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CASE NUMBER: SN-2023-MV-000095
PII COMPLIANT



Court: Shawnee County District Court
Case Number: SN-2023-MV-000095
Case Title: In the Matter of David Matthew Billingsley
Type: ORD: Order Originated by Judge MEMORANDUM
DECISION AND ORDER

SO ORDERED,

A handwritten signature in cursive script, appearing to read 'T. Watson'.

/s/ Honorable Teresa L Watson, District
Court Judge

**IN THE DISTRICT COURT OF SHAWNEE COUNTY, KANSAS
DIVISION THREE**

KANSAS GOVERNMENTAL ETHICS
COMMISSION, *ex rel.* MARK SKOGLUND,
EXECUTIVE DIRECTOR,

Plaintiff

SN-2023-MV-95

DAVID MATTHEW BILLINGSLEY,

Defendant

MEMORANDUM DECISION AND ORDER

The Kansas Governmental Ethics Commission (“KGEC”) authorized issuance of a subpoena duces tecum to David Billingsley as part of that agency’s investigation of alleged violations of Kansas governmental ethics laws. See K.S.A. 25-4158(d)(1). Recent amendments to the law require the KGEC to apply to this Court for review and approval of the proposed subpoena prior to its issuance. See K.S.A. 25-4158(d)(2). The KGEC filed its petition asking the Court to approve issuance of the subpoena. Defendant David Billingsley filed a motion to strike the petition under the Public Speech Protection Act (“PSPA”), K.S.A. 60-5320, asserting that the subpoena is based on, relates to, or is in response to Billingsley’s exercise of certain First Amendment rights.

Billingsley also moved to dismiss the petition for failure to state a claim. See K.S.A. 60-212(b)(6). The motions were fully briefed and argued to the Court. The Court is ready to rule.

STATEMENT OF FACTS

Because this matter is before the Court on a motion to strike the KGEC's petition under the PSPA, the facts are drawn from the parties' pleadings and supporting and opposing affidavits offered in conjunction with the motion. K.S.A. 60-5320(d). To the extent this Court considers Billingsley's arguments separately under a motion to dismiss standard, it will be noted below.

Billingsley is the treasurer for the LIFT Up Kansas PAC ("LIFT PAC"). His duties as treasurer include "collecting invoices and issuing checks, filing campaign finance reports, monitoring bank accounts, and other duties as set forth under Kansas law." LIFT PAC is a registered political action committee ("PAC") in Kansas. Billingsley asserts that LIFT PAC is "a group of individuals who have joined together under their right to associate to collectively express, promote, pursue, and defend common interests, including, without limitation, supporting certain public initiatives and candidates for public office to then petition the government." He says LIFT PAC "directly engages in its right to free speech through its contributions and independent expenditures in support of its favored elected officials and candidates." Billingsley supports LIFT PAC and this allows him to "engage in his First Amendment rights to associate with others," engage in political speech, and petition public officials. Billingsley says his participation in LIFT PAC "directly involve[s] petitioning the government, speaking about issues of public concern, and associating with others about issues of public concern by directly engaging in political speech during the election process."

In 2021, the KGEC began investigating possible violations of the Kansas Campaign Finance Act, K.S.A. 25-4142 *et seq.* ("KCFA"). After preliminary investigation, the KGEC believed that some campaign contributions from political committees to party committees and ultimately to candidates during the 2020 election cycle were "earmarked" for certain recipients in violation of state law. In February 2022, the KGEC met as a body to make the written findings of fact and conclusions of law required by K.S.A. 25-4158(d)(1) to issue subpoenas to several individuals to gather further evidence of alleged KCFA violations.

The KGEC issued its first subpoena duces tecum to Billingsley on February 23, 2022. It was addressed to Billingsley without reference to his capacity as the LIFT PAC treasurer. It requested "all communications and shared documents, including but not limited to email, text, and social media messages, that are to, from, carbon copying, or shared with any of the following individuals," listing 23 individuals and five categories of additional individuals such as "[any] other known representative or individual known to be associated with the Johnson County Republican Central Committee." The 2022 subpoena also requested: "At any time, all communications and shared documents, including but not limited to email, text, and Facebook messages, not otherwise produced that discuss or concern any of the following" listing four subject matter areas including certain transfers of funds and items purchased from Battleground Connect.

On June 15, 2022, Billingsley's attorney sent a letter to the KGEC objecting to the subpoena on behalf of Billingsley and several other clients who received similar subpoenas. The KGEC did not formally respond to the letter, but ultimately released seven of those subpoenaed (not including Billingsley). The KGEC filed petitions to enforce some of the subpoenas (not

including the one issued to Billingsley) and the enforcement of some of the February 23, 2022, subpoenas has been the subject of separate litigation in this Court.¹

On August 23, 2023, the KGEC met once again as a body to make the written findings of fact and conclusions of law required by K.S.A. 25-4158(d)(1) to issue subpoenas, including one to Billingsley, to gather evidence of alleged KCFA violations based on the same or similar facts as the first round of subpoenas. The findings of fact and conclusions of law, dated August 23, 2023, said:

I. FINDINGS OF FACT

Facts Relevant to All Contributions

1. Ronald W. Ryckman Jr. ("Ryckman") is an individual residing in the State of Kansas.
2. Ryckman was a candidate for State Representative by virtue of his appointing of a treasurer on July 27, 2012.
3. Paje Resner ("Resner") is an individual residing in the State of Kansas.
4. At all relevant times, Resner was Ryckman's Chief of Staff.
5. Lift Up Kansas PAC ("Lift Up PAC") is a registered political action committee affiliated with Lift Up Kansas, Inc., a Kansas not for profit corporation.
6. The Right Way Kansas PAC for Economic Growth ("Right Way PAC") is a registered political action committee.
7. The Republican House Campaign Committee (RHCC) and the Kansas Republican Party (KRP) are party committees.
8. At all relevant times, Jared Suhn was consultant for the RHCC.

¹These include *KGEC v. Cheryl Reynolds*, 2022-MV-124 (appeal pending); *KGEC v. Daniel Thorne*, 2022-MV-128 (dismissed by stipulation); *KGEC v. Scott Bishop*, 2022-MV-130 (dismissed by stipulation); and *KGEC v. Fabian Shepard*, 2022-MV-131 (appeal pending).

Lift Up Kansas PAC Contributions

9. On or about February 13, 2019, the Lift Up PAC filed its Statement of Organization and an initial appointment of treasurer with the Secretary of State. Ex. 1 to App. for Subpoena.
10. At all relevant times, David Matthew Billingsley ("Billingsley") was the treasurer for the Lift Up PAC.
11. On or about August 31, 2020, the Republican State Leadership Committee (RSLC), headquartered in Washington, D.C., contributed \$37,500.00 to the Lift Up PAC. Exs. 2-3 to App. for Subpoena.
12. On or about September 10, 2020, the Lift Up PAC contributed \$5,000.00 to the RHCC. Exs. 3-4 to App. for Subpoena.
13. On or about September 23, 2020, the Lift Up PAC contributed \$5,000.00 each to the KRP, the Johnson County Republican Central Committee, the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee (the "Committees"). Exs. 3; 5-8 to App. for Subpoena.
14. There is a reasonable suspicion that the September 23, 2020, contributions were preconditioned upon the Committees giving most or all funds to the KRP. Ex. 13 to App. for Subpoena.

Right Way PAC Contributions

15. On or about July 1, 2020, the Right Way PAC filed its Statement of Organization and an initial appointment of treasurer with the Secretary of State. Ex. 11 to App. for Subpoena.
16. At all relevant times, Herbert James Swender Jr. ("Swender") was the treasurer for the Right Way PAC.
17. On or about September 1, 2020, the RSLC contributed \$37,500.00 to the Right Way PAC. Exs. 2 and 12 to App. for Subpoena.
18. On or about September 13, 2020, the Right Way PAC contributed \$5,000.00 to the RHCC. Exs. 4 and 12 to App. for Subpoena.

19. On or about September 25, 2020, the Right Way PAC contributed \$5,000.00 to the KRP and \$5,000.00 each to the Committees. Exs. 5-8; 12 to App. for Subpoena.
20. There is a reasonable suspicion that the September 25, 2020, contributions were preconditioned upon the Committees giving most or all funds to the KRP. Ex. 13 to App. for Subpoena.

Sedgwick County Republican Central Committee Contributions

21. On or about September 23, 2020, the Sedgwick County Republican Central Committee received a \$5,000.00 contribution from the Lift Up PAC. Ex. 3 and 8 to App. for Subpoena.
22. On or about September 25, 2020, the Sedgwick County Republican Central Committee received a \$5,000.00 contribution from the Right Way PAC. Exs. 8 and 12 to App. for Subpoena.
23. On or about September 28, 2020, the Sedgwick County Republican Central Committee contributed \$10,000.00 to the KRP. Exs. 5 and 8 to App. for Subpoena.

Johnson County Republican Central Committee Contributions

24. On or about September 23, 2020, the Johnson County Republican Central Committee received a \$5,000.00 contribution from the Lift Up PAC. Exs. 3 and 6 to App. for Subpoena.
25. On or about September 25, 2020, the Johnson County Republican Central Committee received a \$5,000.00 contribution from the Right Way PAC. Exs. 6 and 12.
26. On or about September 29, 2020, the Johnson County Republican Central Committee contributed \$9,000.00 to the KRP. Exs. 5 and 6 to App. for Subpoena.

Shawnee County Republican Central Committee Contributions

27. On or about September 23, 2020, the Shawnee County Republican Central Committee received a \$5,000.00 contribution from the Lift Up PAC. Exs. 3 and 7 to App. for Subpoena.
28. On or about September 25, 2020, the Shawnee County Republican Central Committee received a \$5,000.00 contribution from the Right Way PAC. Exs. 7 and 12 to App. for Subpoena.

29. Around or about September 30-October 2, 2020, the Shawnee County Republican Central Committee contributed a total of \$5,000.00 to the KRP. Exs. 5 and 7 to App. for Subpoena.

2021 Contributions

30. On or about December 8, 2021, the RSLC made a \$5,000.00 contribution to the RHCC. Exs. 15-16 to App. for Subpoena.
31. On or about December 8, 2021, the RSLC made a \$5,000.00 contribution to the Lift Up PAC. Exs. 15 and 17 to App. for Subpoena.
32. On or about December 8, 2021, the Lift Up PAC made a \$5,000.00 contribution to the RHCC. Exs. 16-17 to App. for Subpoena.
33. On or about December 15, 2021, the RSLC made a \$5,000.00 contribution to the Right Way PAC. Exs. 15 and 18 to App. for Subpoena.
34. On or about December 20, 2021, the Right Way PAC made a \$5,000 contribution to the RHCC. Exs. 16 and 18 to App. for Subpoena.
35. The 2021 contributions to the RHCC, the Lift Up PAC, and the Right Way PAC were all identified as "KS House - EOY Contribution" by the RSLC. Exs. 15-20 to App. for Subpoena.

Evidence of Passthrough Scheme

36. In 2020, a total of \$39,000.00 was contributed to the KRP which originated from the RSLC from both via direct donations as well as being passed through the PACs and the Committees. Exs. 2-10; 12 to App. for Subpoena.
37. In 2021, a total of \$15,000.00 was contributed to the RHCC which originated from the RSLC both via direct donations as well as being passed through the PACS. Exs. 15-19 to App. for Subpoena.
38. A fund referred to as a "critical races fund" was formed in part from contributions that passed through other entities such as the PACs to the KRP and RHCC. Ex. 14 to App. for Subpoena.
39. Ryckman and Resner organized the contributions from the RSLC to the PACs.

- a. Specifically, Resner was the contact point to identify bank information for the PACs and communicated with the bank on the PACs' behalf in her capacity as Chief of Staff for Speaker Ryckman. Exs. 21-22 to App. for Subpoena.
 - b. RSLC handled contributions to the Lift Up PAC the same as contributions to the Right Way PAC, including listing bank wire information alongside the RHCC bank wire information in an email from Jared Suhn, giving maximum contributions on the same date, and identifying contributions to each as the same project: "KS House - EOY Contribution." Exs. 9-10; 20-25 to App. for Subpoena.
 - c. Resner's communications included communications with a specific nexus to the relevant contributions from the RSLC. Exs. 21-22 to App. for Subpoena.
40. Ryckman was also sent letters by the RSLC when the RSLC made contributions to the PACs. Exs. 23-25 to App. for Subpoena.
 41. Billingsley, as Treasurer and Chairperson for the Lift Up PAC, signed checks on the PACs behalf that were involved in the passthrough scheme. Specifically, Billingsley signed the check associated with the September 10, 2020, contribution from Lift Up PAC to the RHCC and the September 23, 2020, contribution from Lift Up PAC to the KRP. Exs. 26-27 to App. for Subpoena.
 42. It is apparent that individuals associated with the PACs, the RHCC, the RSLC, and/or the Committees had knowledge of the September 23, 2020, and September 25, 2020, contributions from the Right Way PAC and Lift Up PAC, respectively, and had knowledge that such contributions were preconditioned upon the Committees giving most or all funds to the KRP. This knowledge is evidenced by the communications between various individuals associated with the RSLC; the Johnson County Republican Central Committee; and Jared Suhn, consultant for the RHCC, and reasonable inferences that can be drawn from such communications; the temporal proximity of the relevant contributions; and identical conduct involving similarly situated entities. Exs. 2-10; 13; 15-25 to App. for Subpoena.

II. CONCLUSIONS OF LAW

Relevant Statutory Provisions

1. K.S.A. 25-4143(j) defines a party committee as:

The state committee of a political party . . . (2) the county central committee or the state committee of a political party . . . (5) the political committee established by the state committee of any such political party and designated as a recognized political committee for the house of representatives[.]
2. K.S.A. 25-4153(d) states:

the aggregate amount contributed to a state party committee by a person other than a national party committee or a political committee shall not exceed \$15,000 in each calendar year; and the aggregate amount contributed to any other party committee by a person other than a national party committee or a political committee shall not exceed \$5,000 in each calendar year.
3. K.S.A. 25-4143(l)(1) defines a political committee as:

any combination of two or more individuals or any person other than an individual, a major purpose of which is to expressly advocate the nomination, election or defeat of a clearly identified candidate for state or local office or make contributions to or expenditures for the nomination, election or defeat of a clearly identified candidate for state or local office.
4. K.S.A. 25-4143 defines a person as "any individual, committee, corporation, partnership, trust, organization or association."
5. K.S.A. 25-4154(a) states that "[n]o person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another."
6. K.S.A. 25-4153b prohibits "a member of or a candidate for the legislature" from establishing a political committee.
7. K.S.A. 25-4153(d) establishes a \$5,000.00 aggregate contribution limit per calendar year for contributions from a political committee to any party committee, including a state party committee; a \$15,000.00 aggregate contribution limit per calendar year for contributions from any other person, other than national party committees, to a state party committee; and a \$5,000.00 aggregate contribution limit per calendar year for contributions

from any other person, other than national party committees, to any other party committee.

8. K.S.A. 25-4170(b) states that "intentionally accepting any contribution made in violation of a provision of K.S.A. 25-4153" is an excessive campaign contribution that constitutes a class A misdemeanor.
9. K.S.A. 25-4158(c) authorizes the Commission to "investigate, or cause to be investigated, any matter required to be reported upon by any person under the provisions of the campaign finance act, or any matter to which the campaign finance act applies irrespective of whether a complaint has been filed in relation thereto."
10. K.S.A. 25-4171 provides that an intentional violation of K.S.A. 25-4154 is a class A misdemeanor.
11. K.S.A. 25-4181 provides that violations of the campaign finance act may be punishable by a civil fine not to exceed \$5,000.00 for the first violation, \$10,000.00 for the second violation, and \$15,000.00 for the third violation.

Application of Law

12. At all relevant times, the RSLC was a person as defined in K.S.A. 25-4143(k).
13. At all relevant times, the Lift Up PAC and the Right Way PAC were registered political committees as defined in K.S.A. 25-4143(l).
14. At all relevant times, the KRP and RHCC were party committees as defined in K.S.A. 25-4143(j). KRP is the state party committee as defined in K.S.A. 25-4143(j)(1).
15. At all relevant times, the Johnson County Republican Central Committee, the Shawnee County Republican Central Committee, and the Sedgwick County Republican Central Committee (the "Committees") were party committees as defined in K.S.A. 25-4143(j).
16. At all relevant times, the RSLC, the RHCC, the PACs, the KRP, and the Committees were all persons as defined in K.S.A. 25-4143.
17. There is reasonable suspicion to believe that individuals associated with the PACs, the RHCC, the RSLC, and the Committees had knowledge of the September 23, 2020, and September 25, 2020, contributions from the Right Way PAC and Lift Up PAC, respectively, and had knowledge that such

contributions were both made and accepted in the name of another in violation of K.S.A. 25-4154(a), and being made and accepted in excess of campaign contribution limits in violation of K.S.A. 25-4153(d).

18. At all relevant times, Ryckman was a member of the legislature.
19. There is reasonable suspicion to believe that Billingsley has knowledge regarding the establishment and organization of the Lift Up PAC, that contributions involving this PAC were given and accepted in the name of another, that contributions involving this PAC were given and accepted in excess of legal contribution limits, and that Billingsley is positioned to have knowledge about said transactions.”

On August 31, 2023, the KGEC generated a new subpoena duces tecum to be issued to Billingsley. The 2023 subpoena is addressed to Billingsley individually without reference to his capacity as the LIFT PAC treasurer. The 2023 subpoena commands Billingsley to testify at a deposition and produce documents in his possession as follows:

1. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, that specifically include the words "Lift Up" when referencing an existing or planned political committee.
2. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, regarding contributions from the Republican State Leadership Committee to Lift Up Kansas PAC.
- 2.² Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, regarding contributions from the Republican State Leadership Committee to the Kansas Republican Party.
3. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of July 1, 2020, through December 31, 2020, regarding contributions

²Duplicate numbering is original.

from the Republican State Leadership Committee to the Republican House Campaign Committee.

4. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of July 1, 2020, through December 31, 2020, regarding contributions from Lift Up Kansas PAC to the Johnson County Republican Central Committee, Shawnee County Republican Central Committee, and/or Sedgwick County Republican Central Committee.
5. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, by and between [defined in a footnote to include emails where the named individual has been carbon copied or blind copied] you and Jared Suhn, regarding the formation, operation, contributions to, or expenditures from Lift Up Kansas PAC.
6. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, by and between [defined in a footnote to include emails where the named individual has been carbon copied or blind copied] you and Ron Ryckman Jr. and/or Ron Ryckman Jr.'s staff regarding the formation, operation, contributions to, or expenditures from Lift Up Kansas PAC.
7. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, by and between [defined in a footnote to include emails where the named individual has been carbon copied or blind copied] you and Paje Resner regarding the formation, operation, contributions to, or expenditures from Lift Up Kansas PAC.
8. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, from the time period of December 13, 2018, through January 31, 2022, by and between [defined in a footnote to include emails where the named individual has been carbon copied or blind copied] you and H.J. Swender regarding the formation, operation, contributions to, or expenditures from Lift Up Kansas PAC.
9. Any and all written communications, documents, and records, including but not limited to email, text, and/or social media messages, related to Lift Up

Kansas PAC's expenditures to Battleground Connect that occurred on or about November 1-3 of 2020.

On August 31, 2023, the KGEC filed the instant action asking the Court to approve the issuance of its proposed subpoena. On November 7, 2023, Billingsley moved to strike the petition under the PSPA, or in the alternative, moved to dismiss the KGEC's petition for failure to state a claim under K.S.A. 60-212(b)(6).

Billingsley states in his affidavit that he has spent significant time and money, including hiring legal counsel, in response to the KGEC's 2022 subpoena and to the KGEC's request that this Court approve the 2023 subpoena. He said this "has created a chilling effect against my future engagement in the public policy process and public advocacy process unless I am willing to face the expense and burden of defending myself from privacy invasions in which my confidential communications with family, friends, colleagues, or others must be surrendered."

CONCLUSIONS OF LAW

I. BILLINGSLEY'S MOTION TO STRIKE UNDER THE PSPA.

Billingsley moves to strike the KGEC's petition asking the Court to approve the issuance of its administrative subpoena under the PSPA. This requires interpretation of statutes, which is a question of law. The Court follows these guidelines when considering the meaning of a statute:

When interpreting a statute, the court first attempts to discern the legislature's intent through the language enacted, giving common words their ordinary meanings. When statutory language is plain and unambiguous, the court does not speculate as to legislative intent, and does not read into the statute words not readily found there. It is only when the language is unclear or ambiguous that the court employs the canons of statutory construction, consults legislative history, or considers other background information to ascertain the statute's meaning. *Whaley v. Sharp*, 301 Kan. 192, 196, 343 P.3d 63 (2014).

THE POLITICAL SPEECH PROTECTION ACT.

The PSPA was adopted by the Kansas Legislature in 2016. Its purpose is “to encourage and safeguard the constitutional rights of a person to petition, and speak freely and associate freely, in connection with a public issue or issue of public interest to the maximum extent permitted by law while, at the same time, protecting the rights of a person to file meritorious lawsuits for demonstrable injury.” K.S.A. 60-5320(b). Its provisions “shall be applied and construed liberally to effectuate its general purposes.” K.S.A. 60-5320(k). It is an anti-SLAPP statute, a name for laws “intended to prevent meritless lawsuits that chill free speech,” known as SLAPPs, or strategic lawsuits against public participation. *Doe v. Kansas State University*, 61 Kan.App.2d 128, 135, 499 P.3d 1136 (2021), citing *T & T Financial of Kansas City, LLC v. Taylor*, 2017 WL 6546634, at *3 (Kan.App. 2017) (unpublished).

K.S.A. 60-5320(d) allows a party to bring a motion to strike a claim “if a claim is based on, relates to or is in response to a party's exercise of the right of free speech, right to petition or right of association.” A claim is defined as “any lawsuit, cause of action, claim, cross-claim, counterclaim or other judicial pleading or filing requesting relief.” K.S.A. 60-5320(c)(1). Any action filed by the KGEC in this Court is a “claim” for purposes of the PSPA. K.S.A. 25-4119h(a). The KGEC’s petition asking the Court to approve the issuance of its subpoena meets the definition of “claim,” and it is subject to a motion to strike under the PSPA.

Evaluating a motion to strike under the PSPA requires a burden-shifting approach. K.S.A. 60-5320(d) states in pertinent part:

A party bringing the motion to strike has the initial burden of making a prima facie case showing the claim against which the motion is based concerns a party's exercise of the right of free speech, right to petition or right of association. If the moving party meets the burden, the burden shifts to the responding party to

establish a likelihood of prevailing on the claim by presenting substantial competent evidence to support a prima facie case. If the responding party meets the burden, the court shall deny the motion. In making its determination, the court shall consider pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

“While the court should examine the pleadings to determine the nature of the claims asserted and should also consider well-pled facts in a petition and any answer . . . it is not required to accept the facts asserted in the plaintiff's petition as true. Otherwise, no defendant could ever prevail on an anti-SLAPP motion.” *Doe*, 61 Kan.App.2d at 148.

BILLINGSLEY’S INITIAL BURDEN.

Billingsley’s initial burden is to make a prima facie case showing that the KGEC’s petition asking the Court to approve the issuance of its administrative subpoena, and thus the subpoena itself, concerns Billingsley’s exercise of the right to free speech, right to petition, or right of association. “None of these definitions address the motive or merits of a communication; they simply address its content.” *Doe*, 61 Kan.App.2d at 142.

The subpoena in paragraphs 1-9 directs Billingsley to produce “[a]ny and all written communications, documents, and records, including but not limited to email, text, and/or social media messages,” dated during various time periods:

- “that specifically include the words ‘Lift Up’ when referencing an existing or planned political committee.”
- “regarding contributions from the Republican State Leadership Committee to Lift Up Kansas PAC” or “the Kansas Republican Party” or “the Republican House Campaign Committee.”
- “regarding contributions from Lift Up Kansas PAC to the Johnson County Republican Central Committee, Shawnee County Republican Central Committee, and/or Sedgwick County Republican Central Committee.”

- “by and between you and Jared Suhn” or “Ron Ryckman Jr. and/or Ron Ryckman Jr.’s staff,” or “Paje Resner” or “H.J. Swender regarding the formation, operation, contributions to, or expenditures from Lift Up Kansas PAC” including emails where the named persons were carbon or blind copied.
- “related to Lift Up Kansas PAC's expenditures to Battleground Connect that occurred on or about November 1-3 of 2020.”

The PSPA defines exercise of the right to free speech as “a communication made in connection with a public issue or issue of public interest.” K.S.A. 60-5320(c)(4). Communication is defined as “the making or submitting of a statement or document in any form or medium, including oral, visual, written or electronic.” K.S.A. 60-5320(c)(2). A public issue or issue of public interest includes in pertinent part an issue related to the government, or a public official or public figure. K.S.A. 60-5320(c)(7)(C) and (D).

The subpoena’s call for “[a]ny and all written communications, documents, and records, including but limited to email, text, and/or social media messages” in Billingsley’s possession on the topic of political contributions and political committees clearly seeks communications as defined by statute. Paragraphs 1-4 of the subpoena seek communications regarding political contributions involving political committees. Paragraphs 5-9 seek all communications regarding the “formation, operation, contributions to, or expenditures from” LIFT UP, a political committee. These communications involve issues related to government and public officials, thus concern public issues or issues of public interest. The subpoena concerns Billingsley’s exercise of the right of free speech as defined by the PSPA.

The PSPA defines exercise of the right of association as “a communication between individuals who join together to collectively express, promote, pursue or defend common interests.” K.S.A. 60-5320(c)(3). Again, the subpoena seeks communications, as defined by the

statute, among individuals connected by common political interests – namely, supporting certain political candidates for government office. Thus, the subpoena concerns Billingsley’s exercise of the right of association as defined by the PSPA.

The PSPA defines exercise of the right to petition to include communications on several specific topics, including:

- communication in or pertaining to a judicial, executive, or legislative proceeding or before a local governing body; K.S.A. 60-5320(c)(5)(A)
- “communication in connection with an issue under consideration or review by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(B)
- communication that is “reasonably likely to encourage consideration or review of an issue by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(C)
- communication “reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, judicial or other governmental or official proceeding;” K.S.A. 60-5320(c)(5)(D) and
- “any other communication or conduct that falls within the protection of the right to petition the government under the constitution of the United States or the constitution of the state of Kansas.” K.S.A. 60-5320(c)(5)(E).

Billingsley is the treasurer of the LIFT PAC. The parties do not dispute that the LIFT PAC is a group of people joined together to promote public initiatives and candidates for public office as part of a larger effort to petition the government on certain issues. On the facts before this Court, including the statements in Billingsley’s affidavit, the subpoena concerns Billingsley’s right to petition the government.

The content of the subpoena sought to be approved here concerns the exercise of First Amendment rights. Billingsley has met his initial burden.

THE BURDEN SHIFTS TO THE KGEC.

The burden then shifts to the KGEC to establish a likelihood of “prevailing on the claim” by presenting substantial competent evidence to support “a prima facie case.” If the responding party meets the burden, the court shall deny the motion. K.S.A. 60-5320(d). “Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as being adequate to support a conclusion.” *Doe*, 61 Kan.App.2d at 147-48, citing *Fisher v. Kansas Dept. of Revenue*, 58 Kan.App.2d 421, 423, 471 P.3d 710 (2020).

The threshold question is what does “prevailing on the claim” mean in this context? Here, it means that the KGEC must establish a likelihood that this Court would approve the issuance of KGEC’s administrative subpoena directed at Billingsley, supported by substantial competent evidence of the elements necessary to compel enforcement of the subpoena. It does not require the KGEC to establish a likelihood that it can successfully prosecute him for campaign finance violations. The limited scope of this action is whether Billingsley must respond to the subpoena.

Thus defined, this second stage of the analysis requires some background regarding the investigatory powers of the KGEC. K.A.R. 19-3-3 says:

Whenever any matter is brought to the attention of a member of the commission or the executive director which appears to raise an issue of a violation of the relevant law, the executive director is authorized to conduct a preliminary inquiry on the issue of whether there are facts sufficient to support the appearance of a violation. At the conclusion of a preliminary inquiry, the executive director shall report to the commission. The commission shall thereafter determine whether further investigation is required.

K.S.A. 25-4158(c) says that the KGEC “may investigate, or cause to be investigated, any matter required to be reported upon by any person under the provisions of the campaign finance

act, or any matter to which the campaign finance act applies irrespective of whether a complaint has been filed in relation thereto.”

K.S.A. 25-4158(d)(1) says:

After a preliminary investigation of any matter reported to the commission pursuant to subsection (c), and **upon specific written findings of fact and conclusions of law by the commission that there is a reasonable suspicion that a violation of the campaign finance act has occurred**, the commission or any officer designated by the commission may apply to the district court of Shawnee county for an order to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents or records which the commission deems relevant or material to the investigation. All applications for a court order shall be made under seal of the court. The commission shall reimburse the reasonable costs of production of documents subject to subpoena. All subpoenas and subpoenas duces tecum issued under this section shall be authorized by the affirmative vote of not less than 2/3 of the members of the commission. **Subpoenas duces tecum shall be limited to items reasonably relevant to such alleged violations.** No subpoena or other process issued by the commission pursuant to this section shall be served upon any person unless an application has been filed in the district court of Shawnee county pursuant to this section. (Emphasis added.)

Relevant here is that to issue a subpoena duces tecum such as the one directed to Billingsley, the KGEC must make specific findings of fact and conclusions of law articulating a reasonable suspicion that a campaign finance violation has occurred, and the subpoena shall be limited to items reasonably relevant to the alleged violations. Upon application from the KGEC, this Court is directed to “review of the sufficiency of the written findings of fact and conclusions of law, the record before the commission and the reasonableness and scope of the subpoena,” then enter orders as appropriate. K.S.A. 25-4158(d)(2).

BILLINGSLEY CHALLENGES THE CONSTITUTIONALITY OF K.S.A. 25-4154(A).

Billingsley insists that the KGEC cannot establish a likelihood of “prevailing on the claim” under the PSPA. He reasons that the subpoena is unenforceable because it requires a reasonable

suspicion of a violation of K.S.A. 25-4154(a), as interpreted by the KGEC through its Opinion 1997-45, and there can be no such finding because the statute is unconstitutional on its face and as applied.

K.S.A. 25-4154(a) says: “No person shall make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another.” “Person” includes “any individual, committee, corporation, partnership, trust, organization or association.” K.S.A. 25-4143(k). Intentional violation of K.S.A. 25-4154 is a class A misdemeanor. K.S.A. 25-4171(a).

KGEC’s Opinion 1997-45, in answering questions posed by a state representative, stated in pertinent part:

Applying this language to your first question, if "A" gives money to "B" with the understanding that the money will then be contributed to "C", and "B" then contributes the money to "C", this would be a violation of the law.

In answer to your second question, this law cannot be violated until the money is actually contributed to "C". Thus, regardless of what "A" intended for "B" to do, if "B" does not contribute the money to "C", there is no violation.

In answer to your third question, so long as there was not an understanding between "A" and "B" that the money was to be contributed to "C", the fact that "B" eventually contributes the money to "C" would not constitute a violation of the law.

This opinion was issued by the then-Chair of the KGEC at the direction of the KGEC. This opinion introduces the undefined concept of taking an action “with the understanding” that it was done for a particular purpose. This concept of “understanding” is not found in the language of the statute itself. The KGEC opinion is not binding on this Court or any other. Its application does not appear to be the subject of analysis in any Kansas cases.

In *State v. Palmer*, 248 Kan. 681, 810 P.2d 734 (1991), the statute was used to prosecute alleged violations of K.S.A. 25-4154(a) (among others) where an individual directed persons under his control to make certain political contributions in their own names, and he later reimbursed them. There was no challenge to or analysis of the constitutionality of the statute. Apart from *Palmer*, there are only two other cases citing K.S.A. 25-4154(a), and then only in passing. They are not helpful to the issues raised here regarding its interpretation. See *Nichols v. Kansas Pol. Action Com'n*, 270 Kan. 37, 39, 11 P.3d 1134 (2000); and *Nichols v. Kansas Governmental Ethics Com'n*, 28 Kan.App.2d 524, 525, 18 P.3d 270 (2001).

BILLINGSLEY ARGUES THAT K.S.A. 25-4154(A) IS VAGUE.

The Court turns first to Billingsley's vagueness argument, because it is dispositive. In his opening brief, Billingsley raises both a facial and as-applied challenge to K.S.A. 25-4154(a). He does not clearly articulate the difference between the two challenges in his briefing, nor does he analyze them separately. The facial challenge is not the thrust of Billingsley's request for relief. He does not ask the Court to void the statute for all intents and purposes. His request here is narrower – that the Court strike the KGEC's application for issuance of the subpoena to him. For these reasons, the Court will address Billingsley's vagueness argument as an as-applied challenge. See, e.g., *Fresh Vision OP, Inc., v. Skogland*, 2024 WL 3534739, at *7 (D.Kan. 2024) (evaluating constitutional challenge to statute under category of as-applied based on lack of briefing on all aspects of facial challenge and on nature of relief sought).

The KGEC argues that Billingsley's as-applied challenge fails because there are no facts to which the statute can be applied, and there will be no such facts until Billingsley responds to the KGEC's wide-ranging subpoena. To the contrary, the KGEC made findings of fact and

conclusions of law to support issuance of a subpoena to Billingsley. KGEC then relied upon those facts and conclusions to urge this Court to issue the subpoena. These facts provide context for Billingsley’s as-applied challenge to the statute.

The measure of whether a statute is vague is “(1) whether the statute gives fair warning to those potentially subject to it, and (2) whether it adequately guards against arbitrary and unreasonable enforcement. At its heart the test for vagueness is a commonsense determination of fundamental fairness.” *State v. Bollinger*, 302 Kan. 309, 318, 352 P.3d 1003 (2015) (internal quotations and citations omitted). Failure of either of these requirements renders a statute impermissibly vague. *Matter of A.B.*, 313 Kan. 135, 138, 484 P.3d 226 (2021).

When a statute implicates “the right of free speech or of association, a more stringent vagueness test should apply.” *Wyoming Gun Owners v. Gray*, 83 F.4th 1224, 1234 (10th Cir. 2023) (internal quotations and citation omitted).

The void-for-vagueness doctrine requires that statutory commands provide fair notice to the public. This is especially true for election speech provisions that impinge on First Amendment rights. Vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech. *Id.* at 1233 (internal quotations and citations omitted).

The Court looks first to “whether a person of ordinary intelligence understands what conduct is prohibited by the statutory language at issue.” *State v. Jenkins*, 311 Kan. 39, 53, 455 P.3d 779 (2020) (internal quotations omitted). “Kansas has long held that a statute will not be declared void for vagueness and uncertainty where it employs words commonly used, previously

judicially defined, or having a settled meaning in law.” *In re Brooks*, 228 Kan. 541, 544, 618 P.2d 814 (1980).

The problem with K.S.A. 25-4154(a) is not that it contains uncommon words, but that it contains too few of them, with little explanation of precisely what they mean. “In the name of another” is the sticking point. This phrase has not been judicially defined in Kansas, as it exists in this statute or any other that would be helpful to this analysis. Nor does this phrase have a settled meaning in Kansas law, notably in the context of modern campaign finance.

The KGEC points out that there is a federal statute with similar wording. 52 U.S.C. §30122, part of the Federal Election Campaign Act (“FECA”), says: “No person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.” But the federal statute, unlike K.S.A. 25-4154(a), has the benefit of supporting regulations that further define the concept of making a contribution “in the name of another” in various circumstances. See, e.g., 11 C.F.R. §110.4 (defining the concept and giving examples); and §110.6 (defining and addressing separately in detail “earmarked” contributions or those made through an “intermediary or conduit”). See also 52 U.S.C. §30116(a)(8) (limits on contributions “earmarked or otherwise directed through an intermediary or conduit”).

KGEC’s reliance on the dated *Fed. Election Comm’n v. Weinstein*, 462 F. Supp. 243, 250 (S.D.N.Y. 1978), is unhelpful. There, Weinstein directed his plant manager to make corporate funds available to employees so that they could send individual checks in their own names to a candidate’s campaign. The district court rejected a vagueness challenge to 2 U.S.C. §441f, the predecessor to 52 U.S.C. §30122, with little discussion. *Id.* Two other federal cases cited by the

KGEC involving 2 U.S.C. §441f are of limited use. These cases do not shed light on the instant challenge to the Kansas statute under these facts.

More instructive are Kansas cases where the courts have struck various statutes as unconstitutionally vague. For example, in *State v. Harris*, 311 Kan. 816, 467 P.3d 504 (2020), the Kansas Supreme Court considered a statute that criminalized a felon’s possession of a knife. Knife was defined by statute to include “a dagger, dirk, switchblade, stiletto, straight-edged razor or any other dangerous or deadly cutting instrument of like character.” *Id.* at 816. After questioning whether such definition might include a butter knife, the court said the phrase “any other dangerous or deadly cutting instrument of like character” was so vague that it failed to “provide explicit standards for enforcement,” thus “threaten[ed] to transfer legislative power to police, prosecutors, judges, and juries, which leaves them the job of shaping a vague statute's contours through their enforcement decisions.” *Id.* at 822. The court said whether the challenge was facial or as-applied made little difference to the vagueness analysis where a challenged law “invites arbitrary enforcement.” *Id.* at 820.

Here, there is a decided lack of precision or guidance in the statute, even when coupled with KGEC’s Opinion 1997-45, which does little to define “in the name of another” under these circumstances.³ The KGEC is investigating the subject contributions as an alleged “passthrough scheme” where certain contributions to one entity are allegedly “earmarked” for contribution to another. Billingsley spends much space in his brief urging the Court to review various campaign contribution reports involving entities associated with the Kansas Democratic Party. He says these

³Indeed, the KGEC asserts in its brief that the Court should not consider Opinion 1997-45, or any other agency opinion, as part of the vagueness analysis because it goes beyond the plain language of the statute.

reports demonstrate that the flow of campaign funds through various political entities has occurred and continues to occur on a regular basis across the Kansas political spectrum. But now, Billingsley says, “those enforcing the law” (the KGEC) are in fact enforcing it (or failing to enforce it) in “an arbitrary or discriminatory way” according to political affiliation. *Wyoming Gun Owners*, 83 F.4th at 1234. The KGEC defends its position, in part, by pointing out nuances in the activities of entities associated with the Kansas Democratic Party. The KGEC says these nuances render the contributions different than the ones at issue, and thus acceptable under the statute.

The question for the Court “is not whether discriminatory enforcement occurred,” but whether it “is a real possibility.” *Id.* at 1237. Even without evaluating the merits of Billingsley’s claim of discriminatory enforcement by the KGEC, the parties’ arguments demonstrate that – given the lack of a detail about what is prohibited under the statute - uneven enforcement is a “real possibility.”

The 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. For these reasons, the Court concludes that K.S.A. 25-4154(a) is unconstitutionally vague as applied, such that alleged violations of the statute cannot support the proposed subpoena directed at Billingsley.

THE KGEC ASSERTS INDEPENDENT BASES FOR APPROVING THE ISSUANCE OF THE SUBPOENA.

The KGEC points out that its proposed subpoena is based on a reasonable suspicion of violation of not only K.S.A. 25-4154(a), but also K.S.A. 25-4170 and K.S.A. 25-4153b. The

KGEC asserts that these are “uncontested, constitutional, and independent bases for enforcing the subpoena.”

K.S.A. 25-4170 says intentionally making or accepting a campaign contribution exceeding legal limits is a class A misdemeanor. But the KGEC cannot make its case for a violation of K.S.A. 25-4170 apart from K.S.A. 25-4154(a), in that it relies on the alleged “passthrough scheme” to compile enough alleged contributions to exceed legal limits. Based on the facts alleged by the KGEC and the Court’s holding that K.S.A. 25-4154(a) is unconstitutionally vague, an alleged violation of K.S.A. 25-4170 is not an independent basis for issuance of the subpoena here.

K.S.A. 25-4153b(a) says:

No political committee, a major purpose of which is to expressly advocate the nomination, election or defeat of a clearly identified candidate for the legislature or to make contributions or expenditures for the nomination, election or defeat of a clearly identified candidate for the legislature, shall be established by a member of or a candidate for the legislature.

There is nothing in the KGEC’s findings of fact or conclusions of law that establishes a reasonable suspicion that a violation of K.S.A. 25-4153b(a) has occurred. The KGEC’s findings and conclusions allege that Ryckman was a member of and candidate for the legislature, and he received letters from the RSLC when contributions were made to the PACs. The KGEC also alleges that Ryckman’s chief of staff, Resner, communicated with banks about the PACs. There is nothing articulated in the KGEC’s findings and conclusions that addresses whether Ryckman “established” a political committee. The findings and conclusions are insufficient to support an alleged violation of K.S.A. 25-4153b(a) as an independent basis for issuance of the subpoena.

THE KGEC CANNOT ESTABLISH A LIKELIHOOD OF “PREVAILING ON THE CLAIM” UNDER THE PSPA.

The proposed subpoena is unenforceable against Billingsley because it requires a reasonable suspicion of a violation of K.S.A. 25-4154(a), and there can be no such finding because the statute is impermissibly vague as applied. Likewise, the KGEC’s findings and conclusions do not give rise to a reasonable suspicion of a violation of either K.S.A. 25-4170 or K.S.A. 25-4153b(a). For these reasons, the KGEC has not met its burden - it cannot establish a likelihood of “prevailing on the claim” (obtaining this Court’s approval of the subpoena) under the PSPA. Billingsley’s motion to strike the KGEC’s petition is granted. The KGEC’s subpoena will not issue.

II. BILLINGSLEY’S OTHER GROUNDS FOR RELIEF.

Billingsley moved, in the alternative, to dismiss the KGEC’s petition for failure to state a claim under K.S.A. 60-212(b)(6). He argues that the KGEC’s petition seeking approval of the subpoena duces tecum should be dismissed because it relies upon an unconstitutionally vague statute as set forth in the motion to strike. Billingsley did not explain whether or how this Court should analyze the constitutional issues differently than it did in the motion to strike under the PSPA, other than to cite the standard of review for a motion to dismiss. Since the motion to strike was granted, the motion to dismiss is moot.

Billingsley raised other grounds for relief from issuance of the subpoena. Because the issues outlined above are dispositive, the Court need not address Billingsley’s additional grounds for relief from the subpoena.

III. ATTORNEY FEES AND SANCTIONS.

Finally, there is the matter of Billingsley's requests for attorney fees and sanctions. First, he seeks an award of attorney fees under the PSPA. K.S.A. 60-5320(g) says in pertinent part:

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: (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.

Because Billingsley prevailed on the motion to strike, he may be entitled to attorney fees and sanctions for prosecution of the motion under the PSPA. The issue of attorney fees and sanctions will be the subject of a separate hearing.

Billingsley also requests an award of attorney fees under K.S.A. 25-4158(d)(3), which says:

The commission shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. Any person subject to a subpoena shall be informed that such person may apply to the district court for relief on the basis that responding to the subpoena will cause an undue burden or expense. The district court on review of any such application for relief, may impose an appropriate sanction on the commission including an order requiring the commission to reimburse the person for lost earnings and attorney fees.

Because the Court has granted Billingsley's motion to strike the KGEC's petition, Billingsley is not "subject to" a subpoena, nor is he required to respond to it. Thus, Billingsley's request for an award of attorney fees under K.S.A. 25-4158(d)(3) is moot.

CONCLUSION

For the reasons set forth above, Billingsley’s motion to strike is granted. His motion to dismiss for failure to state a claim is denied as moot. Given his success on the motion to strike, Billingsley’s motion for attorney fees and sanctions under K.S.A. 60-5320(g) will be considered at a separate hearing. The parties are directed to contact the Court within 10 days of the date of this order to schedule a status hearing.

This order is effective on the date and time shown on the electronic file stamp.

IT IS SO ORDERED.

HON. TERESA L. WATSON
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above document was filed electronically providing notice to counsel of record.

/s Angela Cox
Administrative Assistant