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**Testimony in Support of HB 2391**  
**Submitted to the Kansas House Elections Committee**  
**By Joshua Ney, Partner**  
**Thursday, February 16, 2023**

Chairman Proctor, Vice-Chairman Waggoner, Ranking Minority Member Woodard, and Committee Members:

Perhaps the best way to introduce my perspective on the legislative discussion surrounding HB 2391 is to revisit a famous passage from Robert Bolt's play, "A Man for All Seasons":

***WILLIAM ROPER: So! Now you'd give the Devil benefit of law!***

***THOMAS MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?***

***WILLIAM ROPER: Yes! I'd cut down every law in England to do that!***

***THOMAS MORE: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!***

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Throughout my career I've been an elected prosecutor, criminal defense attorney, administrative agency prosecutor, administrative law judge, and defense attorney for individuals in many hearings before the courts and administrative agencies. I've filed substantial interests forms as a governmental official and campaign finance reports as a candidate, and I've represented clients harmed by others' campaign finance violations.

To my knowledge, I am one of the few Kansas attorneys that has defended a Kansas candidate against federal charges related to the Kansas campaign finance act. And just few weeks after successfully defending that client at a week-long federal jury trial ending in acquittal (having called then-Executive Director Carol Williams as an expert for the defense), I successfully prosecuted a criminal defendant for first degree premeditated murder at jury trial in Jefferson County.

I have represented clients in campaign finance matters being investigated or prosecuted by the Kansas Attorney General's Office, the Kansas Bureau of Investigation, and various district and county attorneys regarding Kansas campaign finance matters. For 14 years, I have represented many clients before the Kansas Governmental Ethics Commission ("KGEC" or "Commission"), in matters ranging from aborted investigations, probable cause hearings, and formal "public" hearings, to appeals to district court of Commission decisions under the Kansas judicial review act. I have had cases dismissed by the Kansas government ethics commission prior to a "public" probable cause hearing, others dismissed after a formal hearing, and still others resolved both informally or via formal "consent orders" with the Commission. I have represented Democrats, Republicans, and Libertarians in front of the Commission. I have advised hundreds of Kansas candidates, committees, and other persons regarding Kansas and federal campaign finance law for most of my legal career.

I have presided over many administrative hearings under the Kansas administrative procedure act both as a singular administrative agency head as the Kansas Securities Commissioner, and as a member of an adjudicatory commission as a commissioner of the Kansas Human Rights Commissioner representing the Kansas legal profession. I have served as the elected Jefferson County Attorney for the past six years, prosecuting crimes ranging from premeditated murder to financial crimes to KOMA violations to speeding tickets. I am regularly in front of district court judges assisting law enforcement detectives make applications for search warrants, and I have conducted number pre-charge judicial inquisitions over the years under the supervision of the district court. I am the county counselor for Jefferson and Osage Counties, and routinely advise local government bodies regarding civil matters, adjudicative hearings, and general open government requirements.

Over most of my career, I have generally maintained a good working relationship, albeit very adversarial at times, with KGEC Executive Director Mark Skoglund and the KGEC staff. In 2017, I recommended him to replace retiring Executive Director Carol Williams when then-KGEC Chairman Daniel Harden asked to meet with me to discuss Mr. Skoglund's qualifications. Mr. Skoglund had served as a legislative research analyst for my agency during the time I served as the Kansas Securities Commissioner from 2013-2017.

I say all of this to emphasize that my commitment is to the rule of law, both procedurally and substantive, because I've litigated on all sides of the issues involved in HB 2391 and similar provisions in state law. I've wielded government power. I've litigated and defended against abuses of government power. And given my experience as a legal practitioner and former administrative agency head and hearing officer, and given the professional relationships I've built along the way, I do not take pleasure in stating what should be obvious to any reasonable observer by now:

**The Kansas Governmental Ethics Commission is structurally broken.**

I have been directly involved in the drafting of HB 2391. Nearly every one of the provisions in this bill is directly related to a significant due process issue or question of law that has arisen in one of my many cases before the commission over the past several years. I have

prepared an extensive explainer spreadsheet attached as **Exhibit A** to my testimony that describes the specific problems in current law and the proposed specific legislative solutions. This must be a bipartisan legislative discussion, and each proposed provision should trigger deliberation and consensus about what you, as our elected representatives, want the law to be for future generations when exercising their First Amendment rights in Kansas.

But those who say that no discussion is needed simply are ignoring a litany of cases demonstrating the reality of a broken agency, or worse, contributing to the continued deterioration and weaponization of the administrative agency whose every action implicates our fundamental First Amendment rights. And to the extent that shrill voices contend that there is “nothing to see here” or that these constructive recommendations are a mere “cover” to disrupt current agency operations, I trust this committee and the legislature can cut through short-sided partisan noise to engage in much needed deliberations about updating the Kansas campaign finance act and the procedural laws that apply to the Kansas Governmental Ethics Commission. The end goal of these deliberations within the lawmaking branch should be to ensure that **all** Kansans have maximum due process, clarity of law, and fair notice regarding the regulations that restrict and guide their free expression in the political arena. When the dust has settled on the current case, investigation, prosecution, or civil suit (and there will always be a current case), what do we want the law to be for the next one?

The remainder of my testimony attached as **Exhibit B** describes particularly egregious examples from cases I’ve litigated in front of the commission that describe due process and other constitutional infirmities of various actions by the Kansas Governmental Ethics Commission over the past several years. I hope these unfortunately episodes in Commission proceedings can inform your discussion as you consider much needed procedural and substantive updates to the Kansas campaign finance act.

I support HB 2391 because it would bring much need procedural checks and substantive clarity of law to an ethics agency run amuck. Most of the bill’s provisions are patterned after current laws that to other governmental officials either in the administrative law or criminal law context, and many of the substantive provisions are seeking simply to apply time-tested federal standards to reign in the agency’s novel interpretations of law most Kansans are just learning about. Similar to criminal procedure laws that allow attorneys to fairly litigate on both sides, HB 2391 represents the type of laws I would want if the Executive Director Skoglund’s role as an investigator and complainant and my role as defense counsel were switched every other case.

I look forward to being a part of this good faith discussion about the laws applying to Kansas campaign finance act should look like regardless of who is serving in various public or private roles at any one time.

Thank you.

Bill Section	Statute	Subject	Why Change Needed	The Problem
Sec. 01 (a)	NEW	Application of general civil and administrative procedure laws	<b>Due process:</b> Cures ambiguity in current law by applying general Kansas procedural statutory and case law to administrative hearings conducted under campaign finance act	Questions related to subpoena and hearing process raised during litigation before the commission demonstrated that the law is unclear the extent to which the Kansas code of civil procedure, Kansas administrative procedure act, and anti-SLAPP act apply to hearings and actions under the campaign finance act. Application of anti-SLAPP act necessary to prevent unconstitutional and meritless actions being pursued under Kansas campaign finance act (anti-SLAPP act does not apply to meritorious actions under Kansas campaign finance act)
Sec. 01 (b)	NEW	Creation of statute of limitations for administrative actions under campaign finance act	<b>Due process:</b> Cures ambiguity in current law by creating a two-year statute of limitations (corresponding to length of election cycle) for administrative fine and civil penalty actions under the act	Statute of limitations is arguably one year under current law (K.S.A. 60-514 statute of limitations for civil penalties); KGEC staff has stated that they believe there is <u>no</u> statute of limitations applicable to administrative actions under campaign finance act; recent actions of KGEC have reached back 5-10 years, well after the criminal statute of limitations on the same violations have run. Two year statute of limitations in bill would extend two years after any potential violations within previous election cycle. Statute of limitations would place limits on "endless investigations" with no verified complaint being filed.
Sec. 01 (c)	NEW	Prohibiting KGEC from requiring respondents release civil rights in exchange for dismissal of enforcement action	<b>Conflict of interest:</b> Prevents KGEC from abusing administrative enforcement powers by prohibiting agency from extracting a private benefit for commissioners (release of civil liability) in exchange	In September 2022, KGEC required Fresh Vision OP respondents to waive civil liability for malicious prosecution and any other civil claims against commissioners in their official and individual capacities before agency would agree to dismiss the case with prejudice. This conveyed a private benefit to commissioners (civil release of liability) in exchange for dropping arguably unconstitutional "charges" against respondents. KGEC has a history of requiring such releases in their consent orders with unrepresented and represented respondents. Unethical for prosecutors to consider personal interests in resolution of case. <i>See</i> CRIMINAL JUSTICE STANDARDS for the PROSECUTION FUNCTION (4th ed.) Standard 3-1.7(f) ("The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, <u>financial</u> , professional, business, <u>property</u> , or <u>other interests</u> or relationships.")
Sec. 01 (d)	NEW	Clarifying agent liability for campaign finance violations	<b>Clarity of law:</b> Cures ambiguity in current law regarding "accomplice liability" principles applicable in other laws but not under campaign finance act	Current law is vague on nature of "liability for another" for volunteers, staffers, associates, and others in political system but accomplice liability does not likely exist in the administrative context. By defining "agent," persons acting on behalf of a principle are given clear notice under law of liability. Applies longstanding power of attorney law and statutes to campaign finance act.
Sec. 01 (e)	NEW	Requiring conflict of interest and recusal standards for commissioners	<b>Conflict of interest:</b> KGEC does not currently have written standards by which commissioners, executive director, and other staff must recuse themselves from a matter under KGEC jurisdiction, leading to appearance of targeted enforcement and conflicts of interest	On January 27, 2021, a commissioner refused to recuse herself from hearing and deliberations on a respondent she had personally reported to the Federal Election Commission, despite request for recusal by respondent (commissioner abstained from vote but participated in deliberations after expressly refusing to recuse). Other instances of respondents appearing before commission when family member of commissioner reported alleged violation (case was dismissed after verified complaint filed but prior to probable cause finding--commissioner apparently recused himself but no clear standards for when and how a commissioner should recuse in an investigation or hearing).
Sec. 02	25-4119a	Technical amendments; applying commissioner qualifications to KGEC executive director as well	<b>Conflict of interest:</b> Ensure KGEC executive director and "lead prosecutor" possesses the same qualifications as commissioners	Ensures officer filing complaints has similar qualifications and prohibitions on concurrent political activity as commissioners while serving in statutory role

Sec. 02 (balloon amendment)	25-4119a	Retain provision in current law related to maximum number of commissioners from same political party	<b>Conflict of interest:</b> Retention of current current law promotes appearance of a neutrality and nonpartisan commission	Current law ensures appearance of neutral nonpartisan commission by preventing more than 5 members of commission from being from same political party (even though appointing officials can manipulate makeup of commission by appointing commission members from other parties to "take up spots" preventing other appointing officials from appointing members of their same party).
Sec. 03	25-4119d	Update qualifications provisions applicable to commissioners and executive director; adopt federal definition of "partisan political office" for purposes of clarifying existing language in current law	<b>Lack of Subject Matter Expertise:</b> Current law provisions prevent individuals with certain experience in political process from serving on the commission, ensuring that the officials overseeing regulation of First Amendment conduct have little to no experience in the area of law they are regulating	Bill provisions would merely prohibit <u>concurrent</u> political activities by commissioners and executive director but remove prohibitions that persons with <u>prior</u> experience and subject matter expertise in political arena can serve on commission. No other administrative agency qualification statute structurally ensures that the regulator has little to no experience in the area of law they are tasked with regulating.
Sec. 04	25-4143(a)	Add definition of "agent"	<b>Clarity of law:</b> Term "agent" is used in current law but not defined	Current law is vague regarding what persons can legally bind a candidate or committee or commit violations on behalf of an individual. Potential for enforcement actions against unpaid volunteers and mere associates of candidates or committees. Legislature should define the term it has used in current law.
Sec. 04 (balloon amendment)	25-4143	Add definition of "coordination"	<b>Clarity of law:</b> Current law defining independent expenditures and "cooperation and consent of candidate" is unconstitutionally vague. Bill adopts federal definition of "coordination" including longstanding conduct standards and safeharbors.	Current law is subject to federal court "void for vagueness" challenge due to broad and undefined "cooperation and consent" language. KGEC has not given any guidance or advisory opinions regarding whether "cooperation and consent" is distinct standard from federal "coordination" standard. HB 2391 would align coordination definition in state law with federal standards, allowing political actors to operate similarly in federal and state elections.
Sec. 04	25-4143(1)(1)	Update definition of "political committee" and add statutory "primary purpose" test, replacing unconstitutional "major purpose" test in K.A.R. 19-21-3	<b>Clarity of law:</b> Current "major purpose" test provided in K.A.R. is unconstitutional based on subjective criteria based solely on discretion of fact finder. Bill creates "bright-line" financial thresholds by which an entity can be determined to be a PAC, consistent with definitions in other states.	Fresh Vision OP case in March 2022 (dismissed in September 2022) involved attempted agency enforcement of "major purpose" test against a neighborhood civic group. Agency's theory focused on an isolated window of activity and a single mailer. In settlement and dismissal, KGEC agreed that current law should be updated to bring greater clarity and "bright-line rules" for civic groups engaging in isolated instances of express advocacy.
Sec. 04	25-4143(1)(2)	Clarifying "segregated fund" can be treated as a PAC without subjecting parent organization to "primary purpose" test	<b>Clarity of law:</b> Provides statutory clarity to existing practice to expressly authorize "segregated funds" of parent organizations	Novel KGEC "interpretations" of statutes in recent enforcement actions have created an environment of distrust that previous longstanding practices (like recognizing segregated funds as PACs instead of parent organization for reporting purposes) will continue to be honored. The legislature must provide maximum clarity in the law to prevent KGEC staff from attempting to change its "interpretation" of laws through enforcement action without prior notice to the public.
Sec. 05	25-4145	Creation of "intermediate" PAC registration level to establish reasonable registration fees for small organizations spending less than \$10,001	<b>Reasonable administrative fees:</b> Current law establishes two categories of registration fees for PACs: \$300 fee for PACs spending more than \$2,501 and \$100 fee for PACs spending less than \$2,500. This bill provision would create an intermediate level with mid-level fee for PACs spending between \$2,501 and \$10,000.	Current law charges the same \$300 registration fee for a PAC that spends millions of dollars and a PAC that spends \$2,501. Many PACs operate in the intermediate spending range this bill would address.
Sec. 05 / Sec. 06 / Sec. 07	25-4145(c); 25-4146; 25-4147	Update references to include federal "coordination" standard	<b>Conflicting laws:</b> Undefined "cooperation and consent" provision in current law creates ambiguous and uncertain legal standards without reference to federal standards	Standardizing Kansas campaign law definition of "coordination" for independent expenditures and political committee purposes allows participants clear guidance and notice regarding time-tested federal "coordination" standard; current Kansas law has rarely been enforced or interpreted

Sec. 08	25-4152	Civil fines and penalties assessed by commission remitted to state general fund	<b>Conflict of interest:</b> Current law creates a financial incentive and "profit-motive" for KGEC to assess more civil fines and penalties because the money is remitted to a fund over which they exercise spending control	Eliminating "profit-motive" for administrative agencies, including KGEC, to assess more civil fines and penalties removes conflict of interest created by agency retaining spending discretion over fines it assesses
Sec. 09	25-4153a	Creating safeharbor for legislator solicitations during session	<b>Reasonable regulation:</b> Current law creates "technical" violation if legislator or candidate inadvertently sends solicitation meant for individuals to email list including businesses or lobbyists	By creating a "safeharbor" provision allowing all solicitations sent by candidates during legislative session to include a disclaimer that the solicitation is only intended for individuals, the bill would eliminate a common "technical" violation and reduce the need for minor enforcement actions by the agency
Sec. 10	25-4153b	Clarifies vague statutory language to allow legislators to participate in activities and fundraising of PAC while still prohibiting "coordination" between candidate and PAC; adds provision prohibiting legislator from serving as chairperson or treasurer of a PAC	<b>Clarity of law:</b> Provides statutory clarity to existing practice to expressly authorize legislators to participate in activities and fundraising of PACs provided candidates comply with prohibitions related to coordination or serving as officer of PAC	Novel KGEC "interpretations" of statutes in recent enforcement actions have created an environment of distrust that previous longstanding practices (like allowing legislators to raise funds for a PAC) will continue to be honored. The legislature must provide maximum clarity in the law to prevent KGEC staff from attempting to change its "interpretation" of laws through enforcement action without prior notice to the public. Adding a prohibition on serving as a chairperson or treasurer of a PAC clarifies language in current law prohibiting a legislator from "establishing" a PAC.
Sec. 11	25-4154	Clarifies vague statutory language to define "giving in the name of another"	<b>Clarity of law:</b> Provides statutory clarity in the context of novel "interpretations" of ambiguous statute	Current law was intended to prevent donors from concealing their identity from publicly filed campaign reports by giving money to another person to make a contribution. KGEC staff has created a novel "interpretation" of this law to prohibit transfers between entities that publicly report both the original source and recipient of the contribution, even though no information is concealed nor is the transfer between entities legally restricted to specific uses. Clarification of this statute would clarify existing law to allow longstanding practice of unrestricted transfers when the transfers are transparently and accurately reported.
Sec. 12	25-4157a	Update permissible uses of campaign funds to conform with longstanding practices	<b>Clarity of law:</b> Provides statutory clarity regarding specific permissible uses of campaign funds, including: child care, compensation for staff of political office, payment of civil fines or penalties, payment of legal defense costs for campaign finance matters	Current law allows campaign funds to be used for "legitimate campaign purposes" and "expenses of holding political office." These terms are extremely vague and foster uneven and arbitrary "interpretation" of permissible uses by the KGEC (and criminal prosecutors). Previous agency interpretation allowed the compensation of legislative staff from campaign accounts. Even though no law has changed, current agency interpretation "prohibits" paying legislative staff from campaign funds. The KGEC has stated in legislative testimony that campaign funds can be used to pay fines and penalties assessed by the commission, but an agency advisory opinion states that that same candidate cannot use campaign funds for legal defense against commission actions. This creates a conflict of interest for the agency by arbitrarily allowing payment of fines to the agency based on violation while prohibiting the candidate from paying for legal defense against violation allegations.
Sec. 12	25-4157a(f)	Clarifies existing law to allow unrestricted transfers from candidate to political or party committee while remaining subject to contribution limits	<b>Clarity of law:</b> Provides statutory clarity in the context of novel "interpretations" of ambiguous statute	Current law allows candidates to use campaign funds to make contributions to political and party committees. KGEC staff has created a novel "interpretation" of this law to attempt to prohibit transfers the agency believes are made with the "intent" that they be used for specific purposes, even though the transfer is legally unrestricted. The KGEC has essentially created a "thought crime"--attempting to police the "hopes" or "suggestions" of unrestricted contributions made by a candidate or committee. Clarification is needed to allow free speech and free association rights when contributions are not legally restricted by donors for specific uses.

Sec. 13	25-4158	Agency investigatory subpoena power: requires involvement of judge and elected district attorney prior to issuance of investigatory subpoenas	<b>Checks and balances:</b> Requires pre-complaint investigatory subpoenas to be issued pursuant to a K.S.A. 22-3101 judicial inquisition at the request of the agency; maintains inherent subpoena authority of the commission (issuance without review of a judge and district attorney) during hearing process after a verified complaint is filed and probable cause is determined by commission	The agency has interpreted its authority to issue investigatory (pre-complaint) subpoenas to allow the compelled production of text messages, emails, and other correspondence from persons even if the agency does not suspect the recipient of wrongdoing. By applying the same judicial process for subpoenas that apply to law enforcement officers and detectives investigating violations of the campaign finance act, the bill would ensure review of the factual basis and legal sufficiency of a subpoena by a district court judge and elected prosecutor before a citizen's free speech and associational privileges are intruded. Because core constitutional rights are implicated in an agency's attempt to search constitutionally protected communications, the same judicial review standards applicable to criminal investigations of the very same laws should be applied to agency investigations.
Sec. 14	25-4161(g)	Prohibiting agency attorney from representing commission and complainant in same matter	<b>Conflict of interest:</b> Prohibits agency attorney representing complainant as an adverse party in a proceeding in which the commission is serving as a neutral arbitrator from also serving as the commission's legal counsel in the same matter	In September 2022, after months of litigation in which the KGEC agency attorney represented the executive director as complainant (a party adverse to the respondents), arguing several contested motions on behalf of the complainant, the commission requested the same attorney enter into executive session to provide advice in the commission's adjudicative capacity. The motion to enter into executive session for the purpose was objected to by counsel for respondents, stating that the executive session would constitute "ex parte communication" with an attorney for an adverse party. The commission overruled the objection, stating that conflicts were unavoidable. This bill's provisions would make that inherent conflict avoidable.
Sec. 14 / Sec. 15	25-4161(h); 25-4162	Allowing respondent to request hearing be held before the office of administrative hearings	<b>Due process:</b> Allows a respondent to request the evidentiary portion of a formal hearing be held before a trained administrative law judge with the office of administrative hearings; providing that hearing subpoenas requested by either party be subject to the process specified in the Kansas administrative procedure act	The repeated due process violations committed by commission in various hearings over the past several years have significantly called into question the competence and ability of the commission members to conduct a hearing conforming to standard administrative procedural laws. Moreover, the commission has demonstrated a strong bias toward affirming the allegations of its executive director as complainant, given that the executive director has many times extensively briefed the commission on the complainant's theory during the investigative phase. While this would allow the evidentiary hearing to be held in front an ALJ, the commission would retain the authority to approve or reject an initial order by the administrative hearing officer and issue a final order prior to the rights of appeal under the judicial review act attaching.
Sec. 16	25-4165	Clarifying that confidentiality provisions of campaign finance act only apply to commissioners, executive director, and agency staff or agents	<b>Constitutional requirements:</b> Clarifies that confidentiality provisions of campaign finance act only apply to agency staff	In 2009, the KGEC previously attempted to enforce the confidentiality provisions of the campaign finance act against a private citizen in a matter involving the private citizen, constituting an unconstitutional "gag order." The agency withdrew its attempts to unlawfully enforce this provision against a private citizen when Attorney General Steve Six informed the agency that this would clearly be unconstitutional.
Sec. 17	25-4170	Clarifying that candidates contributions to political or party committees is not unlawful	<b>Clarity of law:</b> Clarifies that common and widespread practice of candidates making a contribution to political or party committees is not inherently unlawful, subject to legal principles applying to legally restricted contributions	Current law allows candidates to use campaign funds to make contributions to political and party committees. KGEC staff has created a novel "interpretation" of this law to attempt to prohibit transfers the agency believes are made with the "intent" that they be used for specific purposes, even though the transfer is legally unrestricted. The KGEC has essentially created a "thought crime"--attempting to police the "hopes" or "suggestions" of unrestricted contributions made by a candidate or committee. Clarification is needed to allow free speech and free association rights when contributions are not legally restricted by donors for specific uses.

Sec. 18	25-4181(a)	Capping fines for multiple campaign finance violations in one matter at double the amount of fines for one count; eliminating "profit-motive" of imposition of fines by remitting agency-imposed fines to state general fund	<b>Conflict of interest:</b> Patterns agency fine authority to criminal sentencing standards allowing a maximum of double the fine amount for the top count in any one case; eliminates profit-motive and agency discretion to increase leverage on respondent by "charge-stacking"; eliminates "profit-motive" of imposition of fines by remitting agency-imposed fines to state general fund instead of into the governmental ethics commission fee fund (a fund over which the commission exercises spending discretion)	Both the commission and the executive director have used "charge stacking" to trigger massive amounts of potential liability for respondents regardless of the nature of the alleged offenses. Executive Director currently has discretion to stack dozens of minor violations to expose respondents to the potential of hundreds of thousands of dollars of fines. This creates a major disincentive for respondents to raise a legal or factual defense, and allows the commission to create an incentive for respondents to enter into consent orders. Commission also has a routine practice of ordering tens of thousands of dollars in fines but "waiving" the amount if the respondent stipulates to the factual findings and conclusions of law in a consent order. Bill is patterned on K.S.A. 21-6819, the criminal sentencing statute that sets a maximum prison sentence of double the top count, and K.S.A. 21-6611 setting a maximum alternative fine amount of a "sum not exceeding double the pecuniary gain derived from the crime by the offender." Eliminating "profit-motive" for administrative agencies, including KGEC, to assess more civil fines and penalties removes conflict of interest created by agency retaining spending discretion over fines it assesses.
Sec. 18	25-4181(c)	Prohibiting commission from waiving or modifying fines as an incentive for respondent to forgo due process rights	<b>Conflict of interest:</b> Prohibits agency from using "charge-stacking" and unilateral waiver of inordinately high fine liability as a means of discouraging respondent from exercising due process rights to a hearing.	Common KGEC practice is to impose an inordinately high fine amount and agree to "waive" most if not all of the fine if the respondent agrees to its settlement terms, including: 1) paying fine to the agency fee fund within a specific amount of days; 2) stipulating to the factual findings and conclusions of law alleged by the executive director (regardless of the truth of the matter); or 3) waiving all civil remedies against the commission, including claims of malicious prosecution or constitutional infringement.
Sec. 18	25-4181(d)	Prohibiting commission from ordering "community service" or other specific performance in lieu of statutorily prescribed civil penalties	<b>Conflict of interest:</b> Prohibits agency from ordering or overseeing "community service" for some respondents in lieu of fine; prevents conflicts of interest, potential for disparate treatment, and appearance of impropriety for commission to order specific types of political activity as an alternative "penalty" for violations under the act.	In late 2022, the Commission engaged in an extensive deliberation regarding appropriate forms of "community service" in lieu of a fine for party treasurers in which hundreds of thousands of dollars in campaign contributions were misreported or illegal received. Commissioners' ideas for community service included engaging in political volunteer activities advancing the political parties interests. Ultimately, at the prudent suggestion of the executive director, the Commission determined it would be best to require community service that was not politically self-serving. Community service is not outlined in statute as an enforcement remedy, and the consideration of community service in lieu of fine has encouraged disparate treatment of different respondents appearing before the commission.
Sec. 18	25-4181(e)	Prohibiting commission staff from offering "administrative immunity" to cooperating witnesses in lieu of criminal immunity offered by AG or DA	<b>Constitutional requirements:</b> Prohibits KGEC executive director from eliciting potentially self-incriminating testimony from under false pretense of "administrative immunity" when criminal immunity by AG or DA has not been offered.	Violations of the campaign finance act are also criminal misdemeanors, subjecting targets of an agency investigation to separate criminal prosecution by the Attorney General or District Attorney (or even federal prosecutors). The Commission does not have the authority to give criminal immunity, and the executive director's recent attempts to offer "administrative immunity" (which is not a category in case law) creates the potential for citizens' constitutional rights to be violated under false pretenses. <i>See GEC v. Cahill</i> , 225 Kan. 772 (1979) (stating that the Attorney General or District Attorney must give criminal immunity before a respondent can be compelled to provide self-incriminating testimony). The executive director does not have authority to offer immunity when he has no control over an AG or DA prosecution. This bill would prevent constitutionally suspect attempts by commission staff to elicit self-incriminating testimony via promise of "immunity" when the agency has not procured the agreement of the AG or a DA to extend criminal immunity pursuant to <i>GEC v. Cahill</i> , 225 Kan. 772 (1979).



Sec. 19	25-4182	Allowing respondent to request hearing be held before the office of administrative hearings regarding cease and desist orders	<b>Due process:</b> Applies similar provisions as Section 14 and 15 above to cease and desist order proceedings as well; allows a respondent to request the evidentiary portion of a cease and desist order hearing be held before a trained administrative law judge with the office of administrative hearings	The repeated due process violations committed by commission in various hearings over the past several years have significantly called into question the competence and ability of the commission members to conduct a hearing conforming to standard administrative procedural laws. Moreover, the commission has demonstrated a strong bias toward affirming the allegations of its executive director as complainant, given that the executive director has many times extensively briefed the commission on the complainant's theory during the investigative phase. While this would allow the evidentiary hearing on a cease and desist order to be held in front an ALJ, the commission would retain the authority to approve or reject an initial order by the administrative hearing officer and issue a final order prior to the rights of appeal under the judicial review act attaching.
Sec. 20	25-4185	Providing a trial <i>de novo</i> on judicial review of KGEC decision	<b>Due process:</b> Allows a district court to conduct a trial <i>de novo</i> and evidentiary hearing in which issues of law and fact are be determined anew; patterned on identical trial <i>de novo</i> provisions in K.S.A. 74-2426 (appeals from board of tax appeals decisions to district court); K.S.A 44-1011 (appeals fo human rights commission decisions on anti-discrimination laws to district court); K.S.A. 22-3609a (appeals from district magistrate judges to district court); K.S.A. 22-3610 (appeals from inferior courts to district court); K.S.A. 12-4602 (appeals from municipal court to district court); K.S.A. 38-2382 (appeals to a district court judge under juvenile justice code); K.S.A. 8-259 (appeal of decision of division of motor vehicles suspending license for DUI to district court); K.S.A. 26-508 (appeal of appraisers award in eminent domain proceeding to district court).	Like anti-discrimination laws and taxpayer hearings, when fundamental constitutional rights and First Amendment activity is at issue in front of an administrative agency, a district court judge must have the final say on the facts and law. During the settlement negotiations in the Fresh Vision OP case in August 2022, the commission incorrectly stated that the respondent had a right to a "trial <i>de novo</i> " when appealing the agency's decision under the Kansas judicial review act. Respondent's legal counsel corrected the commission's incorrect understanding, pointing out that KGEC decisions are reviewed by a district court under an "arbitrary and capricious" standard, making overturning the decision of agency nearly impossible. As demonstrated by past practice, KGEC Commissioners are not "experts" in constitutional law, or even campaign finance law. A district court judge vested with general jurisdiction over application of constitution, statutes, and case law is in a far better position to evaluate conduct implicating fundamental first amendment rights.

# Fresh Vision OP

KGEC Docket Nos. 715 and 716  
October 25, 2021 through September 30, 2022  
(dismissed with prejudice)

The screenshot shows a YouTube video player interface. At the top, there is a search bar and navigation icons. The main content is a grid of 12 video thumbnails from a Zoom meeting, with the Kansas Governmental Ethics Commission logo in the top center. Below the grid is a video player control bar showing a play button, volume, and a timestamp of 17:22 / 1:51:15. Below the player, the video title 'Kansas Governmental Ethics Commission Meeting - March 23, 2022' is displayed, followed by the channel name 'Kansas Ethics' with 12 subscribers and a 'Subscribe' button. Interaction buttons for likes (0), shares, and downloads are also visible.



**April 27, 2022– Immediately after Commission orders a rehearing on the complaint, Commissioner Solbach warns respondent’s counsel that exercising due process rights will be “expensive” for clients**

Commissioner Solbach: Mr. Ney, I bring you back to the real issues here and **we found that your clients were a PAC. Why? Because the majority of money that they raised was spent to support or oppose a particular candidate.** All we’re asking and all the law asks is that be disclosed. So this isn't dark money, it's a little late to influence that election but that's the only issue here. **And you're proposing something that I think is going to be very expensive for someone, not for us, but for someone and it may end up with the same result I would urge you to counsel your client about the cost-benefit analysis of what you're trying to propose and instead of simply accepting the fact that you're a PAC, doing the paperwork, and being done with it.** But that's up to you and to your client. I might ask the chairman if you would authorize me as hearing officer to hold a scheduling conference with the two counsel when they're ready to do so. Okay?



**May 25, 2022 - Commissioner confused over difference between staff allegations and legal and fact issues for commission to neutrally determine**

Commissioner Deterding: Can I have a point of clarification before we get a motion on that because it seems to me as we're talking here, the scope of this inquiry is much broader than failure to file the statements of organization, et cetera. Is there something else out there that is not included in our packet that is relevant to this?

Mr. Joshua Ney: That's the whole point of discovery. I don't prepare the packets, the staff of the KGEC commission prepares the packets and the complaints. I'm defending against those packets. I'm defending against the complaint, and so as authorized by the statutes, and KGEC specific statutes related to hearing, we're starting discovery process. And so the representations of the opposing counsel regarding what may be relevant and what may not be relevant, the purpose of discovery is to discover relevant evidence.

Commissioner Deterding: Are you suggesting Mr. Ney, that there is another topic here that is not included in this complaint?



Mr. Joshua Ney: I explained earlier the major purpose pronged of the allegation that they were a PAC is the entire legal issue.

Commissioner Deterding: But that's not in this complaint.

Mr. Joshua Ney: The amended complaint reads that on or about the February 25th, 2021 and August 10th, 2021 County Chengny Thao, an individual in combination with other individuals or persons formed Fresh Vision OP Inc. a political committee. But they're alleging that that organization, that combination is a political committee, that's something for you to make a finding on after the evidence is submitted. That's an allegation at this point. In order for you to reach whether this organization or the combination as a whole was a political committee subject to reporting, there has to be evidence regarding the activities and expenditures of that combination of individuals. And I'm suggesting that the slice and time that the complaint tries to limit this to would exclude the extremely relevant information regarding the group's activities going back years to whether a major purpose of that combination of individuals was to engage in express advocacy.



**May 25, 2022 - Commissioner warns respondent counsel of potential civil liability after respondent requests first subpoenas pursuant to K.S.A. 25-4161**

Commissioner Scharnhorst: One question, Mr. Ney, you understand that by issuing subpoenas and going down this road that you're subject to the same problems you could find yourself in if you were in the civil court. In other words, you can have abusive process problems and things like that. Not from us necessarily, but from the witnesses that you're issuing a subpoena to.

Mr. Joshua Ney: I understand that they have rights and I understand that we have rights.

Commissioner Scharnhorst: But I'm asking you, you understand what their rights are and the fact that you need to play within the rules?

Mr. Joshua Ney: Yes. And has it even been suggested that I'm not?

Commissioner Scharnhorst: I'm not suggesting anything. I'm just having a discussion with you, but you'd be willing to lay this out in the context of a brief to the Commission so that we could have your position well understood and Brent could respond to that.

**August 24, 2022 – Ney: Commission got its “pound of flesh” by churning legal fees**

Mr. Ney: That is a fair statement. I appreciate you at least acknowledging that every time we come back, that's more money that my clients have to spend, and we've gotten into the minutia on this case. What the authority of a respondent in a case is to ask for a subpoena is. And in terms of the pound of flesh, it's already been taken. So that's part of my concern, is that I think that this is a pretty good settlement, as an officer of the court I don't have any claim in my mind, especially that I've been retained to bring, a collateral claim or something like this, that I'm trying to sneak by you. The issue really comes down to this is a very broad area of the law, especially when it comes to the remedies available to persons who are protecting their constitutional rights.

Whether that's equitable injunctive power or illegal damages in some sort of constitutional litigation. I don't know that, I think that meritless probable cause determinations, you all signed off on probable cause. We're not seeking to challenge probable cause when it comes to a malicious prosecution claim, that's specifically what your statutes allow for. So I guess what I'm saying is that for me to take that language back and say, "Well, this is the offer." To the extent that there may be a lack of trust in what my clients are going to do, my clients still have to pay for every single dollar, every single 10th of an hour to be able to protect their rights. There's a lack of trust going right back and they feel aggrieved here and this is the meeting of the minds in the middle.

**August 24, 2022 – Ney: Breakdown in trust, commission increasing legal fees for respondents**

Commissioner Scharnhorst: Would your clients be amenable to a dismissal without prejudice?

Mr. Ney: No.

Commissioner Scharnhorst: Okay, and why is that?

Mr. Ney: They don't trust you.

Commissioner Scharnhorst: Okay. Any other reason than not trusting the commission? They want some finality?

Mr. Ney: The other 1% that I'll try. I mean, 99% of the issue in this case has been a breakdown and a bone on bone litigation strategy that we're trying to explore that is clearly costing my client's money on a regular basis. And they were a Republican, a Democrat, and a libertarian as part of this group that we're just trying to engage locally in Overland Park matters and now they're stuck here a year later. So at the end of the day, that's just as much a non-starter in terms of whether there's going to be a complaint, somebody turn around and bring a complaint.



**September 28, 2022 – Commissioner Solbach describes “unavoidable” conflicts within Commission**

Commissioner Solbach: We're an administrative body and there are conflicts and we just have to live with those. This isn't a court and if someone doesn't like what has happened to them here in this commission, they have the right to appeal and have a trial de novo in a court where all those conflicts will go away, but we have those conflicts here and we have to live with them. We have to remember which hats we're wearing at various times and try to set those conflicts aside, but the conflicts are going to be there and there's no getting around them. He is counsel for the commission, but he's also a counsel for one of the parties and your counsel for their party in the hearing on the issues involved. If we ask staff to go with us into executive session, we just have to live with that.

Mr. Ney: I would contend that it's an ex parte communication in a formal hearing, in violation of law and the rules and regs.

Commissioner Solbach: I think that you're welcome to make that point, but that doesn't mean that we shouldn't ignore it.

Mr. Ney: For the record, respondents object.



**September 28, 2022 – Commission comments on its conflicts of interest when inviting complainant attorney to advise commission in executive session**

Commissioner James: Okay. Ken, do you want to meet without Berry?

Commissioner Moore: We have to have our counsel to give the exception.

Mr. Skoglund, Complainant: I'm not familiar enough with KOMA to be able to recite every possible KOMA exception. The one that we normally use for executive session is attorney client communication, though.



**September 28, 2022 – Commission comments on its conflicts of interest**

Mr. Ney Just, for the record, it's for attorney-client with Brett Berry, does that include the complainant?

Commissioner Solbach: Are we going to ask staff to be in the second session with, or just permission?

Commissioner Moore: My motion is just for attorney-client with Mr. Berry, if he's says he has no concerns about that.

Commissioner Solbach: He'll have to take off one hat and put on another hat and that's just the way it is.



**September 28, 2022 – Commissioner attempts to order hearing be held after Commissioner grants respondent no discovery**

Commissioner Solbach: I think that the respondents need to be advised by their counsel that should they reject this, then they need to be prepared at our next meeting for a hearing and we will proceed with the hearing on their case at the next meeting.

Mr. Ney: We have pending motions. Are you going to summarily deny all the motions today?

Commissioner Solbach: It's very possible that that would happen at that meeting. You need to advise your clients that if this is not acceptable, they need to be prepared to come here for a hearing at our next meeting.

Mr. Ney: Okay. Is that the commission's voice or is that one Commissioner?



**September 28, 2022 – Commissioner attempts to order hearing be held after Commissioner grants respondent no discovery**

Commissioner: I think executive director Skogland, Mr. Ney and Mr. Berry, I would encourage you to figure out what we need to do prior to our next meeting to make the best use of the commission's time. So I think for now, unless there's any other items to discuss-

Mr. Ney: There are a lot of items to discuss now that we're in this position, unfortunate position. It's my understanding that the commission, despite the complainant asking to dismiss this, the commission is insisting on, I guess bringing its own complaint or directing its executive director to bring a complaint that the commission is somehow going to serve as a neutral arbiter over and there are pending motion to, for subpoenas to depose Mark Skogland, for duces tecum, Mark Skogland as well as the reporting person and deposition, and so those have to be ruled on in the procedure. And correct me if I'm wrong-



**September 28, 2022 – Commissioner Solbach mistakenly believes respondents have a right to a trial de novo in district court**

Commissioner Solbach: Mr. Ney, this is a commission, this is not a court of law and it would be my position that we've messed around with this long enough and that, I mean the hearing needs to go forward if it can't be settled and if you don't like the result of the hearing, whatever that may be, **you have the right to appeal it and have a trial de novo and you can do all the discovery and-**

Mr. Ney It's not a trial de novo, it's-

Commissioner Solbach: Please don't, interrupt me. Please don't interrupt me. And you can do all those things in a court of law. This is not a court of law. This is the ethics commission and we've already bent over backwards and that's the way I see it.



Commissioner: The commission has made an action that I guess is maybe best characterized as a counter offer for settlement, which we would encourage you to take back to your client.

Mr. Ney Well, I've already had that discussion with them and I thought I explained this last time. This has to do with the standard void for vagueness type issues that pop up in these specific type of cases, free speech cases, that the commission is well aware of in its history. I think Mr. Skogland referred to the federal case in '98 when the advocacy standard was struck down by a federal court and we would anticipate having the ability to at least preserve constitutional rights. This isn't about damages, this is about the ability to make law or change the law when it's void. When the constitutional rights are coming. I don't know how many different claims we can waive to not sue you guys individually or official capacity, but now you're trying to shut down our free speech rights. It's just mind boggling to me and you did it at the advice of someone who's providing advice to the prosecutor and the judge at the same time. I mean at some point this is just a travesty of due process and I would plead with you to reconsider what the parties have worked out as a settlement. I don't know how the complainant who is asking you to dismiss a complaint can be told by the judge that no, you will bring this and we're somehow going to have a hearing when we haven't even engaged in discovery. You didn't even give me one subpoena in this case, and then you asked us two times ago, you asked us to come back here with a settlement offer. We did that in good faith. We met at this very table and we worked out a settlement offer. We spent an hour last time talking about that. You gave me specific instructions. A couple of different commissioners gave me specific instructions that could you just carve out the things that you're talking about, the constitutional rights and the legislative stuff. That's exactly what I did. I sent it to Mark and Brett. They said this looks great and now we're here. I simply don't understand how I am to engage in a fair hearing in this context.

Commissioner Solbach:: Mr. Ney, I think you've seen the commission's action.

ATTACHMENT A

RELEASE

WHEREAS an amended complaint alleging a violation of the Kansas campaign finance act, has been filed against each of the undersigned individual persons, Chengny Thao (Complaint 715) and James Muir (Complaint 716);

WHEREAS, in the interests of the economy of justice the parties have agreed to resolve this matter by dismissal with prejudice and release by Respondents of claims listed below;

NOW THEREFORE THE UNDERSIGNED, Chengny Thao and James Muir, as individual persons, in consideration of the dismissal of Complaints 715 (Thao) and 716 (Muir) with prejudice, do hereby and for their heirs, executors, administrators, representatives, successors and assigns, release, acquit and forever discharge the Kansas Governmental Ethics Commission, and its commissioners, employees, directors, attorneys, and/or agents, in their official and individual capacities, from all claims, demands, rights, damages, costs, attorney fees, expenses, and compensation related to Complaints 715 and 716, including all legal and equitable claims and claims related to a civil action against the Kansas Governmental Ethics Commission for malicious prosecution pursuant to K.S.A. 25-4162, provided that Respondents reserve and expressly do not release rights to:

- 1) bring any legal or equitable claim related to each individual Respondent's constitutional rights against the Kansas Governmental Ethics Commission, and its commissioners, employees, directors, attorneys, and/or agents solely in their official capacities, regarding any issue related to Complaints 715 and 716; and
- 2) lobby, engage, or seek redress from the Kansas Legislature, other elected representatives, or any other legislative or executive branch agency or official regarding any issue related to Complaints 715 and 716.

EXECUTED THIS 22 day of September, 2022.

  
Chengny Thao

  
James Muir

## Fresh Vision OP Case - Public Policy Questions

- Respondent due process rights
- Inability of commission to provide competent or fair hearings
- Need for neutral “conflict free” hearing officer
  - Office of Administrative Hearings
- Conflicts of interest involving commission, staff, and staff attorney
- Trial *de novo* at district court
- Requiring civil release in exchange for dismissal
- Unconstitutionally vague “major purpose” test
- Application of general civil and administrative procedure laws

Other examples

## Braun Case No. 704 - Overview

- Blatantly unconstitutional attempt to regulate content of political signs of candidates (highest level of protected free speech)
- Summarily dismissed after respondent had paid thousands of dollars in legal fees
- Dismissed after motion to dismiss suggesting KGEC check with Attorney General's Office on constitutional issues and potential liability before proceeding
- KGEC Docket No. 704
- April 23, 2021 through October 7, 2021
- Dismissed prior to probable cause finding, never public

## O'Donnell Case No. 690 - Timeline

- Respondent self-referred to commission July 30, 2018
- Acquitted at federal trial on same charges on February 28, 2019
- Counsel reached out to Mark Skoglund in early March 2019
- Complaint filed August 24, 2020 (3-5 years after alleged violations) just over 2 months before commissioner race election day
- Complaint identical to allegations at federal trial
- Consent order entered February 3, 2021 issuing

## Case No. 690 - Timeline

- KGEC filed 47 separate counts based on separate payments made to campaign staff ranging from \$100 to \$550
- “Charge-Stacking” 47 counts exposed respondent to \$470,000 in potential fines
- Commissioner Jane Deterding had previously reported respondent to the FEC in 2014
- Commissioner Jane Deterding refused to recuse herself from deliberations on consent order after counsel for respondent formally moved for her recusal
- Commission imposed \$25,000 in fines, but waived \$12,500 if paid within 90 days—completely arbitrary standard

## Public Policy Questions

- Formal recusal standards for commission?
- Statute of limitations issues
  - Should Mark Skoglund be able to investigate 5-10 years worth of activity? Or if it’s that serious should the KBI or DA be involved?
  - Search warrants instead of administrative subpoena?
- Charge-stacking / fine cap
  - Should complainant be able to manipulate “civil fine” exposure by stacking multiple small violations instead of pleading one large one?
  - Double fine cap?
- Imposition of large fee with large waiver if paid in 90 days
  - Commission routinely disincentivizes exercising due process rights (see Fresh Vision OP)

## More Public Policy Questions

- Subpoenas for cell phone and text records of legislators not accused of wrongdoing?
  - Should the same standard as law enforcement be applied?
- Commission staff allowed to engage in meritless or blatantly unconstitutional “enforcement” actions?
  - Anti-SLAPP already being applied
  - Should commission be responsible for legal bills if it meritless action?
- “Administrative immunity” is not a legal category
- Eliminate motive for imposition of civil fines and fees