Joshua A. Ney
Ryan A. Kriegshauser
firm@knlawgroup.com
Direct Dial: 913.303.0639

Testimony Before the House Elections Committee
In Support of HB 2206
Thursday, February 6, 2025

Chairman Proctor, Vice-Chairman Waggoner, Ranking Member Haskins, and Committee:

I support HB 2206 because it would bring Kansas into constitutional compliance regarding several statutes deemed unconstitutional as applied in at least three lawsuits over the past several months.

In October 2023, the 2023 Special Committee on Governmental Ethics Reform & Campaign Finance Law issued a **bipartisan, unanimous report** finding several laws vague and ambiguous, including the PAC definition, coordination definition, and giving in the name of another statutes.

In August 2024, a **Shawnee County District Court judge found** the "giving in the name of another" statute to be unconstitutionally applied as to our client. The judge granted our Motion to Strike the KGEC's petition to enforce a subpoena, and the court ordered the KGEC to pay our client $85,785.00 in attorney's fees, pending appeal.

On January 3, 2025, after a bench trial this fall, **a federal district court judge granted** our clients Fresh Vision OP's request for a permanent injunction against the KGEC, determining that Kansas's political committee ("PAC") definition to be unconstitutional under longstanding 10th circuit precedent. A motion for attorney's fees against the KGEC has been filed requesting $170,000.00 in attorney's fees and costs.

On January 14, 2025, the same **Shawnee County District Court judge found** the "giving in the name of another" statute to be unconstitutionally applied as to another individual in a separate court case with separate legal counsel. The judge granted the respondent's Motion to Strike the KGEC's petition to enforce a subpoena, and a motion for attorney's fees against the KGEC will likely be filed in the coming weeks.

With all of this as context, each of the statutory changes in HB 2206 are addressed in turn below:

Agency Name Change
The 2023 interim committee discussed the potential change of the name of the KGEC to another name given that the "ethics" tag stigma on *any* action of this commission (including assessing standard penalties for late report filing) is publicly reported as an "ethics" investigation/violation. Given the First Amendment context of activity regulated by this commission, even the hint of an adverse action by this commission against a person engaging in the political process creates reputational damage or a chilling effect that has the ability to affect the democratic process. "Ethics" comes from Chapter 46—rules governing gifts for governmental officials, lobbying, and

statements of substantial interest. “Campaign finance” is in Chapter 25 and does not regulate the “ethics” of the democratic process but rather the regulation of campaign finance activity.

This agency has gone by several different names since its creation in the 1970s including:

- Kansas commission on governmental standards and conduct
- Kansas public disclosure commission
- Kansas governmental ethics commission
- Kansas public disclosure commission (yes, this is listed twice)

Interestingly, the name of the agency was *changed* from the Kansas governmental ethics commission to the Kansas public disclosure commission in 1981. For whatever reason, this name change is still law under K.S.A. 25-4119b (“All of the powers, duties and functions of the existing governmental ethics commission are hereby transferred to and conferred and imposed upon the Kansas public disclosure commission created by K.S.A. 25-4119a, as amended.”).

It appears that the legislature never got around to updating references to the “governmental ethics commission” throughout chapter 25, chapter 46, and chapter 75, even though the name of the agency was changed to “public disclosure commission” in K.S.A. 25*4119b in 1981.

So HB 2206 would just clean up the statutes based on the legislative intent in 1981. I think this is a good change anyway, given the overarching goal of campaign finance and governmental standards reports is *transparency* in government (i.e. public disclosure) and not *restricting* free speech.

Cooperation and Consent (i.e. “coordination”)
For whatever reason, Kansas uses the terms “cooperation and consent” instead of “coordination” in describing restrictions on certain communications and activities between PACs and candidates. However, “coordination” is the predominant term in regulations at the federal and state levels in the United States. The two arguably mean the same thing, but “coordination” is defined in other states and at the federal level while “cooperation and consent” is not defined in Kansas.

HB 2206 would bring much needed definition to “cooperation and consent” in Kansas by adopting safe harbor language from federal statutes and other states that carve out recognized exceptions to “coordinated” activities. These safe harbors would carve out publicly available information, endorsements, solicitation of contributions for certain committees, and common vendor firewall exceptions that have been recognized for years at the federal level. Kansas needs to define “cooperation and consent” with specificity to give reasonable notice to political actors on what activities are prohibited and what activities are not. Otherwise, Kansans will be at the mercy of “eye of the beholder” interpretations in enforcement actions without the benefit of prior notice. This is not an academic exercise—many of our clients have been on the receiving end of these “lawmaking by enforcement” actions from this agency, so it is imperative the legislature provide clarification on what it seeks to regulate and what is does not.

PAC definition and non-PAC disclosures
Kansas’s current PAC definition is unconstitutional as applied by the agency, as determined by a federal judge earlier this year. The definition in HB 2206 would adopt the constitutional “the major purpose test” with a straightforward “at least 50% express advocacy” threshold that has been upheld by the 10th circuits.

Importantly, the PAC definition in K.S.A. 25-4143 and associated filing requirements work hand-in-hand with the non-PAC independent expenditures filing requirements in K.S.A. 25-4150. If an organization is a PAC, it must disclose *all* of its donors, even if 49.9% of its expenditures are not spent on express advocacy. This is the "piercing the veil" effect of the legal determination that an entity is a PAC, regardless of the organizational intent or formation documents.

Conversely, a non-PAC organization still has to file public reports regarding its express advocacy expenditures (i.e. independent expenditures) under K.S.A. 25-4150. Currently the statute governing these non-PAC disclosures seems to require every bit of information that is required of PACs (if not more), even though the commission has stated in federal trial that it chooses not to require all of the information required under statute.

So an update to the PAC / non-PAC statutory continuum is much needed, if for no other reason than to resolve pending litigation that has ruled the PAC statute unconstitutional as applied. The basic purpose of these statutes is to require public disclosure of certain information if a non-PAC is engaging in express advocacy, but then to require *more* financial information regarding receipts and expenditures (and all donor information) if at least 50% of the organization's total spending is used on express advocacy. This way, you require some public disclosures for non-PACs and more comprehensive public disclosures for PACs, bringing Kansas into constitutional compliance.

Giving in the name of another

Again, this statute was determined to be unconstitutional as applied in Shawnee County District Court in August 2024 and again in January 2025 in two separate cases. For past three years, the commission had tried to bootstrap federal *earmarking* regulations into the "giving in the name of another statute" rather than asking the legislature to just regulate earmarking. This concocted "interpretation" did not hold up in court. Rather, as the district court noted, K.S.A. 25-4154 has only been interpreted in the past to prohibit persons from intentionally keeping their name off a report by reimbursing other reported donors for their donations.[1]

As Judge Watson noted in her August 2024 ruling: "The problem with K.S.A. 25-4154(a) is not that it contains uncommon words, but that it contains too few of them, with little explanation of precisely what they mean. "In the name of another" is the sticking point. This phrase has not been judicially defined in Kansas, as it exists in this statute or any other that would be helpful to this analysis. Nor does this phrase have a settled meaning in Kansas law, notably in the context of modern campaign finance."

HB 2206 would clarify (based on case law) that "giving in the name of another" prohibits persons from keeping their name off of public campaign reports by privately reimbursing others for donations. This statute should not be used to "bootstrap" in regulations regarding earmarking or the flow of money through the political system if otherwise publicly reported at every step.

If the legislature wants to regulate earmarking, it should do so clearly and via a separate, new statute. But when the commission attempts to make law through enforcement by bootstrapping non-existent regulations into vague statutory phrases intended to regulate something completely different, the state ends up paying hundreds of thousands of dollars in attorney fees.

[1] *See State v. Palmer,* 248 Kan. 681, 810 P.2d 734 (1991) (cited at page 21 of Judge Watson's opinion).