of a uniform size and no smaller than the largest font used elsewhere[.]” 1-23, lines 13-14; lines 20-23. These two sections are fatally flawed.

Compelled speech requirements such as here “are, for all practical purposes, requirements that commercial actors communicate value-laden messages about inherently political questions.”² These government speech-mandates “burden the speech of others in order to tilt public debate in a preferred direction.”³

¹ KJI is a non-profit, public-interest litigation firm committed to protecting individual liberty and the constitutional rights of all Kansans. It is a part of Kansas Policy Institute.

² Jonathan H. Adler, *Compelled Commercial Speech and the Consumer “Right to Know”*, 58 Ariz. L. Rev. 421, 450 (2016).

³ *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578-79 (2011).

As written and introduced, SB 308 is a content-, viewpoint-, and subject matter-based regulation of speech directed solely at raw milk producers. By forcing these businesses to “speak a particular message” it would “alter the content of their speech.”⁴ Federal courts apply “strict scrutiny” to evaluate the constitutionality of content-, viewpoint-, or subject matter-based compelled speech regulations, the most stringent review possible. Virtually no law survives this level of judicial review.⁵

Moreover, the font-size requirement would effectively prohibit certain advertisements such as business cards, pull-tab flyers, etc., altogether.

Senate Bill 308 is not narrowly tailored either. First, as mentioned before, Kansas already has laws that prevent misleading labels or advertisements. Second, the current statutory language already requires raw milk producers to “clearly label” “each container in which any unpasteurized is sold or offered for sale” as “ungraded raw milk.” There is no consumer-protection basis for SB 308 either. Kansans are savvy enough to understand that raw milk is unpasteurized. In fact, that’s the whole point of selling and consuming raw milk.

Instead of protecting the public, this bill appears to be more about economic protectionism and was almost certainly manufactured in response to a free speech case earlier this year. These are not appropriate reasons for proposing, let alone enacting, clearly unconstitutional regulations of speech. If enacted, as written, this bill would almost certainly invite immediate, aggressive, and well-publicized litigation.

On the other hand, common-sense and reasonableness should prevail. A sensible labeling requirement might read as follows:

Raw Milk Labeling

A raw milk container label shall not be false or misleading.

Each container of ungraded raw milk sold or offered for sale must contain the following or its equivalent: This product contains ungraded raw milk that is not pasteurized, which may increase your risk of foodborne illness.

This section shall be deemed satisfied if such language is clearly visible on the raw milk container.

In sum, KJI opposes SB 308 and respectfully asks this Committee to carefully consider the issues raised above before deciding whether to impose nonsensical, unreasonable, and unconstitutional speech regulations.

⁴ *NIFLA v. Becerra*, 138 S.Ct. 2361, 2371 (2018).

⁵ Even under a lesser standard of review, SB 308 would still be deemed unconstitutional.