PEOPLE UNITED *for* PRIVACY

October 3, 2023

The Honorable Pat Proctor
Kansas State Capitol, Room 149-S
300 SW 10th Street
Topeka, KS 66612

The Honorable Mike Thompson
Kansas State Capitol, Room 136-E
300 SW 10th Street
Topeka, KS 66612

RE: Suggested First Amendment and Privacy-Friendly Reforms to Kansas Campaign Finance Laws

Dear Chair Proctor, Vice Chair Thompson, and Members of the Special Committee on Governmental Ethics Reform, Campaign Finance Law:

In the 2023 Regular Session, the Kansas Legislature passed S.B. 208, which enacted several reforms to the state's campaign finance laws. However, the bill did not address several important substantive issues, and the Legislative Coordinating Council was asked to convene a Special Committee to further evaluate those issues. People United for Privacy[1] suggests that the Special Committee focus on three key aspects of Kansas law that insufficiently protect First Amendment freedoms and donor privacy and fail to properly advance the law's interest in "provid[ing] the electorate with information as to where political campaign money comes from."[2]

First, the definition of a "political committee" (often known as a "PAC") should be clarified. Under Kan. Stat. § 25-4143(l)(1), whether an organization has to register and report as a PAC depends on whether it has "a major purpose" of engaging in regulated campaign finance activities. However, the statute does not further define "major purpose." This gap in the statute has led the Kansas Governmental Ethics Commission ("KGEC") to promulgate a vague and open-ended rule for determining PAC status that provides no clear guidance to the public or consistent standards for enforcement.

Second, the threshold at which donors to a candidate, political party committee, or PAC are required to be publicly reported should be substantially increased and indexed to inflation. Under Kan. Stat. § 25-4148(b)(2), anyone who gives more than $50 during a primary or general election period to a candidate, political party committee, or PAC must be publicly reported. The $50 threshold is far too low and fails to properly advance the law's interest in "deter[ring] actual corruption and avoid[ing] the

[1] People United for Privacy (PUFP) believes every American has the right to support causes they believe in without fear of harassment or intimidation. We are a nonprofit, nonpartisan organization that works to protect the rights of individuals to come together in support of their shared values. PUFP provides information and resources to policymakers, media, and the public about the need to protect freedom of speech and freedom of association through preserving citizen privacy.
[2] *Buckley v. Valeo*, 424 U.S. 1, 66 (1976) (internal quotation marks and citation omitted).

appearance of corruption by exposing *large* contributions and expenditures to the light of publicity" and providing the public "with information about a candidate's most generous supporters."[3]

Third, the scope of donor exposure should be clarified for organizations that are not PACs if they make independent expenditures expressly advocating for the election or defeat of candidates. On its face, Kan. Stat. § 25-4150 purports to require such organizations to file the same reports as PACs under Kan. Stat. § 25-4148. However, such a broad reporting requirement would be unconstitutional and nonsensical. It would conflate PAC and non-PAC entities and render the PAC definition and the "major purpose" standard encompassed therein moot. Under current law, it is unclear exactly what non-PAC entities are required to report when they make independent expenditures, especially with respect to donor information.

I. The Constitutional Framework of Donor Exposure Laws

The issues that we focus on in these recommendations concern requirements for organizations to publicly report their donors. Donors to nonprofit organizations have a First Amendment-protected right to associational privacy. Campaign finance reporting requirements are a narrow exception to that right. As the U.S. Supreme Court has explained:

> [W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment. We long have recognized that significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest. Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a relevant correlation or substantial relation between the governmental interest and the information required to be disclosed . . .
>
> It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute. In some instances, disclosure may even expose contributors to harassment or retaliation. These are not insignificant burdens on individual rights, and they must be weighed carefully against the interests which Congress has sought to promote by [disclosure] legislation.[4]

Under the "exacting scrutiny" standard, donor reporting requirements must be "narrowly tailored" to the governmental interest that the law purports to advance,[5] and there cannot be a "dramatic mismatch . . . between the interest that the [government] seeks to promote and the disclosure regime that [it] has implemented in service of that end."[6] In the context of campaign finance reporting requirements, the only

[3] *Id.* at 67 (emphasis added).
[4] *Id.* at 64, 68 (internal quotation marks and citations omitted).
[5] *Amer. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2383 (2021).
[6] *Id.* at 2386.

"legitimate governmental interest" that the Supreme Court has recognized is "provid[ing] the electorate with information as to where political campaign money comes from."[7]

II. Recommendation 1: Revise PAC Definition and Define "Major Purpose" Standard

Kansas defines a "political committee" as:

> any combination of two or more individuals or any person other than an individual, *a major purpose* of which is to expressly advocate the nomination, election or defeat of a clearly identified candidate for state or local office or make contributions to or expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office.[8]

Like most other states, Kansas requires PACs to broadly report their revenues and disbursements, including the names and addresses of all donors who give more than $50 during a primary or general election period.[9] These broad reporting requirements are presumably imposed to advance the "governmental interests sufficiently important to outweigh the possibility of infringement" on First Amendment rights – namely: (1) "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent"; and (2) "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing large contributions and expenditures to the light of publicity."[10]

"To fulfill the[se] purposes," the Supreme Court has held that the definition of a PAC "need only encompass organizations that are under the control of a candidate or *the major purpose* of which is the nomination or election of a candidate."[11] As the U.S. Court of Appeals for the Tenth Circuit, which has jurisdiction over Kansas, has explained, "the 'major purpose' test . . . sets the lower bounds for when regulation as a political committee is constitutionally permissible."[12]

Intuitively, the "major purpose" standard makes sense. If an organization does not have the "major purpose" of supporting or opposing the nomination or election of a candidate, it should not be required to report as a PAC simply because it occasionally engages in express advocacy for or against candidates. Requiring such an organization to broadly report all of its disbursements and sources of contributions would not serve the government's interest in "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent" and "exposing large [political] contributions and expenditures to the light of publicity." At the same time, it would unnecessarily intrude on the privacy of the organization's donors.

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[7] *Buckley*, 424 U.S. at 64, 66 (internal quotation marks and citation omitted).

[8] Kan. Stat. § 25-4143(l)(1) (emphasis added). Section 4143 was modified by S.B. 208 of the 2023 Session. While there were no amendments to the "political committee" definition, the numbering in the section was affected. S.B. 208 is available at: https://www.kslegislature.org/li/b2023_24/measures/documents/sb208_enrolled.pdf.

[9] Kan. Stat. §§ 25-4145, -4148.

[10] *Buckley*, 424 U.S. at 66-67 (internal quotation marks and citations omitted).

[11] *Id*. at 79 (emphasis added).

[12] *N.M. Youth Organized v. Herrera* (*hereinafter*, "*NMYO*"), 611 F.3d 669, 677 (10th Cir. 2010).

For example, suppose that the Kansas Humane Society were to incidentally make some expenditures opposing the candidacy of Cruella de Vil[13] for local dog catcher. It would make no sense to require the organization to report as a PAC, since most of its budget is presumably spent on running shelters for abandoned dogs and cats, and most of its donors likely donate for that purpose.[14]

While Kansas uses the phrase "major purpose" in its statutory PAC definition, it is unconstitutionally deficient in two ways:

First, Kansas's "major purpose" standard is preceded by the indefinite article "a," rather than the definite article "the"; the latter is how the Supreme Court and Tenth Circuit have articulated the standard.[15] The use of the indefinite article in the Kansas statute suggests than an organization may have multiple "major purposes," one of which is express advocacy for or against candidates.[16] However, that is not the proper standard for regulating a PAC. As the Tenth Circuit has explained, the proper standard for determining whether an organization is a PAC is a "comparison of the organization's electioneering spending with overall spending to determine whether *the preponderance* of expenditures is for express advocacy or contributions to candidates."[17]

"Preponderance" means "majority."[18] Insofar as an organization can only become a PAC if the majority of its spending is on express advocacy or candidate contributions, then that is "*the* major purpose" of the organization. If the proper regulatory standard was "*a* major purpose," as the Kansas statute phrases it, then an organization could become a PAC if a plurality of its spending were on such activities. However, that is not the regulatory standard that the Tenth Circuit has held is within "the lower bounds for when regulation as a political committee is constitutionally permissible."[19]

Second, the Kansas statute does not define "major purpose." This has allowed the KGEC to commit regulatory malpractice by instituting and applying other, extra-statutory factors to determine when an organization qualifies as a PAC. According to the KGEC rules:

> The following factors shall be considered in determining whether a combination of two or more persons, or a person other than an individual, constitutes a political committee:

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[13] Cruella de Vil is the fictional character in "101 Dalmatians" who kidnaps dogs to turn them into fur coats.

[14] *See* "About Us," Kansas Humane Society. Available at: https://kshumane.org/about-us.html.

[15] *Compare* Kan. Stat. § 25-4143(l)(1) *with Buckley*, 424 U.S. at 79 and *NMYO*, 611 F.3d at 677.

[16] *See, e.g.*, *Human Life of Wash. Inc. v. Brumsickle*, 624 F.3d 990, 1009-1010 (9th Cir. 2010) (discussing how the "regulation of groups with '*a*' primary purpose of political advocacy" is distinct from "defining groups with '*the* major purpose' of political advocacy as political committees") (emphasis added). The Ninth Circuit concluded that the Supreme Court's "the major purpose" standard under *Buckley* merely "defined *the outer limits* of permissible political committee regulation." *Id*. at 1010 (emphasis added). However, this is directly at odds with how the Tenth Circuit reads the "major purpose" standard from *Buckley* to "set[] *the lower bounds* for when regulation as a political committee is constitutionally permissible." *NMYO*, 611 F.3d at 677 (emphasis added). The U.S. Supreme Court has not resolved the circuit split on this issue. *See Corsi v. Ohio Elections Comm'n*, Petition for a Writ of Certiorari, 2013 WL 2726801 *and* 134 S. Ct. 163 (Oct. 7, 2013) (denying cert.). Kansas falls within the Tenth Circuit's jurisdiction, and therefore the Tenth Circuit's holding on this issue is controlling, and the Ninth Circuit's holding is not.

[17] *NMYO*, 611 F.3d at 678 (emphasis added).

[18] *See, e.g.*, "Preponderance," Merriam-Webster. Available at: https://www.merriam-webster.com/dictionary/preponderance.

[19] *NMYO*, 611 F.3d at 677-678.

(1) The intent of the person or persons;
(2) the amount of time devoted to the support or opposition of one or more candidates for state office;
(3) the amount of time devoted to the support or opposition of any other political committee or party committee;
(4) the amount of contributions, as defined by the act, made to any candidate, candidate committee, party committee or political committee;
(5) the amount of expenditures, as defined by the act, made on behalf of any candidate, candidate committee, party committee or political committee; and
(6) the importance to any candidate, candidate committee, party committee or political committee of the activities in which the person or persons engage.[20]

The KGEC rules are unconstitutionally vague in that they regulate core First Amendment activity without "narrow specificity."[21] The rules do not explain whether any of these factors is dispositive, whether all of these factors must be considered, or how they are to be weighed against each other.

The rules also fail to define what "intent" is relevant. "Intent" … to do what, exactly? In contrast to all the other factors, which reference objectives like "support or opposition" of candidates, other PACs, and political party committees, the first factor merely and vaguely references an unspecified "intent."

The last factor in the KGEC rules is similarly vague, subjective, and indeterminable and puts organizations wholly at the mercy of factors beyond their control. If an organization were to make independent expenditures to support a candidate, the KGEC rule purports to determine whether that organization qualifies as a PAC based on "the importance to any candidate" of that organization's "activities." And how, exactly, is this to be determined? Will the KGEC depose the candidates supported and/or opposed by the organization's independent expenditures and ask them how "importan[t]" the independent expenditures were to their race? What if the candidates give contradictory answers? Perhaps the candidate supported by the independent expenditures thought they were unimportant to her victory, but the candidate opposed by them thought they were crucial to her defeat.

The last factor also may depend on what candidates and other organizations spend. For example, if an organization spends $100,000 in a race in which the candidates spend $10 million, the organization's spending probably would be treated as not "importan[t] to [the] candidate[s]" under the KGEC rule. But if the candidates only spend $200,000 in the race, the KGEC rule probably would treat the organization's independent expenditures as "important." But why should whether the organization is regulated as a PAC depend on this factor?

More importantly, how in the world is an organization supposed to know in advance whether it must register and timely file reports as a PAC when it cannot possibly determine in advance with any

[20] Kan. Admin. Regs. § 19-21-3(a).

[21] *Buckley*, 424 U.S. at 40-41 n.48 ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

metaphysical certainty "the importance to any candidate" of its independent expenditures? After all, the PAC registration and reports cannot be filed *post hoc*.[22]

The KGEC rules are an ink blot. They are wholly unworkable and likely to result in completely inconsistent and untenable regulatory outcomes. Not surprisingly, this is why no courts to our knowledge have ever upheld or articulated such free-ranging standards for determining PAC status. Instead, the Tenth Circuit's "major purpose" standard for PAC regulation is simple and clear:

> There are two methods to determine an organization's "major purpose": (1) examination of the organization's central organizational purpose; or (2) comparison of the organization's electioneering spending with overall spending to determine whether the preponderance of expenditures is for express advocacy or contributions to candidates.[23]

Consistent with the Tenth Circuit's instructions, we suggest that the Kansas PAC definition at Kan. Stat. § 25-4143 be amended as follows:[24]

> (l)(1) "Political committee" means any combination of two or more individuals or any person other than an individual, ~~a~~ the major purpose of which is to expressly advocate the nomination, election or defeat of a clearly identified candidate for state or local office or make contributions to or expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office.
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> (2) An organization shall have the "major purpose" of a political committee if:
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> (a) its central purpose, as stated in corporate or organizational documents, is to expressly advocate the nomination, election or defeat of a clearly identified candidate for state or local office or make contributions to or expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office; or
>
> (b) the preponderance of its non-administrative spending during a calendar year[25] is on expressly advocating the nomination, election or defeat of a clearly identified candidate for state or local office or on making contributions to or expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office.
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> (~~2~~3) "Political committee" shall not include a candidate committee or a party committee.

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[22] *See* Kan. Stat. §§ 25-4145(a) (requiring a PAC to register "not later than 10 days after establishment of such committee") *and* -4148(a) (prescribing a schedule for periodic reports to be filed).

[23] *NMYO*, 611 F.3d at 678.

[24] Throughout this document, ~~strikethroughs~~ indicate suggested deletions and underlined red text indicates suggested additions.

[25] Our suggestion to use a calendar year basis is consistent with the reporting cycle/schedule for Kansas PACs, which is based on a calendar year. *See* Kan. Stat. § 25-4148(a).

III. Recommendation 2: Increase and Index Donor Reporting Threshold

Kansas law requires candidates' campaign committees, political party committees, and PACs to report the names and addresses of all donors who have given more than $50 during a primary or general election period.[26] This threshold is far too low to satisfy the "exacting scrutiny" constitutional standard for donor reporting requirements.

Specifically, there is a "dramatic mismatch"[27] between the small-dollar donors that Kansas law requires to be reported and the "legitimate governmental interest" that the Supreme Court has recognized in "provid[ing] the electorate with information as to where political campaign money comes from," "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing *large contributions* and expenditures to the light of publicity," and providing the public "with information about a candidate's *most generous supporters*."[28] Needless to say, unless someone is merely interested in snooping on or stalking others, no one is interested in a donor who gives merely $50.01 as a source of "political campaign money," nor does such a donor qualify as the maker of a "large contribution[]" or "generous supporter[]" who is capable of causing "actual corruption" or "the appearance of corruption."

In 1976, the Supreme Court reluctantly upheld the $100 threshold[29] for publicly reporting donors under the Federal Election Campaign Act, characterizing it as "indeed low."[30] The Court recognized that "[c]ontributors of relatively small amounts are likely to be especially sensitive to recording or disclosure of their political preferences" and that the "strict" requirement to publicly report donors "may well discourage participation by some citizens in the political process."[31] Adjusted for inflation, the "indeed low" $100 contribution threshold that the Supreme Court reluctantly upheld would be $552 today.[32] It is highly likely that a court would find Kansas's $50 threshold for publicly reporting donors to be unconstitutionally low.

The Legislature should substantially increase Kansas's threshold for reporting donors to $500 and also index it for inflation, since inflation will inevitably erode the real value of any revised threshold that is adopted in the statute. To that end, we suggest that the donor reporting threshold at Kan. Stat. § 25-4148(b)(2) be amended as follows:

(b) Each report required by this section shall state:

. . .

[26] Kan. Stat. § 25-4148(b)(2).
[27] *Amer. for Prosperity Found.*, 141 S. Ct. at 2386.
[28] *Buckley*, 424 U.S. at 64, 66-67 (internal quotation marks and citations omitted) (emphasis added).
[29] This threshold was subsequently increased to $200.
[30] *Buckley*, 424 U.S. at 83.
[31] *Id.*
[32] This figure is accurate as of August 2023, the latest month for which data was available, and was derived using the U.S. Bureau of Labor Statistics' CPI Inflation Calculator. Available at: https://www.bls.gov/data/inflation_calculator.htm.

(2) the name and address of each person who has made one or more contributions in an aggregate amount or value in excess of $500 during the election period together with the amount and date of such contributions, including the name and address of every lender, guarantor and endorser when a contribution is in the form of an advance or loan. This $500 threshold shall be adjusted for inflation at the beginning of each calendar year based upon changes in the U.S. Bureau of Labor Statistics' Consumer Price Index for the Midwest Region, as soon as updated data is available;

IV. Recommendation 3: Clarify Independent Expenditure Reporting for Non-PAC Entities

Kansas law is woefully unclear about what reports of independent expenditures (*hereinafter*, "IEs") must include for entities that are not PACs (*hereinafter*, "non-PAC entities"). Kansas defines an IE as "an expenditure that is 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."[33]

Kan. Stat. § 25-4150 requires any non-PAC entity that makes IEs expressly advocating for or against candidates totaling $100 or more during a calendar year to file "statements containing the information required by [Kan. Stat. §] 25-4148." Section 4148 of Kan. Stat. sets forth the reporting requirements for PACs.

The statute cannot be read literally to mean that a non-PAC entity that makes IEs (governed by Section 4150) must file exactly the same reports as PACs (governed by Section 4148), since that would make Section 4150 redundant of Section 4148 and therefore superfluous. A basic principle of American law is that a statutory provision should not be read as being superfluous of another provision, especially where, as here, they appear in the same statute.[34]

In other words, if the Legislature merely had intended for any person or entity that makes IEs to report on the same basis as a PAC, then it would not have separately addressed reporting for PACs and non-PAC entities under Sections 4148 and 4150, respectively. Further, for the reasons discussed above regarding the PAC definition and "major purpose" standard, requiring non-PAC entities without the "major purpose" of candidate advocacy to broadly report all of their spending and donors on the same basis as PACs would be unconstitutionally overbroad. This is yet another reason why Section 4150 cannot be

[33] Kan. Stat. § 25-4148c(d)(2); *see also* "Receipts and Expenditures Report for a Person Other Than a Candidate, Party Committee or Political Committee – Instructions" (*hereinafter*, "KGEC IE Reporting Form"), KGEC. Available at: http://ethics.ks.gov/CFAForms/Independent%20Expend%20State.pdf; "Campaign Finance Handbook for Party and Political Action Committees 2024" (*hereinafter*, "KGEC PAC Handbook"), KGEC *at* 15. Available at: https://ethics.kansas.gov/wp-content/uploads/2023/06/2024-Campaign-Finance-Handbook-Party-PAC-1.pdf.

[34] *See, e.g.*, *Colautti v. Franklin*, 439 U.S. 379, 392 (1979) ("Appellants' argument . . . would make either the first or the second condition redundant or largely superfluous, in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."); *Yates v. United States*, 574 U.S. 528, 543 (2015) (declining to read a statute so as to "significantly overlap" with a distinct statute, resisting a reading that would "render superfluous an entire provision passed in proximity as part of the same Act").

read literally to mean that non-PAC entities that make IEs are subject to exactly the same reporting requirements as PACs under Section 4148.

Indeed, the KGEC sensibly has *not* interpreted the reports of non-PAC entities required under Section 4150 to be identical to the reports of PACs required under Section 4148.[35] For example:

- While PACs are required to file recurring reports on a periodic schedule, non-PAC entities are only required to file one-time reports during any reporting period in which they have made IEs.

- While PACs are required to report their cash on hand during a reporting period, non-PAC entities are not.

- While PACs are required to report certain information about proceeds from "sales of political materials" and "purchases of tickets or admissions to testimonial events," non-PAC entities are not.

What concerns PUFP, given our mission, and organizations that make IEs in Kansas is the lack of clarity over what non-PAC entities must report about their donors. As the KGEC's guidance for PACs explains, "[*a*]*ll receipts* and disbursements must be reported" on PAC reports.[36] Consistent with every other U.S. jurisdiction we are aware of, this requirement for PACs to report all of their contribution receipts makes sense. Assuming a PAC (as discussed above) is properly defined as an organization that has as its "major purpose[,] the nomination or election of a candidate," contributions made to a PAC "can be assumed to fall within the core area sought to be addressed by [the Legislature]. They are, by definition, campaign related."[37] Therefore, requiring PACs to broadly report their receipts properly furthers the "legitimate governmental interest" in "provid[ing] the electorate with information as to where political campaign money comes from."[38]

For the reasons discussed above regarding the PAC definition and "major purpose" standard, the same cannot be said for non-PAC entities – *i.e.*, entities whose "major purpose" is *not* to influence elections. Recall our example of the Kansas Humane Society, which incidentally makes some IEs opposing the candidacy of Cruella de Vil for local dog catcher. Consistent with the "exacting scrutiny" standard and the requirement that campaign finance reporting laws be "narrowly tailored" to provide the public with information about the sources of campaign funds, federal district and appellate courts around the country

[35] *Compare* KGEC IE Reporting Form, *supra* note 33, *with* Kan. Stat. § 25-4148.
[36] KGEC PAC Handbook, *supra* note 33, at 9 (emphasis added).
[37] *Buckley*, 424 U.S. at 79. While this language in *Buckley* specifically addressed the reporting of expenditures, its logic also applies to the reporting of contributions made to a PAC.
[38] *Id*. at 64, 66 (internal quotation marks and citation omitted).

– including the Tenth Circuit – have suggested that reports by non-PAC entities should be required only to identify donors who have earmarked their funds for such purposes.[39]

Arguably, Kansas law already limits IE reports filed by non-PAC entities to reporting only donors who earmark their contributions for IEs. Kan. Stat. § 25-4150, the reporting provision at issue, incorporates by reference Kan. Stat. § 25-4148, which requires reporting of "contributions." Kan. Stat. § 25-4143(f)(1) defines a "contribution," in relevant part, as any payment "*made to expressly advocate* the nomination, election, or defeat of a clearly identified candidate for state or local office" (emphasis added). And, as explained above, Kansas defines an IE as "an expenditure that . . . expressly advocates the election or defeat of a clearly identified candidate." Therefore, it appears that non-PAC entities are only required to report donors who earmark their funds for IEs or express advocacy. Nonetheless, this point is less than clear from the statute, and it should be made much clearer.

On this topic, we also wish to raise three ancillary but related issues:

First, Kan. Stat. § 25-4150, the reporting provision at issue, actually does not even reference "independent expenditures." Rather, the KGEC sensibly has interpreted the provision to cover IEs.[40] On its face, Section 4150 confusingly applies to any person or entity "who makes *contributions or expenditures*, other than by contribution to a candidate or a candidate committee, party committee or political committee" (emphasis added).

This language is largely nonsensical. The provision purports to cover "contributions" as well as "expenditures," but then excludes contributions to candidates, candidate committees, party committees, and PACs. However, those are really the only types of contributions the Kansas campaign finance statute regulates.[41] Therefore, the reference here to "contributions" is to a null set insofar as the provision otherwise excludes all relevant "contributions" from its scope. Moreover, the reference to "expenditures" must be to *independent* expenditures. Were the reference meant to cover expenditures that are coordinated with a candidate, then such expenditures would actually be in-kind contributions to the candidate.[42] And, again, Section 4150 actually does not apply to contributions, notwithstanding its null reference to "contributions."

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[39] *See*, *e.g.*, *Independence Institute v. Williams*, 812 F.3d 787, 789 (10th Cir. 2016) (The law's "scope is sufficiently tailored to require disclosure only of *funds earmarked for the financing of such ads*.") (emphasis added); *Lakewood Citizens Watchdog Group v. City of Lakewood*, Civil Action No. 21-cv-01488-PAB at 26 (D. Colo. 2021) (An organization "'need only disclose those *donors who have specifically earmarked their contributions* for electioneering purposes.'") (quoting *Independence Institute*, 812 F.3d at 797-798) (emphasis added); *National Association for Gun Rights v. Mangan*, 933 F.3d 1102, 1117 (9th Cir. 2019) (Organizations need only report "contributions [that] were *solicited or earmarked* for a particular candidate, ballot issue, or petition for nomination.") (emphasis added); *Wisconsin Family Action v. FEC*, No. 21-C-1373 at 21 (E.D. Wis. 2022) (Organizations "must disclose only those donors whose contributions are *earmarked* for political purposes and are tied to a[n] election. *Absent such an earmark* and tie, the donor need not be disclosed.") (emphasis added) (internal citation omitted).

[40] *Compare* KGEC IE Reporting Form, *supra* note 33, *with* Kan. Stat. § 25-4150.

[41] *See* Kan. Stat. § 25-4143(f)(1).

[42] The Kansas statute seems to imply this distinction between independent and coordinated expenditures, although this point also is not clear. *Compare id.* § 25-4148c(d)(2) (defining "independent expenditure") *with id.* § 25-4143(f)(1)(D) (defining a "contribution" to include payment by any third party for "services rendered without charge to or for a candidate's campaign or to or for any such committee"). A coordinated expenditure would seem to fall under this definition. Every other U.S. jurisdiction that we know of distinguishes independent and coordinated expenditures in this manner.

Second, IEs are defined under Kan. Stat. § 25-4148c(d)(2). However, that statutory section's title suggests that it is intended to address specifically only IEs made by political parties and PACs, and not IEs made by other persons and non-PAC entities.

Third, the $100 expenditure threshold for reporting IEs is far too low for the same reason the $50 threshold for publicly reporting donors discussed above is far too low. Requiring anyone spending merely $100 to expressly advocate for or against a candidate to file public reports is not "narrowly tailored" to the state's interest in "provid[ing] the electorate with information as to where political campaign money comes from," "deter[ring] actual corruption and avoid[ing] the appearance of corruption by exposing *large contributions and expenditures* to the light of publicity," and providing the public "with information about a candidate's *most generous supporters*."[43] The Legislature should substantially raise the IE reporting threshold for non-PAC entities to at least $1,000 or higher and index it for inflation.

To address all of these issues, we suggest that: (1) the Legislature move the definition of an IE, which is currently codified under Kan. Stat. § 25-4148c(d)(2), into the general definitions under Kan. Stat. § 25-4143 so that it applies to IEs made by any person or entity; and (2) Kan. Stat. § 25-4150 be substantially rewritten as follows:

> (a) Every person, other than a candidate or a candidate committee, party committee or political committee, who makes ~~contributions or~~ independent expenditures~~, other than by contribution to a candidate or a candidate committee, party committee or political committee,~~ in an aggregate amount of $1,000 or more within a calendar year shall make statements containing the information ~~required by K.S.A. 25-4148, and amendments thereto~~ set forth below in this section. 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, for any such reporting period in which the person makes one or more reportable independent expenditures in an aggregate amount of $1,000 or more. If such ~~contributions are received or~~ independent 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~~ independent 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~~ independent 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.

[43] *Buckley*, 424 U.S. at 64, 66-67 (internal quotation marks and citations omitted) (emphasis added).

(b) Each report required by this section shall state:

(1) The name and address of the person or entity filing the report;

(2) Each payment made to expressly advocate the election or defeat of a clearly identified candidate, including: (i) the date the payment was made or a public communication associated with the payment was first disseminated (whichever is earlier); (ii) the name and address of the recipient of the payment; (iii) the candidate or committee supported or opposed by the independent expenditure; and (iv) the amount of the payment; and

(3) The sources of all contributions exceeding $500 in the aggregate that were made during the reporting period to the person or entity filing the report for the purpose of furthering the reported independent expenditure, including: (i) the date the contribution was made; (ii) the name and address of the contributor; and (iii) the amount of the contribution. This $500 threshold shall be adjusted for inflation at the beginning of each calendar year based upon changes in the U.S. Bureau of Labor Statistics' Consumer Price Index for the Midwest Region, as soon as updated data is available.

* * *

As a general matter, Kansas's campaign finance statute appropriately advances the state's interest in ensuring transparency in political campaign spending. However, the statute is not narrowly tailored to further this interest in some key details when it comes to regulating PACs, setting the monetary threshold for when certain donors must be reported, and clarifying which donors non-PAC entities must report when making independent expenditures.

These shortcomings in the Kansas statute threaten to impose undue burdens on the fundamental First Amendment rights of all Kansans to freely associate with the organizations and causes they believe in. Fortunately, there are several relatively simple fixes that can be made to address these shortcomings without inflicting any harm to the statutory scheme, and we have suggested such amendments above.

We thank the Special Committee for considering our concerns and suggestions, and we welcome any questions the Committee may have regarding the issues raised in this letter.

Sincerely,

Matt Nese
Vice President, People United for Privacy

Eric Wang
Counsel to People United for Privacy