

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

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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

• COURT USE ONLY •

Attorneys for Plaintiff*:

Case No.: 13CV030421

David A. Lane, #16422
KILLMER, LANE & NEWMAN, LLP
The Odd Fellows Hall
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: (303) 571-1000; Fax: (303) 571-1001
dlane@kln-law.com

Div: 376

Robert J. Bruce, #17742
LAWLIS & BRUCE, LLC
1875 Lawrence Street, Suite 750
Denver, Colorado 80202
Telephone: (303) 573-5498; Fax: (303) 573-5537
robertbruce@lawlisbruce.com

Michael R. Davis, #39788
LAW OFFICE OF MICHAEL R. DAVIS, LLC (MRDLaw)
3301 West Clyde Place
Denver, Colorado 80211
Telephone: (303) 325-7843; Fax: (303) 723-8679
mrd@mrdavislaw.com

*Acting as Special Assistant Attorneys General

PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff Scott Gessler (“Plaintiff” or “the Secretary”), by and through his undersigned attorneys, respectfully submits the following as his Complaint.

I. INTRODUCTION

1. The Colorado Independent Ethics Commission (“the Commission” or “IEC”) has exceeded its jurisdiction granted to it by Amendment 41 (Article XXIX) to the Colorado Constitution and C.R.S. § 24-18.5-101. The Commission has done this by asserting broad jurisdiction over an ethics complaint against the Secretary, which cites potential violations of three criminal statutes, and does not relate to Amendment 41’s gift ban, lobbying ban, or influence peddling.

2. The Secretary will suffer irreparable harm, as the Commission has brought him in before the tribunal, subjected him to evolving and unconstitutional procedures, and forced him to respond to criminal (or some other unspecified legal) allegations over which the Commission clearly has no jurisdiction. This illegal assertion of jurisdiction also has harmed or will harm the Secretary’s reputation and his ability to carry out his official duties as he sees fit. Preliminary-injunctive relief is appropriate, because monetary damages are likely unavailable, an injunction will preserve the status quo pending a trial on the merits, and the public interest is served by reigning in agencies that act beyond their authority.

II. GENERAL ALLEGATIONS

3. 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.

4. 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.

5. 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.

6. On November 5, 2012, the Commission undertook review of a Complaint filed by Citizens for Responsibility and Ethics in Washington (d/b/a Colorado Ethics Watch) (“CREW”), in which CREW alleges that the Secretary “may” have committed a felony and two misdemeanors related to state expenditures. The Commission designated the Complaint as Case No. 12-07. At that meeting, the Commission voted to approve an Order for Secretary Gessler to respond to the Complaint.

7. On December 20, 2012, the Secretary fully and substantively responded to the factual allegations in the Complaint.

8. The Secretary also separately filed a Motion to Dismiss based, in part, on the fact that the Commission does not have jurisdiction over the matters set forth in the Complaint.

9. 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. The denial of the Secretary's Motion to Dismiss was improper and erroneous.

10. The Complaint in IEC Case No. 12-07 sets forth allegations that the Secretary violated certain criminal codes. Despite not having jurisdiction over criminal standards, the Commission decided to proceed with Case No. 12-07 claiming to have authority over other standards of conduct or reporting requirements. By its own admission, the Defendants have not defined such other standards of conduct or reporting requirements and as such, those terms are unconstitutionally vague as set forth in Article XXIX of the Colorado Constitution and as applied in IEC Case No. 12-07.

11. The Commission is an inferior tribunal and governmental body of limited jurisdiction. The actions of the Commission are subject to review pursuant to C.R.C.P. 106(a)(4).

12. Commissioner Marshall has had prior interactions with the Secretary that evidence her appearance of bias against him. Before Commissioner Marshall joined the Commission, she has 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. 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. These actions demonstrate bias and, at a minimum, the appearance of impropriety on behalf of Commissioner Marshall. Notwithstanding the foregoing, Commissioner Marshall has failed and refused to recuse herself from deciding IEC Case No. 12-07.

13. Chairman Grossman has also made campaign contributions to the 2010 and 2014 political opponents of the Secretary. These campaign donations create the appearance of impropriety and bias against the Secretary. Notwithstanding the foregoing, Chairman Grossman has failed and refused to recuse himself from deciding IEC Case No. 12-07.

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

III. FIRST CLAIM FOR RELIEF
[C.R.C.P. 106 and/or C.R.S. §24-4-106(2)]

15. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 14 above as if recited herein.

16. The Commission and its members exceeded their jurisdiction and/or abused their discretion when, on January 7, 2013, they denied the Secretary's Motion to Dismiss the Complaint filed by CREW.

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

IV. SECOND CLAIM FOR RELIEF

[C.R.C.P. 106(a)(4)(V), C.R.C.P. 65 and/or C.R.S. §24-4-106(8)]

18. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 17 above as if recited herein.

19. This Court is authorized to enter appropriate injunctive relief when governmental bodies and inferior tribunals exceed their jurisdiction and/or abuse their discretion. C.R.C.P. 106(a)(4)(V), C.R.C.P. 65 and/or C.R.S. §24-4-106(8).

20. The Secretary has a reasonable probability of success on the merits of his claims.

21. There is a real, immediate and irreparable injury to the Secretary, if the Defendants proceed without jurisdiction, the injury of which may be prevented by injunctive relief.

22. There is no plain, speedy and adequate remedy at law available to the Secretary.

23. Granting an injunction, both preliminarily and permanently, will not disserve the public interest.

24. The balance of equities favors enjoining the Defendants from further proceedings.

25. A preliminary injunction will preserve the status quo pending a final decision to make the injunction permanent.

V. THIRD CLAIM FOR RELIEF – (DECLARATORY JUDGMENT)

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

26. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 25 above as if recited herein.

27. Due process requires that any decision of the Commission be made by unbiased decision makers.

28. Commissioner Marshall and Chairman Grossman have either real or apparent bias against the Secretary.

29. Given that Commissioner Marshall and Chairman Grossman have failed and refused to recuse themselves from IEC Case No. 12-07, the Secretary's right to due process has been violated.

30. 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.

VI. FOURTH CLAIM FOR RELIEF – (DECLARATORY JUDGMENT)

[Violation of Due Process, Colo. Const. Art. II, Sec 25
and U.S. Const. Amend. 5 and Amend. 14]

31. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 30 above as if recited herein.

32. 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 stated in the Complaint on the grounds that "other standards of conduct" could be implicated did not sufficiently inform the Secretary of what conduct could result in penalties and as applied is unconstitutionally vague.

33. 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.

VII. FIFTH CLAIM FOR RELIEF – (DECLARATORY JUDGMENT)

[Violation of Due Process, U.S. Const. Amend. 5 and Amend. 14]

34. The Secretary hereby incorporates the allegations contained in paragraphs 1 through 33 above as if recited herein.

35. Due process and fundamental fairness require that anyone subject to governmental sanction be provided with fair warning and notice of specific conduct that could give rise to a sanction.

36. The inclusion of "other standards of conduct and reporting requirements" within Colo. Const., Art. XXIX is unconstitutionally vague and violates due process rights of the Secretary as applied and to others who may be subject to Colo. Const., Art. XXIX.

37. The Secretary is entitled to a declaratory judgment stating that Colo. Const., Art. XXIX is unconstitutionally vague and as such is void and of no effect.

WHEREFORE, Plaintiff 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(2), that the Defendants have exceeded their jurisdiction and/or abused their discretion;
- B. Enter preliminary and permanent injunctions, pursuant to C.R.C.P. 106(a)(4)(V), C.R.C.P. 65, and/or C.R.S. §24-4-106(8), prohibiting Defendants from proceeding in excess of their limited jurisdiction;

- 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. Award Plaintiff his costs; and
- G. Grant such other and further relief as this Court deems just and proper.

DATED this 11th day of March, 2013.

Respectfully submitted:

/s/ Robert J. Bruce

David A. Lane, #16422
KILLMER, LANE & NEWMAN, LLP
The Odd Fellows Hall
1543 Champa Street, Suite 400
Denver, Colorado 80202
Telephone: (303) 571-1000
Fax: (303) 571-1001
dlane@kln-law.com

and

Robert J. Bruce, #17742
LAWLIS & BRUCE, LLC
1875 Lawrence Street, Suite 750
Denver, Colorado 80202
Telephone: (303) 573-5498
Fax: (303) 573-5537
robertbruce@lawlisbruce.com

and

Michael R. Davis, #39788
LAW OFFICE OF MICHAEL R. DAVIS, LLC
3301 West Clyde Place
Denver, Colorado 80211
Telephone: (303) 325-7843
Fax: (303) 723-8679
mrd@mrdavislaw.com

Attorneys for Plaintiff – Acting as duly
appointed Special Assistant Attorneys General

Plaintiff's Address:

1700 Broadway, Suite 200
Denver, Colorado 80290

CERTIFICATE OF SERVICE

I certify that on this 11th day of March, 2013, I electronically served via ICCES or sent via email a true and complete copy of the *Plaintiff's First Amended Complaint* to:

Lisa Brenner Freimann, First Assistant Attorney General
Office of the Attorney General, State of Colorado
1300 Broadway, 8th Floor
Denver, Colorado 80203
Telephone: (720) 508-6385
Fax: (720) 508-6037
lisa.freimann@state.co.us

Respectfully submitted,

/s/ Shannon Neary
Shannon Neary