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Chairman Proctor, Ranking Member Woodard, and members of the Committee, on behalf of the Institute for Free Speech, thank you for allowing me to testify at this hearing on House Bill 2391.

Last August, we published our Free Speech Index of the 50 states. It's the most comprehensive report ever published on state laws regulating speech about government and public policy. An editorial in *The Wall Street Journal* told readers, "it's worth spending a few minutes to read a new report from the Institute for Free Speech. It's an index of how state laws and regulations treat political committees, grassroots advocacy, independent expenditures, and the like. The results aren't partisan, and they're probably not what you expect."

I regret to inform you that Kansas earned a disappointing 65% score in this report. Many of the free speech deficiencies in your state's law would be addressed by this bill if some minor amendments are made to it. If these and one other deficiency I describe in my testimony (regarding reporting of independent expenditures by non-PACs) are addressed, then we estimate the score for Kansas would rise to 83%, the second-best free speech score in the nation.

While improvements are urgently needed to protect free speech, there are several good features in the existing Kansas campaign finance law. In particular, its definitions of contribution expenditure are much better than in most states. The cabining of speech regulation to express advocacy also is praiseworthy.

The Definition of a PAC

As we were preparing our Free Speech Index, we noticed the enforcement action taken by the Kansas Ethics Commission (KEC) against Fresh Vision Overland Park, which illustrates one of the problems with the existing law.

This action arose because Kansas law on what makes a group a PAC is extremely difficult to understand. The KEC attempted to use punishment of Fresh Vision to guide groups in the future on how the rules would apply to their activities. That's unfair, unethical, and harms vital First Amendment rights. Worse, in the process, the KEC adopted a vision of the rules that is indefensible.

Neither the law nor the Commission's regulations provide an understandable definition of "a major purpose," a key phrase in the current law defining a political committee, or PAC. That's a constitutional problem. The courts have repeatedly made clear that laws must give "persons of ordinary intelligence a reasonable opportunity to know what is prohibited."

Both the Kansas statutes and the Commission failed to do that. The closest thing to a clear standard in the Commission's regulation is that any person or group with "the intent" of becoming a PAC is a PAC. But that certainly wasn't the case, however, with Fresh Vision, whose mission is working for a better community. Yet the KEC pursued Fresh Vision. So what does it mean to have the "intent" of becoming a PAC, and who makes that decision—the speaker or the KEC? How can a speaker intend on becoming, or not becoming, a PAC when the definition of a PAC is otherwise so murky?

The other standards in the KEC's PAC regulation at Kan. Admin. Regs. § 19-21-3(a)—presumably the standards a group would use in deciding if it wanted to—that is, *intended to*—become a PAC, are hopelessly vague. Whether a group is a PAC, for example, is based on "the amount of time devoted to the support or opposition of one or more candidates for state office" or "the amount of expenditures … made on behalf of any candidate, candidate committee, party committee or political committee" and other similar factors.

But what portion of time? Does it include volunteer time? What portion of the group's expenditures? And over what timeframe is this decided? A year? A two-year election cycle? Some other period of time?

Neither the statute nor the Commission's regulation – provide answers. Grassroots advocacy groups deserve clear guidance – in advance – about how the law regulates their speech and what they can and cannot do consistent with the law.

In the landmark U.S. Supreme Court case, *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that:

> To fulfill the purposes of the Act, the [definition of "political committee"] need only encompass organizations that are under the control of a candidate or **<u>the major purpose of which is the nomination or election</u>** of a candidate. Expenditures of candidates and of "political committees," so construed, can be assumed to fall within the core area sought to be addressed by Congress. They are, by definition, campaign-related.
>
> But when the maker of the expenditure is not within these categories -- when it is an individual other than a candidate or a group other than a "political committee" -- the relation of the information sought to the purposes of the Act may be too remote.
>
> (Emphasis added.)

This is known as the major purpose test, and Kansas law should be updated to comply with the Supreme Court's First Amendment ruling. This requires both a major purpose requirement and a reasonable and clear definition of what constitutes "major purpose." If the Commission had written a regulation interpreting the current law in a manner that respected the *Buckley* precedent, then amending the statute would be unnecessary. Unfortunately, the KEC made the law even worse through its vague regulation that adds even more uncertainty to an already ambiguous statute.

While the bill attempts to address the current law's defective major purpose standard, the language needs further improvement.

How Much Spending Triggers an Evaluation of Political Committee Status?

No citizen or group should have to register or report to the government before spending a few hundred dollars on flyers, a billboard, or Facebook ads urging their fellow citizens to vote for or against a candidate.

But in Kansas today, if you and your spouse spend one dollar to expressly advocate for the election or defeat of a candidate, the law says you have become a PAC. That is, if a married couple sends first-class letters to two persons urging them to vote for a candidate, they must register with the state.

Similarly, if two people went to a store, purchased a marker and poster board, wrote "Smith for State Senate" on the poster and displayed it at a campaign rally, they would be required under Kansas law to appoint a treasurer, register as a PAC, and report their contributions and expenditures.

These two examples show how ridiculous and unconstitutional it is to define a PAC as a group that spends any money at all.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.* ("MCFL"), the Supreme Court held that such grassroots operations may not be forced to register as PACs. The justices were clearly troubled by the burdens placed upon nonprofit organizations by the reporting requirements of political committee status. Some were concerned with the detailed recordkeeping, reporting schedules, and limitations on fundraising required by federal laws regulating PACs. Justice Sandra Day O'Connor wrote specifically to address the law's "organizational restraints," including "a more formalized organizational form" and a significant loss of funding availability.

In *Coalition for Secular Government v. Williams*, the United States Court of Appeals for the Tenth Circuit, which includes Kansas and so is binding on federal courts in the state, held that an organization's planned activity of $3,500 was impermissibly low for triggering Colorado's regulation of an organization as a PAC for ballot measures, given the associated reporting requirements.

Unquestionably, the Kansas PAC definition and the zero-dollar threshold are unconstitutional under several precedents. While the bill commendably proposes raising the threshold for contributions or expenditures that trigger registration to $2,500, an increase to at least $3,500 is necessary to ensure that the threshold is constitutional. A higher, more reasonable limit that at an absolute minimum adjusted for inflation the level found unconstitutional in *Williams,* would be desirable.

Other states have better options. Nebraska, for example, only requires PAC registration and reporting once a group receives more than $5,000 in contributions or makes over $5,000 in

expenditures. Some states go farther, like Georgia, which sets its threshold at a more reasonable $25,000. The best way to avoid forcing groups engaged in minimal advocacy for or against candidates from having to register and report as PACS is to set a reasonable dollar threshold and index that threshold to inflation. Kansas does neither.

Definition of Coordination

Current law states (§ 25-4148c(d)(2)) that an "independent expenditure" is one "made without the cooperation or consent of the candidate or agent of such candidate intended to be benefited and which expressly advocates the election or defeat of a clearly identified candidate."

Unfortunately, the law lacks a definition of "cooperation or consent." What must a candidate do to be presumed not to consent? What does it mean to cooperate? Can it include responding to public inquiries? Private inquiries? These vague terms chill speech. Without a reasonable definition, speakers are left without coherent guidance about what speech and behaviors are done in "cooperation or consent." This impermissibly restricts the First Amendment rights of those seeking to speak independently.

The "First Amendment right to speak one's mind…on all public institutions includes the right to engage in vigorous advocacy no less than abstract discussions," *Buckley* (1976) (quoting *New York Times v. Sullivan* (1964)) and crucially, "independent advocacy" does not "pose [the] dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Buckley* (1976). Independent speech has a treasured history in our country, and clear demarcations from the Legislature should protect the right.

Here, federal regulations provide one way to clarify the type of conduct that can constitute coordination. This clarity protects speakers from inadvertently violating the law while ensuring independent expenditures remain independent.

Additionally, the statute should include several safe harbors, including one for publicly available information. If a speaker uses information available to everyone to develop a communication, that could not constitute coordination. Federal regulations state that a communication is not coordinated "if the information material to the production, or distribution of the communication was obtained from a publicly available source." (11 CFR§ 109.21(d)(2))

I suggest a definition of "cooperation or consent" in Exhibit 1 of my statement.

Donor Disclosure for non-PACs

Under current law, it is unclear if general donor disclosure is required on independent expenditure reports for groups that are not PACs. The law should be clarified, and the better rule is that only donors of funds earmarked for political activity should be disclosed. General disclosure of donors to organizations that make limited political expenditures tends to mislead the public both as to the amounts being spent and the true sources of financial support for political ads.

Only donors of funds "for the express purpose of nominating, electing or defeating a clearly identified candidate for a state or local office" and expenditures that are "made to expressly advocate the nomination, election or defeat of a clearly identified candidate for a state or local office" should be required to be disclosed. See Kan. Stat. Ann. § 25-4143(e)(1)(B) (defining "contribution"). However, currently it is unclear whether donor disclosure on independent expenditure reports is, in fact, subject to this limitation.

The U.S. Supreme Court ruled in *Citizens United* that all U.S. citizens and organizations have a First Amendment right to urge people to vote for or against candidates. But most groups do not exist solely for that purpose. From time to time, general advocacy groups may want to speak or publish information to support or oppose the election of a candidate, even if such speech is not normally its primary goal. The First Amendment protects such speakers. Advocating for candidates cannot be reserved solely for candidates, parties, and groups registered as political committees.

An organization that makes an independent expenditure should not have to sacrifice its privacy or the privacy of all its supporters. The more state law treats groups that make some independent expenditures like full-fledged political committees, the less they will engage in campaign speech.

Courts have recognized that occasional campaign speech cannot be regulated with the same strictness and severity placed upon organizations whose major purpose is candidate advocacy. The en banc Eighth Circuit struck down a law requiring independent expenditure funds to have "virtually identical regulatory burdens" as PACs. *Min. Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 872 (8th Cir. 2012) (en banc).

This lack of clarity in the Kansas statutes regarding what donors must be disclosed should be corrected. This can be easily done by adding a few lines to the current Kan. Stat. Ann. § 25-4150. If the text that appears in underline below is added, that will resolve the uncertainty in the current law:

> **25-4150. Contributions and expenditures by persons other than candidates and committees; reports, contents and filing.** Every person, other than a candidate or a candidate committee, party committee or political committee, who makes contributions or expenditures, other than by contribution to a candidate or a candidate committee, party committee or political committee, in an aggregate amount of $100 or more within a calendar year shall make statements containing the information required by K.S.A. 25-4148, and amendments thereto <u>during any reporting period when contributions or expenditures are made. With respect to the information required by K.S.A. 25-4148(b)(2), the person (if other than a natural person) shall be required to report only funds the person has received that are earmarked: (a) for the express purpose of nominating, electing or defeating a candidate or candidates for a state or local office; or (b) to expressly advocate the nomination, election or defeat of a candidate or candidates for a state or local office.</u> Such statements shall be filed in the office or offices required so that each such statement is in such office or offices on the day specified in K.S.A. 25-4148, and amendments thereto. If such contributions are received or expenditures are made to expressly advocate the nomination, election or defeat of a clearly identified

> candidate for state office, other than that of an officer elected on a state-wide basis such statement shall be filed in both the office of the secretary of state and in the office of the county election officer of the county in which the candidate is a resident. If such contributions are received or expenditures are made to expressly advocate the nomination, election or defeat of a clearly identified candidate for state-wide office such statement shall be filed only in the office of the secretary of state. If such contributions or expenditures are made to expressly advocate the nomination, election or defeat of a clearly identified candidate for local office such statement shall be filed in the office of the county election officer of the county in which the name of the candidate is on the ballot. Reports made under this section need not be cumulative.

Adjust All Monetary Amounts for Inflation

A dollar today is worth less than a dollar in the past. Nevertheless, Kansas campaign finance law sets monetary thresholds in fixed dollar amounts, and these amounts are not regularly updated. These thresholds run the gamut, from how much spending triggers reporting requirements to how large a contribution must be to require reporting of a contributor's personal information. As a result of this system, regulations unnecessarily capture ever smaller groups, more private information, and more speech over time. Adjusting these thresholds for inflation is a simple and uncontroversial way for states to acknowledge that small speakers and contributors do not need to be regulated by the government. It would also ensure that the value of contribution limits is not reduced over time by inflation.

Exhibit 1

Add to the definitions in K. S. A. 25-4143:

"Cooperation or consent," means:
(A)an express advocacy expenditure is either created, produced, or distributed at the request or suggestion of a candidate, candidate committee, or party committee; or

(B) the person paying for the expenditure, and the candidate, candidate committee, or party committee assents to the request or suggestion of the person. Such assent leads to coordination only when the person paying for the expenditure (1) consults with the candidate, candidate committee, or party committee about the expenditure, and (2) the candidate, candidate committee, or party committee assents before the expenditure is made.

(C) Safe harbors. Cooperation or consent does not include:

1. A candidate's or a political party's response to an inquiry about that candidate's or political party's positions on legislative or policy issues;

2. An expenditure for which the information material to the creation, production, distribution, or undertaking of the expenditure was obtained from a publicly available source;

3. An endorsement of a candidate;

4. Soliciting contributions for a candidate or party committee;

5. A finding based solely on the use of a commercial vendor or a former employee of the candidate by the person paying for the communication, when the commercial vendor or former employee has provided political services to a candidate during the previous 120 days if a firewall is established and implemented by the person paying for the communication, and the firewall is designed and implemented to prohibit the flow of information between employees or consultants providing services for the person paying for the expenditure and those employees or consultants are currently providing or previously provided services to the candidate; and

6. A finding based solely on the use of a commercial vendor or former employee of the candidate who has not provided political services to the candidate within 120 days.