2023 Special Committee on Governmental Ethics Reform, Campaign Finance Law

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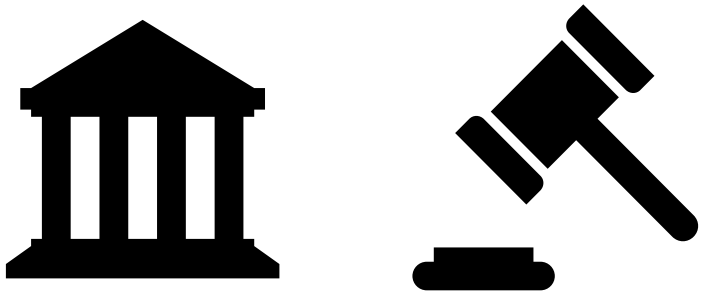
Our Mission



The Institute for Free Speech promotes and defends the First Amendment rights to freely speak, assemble, publish, and petition the government through strategic litigation, communication, activism, training, research, and education.

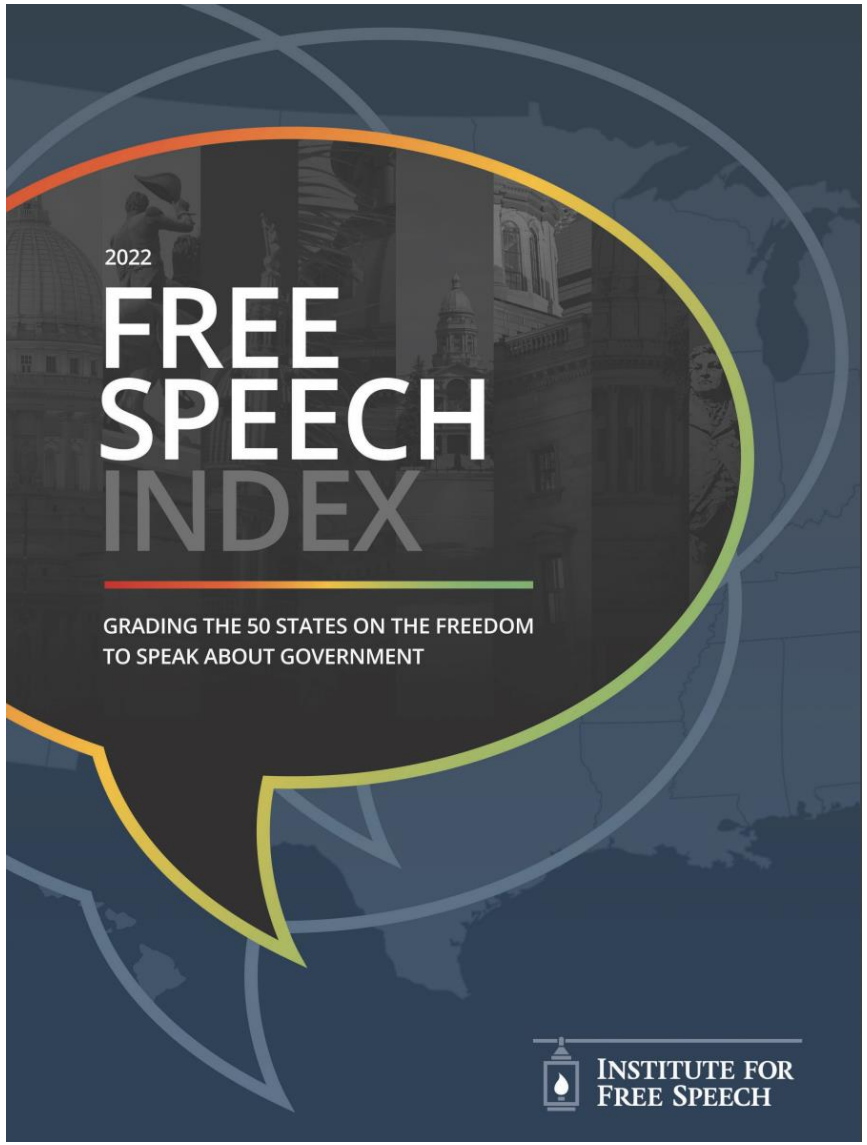
Best Practices for Free Speech in Campaign Finance and Lobbying Laws

Relevant First Amendment text:

"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Free Speech Index

- In August 2022, we published our Free Speech Index of the 50 states.
- *The Wall Street Journal* told readers, “It’s an index of how state laws and regulations treat political committees, grassroots advocacy, independent expenditures, and the like. The results aren’t partisan, and they’re probably not what you expect.”
- Kansas earned a disappointing **65 percent** score.
- With just two changes to the law, the score for Kansas would rise to **83 percent**.



Follow the Constitution

- Make all definitions clear while not abridging the rights guaranteed by the First Amendment. Follow the guidance of the U.S. Supreme Court on key definitions.
- Kansas does this well with its definitions of express advocacy, contributions, and expenditures.

The Only Recognized Purpose of Campaign Finance Laws is Preventing Quid Pro Quo Corruption or Its Appearance

- The Supreme "Court has recognized only one permissible ground for restricting political speech--the prevention of '*quid pro quo*' corruption or its appearance"--and "consistently rejected attempts to restrict campaign speech based on other legislative aims." *Cruz*, 142 S.Ct. at 1652 (quoting *McCutcheon v. Federal Election Commission*, 572 U.S. 185, 207 (2014) (plurality opinion)).

- Whether through deliberate choice or bureaucratic inertia, many provisions of federal and state campaign finance laws have drifted away from this basic purpose. While better than many states, Kansas is no exception.

Simplify to the Extent Possible

- Registration, disclaimer, and reporting thresholds should avoid regulating grassroots activity.
  - People should not have to hire lawyers before spending small amounts of money on election campaign speech.
  - Supreme Court: “[t]he First Amendment does not permit laws that force speakers to retain a campaign finance attorney” to determine whether and how they may speak.
- Contribution limits add complexity to avoid “loopholes.” Contribution limits also hinder candidates and parties in the era of the Super PAC.
- Simple disclaimers help compliance and make disclaimers more effective.

Excessive Disclosure Harms Political Speech, Hurts Fundraising, and Fuels a Cancel Culture

- Low donor disclosure thresholds create cancel culture concerns for smaller donors.
- Disclosure of general donors misleads the public and creates risk of harassment.
- As citizens understand disclosure risks, fundraising may become more difficult.
- Best practices for disclosure is that only contributions that are earmarked for regulated speech should be disclosed.

Political Parties Play an Important Role in our Political System

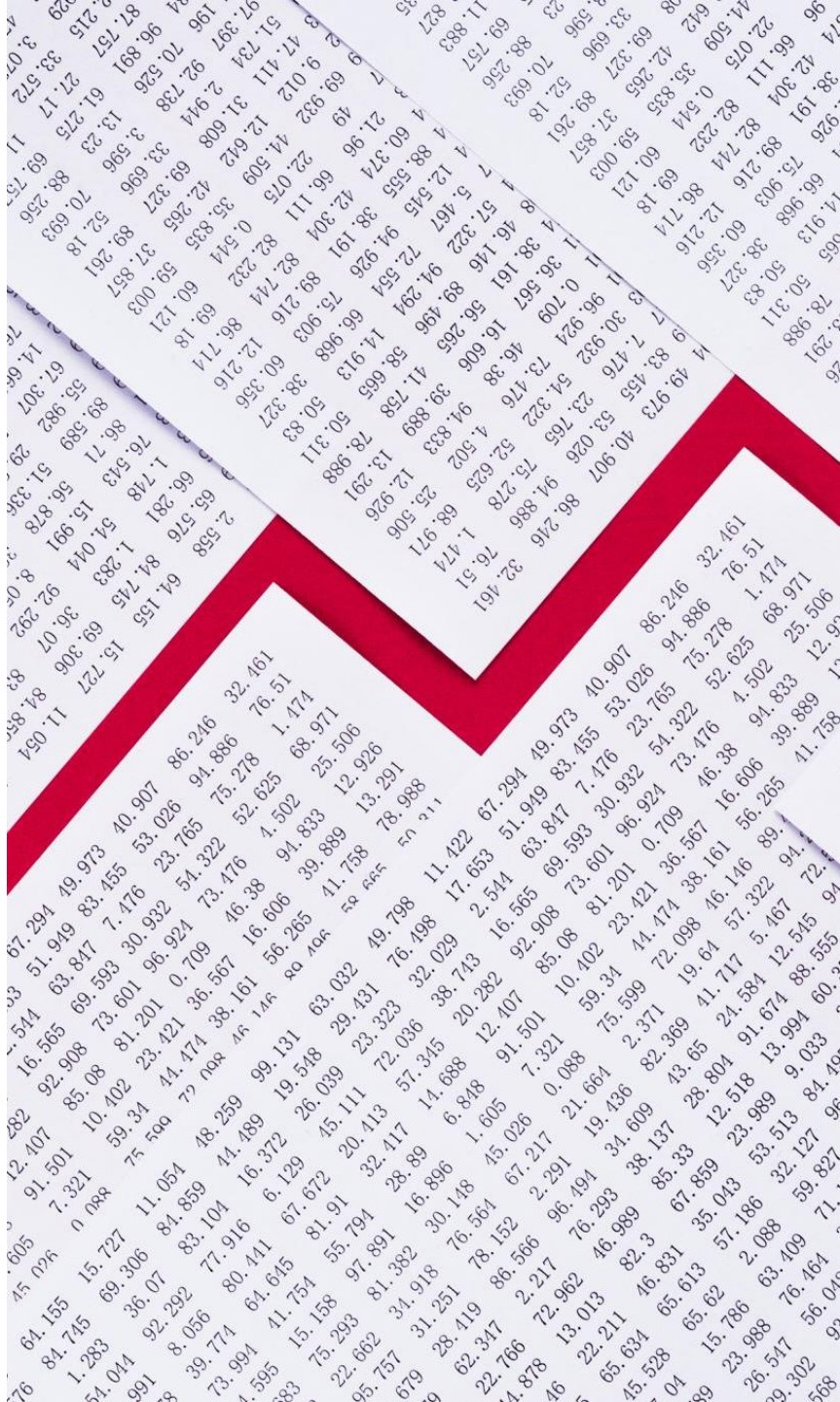
- Political parties help people come together and work for common goals.
- Historically, political parties have been meliorating institutions that balance a wide variety of views and interests in broad coalitions.
- Treating political parties as inferior to other groups and organizations in society makes politics more atomized, more focused on individual candidates, and less of a team sport.

Require Bipartisan Enforcement Both for Credibility and Fairness

- A partisan structure risks the reality or appearance of a referee with his thumb on the scale of the contest, using his immense regulatory power for partisan gain.
- Fortunately, Kansas is one of only a few states that attempts to ensure bipartisan enforcement.

Index Fixed Dollar Amounts to Avoid Allowing Inflation to Change the Law

- Indexing keeps a simple law from becoming more complex over time.
- A $1,000 contribution limit in January 2000 would need to be $1,800 today to keep pace with inflation.
- Campaign contributions are now not eroded by inflation in **29** of the 50 states. New Jersey is the latest to add indexing.
- Unfortunately, Kansas does not index any fixed dollar amounts in its campaign finance or lobbying laws.



Do Not Regulate Grassroots Advocacy

- The act of petitioning for redress of grievances has deep American roots, going back to pamphleteers like Thomas Paine's now-famous *Common Sense*. It is celebrated in our culture, from the paintings of Norman Rockwell to the town council meetings on television shows. The Supreme Court has said the right to petition the government is "among the most precious of the liberties safeguarded by the Bill of Rights."
- Grassroots advocacy is vital to representative democracy and should be free of registration and reporting requirements.

Recommendations For Kansas

Constitutional Flaw

The Kansas PAC threshold is clearly unconstitutional.

- There is no dollar threshold for the registration requirement. The courts have repeatedly ruled that zero-dollar or low-dollar thresholds are unconstitutional
- We recommend a threshold of $5,000 for a calendar year, indexed for inflation.

Constitutional Flaw

The Kansas PAC "a major purpose" standard is unconstitutional.

- Groups must have "the major purpose" of express advocacy or contributions to candidates or parties, but Kansas defines PACs as only having "a major purpose" of such activities.
- KGEC regulations make an already vague law worse as it does not specify how much activity constitutes "a major purpose" and sweeps in volunteer activities.

The PAC Definition is Crucial to a Good Campaign Finance Law

- The only groups that should be PACs are those where "the major purpose" of the group is express advocacy (properly defined) or contributions to candidates, parties and PACs.
- Major purpose should be defined as:
  - The entity states in the entity's official documents that its purpose is to elect state or local candidates through express advocacy and contributions; or
  - A majority of its program spending is for contributions or expenditures as defined in the campaign finance law.
- Exhibit 1 to our written statement suggests one way to write a constitutionally sound definition. It is based on the one adopted by the Arizona Citizens Clean Elections Commission.

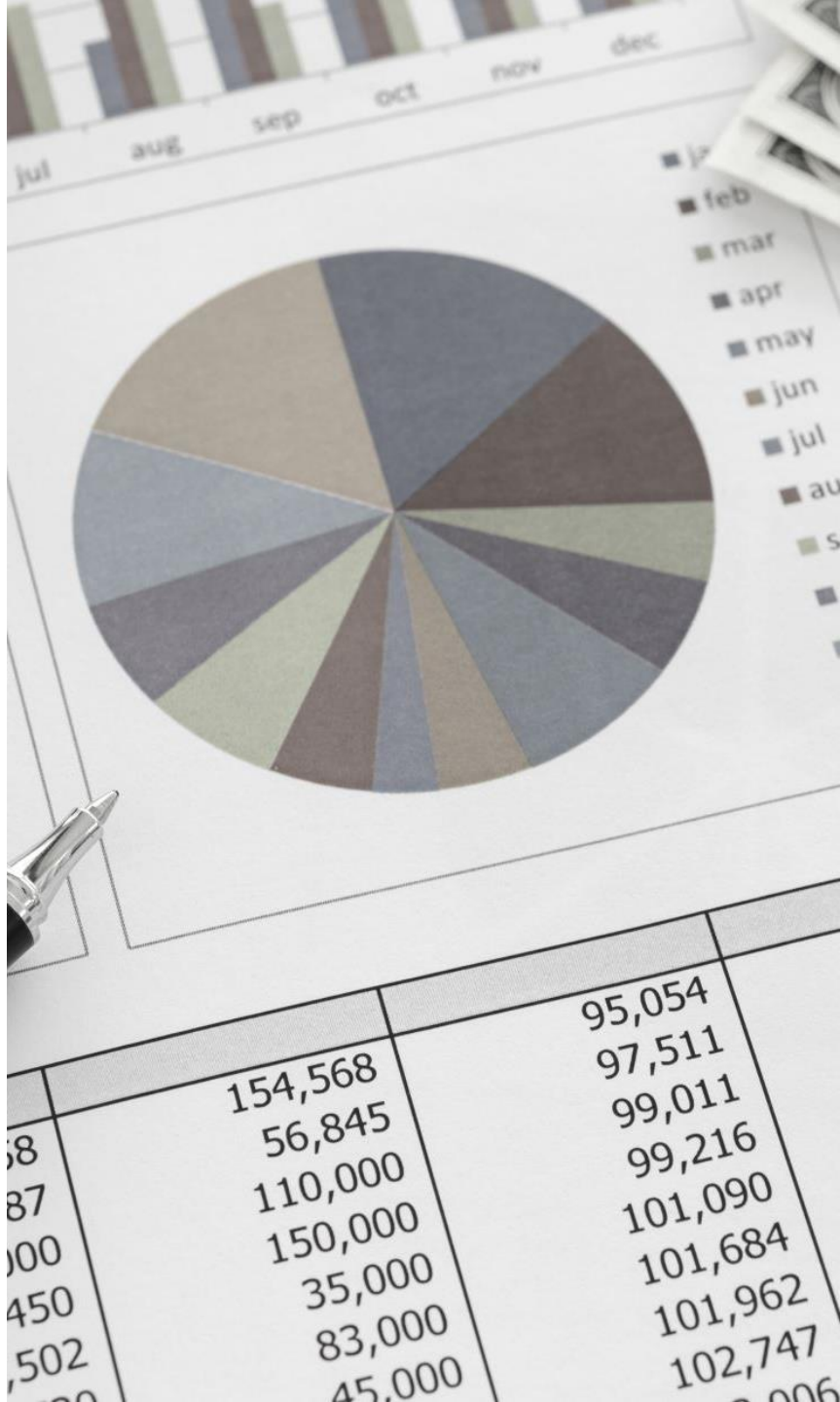
Constitutional Flaw

The current law's donor disclosure for independent expenditures by non-PACs is unclear. If it is interpreted to mean general donor disclosure, it is likely unconstitutional.

- The best practice for states that require such disclosure is that only contributions that are earmarked for independent expenditures should be disclosed.
- Our written statement suggests a way to add this minor change to current law. It would add the following to K.S.A. 25-4150:
    - With respect to the information required by K.S.A. 25-4148(b)(2), the person (if other than a natural person) shall be required to report only funds the person has received that are earmarked: (a) for the express purpose of nominating, electing or defeating a candidate or candidates for a state or local office; or (b) to expressly advocate the nomination, election or defeat of a candidate or candidates for a state or local office.

Excessive Disclosure Harms Political Speech, Hurts Fundraising, and Fuels a Cancel Culture

- Raise donor disclosure thresholds to avoid cancel culture concerns for smaller donors, which should ease fundraising for candidates and parties.
- The FEC threshold is $200 and that is too low – it's been at that level since the early 1980s.
- The Kansas threshold is just $50. Only 14 states are lower.



Using Enforcement to Provide Guidance is Unfair

- If guidance has more than one interpretation, write a new rule or recommend that the Legislature amend the law.
- The Federal Election Act contains a provision similar to this recommendation: “Any rule of law which is not stated in this Act . . . may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in pursuant to procedures established in section 30111(d) of this title.” (Section 30111(d) provides Congress with an opportunity to reject any proposed rule.)
- Speakers need to know, in advance, what the law restricts or regulates. Ideally, the legislature would update vague laws. The KGEC should have a duty in statute to bring vague and ambiguous language needing clarity to the Legislature's attention.

Supreme Court: “[I]n a debatable case, the tie is resolved in favor of protecting speech.”

FED. ELECTION COM'N V. WISC. RIGHT TO LIFE, 551 US 449

- The problem is that regulators frequently take the **most** speech-restrictive view of the law.
- It is as if they view that as their role as an advocate. But that is wrong.
- Regulators shouldn't use enforcement to provide clarity on a vague law because that is unfair to a speaker subjected to the enforcement.

Recommendation – A Presumption for Speech

- The Legislature should consider spelling out a presumption of free speech in the law, such as:
  - "The Commission shall use the most reasonable reading of the law in any enforcement action. To the extent a law is vague or ambiguous, the least speech-restrictive interpretation should prevail."
- Such a rule would match the Supreme Court's admonition that a tie should go to the speaker.

The Coordination Law Is Unclear

- Current law states (§ 25-4148c(d)(2)) that an “independent expenditure” is one “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.”
- Unfortunately, the law lacks a definition of “cooperation or consent.”
- There is no public information exemption for coordination under the Kansas statute and regulations.

The Coordination Law Is Unclear

- If a candidate or his agents know about an expenditure, what must that candidate do to be presumed not to "consent?" Must he publicly denounce his supporters? If asked about the effort, can he say he is "grateful for their support?" What does it mean for a candidate and an individual, a civic organization, a union, or a trade association to "cooperate?" Can it include responding to public inquiries? Private inquiries?
- These vague terms chill speech. Without a reasonable definition, speakers are left without coherent guidance about what speech and behaviors are done in "cooperation or consent." This impermissibly restricts the First Amendment rights of those seeking to speak independently.

Recommendations on Coordination

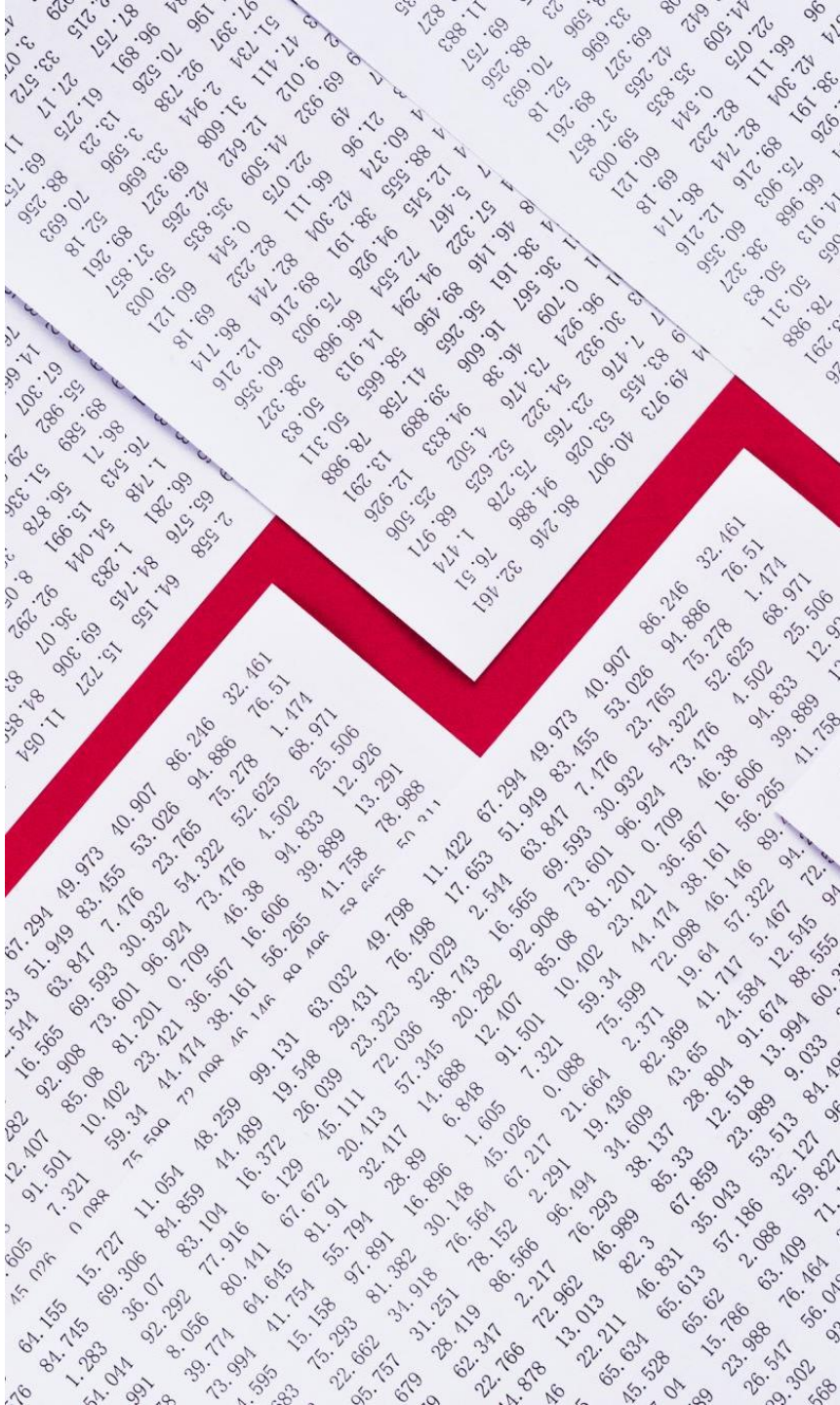
- The federal regulations at 11 C.F.R. §109.21 provide an example of how to clarify the type of conduct that can constitute coordination. This clarity protects speakers from inadvertently violating the law while ensuring independent expenditures remain independent.

- The statute should include several safe harbors, including one for publicly available information. If a speaker uses information available to everyone to develop a communication, that could not constitute coordination. Federal regulations state that a communication is not coordinated "if the information material to the production, or distribution of the communication was obtained from a publicly available source." (11 CFR§ 109.21(d)(2))

- We suggest a definition of "cooperation or consent" in Exhibit 2 of our statement.

Index Fixed Dollar Amounts

- Indexing keeps a simple law from becoming more complex over time.
- Index the following for inflation:
  - Contribution limits (Campaign contributions are now not eroded by inflation in **29** of the 50 states).
  - Other fixed dollar amounts in the campaign finance or lobbying laws, such as thresholds for registration or reporting of donors.



Repeal Grassroots Advocacy Reporting

- Grassroots advocacy is vital to representative democracy and should be free of registration and reporting requirements.
- At a minimum, the current law needs reform. It is overbroad and the threshold is too low.
  - A reference to specific legislation does not appear to be required for a communication to be regulated as grassroots lobbying.
  - The $1,000 threshold for reporting is too low. A $25,000 threshold would be preferable.

Consider an Internet Exemption

- The FEC recognized that the internet is unique because:
    - it "provides a means to communicate with a large and geographically widespread audience, often at very little cost";
    - "individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others"; and
    - "[w]hereas the corporations and other organizations capable of paying for advertising in traditional forms of mass communication are also likely to possess the financial resources to obtain legal counsel and monitor Commission regulations, individuals and small groups generally do not have such resources. Nor do they have the resources . . . to respond to politically motivated complaints in the enforcement context."

The FEC's Internet Exemption:

"The term general public political advertising shall not include communications over the internet, except for communications placed for a fee on another person's website, digital device, application, or advertising platform." 11 C.F.R. § 100.26

- Under the FEC's rule, paid internet advertising is subject to regulation.
- Other forms of online communications, such as a website; Facebook page; Twitter tweets (now X posts); YouTube uploads; or "communications over the internet" are not regulated.

Helping Political Parties

- Kansas should consider joining the majority of states nationally that do not limit individual contributions to political parties.
- This would allow parties to compete with Super PACs and could reduce complexity.

Kansas Contribution Limits Are Below the National Average

- Consider substantial increases in or elimination of some or all contribution limits.
- At a minimum, the Legislature should consider an increase in contribution limits to account for inflation since the last adjustment.

Kansas	Overall Rank	To Governor	To State Senate	To State House	To Parties	To PACs
Individual Giving	31	32	33	39	35	1
		$2,000/election	$1,000/election	$500/election	$15,000/year	Unlimited
PAC Giving	43	31	35	40	43	
		$2,000/election	$1,000/election	$500/election	$5,000/year	
Party Giving	1	1	1	1		
		Unlimited	Unlimited	Unlimited		
Union Giving	21	18	18	23		
		$2,000/election	$1,000/election	$500/election		
Corporate Giving	18	15	15	20		
		$2,000/election	$1,000/election	$500/election		

Inflation Adjustment: No

A Review of One of the Select Bills on the Agenda:

HB 2206

(h) "Expressly advocate the nomination, election or defeat of a clearly identified candidate" means any communication which uses phrases including, but not limited to:

(1) "Vote for the secretary of state";

(2) "re-elect your senator";

(3) "support the democratic nominee";

(4) "cast your ballot for the republican challenger for governor";

(5) "Smith for senate";

(6) "Bob Jones in '98";

(7) "vote against Old Hickory";

(8) "defeat" accompanied by a picture of one or more candidates; ~~or~~

(9) "Smith's the one."; *or*

(10) other phrases, images or graphics, when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate or candidates because:

(A) The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and

(B) reasonable minds could not differ as to whether such phrases, images or graphics encourages actions to elect or defeat one or more clearly identified candidate or candidates or encourages some other kind of action.

Practical Problems with this Approach

- This is patterned after the FEC's regulation at 11 CFR 100.22(b) and is highly controversial.
- The First and Fourth Circuit Courts have ruled the regulation unconstitutional. The Eighth Circuit ruled an essentially identical Iowa rule unconstitutional. The Fifth Circuit ruled similar language in Louisiana was unconstitutional. It has been upheld in the Tenth Circuit.
- Our experience is that, nationally, regulators are often not reasonable and this language puts a great deal of discretion in their hands. Worse, speakers have to guess a regulator's perception of a communication.
- "Reasonable minds" often differ on the meaning of a communication but regulators often do not take that into account.
- This definition allows a regulator to look beyond the speech to "external events" and broadens the speech covered to the vague "encourages actions to elect or defeat" standard. A potential speaker has no way of knowing if their speech would be captured by this definition.

The Provisions are Vague

- As one former FEC chairman noted:
    - Does “proximit[y]” mean mere days before the election? Weeks or months? 61 days before a general, or 31 days before a primary? What is a “limited reference” to “external events?”
    - Then there is the internal inconsistency that seems to create a two-part test. First, read the communication “taken as a whole” (which includes not only the whole of the communication's content, but unspecified “external” factors); and if (presumably) that is not enough to justify regulation of the communication, move on to step two, and focus on the “electoral portion.” But which is the focus? The whole communication, or just the “electoral portion?”

Statement of Reasons of Commissioner Donald F. McGahn, MUR 5841, Feb. 1, 2011.

The Language Does Not Follow U.S. Supreme Court Guidance

- In footnote 7 in *Fed. Election Com'n v. Wisc. Right to Life*, 551 US 449 - Supreme Court 2007, Chief Justice Roberts wrote:

> We agree with Justice Scalia on the imperative for clarity in this area; that is why our test affords protection unless an ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. It is why we emphasize that
>
> (1) there can be no free-ranging intent-and-effect test;
>
> (2) there generally should be no discovery or inquiry into the sort of "contextual" factors highlighted by the FEC and intervenors;
>
> (3) discussion of issues cannot be banned merely because the issues might be relevant to an election; and
>
> (4) in a debatable case, the tie is resolved in favor of protecting speech.
>
> And keep in mind this test is only triggered if the speech meets the bright-line requirements of BCRA § 203 in the first place.

The Bright-line Requirements Referenced in the Roberts Opinion:

- The communication mentions the name of a clearly identified candidate;
- It is distributed by radio or television;
- It can be received by 50,000 or more people in a district or state where the candidate is running;
- And the communication is aired within 30 days of a primary election or within 60 days of a general election.

- Several of these factors are not in the HB 2206 definition and, most importantly, there is no time limit.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