

DISTRICT COURT, CITY AND COUNTY OF DENVER,  
STATE OF COLORADO  
1437 Bannock Street  
Denver, Colorado 80202

Plaintiff: SCOTT E. GESSLER, individually and in his  
capacity as the Secretary of State of the State of Colorado

v.

Defendants: DAN GROSSMAN, SALLY H. HOPPER,  
BILL PINKHAM, MATT SMITH and ROSEMARY  
MARSHALL, in their official capacities as members of the  
Independent Ethics Commission and the INDEPENDENT  
ETHICS COMMISSION, an inferior tribunal of the State  
of Colorado

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• COURT USE ONLY •

Case No.: 13CV030421

Div: 376

**PLAINTIFF'S SECOND AMENDED COMPLAINT**

Plaintiff Scott E. Gessler (“Plaintiff” or “the Secretary”), by and through his undersigned attorneys, respectfully submits this Second Amended Complaint.

## I. INTRODUCTION

1. On June 19, 2013, the Colorado Independent Ethics Commission (“the Commission” or “IEC”) issued a written order in IEC Case No. 12-07, finding that the Secretary violated C.R.S. § 24-18-103(1) in the manner in which he utilized \$1,396.89 in discretionary funds governed by Colorado statute. *See* C.R.S. § 24-9-105(1) (emphasis added) (“for expenditure in pursuance of official business *as each elected official sees fit.*”).

2. By doing this, the Commission has exceeded its jurisdiction granted to it by Amendment 41 (Article XXIX) to the Colorado Constitution and C.R.S. § 24-18.5-101. This is so, because the Commission does not have jurisdiction to adjudicate claims of violation of either C.R.S. § 24-18-103(1) or C.R.S. § 24-9-105(1). Moreover, IEC Case No. 12-07 does not include allegations of the Secretary’s violation of Amendment 41’s gift or lobby bans, nor does it even involve any general allegations of influence peddling.

3. In the more than six months that the Commission considered IEC Case No. 12-07, the Commission repeatedly abused its discretion, acted arbitrarily and capriciously, politicized the proceedings, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law. The Commission refused to provide the Secretary with any notice of the legal allegations he faced – until after his hearing. In other words, the Commission never told the Secretary what law he allegedly violated before his hearing, so he could properly defend himself at his hearing. Moreover, the Secretary faced the continued bias – or at least, appearance of bias – by two of the Commission’s five commissioners. These two commissioners – who supported the Secretary’s political opponents or potential political opponents – politicized the proceedings, and the Commission utilized an incorrect legal standard in determining the Secretary’s repeated motions for recusal. The Commission even arbitrarily denied the Secretary the right to call witnesses to the hearing necessary to his defense. These are just a few of the many examples of the Commission’s abuses of discretion, arbitrary and capricious actions, politicization of the proceedings, and other actions that violate the law and deny the Secretary his due-process rights to fair notice and fair hearing.

4. Finally, the Commission found a violation, even without any evidence to support its finding. The undisputed evidence at the June 7, 2013 hearing demonstrates that the Secretary legally, ethically, and appropriately utilized the \$1,818.89 in state funds in dispute in this case. Every witness and every piece of evidence, including the Commission’s own investigator and the Complainant’s witnesses and exhibits, confirmed this at the hearing. The Commission heard no evidence of any ethical violation, because no such evidence exists. Whether it is the complainant’s or the Commission’s evidentiary burden, neither of them met it. Yet the Commission misread an exhibit containing an email and incorrectly held that this email (somehow) created a legal obligation that the Secretary violated. Thus, the Commission abused its discretion, acted arbitrarily and capriciously, violated the Secretary’s due-process rights to fair

notice and hearing, and otherwise acted contrary to law by finding against the Secretary, without evidence to support the finding.

## II. GENERAL ALLEGATIONS

5. Plaintiff Scott E. Gessler is a resident of the State of Colorado. The Secretary currently holds the elected office of Secretary of State for the State of Colorado. The Secretary brings this action pursuant to C.R.C.P. 106(a)(4) individually and in his capacity as Secretary of State for the State of Colorado.

6. Defendants Dan Grossman, Sally H. Hopper, Bill Pinkham, Matt Smith, and Rosemary Marshall are residents of the State of Colorado and are members of the Commission. This action is brought against these Defendants in their official capacity as members of the Commission.

7. The Commission is an inferior tribunal and government body of limited jurisdiction arising under Colo. Const. Art. XXIX §5(1) and C.R.S. §24-18.1-101.

8. The undisputed evidence in IEC Case No. 12-07 shows that the Secretary utilized:

- a. \$1,278.90 in fiscal year 2011-2012 discretionary funds to travel to Sarasota, Florida (airfare, luggage, three nights of lodging, and meals) to attend and serve as an expert panelist in an election-law seminar and Continuing Legal Education (CLE) program sponsored by the Republican National Lawyers Association (RNLA) and accredited by the Colorado Supreme Court;<sup>1</sup>
- b. \$422<sup>2</sup> in Department funds to return early from Florida, at his chief of staff's request after discussions with Colorado law-enforcement authorities, following two specific and credible threats of violence against the Secretary, his wife, and their then-four-year-old daughter, directly related to the Secretary's official duties; and
- c. \$117.99 in fiscal year 2011-2012 discretionary funds for end-of-year reimbursement, submitting a general memorandum in lieu of receipts, but for which the Secretary has subsequently provided a specific breakdown of \$616 in unreimbursed expenses.

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<sup>1</sup> On May 20, 2013, the Secretary reimbursed the Department of State for this expenditure to avoid the appearance of impropriety.

<sup>2</sup> This sum was for airfare only even though the department authorized hotel expenses as well. No such expenses were paid, and no evidence in the record indicated hotel expenses were incurred to deal with these vicious threats.

9. On November 5, 2012, the day before the 2012 elections, the Commission undertook review of a complaint filed by the left-leaning entity Citizens for Responsibility and Ethics in Washington (d/b/a Colorado Ethics Watch) (“CREW”), in which CREW alleged that the Secretary “may” have committed a felony and two misdemeanors in the manner in which the Secretary’s utilized \$1,818.89 in state expenditures. The Commission designated the Complaint as IEC Case No. 12-07. At that meeting, the Commission voted to assert improper jurisdiction over the Complaint. The Commission also ordered the Secretary’s response to the Complaint.

10. On December 20, 2012, the Secretary fully and substantively responded to the factual allegations in the Complaint, denying all wrongdoing.

11. The Secretary’s response noted that the Governor receives an annual salary of \$90,000; the Attorney General receives \$80,000; and the Lieutenant Governor, Secretary of State, and State Treasurer each receive \$68,500. C.R.S. § 24-9-101(1). Additionally, each receives an annual discretionary fund “for expenditure in pursuance of official business *as each elected official sees fit*.” C.R.S. § 24-9-105(1) (emphasis added). The Governor receives \$20,000 each year, and the others each receive \$5,000. *Id.*

12. By the Secretary’s spending \$1,396.89 in discretionary and \$422 in Department funds generally in the manner discussed in Paragraph 8, CREW argued that the Secretary “may” have violated three specific Colorado criminal statutes.

13. On December 20, 2012, the Secretary also separately filed a motion to dismiss, arguing that the Commission lacked jurisdiction over (a) allegations that do not involve Amendment 41’s gift ban or influence peddling; or (b) criminal allegations. To the extent that CREW is not making criminal allegations, the Secretary argued, (c) the legal allegations against the Secretary are vague and undefined. These allegations remained so, until after the Commission heard the evidence and argument from the parties.

14. On January 7, 2013, the Commission voted to deny the Secretary’s motion to dismiss the Complaint and retained jurisdiction to proceed with the case. Despite not having jurisdiction over criminal standards, the Commission decided to proceed with the case, asserting broad jurisdiction over vague and unspecified other standards of conduct or reporting requirements; the Commission even asserted jurisdiction over a vague and unspecified potential violation of the Constitution.

15. In its subsequent written order on May 6, 2013, however, the Commission listed five different civil statutes and five different fiscal rules, any or all of which “may” serve as the legal standard(s) in this case. In other words, the Commission asserted broad jurisdiction over evolving legal standards, over which it has no jurisdiction. By doing this, the Commission exceeded its jurisdiction, abused its discretion, acted arbitrarily and capriciously, violated the Secretary’s due-process rights to fair notice and hearing, and otherwise acted contrary to law.

16. Moreover, neither CREW nor the Commission alleged – let alone, proved – that the Secretary violated any of these legal standards or even how the Secretary could have

violated these legal standards. In other words, there were not even legal allegations made against the Secretary in IEC Case No. 12-07.

17. The undisputed evidence in this case – including, but not limited to, the testimony from Colorado State Controller Robert Jaros – shows that the fiscal rules do not even apply to the Secretary’s use of the \$1,396.89 in discretionary funds in dispute; the fiscal rules merely provide “guidance.”

18. Moreover, the Commission heard no evidence which supported any potential allegation that the Secretary violated any of the five statutes or five fiscal rules cited by the Commission on April 30, 2013, to the extent that these five statutes and five fiscal rules somehow serve as legal allegations against the Secretary.

19. To the contrary, the undisputed evidence affirmatively shows that the Secretary, in fact, appropriately utilized the \$1,818.89 in state funds.

a. RNLA Election-Law Seminar (Discretionary Funds):

- (1) The Secretary testified related to the clear benefits to his office for his attendance and participation in the RNLA election-law seminar, for which the Secretary served as an expert panelist, from which the Secretary learned a great deal about the federal and other states’ election laws and practices, and for which the State did not have to pay for the Secretary’s attendance.
- (2) No reasonable person can dispute that election-law education helped the Secretary better perform his official duties, because he is – after all – the State of Colorado’s chief election officer. Put another way, it is perfectly reasonable for the state’s chief election officer to learn more about election law, and this easily fits within an elected official’s view of his duties.
- (3) At the conference itself, the Secretary participated on a panel entitled “The Department of Justice, the Role of the States, and Voter ID.” Participants included other governmental and former government officials, including the chair of a state election commission and a former U.S. Department of Justice trial attorney specializing in voting rights.

And the Secretary attended other panels, including among others:

- “Voting Before Election Day: Military, Overseas, Absentee, and Early Voting”;
- “Poll Closing and Opening; Provisional Ballots”; and
- “After Election Day: Recounts and Contests.”

These panels and sessions were taught by leading legal practitioners and officials, including:

- a former state governor;
  - a sitting state attorney general;
  - a sitting secretary of state;
  - legal counsel to governors;
  - high-ranking former military commanders;
  - a state assistant attorney;
  - a county commissioner;
  - attorneys for a presidential and other national campaigns and political organizations; and
  - leading campaign election-law attorneys from across the nation.
- (4) Meeting and learning from these national election-law leaders is both relevant and useful to performing the official duties of Colorado Secretary of State.
- (5) Moreover, the Secretary is an attorney. To keep his law license current, he must earn 45 credit hours of CLEs every three years. The Department has a long-standing policy, pre-dating Secretary Gessler, of paying for its lawyer-employees' CLEs. The Department has the policy, because it recognizes the immense benefit of having attorneys on its staff when the Department must deal with a steady stream of legal issues.
- (6) The Colorado Supreme Court's Board of Continuing Legal and Judicial Education accredited for CLE credit the three-day RNLA election-law seminar. This means that the Supreme Court board found that the RNLA national election-law seminar was an "educational activity which has as its *primary objective* the increase of professional competence of registered attorneys and judges" and it was "an organized activity dealing with subject matter directly related to the practice of law or the performance of judicial duties."<sup>3</sup> In other words, the Colorado Supreme Court's board looked beyond the RNLA's name and saw the clear educational benefit to Colorado lawyers who attended the RNLA's election-law seminar.

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<sup>3</sup>Regulation 103, Board of Continuing Legal and Judicial Education, <http://www.coloradosupremecourt.com/pdfs/CLE/Rules.pdf> (last visited June 11, 2013) (emphasis added).

- (7) The State Controller generally testified that it was an appropriate use of state funds for the Secretary to attend the RNLA election-law seminar, because the Secretary received election-law information that fit within the Secretary's official duties.
- (8) The State Controller generally testified that the Secretary could have actually expensed the RNLA election-law seminar trip to the Department, as opposed to the discretionary fund.
- (9) In addition to the Secretary and the State Controller, former longtime Deputy Secretary of State Bill Hobbs, Department Chief of Staff Gary Zimmerman, and Department Chief Financial Officer (CFO) Heather Lizotte all generally testified that the RNLA expense served a legitimate departmental purpose and was, thus, appropriate.
- (10) The Secretary testified that he used his discretion to expense the RNLA election-law seminar to his discretionary fund, because he thought it was the appropriate account.
- (11) Nonetheless, the Secretary generally testified that he returned this money to the Department, because CREW's complaint was a partisan distraction that he wanted behind him.

b.. RNC (Campaign Funds):

- (1) The State Controller testified that the Secretary was not required to apportion the cost of the original Florida round-trip flight, paid from the Secretary's discretionary fund, between the Secretary's discretionary and campaign funds, even though the Secretary attended the RNC on the same trip as the RNLA election-law seminar.
- (2) This is so, according to the State Controller, because the RNC portion of the trip did not increase the overall cost of the flight.

c. Threats of Violence (Department Funds):

- (1) It is beyond question that the Secretary appropriately utilized \$422 in Department funds to return early from Florida, at his chief of staff's request after discussions with Colorado law-enforcement authorities, following specific and credible threats of sexual violence against the Secretary's wife and then-four-year-old daughter, directly related to the Secretary's official duties.

- (2) CREW stated at the hearing that the “only factual issue” surrounding the threats against the Secretary and his wife and then-four-year-old daughter was the “timeline.” While it is not entirely clear what CREW was insinuating by this “timeline” comment, the Commission heard specific testimony from the Secretary, the chief of staff, and Colorado law-enforcement authorities on the timing of, and reactions to, the two separate, very serious, and credible threats against the Secretary and his family.

d. End-of-Year Reimbursement (Discretionary Funds):

- (1) The undisputed evidence is that the Secretary requested \$117.99 in fiscal year 2011-2012 discretionary funds for end-of-year reimbursement with a memorandum in lieu of receipts, but for which the Secretary had subsequently provided a specific breakdown of \$616 in unreimbursed expenses.
- (2) The State Controller testified that a memorandum in lieu of receipts is generally permissible; the State Controller also testified that the Department of State’s new receipt policy did not take effect until after the Secretary sought this reimbursement.
- (3) The Commission also heard evidence of how prior Secretaries utilized their discretionary funds, including Secretary Buescher’s purchase of train tickets for his family on a personal family trip to China, another Secretary’s using the discretionary fund to purchase clothing, another Secretary’s using the discretionary fund to throw parties, and another Secretary’s simply taking the full \$5,000 discretionary fund as income.
- (4) As the Secretary argued to the Commission when the Commission denied the Secretary his right to call several necessary witnesses to his defense, the Department’s interpretation of the discretionary-fund statute, as evidenced by its prior Secretaries’ practices, is relevant to interpreting the meaning of the statute.

20. On all of these expenditures, the Commission’s own investigator generally testified that they were in line with past practices of prior Secretaries of State.

21. Of note, the State Controller testified that he and his office were fully aware of these expenditures, it was his office’s job to take action if the expenditures were inappropriate, and his office took no action against the Secretary.

22. Even though there is no evidence that the Secretary violated any of the five statutes or five fiscal rules cited as the potential legal allegations against the Secretary in the

Commission's April 30, 2013 written order, the Commission stated that the legal standard(s) against which the Secretary must defend are subject to change, "depending on the evidence presented, and the arguments made, at the hearing in this matter."

23. In other words, the Commission reserved the right to make a determination that the Secretary violated some other vague, unspecified, and evolving legal standard(s) in the manner in which he spent \$1,818.89 in state funds – after the Commission heard the evidence at the June 7, 2013 hearing.

24. And the Commission did just that, finding that the Secretary violated legal standards never previously alleged that the Secretary violated. In fact, for example, the Commission found that the Secretary (somehow) violated an email from the Department of State CFO, in which the CFO stated that the State Controller advised and provided guidance on how the Secretary should use his discretionary fund.

25. By doing this, the Commission abused its discretion, acted arbitrarily and capriciously, violated the Secretary's due-process rights to fair notice and hearing, and otherwise acted contrary to law by refusing to tell the Secretary what law he allegedly violated before his hearing, so he could properly defend himself at his hearing.

26. Moreover, as the Secretary argued to the Commission, the Commission cannot serve as both the prosecutor and the judge – and by making up its own legal allegations separate from CREW's complaint, the Commission improperly did just that and assumed an improper prosecutorial role.

27. By its own admission, the Commission has not defined such "other standards of conduct or reporting requirements" and as such, those terms as set forth in Article XXIX (Amendment 41) of the Colorado Constitution are unconstitutionally vague, both on their face and as applied against the Secretary in IEC Case No. 12-07.

28. As the Secretary repeatedly argued to the Commission, the Commission also acted arbitrarily and capriciously, abused its discretion, violated the Secretary's due-process rights to fair notice and fair hearing, politicized the proceedings, and otherwise violated the law in many other ways throughout the proceedings in IEC Case No. 12-07.

29. The Secretary made and renewed several recusal motions, based upon the objective evidence of bias – or at least, the appearance of bias – by two of the five commissioners, along with the Commission's executive director.

30. Commissioner Marshall, a former Democrat state representative, has had prior interactions with the Secretary that evidence her appearance of bias against him. Before Commissioner Marshall joined the Commission, she had questioned the Secretary's motives in unrelated legal proceedings before this Court and stated that she was going to keep an eye on the Secretary. Commissioner Marshall, who did not join the Commission until January 2013 and had not participated in oral argument on – and presumably, had not even read – the Secretary's

motion to dismiss, nonetheless rushed to vote against the Secretary as her first act on the Commission. The Secretary submitted to the Commission a motion to recuse Commissioner Marshall, and she even took the unusual step of discussing with the media the merits of the motion. Commissioner Marshall has also donated to the campaign of the 2010 political opponent of the Secretary. Additionally, Commissioner Marshall gave financial contributions to Governor Hickenlooper, a potential political opponent of the Secretary for the gubernatorial race in 2014. At the hearing on June 7, 2013, Commissioner Marshall even improperly attempted to politicize the legal issue as to whether the Secretary had announced any gubernatorial campaign, which had nothing whatsoever to do with IEC Case No. 12-07.

31. Commissioner Grossman, a former Democrat state representative and senator, has also made campaign contributions to the Secretary's 2010 and 2014 political opponents or potential political opponents. Moreover, there is evidence that Commissioner Grossman, then serving as chairman, improperly instructed the Commission's independent investigator to add to his investigative report, and thus politicize, allegations surrounding the Secretary's and his family's personal security, following specific and credible threats of sexual violence against the Secretary's wife and then-four-year-old daughter. There is also evidence that Commissioner Grossman may have misled the Commission and even improperly participated in denying the Secretary the right to learn the truth about Commissioner Grossman's involvement with the potential politicization of the Secretary's and his family's personal security. Finally, there is evidence that Commissioner Grossman made sexist and derogatory comments about the Secretary's deputy and key staff liaison to the Commission, referring to the Deputy Secretary of State as "The Dragon Lady."

32. The Commission even denied the Secretary's Motion to Appoint an Independent Investigator, despite overwhelming evidence that Commission Executive Director Jane Feldman, who initially served as the investigator, had demonstrated an early bias against the Secretary and prejudged the case. The Executive Director provided to then-Chairman Grossman false, unreliable (double-hearsay), and biased information related to what became factual allegations in IEC Case No. 12-07. The Executive Director improperly contacted a represented party in IEC Case No. 12-07 and in this present proceeding. The Executive Director also had improper and biased communications with outside parties, including a witness in IEC Case No. 12-07, related to her initial investigation. She even publicly commented on the case to the media, criticizing the Attorney General for legal action it took with implications for IEC Case No. 12-07. While the Commission denied the Secretary's motion, it nonetheless hired an independent investigator. Yet the Commission apparently did not like that the independent investigator's report showed no evidence of the Secretary's violation of any law. Thus, the Commission largely ignored his report. Moreover, the Executive Director continued with her active role in IEC Case No. 12-07.

33. These actions objectively demonstrate Commissioner Marshall's, Commissioner's Grossman's, and the Executive Director's bias – or, at a minimum, appearance of bias – against the Secretary.

34. Yet the Commission abused its discretion, acted arbitrarily and capriciously, violated the Secretary's due-process rights to fair notice and hearing, and otherwise acted

contrary to law, by utilizing an improper subjective standard in determining the issue of bias and refusing to recuse Commissioner Marshall, Commissioner Grossman, and the Executive Director from IEC Case No. 12-07.

35. Prior to the hearing, the Secretary requested the issuance of subpoenas to several key witnesses critical to the Secretary's defense. These included prior Secretaries of State and other statewide elected officials, all of whom had and utilized their discretionary funds in various ways. The Department of State's and other agencies' interpretation of the discretionary-fund statute, as evidenced by its prior elected officials' practices, is relevant to interpreting the meaning of the discretionary-fund statute. Yet, at the insistence of Commissioner Grossman, the Commission abused its discretion by arbitrarily and capriciously denying the Secretary's subpoena requests and ability to call these key witnesses. In doing this, the Commission violated the Secretary's due-process rights to fair notice and fair hearing and otherwise violated the law. Remarkably, after denying the Secretary the right to call necessary witness, the Commission noted in its deliberations following the June 7, 2013 hearing the lack of evidence of prior practices within the office of the Secretary of State.

36. Again at Commissioner Grossman's insistence, the Commission also abused its discretion by arbitrarily and capriciously denying the Secretary's request to call an expert witness in governmental accounting and auditing, who would have opined that he did not see any audit or accounting issues with any of the \$1,818.89 of expenditures that were in dispute.

37. The Commission's rules and procedures are vague, evolving, selectively enforced, and often times in conflict with the law. The Secretary submitted nearly two-dozen written and oral motions to the Commission, in an attempt to obtain clarity, preserve his rights, and have a fair hearing. Yet the Commission repeatedly abused its discretion, acted arbitrarily and capriciously, politicized the proceedings, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law in denying virtually every motion submitted by the Secretary.

38. Following its June 7, 2013 hearing on IEC Case No. 12-07, the Commission found a violation – without any evidence to support its finding. The undisputed evidence at the June 7, 2013 hearing demonstrates that the Secretary legally, ethically, and appropriately utilized the \$1,818.89 in state funds in dispute in this case. Every witness and every piece of evidence – including the Commission's own investigator, the State Controller, the prior veteran Deputy Secretary of State, the Department of State's CFO, and every one of CREW's witnesses and exhibits – confirmed this at the hearing. The Commission heard no evidence of any ethical violation, because no such evidence exists. Whether it is CREW's or the Commission's evidentiary burden, neither of them met it. Yet the Commission misread an exhibit containing an email from the Department CFO and incorrectly held that this email (somehow) created a legal obligation that the Secretary violated. Thus, the Commission abused its discretion, acted arbitrarily and capriciously, violated the Secretary's due-process rights to fair notice and hearing, and otherwise acted contrary to law by finding against the Secretary, without evidence to support the finding.

39. The discretionary-fund statute provides to the Secretary, like prior Secretaries and other statewide elected officials, the discretion to determine the propriety of discretionary expenditures. *See* C.R.S. § 24-9-105(1) (emphasis added) (“for expenditure in pursuance of official business *as each elected official sees fit*.”). Even if the Commission had jurisdiction over this statute, the Commission abused its discretion, acted arbitrarily and capriciously, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law, by misreading the plain language of the statute. Indeed, the statute does not state “for expenditure in pursuance of official business *as the Commission official sees fit*.” The Commission improperly substituted its own judgment, in clear violation of this statute.

40. As permitted by Colorado statute and case law, the Secretary’s counsel offered the Deputy Secretary of State to testify on behalf of the Secretary on the hearing. Despite the Secretary’s counsel’s stated availability and opposition to any *ex parte* proceeding with this Court, the Commission nonetheless improperly obtained an *ex parte* order from this Court compelling the Secretary’s testimony.

41. The proceedings before the Commission are public meetings, subject to Colorado’s Sunshine Law. At 5 p.m. MST, during the presentation of evidence at the June 7, 2013 hearing, the building where the Commission held its hearing became closed to the public. The building reopened to the public at approximately 6:18 p.m. MST, at which time the public could attend the proceedings only with a police escort. Several members of the public were actually prevented and/or deterred from attending the public meeting. The Secretary’s counsel notified the Commission of this legal issue, and the Commission decided to ignore it and improperly proceed with a meeting in violation of Colorado’s Sunshine Law.

42. During the deliberations, the Commission voted to penalize the Secretary by making him pay a fine of two times (2Xs) the \$1,396.89 expenses paid to the Secretary that the Commission ruled violated the discretionary-fund statute. Commissioner Grossman insisted that the Commission impose the penalty, because the Secretary had not shown “proper respect” toward the Commission.

43. Moreover, despite overwhelming and undisputed evidence that the Secretary properly utilized \$422 in state funds to respond to specific and credible threats of sexual violence against the Secretary’s wife and then-four-year-old daughter, the Commission nonetheless indefinitely held open this factual allegation against the Secretary. The Commission did this, again at Commissioner Grossman’s insistence, so the Commission could potentially find a future violation – even though the Commission conceded that it had no evidence of wrongdoing. In other words, CREW or the Commission will have the opportunity for a do-over, so it can meet its evidentiary burden on this already litigated factual allegation and potentially find another violation against the Secretary. As the Secretary argued to the Commission, Commissioner Grossman has repeatedly politicized issues surrounding the Secretary’s and his family’s personal security.

44. The Commission ratified its action through its written order on June 19, 2013.

45. The actions of the Commission are subject to review, pursuant to C.R.C.P. 106(a)(4).

46. Venue is proper in this Court, pursuant to C.R.C.P. 106 and C.R.C.P. 98.

### III. LEGAL CLAIMS

#### FIRST CLAIM FOR RELIEF

[C.R.C.P. 106 and/or C.R.S. §24-4-106(2)]

[Actions in Excess of Jurisdiction]

47. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 46 above as if recited herein.

48. The Commission and its members exceeded their jurisdiction, abused their discretion, acted arbitrarily and capriciously, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law when, on January 7, 2013, they denied the Secretary's motion to dismiss the Complaint filed by CREW, and thereafter continued to assert illegal jurisdiction over the Secretary in IEC Case No. 12-07.

49. The Secretary is entitled to have the Defendants' erroneous action overturned, pursuant to C.R.C.P. 106(a)(4) and/or C.R.S. §24-4-106(2).

#### SECOND CLAIM FOR RELIEF

[C.R.C.P. 106 and/or C.R.S. §24-4-106]

[Abuse of Discretion]

50. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 49 above as if recited herein.

51. The Commission and its members abused their discretion, acted arbitrarily and capriciously, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law, when on June 13, 2013 and June 19, 2013 they made certain findings and conclusions that were adverse to the Secretary, imposing certain sanctions, and deferring ruling on certain matters at issue.

52. The Secretary is entitled to have the Defendants' erroneous actions overturned, pursuant to C.R.C.P. §106(1)(4) and C.R.S. §24-4-106(7).

#### THIRD CLAIM FOR RELIEF – (DECLARATORY JUDGMENT)

[Violation of Due Process, Colo. Const. Art. II, Sec 25]

53. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 52 above as if recited herein.

54. Due process requires that any decision of the Commission be made by unbiased decisionmakers.

55. Commissioner Marshall and Commissioner Grossman have either real or apparent biases against the Secretary.

56. The Commission abused their discretion, acted arbitrarily and capriciously, denied the Secretary his due-process rights to fair notice and hearing, and otherwise acted contrary to law, by utilizing an improper subjective standard in determining the issue of bias and refusing to recuse Commissioner Marshall and Commissioner Grossman.

57. The Secretary is entitled to a declaratory judgment rendering the Commission's decision in IEC Case No. 12-07 void due to the violation of the Secretary's right to due process.

**FOURTH CLAIM FOR RELIEF – (DECLARATORY JUDGMENT)**

[Violation of Due Process, Colo. Const. Art. II, Sec 25]

58. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 57 above as if recited herein.

59. The Commission's decision to proceed in IEC Case No. 12-07, in the absence of any articulated standard of conduct over which it has jurisdiction and by asserting broad, vague, and evolving legal standards, failed to provide sufficient notice to the Secretary of what law he alleged violated, so he could properly defend himself at his hearing. The Commission violated the Secretary's due-process rights of fair notice and hearing. By the Commission's imposition of penalties, the Commission has also deprived the Secretary of property, without due process of law.

60. The Secretary is entitled to a declaratory judgment that Colo. Const., Art. XXIX as applied in IEC Case No. 12-07 is unconstitutional and any decisions in that case are void as violating due-process requirements of the law.

**FIFTH CLAIM FOR RELIEF**

[Appeal pursuant to C.R.S. §24-18.5-101(9)]

65. The Secretary hereby incorporates the allegations contained in Paragraphs 1 through 64 above as if recited herein.

66. To the extent the First and Second Claims for Relief above are not deemed an notice of appeal, pursuant to C.R.S. §24-18.5-101(9), the Secretary hereby submits this notice of appeal of the actions of the Commission as in excess of jurisdiction, in violation of law, without evidentiary support, as arbitrary and capricious, and as abuses of discretion.

SIXTH CLAIM FOR RELIEF  
[C.R.S. §24-6-402(8)]  
[Violation of Open Meetings Law]

67. The Secretary hereby incorporates the allegations contained in Paragraphs 1 through 66 above as if recited herein.

68. Colorado has a public policy against holding public meetings in secret.

69. The Commission violated C.R.S. §24-6-401, et seq. when it conducted proceedings in a closed building and subsequently only with a police escort.

70. Due to the violation of the open-meetings law, the Court must determine that the actions taken by the Commission in IEC Case No. 12-07 are void and vacate its decisions.

WHEREFORE, Plaintiff Secretary of State Scott E. Gessler respectfully requests that this Court grant the following relief:

A. Enter an Order, pursuant to C.R.C.P. 106(a)(4) and/or C.R.S. §24-4-106, that the Defendants have exceeded their jurisdiction and vacating the Commission's orders accordingly;

B. Enter an Order pursuant to C.R.C.P. 106(a)(4) and/or C.R.S. §24-4-106 that the Defendants have abused their discretion and vacating the Commission's orders accordingly;

C. A declaratory judgment that the Defendants have violated the Secretary's due-process rights to have IEC Case No. 12-07 adjudicated by an unbiased panel;

D. A declaratory judgment that the Defendants have violated the Secretary's due-process rights in applying Colo. Const. Art. XXIX without fair warning of the standards to be applied to its decisions;

E. A declaratory judgment that Article XXIX of the Colorado Constitution is unconstitutional, as written and as applied to the Secretary, due to vagueness in its purported application to "other standards of conduct and reporting requirements."

F. An Order vacating the Commission's orders on appeal as contrary to law and fact;

G. An Order that all actions taken at the hearing of IEC Case No. 12-07 are void due to the Commission's noncompliance with C.R.S. §24-6-401, et. seq.

H. Award Plaintiff his attorneys' fees and costs; and

I. Grant such other and further relief as this Court deems just and proper.

DATED this 19<sup>th</sup> day of June, 2013.

Respectfully submitted,

*/s/ Robert J. Bruce*

*/s/ Michael R. Davis*

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## CERTIFICATE OF SERVICE

I certify that on this 19<sup>th</sup> day of June, 2013, I electronically served via ICCES or sent via email a true and complete copy of the *Plaintiff's Second Amended Complaint* to:

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Respectfully submitted,

*/s/ Shannon Neary* \_\_\_\_\_

Shannon Neary