CASE NO. 17-6456

UNITED STATES COURT OF APPEALS
for the SIXTH CIRCUIT

JOHN SCHICKEL et al.
Plaintiffs-Appellees

v.

CRAIG DILGER et al.
Defendants-Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
NO. 2:15-cv-00155-WOB-JGW

BRIEF OF THE DEFENDANTS-APPELLANTS KENTUCKY LEGISLATIVE ETHICS COMMISSION

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Defendants-Appellees George C. Troutman, in his official capacity as Chairman and member, Kentucky Legislative Ethics Commission, Pat Freibert, Tony Goetz, Ken Winters, Tom Jensen, Sheldon Baugh, Elmer George, Phil Huddleston, and Anthony M. Wilhoit, in their official capacities as members, Kentucky Legislative Ethics Commission, and H. John Schaaf, in his official capacity as Executive Director, Kentucky Legislative Ethics Commission, (together, "KLEC"), respectfully request oral argument in this matter, as the constitutionality and interpretation of Kentucky's Code of Legislative Ethics, which regulates the interactions between lobbyists and legislators, are matters of paramount importance to the Commonwealth of Kentucky. The Commonwealth has an established legitimate governmental interest in regulating corruption and its appearance in the activities of its legislators and the passage of legislation.

STATEMENT OF ISSUES PRESENTED

1. Whether the District Court properly held that Ky. Rev. Stat. Ann. §§ ("KRS") 6.767(3) and 6.811(7), which prevent employers of lobbyists from donating to legislative campaigns during a regular legislative session, and legislators from accepting campaign contributions from employers of lobbyists during a regular legislative session, are constitutional.

2. Whether the District Court properly held that KRS 6.767(2) and 6.811(6), which prevent lobbyists from making campaign contributions to legislators, and legislators from accepting campaign contributions from lobbyists, are unconstitutional;

3. Whether the District Court properly held that KRS 6.751(2) and 6.811(4), which prevent lobbyists from offering anything of value to legislators, and legislators from soliciting or accepting anything of value from lobbyists, are unconstitutional.

4. Whether the District Court properly held that KRS 6.811(5), which prevents lobbyists from serving as treasurers or soliciting donations for legislative campaigns, is unconstitutional.

5. Whether the District Court applied the appropriate level of scrutiny to constitutional challenges to the Kentucky Code of Legislative Ethics.

6. Whether the District Court properly held that Plaintiffs have standing.

BACKGROUND

1. Kentucky's Code of Legislative Ethics ("Ethics Code") is codified at KRS 6.601 to 6.849. It was enacted in 1993. 1993 Ky. Acts 1st Extra Sess. 4. It established KLEC to enforce its provisions. *Id.* at 23-24.

2. The Ethics Code was enacted in response to the infamous Operation BOPTROT. (KLEC 30(b)(6) Dep 40: 8-12, Doc. 47-1 ("KLEC Dep."), Page ID # 659.)[1] In *United States v. Blandford*, 33 F.3d 685 (6th Cir. 1994), the court discussed the events in Operation BOPTROT:

> This case arises out of an FBI investigation into public corruption in Kentucky. The investigation, dubbed "Operation BOPTROT," focused on certain members of the Kentucky General Assembly who were suspected of extorting cash payments in exchange for assurances that they would take a particular stance on legislation pertaining to the horse racing industry. Initiated in September 1990, Operation BOPTROT ultimately ensnared several public officials, including Donald J. Blandford, Speaker of Kentucky's House of Representatives.

Id. at 688. *See generally id.* at 688-93 (summarizing the events leading to the conviction of Blandford).[2]

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[1] *See also Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947, 950 (Ky. 1995) ("Kentucky's public scandal involving the indictment and conviction of legislators, former legislators, and lobbyists for criminal misconduct prompted/hastened the enactment of Senate Bill 7 during . . . 1993. Such legislation made changes to KRS Chapters 6 and 11A which are referred to as the 'Kentucky Code of Legislative Ethics' and the "Executive Branch Code of Ethics.").

[2] *See also* KLEC Dep. Exs. 53-54, Docs. 47-56, 57, Page ID # 1422-27 (discussing Operation BOPTROT).

3. In 2014, the Kentucky legislature amended the Ethics Code in H.B. 28, 2014 Gen. Assemb., Reg. Sess. (Ky. 2014) ("H.B. 28"). H.B. 28 amended KRS 6.611(2)(b) and 6.811(7) to prohibit lobbyists and their employers from paying for food and beverages for individual legislators and candidates, amended KRS 6.767(2) and 6.811(7) to prohibit lobbyist employers from making and legislators from accepting employers' campaign contributions during a regular session of the legislature, and amended KRS 6.811(5) to prohibit a lobbyist from directly soliciting, controlling, or delivering a campaign contribution to a member of the General Assembly or a legislative candidate. (KLEC Dep. Ex. 36, Doc. 47-39, Page ID # 1332-1349.)

4. KRS 6.767(3) provides that "a member of the General Assembly, candidate for the General Assembly, or his or her campaign committee shall not, during a regular session of the General Assembly, accept a campaign contribution from an employer of a legislative agent, or from a permanent committee as defined in KRS 121.015." KRS 6.811(7) reciprocally provides that "during a regular session of the General Assembly, an employer of a legislative agent shall not make a campaign contribution to a legislator, candidate, campaign committee for a legislator or candidate, or caucus campaign committee."

5. KRS 6.767(2) provides that "a member of the General Assembly, candidate for the General Assembly, or his or her campaign committee shall not

accept a campaign contribution from a legislative agent. Violation of this provision is ethical misconduct." KRS 6.811(6) reciprocally provides that "a legislative agent shall not make a campaign contribution to a legislator, a candidate, or his or her campaign committee."

6. KRS 6.751(2) provides that "a legislator or his spouse shall not solicit, accept, or agree to accept anything of value from a legislative agent or an employer. Violation of this subsection is a Class B misdemeanor." KRS 6.811(4) reciprocally provides that "a legislative agent or employer shall not knowingly offer, give, or agree to give anything of value to a legislator, a candidate, or the spouse or child of a legislator or candidate." KRS 6.611(2)(a) defines "anything of value" to include "any other thing of value that is pecuniary or compensatory in value to a person, or the primary significance of which is economic gain." KRS 6.611(2)(a)(14).

7. KRS 6.811(5) provides that "a legislative agent shall not serve as a campaign treasurer, and shall not directly solicit, control, or deliver a campaign contribution, for a candidate or legislator."

STATEMENT OF THE CASE

1. On August 24, 2015, Plaintiffs Sen. John Schickel, David Watson, and Ken Moellman, Jr. filed suit against the members and executive directors of the Kentucky Registry of Election Finance ("KREF") and KLEC. (Compl., R. 1, Page ID # 1-27.) Sen. Schickel is the Kentucky State Senator for the 11th District of Kentucky, representing Boone County. (*Id.* ¶ 2, Page ID # 5.) Mr. Watson was a candidate for the Kentucky 6th House District in 2016. (*Id.* ¶ 3, Page ID # 6; KREF 30(b)(6) Dep. Ex. JJ, R. 60-39, Page ID # 2739.) Mr. Moellman asserted that he would be a candidate for the office of Pendleton County Judge/Executive in 2018. (Compl. ¶ 4, R. 1, Page ID # 6.)

2. Plaintiffs sought a preliminary and permanent injunction against the enforcement of KRS§ 121.150(6), (11), (13), and (23)(a) (collectively, "campaign finance restrictions"), enforced by KREF, and 6.611(2), 6.751(2) 6.767(1) and (2), and 6.811(4), (5), (6), and (7) (collectively, "lobbying restrictions"), enforced by KLEC. (*Id.* ¶¶ A-C, Page ID # 25-26.) Plaintiffs alleged that those laws violated their rights to free speech under the First Amendment and equal protection under the Fourteenth Amendment, and are void for vagueness and overbreadth. (*Id.* ¶¶ 81, 85-87, Page ID # 24-25.)

3. KLEC filed a motion to dismiss on October 6, 2015, on the grounds that Plaintiffs lacked standing, and that the lobbying restrictions were

constitutional. (KLEC Mot. Dismiss, R. 17, Page ID # 246-65.) The District Court held oral argument on the motion to dismiss on January 28, 2016, and summarily denied it on January 29, 2016. (Order, R. 25, Page ID # 335-36.)

4. After discovery, all parties filed motions for summary judgment. The Court held oral arguments on the summary judgment motions on January 10, 2017. (Minutes, R. 97, Page ID # 4350.)

5. On June 6, 2017, the District Court issued its opinion on the summary judgment motions. (Mem. Op. & Order, R. 122 ("Opinion"), Page ID # 4620-54.) The District Court found that the challenges to the campaign finance restrictions were largely rendered moot by the passage of S.B. 75, Gen. Assemb., Reg. Sess. (Ky. 2017), but struck down the definition of "caucus campaign committee" in KRS 121.015(3)(b) as violating equal protection. (Opinion 5-12, Page ID # 4624-31.) The District Court struck down the ban on lobbyists giving legislators "anything of value" in KRS 6.751(2) and 6.767(1) as vague and overbroad, chilling speech, and violating equal protection. It struck down the ban on campaign contributions by lobbyists to legislators in §§ 6.767(1) and 6.811(6) as not narrowly tailored and overbroad. It also struck down the ban on lobbyists serving as campaign treasurers and soliciting campaign contributions for legislators in § 6.811(5) as not narrowly tailored. However, it upheld the ban on campaign

contributions from employers of lobbyists during an active legislative session in §§ 6.767(2) and 6.811(1) as closely drawn. (Opinion 12-31, Page ID # 4631-50.)

6. The District Court ordered the parties to confer and draft a permanent injunction in conformity with the opinion within twenty (20) days. (*Id.* at 35, Page ID # 4654.) Plaintiffs and KLEC complied on June 26, 2017. (Notice of Filing With Mem. Regarding Proposed Inj., R. 128, Page ID # 4672-79.) KREF instead filed a Motion to Reconsider and Amend Order, or to Stay Enforcement of Order on June 23, 2017. (R. 125, Page ID # 4657-67.)

7. On December 1, 2017, the District Court denied KREF's motion and entered a permanent injunction. (Mem. Op. & Order, R. 138, Page ID # 4805-10; Permanent Inj., R. 139, Page ID # 4811-12.) On December 6, 2017, the District Court entered a Judgment in accordance with the opinion and injunction. (Judgment, R. 140, Page ID # 4813-14.)

8. KLEC appealed on December 6, 2017, and moved directly in this Court for an emergency stay of the District Court's injunction pending appeal on December 10, 2017, which this Court granted on December 28, 2017. Plaintiffs cross-appealed on December 20, 2017. KREF also appealed the District Court's decision on January 2, 2018.

SUMMARY OF ARGUMENT

The District Court erred in striking down Kentucky's bans on campaign contributions from legislators to lobbyists, on gifts from lobbyists to legislators, and on lobbyists serving as campaign treasurers and soliciting campaign contributions, but properly upheld the ban on campaign contributions by employers during a legislative session. Bans on campaign contributions by lobbyists, both during a legislative session and year-round, have been consistently upheld. The ban on gifts from lobbyists to legislators is constitutional, as it does not restrict association, only paid association, and contains many exemptions to ensure that it is closely drawn and not vague or overbroad. The District Court relied on its own misunderstanding of a few hypothetical situations at the margins, and ignored the plainly legitimate sweep of the gift ban. The ban on lobbyists serving as campaign treasurers and soliciting campaign contributions is also closely drawn to prevent lobbyists from amassing campaign contributions indirectly when they are not able to do so directly. Additionally, Plaintiffs lack proper standing to challenge the lobbying restrictions.

ARGUMENT

I. Standard of Review.

Fed. R. Civ. P. 56(a) provides that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." "There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. . . . The inquiry performed is the threshold inquiry of determining whether there is the need for a trial . . . ." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986).

II. Standards for First Amendment and Equal Protection Challenges.

Plaintiffs allege that the lobbying restrictions deprive them of their "rights to Free Speech, Expression, and Association guaranteed to them under the First Amendment of the U.S. Constitution, and their rights to Equal Protection, under the Fourteenth Amendment." (Compl. ¶ 81, R. 1, Page ID # 24.) They also challenge the lobbying restrictions as vague and overbroad. (*Id.* ¶¶ 85-87, Page ID # 25.) Restrictions on lobbying are subject to intermediate "closely drawn" scrutiny. *FEC v. Beaumont*, 539 U.S. 146, 161-62 (2003). The same standard applies to equal protection challenges. *Holmes v. FEC*, 71 F. Supp. 3d 178, 186 (D.D.C. 2014). In order to succeed on a facial vagueness challenge, a plaintiff must "'demonstrate[] that the law is impermissibly vague in all of its applications."

Green Party of Tenn. v. Hargett, 700 F.3d 816, 825 (6th Cir. 2012). In order to succeed on an overbreadth challenge, the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

A. Lobbying Restrictions are Subject to Closely Drawn Scrutiny.

U.S. Const. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." However, "the state may sometimes curtail speech when necessary to advance a significant and legitimate state interest." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

Restrictions on political contributions are subject to an intermediate "closely drawn" standard of scrutiny:

> The level of scrutiny is based on the importance of the "political activity at issue" to effective speech or political association. Going back to *Buckley v. Valeo*, restrictions on political contributions have been treated as merely "marginal" speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression. "While contributions may result in political expression if spent by a candidate or an association . . . , the transformation of contributions into political debate involves speech by someone other than the contributor." This is the reason that instead of requiring contribution regulations to be narrowly tailored to serve a compelling governmental interest, "a contribution limit involving 'significant interference' with associational rights" passes muster if it satisfies the

> lesser demand of being "'closely drawn' to match a 'sufficiently important interest.'"

Beaumont, 539 U.S. at 161-62 (2003). *See also Yamada v. Snipes*, 786 F.3d 1182, 1205 (9th Cir. 2015) ("Contribution bans are subject to 'closely drawn' scrutiny.*"*); *Preston v. Leake*, 660 F.3d 726, 735 (4th Cir. 2011) ("In reviewing the Campaign Contributions Prohibition, we must determine whether it is closely drawn to a sufficiently important government interest."); *Green Party of Conn. v. Garfield*, 616 F.3d 189, 199 (2d Cir. 2010) ("The Court has always applied that lower standard—often referred to as the 'closely drawn' standard—to evaluate First Amendment challenges to laws restricting campaign contributions."). The campaign contribution restrictions are marginal speech restrictions, and are subject to the closely drawn standard, meaning that they must only be closely drawn to match a sufficient government interest.

Shortly after the passage of the Ethics Code, in *Associated Indus. of Ky. v. Commonwealth*, 912 S.W.2d 947 (Ky. 1995), the Kentucky Supreme Court considered a challenge from employers of lobbyists to the Ethics Code as violating the First Amendment, and upheld it as closely drawn. *Id.* at 952. The court found that "the Commonwealth of Kentucky has a compelling interest in insuring the proper operation of a democratic government and deterring corruption, as well as the appearance of corruption." *Id.* at 953. It further found that the Ethics Code "employs means, closely drawn, to avoid unnecessary abridgement of associational

freedom." *Id.* Accordingly, the court found that "the conduct prohibited by KRS 6.811 . . . [does] not constitute impermissible abridgement of AIK's First Amendment right to petition and freedom of association." *Id.* at 952.[3]

Bans on gifts from lobbyists to legislators should also be subject to closely drawn scrutiny, as there is essentially no distinction between a campaign contribution and a gift. "*Any payment* made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship . . . ." *Preston*, 660 F.3d at 737.

Restrictions on solicitation involving lobbyists and legislators should also be subject to closely drawn scrutiny. Although solicitation involves speech, restrictions on solicitation in professions involving the public trust or welfare have typically been subject to more intermediate scrutiny. "'Area[s] traditionally subject to government regulation,; such as commercial speech and professional conduct, typically receive a lower level of review." *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014). *See generally Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (restrictions on solicitations by lawyers are commercial speech and constitutional under intermediate scrutiny); *Capobianco v. Summers*, 377 F.3d 559 (6th Cir.

[3] Although "the decision of a state court of last resort is not binding on a federal court on a federal constitutional question," it is "entitled to great respect, and perhaps completely persuasive." *Joseph v. Blair*, 482 F.2d 575, 579 n. 4 (4th Cir. 1973).

2004) (restrictions on solicitations by chiropractors are commercial speech and constitutional under intermediate scrutiny).[4]

B. Standards for Vagueness and Overbreadth.

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), the court explained the distinction between vagueness and overbreadth:

> Imprecise laws can be attacked on their face under two different doctrines. First, 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." Second, 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. at 52 (citations omitted).

"For statutes to survive a vagueness challenge, the Supreme Court requires 'that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'" *Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1487 (6th Cir. 1995). "A statute need not define every term to survive a vagueness challenge." *Brown v. Chicago Bd. of Educ.*, 824 F.3d 713, 717 (7th Cir. 2016). "A statute will be struck down as facially vague only if the plaintiff has 'demonstrate[d] that the law is impermissibly vague in all of its applications.'" *Hargett*, 700 F.3d at 825. "Statutes

[4] *But see Green Party v. Garfield*, 616 F.3d. 189, 207-08 (2d Cir. 2010) (solicitation of contributions by contractors lobbyists subject to strict scrutiny).

and regulations will not become 'impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope.'" *United States v. Midwest Fireworks Mfg. Co.*, 248 F.3d 563, 568 (6th Cir. 2001). "A regulation is not impermissibly vague because it is 'marked by flexibility and reasonable breadth, rather than meticulous specificity.' Fair notice in these circumstances demands 'no more than a reasonable degree of certainty.'" *U.S. Telecom Ass'n v. FCC*, 825 F.3d 674, 737 (D.C. Cir. 2016) (citations omitted). "The presence of enforcement discretion alone does not render a statutory scheme unconstitutionally vague." *Kincaid v. Gov't of D.C.*, 854 F.3d 721, 729 (D.C. Cir. 2017).

"The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. "To show that a statute is unconstitutionally overbroad, plaintiffs ''must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.'"" *Am. Booksellers Found. For Free Expression v. Strickland*, 601 F.3d 622, 627 (6th Cir. 2010). "The overbreadth doctrine is 'strong medicine,' used only if the

overbreadth is 'substantial.'" *Jacobsen v. Howard*, 109 F.3d 1268, 1274 (8th Cir. 1997) (citations omitted).[5]

C. Standards for Equal Protection Challenges.

Courts apply the same standard to equal protection challenges as to First Amendment challenges:

> The Supreme Court has held that the First Amendment requires "closely drawn" scrutiny for limits on political contributions . . . but has not addressed the scrutiny applicable to a challenge to restrictions on political contributions under an equal protection rubric. Recent courts to have considered the issue have applied the same "closely drawn" scrutiny to equal protection challenges.

Holmes, 71 F. Supp. 3d at 186 (citing cases). Additionally, lobbyists are not a suspect classification. *See Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1194 (E.D. Cal. 2001) ("Plaintiffs do not claim they are members of a 'suspect' classification . . . ."); *Nat'l Ass'n of Soc. Workers, R.I. Chapter v. Harwood*, No. 93-0229 P, 1993 WL 742703, at *4 (D.R.I. Nov. 10, 1993) ("There is no question that lobbyists as such are not a suspect classification under Equal Protection jurisprudence."). Accordingly, equal protection challenges to the lobbying restrictions are subject to the same closely

[5] "Overbreadth is a judicially created doctrine designed to prevent the chilling of protected expression." *Massachusetts v. Oakes*, 491 U.S. 576, 584 (1989). As the analysis of overbreadth and a "chilling effect" are necessarily intertwined, KLEC will refer to overbreadth throughout.

drawn scrutiny as the First Amendment challenges. KLEC therefore does not make separate arguments based on equal protection, as the standards are the same.

VI. The Lobbying Restrictions Were Enacted to Prevent Actual and Perceived *Quid Pro Quo* Corruption.

"The sole governmental interest which justifies restrictions on political contributions is the need to prevent actual or perceived *quid pro quo* corruption . . . ." *Mich. State Chamber of Commerce v. Austin*, 832 F.2d 947, 949 (6th Cir. 1987). *See also McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014) ("Any regulation must instead target what we have called '*quid pro quo*' corruption or its appearance."); *Farris v. Seabrook*, 677 F.3d 858, 865 (9th Cir. 2012) ("States have an important governmental interest in preventing the actuality or appearance of quid pro quo corruption."); *Frank v. City of Akron*, 290 F.3d 813, 818 (9th Cir. 2002) ("The restriction on contributions clearly achieves the significant objective . . . in limiting the appearance and the reality of corruption in the form of *quid pro quo* agreements and undue political influence . . . ."). Federal courts have consistently held that the need to prevent quid pro quo corruption is a significant government interest that justifies regulating political contributions.

There need not be actual quid pro quo corruption; the appearance of quid pro quo corruption is sufficient to justify governmental restrictions on contributions. "It is not necessary to produce evidence of actual corruption to demonstrate the sufficiently important interest in preventing the appearance of corruption."

Ognibene v. Parkes, 671 F.3d 174, 183 (2d Cir. 2011). Restrictions on political contributions are justified by the need to prevent both actual quid pro quo corruption and the appearance of quid pro quo corruption.

Plaintiffs repeatedly attempt to argue that a recent scandal is necessary for any regulation of corruption, citing *Garfield* and *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012). Specifically, Plaintiffs argue that "*Lavin* cited *Garfield*, and noted that in the absence of a **recent scandal**, a donation restriction could not be upheld." (Pls.' Mem. Opp. KLEC's Mot. Summ. J. 30, R. 69, Page ID # 3747 (citing *Lavin*, 689 F.3d at 547).) However, *Lavin* never says this. 689 F.3d at 547.[6] Rather, both *Garfield* itself and other cases make expressly clear that no recent scandal is required to prevent the appearance of corruption.

First, *Garfield* expressly held that "if the state's only interest in this case were combating *actual* corruption, the CFRA's outright ban on contractor

[6] In *Lavin v. Husted*, 689 F.3d 543 (6th Cir. 2012), Ohio banned campaign contributions from over 93,000 Medicaid providers. *Id.* at 548. The ban was struck down because there was "no evidence that prosecutors in Ohio, or any other state for that matter, have abused their discretion in this fashion. Indeed, the Secretary concedes that he has no evidence at all in support of his theory that § 3599.45 prevents actual or perceived corruption among prosecutors in Ohio. Meanwhile, the plaintiffs have evidence showing the contrary . . . ." *Id.* at 547. *Lavin* struck down a campaign contribution ban on over 93,000 people, a far more massive group than lobbyists and legislators, without any evidence of corruption. Also, lobbyists are uniquely situated with respect to their role in drafting legislation and their access to legislators. *Lavin* is therefore not on point for Kentucky's much more closely drawn restrictions involving only lobbyists and legislators, after Kentucky's established history of corruption between them.

contributions would likely be held overbroad. Combating *actual* corruption, however, is not the state's only interest here; the CFRA is also meant to address the *appearance* of corruption caused by contractor contributions." 616 F.3d at 205.

The Second Circuit subsequently expressly clarified in *Ognibene* that *Garfield* does not require recent scandals. "Appellants argue that *Green Party* requires evidence of recent scandals in order to justify any contribution restriction, not just a ban. . . . This is not what *Green Party* says. There is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures." 671 F.3d at 188. *See also N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 716 (4th Cir. 1999) ("Courts simply are not in the position to 'second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.'" (quoting *FEC v. Nat'l Right to Work Comm.*, 459 U.S. 197, 210 (1982)). The *Ognibene* court further noted that "to require evidence of actual scandals for contribution limits would conflate the interest in preventing actual corruption with the separate interest in preventing apparent corruption." 671 F.3d at 188. "Appellants essentially propose giving every corruptor at least one chance to corrupt before anything can be done, but this dog is not entitled to a bite." *Id.* The case law is clear that a recent scandal is not required for legislation to target the appearance of corruption.

Regardless, the Ethics Code was enacted in response to an actual corruption scandal, Operation BOPTROT. That operation involved "an FBI investigation into public corruption in Kentucky" of "certain members of the Kentucky General Assembly who were suspected of extorting cash payments in exchange for assurances that they would take a particular stance on legislation pertaining to the horse racing industry." *Blandford*, 35 F.3d at 688. Ultimately, "fifteen top state legislators, lobbyists and other public figures, including the former Speaker of the Kentucky House, have been convicted or face trial on various charge of bribery, extortion, fraud and racketeering."[7] BOPTROT "was especially notable for revealing how cheaply the legislators were willing to sell their votes," (KLEC Dep. Ex. 53, R. 47-56, Page ID # 1422-24), including for as little as $400. (*Id.* at 304:17-05:5, Page ID # 923-24; *id.* Ex. 62, Doc. 47-65, Page ID # 1461.) Part of this corruption involved customs such as lobbyists leaving their credit cards at restaurants to pay for legislators' meals, which contributed to the culture that existed at the time that led to even more serious problems. (*Id.* at 305:6-17, Page ID# 924.)

[7] B. Drummond Ayres, Jr., *With Leaders Leaving Office for Jail, Kentucky Works to Refurbish Image*, *N.Y. Times*, Sept. 19, 1993, *available at* http://www.nytimes.com/1993/09/19/us/with-leaders-leaving-office-for-jail-kentucky-works-to-refurbish-image.html (KLEC Mem. Supp. Mot. Summ. J. Ex. 2, R. 64-4, Page ID # 3350-53.)

The rampant quid pro quo corruption of Operation BOPTROT subsequently prompted the adoption of the Ethics Code. The Code was meant to remedy the corruption of BOPTROT, and to create a different culture in which there would be guidelines and enforcement where none had existed before. (*Id.* at 306:3-10, Page ID # 925.) The purpose of the Code "is to assure the public that the members of the General Assembly are operating within a reasonable code of ethics that provides some separation between the people who are making policy and the people who want particular policies made, to maintain a professional relationship between the parties." (*Id.* at 62:10-24, Page ID # 681.) At the time of the enactment of the Code, some advocated for "an all-out ban—a so-called 'no cup of coffee' rule like those in Wisconsin and South Carolina."[8] However, the legislature settled on a limit of "$100 per year in meals and drinks from each lobbying interest, which must be reported."[9]

Since the enactment of the Code, problems in Kentucky and scandals in other states prompted recommendation of the changes that culminated in H.B. 28. In Kentucky, there were administrative problems with the reporting requirement for expenditures under $100, including incorrect reports, and legislators unexpectedly ending up on the reports. (KLEC Dep. 154:6-56:7, 263:12-64:8, Page

[8] Al Cross, *Lies, Bribes, and Videotape*, *Courier-Journal*, July 1, 1993. (KLEC Dep. Ex. 54, R. 47-57, Page ID # 1427.)
[9] *Id.*

ID # 773-75, 882-83.) KLEC's representative also testified that beginning in approximately 2007, based on problems that were arising in other states that did not have strict gift laws, KLEC began to recommend repealing the $100 minimum and adopt the "no cup of coffee" rule, in order to paint a brighter line for the General Assembly and the public to know that legislators are not taking anything of value. (*Id.* at 207:6-08:5, Page ID # 826-27.) "The "no cup of coffee" rule is part of creating a culture in which legislators do not take anything from lobbyists, and it helps to develop this kind of culture." (*Id.* at 98:2-6, Page ID # 717.) States that do not have such a rule have had problems with legislators getting such things as cash gifts, jewelry, and other things, (*id.* at 97:8-103:8, Page ID # 716-22), where "the line between legislators and lobbyists is blurred." (*Id.* at 103:1-2, Page ID # 722.)

As examples,[10] Georgia, like Kentucky, had a $100 cap on lobbyist gifts. To get around that cap, lobbyists exploited a loophole to give lunches to committee chairs. Nebraska had a $50 per month per senator cap on gifts from lobbyists, but food and beverages were exempt, leading to lobbyists hosting large breakfasts as

[10] The examples cited are from the Ethics Reporters issued monthly by KLEC, which contain compilations of news articles relating to legislative ethics from around the country. KLEC's representative, H. John Schaaf, testified that he generally writes the newsletters, and that they are emailed to all legislators, lobbyists, lobbyist employers, and anyone who wants to be on the list. (KLEC Dep. 63:22-66:4, Page ID # 682-85.) The Ethics Reporters are attached as Ex. 3 to KLEC's Memorandum in Support of Motion for Summary Judgment, (*id.* Ex. 3, R. 64-5, Page ID # 3354-67), which also contains references to the source articles. (*Id.* n. 22-29, R. 64-2, Page ID # 3280-81.)

fundraisers for legislators, and allowing lawmakers to collect "as much as $7,000 just for eating breakfast in a room full of people." Nebraska also only required senators to report gifts valued at more than $100, and as a result, "'golf outings, luncheons, holiday gifts, birthday gifts, wedding presents, tickets to events, are all nearly impossible to track.'" In Missouri, "lobbyists paid for St. Louis Cardinals games, legislative barbecues, retirement dinners, catered lunches, snacks, liquor, hotel rooms, and other gifts. Missouri does not limit how much lobbyists can spend on legislators." Kansas prohibits legislators from "accepting gifts worth more than $40 or entertainment worth more than $100 from any one entity each year," but Kansas lawmakers still get "free University of Kansas basketball games, NASCAR races, and Disney on Ice, along with countless meals, a few rounds of golf, and the occasional cigar." In Hawaii, the law "requires lawmakers to disclose gifts that exceed $200 in value," but legislators still received such things as "an Apple iPad, . . . two dozen Blu-ray DVDs worth $360," and gifts ranging from "hand-pounded poi valued at five dollars to free tickets to the governor's inaugural ball valued at $250 apiece." Based on Kentucky's own history of corruption and problems with gifts in other states, Kentucky amended the Ethics Code in H.B. 28 to avoid corruption and the appearance of corruption.

VII. The Lobbying Restrictions are Constitutional.

The lobbying restrictions are constitutional, as they are closely drawn to preventing quid pro quo corruption or its appearance. The restrictions on campaign contributions by lobbyists or their employers, whether during the session or year-round, have been consistently upheld as constitutional, as they regulate only lobbyists and legislators, and how much they can contribute to campaigns. The ban on gifts between lobbyists and legislators is also constitutional, as it targets only paid interactions between individual legislators or targeted groups of legislators, and contains many exceptions to ensure that it does not overreach. The ban on lobbyists serving as treasurers or soliciting campaign contributions is also constitutional, as it prohibits only lobbyists from managing or accumulating campaign contributions for legislators.

A. The Ban on Campaign Contributions by Employers of Lobbyists During a Legislative Session is Constitutional.

The District Court properly determined that the bans on campaign contributions by employers of lobbyists during an active regular legislative session in KRS 6.767(3) and KRS 6.811(4) are constitutional, as courts have consistently upheld such bans. In *Bartlett*, 168 F.3d 705 (4th Cir. 1999), a North Carolina statute "prohibits a lobbyist, a lobbyist's agent, or a political committee that employs a lobbyist from contributing to a member of or candidate for the North Carolina General Assembly or Council of State while the General Assembly is in

session. *Id.* at 714. The court noted that "the restrictions . . . are limited to lobbyists and the political committees that employ them—the two most ubiquitous and powerful players in the political arena." *Id.* at 716. The court found "a genuine risk of both actual corruption and the appearance of corruption," *id.* at 715, and held that "North Carolina can constitutionally enact the limited restrictions on lobbyist and political committee contributions." *Id. See also Kimbell v. Hooper*, 665 A.2d 44, 51 (Vt. 1995) (holding restrictions on contributions by lobbyists during general assembly sessions constitutional). Plaintiffs cited to no cases in which a ban on contributions by lobbyists or their employers during an active legislative session was found unconstitutional. Accordingly, the District Court properly found that the ban on campaign contributions by employers of lobbyists during an active legislative session was constitutional.

B. The Ban on Campaign Contributions by Lobbyists is Constitutional.

The District Court erred in striking down the complete bans on campaign contributions from lobbyists to legislators in KRS 6.767(2) and 6.811(6), as such bans have been consistently upheld as constitutional.[11] The District Court cited

[11] It is unclear what level of scrutiny the District Court applied to the ban on campaign contributions. The District Court initially referenced "closely drawn" scrutiny. (Opinion 24, Page ID # 4643.) It then referred to "'core political speech,' requiring that a burdensome provision be narrowly tailored to serve the overriding state interest," and subsequently used the terms "narrowly tailored" and "less restrictive means," (*id.* at 24-27, Page ID # 4643-46), which appear to apply strict scrutiny. The District Court concluded that "the statutes are neither closely drawn

several decisions upholding temporary bans during the legislative session, but curiously neglected subsequent cases in which year-round bans have been upheld, even within the same circuit and state. For instance, the District Court relied on *Bartlett*, which upheld North Carolina's ban on contributions during the session. (Opinion 25, Page ID # 4644.) However, the very same circuit later upheld a year-round ban on contributions in the very same state in *Preston*. The court noted that "although a ban ends association rights to a greater degree than does a limit by foreclosing the ability to make even a small donation, this amounts to a difference *in the scope* of a particular law, not a difference in the type of activity regulated by the law." 660 F.3d at 734. The District Court takes no note of this later decision by the very same circuit on which it relied.

Similarly, in *Governmental Advocates*, the court also upheld a year-round ban on contributions by lobbyists. The court noted that the statute "is not unconstitutional simply because it bans, rather than limits, contributions by certain lobbyists. . . . A ban on contributions is not per se illegal." 164 F. Supp. at 1191. *See also Yamada*, 786 F.3d at 1206 ("Hawaii's ban on government contractors survives closely drawn scrutiny."); *Vt. Right to Life Comm., Inc. v. Sorrell*, 758

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nor narrowly tailored." (*Id.* at 27, Page ID # 4646.) To the extent the District Court applied strict scrutiny to restrictions on campaign contributions, the District Court erred as argued above.

F.3d 118, 140 (2d Cir. 2014) ("Contribution limitations or bans 'are permissible as long as they are closely drawn to address a sufficiently important state interest.'").

Plaintiffs and the District Court rely on *Garfield* for the proposition that "if the state's interests . . . can be achieved by means of a *limit* on lobbyist contributions, rather than a ban, the ban should be struck down for failing to avoid unnecessary abridgement of associational freedoms." (Pl.'s Mem. Opp. KLEC Mot. Summ. J. 29, R. 69, Page ID # 3746; Opinion 26, Page ID # 4645 (quoting *Garfield*, 616 F.3d at 206).) However, in *Garfield*, the court considered the constitutionality of an act passed in response to scandals involving "Connecticut's former governor . . . . accepting over $100,000 worth of gifts and services from state contractors . . . . in exchange for assisting the contractors in securing lucrative state contracts." 616 F.3d at 193. Connecticut subsequently enacted laws that "prohibit state contractors and certain lobbyists from (1) making campaign contributions to candidates for state office and (2) soliciting campaign contributions on behalf of candidates for state office." *Id.* at 194.

The court struck down that law as it applied to lobbyists, but only because "the recent corruption scandals had nothing to do with lobbyists." *Id.* at 206. It actually upheld the total ban on contributions by contractors, finding that the "imposition of an outright ban on contributions by contractors . . . is closely drawn to the state's interest in combating the appearance of corruption." *Id.* at 205.

Garfield stands only for the proposition that a state should not restrict the contributions of completely unrelated groups, and reaffirms that an outright ban can be closely drawn.

In *Ognibene*, the Second Circuit subsequently repeatedly reaffirmed that bans may be necessary to avoid the appearance of corruption. The court stated that "contribution limits and bans are permissible as long as they are closely drawn to address a sufficiently important state interest." 671 F.3d at 183. "As noted in *Green Party*, while a limit may be sufficient to address actual corruption, the appearance and public perception of corruption may be so grave as to merit a ban." *Id.* at 186. The court reasoned that "because the scope of *quid pro quo* corruption can never be reliably ascertained, the legislature may regulate certain indicators of such corruption or its appearance, such as when donors make large contributions. . . . Such donations certainly feed the public perception of *quid pro quo* corruption, and this alone justifies limitations or perhaps an outright ban." *Id.* at 187.

Next, the District Court further reasoned that a ban on campaign contributions "is also overbroad because the candidate might not know that the contribution comes from a 'legislative agent.'" The donor might not even know he or she is considered a 'legislative agent.'" (Opinion 27, Page ID # 4646.) The District Court's reasoning on this matter is curious, as Plaintiffs did not argue it in their briefs, and for good reason: all lobbyists in Kentucky are required to be

registered. KRS 6.807. KLEC maintains a searchable database of all registered lobbyists.[12] It is thus very easy for any legislator to find out whether a donation is from a lobbyist, and the District Court's speculation that the donor might not even know whether he or she is a lobbyist is implausible. Additionally, if a contribution is accepted in error, KRS 6.767(4) allows a legislator to return the contribution within thirty days with no consequences.

Year-round bans on contributions by lobbyists have been found to be different only in scope and not in kind from limits on contributions, and have been upheld as constitutional. The District Court cites only cases where temporary bans on contributions during the session were upheld, does not cite to a single case striking down a year-round ban, and ignores multiple cases where year-round bans have been upheld.

C. The Gift Ban is Constitutional.

The District Court erred in finding that KRS 6.751(2) and KRS 6.811(4), the "gift ban," which reciprocally prevent lobbyists from offering and legislators from accepting anything of value, are unconstitutional as vague, overbroad, and violative of equal protection. The District Court based its findings solely on its interpretation of a couple of hypothetical cases at the margins, without any support

[12] *Kentucky Legislative Ethics Commission*, http://klec.ky.gov.

in case law, and ignored the plainly legitimate sweep of the entire universe of gifts that a lobbyist could give to a legislator and the cases upholding gift bans.

1. The Gift Ban Contains Appropriate Exceptions to Ensure it is Closely Drawn.

The gift ban contains many appropriate exceptions to ensure that it is closely drawn to avoid corruption and its appearance. The definition of "anything of value" in KRS 6.611(2)(a) contains a list of fourteen separate items to demonstrate its intent, such as money, promissory notes, loans, forgiveness of indebtedness, automobiles, real property, rebates, or offers of employment. And perhaps most importantly, the "catch-all" provision is "any other thing of value that is pecuniary or compensatory in value to a person, or the primary significance of which is economic gain." KRS 6.611(2)(a)(14). If something is not pecuniary or compensatory in value, or does not have economic gain as its primary significance, it is not within the definition of "anything of value." Anything that would normally be considered complimentary is therefore not "anything of value."

Further, the definition of "anything of value" contains a lengthy list of exceptions to ensure that it does not overreach. These exceptions include, as examples:

- Anything provided by anyone other than a lobbyist or employer, KRS 6.611(2)(b)(2);

- Certificates, plaques, or commemorative tokens of less than $150 value, KRS 6.611(2)(b)(4);
- Promotional items of less than fifty dollars, KRS 6.611(2)(b)(5);
- Educational and informational items, KRS 6.611(2)(b)(6), (7);
- The cost of attendance, food, and beverages at any event where a recognized legislative group is invited, and any in-state event for which an individual legislator receives prior approval, KRS 6.611(2)(b)(8);
- Gifts from relatives, KRS 6.611(2)(b)(9);
- Gifts that are not used, but returned or donated to charity within 30 days, KRS 6.611(2)(b)(10); and
- Cost of attendance and food and beverages consumed at civic, charitable, trade, or community events, KRS 6.611(2)(b)(12).

And perhaps most importantly, KRS 6.611(2)(b)(14) exempts "anything for which the recipient pays or gives full value." As KLEC's representative noted, "if the legislator pays his own way, he can go out with anybody he wants." (KLEC Dep. 297:6-7, Page ID # 916.)

The Ethics Code further provides multiple mechanisms to determine whether an expenditure is permissible, and gives the legislator an opportunity to pay for anything determined to be something of value. KRS 6.827(1) requires lobbyists or their employers to deliver a copy of any reported expenditures to the legislator at

least ten (10) days before filing a report with KLEC, and KRS 6.827(2) provides a procedure for KLEC to resolve any discrepancies. And if a legislator or lobbyist is ever uncertain as to whether something constitutes "anything of value," they may seek an advisory opinion from KLEC under KRS 6.681. "There is a mechanism in the codes that would overcome due process problems, if any there are." *Associated Indus.*, 912 S.W.2d at 956.

What the gift ban does is not to restrict interactions between legislators and lobbyists, but only to provide that lobbyists cannot pay for those interactions. "Keep in mind this law doesn't prevent them from meeting with lobbyists. They can sit down in the annex cafeteria, in the lobbyist's office, in the legislator's office, anywhere they want. It just says the cup of coffee is not going to be a part of that, or if it is, you're going to pay for it yourself with this money that the taxpayers give you, $154 a day . . . ." (KLEC Dep. 156:19-57:2, Page ID # 775-76.) The gift ban does not restrict lobbyists from talking to legislators, or forbid lobbyists from hosting events for all legislators or a recognized subgroup of them. What the gift ban does is prevent lobbyists from paying for one-on-one or small group interactions with legislators, to avoid the reality or appearance that important

state legislation is being bought and sold in private. Further, various types of gift bans between lobbyists and legislators have been adopted by many states.[13]

[13] *See, e.g.*, Del. Code Ann. tit. 29, § 5806(b) ("No state employee, state officer . . . shall accept . . . any compensation, gift, payment of expenses or any other thing of monetary value under circumstances . . . ."); Fla. Stat. § 112.313(2) ("No public officer, employee of an agency, local government attorney, or candidate for nomination or election shall solicit or accept anything of value to the recipient, including a gift, loan, reward, promise of future employment, favor, or service, based upon any understanding . . . ."); Haw. Rev. Stat. § 84.11 ("No legislator or employee shall solicit, accept, or receive, directly or indirectly, any gift, whether in the form of money, service, loan, travel, entertainment, hospitality, thing, or promise, or in any other form, under circumstances . . . ."); La. Rev. Stat. Ann. § 42.1115 ("No public servant shall solicit or accept, directly or indirectly, any thing of economic value as a gift or gratuity from any person. . . , if such public servant knows or reasonably should know that such person . . . (2) Is seeking, for compensation, to influence the passage or defeat of legislation by the public servant's agency."); Minn. Stat. § 10A.071(2) ("A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal."); N.Y. Legislative Law § 1-m ("No individual or entity required to be listed on a statement of registration . . . shall offer or give a gift to any public official . . . , unless under the circumstances it is not reasonable to infer that the gift was intended to influence such public official."); 65 Pa. Cons. Stat. § 1103(c) ("No public official . . . shall solicit or accept anything of monetary value, including a gift, loan, political contribution, reward or promise of future employment, based on any understanding . . . ."); S.C. Code Ann. § 2-17-80(A) ("A lobbyist . . . shall not offer, solicit, facilitate, or provide to or on behalf of any member of the General Assembly . . . (4) food, meals, beverages, money, or any other thing of value . . . ."); Wisc. Stat. Ann. § 19.45(3) ("No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official . . . .").

2. The Gift Ban Is Not Vague.

The District Court erroneously found that the gift ban was vague based on its misinterpretation of only a few potential examples. "Statutes and regulations will not become 'impermissibly vague simply because it may be difficult to determine whether marginal cases fall within their scope.'" *Midwest Fireworks*, 248 F.3d at 568. The few hypothetical examples cited and misapplied by the District Court are insufficient for a finding of facial vagueness.

First, the District Court cites as an example "a bottle of water consumed by a legislator during the course of a meeting at a lobbyist's office." (Opinion 16, Page ID # 4635.) However, KLEC's representative stated only that whether a glass of water constitutes anything of value "depends on the circumstances really. If the commission were to receive a complaint that a legislator received a glass of water at the lobbyist's office, then they would have to determine is that a thing of value." (KLEC Dep. 48:14-49:2, Page ID # 667-68.) KLEC's representative further noted, "We've never had anyone file a complaint about a lobbyist offering or a legislator accepting a glass or bottle of water." (*Id.* at 50:22-24, Page ID # 669.) The District Court nonetheless concluded that "this testimony alone indicates that the law is unconstitutionally vague." (Opinion 16, Page ID # 4635.)

But all KLEC's representative said regarding the bottle of water example is that he would have to examine the circumstances to determine whether something

is a thing of value. As KLEC's representative stated, "It depends I guess on whether the food or drink or beverage was given in a situation in which it was of pecuniary or compensatory value." (KLEC Dep. 45:22-24, Page ID # 664.) An "official's inability to supply precise answers regarding its hypothetical application is insufficient to render that ordinance unconstitutionally vague." *Keepers, Inc. v. City of Milford*, 807 F.3d 24, 38 (2d Cir. 2015). The District Court expressly misapplied the standard for vagueness in concluding that one hypothetical example "alone indicates that the law is unconstitutionally vague." Rather, the appropriate standard is that "a statute will be struck down as facially vague only if the plaintiff has 'demonstrate[d] that the law is impermissibly vague in all of its applications.'" *Hargett*, 700 F.3d at 825. And again, unless the bottle of water is somehow something "the primary significance of which is economic gain," it is not anything of value.

A second example cited by the District Court in support of its finding of vagueness is "the exception for events to which the entire legislature is invited. What if an event hosted by a large company who employs lobbyists is open to the general public and no specific invitation is required? . . . KRS § 6.751(2) is too vague to answer these questions." (Opinion 17, Page ID # 4636.) KLEC respectfully disagrees; if an event is open to the public, it is necessarily open to all

legislators. Plaintiffs do not appear to disagree with this interpretation, as they did not raise this particular issue.

The third example cited by the District Court is that of a legislator attending a funeral of the relative of a lobbyist who "attends the funeral and partakes of the refreshments, but the legislator does not know that the host is a lobbyist. . . . The statute is vague on this point." (*Id.* at 22, Page ID # 4641.) The District Court relies on multiple misinterpretations in this example. As noted above, all lobbyists are required to be registered, and so the legislator can find out rather quickly whether the host is a lobbyist. Second, the funeral would have to not be open to the general legislature, but be by invitation-only. Third, even if the legislator received something that was in violation of the gift ban, at an invite-only funeral that is hosted by a lobbyist, the legislator would have to be notified by the lobbyist as required by KRS 6.827(1), and could always reimburse the lobbyist for its value. The few examples cited by the District Court as examples of potential vagueness do not properly consider the interaction of the various provisions of the gift ban.

Other courts have found that the use of "anything of value" does not render a lobbying restriction vague. In *Fla. Ass'n of Prof'l Lobbyists, Inc. v. Div. of Legislative Info. Servs. Of the Fla. Office of Legislative Servs.*, 525 F.3d 1073 (11th Cir. 2008), the court considered a vagueness challenge to Fla. Stat. § 11.045(c), which provided that "'expenditure' means a payment, distribution, loan,

advance, reimbursement, deposit, or anything of value made by a lobbyist or principal for the purpose of lobbying." The court found that "the statutory language at issue 'provide[s] explicit standards for those who apply them' and 'give[s] the person of ordinary intelligence a reasonable opportunity to know what is prohibited.' . . . We cannot conclude that the statutory language Plaintiffs challenge is so vague as to violate the Constitution." *Id.* at 1079 (citations omitted). *See also Yamada*, 786 F.3d at 1188-92 (definition of "expenditure" as "anything of value" held not vague); *Vt. Right to Life*, 758 F.3d 118, 130 (definition of "expenditure" including "anything of value" not vague); *Kimbell*, 665 A.2d at 49-50 (definition of "expenditure" as "anything else of value" not vague). The District Court ignores the holdings in these cases, and cites no authorities where a gift ban from lobbyists to legislators has been found to be vague.

3. The Gift Ban Is Not Overbroad.

The District Court also erroneously found that the gift ban was overbroad based on the same few examples and misinterpretations. "The overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615. "To show that a statute is unconstitutionally overbroad, plaintiffs ''must demonstrate from the text of [the statute] and from actual fact that a substantial number of instances exist in which the [l]aw cannot be applied constitutionally.'" *American Booksellers*, 601

F.3d at 627. The District Court reasons from its misinterpretations of a few examples, and ignores the plainly legitimate sweep of the gift ban: the entire universe of gifts that a lobbyist could give to a legislator.

The District Court cites as examples of potential examples of overbreadth "a glass of water . . . . the heating of a building on a cold winter day, or air-conditioned cooling in the middle of the summer." (Opinion 20, Page ID # 4639.) Again, a glass of water and building heating or air conditioning are not things "the primary significance of which is economic gain." The District Court lists another example of "a legislator . . . hesitant to visit a factory . . . for fear that the visit may constitute an economic benefit." (*Id.* at 21, Page ID # 4640.) The District Court does not explain how or why a potential visit to a factory may be a violation, if the legislator does not receive anything of value in exchange for that visit. The District Court also argues that "the ban prohibits a [legislator] from attending a social event held by his friend if that person happens to be a lobbyist," (*id.*), and mentions the funeral example again. (*Id.* at 22, Page ID # 4641.) Again, nothing in the gift ban prohibits a legislator from attending anything, only from receiving something of value.

The District Court does note that "legislators are free to attend such events within the confines of this ban as long as the legislator . . . reimburses the lobbyist for anything of value obtained." (*Id.*) However, it cursorily states that "this

requirement is clearly an overreaching and unreasonable restraint." (*Id.*) The District Court does not attempt to explain why this is an overreach or unreasonable restraint.

The District Court makes no attempt to contemplate the plainly legitimate sweep of the law, which is the entire universe of potential gifts that a lobbyist could give to a legislator. While there may be a couple of hypothetical cases at the margins, neither the District Court nor Plaintiffs dispute the gift ban's clear application to a bottle of good bourbon, a hundred-dollar bill, a car, a house, a plane, anything one could conceivably imagine as a "gift." It cannot reasonably be disputed that allowing unlimited gift-giving from lobbyists to legislators does not at least create the appearance of corruption, and actual corruption. The District Court cites only a few potential hypothetical examples, which are insignificant in relation to the plainly legitimate sweep of the law, which is all of the gifts that a lobbyist could potentially buy for a legislator.

4. The Gift Ban Is Not Content-Based.

Plaintiffs argued, and the District Court appears to accept, that "the gift ban amounts to a content-based speech restriction because it targets the identity of the giver." (Opinion 18, Page ID # 4637.) The District Court cited to *Reed v. Gilbert*, 135 S. Ct. 2218 (2015), for the proposition that "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." (Opinion 18, Page ID # 4637 (quoting *Reed*, 135 S. Ct. at 2227.)[14] It is not clear how *Reed* applies to this situation, as it concerned an ordinance that distinguished between "ideological signs," "political signs," and "temporary directional signs relating to a qualifying event." *Id.* at 2224-25. "By contrast, laws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 643 (1994). It is hard to conceive of how Kentucky's gift ban distinguishes between different ideas or messages; it simply bans lobbyists from giving gifts to legislators regardless of the "ideas or views expressed" by the gift, to the extent there are any. The District Court erred in finding that the gift ban was a content-based restriction.

The District Court further reasoned that "the statutes allow lobbyists and their employers to invite all legislators to events . . . . This lack of accountability for 'group events' does not render a complete ban on invitations to fewer than all legislators narrowly tailored to prevent *quid pro quo* corruption." (Opinion 19, Page ID # 4638.) Again, the standard is closely drawn, not narrowly tailored. Further, as stated above, the purpose of the gift ban is not to eliminate all potential contact between lobbyists and legislators, only paid interactions between lobbyists

[14] Plaintiffs also cited to *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), (Pl.'s Mem. Opp'n KLEC's Mot. Summ. J. 3, R. 69, Page ID # 3720), but that case involved an anti-panhandling ordinance. *Norton*, 806 F.3d at 412.

and specifically targeted legislators. KLEC's representative explained the rationale behind exempting group events:

> There's a difference in terms of assuring that there will be members of both parties and both chambers, a cross section of legislators will be there, and they'll all be treated in the same fashion, which is different from a situation in which a lobbyist can take an individual legislator out for a meal and have that one-on-one time with no one else around. I think that was the problem in BOPTROT, was there were no rules at the time, and so there was a culture that developed, which I don't think is present when you have a broad cross section of legislators in attendance.

(KLEC Dep. 79:7-18, Page ID # 698.) "The General Assembly has recognized if you're there, you're in a large group of people, and this is different from a lobbyist getting you in a one-on-one situation where they can wine and dine you . . . ." (*Id.* at 283:1:5, Page ID # 902.) KLEC's representative further stated that the distinction appears to be working, as "we're not aware of any opportunity for corruption that has arisen out of that." (*Id.* at 104:21-23, Page ID # 723.) While a fair amount of money can be spent on the group events, because they involve large groups, anyone in the group can attend and be seen by anyone else in the group, and a lobbyist does not have the opportunity to wine and dine an individual legislator and make proposals that the lobbyist would not make in the presence of other people.

More generally, "equal protection of the law 'does not require that a [government] must choose between attacking every aspect of a problem or not

attacking the problem at all.'" *Curry v. Dempsey*, 701 F.2d 580, 584 (6th Cir. 1983). "The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Richland Bookmart, Inc. v. Nichols*, 278 F.3d 570, 577 (6th Cir. 2002). *See also Yamada*, 786 F.3d at 1206 ("There is no question the ban is closely drawn to the state's anticorruption interest as a general matter, and we decline to revisit the legislature's judgment not to craft a still narrower provision."). Plaintiffs attempt to argue that the gift ban is invalid because it still allows for food and beverages to be provided to legislators generally or recognized groups of them, but a state legislature is not required to fix every problem, if the group events even are a problem, which Plaintiffs did not begin to establish.

The District Court erred in finding the gift ban to be a content-based restriction, as it targets only lobbyists and legislators, and not the content of any speech. It further erred in finding that the gift ban was not narrowly tailored because it did not include group events, as the appropriate level of scrutiny is closely drawn, and Plaintiffs did not establish that the group events lead to corruption or its appearance. Even if they did, a legislature is not required to address all aspects of a problem in order to address some.

In striking down the gift ban, the District Court applies the wrong standards of scrutiny, vagueness, and overbreadth. It relies on its own misinterpretations of a few potential hypothetical examples, and does not properly contemplate either the

exceptions to the gift ban or its plainly legitimate sweep over all of the gifts a lobbyist could give to a legislator. The gift ban was enacted to avoid paid interactions between lobbyists and legislators, either one-on-one or in targeted groups. These kinds of interactions lead to actual corruption of the highest order in BOPTROT, and the legislature was justified in enacting the gift ban to further reduce corruption and its appearance.

D. The Ban on Lobbyists Serving as Campaign Treasurers and Soliciting Campaign Contributions is Constitutional.

The District Court struck down the ban in KRS 6.811(5) on lobbyists serving as campaign treasurers or soliciting campaign contributions apparently based on nothing more than a misreading of the statutory text. The District Court held that "KRS 6.811(5) prohibits a lobbyist from advocating his or her support for a candidate through solicitation of any kind. This restriction impedes an individual's associational freedom by stifling a lobbyist's ability to express his or her opinion of a candidate's worthiness of support . . . ." (Opinion 30, Page ID # 4649.) It does not. KRS 6.811(5) only states that "a legislative agent shall not serve as a campaign treasurer, and shall not directly solicit, control, or deliver a campaign contribution, for a candidate or legislator." It does not prevent a lobbyist from expressing any opinions, or doing any other non-financial activity whatsoever in support of a legislator; it only prevents lobbyists from soliciting campaign contributions. "Lobbyists can stuff envelopes, they can speak well of any member

of the General Assembly or any candidate, they can put up yard signs, they can do a whole range of activities on behalf of legislative candidates. But the money is the heart of the matter, and so in that regard the General Assembly separated . . . the policy makers from the policy influencers." (KLEC Dep. 180:24-81:7, Page ID # 799-800.) The District Court reads far more into the statutory text of KRS 6.811(5) than is actually there.

The District Court does make a cursory attempt to address KLEC's arguments when it states that "defendants counter that this solicitation ban is constitutional because other jurisdictions have upheld similar bans." (Opinion 30, Page ID # 4649.) Indeed, in *Md. Right to Life State Political Action Comm. v. Weathersbee*, 975 F. Supp. 791 (D. Md. 1997), the court upheld a statute that "prohibits lobbyists from serving as officers or treasurer of certain political committees." *Id.* at 797. And in *Kimbell*, 665 A.2d 44, the court upheld a ban on legislators soliciting campaign contributions from lobbyists and lobbyists from promising campaign contributions during the legislative session. *Id.* at 50-51. Again, such solicitation bans are commonplace in many states.[15]

[15] *See, e.g.* Alaska Stat. § 24.45.121(a) ("A lobbyist may not . . . (8) . . . directly or indirectly collect contributions for . . . or otherwise engage in the fund-raising activity of a legislative campaign.");

Ariz. Rev. Stat. Ann. § 41-1234.01(A) ("A . . . lobbyist . . . shall not . . . solicit or promise to solicit campaign contributions.");

Colo. Rev. Stat. § 24-6-308(1) "No person engaged in lobbying shall . . . (l) . . . solicit, or promise to solicit a campaign contribution.");

Nonetheless, the District Court rejects this argument on the grounds that "Defendants have shown no evidence of recent corruption in Kentucky that is narrowly tailored to address an important government interest." (Opinion 30-31, Page ID # 4649-50.) As argued in detail above, evidence of a recent scandal in Kentucky is not required, only an effort to avoid the appearance of corruption. The District Court strikes down KRS 6.811(5) based solely on its own over-reading of the statutory text, and ignores the case law upholding such restrictions.

Rather, KRS 6.811(5) is an essential corollary to the other lobbying restrictions. Allowing lobbyists to circumvent restrictions on their own campaign contributions or gifts by soliciting an indefinite number of contributions or gifts from others would seriously undermine the contribution and gift bans, as long as the lobbyist can find others to make the contribution or gift. To allow lobbyists to solicit contributions or gifts from others would enable them to do indirectly what

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Md. Code Ann., Gen. Prov. § 5-715(d)(1) (" A regulated lobbyist . . . may not: (i) solicit or transmit a political contribution from any person.");

N.M. Stat. Ann. § 2-11-8.1(B) ("It is unlawful during the prohibited period for any lobbyist or lobbyist's employer to contribute to or act as an agent or intermediary for political contributions to or arrange for the making of political contributions to the campaign funds of any statewide elected official or legislator.");

Okla. Stat. tit. 21, § 187.1(G) ("No lobbyist . . . shall . . . solicit or promise to solicit a contribution for a member of the Oklahoma Legislature or a candidate for a state legislative office.");

S.C. Code Ann. § 2-17-80(A) "A lobbyist . . . shall not offer, solicit, facilitate, or provide to or on behalf of any member of the General Assembly . . . (5) contributions.).

they cannot do directly. *See generally Fla. Ass'n*, 525 F.3d at 1078-79; *Vt. Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376, 402–03 (D. Vt. 2012) ("States are permitted to address the 'hard lesson' that contributors, once stymied from swaying candidates unduly by direct means, might render contribution limits irrelevant 'by scrambling to find another way to purchase influence.'").

VIII. Plaintiffs Lack Standing to Challenge the Lobbying Restrictions

Plaintiffs also lack standing to challenge the lobbying restrictions. Fed. R. Civ. P. 12(b)(1) provides that a party may move to dismiss a case for "lack of subject-matter jurisdiction." "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). "To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 113 (2013). Plaintiffs lack standing to challenge the lobbying restrictions, and the District Court's decision should be reversed grounds.

At a minimum, Plaintiffs lack standing to challenge the statutes restricting lobbyists and their employers, as none of them are lobbyists or employ lobbyists. Based on the allegations in their Complaint, Plaintiffs will never be subject to the restrictions of KRS 6.811(4), (5), (6), and (7) which they challenge. The penalties

for violating those provisions in KRS 6.811(11) only apply to a "legislative agent or employer." Accordingly, Plaintiffs' challenges to KRS 6.811(4), (5), (6), and (7) should be dismissed for lack of standing.

More generally, Plaintiffs do not state that they have suffered any actual injury, only that they desire "to engage in campaign activities that are currently prohibited by the statutes challenged herein." (Compl. ¶¶ 2-4, R. 1, Page ID # 5-6.) "An allegation of future injury may suffice if the threatened injury is 'certainly impending,' or there is a ''substantial risk' that the harm will occur.'" *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). However, "abstract injury is not enough. It must be alleged that the plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. The injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (citations omitted). Here, Plaintiffs have established no real and immediate threat of injury, but only a conjectural and hypothetical interest in engaging in certain activities.

In *Associated Indus.*, an organization of lobbyists asserted a general challenge to the Code of Legislative Ethics. 912 S.W.2d at 949-50. The court dismissed the challenges to "the fines and criminal penalties which can be imposed under the legislative and executive codes for failure to properly register, report

and/or disclose information" on the grounds that the organization "is duly registered with the respective commissions and no proceeding (adjudicatory/investigatory) is disclosed to be pending at this time." *Id.* at 950. The court concluded that "a determination of the validity of the challenged statutory penalties is speculative" and that "this record does not disclose an actual and justiciable controversy upon this issue to be pending before the court." *Id.* The court further found that "standing was lacking" to "challenge to the expenditure reporting requirements relating to lobbyists' reports and the no campaign contributions requirement" because "the legislative agents (the affected parties) are not before the court." *Id.* at 951. Similarly, in this case, Plaintiffs do not allege that there are any proceedings currently pending against any of them, and there are no lobbyists or employers before this Court. Accordingly, this Court should follow the reasoning of *Associated Indus.* and find that Plaintiffs lack standing to challenge the lobbying restrictions.

CONCLUSION

As the Fourth Circuit held in *Preston*, "any payment made by a lobbyist to a public official, whether a campaign contribution or simply a gift, calls into question the propriety of the relationship, and therefore [a state] could rationally adjudge that it should ban all payments." 660 F.3d at 737. The District Court in this case disagreed, striking down the bans on campaign contributions, gifts, and

solicitations for campaign contributions from lobbyists to legislators. It did so based solely on its own misinterpretations of a few examples and misapplication of the constitutional standards, and ignored the abundance of case law upholding such restrictions. Kentucky's lobbying restrictions are closely drawn to regulate only paid interactions between lobbyists and targeted individual or groups of legislators. In addition, Plaintiffs lack standing to properly challenge the lobbying restrictions. Accordingly, this Court should reverse the District Court and uphold Kentucky's bans on campaign contributions, solicitation of campaign contributions, and gifts from lobbyists to legislators.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P. 32(a)(7)(B) and (g), I hereby certify that this Brief of the Defendants-Appellants Kentucky Legislative Ethics Commission was prepared using a proportional 14-point typeface and contains 11,785 words, (excluding the parts of the brief exempted by Rule 32(f)), as calculated by the word processing system used to prepare this brief.

/s/ Matt James
Matt James

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2018, I electronically filed this Brief of the Defendants-Appellants Kentucky Legislative Ethics Commission with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all parties.

/s/ Matt James
Matt James

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

RE	Date	Description of Document	Page ID #
1	8/24/2015	Verified Complaint for Declaratory and Injunctive Relief, Costs, and Attorney Fees for Constitutional Violations	1-27
17	10/6/2015	Legislative Ethics Commission Defendant's Motion to Dismiss	246-65
25	1/29/2016	Order	335-36
47	6/3/2016	Notice of Filing of Deposition of the Kentucky Legislative Ethics Commission (John Schaaf, 30(B)(6) Witness)	618-1461
60	7/23/2016	Notice of Filing of Deposition of the Kentucky Registry of Election Finance (John Steffen 30(b)(6) Witness)	2154-2975
97	1/10/2017	Civil Minutes – General	4350
122	6/6/2017	Memorandum Opinion and Order	4620-54
128	6/26/2017	Notice of Filing With Memorandum Regarding Proposed Injunction	4672-79
138	12/1/2017	Memorandum Opinion and Order	4805-10
139	12/1/2017	Permanent Injunction	4811-12
140	12/6/2017	Judgment	4813-14