BEFORE THE INDEPENDENT ETHICS COMMISSION
STATE OF COLORADO

CASE NO. 12-07

In the Matter of

SCOTT E. GESSLER, Colorado Secretary of State

MOTION TO DISMISS

Respondent Colorado Secretary of State Scott E. Gessler ("the Secretary") respectfully moves to dismiss the complaint and supplemental complaint (collectively the "Complaint") submitted by Citizens for Responsibility and Ethics in Washington, a/k/a Colorado Ethics Watch ("CREW").

The Commission must dismiss the Complaint because:

(A) Amendment 41 bans "gifts" offered to influence a public official and does not apply to expenditures under the State fiscal rules;

(B) The Commission does not have authority over criminal allegations; and

(C) By interpreting "other standards of conduct" to include undefined allegations, the Commission violates the Secretary's right to a fair hearing.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

The Secretary incorporates by reference his *Response and Request for Determination of Frivolousness* submitted concurrently, including the factual background and procedural history. To summarize, on October 15, 2012, CREW filed a complaint with the Denver District Attorney alleging that the Secretary "may" have committed three crimes related to use of public funds: (1) misdemeanor first-degree official misconduct

(C.R.S. § 18-8-404[1] and 1 Colo. Code Regs. § 101-1:2-1.01); (2) felony embezzlement (C.R.S. § 18-8-407); and (3) misdemeanor abuse of public records (C.R.S. § 18-8-114). As detailed in the *response*, the Secretary denies CREW's alleged criminal wrongdoing.

At the Commission hearing on November 10, 2012, the Chairman invited the Secretary to submit a motion following a constitutional objection by the Secretary's counsel.

II. ARGUMENT

A. Amendment 41 bans "gifts" offered to influence a public official.

1. In order to preserve its constitutionality, both the state legislature and attorney general have limited Amendment 41 to influence peddling.

In November 2006, Colorado voters passed Amendment 41 (Article XXIX) to the Colorado Constitution. Entitled "Ethics in Government," Amendment 41 generally bans gifts to public officials for the purpose of curbing influence peddling. As relevant here, the plain language of Amendment 41 prohibits "gift" bans only.[2] Specifically, Section 3 is entitled "gift ban," and every subsection relates to the prohibition on certain gifts to public officials. For example, subsection (1) defines "gift," and subsection (2) specifically governs "gifts."

When interpreting a constitutional provision, one "must consider the object to be accomplished and the mischief to be prevented."[3] As a first step, the Commission must

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[1] CREW incorrectly cited to C.R.S. § 18-8-104, which sets forth the crime of obstruction of justice.

[2] *See* Colo. Const. art. XXIX.

[3] *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 682 (Colo. App. 2010), *aff'd* 269 P.3d 1248 (Colo. 2012) (internal quotation omitted).

look at the plain language and give effect to every word.[4] Here, the term "gift" is clear and unambiguous. It is "a thing given willingly to someone without payment."[5]

This plain language is reinforced by the 2006 "Bluebook."[6] Mailed to all voters in the state, the 2006 Bluebook described Amendment 41 to every voter. Voters relied upon the Bluebook description, and recognizing the Bluebook's critical importance, the Colorado Supreme Court recently reaffirmed that the Bluebook shows the voters' intent in passing a ballot measure:

> [A] court may ascertain the intent of the voters by considering other relevant matters such as . . . the biennial "Bluebook," which is the analysis of ballot proposals prepared by the legislature.[7]

The 2006 Bluebook described the five – and only five – provisions of Amendment 41:

- A ban on public officials receiving *gifts* greater than $50 per year;
- A ban on family members of public officials receiving I greater than $50 per year;
- A total ban on lobbyists' ability to give *gifts* to public officials and their families;
- A prohibition on lobbying government officials following government employment; and
- The creation of a new Independent Ethics Commission.[8]

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[4] *See City of Aurora v. Acosta*, 892 P.2d 264, 267 (Colo. 1995).

[5] Oxford Am. College Dictionary, 565 (Oxford University Press 2002).

[6] Colo. Legis. Council, Research Pub. No. 554, 2006 *Ballot Information Booklet: Analysis of Statewide Ballot Issues*, 9 (2008).

[7] *See Colo. Ethics Watch v. Senate Majority Fund*, LLC, 269 P.3d 1248, 1256 (Colo. 2012) (quoting *In re Interrogatories on House Bill 99–1325*, 979 P.2d 549, 554 (Colo. 1999)).

[8] Research Pub. No. 502-1, p. 9. (emphasis supplied).

In short, the Bluebook shows that voters intended to ban gifts only (plus lobbying following public employment, which is not at issue in this case). Nowhere did the Bluebook describe anything beyond gifts. At no point did the Bluebook indicate that Amendment 41 created a new enforcement mechanism over Colorado's criminal laws. It would be a great surprise for voters to learn that they had somehow created a Commission with concurrent jurisdiction over criminal laws.

Soon after its passage, various plaintiffs sued Colorado, arguing that because the gift bans were overbroad and vague they "violat[ed] their First Amendment rights to free speech, free association, and petition."[9] While this lawsuit was pending, in April 2007 the General Assembly adopted Senate Bill 07–210 ("S.B. 07–210") in order to implement Amendment 41."[10]

The statute limited the types of complaints the Commission may hear. The Commission must dismiss a "frivolous" complaint, defined as:

> any complaint filed under article XXIX that fails to allege that a [covered official or employee] has accepted or received any gift or other thing of value for *private gain or personal financial gain*.[11]

And the Colorado Supreme Court recognized that "private gain" or "personal financial gain" means:

> any money, forbearance, forgiveness of indebtedness, gift, or other thing of value *given or offered by a person seeking to influence an official act* that is performed in the course and scope of the public duties of a public

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[9] *Developmental Pathways v. Ritter*, 178 P.3d 524, 526 (Colo. 2008).

[10] *Id.* at 528 (citing C.R.S. § 24–18.5–101).

[11] *Id.* (quoting C.R.S. § 24-18.5-101(5)(a)) (emphasis in original).

> officer, member of the general assembly, local government official, or government employees.[12]

An "official act" means:

> any vote, decision, recommendation, approval, disapproval, or other action, including inaction, which involves the use of discretionary authority."[13]

In his efforts to defend Amendment 41 from attack, the Colorado Attorney General relied heavily on S.B. 07-210, representing to the Denver District Court that Amendment 41 was limited to influence peddling;

> [w]hen article XXIX [Amendment 41] is read as a whole and the provisions harmonized, it requires a nexus between the gifts or activities and the covered persons' public responsibilities. That is, the amendment limits or prohibits only those gift and activities that would cause the covered official to breach the public trust for private gain.[14]

The Colorado Supreme Court later relied upon the Attorney General's representation to the Denver District Court that S.B. 07-210;

> [c]onfirm[ed] the existence of a nexus between the gift ban provisions and the receipt of gifts in violation of the public trust for private gain, thus negating Plaintiffs' constitutional challenges of overbreadth and vagueness.[15]

Ultimately the Colorado Supreme Court rested its decision on different grounds. But the fact remains that the Attorney General has represented in a court of law – and the Denver District Court has agreed – that Amendment 41 runs afoul of the federal

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[12] *Id.* (quoting C.R.S. § 24-18.5-101(5)(b)(II)) (emphasis added).

[13] IEC Rule 3(A)(12).

[14] Colo. Att'y Gen.'s Br. in Opp'n to Pls.' Mot. for Prelim. Inj., *Developmental Pathways v. Ritter*, Case No. 07CV1353, 2007 WL 5794312 (Denver District Court, filed April 26, 2007).

[15] *Developmental Pathways*, 178 P.3d at 528.

constitution if state officials apply it broader than influence peddling. Indeed, based upon the Attorney General's representations, the State may not now "deliberately chang[e] positions according to the exigencies of the moment."[16]

This interpretation is not limited to the plain language, Bluebook, Attorney General, and Colorado courts. The Commission itself has repeatedly acknowledged these constitutional limitations in past opinions. Examples include:

- Earlier this month, the Commission issued a travel opinion finding that "[t]he purpose of the Amendment . . . is to restrict gifts to public employees and officials acting in their official capacities."[17]
- In 2011, the Commission agreed that the Governor's appearance on an NBC panel to discuss education reform was a proper use of state funds, but could not be reimbursed by NBC because such reimbursement would be a "gift."[18]

As a state agency, the Commission must follow the statute. "Administrative agencies are legally bound to comply strictly with their enabling statute. Agency rules that are inconsistent with or contrary to the statute pursuant to which they were promulgated are void."[19] While the Colorado Supreme Court itself did not opine on the

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[16] *See Eastman v. Union Pac. R. Co.*, 493 F.3d 1151, 1156 (10th Cir. 2007) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)) (judicial estoppel's "purpose is to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment" and "to prevent improper use of judicial machinery")

[17] IEC Advisory Opinion 12-01.

[18] *Id.* 11-12.

[19] *Schlapp ex rel. Schlapp v. Colo. Dept. of Health Care Policy & Fin.*, 284 P.3d 177, 182 (Colo. App. 2012).

validity of S.B. 07-210, it is for the courts – not the Commission – to decide the constitutionality of S.B. 07-210.[20] Indeed, the Colorado Supreme Court has repeatedly held that boards and commissions may not evaluate the constitutionality of Colorado statutes;

> Provisions delineating the authority of the Board suggest that it may enter an order declaring that a statute, on its face, violates state or federal constitutional provisions. . . . The Board has no authority to evaluate the facial constitutionality of statutes adopted by the General Assembly . . . .[21]

In short, the Commission must follow the interpretation set forth in Colorado law.

2. CREW's complaint is legally "frivolous," because it does not allege influence peddling.

CREW's complaint is "frivolous," as a matter of law, and requires the Commission's dismissal, because CREW's complaint fails to demonstrate any ethical violation under Amendment 41 or C.R.S. § 24-18.5-101(5). Simply put, none of CREW's allegations involve gifts or "influence peddling"; nothing alleges anything was "given or offered by a person seeking to influence an official act," which is the basis for the Commission's jurisdiction.[22]

The expenditure of state funds to reimburse for expenses is not a "gift." In fact, interpreting the gift ban in this manner would directly conflict with one of Amendment 41's purposes and findings:

> The people of the state of Colorado also find and declare that there are certain costs associated with holding public office and that to ensure the

[20] *Developmental Pathways*, 178 P.3d at 533, n.6.

[21] *See Kinterknecht v. Indus. Comm'n*, 485 P.2d 721, 724 (1971); *see also Horrell v. Dep't of Admin.*, 861 P.2d 1194, 1199 (Colo. 1993).

[22] C.R.S. § 24-18.5-101(5)(b)(II).

> integrity of the office, such costs of a reasonable and necessary nature should be born by the state or local government.[23]

Likewise, it is logically impossible for state funds, directed by the Secretary, to be used to "influence" the Secretary. In other words, the Secretary cannot "influence" himself.

IEC Rule 7(G)(1) states that "[a] complaint shall be dismissed by the IEC" if "[t]he complaint is frivolous." The Commission's rules define "frivolous" as "a complaint filed without a rational argument for the IEC's involvement based on the facts or law." The Complaint fails to meet the statutory jurisdictional requirement of influence peddling.[24] Thus, IEC Rule 7(G)(1) requires dismissal.

B. The Commission does not have authority over criminal allegations.

Even if the Commission erroneously construes CREW's allegations as influence peddling, the Complaint faces another insurmountable barrier; the Commission lacks jurisdiction over criminal allegations.

As noted above, it would be an extreme and unprecedented interpretation to construe Amendment 41 to grant the Commission roving authority to enforce criminal laws. And the Commission has recognized this limitation on its jurisdiction. The Commission's website admits that "[i]n general, the IEC does not have authority over . . . criminal conduct."[25] Yet, the Commission is now adjudicating CREW's criminal allegations, based upon three criminal statutes, against the Secretary.

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[23] Colo. Const. art. XXIX, § 1(2).

[24] C.R.S. § 24-18.5-101(5)(b)(II).

[25] FYI 2: Asking the IEC for Help, http://www.colorado.gov/cs/Satellite/DPA-IEC/IEC/1251597368605 (last visited Dec. 26, 2012).

Under longstanding constitutional provisions and commons standards of statutory interpretation, Colorado District Courts – not the Commission – have original jurisdiction over criminal matters.[26] And as discussed above, there is no evidence that the voters of Colorado intended to upset that constitutional balance in enacting Amendment 41. Colo. Const. art. VI, § 9(1) states Colorado courts "must consider the amendment as a whole, and if possible, interpret the provision in harmony with other provisions to avoid a conflict."[27] In other words, without evidence of intent to the contrary, Amendment 41 must be interpreted to avoid conflict with Article VI's original grant of criminal jurisdiction to District Courts and"[t]he electorate, as well as the legislature, must be presumed to know the existing law at the time they amend or clarify that law."[28] The Commission must no encroach upon the criminal justice system's jurisdiction through an unwarranted expansion of the Commission's jurisdiction.

If the Commission were to exercise jurisdiction over criminal allegations, it would create federal Due Process violations and deprive the Secretary of a fair hearing.

First, the Commission does not require "probable cause" for criminal allegations, which exposes the commissioners to personal liability for a malicious-prosecution tort claim.[29] The Commission instead uses a lower statutory standard of "frivolous." And the

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[26] Colo. Const. art. VI, § 9(1).

[27] *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. App. 2008).

[28] *Common Sense Alliance v. Davidson*, 995 P.2d 748, 754 (Colo. 2000); *accord Colo. Ethics Watch, LLC*, 275 P.3d at 683.

[29] *See McCarty v. Gilchrist*, 646 F.3d 1281, 1285 (10th Cir. 2011).

Commission follows an even lower standard; "without a rational argument for the IEC's involvement based on the facts or law."[30]

Second, the Commission does not guarantee the Secretary's constitutional right to discovery and confrontation of witnesses; indeed, the IEC Rules do not even contain the necessary provisions for a fair hearing:

- The Commission permits discovery in such form as the Commission deems appropriate;[31]
- The Commission maintains discretion whether to subpoena witnesses and documents;[32]
- The Commission permits testimony by affidavit or by telephone, if a witness is unavailable to testify in person; there is not right to cross examination;[33]
- The Commission may exclude evidence at its sole discretion;[34] and
- The Commission may limit the scope of the hearing to specific factual, ethical, or legal issues.[35]

This violates the Sixth Amendment's Confrontation Clause, which "provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'"[36] The United States Supreme Court has "held that this

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[30] IEC Rule 3(A)(5).

[31] *Id.* 8(C)(4).

[32] *Id.* 8(C)(6).

[33] *Id.* 8(E).

[34] *Id.* 8(E).

[35] *Id.* 8(A)(2).

[36] *See Crawford v. Washington*, 541 U.S. 36, 42 (2004).

bedrock procedural guarantee applies to both federal and state prosecutions."[37] The Commission is not bound by the Colorado Rules of Evidence or any other definite standard.[38] In other words, the Commission could hear constitutionally impermissible evidence, such as hearsay evidence not subject to cross-examination. Yet the Confrontation Clause requires that hearsay (out-of-court) statements be subjected to "testing in the crucible of cross-examination."[39]

Third, the Commission does not provide for a constitutionally-required jury trial. "The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community."[40] Instead, the commissioners make all legal and factual determinations.[41] The commissioner, thus, impermissibly serves as investigator, judge, and jury.

Finally, the Commission does not guarantee the constitutionally-required use of the required "beyond-a-reasonable-doubt" standard for finding criminal guilt. Instead, Amendment 41 establishes "a presumption that the findings shall be based on a preponderance of the evidence unless the commission determines that the circumstances

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[37] *Id.*

[38] IEC Rule 8(D) ("The Colorado Rules of Evidence shall provide guidance for all hearings, but may not be strictly enforced. The IEC, at its discretion, may receive any evidence at a hearing that it deems relevant or helpful to the inquiry at hand as allowed under Colorado law.").

[39] *Crawford*, 541 U.S. at 61.

[40] *Berghuis v. Smith*, 130 S. Ct. 1382, 1387 (2010) (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975)); *see also People v. Norman*, 703 P.2d 1261, 1271 (Colo. 1985) (citing U.S. CONST. amend. VI and Colo. Const. art. II, § 23) ("The right to trial by a jury in criminal cases is guaranteed by the United States and Colorado Constitutions.").

[41] *See* Colo. Const. art. XXIX, § 5(1).

warrant a heightened standard."[42] "It has been settled throughout our history that the Constitution protects every criminal defendant 'against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.'"[43] The Commission's amended rules (as of April 14, 2011) appear silent on what standard it will employ.

These are just some of the many examples of the federal Due Process violations caused by the Commission's adjudication of CREW's criminal allegations against the Secretary. As described below, Amendment 41 includes a very broad and vague provision that purports to give the Commission jurisdiction over "any other standards of conduct or reporting requirements as provided by law."[44] But again, neither the plain language nor the relevant Bluebook provisions evidence that the voters intended to grant to the Commission the authority to adjudicate criminal allegations. Interpreting Amendment 41's broad and vague language to encompass criminal allegations violates fundamental concepts of fairness.

C. By interpreting "other standards of conduct" to include undefined allegations, the Commission has violated the Secretary's right to a fair hearing.

CREW's Complaint alleges that the Secretary violated three criminal statutes, and only three criminal statutes. As noted above, the Commission does not have jurisdiction over criminal statutes. At the same time, the Commission does not have jurisdiction over

[42] Colo. Const. art. XXIX, § 5(3)(e).

[43] *See United States v. Booker*, 543 U.S. 220, 230 (2005) (quoting *In re Winship*, 397 U.S. 358, 364 (1970)).

[44] Colo. Const. art., § 5(1).

some unspecified "other standards of conduct" that are separate from the criminal allegations. To hold a hearing based on unspecified and vague "other standards of conduct" is unconscionable. Indeed, it is impossible for the Secretary to defend himself against some "other standard[] of conduct" when he does not even know what that means. For this reason, Colorado Supreme Court has made it clear that extending jurisdiction to unspecified conduct is unconstitutional:

> A penal statute must define an offense with sufficient clarity to permit ordinary people to understand what conduct is prohibited and in such manner that does not encourage arbitrary and discriminatory enforcement of the statute. Thus, the due process clauses of the federal and Colorado constitutions require articulation of definite and precise standards capable of fair application by judges, juries, police and prosecutors. As emphasized in *Kolender*, "[w]here the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"[45]

And The Tenth Circuit has held that this same vagueness and fair-notice concern also applies to civil agencies:

> In the context of agency proceedings, an agency "may fail to give sufficient fair notice to justify a penalty if the regulation [at issue] is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, must therefore look to the agency for guidance, and the agency failed to articulate its interpretation before imposing a penalty.[46]

Here, CREW alleges criminal violations. The Commission may not review criminal allegations under an amorphous and unclear doctrine of "other standards of conduct." To be precise, if CREW is does not allege criminal violations – after citing in its complaint three specific criminal statutes – it is entirely unclear what

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[45] *See Norman*, 703 P.2d at 1266 (internal citations omitted).

[46] *Excel Corp. v. U.S. Dep't of Agri.*, 397 F.3d 1285, 1297 (10th Cir. 2005) (quoting 1st Circuit case).

CREW alleges. The Secretary has no notice or ability to defend himself against evolving and unspecified allegations. Criminal allegations cannot be expanded to include unknown, unspecified and un-alleged "other standards of conduct."

III. REQUESTED RELIEF

The Secretary respectfully requests that the Commission dismiss CREW's Complaint because:

(A) Amendment 41 bans "gifts" offered to influence a public official and does not apply to expenditures under the State fiscal rules;

(B) The Commission does not have authority over criminal allegations; and

(C) By interpreting "other standards of conduct" to include undefined allegations, the Commission has violated the Secretary's right to a fair hearing.

Dated: December 20, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2012, I submitted via email the foregoing **MOTION TO DISMISS** to the following recipients:

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Dated: December 20, 2012

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