



Since 1894

Date: February 14, 2024

To: Senate Committee on Agriculture and Natural Resources  
Senator Virgil Peck, Chair

From: Jackie Garagiola, Associate Counsel, Kansas Livestock Association

Re: **SB 389 AN ACT prohibiting entering or remaining on and knowingly making false statements to gain access to animal facilities and field crop production areas, providing penalties therefor and removing the intent to destroy property in the farm animal and field crop and research facilities protection act.**

Position: Proponent, In-Person

*The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing more than 5,700 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf, and stocker cattle production; cattle feeding; dairy production; swine production; grazing land management; and diversified farming operations.*

Thank you, Chairman Peck and members of the Senate Agriculture Committee, for allowing the Kansas Livestock Association (KLA) the opportunity to share our views on SB 389. If passed, SB 389 would ensure protection against trespassing or entry through knowingly fraudulent statements on employment applications for animal facilities and field crop production areas.

KLA policy supports efforts to secure the health and safety of agriculture from vandalism and negative influences to protect the industry and allow for a stable food supply for consumers. KLA policy states “Therefore be it resolved, the Kansas Livestock Association supports initiatives concerning acts against the livestock industry to: (1) strengthen the penalties for anyone involved in illegal biosecurity activities affecting the agricultural industry; (2) provide increased coordination of local, state, and federal officials to more effectively respond to these threats; (3) give producers increased protections against false and derogatory statements that would damage or endanger a producer’s livelihood, product, property or diminish livestock production practices; and (4) allow producers to secure their facilities and operations at all times.” To further our members’ goals, KLA staff with other industry input has drafted legislation amending the Kansas Farm Animal and Field Crop and Research Facilities Protection Act (“the Act”).

The original Act was found unconstitutional in part in 2022 by the U.S. Court of Appeals for the Tenth Circuit. The Court struck down parts of the Act on First Amendment grounds stating the term “effective consent” regulated speech and “intent to damage” was impermissibly viewpoint discrimination. Since the U.S. Supreme Court declined to hear the State of Kansas’ appeal of this

decision, specific sections of the Act must be amended so critical protections provided by the Act for these facilities remain but in a manner that does not come into conflict with the First Amendment. The following changes were made to provide these facilities with an added level of security from trespassers and those who seek to gain access to the facility by providing false or fraudulent information on an employment application.

The court indicated two specific instances incorporated in the Act that violated First Amendment protections. First, the Court held the Act regulated speech as opposed to merely conduct. For this reason, the court found the term “effective consent” unconstitutional. Further, the Court looked to *W. Watersheds Project v. Michael*, 869 F.3d 1198 (10th Cir. 2017), which held the photographing of animals or the conditions in which they live “fit comfortably in the speech-creation category...” Therefore, the term “effective consent” and the prohibition on photography have been removed to comply with the Court’s decision.

The court’s main point of contention is that the Act forbid certain speech made with the “intent to damage the enterprise conducted at the animal facility.” The court references *Reed v. Town of Gilbert*, 576 U.S. 164 (2015), which states, “Government discrimination among viewpoints – or the regulation of speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker’ – is a ‘more blatant’ and ‘egregious form of content discrimination.’” Because sections of the Act prohibit only acts of those intending to harm the facility, and not those who seek to help or act with no intent, the court found the Act to be viewpoint discriminatory. The Court further indicated that “...while it may be permissible to punish all entry onto private property by deception, the Act becomes impermissibly viewpoint discriminatory by choosing to punish only entry by deception with the intent to damage the facility.”<sup>1</sup> This indicates the Act could avoid discrimination by simply disallowing all entry through deceit or without consent of the private property owner, setting aside the intent requirement. As a result, this bill has stricken the “intent to damage” language, creating a simple prohibition for trespass or a fraudulent employment application, regardless of the intent of the individual in violation of the Act.

While protection against traditional means of trespass is important to KLA members, lately, the most frequent concern relayed to KLA staff is the issue of low flying drones or other aircraft disturbing cattle and creating safety and security concerns for employees of the facility. To address this concern, the new definition of trespass includes the airspace above these facilities or production areas for aircraft and is tied to the safe altitude requirements of the relevant federal regulations.

Thank you for the opportunity to submit KLA’s views to the Committee. KLA asks the Committee to approve SB 389 favorably for passage.

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<sup>1</sup> *Animal Legal Def. Fund v. Kelly* at 1225.