

IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
CIVIL DIVISION

KANSAS GOVERNMENTAL)	
ETHICS COMMISSION, EX REL.)	
MARK SKOGLUND, EXECUTIVE DIRECTOR,)	
)	
Plaintiff,)	Case No. SN-2023-MV-000095
)	
vs.)	
)	
DAVID MATTHEW BILLINGSLEY,)	
)	
Defendant,)	
)	

MEMORANDUM IN SUPPORT OF MOTION TO APPROVE ATTORNEY FEES AND SANCTIONS AMOUNT

COMES NOW, the Defendant, by and through counsel, and submits this memorandum in support of its motion for the Court to approve the amount attorneys’ fees, costs, and sanctions in this matter pursuant to the Kansas Public Speech Protection Act, K.S.A. 60-5320 (the “Act” or “PSPA”) and 2023 H Sub. S. B. 208 as enacted in 2023 Kansas Session Laws, Ch. 23, Section 1 in the amount of \$75,125¹ in attorneys’ fees and \$198,482.50 in sanctions. The proposed fees and sanction amounts reflect the attorneys’ fees and expenses *already paid* by various parties represented by counsel in joint defense with the Defendant in the underlying years-long investigation. This amount—nearly \$200,000 *on top of* attorneys’ fees paid by the Defendant—is directly related actions of the Plaintiff (hereinafter referred to as the “Kansas Governmental Ethics Commission” or “KGEC”) as described herein and the briefing related to the Motion to Strike.

¹ Because the final amount of Defendant’s fees request will depend on the time spent on the appeal of this matter as indicated by the Notice of Appeal filed by the Plaintiff, Defendant requests that the appropriate amounts be adjusted and due within 45 days from the date of final resolution of any appeal, including any application for review in front of the Kansas Supreme Court or petition for writ of certiorari in the United States Supreme Court.

The PSPA provides that “[t]he court shall award the defending party, upon a determination that the moving party has prevailed on its motion to strike, without regard to any limits under state law: (1) Costs of litigation and reasonable attorney fees; and (2) such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated.” K.S.A. 60-5320(g). The KGEC has argued “there is no conduct to deter.” *See* Plaintiff’s Sur-Reply to Defendant’s Reply Memorandum at 8-9. This argument is stunning, given the ramifications of the KGEC’s conduct to the Defendant and other subpoena recipients—mentally, financially, reputationally, operationally, politically, and otherwise. Without sanctions, as has happened and continues to happen here, the KGEC in its current or future makeup, as well as other administrative agencies, could put their finger on the political scales through multiple election cycles under the auspices of “investigating” an unconstitutionally vague regulatory regime based on surprise legal theories. Sanctions would in no way result in a profit to subpoena recipients but could *begin* to repair some of the damage left in the wake of the KGEC’s actions.

In the underlying investigation, the KGEC issued dozens of stunningly broad subpoenas that had a massive impact on one side of the political aisle, stifling First Amendment activity, and costing hundreds of thousands of dollars in attorneys’ fees across dozens of individuals and entities supportive of Republican candidates. Successive subpoenas have been issued by the KGEC even after individuals, attorneys, numerous legislative conferees, legislators, bipartisan legislative committees, the Governor’s Office, national experts, and others have called attention to the vague state of applicable Kansas campaign finance law, including the “giving in the name of another” statute. At the same time the KGEC has allowed essentially identical conduct performed by the Democrat-affiliated party and candidate committees to continue operations

unmolested, conduct that is continuing this very election cycle without an equivalent investigatory response. Essentially, seemingly everyone but the KGEC agrees that applicable Kansas law is incredibly vague. No one, regardless of political party, seems to understand the KGEC's current regulatory regime or theories based on the plain text of K.S.A. 25-4154 in the absence of precedential guidance.

The KGEC has the tools to provide clarity to the law by issuing regulations, promulgating advisory opinions, and engaging in the legislative process on these substantive issues. Instead, the KGEC has now tripled down on its misguided approach of attempting to create new law via enforcement—all at the expense of the Defendant and other Republican-affiliated actors. The sanctions in this matter are necessary to deter future Commissions and other governmental agencies from uneven regulation of First Amendment activity *via* enforcement of novel interpretations of vague laws without prior notice of the proscribed conduct. The PSPA was enacted to afford First Amendment activity additional protections, and the Legislature expressly applied it to KGEC subpoenas in 2023 S. B. 208 in the wake of the KGEC's conduct in this matter and others.

Sanctions will not only deter others similarly situated but will be used solely to reimburse political actors *for attorneys' fees they have already paid* defending such unconstitutional governmental conduct in the underlying investigation. Subpoena recipients have been harmed by the KGEC's unconstitutional applications of law, and here, almost three years and two election cycles later, none of these recipients will profit - even if sanctions are awarded as requested. To that end, the Defendant respectfully requests that the KGEC as an agency be the party responsible for paying all such fees and not the individuals named or lawyers representing the government in this matter.

The Global Impact of the Underlying Investigation

The KGEC has approached this matter as essentially attempting to legislate through enforcement. Rather than clarify the vagaries in Kansas law and educate the public of new regulatory standards, the Plaintiff has specifically targeted one side of the political aisle and drained hundreds of thousands of dollars from Republicans that were contributed by donors to engage in advocacy in an election. Meanwhile, the Plaintiff has allowed similar practices to continue unmolested by Kansas Democrats for at least two general election cycles now. In Kansas, novel interpretations of vague laws seemingly only apply to Republican-affiliated individuals and groups.

Although this individual matter deals specifically with the Defendant, the underlying investigation in this case has impacted dozens of individuals and entities. As such, these individuals and entities, including the Defendant, formed a joint defense agreement and combined legal expenses to the extent possible. Accordingly, it is difficult to determine which fees are the Defendants specifically or part of the overall joint defense. However, only the expenses paid by nature of his position are included in Exhibit A related to the 2022 Subpoena. Regardless, this matter has injured numerous public reputations and hobbled the ability of Republican causes to engage in constitutionally protected political activities.

This entire investigation has had the effect of publicly maligning certain individuals and organizations supportive of Republican candidates and interests, including the Defendant. For nearly three years, dozens of Kansans have lived under the “cloud of an ethics investigation”² (a

²See e.g. Carpenter, Tim, “Kansas Statehouse Subpoenas, Pay-to-Play Allegations, Consultants’ Feud Disrupt End of Session,” *Kansas Reflector*, April 3, 2022 available at <https://kansasreflector.com/2022/04/03/kansas-statehouse-subpoenas-pay-to-play-allegations-consultants-feud-disrupt-end-of-session/> (last visited February 15, 2023); see also e.g. Cooper, Brad, “Republicans Challenge Wide-Ranging Ethics Subpoenas,” *Sunflower State Journal*, December 27, 2022 available at https://sunflowerstatejournal.com/?p=28086&rcp_w=89d00be55ae70007521af2bfbe6a5696-- (last visited February 1, 2023). See also e.g. Bahl, Andrew, “A Battle over Subpoenas of Kansas Republican Officials is Heating up.

status exploited by KGEC Executive Director Mark Skoglund while publicly opposing procedural legislation related to the agency).³ Executive Director Skoglund has openly discussed the ongoing investigations with reporters.⁴

Our clients have operated businesses and engaged in core political activities under the ongoing threat posed by the weaponization of a government agency intent on selectively stifling political speech and freedom of association. During the course of 2022 to the present, subpoena recipients, including the Defendant, have had to attempt to engage in political and business practices through major statewide election cycles with zero guidance from the KGEC on what might have possibly been improper about their past activity and were left guessing about to how avoid future similar inquiries. As we pointed out in our June 15, 2023 Objection Letter to the 2022 Subpoena, to the extent the mission of the KGEC articulated by the agency staff's X Account (formerly known as Twitter) states that "the main purpose of ethics laws lies not in punishing wrongdoing, but in preventing it, not in catching people, but in teaching them . . . [i]n ethics, education is the name of the game," the KGEC has miserably failed.⁵ See Billingsley Affidavit, Attachment 2 at 2.

Here's what's at Stake," *Topeka Capital Journal*, December 27, 2022 available at <https://www.cjonline.com/story/news/politics/elections/2022/12/27/judge-declines-to-close-hearing-on-kansas-ethics-commission-subpoenas/69758683007/> (last visited February 1, 2023) see also e.g. Bernard, Katie, "Kansas Republican Leader wants to Target Ethics Commission amid Ongoing Investigation," *Kansas City Star*, January 26, 2023 available at <https://www.kansascity.com/news/politics-government/article271652022.html> (last visited February 1, 2023).

³ See @KansasEthics, Twitter (Feb. 13, 2023 12:21 PM), available at <https://twitter.com/KansasEthics/status/1625198497963118594> (last accessed September 17, 2024).

⁴ Cooper, Brad, "Bill Heightens Tensions between Ethics Commission and Lawmakers," *Sunflower State Journal*, February 16, 2023 available at <https://sunflowerstatejournal.com/new-bill-heightens-tensions-between-ethics-commission-lawmakers/> (last accessed September 17, 2024).

⁵"This is an excellent summary of a principle that has been a cornerstone of the Kansas Governmental Ethics Commission for years[:] . . . "The main purpose of ethics laws lies not in punishing wrongdoing, but in preventing it, not in catching people, but in teaching them. In ethics, education is the name of the game." @KansasEthics, Twitter (Jan. 18, 2019 09:08 AM), available at <https://twitter.com/KansasEthics/status/1086279093300092928> (retweeting quote from Honolulu Ethics Commission) (last accessed February 15, 2023).

In early 2022, the KGEC issued numerous subpoenas to dozens of people, including interns, political consultants, party officials, non-profit organizations, and elected officials, as well as unsuccessful political candidates. The subpoena recipients had no real indication of the legal basis of the investigation or why they were chosen, and the subpoenas were staggeringly broad and incredibly overburdensome. *See e.g.* Billingsley Affidavit, Attachment 1.

Some of the people who received subpoenas, including the Defendant, have been active in Kansas politics for years and had never received any prior communication from KGEC. Yet, the KGEC went from having no prior position on the statutes in question to an expansive dragnet investigation and has inflicted deep wounds on individuals and organizations aligned with Republican interests. There was no opportunity to preliminarily address or resolve these issues before the 2022 subpoenas were issued.

While investigations by the KGEC are statutorily required to be kept confidential by agency staff, the staff of the KGEC has in many ways publicized this investigation through its actions, having the effect of publicly impugning various persons without due process or equal treatment when compared to Democrat activity. For example, in early 2022, the Executive Director Mark Skoglund and his staff walked through the halls of the Capitol during the height of the legislative session, openly distributing the subpoenas to unsuspecting targets. Such a notorious approach had the effect of making the wide-ranging investigation public from the outset, damaging the reputations of those intertwined in the crossfire. The “carpet bombing” effect of the KGEC Executive Director and other KGEC staff personally marching through the Capitol serving subpoenas during the Kansas legislative session doomed the possibility of a confidential investigation from the beginning. The Defendant and our other clients have received media inquiries related to this investigation for years now, and the “cloud of

investigation” the KGEC has fostered and publicly referenced in its legislative advocacy⁶ has damaged the Defendant, burdened his associational and speech rights as well as the rights and reputations of numerous others.

In total, the Defendant has spent \$75,125 in this matter and his participation in the 2022 Subpoena Joint Defense.⁷ See **Exhibit A** attached. However, the overall impact of the 2022 Subpoena and 2023 Subpoena, including all efforts to respond and ultimately resolve issues related to the 2022 and 2023 LIFT Up Subpoenas globally among all of *just our* clients (not including the many others represented by separate counsel) in joint defense regarding this investigation has cost an additional \$198,482.50.⁸

Necessity Of Sanctions to Deter Others Similarly Situated

Regarding sanctions, the PSPA provides: “(g) The court shall award the defending party, upon a determination that the moving party has prevailed on its motion to strike, without regard to any limits under state law: . . . (2) such additional relief, including sanctions upon the responding party and its attorneys and law firms, as the court determines necessary to deter repetition of the conduct by others similarly situated.” K.S.A. 60-5320(g).

Sanctions are appropriate in this context because the KGEC and its prosecutor, Executive Director Mark Skoglund, have demonstrated indifference and even hostility over the course of nearly three-years toward any attempts to bring clarity to the law. The KGEC has been deaf to public and private pleas for clarity over successive legislative sessions that all sides of the

⁶ *Id.*

⁷ This figure is *prior* to the filing of this Motion and Memorandum and any work on appeal. Detailed billing records are attached as **Exhibit A** with redactions based on Joint Defense Privilege, Attorney-Client Privilege, work-product doctrine, and First Amendment Privilege. Unredacted activity reports are available for *in camera* inspection upon request.

⁸ Detailed billing records are available for *in camera* inspection upon request. However, because this amount is requested as sanctions, such redacted records are not attached to this filing as an exhibit. However, all similar applicable privileges and non-disclosure doctrines are asserted and preserved hereby.

spectrum “want to follow the rules” and that “it can be frustrating if you’re someone who gets caught up in the middle of where you think you’re following the law and you’re not, or maybe it’s vague, so there’s an open question.”⁹

Repeatedly since March 2, 2022, in regular communications and informal and official correspondence since then, attorneys for Defendant have raised concerns about the vague nature of the “giving in the name another statute,” the agency’s evolving novel interpretations of that statute, and the constitutional concerns about the agency’s enforcement attempts under those novel interpretations. Those concerns have increasingly become more public, as attorneys for the Defendant have regularly appeared before both the KGEC and Legislature articulating these concerns. In June 2022 and February 2023, attorneys sent formal correspondence to the KGEC that extensive legal and factual analysis of those concerns (including demonstration of the KGEC’s arbitrary enforcement standards between Republican and Democrat activity) in addition to the many hours-worth of oral and written public testimony by counsel before the Legislature.

These concerns have been met by the KGEC with not only indifference but outright hostility. Examples of the vitriolic language KGEC officials have used regarding attempts to bring clarity to the giving in the name of another statute include public comments denigrating attempts to draft and introduce clarifying legislative language to these vague statutes (such as

⁹See Will Lawrence, Chief of Staff for Office of the Kansas Governor, Verbal Testimony Before the 2023 Special Committee on Governmental Ethics Reform, Campaign Finance Law (October 5, 2023), *available at* <https://www.youtube.com/watch?v=-VdhEARaRYo> (last accessed Sept. 17, 2024). Mr. Lawrence testified regarding the “giving in the name of another” statute and other vague statutory provisions:

I think of this process is that you think about it from a sporting event perspective: everyone needs to know the rules, we all want to follow the rules, but you’re all looking for that strategic advantage over your opponents within the rules. . . . It can be frustrating if you’re someone who gets caught up in the middle of where you think you’re following the law and you’re not, or maybe it’s vague, so there’s an open question. . . . So everyone wants to engage in appropriate legal behavior. Regardless of what the [legislature’s] decision [on what the law should be] is, if the commission’s view on the statutes is adopted wholesale and that is the prevailing view, it should be in statute, so we all know what exactly that is and what the rules are because again, back to my main point, I do think that everyone engaged in this process wants to do it in a way that is lawful.

Id.

2023 H. B. 2391), include a KGEC Commissioner calling such legislative efforts “criminal” in nature in a public hearing, comments made by Plaintiff Skoglund on a panel at a 2023 Council on Governmental Ethics Laws (“COGEL”) national conference, and statements under oath in a recent August 2024 deposition of Mark Skoglund.

As stated in Defendant’s Motion to Strike subsequently granted by this Court, counsel’s legislative efforts to bring clarity to the giving in the name of another statute has been met with vitriolic condemnation by the KGEC through its official X (formerly, Twitter) agency account and at least one KGEC commissioner in a public meeting. On February 13, 2023, the official Twitter account of the KGEC posted a long Twitter thread criticizing the H.B. 2391, stating that the bill or specific provisions were “shocking,” “brazen,” “egregious,” and would “undermine all campaign finance enforcement by the Ethics Commission.”¹⁰ Specific to the law at issue in the present matter, the Twitter account posted that H. B. 2391 “[l]egalizes giving contributions in the name of another if done to exceed campaign contribution limits, making these limits meaningless and undermining the foundation of campaign finance law.”¹¹

Just a few days later, at the February 22, 2023 KGEC meeting, counsel appearing in his general professional capacity spoke to the commission in favor of H.B. 2391, indicating that he had helped author the bill in an attempt to bring clarity and due process to the Kansas Campaign Finance Act. (H. B. 2391 included proposed clarifying language to the “giving in the name of another” statute.) During the meeting, Commissioner John Solbach stated the following regarding the “supporters” of H. B. 2391:

One way of looking at this, is that the sponsors of this bill and those who support this bill have the intention to commit a crime in Kansas because what they are taking away from that legislation will no longer make it a crime to do the things

¹⁰See @KansasEthics, Twitter (Feb. 13, 2023 12:21 PM), available at <https://twitter.com/KansasEthics/status/1625198497963118594> (last accessed September 17, 2024).

¹¹See *id.* (indirectly referencing K.S.A. 25-4154).

that they have the intention of doing and instead of doing the crime and secreting themselves they intend to change the laws so they can carry out those criminal intentions without being criminally liable.¹²

In December 2023, Skoglund expressly mentioned attorneys efforts to pass clarifying language regarding the “giving in the name of another” statute as a featured speaker during a panel discussion at a national conference on ethics laws. The panel discussion, entitled ““How to Build Confidence in Public Institutions and Programs,”” referenced Skoglund as a “local celebrity” with “lots of media lately.” Skoglund introduced his comments in the context of an “investigation into some extremely powerful people” that started “two and a half years ago.” Skoglund commented on H.B. 2391:

So they had the first bill that came up, which was written by attorneys who were representing people under investigation, which is a great source for legislation, was included legalizing giving the name of another, if it, as long as you're... only trying to exceed contribution limits – I'm glad that's the reaction that was, that was mine. They tried to redefine PACs so that no PAC would ever register in Kansas. This you know, that's just a couple things off the top they included. This had I think 33 provisions in the original draft of the legislation so we had to figure out again what was going on. We were not involved in the process.¹³

Skoglund referenced his work in attempting to parse down the legislation, removing substantive clarifications and keeping procedural changes:

We worked with the governor's office, we worked with a number of legislators, and ultimately this bill was parsed down to – we identified what was really the real heartache for some people that didn't cause too much damage to us as an entity, and there was mostly procedural changes. Let those changes happen and kept the substantive changes that would have basically eliminated campaign finance and laws in Kansas, and sent those to an interim committee for study. Which some of you I've reached out to and said, "Hey, can you help submit some testimony on this interim committee?" Which was very helpful for those of you who did that. Thank you. The interim committee last just met a few about a month ago and their

¹²See KGEC Meeting (February 22, 2023, timestamp 1:38:17), available at <https://www.youtube.com/watch?v=b31f1nRcvWw> (last accessed Sept. 17, 2024).

¹³See Council on Governmental Ethics Laws, 2023 Conference Schedule, “How to Build Confidence in Public Institutions and Programs,” (December 4, 2023), *available at* <https://www.cogel.org/mpage/2023ConferenceSchedule> (last accessed Sept. 17, 2024) (unofficial transcription of verbal remarks).

conclusions were much more collaborative with us than previously. . . . So after all of this we were now working to keep legislators pivoted towards improving the law rather than undermining it, which requires identifying our allies in the legislature, identifying who is specifically someone who is an advocate for us. Those people who call your office all the time and always ask questions, they ask permission before they go do something, they're the people who we are reaching out to and every single time they're the people who are behind the scenes advocates for us, it's great. And there's a lot of those people.¹⁴

During his comments, Skoglund also referenced the fear most legislators have about being perceived as disagreeing with the Ethics Commission:

I think like most of you, we are generally supported by the Legislature. No one wants to come out and say, "You know who I oppose today is Ethics." It doesn't come off great. So mostly we have a fairly supportive Legislature, generally speaking, but of course when you investigate very powerful people, you generate some backlash.¹⁵

Most recently, Mark Skoglund made negative comments regarding attempts to bring legislative clarity to ambiguous KCFA statutes in an August 2024 deposition in a pending federal case. That case has to-date successfully challenged the constitutionality of the Commission's previous enforcement efforts with respect to the "major purpose" test and statutory political committee definition. H.B. 2391 contained clarifying language regarding Kansas' PAC definition in addition to clarifying language regarding the giving in the name of another statute. Skoglund stated under oath:

Q. And how long have you thought that the law allowed for a newly formed entity to raise money and avoid reporting?

A. I think there are a number of loopholes that can be exploited in the act. In terms of exploring them all, I don't know when I would have explored each particular one. I don't know about this particular one.

Q. Well, this particular one we've been talking about today where a PAC can raise money for a candidate that's not clearly identified and avoid reporting and registering, how long has that been a concern of yours, if it has been?

¹⁴See *id.*

¹⁵See *id.*

A. I don't know that I can answer that. I mean, it's not just in the last couple of months. I mean, it's been -- there are a number of issues with the act that have loopholes that I would love to resolve. This would be one.

Q. Have you done anything to try to resolve that concern?

A. Not yet.

Q. Why is that?

A. We've legislatively been playing defense rather than trying to fix the law. We've been trying to prevent harm to the law.

Q. And why is that?

A. Because certain people attempted to undermine the campaign finance act, in a number of ways, in a haphazard fashion.

Q. And how -- how did that prevent raising the issue of these loopholes existing and potentially fixing those in the meantime?

A. Political capital is rather unlimited [sic],¹⁶ and it's already hard enough to get -- I can't get ethics commissions recommendations across to get voted on. In my tenure I have successfully had one vote on the floor of the House for a recommendation of the commission, and that's just one chamber.

See Deposition of Mark Skoglund, *Fresh Vision OP, Inc. v. Skoglund, et al.*, Case No. 5:24-cv-04055 (D. Kan 2024) (unofficial deposition transcript attached as **Exhibit B** with corrections included).

The point of bringing such comments to the Court's attention is not due to hurt feelings—this is a First Amendment case after all—but rather to demonstrate the indifference and hostility the agency has publicly demonstrated against bipartisan attempts to bring clarity to the unconstitutional law at issue. Addressing public policy considerations either through a unilateral advisory opinion or rules and regulations process, or in the legislative process provides all sides notice of what the rules are. Draining resources from one side of the political aisle through

¹⁶ On September 16, 2024, Executive Director Skoglund informed the transcriptionist that this word should be "limited," correcting the deposition transcript. See Exhibit B at 115-117.

enforcement of unconstitutionally vague laws, when coupled with inaction and outright hostility toward public policy arguments advanced in the proper venue, is conduct that should be deterred in the future.

The Commission for the first time in recent history issued no advisory opinions in 2023. The first advisory opinion in over a year from the Commission was issued on May 22, 2024 and addressed, of all things, the “giving in the name of another” state. See KGEC Opinion No. 2024-01 (May 22, 2024) (discussing apparently legal pass-through schemes of third-party payment processors under K.S.A. 25-4154). The opinion, however, did not address any of the implications for such “pass-through” conduct of third parties under the constitutionally vague prohibitions in K.S.A. 25-4154(a), despite the fact that counsel for Billingsley (appearing in a general capacity and not on Billingsley’s behalf) raised these questions in public comment prior to the issuance of the opinion.¹⁷

The KGEC continues to have unilateral tools at its disposal to regulate with specificity and fairness by providing guidance through an advisory opinion or rules or regulations. Earmarking, pass-through “schemes,” use of Victory Funds to pass money from candidate to candidate, and publicly promulgated “factors” that the Commission may weigh in reviewing such conduct, could all have been addressed by official guidance or rulemaking. However, KGEC has not simply refused to issue public guidance on its evolving novel theories regarding the “giving in the name of another” statute during two general election cycles and a statewide constitutional ballot question election. Instead, KGEC has officially disparaged attempts by others to draft more specific statutory language regarding subject matters it has hereto attempted to regulate only via enforcement.

¹⁷See KGEC Meeting (March 26, 2024, timestamp 23:08), available at <https://www.youtube.com/watch?v=H8i9uXo8094&t=2297s> (last accessed Sept. 17, 2024).

Vague laws court uneven enforcement, and in the current matter, this Court has already held:

“The [giving in the name of another statute] does not give fair warning to those who may be subject to it, notably for the alleged violations of K.S.A. 25-4154(a) used here as the basis for the proposed subpoena to Billingsley. Further, there is not precision or guidance in the statute sufficient to prevent arbitrary or discriminatory enforcement.

See Memorandum Decision and Order at 25, SN-2023-MV-95 (August 19, 2024).

Unfortunately for the Defendant and his associates, that judicial “check” on agency conduct has occurred nearly three years after initial concerns were raised with the agency before \$300,000 in attorneys’ fees had amassed.

Since March 2, 2022 (initial conversation between counsel and Executive Director Skoglund), and substantively since June 15, 2022 (Billingsley objection letter) and February 16, 2023 (follow-up correspondence from counsel discussing Democrat Party Victory Funds), Petitioner has been on notice of the constitutional concerns surrounding application of a novel theory of the “giving in the name of another statute.” Petitioner’s attempt to advance brand new factors non-existent in the law at the anti-SLAPP motion hearing in this case regarding which transfers would be scrutinized by the agency, and which would be overlooked, demonstrates the fundamental undeterred posture the current KGEC administration.

At this late hour, it is almost impossible to trust that the current KGEC will “get it right” in the future when using their vast investigatory and prosecutorial discretion to tie up significant money, time, and other resources during successive election cycles via a “shoot first, educate second” investigatory approach. “[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*). Neither should the Court leave an agency’s abuse of that discretion undeterred.

Deterrence via sanctions is necessary not just to deter the current KGEC administration, but rather “to deter repetition of the conduct by others similarly situated.” See K.S.A. 60-5320(g). Uneven enforcement goes both ways—targeted viewpoints, fact patterns, or individuals are always subject to the “whims” of prosecutorial discretion regardless of the persons currently occupying the office. Sanctions would deter a current and future KGEC from using vague laws that have the “possibility of arbitrary enforcement” to tie up other political actors supporting a different political party through expensive years-long investigation.

The KGEC is the only administrative agency that solely regulates First Amendment conduct. Because of the outsized effect the agency has on the fundamental nature of representative government and the democratic process, it is necessary this Commission and future Commissions be deterred from using enforcement of unconstitutionally vague laws to set novel public policy, especially when it has its own quasi-legislative powers at its disposal through advisory opinions or regulations.

Attorneys’ Fees

Litigating this matter required the investment of a significant number of attorney and paralegal hours. In setting reasonable attorneys’ fees, the general touchstone is whether the rate is in line with those prevailing in the community for comparable services by lawyers of reasonably comparable skill, experience, and reputation. *See, e.g., Lippoldt v. Cole*, 468 F.3d 1204, 1224-1225 (10th Cir. 2006) (considering the “prevailing market rate in the relevant community” in determining what constitutes reasonable rate) (quoting *Malloy v. Monahan*, 73

F.3d 1012, 1018 (10th Cir. 1996)). “The hourly rate should be based on the lawyers’ skill and experience in civil rights or analogous litigation.” *Id.* (internal quotation marks and citation omitted). Various factors can justify a departure from market rates, including “[t]he novelty and difficulty of the questions”; “[t]he skill requisite to perform the legal service properly”; “[w]hether the fee is fixed or contingent”; “[t]he amount involved and the results obtained”; and “[t]he experience, reputation, and ability of the attorneys.” *Mkt. Ctr. E. Retail Prop., Inc. v. Barak Lurie, Lurie & Park*, 730 F.3d 1239, 1247 (10th Cir. 2013) (describing the 12 “*Johnson* factors” regarding fee determinations, as set forth in *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714 (5th Cir. 1974)). Kansas specifically sets forth the applicable factors in Kansas Rule of Professional Conduct (“KRPC”) 1.5. Accordingly, the attorneys’ fees requested herein are reasonable and should be approved.

KRPC 1.5(1): *the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;*

The substantial time devoted to this matter is reasonable in light of the length and complexity of these proceedings. Generally speaking, civil rights litigation is relatively complex.¹⁸ Furthermore, the specialized nature of practice in front of the KGEC requires particular skill and knowledge in administrative law and procedure in conjunction with constitutional standards that relatively few private attorneys in Kansas possess. This case involved constitutional issues, administrative law, as well as Kansas’ PSPA, which is an evolving area of the law. In addition, the current matter is not a standard PSPA action in that it involved an administrative subpoena, a governmental entity with superior resources, required the continuous monitoring of such government entity’s actions, and required research on various

¹⁸ See e.g. Federal Judicial Center, 2003-2004 District Court Case-Weighting Study, at 5 tbl.1 (2005), <https://www.fjc.gov/sites/default/files/2012/CaseWts0.pdf> (last visited Sep. 16, 2016).

novel issues. Furthermore, the impact of this matter in the context of the overall joint defense and the number of parties involved necessitated a large amount of communication and coordination with other counsel as conflicts were identified and addressed.

The associated billing records in this matter are attached hereto as Exhibit A. *See also Footnote 7, Supra.* Defendant's attorneys and paralegals spent 205.5 actual hours on this matter (202.8 in attorney time and 2.7 in paralegal time). This time was actually spent on the litigation performing the tasks described in the description field.

Furthermore, very few attorneys practice in front of the KGEC. Counsel in question have practiced extensively in front of the KGEC over the past 15+ years and is involved in other challenges to Kansas election law and campaign finance law. *See* Affidavit of Ryan Kriegshauser, attached as **Exhibit C** and Affidavit of Josh Ney, attached as **Exhibit D**. Further, counsel in question have been involved with other constitutional challenges in both state and federal court. *Id.* Counsel in question have submitted testimony and acted as expert conferees numerous times in front of the Kansas Legislature, resulting in the passage of various laws involving civil rights, campaign finance, elections, business organizations, securities, criminal law, asset forfeiture, and agency organizations. *Id.* Finally, counsel in question have served as a Kansas state agency head and counsel to various government agencies at the state and local levels. *Id.* This matter necessitated a high level of skill requisite to perform the necessary legal service properly and the counsel in question are uniquely positioned to litigate this matter successfully and navigate the policy issues associated therewith.

KRPC 1.5(2): the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

The counsel in question operate a small boutique law firm (hereinafter, "Kriegshauser Ney Law Group" or the "Firm") that primarily takes matters on at an hourly rate, not

contingency fee cases.¹⁹ The Firm has offices in Topeka, Lawrence, and Olathe, Kansas. Most of the Firm's work occurs in Olathe, Kansas, a suburb of Kansas City where Partner Ryan Kriegshauser works. The Firm currently has two partners, Ryan Kriegshauser and Josh Ney. In addition, the firm has an additional of-counsel attorney, Jonathan Ehrlich. Furthermore, the firm has an associate, Wyatt Hoagland, and a previous associate, Alan Vester, who billed time on the initial objection letter to the 2022 Subpoena. Partner Josh Ney is also the elected County Attorney in Jefferson County, Kansas, and the County Counselor there as well. Given the public and private practice obligations of the Firm's attorneys, its capacity for new cases is extremely limited. *See* Exhibit C and Exhibit D.

For these reasons, the Firm's capacity is very limited, and the Firm is very conscientious about the matters it engages. *Id.* A significant portion of matters that solicit the Firm's services are declined. Furthermore, the Firm's staff support is part-time, further limiting the firm's capacity. *Id.* All time spent on this matter used the finite time available to the Firm to take on other matters, likely at higher rates. *Id.* However, given the important issues at play and the substantial impact of this matter on public policy in the State of Kansas, the Firm was willing to take on this matter to the exclusion of other matters.

KRPC 1.5(3): the fee customarily charged in the locality for similar legal services;

The hourly rates requested for the attorneys and paralegals who performed work on this matter are as follows:

Ryan Kriegshauser (RK)	\$350 in 2022 and \$375 in 2023
Josh Ney (JN)	\$350 in 2022 and \$375 in 2023
Staff and Paralegal Support (Staff)	\$100

¹⁹ The Firm's website is available at www.knlawgroup.com. The information available on the website is incorporated by reference.

These rates reflect the current market rates of the attorneys involved. Missouri Lawyers Media Report on Billing Rates in 2019 is attached hereto as **Exhibit E** (the “Report”). Over five years ago, the Report shows that the attorney range for a partner in Kansas City²⁰ is \$865 to \$195 per hour with a median range of \$475 in 2019. *See* Exhibit E at 3. When factored for inflation, a January 2019 rate of \$865 per hour is \$1,081.79 in August 2024 and a January 2019 rate of \$195 is \$243.87 in August 2024 with a median rate of \$475 per hour in January 2019 being \$594.04 in August of 2024.²¹ The requested top rate of \$375 per hour in 2024 falls below the median rate in 2019 of \$475, despite significant inflation. Additionally, the Report shows that the partner rates in 2018 for Todd Graves is \$575 per hour and Edward Greim was \$460 per hour in the practice of Election Law. When factored for inflation, a January 2018 rate of \$575 is equivalent to \$730.26 in August 2024 and \$460 in 2018 is \$584.21 in August 2024.²² The requested top rate of \$375 per hour in 2024 is less than these rates in 2018 in a similar legal practice area, despite significant inflation. It should be noted that Partner Ryan Kriegshauser worked with and gained experience from these very partners early in his career and the Firm currently has worked as conflict counsel or otherwise on various matters with Graves Garrett where these partners currently practice. While the experience related to the attorneys at issue differ, Graves Garrett and the Firm have overlapping practice areas and thus the rates are somewhat comparable.

Additionally, CLIO, the Firm’s Case Management Software provider, published an article on attorneys’ fees in Kansas, showing that the average fee in Administrative Law in the

²⁰ Most of the Firm’s work occurs in Olathe, Kansas, a suburb of Kansas City.

²¹ *See* Bureau of Labor Statistics Inflation Calculator *available at* <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sep. 17, 2024).

²² *See* Bureau of Labor Statistics Inflation Calculator *available at* <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sep. 17, 2024).

State of Kansas is \$464.²³ Given that this matter involved a specialized aspect of administrative law related to the issuance of an administrative subpoena by the KGEC, the requested top rate of \$375 per hour is less than the statewide average for Administrative Law and is reasonable for the State of Kansas. Furthermore, certain billing entries cut the applicable rate in half for the benefit of the client to lessen the financial impact on the Defendant in this matter. While it is believed that the State of Kansas should not receive the same benefit at the expense of the Firm, these entries were not adjusted further demonstrating that the fees requested are below the fees customarily charged in the locality for similar legal services.

KRPC 1.5(4): the amount involved and the results obtained;

The fees incurred in successfully litigating a Motion to Strike here are in-line at least one other well-known high-profile public successful PSPA case over half a decade ago.²⁴ When indexed for inflation, the requested fees here are less than the amount sought in 2019 for a high-profile PSPA Case although the case in 2019 did not involve a government agency with its resources.²⁵

Here, the amount involved was the actual amount of fees paid by the Defendant. Based on the purpose of the PSPA, “costs of litigation and reasonable attorneys’ fees” shall be paid if the moving party prevails on a Motion to Strike under the PSPA. K.S.A. 60-5320(g). Because the Motion to Strike was granted, the amount is appropriate under the PSPA for the result obtained

²³ See “How Much should I Charge as a Lawyer in Kansas,” *CLIO* available at <https://www.clio.com/resources/legal-trends/compare-lawyer-rates/ks/> (last visited Sep. 17, 2024).

²⁴ See e.g. Dan Margolies, “Overland Park Sen. Denning may have to pay \$90,000 after Losing Defamation Suit, *KCUR* (July 31, 2019) available at <https://www.kcur.org/politics-elections-and-government/2019-07-31/overland-park-sen-denning-may-have-to-pay-90-000-after-losing-defamation-suit> (last accessed Sep. 16, 2024) see also Katie Bernard, “Kansas Lawmaker Ordered to pay the Star Thousands in Legal Fees for Dismissed Lawsuit” *The Kansas City Star* (Oct. 31, 2019) available at <https://www.kansascity.com/news/politics-government/article236857208.html> (last accessed October 31, 2019) (reported that the Court ultimately awarded approximately \$63,000 in fees).

²⁵ \$63,000 in October 2019 equates to \$77,064.14 in August 2024 see Bureau of Labor Statistics Inflation Calculator available at <https://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Sep. 17, 2024).

based on the language of the PSPA. *See* K.S.A. 60-5320(g). Such amount is to be paid by an agency of the State of Kansas which collects fees and receives appropriations from the Legislature. Accordingly, such amount is not unduly burdensome given that it is to be paid by an agency of the State of Kansas backed by the full faith and credit of the State of Kansas. On the other hand, the Defendant in this matter has finite resources in comparison to the State of Kansas so it is not unreasonable that such amount be repaid given the result obtained under the PSPA.

KRPC 1.5(5): the time limitations imposed by the client or by the circumstances;

The PSPA has specific timelines associated with it and the filing of the Motion to Strike. *See generally* K.S.A. 60-5320. Accordingly, actions under the PSPA can move at a quick pace. Given the limited capacity of time available to the Firm, the filings in this matter were constrained by both time and the resources available leading up to and during multiple Legislative sessions and election seasons (the Firm has many clients involved in the legislative process and elections in Kansas). On the other hand, the KGEC had superior resources as a government agency with full time staff.

Looking at the underlying investigation globally, there has been significant time and resource constraints present in the subpoena defense across all of the Firm's clients and the timelines involved given the incredible breadth of subpoenas at issue. Significant time was required to review potential conflicts, find and refer conflicts counsel, examine potential for conflict waivers, organize a joint defense among numerous parties, analyze novel legal theories, and document review in response to stunningly broad subpoenas.

KRPC 1.5(7): the experience, reputation, and ability of the lawyer or lawyers performing the Services;

As evidenced by Exhibits C and D along with their attachments, which are incorporated herein by reference, counsel in question in this matter have been involved in numerous high-

profile matters that have generated a significant amount of media attention over their legal careers. *See* Exhibit C and D. A 2020 Kansas City Star Editorial noted Ryan Kriegshauser’s “remarkable success” in “challenging government decisions.”²⁶ *Id.* The counsel in question have over a decade of combined experience practicing administratively in front of the KGEC and challenging aspects of Kansas law related to the KGEC. *Id.* In addition, the counsel in question have been involved in numerous jury trials—one of which resulted in counsel securing numerous acquittals and a dismissal for a client in federal court in a case involving alleged Kansas campaign finance violations. *Id.* The counsel in question have been involved in multiple successful constitutional challenges—one of which resulted in a multi-million dollar benefit to the settlement class. *Id.* It should also be noted that based on the counsel in question’s reputation and experience, the Firm was awarded a contract with the State of Kansas in 2020 to perform services on behalf of the State of Kansas at rates of \$300 an hour to \$400 per hour during the four-year contract period ending in November 2024.²⁷ Given that the top requested rate herein is lower than the top rate for 2024 in the contract, it further demonstrates that the attorneys’ fees rates requested are reasonable. In light of the information contained herein and in Exhibits C and D along with their attachments, the hourly fee below-median market rate requested by the Defendant is reasonable given the counsel in question’s experience, reputation, and ability.

KRPC 1.5(8): whether the fee is fixed or contingent;

While this matter was litigated on an hourly basis, the fees associated herewith involved various discounts by the attorneys to lessen the financial impact to the Defendant. However, as

²⁶ *See* Kansas City Star Editorial Board, “Why did Blue Valley School Board Pass the Buck on Secretive Reopening Decision,” *The Kansas City Star* (Sep. 2, 2020) available at <https://www.kansascity.com/opinion/editorials/article245429955.html> (last visited Sep. 17, 2024).

²⁷ *See* Kansas Department of Administration, Event ID: EVT0007718, Contract ID 0049847 at 50 available at https://supplier.sok.ks.gov/psp/sokfsprdsup/SUPPLIER/ERP/c/KS_SUPPLIER_MENU.KS_PROCR_CNTRCT.GBL (last visited Sep. 17, 2024).

with contingency fee cases, this matter continues to proceed with a level of risk associated with the litigation, particularly as it relates to the overall investigation. Numerous subpoenaed parties have little resources to contribute to the combined joint defense but have been able to take advantage of the joint defense by shouldering only a fraction of the associated fees. Overall, the Firm sustains the risk of providing the joint defense with the possibility of not being fully paid for its services. After all, attorneys' fees and sanctions in this matter have not been a foregone conclusion; however, this Motion submits that the assessment of fees and sanctions against the KGEC is reasonable and needed to deter similar conduct in the future. The same is true as to the Defendant given the resources involved and the potential the public exposure of this litigation could affect access to additional resources. Accordingly, the hourly fee charged thus far should not be considered to be completely without risk to the Firm, particularly as this matter proceeds to a possible appeal.

Although counsel in question does not request that the Court assess current market rates in this matter, it is submitted that the current market rate of \$400 per hour for both Josh Ney and Ryan Kriegshauser without the various discounts applied would also be reasonable given the information contained herein. Applying current market rates without any discounts would result in \$82,470 being assessed against the Plaintiff in its official capacity. Accordingly, the Defendant reserves the right to seek the current market rate for the time submitted on this matter at the ultimate conclusion of this litigation after any and all appeals are fully exhausted and if fees are ultimately awarded. Nothing in this memorandum should be construed as limiting Defendant's right to request higher rates in the future so long as such rates are reasonable.

Conclusion

Given the foregoing and as stated in the briefing associated with the Motion to Strike, the attorneys' fee amount requested herein is reasonable under the PSPA and should be APPROVED by the Court. Additionally, the sanctions requested are appropriate under the PSPA and should be APPROVED to deter future similar conduct from a governmental agency.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I filed the foregoing with the Clerk of the Court and have provided electronic mail copies of the filing to counsel of record:

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To the extent requested by the above counsel, paper copies will be served via U.S. Mail, postage prepaid to:

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