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Written Testimony Regarding HB 2391
Amending the definition of "political committee"

Presented to the House Committee on Elections
By Attorney General Kris Kobach

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Thank you for allowing me to offer comments regarding HB 2391.

I write in favor of HB 2391's amendment to the definition of "political committee" in K.S.A. 25-4143. The Attorney General's Office does not take a position on any other portion of the proposed bill.

The current version of section 25-4143 may be vulnerable to constitutional attack. The legislature would be wise to shore up this part of the law, regardless of how it handles the remainder of the bill's proposals.

Current law suffers from two main problems: First, it might be overbroad. And, second, it might be vague.

Overbroadness is a First Amendment issue. In regulating campaign finance, we must always be cognizant of what the Supreme Court said in *Buckley v. Valeo*, 424 U.S. 1 (1976): this is "an area of the most fundamental First Amendment activities." *Id.* at 14. Contrary to some of the rhetoric that gets thrown around today, this is not a new concept invented by a bunch of nefarious conservatives in *Citizens United v. FEC*. It's a core part of First Amendment law that has been with us for nearly fifty years.

Because the regulation of money spent on political advocacy necessarily involves core political speech—i.e., speech involving elections and public policy issues—the government has to be careful to avoid stepping on people's First Amendment rights. So the Supreme Court has required that campaign finance laws pass two tests: (1) there must be a substantial relation between the law and a sufficiently important governmental interest and (2) the law must be narrowly tailored to the government's important interest.

I worry that the current definition of "political committee" in section 25-4143 may not be narrowly tailored. To understand this problem, one must focus on the difference between two words: "the" and "a." When a person uses "the," he is referring to one and only one item. But "a" implies the existence of other items of the same type. For example, "the hat" refers to a single, specific hat. But "a hat" refers to one hat among others.

So what does this have to do with campaign-finance law? The current definition of "political committee" refers to entities that have "*a* major purpose" of advocating for or against political candidates. This could

be read to imply that Kansas law reaches organizations for whom such advocacy is but one of several major purposes.

But the U.S. Court of Appeals for the Tenth Circuit—the federal appeals court that covers our state—has held that a law that reaches organizations with multiple major purposes is unconstitutional. A test that recognizes only one major purpose for an organization, in the court's words, "sets the lower bounds for when regulation as a political committee is constitutionally permissible." *N.M. Youth Organized v. Herrera*, 611 F.3d 669, 677–78 (10th Cir. 2010). To regulate more than that does not meet the narrow-tailoring requirement. *N.C. Right to Life, Inc. v. Leake*, 525 F.3d 274, 288–89 (4th Cir. 2008), *cited with approval in N.M. Youth*, 611 F.3d at 678. "A single organization can have multiple 'major purposes,' and imposing political committee burdens on a multi-faceted organization may mean . . . regulating a relatively large amount of constitutionally protected speech unrelated to elections merely to regulate a relatively small amount of election-related speech." *Id.* at 289. If our state's "political committee" definition includes organizations with multiple major purposes,[1] then the state faces significant litigation risk.

Moving on to vagueness: the best practice is that definitions in laws that regulate political speech should be "both easily understood and objectively determinable." *McConnell v. FEC*, 540 U.S. 93, 194 (2003). Without such easily understood and objectively determinable definitions, the state runs the risk that the law does not adequately inform citizens of what is and what is not legal (a due-process problem).

But the current definition of "major purpose" lacks any explicit objectively determinable element. This may leave it open to arbitrary, know-it-when-I-see-it enforcement based on the whims of whoever is on the Governmental Ethics Commission at the time. The proposed bill, however, draws clear, objectively determinable lines: a minimum dollar amount and a strict more-than-50%-of-expenditures rule. Cross those lines, and an organization will clearly know it's subject to campaign finance regulation. Such clear lines are important to protect Kansans' rights to due process of law and shield them from arbitrary governmental action. Without such clear lines, I worry about the defensibility of our campaign finance system.

In summary, I have doubts that Kansas' current definition of "political committee" would hold up in court. I urge you to adopt the new definition proposed by HB 2391, regardless of what the legislature does with the remainder of the bill.

Thank you for your consideration.

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[1] No Kansas court has yet decided this issue.