UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

FRESH VISION OP, INC., et al., *Plaintiffs*, v. MARK SKOGLUND, Executive Director, Kansas Governmental Ethics Commission, et al., *Defendants*.	Case No. 24-cv-4055 Judge Daniel D. Crabtree PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

I. "POLITICAL COMMITTEE" DEFINITION CLAIM

Plaintiffs seek facial invalidation of KSA § 25-4143(l)(1).[1]

As the Court correctly held, "Tenth Circuit precedent concludes that *Buckley*'s major purpose test applies to a state's regulation of political committees. And under *Buckley*'s text, Kansas's statutory definition of a 'political committee' is likely unconstitutionally overbroad." *Fresh Vision OP., Inc. v. Skoglund*, No. 24-4055, 2024 U.S. Dist. LEXIS 130851 at *31 (D. Kan. July 24, 2024). "And that conclusion, alone, ends the dispute" on this claim. *Id*. at *13.

A First Amendment facial challenge tests "whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2397 (2024) (internal punctuation marks omitted). Accordingly, "even a law with 'a plainly legitimate sweep' may be struck down in its entirety … if the law's unconstitutional applications substantially outweigh its constitutional ones." *Id*.

[1] Plaintiffs sought as-applied relief at the TRO stage because their focus was on restarting their non-express advocacy while litigation on their facial claims was pending. They also seek as-applied relief in the alternative should their facial claims fail.

"[O]nly organizations that have '*the* major purpose' of electing or defeating a candidate may be forced to register as political organizations." *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 679 (10th Cir. 2010) (emphasis added). Instead, Kansas's law imposes political committee regulation on groups that have "*a* major purpose" of electing or defeating a candidate. Accordingly, Kansas's law could be applied to an organization with the major purpose of electing a candidate. But it could also be applied to a myriad of other organizations with innumerable major purposes unrelated to election activity when those groups tangentially support a candidate—like Fresh Vision. *See* Ex. 1, Defendants' Answers to Plaintiffs' Interrogatories #4 ("There is no specific percentage of expressive activity and/or expenditures that triggers a finding that an entity or individuals meet (or do not meet) the definition of a political committee."). Therefore, while the law has one lawful use, it has countless unconstitutional applications and, thus, "is impermissibly broad due to the statute's use of the indefinite article, 'a.'" *Fresh Vision*, 2024 U.S. Dist. LEXIS 130851 at *17; *see also*, *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 287-88 (4th Cir. 2008) (the '"*a* major purpose'" test "subject[s] a large quantity of ordinary political speech to regulation.").

A federal court "will not rewrite a law to conform it to constitutional requirements." *Iancu v. Brunetti*, 588 U.S. 388, 397 (2019) (internal quotation marks and citation omitted). A court "may adopt [a reading] only if [it] can see [an interpretation] in the statutory language." *Id*. The Court cannot interpret "a" to mean "the." The statute must be enjoined.

Additionally, an as-applied ruling leaves the unconstitutional language active, which impermissibly chills the speech of other would-be speakers. "The ongoing chill upon speech that is beyond all doubt protected makes it necessary in this case to invoke the earlier precedents that a statute which chills speech can and must be invalidated where its facial invalidity has been

demonstrated." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 336 (2010). Thus, KSA § 25-4143(*l*)(1) must be facially invalidated.

Because the definitional provision should be invalidated, the Court should also enjoin the enforcement statutes to the extent they rely on the definition. Thus, the TRO against enforcing KSA §§ 25-4145, 25-4148 and KAR. § 19-21-3, to the extent enforcement is based upon the current definition of "political committee," should be converted into a facial permanent injunction. This injunction should also extend to KSA §§ 25-4152, 25-4167, and 25-4181, which are the penalty provisions that flow from §§ 25-4145, 25-4148.[2] *See* Stipulated Facts (ECF 32) at ¶¶ 41-43.

II. $100 Expenditure and Contribution Claim

A. KSA § 25-4150 and KAR § 19-21-5 are facially unconstitutional.

Kansas essentially admits these laws are facially invalid because it asks the Court to ignore the text of both laws and focus on defendants' enforcement tradition instead. *See* Resp. (ECF 15) at 11-16; Stipulated Facts (ECF 32) at ¶ 25; Ex. 1 at #9; Ex. 2, Skoglund Dep. at 6:9-11, 12:17-21, 24:8-25:1. Defendants admit their law "references" other laws with "necessary" and "more extensive disclosures," but assures everyone "that is not how the Commission enforces" its statute or "how the Commission interprets or enforces" its regulation. Resp. (ECF 15) at 12 n.3. And the Commission's Executive Director, defendant Mark Skoglund, testified, "The statute is inconsistent with actual historical enforcement." Ex. 2 at 6:9-11, 50:15-22.

Defendants know that KSA § 25-4150 and KAR § 19-21-5 command that any covered person "shall" make statements containing the information required by KSA 25-4148 and KAR

[2] The Court stated plaintiffs did not ask to enjoin the penalty statues. *Fresh Vision*, 2024 U.S. Dist. LEXIS 130851 at *31 n.8. But plaintiffs referenced them in their motion. *See* Mot. (ECF 2) at 6. Enjoining them is the natural result of enjoining Kansas's "political committee" definition.

19-29-2, respectively. *See* Ex. 2 at 6:9-11, 7:14-24, 12:5-15:13, 21:4-11, 22:14-20, 26:2-8, 27:15-24, 32:12-33:1, 35:25-39:9. However, defendants admit that they require reporting persons to partially comply with the laws' demands by only disclosing the information requested on their form. *Id*. Indeed, defendants ask the Court to ignore the text of the statute and regulation, and instead focus only on their disclosure form. *Id*.

But "[e]ven if these [arguments] have logical appeal—as defendants suggest—it doesn't matter." *Fresh Vision*, 2024 U.S. Dist. LEXIS 130851 at *15. "[T]he First Amendment protects against the Government; it does not leave [plaintiffs] at the mercy of *noblesse oblige*. [The Court should] not uphold an unconstitutional statute merely because the Government promise[s] to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see also United States v. Hernandez-Calvillo*, 39 F.4th 1297, 1312 (10th Cir. 2022) (citing *Stevens*).

Because defendants "ha[ve] the statutory authority" to regulate plaintiffs like a political committee if they contribute or spend $100 on express advocacy, their "assurance [they] will elect not to do so is insufficient to remedy the constitutional violation." *Fed. Commc'n Comm'n v. Fox TV Stations, Inc*., 567 U.S. 239, 255 (2012). KSA § 25-4150 requires "[e]very person" that makes a $100 contribution or expenditure for express advocacy to file a statement with the government "containing the information required by KSA § 25-4148." KSA § 25-4148 demands the burdensome filing requirements for political committees, *see* Ex. 1 at #12; Ex. 2 at 6:9-11, 50:11-14, which must be filed on the dates required by the election related to the express advocacy. *See* KAR § 19-29-1a.

Indeed, their implementing regulation belies their promise not to enforce the statute as written. KAR 19-21-5 requires "[e]very person" that makes a $100 contribution or expenditure for express advocacy to file a statement with the government "containing the information

required by KAR § 19-29-2." KAR § 19-29-2's legislative history shows it was designed to implement KSA § 25-4148, the mandatory reporting statute for political committees, and it lists the onerous contents for the receipt and expenditure reports that both KSA § 25-4148 and KAR § 19-29-2 demand.

Kansas cannot save its facially unconstitutional law by promising not to enforce it as written. Despite their current practice, defendants can change their reporting form at any time. *See* KSA § 25- 4158a; KAR § 19-21-5; Ex. 2 at 33:8-34:25. And regardless of how defendants currently implement KSA § 25-4150 and KAR § 19-21-5, these laws require them to regulate anyone that spends $100 on express advocacy with the same disclosure requirement as a political committee. The odds they do so will increase if the TRO against the "political committee" definition becomes permanent as regulators look for enforcement tools. *See* Ex. 2 at 6:9-11, 66:11-24, 93:19-95:6. When two barn doors are open, both must be closed, otherwise the horse escapes.

From this point, the constitutional analysis is straightforward because the Tenth Circuit has already done it twice. In *Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007), the Tenth Circuit ruled a $200 threshold for political-committee-like regulation was too low to be constitutional. And in *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010), the Tenth Circuit ruled a $500 threshold for political-committee-like regulation was too low to be constitutional. If $200 and $500 thresholds are too low to be constitutional, then Kansas's lower threshold cannot be constitutional. Consequently, the Tenth Circuit has already ruled that this "law's unconstitutional applications substantially outweigh its constitutional ones." *NetChoice,* 144 S. Ct. at 2397. Indeed, the "ongoing chill" on political speech these laws create "makes it necessary" for this Court "to invoke the earlier [Tenth Circuit] precedents" and invalidate them. *Citizens United*, 558 U.S. at 336.

B. KSA § 25-4150 and KAR § 19-21-5 fail "exacting scrutiny."

Even if Tenth Circuit precedent did not conclusively decide this issue, Kansas's laws fail "exacting scrutiny." *Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 611, 616 (2021). "[Kansas] is not free to enforce any disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives." *Id*. at 613. The regulatory burden Kansas imposes "approaches or exceeds the value of [a group's] financial contributions to their political effort [(*i.e*., $100)]; and [Kansas's] interest in imposing those regulations is minimal, if not nonexistent, in light of the small size of the contributions." *Sampson v. Buescher*, 625 F.3d 1247, 1261 (10th Cir. 2010).

Defendants' "exacting scrutiny" argument is unavailing. *See* Resp. (ECF 15) at 14-16. Despite their assertions, plaintiffs dispute a $100 expenditure serves any government interest that requires "'imposing the full panoply of regulations that accompany status as a political committee.'" *Colo. Right to Life Comm.*, 498 F.3d at 1154 (quoting *Fed. Election Comm'n v. Mass. Citizens for Life, Inc.,* 479 U.S. 238, 259 (1986) (*MCFL*)). Whether Fresh Vision can segregate these funds, *see* Resp. (ECF 15) at 15, is irrelevant. And Defendants' tailoring arguments miss the point. *Id*. at 14-16.

KSA § 25-4150 and KAR § 19-21-5 are not properly tailored. "The burdens of disclosure regimes are not best saved for upstart advocacy organizations" like Fresh Vision. *Wyo. Gun Owners v. Gray*, 83 F.4th 1224, 1246 (10th Cir. 2023). "Independent expenditures are similar to pure issue discussion and therefore remain far removed from the valid state interest of preventing election corruption." *Colo. Right to Life Comm.*, 498 F.3d at 1147 (citing *MCFL*). And "[Kansas's] 'interest in disclosure . . . can be met in a manner less restrictive than'" treating it

like a political committee merely because it spends $100 promoting a candidate. *Id*. at 1154 (quoting *MCFL*).

Furthermore, although plaintiffs disagree with them, if defendants are correct that Kansas's laws are ambiguous, *see* Resp. (ECF 15) at n.3, then that is another reason the laws fail exacting scrutiny. "A disclosure statute that burdens an advocacy group with muddling through ambiguous statutory text … offers only uncertainty." *Wyo. Gun Owners*, 83 F.4th at 1247-48. And this "uncertainty … amidst the threat of sanction chills the exercise of First Amendment rights." *Id*. at 1249. Accordingly, Kansas's laws are unconstitutional.

III. CONCLUSION

KSA §§ 25-4143(*l*)(1) and 25-4150 and KAR § 19-21-5 should be declared unconstitutional and defendants should be enjoined from enforcing them as well as any statute or regulation that employs KSA § 25-4143(*l*)(1) as the natural result of enjoining Kansas's "political committee" definition.

Dated: September 3, 2024

Respectfully submitted,

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