**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

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| KANSANS FOR CONSTITUTIONAL FREEDOM,<br><br>Plaintiff,<br><br>v.<br><br>KRIS KOBACH, et al.,<br><br>Defendants. | No. 2:25-cv-02265-DDC-GEB<br><br>**ORAL ARGUMENT REQUESTED** |

**MOTION FOR PRELIMINARY INJUNCTION**

**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

**Statutes**



**Regulations**



**Other Authorities**

## INTRODUCTION

The First Amendment is meant to ensure that the government does not interfere with unfettered and robust debate about public policy. House Bill 2106 ("HB2106")—which will become effective on July 1, 2025—directly threatens Plaintiff Kansans for Constitutional Freedom ("KCF")'s ability to engage in that debate. While proponents claimed it was intended to limit the influence of "foreign interests" on voters, as enacted HB2106 severely infringes on the speech rights of *citizens*, including KCF, a domestic, Kansas-based organization. Indeed, several of HB2106's proponents made plain that muting the speech of KCF—which effectively advocated against the legislature's attempt to eliminate abortion protections from the Kansas Constitution in 2022—was one of HB2106's primary goals. And HB2106's plain text achieves this: it will *silence* KCF's and other U.S. speakers' ballot issue related speech, severely burden their associational rights, and is also unconstitutionally overbroad, hopelessly vague, and violative of due process. Thus, regardless of whether Kansas theoretically could silence certain foreign speakers consistent with the U.S. Constitution, HB2106 cannot survive scrutiny. A preliminary injunction is necessary to protect against severe, imminent and irreparable harm.[1]

## BACKGROUND

In 2022, KCF mounted a herculean advocacy campaign to defeat a proposed amendment to the Kansas Constitution that would have revised it to state that it "does not require government funding of abortion and does not create or secure a right to abortion" (the "2022 Amendment"). *See* Ex. A, Decl. of Micah Kubic ¶¶4-8 ("Kubic Decl."). KCF's effort was supported by a broad coalition of individual and organizational donors, including residents of 80 of Kansas's 105

[1] The text of HB2106 is attached to the complaint. *See* ECF No. 1-1. All citations to K.S.A. §25-4180 refer to the text of that section of the Kansas Statutes as amended by HB2106.

counties. *Id.* ¶6. Much of KCF's advocacy consisted of one-on-one conversations with voters, both to educate them and to respond to misinformation spread by the Amendment's proponents. *See id.* ¶7. Ultimately, the voters rejected the measure at the ballot box. *Id.* ¶8.

HB2106 is a direct response to KCF's 2022 advocacy efforts. In support, bill proponents cited KCF's success in defeating the 2022 Amendment, attributing it to "foreign-backed funds." Ex. B, Written Testimony of Ams. for Public Trust (Feb. 26, 2025); *see* Ex. C, Written Testimony of Honest Elections Proj. (Feb. 26, 2025); Ex. D, Email of Rep. Pat Proctor, at 7 (May 3, 2025). Yet, through a series of often inscrutable, overbroad, and overlapping provisions, HB2106 broadly quashes speech and associational rights of *citizen* speakers and *domestic* organizations.

*First*, as amended by HB2106, K.S.A. §25-4180(d)(1) makes it a crime for any person to "accept, directly or indirectly, any contribution or expenditure from a foreign national made for any activity promoting or opposing the adoption or repeal of any provision of the constitution of the state of Kansas." It authorizes the attorney general to "prosecute" any person who violates this prohibition, and allows "[a]ny person who believes" it has been violated to "file a complaint with the attorney general." *Id.* §25-4180(d)(2). It also authorizes the attorney general or the Kansas Governmental Ethics Commission to bring a civil action for an injunction and statutory damages against any alleged violator. *Id.* §25-4180(d)(3).[2]

*Second*, K.S.A. §25-4180(a), as amended by HB2106, requires that "[e]very person" who "engages in any activity promoting or opposing the adoption or repeal of any provision of the" Kansas Constitution and "accepts moneys or property for the purpose of engaging in such activity"

[2] HB2106's definition of "foreign national" is not limited to foreign governments or their subsidiaries, foreign nationals situated abroad with little to no connection to the U.S., or foreign corporations. *But see Citizens United v. FEC*, 558 U.S. 310, 362 (2010). Instead, HB2106's definition of foreign national reaches many who are lawfully residing in the U.S. (*e.g.*, pursuant to student or work visas). K.S.A. §25-4180(e).

must make an "annual report" to the Secretary of State identifying each person who contributed in excess of $50 in value in the preceding calendar year "for such purposes." In that report, they must certify that (1) they have "not knowingly accepted contributions or expenditures either directly or indirectly from a foreign national" *and* (2) "each donor named in such report is not a foreign national and has not knowingly accepted contributions or expenditures either directly or indirectly from any foreign national that in the aggregate exceed $100,000 within the four-year period immediately preceding the date of such donor's contribution or expenditure." *Id.* Intentional failure to file this report is a misdemeanor. *Id.* §25-4180(i). To effectuate this, K.S.A. §25-4180(b) requires anyone who accepts contributions and expenditures as described in (a) to "require each donor to certify that such donor is not a foreign national and has not knowingly accepted contributions or expenditures either directly or indirectly from any foreign national that in the aggregate exceed $100,000 within the four-year period immediately preceding the date of such donor's contribution or expenditure." *Id.* §25-4180(b).

*Third*, K.S.A. §25-4180(c) requires any person making an independent expenditure for or against an amendment to certify within 48 hours that they have not knowingly accepted more than $100,000 directly or indirectly from a foreign national within the previous four years, and that they will not accept any amount of funding from a foreign national for the rest of the year. The provision applies to money received for any purpose. *Compare* K.S.A. §25-4180(d)(1) (containing a purpose requirement), *with* K.S.A. §25-4180(c) (containing no such requirement).

In sum, HB2106 effectively bans the following persons or groups from engaging in "any activity promoting or opposing" a constitutional amendment: (1) *any* individual or organization that has knowingly accepted *any* contributions "directly or indirectly" from any foreign national, for *any* purpose, in *any* amount, and without *any* time limitations; and (2) *any* individual or

organization that has received contributions for the purpose of promoting or opposing a constitutional amendment from *any* individual or organization that itself has knowingly accepted, "directly or indirectly" more than $100,000 from foreign nationals—for *any* purpose—in the preceding four years. In addition, HB2106 bans any individual or organization from making *any* "independent expenditure" for "any activity promoting or opposing" a constitutional amendment if they knowingly accepted more than $100,000 from foreign nationals in the previous four years (again for *any* purpose) or if they intend to accept *any* amount of money from a foreign national before the end of the calendar year, for *any* purpose.

HB2106 becomes effective on July 1, 2025. The Governor declined to sign it, explaining: "I cannot sign a bill that takes away the ability of Kansans and Kansas businesses to support elections if they accept money from overseas for any purpose, not just those related to elections. Forcing Kansans to choose between accepting financial support for any reason or surrendering their voice in the political process is wrong." Ex. E, Press Release, Off. of the Gov., *Gov. Kelly Vetoes Two Bills, Allows Three to Become Law Without Signature* (Mar. 31, 2025).

HB2106 will severely, imminently, and irreparably curtail KCF's speech and associational activities. KCF plans to oppose Senate Concurrent Resolution ("SCR") 1611, a proposed constitutional amendment referred by the legislature that would dramatically alter the judicial selection process in Kansas. Ex. A, Kubic Decl. ¶¶11-12. It will be voted on in a special election next year. To be effective, KCF must start preparing to engage in this advocacy now. *Id*. ¶12. But KCF cannot make the certifications HB2106 requires. *Id*. ¶¶13-14. HB2106 thus bars it from engaging in its planned advocacy to educate Kansas voters about these important policy issues.

## LEGAL STANDARD

A plaintiff seeking a preliminary injunction must show that four factors weigh in its favor: (1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest. *Awad v. Ziriax*, 670 F.3d 1111, 1125 (10th Cir. 2012).

## ARGUMENT

HB2106's restrictions are unconstitutional. More than 50 years ago, the Supreme Court recognized that spending to influence the vote on a question submitted directly to the voters is speech "at the heart of the First Amendment's protection." *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978). The Court has further held that (1) the only legitimate interest that the government may have in restricting political speech is to prevent *quid pro quo* corruption or its appearance, *FEC v. Cruz*, 596 U.S. 289, 305 (2022), and (2) the risk of such corruption simply is not present in the context of a vote on a ballot issue, *Citizens Against Rent Control/Coal. For Fair Hous. v. City of Berkeley*, 454 U.S. 290, 299 (1981). Accordingly, HB2106 cannot stand.

Nor can the State rely on an ostensible interest in preventing its citizens from hearing speech from State-disfavored speakers, even if they are foreign nationals. Time and again, the Supreme Court has made clear that the government lacks any legitimate interest in picking and choosing the issue advocacy that its citizens are allowed to hear. But even if the State could rely on such an interest, HB2106 is not sufficiently tailored. To the contrary, HB2106's plain text targets the speech of citizens and domestic organizations who associate with foreign nationals, even when that association has nothing to do with the advocacy at issue. Even worse, HB2106 requires citizens and domestic organizations wishing to engage in issue advocacy to first make

certifications that many will not be able to make and to further obtain certifications from their donors that they may be unwilling or unable to make. Thus, HB2106 threatens to quash the speech even of U.S. speakers who have no actual association with foreign nationals, but simply cannot convince their donors to provide the assurances that HB2106 requires to engage in the targeted speech. Nor do HB2106's constitutional flaws end there. The statute is hopelessly vague, vastly overbroad, fails to include a constitutionally required, heightened *mens rea* element, and improperly imposes retroactive punishment on conduct that was entirely lawful when it occurred.

KCF is highly likely to succeed on the merits and an injunction is needed to avoid severe, irreparable harm of the most fundamental constitutional magnitude. The other preliminary injunction factors are also strongly in KCF's favor. It is not a close question, but if it were, "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 474 (2007) (Op. of Roberts, C.J.). Enjoining HB2106 is necessary to enforce the basic guarantee of the First Amendment: ensuring access to "the widest possible dissemination of information from diverse and antagonistic sources," *Citizens Against Rent Control*, 454 U.S. at 295, and allowing for the "unfettered interchange of ideas" that is crucial for "the bringing about of political and social changes desired by the people." *Id.* at 295-96.

## I. KCF is likely to succeed on its claims under the First and Fourteenth Amendments.

HB2106 operates as a direct prohibition on speech and association, barring those who have accepted funds from foreign nationals from engaging in pure issue advocacy. That speech is "at the heart of the First Amendment's protection." *Bellotti*, 435 U.S. at 776. Because HB2106 directly infringes on core First Amendment rights, it is subject to strict scrutiny. It cannot survive.

### A. HB2106 is subject to strict scrutiny.

HB2106 is subject to strict scrutiny for three independent reasons. *First*, "[l]aws that burden political speech are subject to strict scrutiny," *Citizens United*, 558 U.S. at 340 (quotation

marks omitted); *see also Chandler v. City of Arvada*, 292 F.3d 1236, 1241–42 (10th Cir. 2002). HB2106 directly targets advocacy for or against constitutional amendments on the ballot, an area where "First Amendment protection is at its zenith." *Buckley v. Am. Const. L. Found. Inc.*, 525 U.S. 182, 183 (1999) (cleaned up); *see also Grant v. Meyer*, 828 F.2d 1446, 1452 (10th Cir. 1987), *aff'd*, 486 U.S. 414 (1988) ("Restrictions on financing of campaigns for ballot measures … are suspect and subject to strict scrutiny.").

*Second*, HB2106 distinguishes speech based on content, and content-based laws are subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015). "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 163. HB2106's restrictions apply only to speech that promotes or opposes amendments to the Kansas Constitution. K.S.A. §25-4180(a)–(d); *see Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619 (2020) (plurality op.) ("A law banning … political speech—and only political speech—would be a content-based regulation." (cleaned up)); *Day v. Holahan*, 34 F.3d 1356, 1360–61 (8th Cir. 1994).

*Third*, HB2106 triggers strict scrutiny because it infringes on KCF's associational rights. *See, e.g.*, *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *see also Buckley*, 424 U.S. at 22 (observing that political spending "enables like-minded persons to pool their resources in furtherance of common political goals"). HB2106 broadly prohibits KCF from freely associating with noncitizens through its certification requirements that bar speech by persons who accept covered contributions from foreign nationals, its imposition of criminal and civil liability on persons who accept funds from foreign nationals, and the threat of investigation. K.S.A. §25-4180(a)–(d); *see Ams. for Prosperity Found. v. Bonta*, 594 U.S. 595, 610 (2021) ("When it comes to a person's … associations, broad and sweeping state inquiries into these protected areas

discourage citizens from exercising rights protected by the Constitution." (cleaned up)). Those burdens themselves trigger strict scrutiny. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000).

**B. HB2106 cannot survive strict scrutiny.**

Laws subject to strict scrutiny are "presumptively unconstitutional," *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1227 (10th Cir. 2021), and may be upheld only if they are "narrowly tailored to serve a compelling state interest," *Yes On Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008). The State must prove the law satisfies that review. *Id.* In another case involving restrictions on ballot-issue advocacy, a unanimous Supreme Court observed that when, as here, "the statute trenches upon an area in which the importance of First Amendment protections is 'at its zenith,' … the burden that [the State] must overcome … is well-nigh insurmountable." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). HB2106 fails both parts of strict scrutiny review: it is neither justified by a compelling government interest, nor is it narrowly tailored.

**Lack of Compelling Interest.** The Supreme Court "has recognized only one permissible ground for restricting political speech: the prevention of '*quid pro quo*' corruption or its appearance." *Cruz*, 596 U.S. at 305; *see also Buckley*, 424 U.S. at 26–27; *Republican Party of New Mexico v. King*, 741 F.3d 1089, 1094 (10th Cir. 2013). It has also held that "[t]he risk of corruption perceived in cases involving candidate elections *simply is not present* in a popular vote on a public issue." *Bellotti*, 435 U.S. at 790 (citations omitted, emphasis added); *accord Citizens Against Rent Control*, 454 U.S. at 299 ("[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure."); *Sampson v. Buescher*, 625 F.3d 1247, 1255 (10th Cir. 2010). Thus, by restricting issue advocacy alone, HB2106 is unconstitutional.

Proponents of HB2106 nonetheless argued that its restrictions were justified to limit the influence of foreign nationals on the State's constitutional amendment process. To be sure, courts have held that certain limited restrictions on *candidate*-related political spending could be justified

on similar grounds. *Bluman v. FEC*, 800 F. Supp. 2d 281, 287 (D.D.C. 2011) (Kavanaugh, J.), *aff'd*, 565 U.S. 1104 (2012). But in so holding, the *Bluman* court repeatedly and explicitly warned that restrictions on *foreign citizens' issue-related* advocacy would raise different constitutional questions, and that its decision *should not be read to support such restrictions*. *See id*. at 292. Moreover, the Supreme Court *rejected* the argument that concerns about foreign influence could justify restrictions in *even the candidate-related context* where those restrictions were not limited to entities created in foreign countries or funded predominately by foreign shareholders. *Citizens United*, 558 U.S. at 362. This is consistent with the Court's longstanding recognition that persons with close ties to the U.S. have First Amendment protections. *See Bridges v. Wixon*, 326 U.S. 135, 148 (1945) ("Freedom of speech and of press is accorded aliens residing in this country.").[3]

But this Court does not need to decide whether Kansas could constitutionally restrict the issue advocacy of the broad swath of "foreign nationals" that come within HB2106's definition, because the law impedes the First Amendment rights of *citizens and entirely domestic organizations like KCF*, both because it restricts their speech and associational rights, *see supra* at 2–4, and because it limits what U.S. citizens may hear in the debate over issues of public policy. The proposition that Kansas could have a compelling interest in "protecting" its citizens from certain types of political speech flatly contradicts the First Amendment's foundational principles: "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind," *Grant*, 828 F.2d at 1455 (quoting *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)), thus "[t]he First Amendment rejects the 'highly

[3] Recently, a Sixth Circuit motions panel read *Bluman* to allow for restrictions on ballot-issue speech of legal permanent residents and other foreign nationals legally present in the U.S., *see OPAWL – Building AAPI Feminist Leadership v. Yost*, 118 F.4th 770, 777–78 (6th Cir. 2024), but in doing so, the panel approved of the very restrictions that *Bluman* made clear it was not endorsing and squarely contradicted the herein-described decades of Supreme Court precedent.

paternalistic' approach of statutes … which restrict what the people may hear." *Bellotti*, 435 U.S. at 791 n.31 (quoting *Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976)). It is "the people in our democracy [who] are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791; *accord Citizens United*, 558 U.S. at 341 ("[V]oters must be free to obtain information from diverse sources in order to determine how to cast their votes."). Similarly, "the fact that advocacy may persuade the electorate is hardly a reason to suppress it." *Bellotti*, 435 U.S. at 790; *see Brown v. Hartlage*, 456 U.S. 45, 60 (1982) ("The State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech."). Kansas' paternalistic desire to prevent its citizens from hearing speech from a State-disfavored source cannot be a compelling interest.

**Narrow Tailoring.** Even if Kansas had a compelling interest in HB2106's restrictions, it separately fails strict scrutiny because it is not narrowly tailored to achieve its purported aim. Not even close. "Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—because First Amendment freedoms need breathing space to survive." *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1248 (10th Cir. 2023) ("*WyGO*") (quoting *Bonta*, 594 U.S. at 609) (cleaned up); *id.* at 1247 ("Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). The Court thus considers whether the law regulates too much speech (*i.e.*, is it "overinclusive") or if it fails to regulate other speech that would serve the state's purported interest (*i.e.*, is it "underinclusive"). *See, e.g.*, *Bellotti*, 435 U.S. at 793. A statute must be the "least restrictive means among available, effective alternatives." *Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). The purpose of this test "is to ensure that speech is restricted no further than necessary to achieve the [state's]

goal, for it is important to ensure that legitimate speech is not chilled or punished." *Id.* It imposes a "heavy burden" that "lies with the government." *Peck v. McCann*, 43 F.4th 1116, 1135 (10th Cir. 2022). If Kansas truly did wish to limit the influence of foreign interests on its constitutional amendment process, it should have enacted a law that was closely targeted to that goal. HB2106 is not.

*First*, HB2106 is breathtakingly overinclusive. Under a plain reading of the law, if a U.S. entity accepts contributions from U.S. citizens to support or oppose a Kansas constitutional amendment, and then takes even a single dollar from a foreign national—for any purpose—the entity will not be able to make the certification required by K.S.A. §25-4180(a)(1) and will be barred from "engag[ing] in any activity promoting or opposing" a Kansas constitutional amendment. K.S.A. §25-4180(a). That draconian penalty, removing the right to engage in political speech "at the heart of the First Amendment's protection," *Bellotti*, 435 U.S. at 776, sweeps in an extraordinarily disproportionate amount of speech to further the state's purported interest. Its practical effect will be to prohibit not just KCF but innumerable civil society organizations from speaking for or against a constitutional amendment. For example, if a church engages in "any activity" promoting or opposing a constitutional amendment, and if it accepted even $1 for that purpose—from any source, whether from a U.S. citizen or not—the church would be required to submit the report currently required by subsection (a). K.S.A. §25-4180(a). And if HB2106 goes into effect, the church would then be required to certify that it has not knowingly accepted any contributions directly or indirectly from any foreign national. *Id.* §25-4180(a)(1). But because subsection (a)(1) applies to contributions made for *any* purpose (not just constitutional amendment advocacy), a church that circulated its weekly collection basket to any foreign national could not make the certification required by subsection (a)(1), and therefore could not engage in any activity

supporting or opposing a constitutional amendment without risking criminal prosecution, *see id.* §25-4180(i). Any other civil society organization that engages in activities supporting or opposing a constitutional amendment and accepts money to do so (even if such advocacy makes up a minimal portion of the organization's overall activities) also would be silenced if they receive *any* contribution from a foreign national, even when received for some purpose besides ballot-issue advocacy.

HB2106's other provisions extend the statute's overreach. Subsection (a)(2) is even more tenuously connected to the State's purported interest in restricting foreign national influence: it bars U.S. citizens and organizations from engaging in any constitutional advocacy if their *donors* received ("directly or indirectly") more than $100,000 over a four-year period from any foreign national—even if the donors received that money for some purpose entirely unrelated to a Kansas constitutional amendment. K.S.A. §25-4180(a)(2). Subsection (c) prohibits persons from making any independent expenditure in support of or against a constitutional amendment if the person has accepted more than $100,000 in the past four years from any foreign national—for any purpose, not just for constitutional advocacy, and whether or not it was received "directly or indirectly"—and then prohibits that person from accepting even $1 more from a foreign national for the rest of calendar year (again, for any purpose). K.S.A. §25-4180(c). That provision would prohibit not just KCF but innumerable civil society organizations (ranging from churches, veterans' groups, labor unions, homeowners' associations, or organizations like the ACLU) from making any independent expenditures on behalf of or against a constitutional amendment. It also would prohibit someone who was employed by a foreign company (or in some circumstances, a U.S. company that is majority-owned by a foreign national), *see id.* §25-4180(e), from engaging in any spending in support of or against a constitutional amendment.

Subsection (d)—which imposes *criminal* penalties—similarly is overbroad in that it prohibits any person from accepting *any* contribution or expenditure from a foreign national for purposes of promoting or opposing a constitutional amendment, thereby making it a crime for a U.S. citizen or entity to accept even a small amount of money from a like-minded foreign national that could have no possible effect on the content of the citizen's speech, and therefore no meaningful influence on the process of amending the Kansas Constitution. Subsection (d)—along with HB2106's other provisions—will also limit KCF's and other entities' ability to solicit funding from potential donors, thereby reducing KCF's and other U.S. speakers' ability to distribute their message as widely as possible. *See* Ex. A, Kubic Decl. ¶15.

*Second*, HB2106 is critically underinclusive. "A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Reed*, 576 U.S. at 172 (cleaned up). Most glaringly, although HB2106 is ostensibly directed toward "foreign" influence, it does not explicitly prohibit *foreign nationals themselves* from engaging in their own, direct spending to support or oppose a constitutional amendment. For example, while HB2106 would prohibit a U.S. citizen from accepting a contribution from a foreign national "for the purpose of" purchasing an advertisement opposing a proposed constitutional amendment, it does not prohibit that *same* foreign national from directly purchasing the advertisement himself, so long as he does not accept funds from other foreign nationals. K.S.A. §25-4180. And while HB2106 purportedly seeks to prevent foreign nationals from influencing Kansas *voters* in how they may vote on a proposed constitutional amendment at the ballot, Kansas law contains no provision prohibiting foreign nationals from lobbying Kansas *legislators*. In *Bellotti*, the Supreme Court noted the same

differential treatment when it expressed doubt on a State's purported interest in banning corporate spending on proposed constitutional amendments and held the ban unlawful. 435 U.S. at 791 n.31.

*Finally*, Kansas cannot possibly show that HB2106 is the least restrictive means to accomplish its ostensible objective in limiting foreign influence. *See Ashcroft*, 542 U.S. at 665. Rather than enacting a blanket prohibition on the speech of U.S. citizens or entities who accept any amount of funds from a foreign national, Kansas could have instead modeled a law off an existing federal regulation that is focused directly on foreign influence in elections:

> A foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person … with regard to such persons' Federal or non-Federal election-related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any Federal, State, or local office or decisions concerning the administration of a political committee.

11 C.F.R. §110.20(i).[4] Whether or not an analogous regulation would itself be constitutional in the ballot issue context (particularly with respect to foreign nationals with close ties to the U.S.), there is no question that it would more directly target the State's purported concern with foreign influence but not completely silence many U.S. speakers' speech in the process. It therefore would be less restrictive. Another federal court recently noted the same in enjoining a state statute restricting the speech of corporations that were partially owned by foreign nationals. *Minn. Chamber of Com. v. Choi*, 707 F. Supp. 3d 846, 864 (D. Minn. 2023).

[4] This C.F.R. does not reach issue advocacy like the advocacy targeted by HB2106. The Federal Election Campaign Act "regulates only candidate elections, not referenda or other issue-based ballot measures." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995); *see* FEC Advisory Op. 2024-05 (May 1, 2024). Regulations promulgated under that statute, such as 11 C.F.R. §110.20(i), also do not reach ballot referenda issues.

### C. HB2106 independently violates the First Amendment by imposing liability for speech without an appropriate *mens rea* requirement.

"Prohibitions on speech have the potential to chill, or deter, speech outside their boundaries." *Counterman v. Colorado*, 600 U.S. 66, 75 (2023). This is because a speaker "may be unsure about the side of a line on which his speech falls," "worry that the legal system will err, and count speech that is permissible as instead not," or "may simply be concerned about the expense of becoming entangled in the legal system." *Id.* "The result is 'self-censorship' of speech that could not be proscribed." *Id.* As a result, the Supreme Court has frequently held that the government may impose civil or criminal liability on speech only if liability is "condition[ed] … on the State's showing of a culpable mental state." *Id.*; *see also id.* at 76–77 (discussing examples).

The level of culpability that the First Amendment requires depends on a balance that considers "the constitutional interest in free expression, and on the correlative need to take into account … prosecutions' chilling effects," and "the competing value in regulating historically unprotected expression." *Id.* at 79–80 (cleaned up). The key question is how close the "protected speech" that is likely to be chilled is "from the First Amendment's central concerns." *Id.* at 81. The Court's treatment of speech that qualifies as "incitement" is instructive. Despite being historically unprotected, the Court has recognized that "incitement to disorder is commonly a hair's-breadth away from political 'advocacy,'" and that the threat that one may be penalized for speech so close to the core of what the First Amendment protects itself requires that the government be able to show that the speaker acted with "specific intent, presumably equivalent to purpose or knowledge," before imposing liability for incitement. *Id.* This is at the top of the hierarchy of possible culpable mental states and is necessary "to ensure that efforts to prosecute incitement would not bleed over, either directly or through a chilling effect, to dissenting political speech," which is "at the First Amendment's core." *Id.* at 81; *see also id*. 78–79 & n.5.

The speech targeted by HB2106 is not just a "hair's breadth away" from advocacy—it *is* political advocacy. *See Citizens Against Rent Control*, 454 U.S. at 298. Consequently, Kansas may not impose civil or criminal liability for spending related to constitutional ballot issue advocacy without requiring proof of a mental state of "purpose or knowledge." *Counterman*, 600 U.S. at 81. But while many of the subsections that HB2106 added to K.S.A. §25-4180 contain an explicit requirement of "knowledge" in their operative provisions, *see* K.S.A. §25-4180(a)(1) (containing a "knowingly" element); *id.* (a)(2) (same); *id.* (b) (same); *id.* (c) (same), K.S.A. §25-4180(d) does not contain *any* requirement of proof of mental state, despite imposing both civil and criminal liability. K.S.A. §25-4180(d)(1) ("No person shall accept, directly or indirectly, any contribution or expenditure from a foreign national made for any activity promoting or opposing the adoption or repeal of any provision of the constitution of the state of Kansas."). This can only mean that the legislature did not intend K.S.A. §25-4180(d) to require proof of any particular mental state. *See City & Cnty. of S.F. v. EPA*, 604 U.S. ----, 145 S. Ct. 704, 713–14 (2025) ("Where [the legislature] includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislature] acts intentionally and purposely in the disparate inclusion or exclusion."). As a result, K.S.A. §25-4180(d) cannot withstand scrutiny.

**D. HB2106 is unconstitutionally overbroad and vague.**

Even if Kansas could constitutionally proscribe some amount of speech by foreign nationals related to constitutional amendments, HB2106 is so imprecise that it prohibits far more than may be constitutionally permissible, fails to give notice of what it prohibits, or both. "[I]mprecise laws can be attacked on their face under two different doctrines." *City of Chicago v. Morales*, 527 U.S. 41, 52 (1999). The overbreadth doctrine "permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when 'judged in relation to the statute's plainly legitimate sweep.'" *Id.* (quoting

*Broadrick v. Oklahoma*, 413 U.S. 601, 612–15 (1973)). But "even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests." *Id*. Many of HB2106's provisions are so imprecise as to be unconstitutionally vague. But a plain-text construction of the statute, to the extent one is available, renders it substantially overbroad.

**1. HB2106 is unconstitutionally overbroad.**

"[A] statute is facially invalid if it prohibits a substantial amount of protected speech." *United States v. Williams*, 553 U.S. 285, 292 (2008). That is because "the threat of enforcement of an overbroad law deters people from engaging in constitutionally protected speech, inhibiting the free exchange of ideas." *Id.* Even if a law is constitutional in some of its applications, it is facially unconstitutional if it is substantially overbroad relative to its "plainly legitimate sweep." *Id.*

Construed according to its plain text, HB2106 proscribes vast amounts of protected speech *of U.S. citizens*—which Kansas has no legitimate interest in proscribing. HB2106 imposes a complete bar on speech of U.S. citizens who have *ever* knowingly accepted *any* "contributions or expenditures" from a foreign national for *any purpose*, as well as U.S. citizens whose *donors* have accepted more than $100,000 from any foreign national in the preceding four years. K.S.A. §25-4180(a). The restriction on independent expenditures is even broader, applying to U.S. citizens who have knowingly accepted $100,000 in "moneys" from foreign nationals during the last four years, or who will accept *any* amount of "moneys" for the remainder of the calendar year. *Id.* §25-4180(c). And subsection (d) *criminalizes* the acceptance of even $1, "directly or indirectly" from any foreign national made for any activity promoting or opposing the adoption or repeal of any provision of the Kansas Constitution. For the same reasons HB2106 fails narrow tailoring, *see supra* at 10–13, it sweeps far beyond any legitimate bounds and fails the overbreadth doctrine. As

Governor Kelly explained, HB2106 "takes away the ability of Kansans and Kansas businesses to support elections if they accept money from overseas for any purpose, not just those related to elections. Forcing Kansans to choose between accepting financial support for any reason or surrendering their voice in the political process is wrong." Ex. E.

**2. HB2106 is unconstitutionally vague.**

HB2106 is also invalid, facially and as applied, because multiple of its provisions are unconstitutionally vague in violation of due process. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute may be unconstitutionally vague either because "it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits," or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000). "[W]hen a 'law interferes with the right of free speech or of association, a more stringent vagueness test should apply." *WyGO*, 83 F.4th at 1234 (quoting *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982)); *see also Smith v. Goguen*, 415 U.S. 566, 573 (1974). This is because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (cleaned up). The text of HB2106 is rife with such "uncertain meanings."

*First*, the terms "contribution" or "expenditure" are not defined by HB2106, and the definitions of "contribution" and "expenditure" for purposes of the Kansas campaign finance act, of which K.S.A. §25-4180 is a part, are explicitly limited to contributions and expenditures "for the purpose of nominating, electing or defeating a clearly identified candidate for a state or local office." K.S.A. §25-4143(f), (h). That definition makes no sense when applied to "contributions" and "expenditures" in K.S.A. §25-4180, which deals exclusively with elections to approve or reject

constitutional amendments. What do these terms mean? Either (1) they refer to *all* contributions and expenditures, for whatever purpose, in which case the law is overbroad for the reasons explained above, or (2) there is some unspoken, hidden limitation on the types of contributions and expenditures that trigger HB2106's onerous requirements, in which case the law both fails to place the public on notice of what it prohibits, and invites arbitrary enforcement.

In *Buckley v. Valeo*, the Supreme Court held that the Federal Election Campaign Act's definition of covered "contributions" and "expenditures" as those made "for the purpose of influencing" an election "raise[d] serious problems of vagueness." 424 U.S. at 76; *see also Independence Inst. v. Williams*, 812 F.3d 787, 793 (10th Cir. 2016) ("The Court held this language potentially vague because its scope was ambiguous and it provided little notice as to what types of expenditures would be covered."). More recently, the Tenth Circuit held that a statute requiring organizations to disclose only "those expenditures and contributions which *relate to* an independent expenditure or electioneering communication" is impermissibly vague. *WyGO*, 83 F.4th at 1237 (quoting Wyo. Stat. §22-25-206(h)(iv)). HB2106 gives even *less* guidance as to the nature of the "contributions" and "expenditures" that it covers. And the vagueness problem is even worse because HB2106 is not merely a disclosure requirement—it is a *ban* on speech by certain speakers. *See Citizens United*, 558 U.S. at 366 (explaining that disclosure requirements are subject to a lesser degree of scrutiny because they "may burden the ability to speak, but they impose no ceiling on campaign related activities" (citation omitted)).

*Second*, echoing the definitions that the Supreme Court found in *Buckley* "raise[] serious problems of vagueness," 424 U.S. at 76, subsection (a) applies to "[e]very person who engages in any activity promoting or opposing the adoption or repeal of any provision of the constitution of the state of Kansas" and "accepts moneys or property for the purpose of engaging in such activity."

K.S.A. §25-4180(a). The statute provides no further guidance on what it means to accept moneys or property "for the purpose of engaging in" "activity promoting or opposing the adoption or repeal of any provision of the constitution of the state of Kansas." This is just as vague, if not more so, than "for the purpose of influencing an election." And in *Buckley*, the Supreme Court held the "phrase, 'for the purpose of … influencing'" carried an unconstitutional "potential for encompassing both issue discussion and advocacy of a political result." *Buckley*, 424 U.S. at 79.

Although the Supreme Court has since said that words like "'promote,' 'oppose,' 'attack,' and 'support'" "provide explicit standards for those who apply them," the provisions the Court analyzed contained the *additional* requirement that the candidate be "clearly identified." *McConnell v. FEC*, 540 U.S. 93, 170 & n.64 (2003); *see also Yamada v. Snipes*, 786 F.3d 1182, 1192 (9th Cir. 2015) (upholding, against a vagueness challenge, a definition of "advertisement" that included a requirement that the communication "identifies an issue or question that will appear on the ballot at the next applicable election"). HB2106 contains no such identification requirement.

As a result, even if a constitutionally relevant distinction *could* be drawn between general issue advocacy (which cannot constitutionally be proscribed) and advocacy for or against a particular constitutional amendment, HB2106 fails to adequately draw that line. Consider the context of the 2022 Amendment: would spending money on an issue advertisement generally exhorting Kansans to support abortion rights be "activity promoting or opposing" the adoption of the 2022 Amendment? Would a grant to KCF made with the express proviso that it be spent supporting abortion rights be made "for the purpose of" such activity, thus triggering Section 25-4180(a)? What if an individual wrote a book about their pro-choice views and talked about why measures like the 2022 Amendment should be defeated? Would that implicate section (a) and if

that person received funding from foreign citizens (e.g. in helping research, write, and publish the book), would they be prohibited from publishing? All this is left unanswered by HB2106.

*Third*, HB2106's treatment of "expenditures" is so nonsensical as to fail to give notice of what it prohibits and invite arbitrary enforcement. Sections 25-4180(a)(2), (b), and (d)(1), as amended, collectively operate to prohibit any covered person from accepting contributions "or expenditures" from foreign nationals or those who associate with them. But that makes no sense in this context. How does one accept an "expenditure"? And how does that act distinguish itself from accepting a "contribution"? That distinction must mean something, because Kansas courts "do not interpret statutes in such a manner as to render portions superfluous or meaningless." *State v. Roeder*, 300 Kan. 901, 923 (2014). It would be reasonable to conclude that an organization like KCF "accepts" an "expenditure" merely when another organization that shares its position on a constitutional amendment spends its own money to advocate for that position. And the lack of an explicit "purpose" limitation for contributions and expenditures in certain parts of the statute, described above, further compounds the vagueness problems.

*Fourth,* HB2106's separate provision for "independent expenditures" is even more puzzling. The Kansas campaign finance act defines an "independent expenditure" as "an expenditure that is 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*." K.S.A. §25-4148c(d)(2) (emphasis added). That makes no sense in the context of a constitutional amendment campaign, which may be supported by any number of disparate individuals, groups, or organizations. Moreover, the "independent expenditure" certification requirement in K.S.A. §25-4180(c) speaks not in terms of "contributions" or "expenditures" but instead requires a speaker to certify that it has not received (and will not

receive) any "moneys" from foreign nationals, directly or indirectly. Whatever (unspecified) limitation might be read into the use of the terms "contributions" and "expenditures" elsewhere in the statute, the even more imprecise term "moneys" cannot be so limited. On its face, the term seems to sweep in *any* income, from whatever source, that has as its ultimate source any foreign national—to include in certain circumstances "any United States entity … that is wholly or majority-owned by any foreign national." K.S.A. §25-4180(e)(5).

*Finally*, HB2106 prohibits accepting "contributions" or "expenditures"—again, without any limiting definition—either "directly or indirectly" from a foreign national. The statute does not explain what "indirectly" means. How many hands must a dollar, once contributed by a foreign national, pass through before an advocacy organization like KCF may accept it? How far must KCF trace the ultimate source of any contributions it receives? The statute provides no guidance.

None of these provisions is "readily susceptible to a narrowing construction that will remedy the constitutional infirmity." *Citizens for Responsible Gov't State Pol. Action Comm. v. Davidson*, 236 F.3d 1174, 1194 (10th Cir. 2000). And "[e]ven assuming that a more explicit limiting interpretation of the statute could remedy the flaws we have pointed out, [courts] are without power to remedy the defects by giving the statute constitutionally precise content." *WyGO*, 83 F.4th at 1239 (cleaned up). K.S.A. §25-4180, as amended by HB2106, is therefore void for vagueness, both facially and as applied.

**E. HB2106 violates due process by retroactively punishing then-lawful conduct.**

When a legislature enacts a law that operates retroactively, the demands of due process "may sometimes bar its way." *De Niz Robles v. Lynch*, 803 F.3d 1165, 1170 (10th Cir. 2015). Even if HB2106 were a lawful regulation of speech relating to the promotion or opposition of constitutional amendments on a going-forward basis, "[i]t does not follow" that what the legislature can legislate prospectively it can legislate retrospectively. *Usery v. Turner Elkhorn*

*Mining Co.*, 428 U.S. 1, 16 (1976). "The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former." *Id.* at 17. Thus, retroactive application of a statute is unconstitutional unless "the retroactive application of the legislation is itself justified by a rational legislative purpose." *Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730 (1984).

There is no legitimate legislative purpose in giving HB2106 retroactive effect. When the Supreme Court has upheld retroactive laws against due process challenges, it normally has done so after concluding that Congress could have viewed the statute's retroactive effect as a rational way to allocate financial burdens resulting from the law or to otherwise avoid economic harm. *See, e.g.*, *Turner Elkhorn*, 428 U.S. at 18; *Pension Ben. Guar. Corp.*, 467 U.S. at 730–31; *United States v. Sperry Corp.*, 493 U.S. 52, 64–65 (1989). By contrast, the Supreme Court has strongly indicated that it would be improper for a State to impose retroactive liability based on a theory of "deterrence" or "blameworthiness." *Turner Elkhorn*, 428 U.S. at 17–18.

HB2106 imposes improper, retroactive punishment on persons who lawfully accepted contributions and expenditures from (1) foreign nationals and (2) donors who had themselves accepted contributions and expenditures from foreign nationals. Specifically, the plain terms of K.S.A. §25-4180(a)(1) *permanently* bar any person from engaging in any activity promoting or opposing a constitutional amendment unless that person can certify that they have *never* knowingly accepted contributions or expenditures from a foreign national—even before HB2106 went into effect. HB2106 also bars persons from engaging in constitutional advocacy for up to four years if they have knowingly accepted more than $100,000 in contributions or expenditures from any foreign national in the past four years, K.S.A. §25-4180(a)(2), and it prohibits potential donors

from giving money to support or oppose a constitutional amendment for the four-year period after the donor knowingly accepted more than $100,000 from any foreign national, *id.* §25-4180(b).

Each of those provisions retroactively imposes a draconian penalty (an outright prohibition of core political speech) based on conduct that was lawful at the time (accepting contributions and expenditures from foreign nationals). Even if HB2106 was a permissible means to prospectively regulate political speech (which it is not), there still would be no basis for its retroactive application. HB2106 is a direct regulation of political speech, and unlike the mine run of cases in which the Supreme Court upheld retroactive application of a law, it cannot be justified as a rational way to share financial burdens or to otherwise prohibit negative distortion of economic activity. Furthermore, the Supreme Court has made clear that justification based on "deterrence" or "blameworthiness" of the then-lawful conduct is impermissible. *Turner Elkhorn*, 428 U.S. at 17–18. If the ostensible purpose of HB2106 was to limit foreign influence on the Kansas constitutional amendment process, it would be fully served by HB2106 operating only prospectively.

**II. The remaining preliminary injunction factors weigh in favor of an injunction.**

KCF's likelihood of success on its constitutional challenges also suffices to carry its burden on the remaining preliminary injunction factors. "When a movant establishes the first prong of a preliminary injunction based on a First Amendment claim, the remaining prongs generally also weigh in his favor." *Pryor v. School Dist. No. 1*, 99 F.4th 1243, 1254 (10th Cir. 2024).

*First*, "a First Amendment violation constitutes irreparable injury." *Id*. Although "any potential loss of First Amendment freedoms—however small—also establishes irreparable injury," KCF has shown that HB2106's unconstitutional restrictions "*have* chilled [its] protected speech." *Id*. As soon as it takes effect on July 1, 2025, HB2106's unconstitutional, overbroad, and vague prohibitions will effectively shut down KCF's ability to engage in core political speech—including related to SCR 1611, a proposed constitutional amendment that will be on the ballot next

year. Those efforts will involve not just buying airtime, but also mobilizing staff and volunteers to engage in personal conversations with voters about the dangers posed by SCR 1611. Barring that protected speech is irreparable harm not just because *any* loss of constitutional rights, for any period, is necessarily irreparable, but also because KCF must begin mobilizing now to plan its advocacy around SCR 1611. *See* Kubic Decl. ¶12. This will require securing funding commitments, planning a budget, identifying and working with vendors, and developing and implementing messaging and voter turnout strategies. *See id.*

*Second*, Kansas cannot point to any potential harms that may overcome KCF's weighty interest in protecting its constitutional rights. "A governmental interest in upholding a mandate that is likely unconstitutional does not outweigh a movant's interest in protecting his constitutional rights." *Pryor*, 99 F.4th at 1254. "When a constitutional right hangs in the balance … even a temporary loss usually trumps any harm to the defendant." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 806 (10th Cir. 2019).

*Finally*, "[i]t is always in the public interest to prevent the violation of a party's constitutional rights." *Awad*, 670 F.3d at 1132 (cleaned up). That is because, whatever public interest may be served by HB2106, "the public has a more profound and long-term interest in upholding an individual's constitutional rights." *Id.* (cleaned up).

## CONCLUSION

For the foregoing reasons, the Court should preliminarily enjoin HB2106.

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