KANSAS JUSTICE INSTITUTE

Testimony to the Federal and State Affairs Committee

HB 2025: "AN ACT concerning privacy rights; relating to real property; imposing restrictions on access and surveillance by certain governmental officials and agencies."

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> "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence."[1]

Chairman Barker and Members of the Committee:

Kansans *should* have robust protections from warrantless governmental intrusions. After all, that is the entire purpose of the Fourth Amendment. To that end, House Bill 2025 is an admirable start. Kansas Justice Institute[2] supports the intent of the bill but asks this Committee, respectfully, to consider two proposals: strike the phrases "or a judicially recognized exception to the search warrant requirement"; and add "Kansas Constitution" after "the constitution of the United States[.]"

This testimony is intended to provide the Committee with an inexhaustive overview of search and seizure issues so it can carefully consider the impact of enacting HB 2025, as proposed. Because the Kansas Supreme Court interprets our state search and seizure clause in

[1] *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (cleaned up).

[2] 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. Since its inception in 2019, KJI has been a leading voice on Fourth Amendment and privacy issues. As one example, KJI successfully litigated a federal lawsuit against a Linn County local health officer involving warrantless searches and seizures of business records. https://kansasjusticeinstitute.org/warrantless-searches/

lockstep with the Fourth Amendment,[3] this testimony predominantly focuses on federal constitutional law.

The United States Supreme Court takes two approaches to Fourth Amendment[4] claims: privacy-based (*Katz v. United States*, 389 U.S. 347 (1967)) and property-based (*United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013)).

The Fourth Amendment protects people. *Katz v. United States*, 389 U.S. 347, 351 (1967); *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018). Its "overriding function" is to "protect personal privacy," and "dignity," (*Winston v. Lee*, 470 U.S. 753, 760 (1985) (cleaned up)), to protect the "security of individuals" (*Camara v. Mun. Court*, 387 U.S. 523, 528 (1967)), and secure the "privacies of life" (*Carpenter* at 2214) "against unwarranted intrusions," (*Winston*) "arbitrary invasions"(*Camara*), and "all general searches" (*Go–Bart Importing Co. v. United States*, 282 U.S. 344, 357 (1931)) by the government.

But the Fourth Amendment *also* protects against government intrusions of protected property interests. *United States v. Jones*, 565 U.S. 400 (2012); *Florida v. Jardines*, 569 U.S. 1 (2013). The "*Katz* reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test." *Jones* at 409. "Indeed, more recent Fourth Amendment cases have clarified that the test most often associated with legitimate expectations of privacy, which was derived from the second Justice Harlan's concurrence in *Katz v. United States*, 389 U.S. 347 (1967), supplements, rather than displaces, the traditional property-based understanding of the Fourth Amendment." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (cleaned up).

The Fourth Amendment was meant to "place obstacles in the way of [the government]" *(Carpenter* at 2214) and "gives concrete expression to a right of the people which 'is basic to a free society.'" *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967) (Quoting *Wolf v. People of the State of Colorado*, 338 U.S. 25, 27 (1949)).

The suspicionless search is one primary evil the Fourth Amendment was intended to stamp out. *See Boyd v. United States*, 116 U.S. 616, 625-30 (1886). "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. The Framers made that right explicit in the Bill of Rights following their experience with the indignities and invasions of privacy wrought by general warrants and warrantless searches that

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[3] *See ex. State v. Howard*, 305 Kan. 984 (2017).

[4] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The Fourth Amendment is incorporated against the states through the Fourteenth Amendment.

had so alienated the colonists and had helped speed the movement for independence." *Byrd v. United States*, 138 S. Ct. 1518, 1526 (2018) (cleaned up).

Throughout the years though, federal *and* Kansas state courts have gutted Fourth Amendment and Section 15 protections by inventing warrant exceptions, upholding invented warrant exceptions, or even claiming the search and seizure clauses do not apply at all. One such example is the judicially created "open fields" doctrine.

In 1924, the United States Supreme Court opined "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields." *Hester v. United States*, 265 U.S. 57, 59 (1924). The "open fields" doctrine was re-affirmed in 1984 in *Oliver v. United States*, 466 U.S. 170 (1984). The "open fields" doctrine is widely criticized. However, these "open fields" cases are, presumably, the reason Kansas government officials would otherwise feel justified to enter, remain, or conduct surveillance on private property without a warrant or the owner's permission.

Admirably, it appears HB 2025 attempts to restore a person's protections against warrantless intrusions by government officials. However, as stated above, the "judicially recognized exception" clauses mean the bill will not fully achieve its intended purpose.

Thank you for the opportunity to submit this testimony.