NO. _____

In the Supreme Court of the United States

SCOTT GESSLER,

Petitioner,

v.

MATT SMITH, APRIL JONES, WILLIAM LEONE, GARY REIFF, AND JO ANN SORENSEN, AND THE INDEPENDENT ETHICS COMMISSION,

Respondents.

On Petition for Writ of Certiorari to the Colorado Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

By popular initiative Colorado created an Independent Ethics Commission with the power to enforce a gift ban and specific influence peddling standards. Expansively interpreting its own jurisdiction, the commission imposed a personal penalty and public censure on the sitting Secretary of State under a statute requiring all government workers to act "for the benefit of the people of the state." The commission provided shifting notice of hundreds of statutes and rules before the hearing, preventing the Secretary from having meaningful pre-hearing notice.

The question presented is:

Are civil laws that impose a personal penalty subject to the same void-for-vagueness standards as criminal laws and deportation laws?

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Scott Gessler as the Colorado Secretary of State was the respondent before the Colorado Independent Ethics Commission below, appellant in the Colorado district court, appellant in the court of appeals, and petitioner in the Colorado Supreme Court.

Matt Smith, April Jones, William Leone, Gary Reiff, and Jo Ann Sorensen, in their official capacities as members of the Independent Ethics Commission, or their predecessors, were appellees before the Colorado district court, appellees in the court of appeals, and respondents in the Colorado Supreme Court.

The Independent Ethics Commission is an independent constitutionally created commission under the Colorado Constitution.

RULE 29.6 DISCLOSOURE

Pursuant to Rule 29.6, Petitioner Scott Gessler is an individual. There is no parent corporation or publicly held company with 10% or more of stock.

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The Colorado Supreme Court's opinion (App., *infra*, 1a-26a) is reported at 419 P.3d 964. The court of appeals' opinion (App., *infra*, 27a-47a) is not reported but is available in public domain format at 2015 COA 62 and at 2015 WL 2190666. The trial court's opinion is unreported (App. 48a-65a). The Independent Ethics Commission's findings of fact and conclusions of law is unreported (App. 66a-75a).

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The opinion of the Colorado Supreme Court was filed on June 4, 2018 and is not subject to further review.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the First and Fourteenth Amendments to the United States Constitution is found at App. 82a. The relevant portions of Article XXIX of the Colorado Constitution and Title 24 of the Colorado Revised Statutes are set forth at App. 84a-93a.

INTRODUCTION

Colorado's independent ethics commission employs unconstitutionally vague standards and flaunts due process notice in a way that should not escape this Court's attention. The courts below

allowed a sitting Secretary of State to be personally penalized and censured for the perfectly legal and commendable choice to attend and lecture at an accredited national election law conference. Given that the Secretary of State is Colorado's *chief election officer*, attending such a conference was unremarkable. Yet from this anodyne premise, political opponents brought charges before the constitutionally created Independent Ethics Commission.

That body, after searching for some law to claim was violated, resorted to a vague grant of jurisdiction to consider "other standards of conduct and reporting requirements as provided by law," Colo. Const. art. XXIX, § 5(1), which it then linked to a generic statute calling on every government worker to "carry out his duties for the benefit of the people of the state," C.R.S. § 24-18-103(1). Two vague steps did not get to the finish line. A third step incorporated the "discretionary fund" statue, C.R.S. § 24-9-105, since the Secretary used discretionary funds to travel to the CLE conference. It was only by second-guessing the Secretary's decision to spend *discretionary* funds that the commission found a violation of the public benefit statute, which was then found to be an ethics violation of an "other standard[] of conduct." Only by piling vagueness upon vagueness, and by truncating the Secretary's right to constitutionally adequate pre-hearing notice of the basis of the charges, could the commission deem the Secretary a scofflaw for lecturing and learning about election law.

This civil commission has, in effect, adopted a quasi-criminal standard making it a punishable offense (via fine and censure) for any government

employee to do anything found to transgress any law or regulation in Colorado. It is as if Colorado adopted a crime of "violation of any law or regulation" and made it punishable as a misdemeanor. Such an undefined crime would surely be unconstitutional. So too should the quasi-crime of crossing the ethics commission be deemed unconstitutionally vague.

With the growth of the administrative state and proliferation of civil penalties imposed on citizens, this case provides an opportunity to sharply correct state commissions and agencies that abuse unconstitutionally vague laws to punish unsuspecting citizens. If not immediately corrected, this case provides a sound vehicle to review the abuse of vague civil laws.

STATEMENT OF THE CASE

In 2012, Colorado Secretary of State Scott Gessler attended a continuing legal education ("CLE") conference on national elections. App. 2a. The Secretary delivered a speech on election law at the conference, which was hosted by the Republican National Lawyers Association. App. 28a. The Secretary paid for his airfare and lodging for the conference (totaling $1,278.90) from his annual $5,000 discretionary fund, funded by a Colorado statute for him to use in "pursuit of official business" as he "sees fit," C.R.S. § 24-9-105. App. 4a-5a.

Upon the conference's completion, he traveled to the Republican National Convention, paying for his lodging and meals there out of his campaign funds. Prior to his trip, the Secretary requested reimbursement of "any remaining discretionary funds" in his discretionary account. Before making

this request the Secretary had traveled throughout the state in his official capacity, and he had not been reimbursed for those miles driven. *Id.*

The Secretary's use of his discretionary fund was more legitimate than even the past practice of previous Secretaries of State using the discretionary fund. App. 81a. Past uses of the fund have included throwing a cocktail reception, purchasing clothing, and taking the fund as income. *Id.* Regardless, a political opponent of the Secretary filed two complaints with Colorado's Independent Ethics Commission questioning whether the Secretary had used his discretionary fund improperly. App. 5a. At the time the complaint was filed the Secretary was running for Governor. The complaint asserted that the Secretary's use of his discretionary fund to attend the election law conference may have implicated three criminal statutes, including: First degree official misconduct, C.R.S. § 18-8-404; Embezzlement of public property, C.R.S. § 18-8-407; and, Abuse of public records, C.R.S. § 18-8-114. The same complaint was also sent to the Denver District Attorney and the Denver Chief of Police, both of whom declined to charge the Secretary with any wrongdoing. App. 5a.

Responding to the complaints, the commission determined that the allegations were non-frivolous and a lengthy investigation ensued. App. 6a. The investigator discovered, among other things, that:

- The Secretary received CLE credit, approved by the Colorado Supreme Court, for his attendance at the election law conference;
- Previous Secretaries of State used their discretionary funds for various purposes,

including "cocktail receptions for county clerks, personal clothing, overseas travel," and, "allegedly" taking "the entire $5,000 as W-2 income";

- The Secretary was not a member of the RNLA, nor did the RNLA require party affiliation to attend its conferences;
- "There appears to have been no real accounting of these [discretionary] funds and there is not a history of receipts being submitted for expenses incurred and charged against the discretionary fund"; and,
- "[T]here appears to be a history of no real control over the discretionary fund, no procedures for vouchers and/or receipts and no specific direction as to how the discretionary fund is to be used."

App. 78a-79a, 81a. Despite the investigator's apparent findings that (1) Secretary Gessler's use of his discretionary fund was more overtly connected with the business of the Secretary of State than past practice, and (2) he used the fund to attend an educational conference, the commission continued with its investigation.

Throughout the investigation, the commission gave the Secretary no clear indication of the legal charges against him stemming from this alleged conduct. While the initial complaints asserted three criminal statutes "may" apply, the commission expressed ambivalence regarding which legal rules the Secretary's conduct implicated until less than six weeks before his hearing. App. 46a.

When a new pre-hearing notice was issued on the eve of the hearing, the commission again gave neither clear nor fixed legal charges to the Secretary. *Id.* The commission listed five statutes and five state fiscal rules that he "may" have violated.[1]

But, it also "reserve[d] the right to consider additional standards of conduct and/or reporting requirements, depending on the evidence presented, and the arguments made, at the hearing in this matter." App. 6a. Critically, of the five listed fiscal rules in the notice, there are more than 200 sub-rules governing everything from the purpose of the state's accounting practices to whether tickets incurred while traveling for official state business will be reimbursed. *See* 1 CCR 101, et seq. The irresoluteness of the commission regarding just which legal rules applied to the case made preparing a defense difficult for the Secretary.

The hearing devolved into an 11-hour affair with multiple witnesses and documentary evidence. At the hearing, a detailed memorandum was submitted cataloguing the miles driven by the Secretary on official business, as the basis for the $117 reimbursement request. App. 44a. There was no dispute that the Secretary drove miles on official business and was entitled to reimbursement for mileage for the miles driven.

At the hearing the Secretary testified extensively about the election law conference, his presentation at

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[1] Public trust–breach of fiduciary duty, C.R.S. § 24-18-103; Elected state officials–discretionary funds, C.R.S. § 24-9-105(1); Elected state officials–discretionary funds, C.R.S. § 24-9-105(2); Control system to be maintained, C.R.S. § 24-17-102(1).

the conference, and how the legal issues related to his duty as the Chief Election Officer for Colorado. The Secretary explained, from memory, many details of federal election law that influence Colorado, including the election clause of the U.S. Constitution (quoted from memory), various federal election law statutes, UOCAVA (Uniform Overseas Citizens Absentee Voter Act), HAVA (Help American Vote Act), NVRA (National Voter Registration Act), as well as voter ID and logistical issues with election night disputes.

After the hearing the commission found that the Secretary's use of his discretionary fund to attend the national election law conference and his request for reimbursement of his remaining discretionary fund for mileage were unethical. The Commission imposed a personal penalty of $1,514.88. App. 73a-74a. According to the commission, the Secretary's use of discretionary funds was "primarily for partisan purposes, and therefore personal purposes" and thus violated the discretionary fund statute and thereby violated the public benefit statute. *Id.* The Secretary appealed the ruling to District Court in Denver, which upheld the findings. App. 48a-65a. The Secretary appealed to the Colorado Court of Appeals, which upheld the penalty in a published opinion. App. 27a-47a. The Colorado Supreme Court granted certiorari review. App. 1a-26a.

The Colorado Supreme Court rejected the Secretary's argument that only a limiting interpretation of the ethics commission's jurisdiction could avoid the constitutional vagueness challenge and procedural due process challenge the Secretary constantly asserted. According to the Court, C.R.S. §

"24-18-103(1) (providing that the holding of public office or employment is a public trust, and that a public official 'shall carry out his duties for the benefit of the people of the state') establishes an ethical standard of conduct subject to IEC jurisdiction." App. 10a. The Court reasoned that the Secretary "had reasonable notice that the IEC had jurisdiction to investigate and adjudicate the allegations against him.… [T]he phrase 'other standards of conduct … as provided by law' refers to ethical standards of conduct concerning activities that could allow covered individuals to improperly benefit financially from public employment." App. 14a. The Court rejected the Secretary's procedural due process concerns by finding the Secretary had shown no prejudice from any lack of notice. This Petition followed.

REASONS FOR GRANTING THE PETITION

I. The Colorado Independent Ethics Commission used an unconstitutionally vague standard to impose a quasi-criminal penalty.

With the state court's blessing, the Colorado Independent Ethics Commission works as roving judge, jury, and prosecutor, using unconstitutionally vague legal standards to threaten and impose personal penalties and public censure on public officials and employees.

A proceeding is quasi-criminal if the punishment imposed is "analogous" to criminal punishment. *See* BLACK'S LAW DICTIONARY, proceeding (10th ed. 2014)

(defining quasi-criminal proceeding). The commission here is empowered to impose a personal monetary fine of "double the amount of the financial equivalent of any benefits obtained by such actions." Colo. Const. art. XXIX, § 6; *Id.* § 5(3)(c) (power to issue public findings). In effect, if a public official is penalized, the commission issues a public opinion deeming the conduct unethical, amounting to a censure. This system violates the fundamental constitutional guarantees against vague laws and for due process in the form of adequate pre-hearing notice.

A. The Commission operates under hopelessly vague standards.

Colorado voters, like those in many other states, created the Independent Ethics Commission (IEC) with the limited purpose of protecting against the potential for interest groups or individuals to buy access or influence government actors by giving them gifts or other things of value. Colo. Const. art. XXIX. Over time, however, the commission expanded its mandate by decreeing itself the authority to oversee, at the pain of personal penalty, almost all aspects of government service under amorphous standards. In this case, the commission went so far as to claim a hortatory statue calling for all government employees to "carry out his duties for the benefit of the people of the state," C.R.S. § 24-18-103(1), was the legal standard to impose a monetary fine and censure the Secretary of State for participating in an election law continuing legal education conference.

The commission oversees not just elected officials in Colorado but every one of the tens of thousands of

government employees, contractors, and other local officials. *See* Colo. Const. art. XXIX, § 2 (covered individual). The commission was originally conceived of as a way to enforce a ban on gifts and influence peddling. 2006 Bluebook, p.9-11 ("Amendment 41 expands the current prohibitions to cover other gifts and things."); *In re Submission of Interrogs. on H.B. 99-1325*, 979 P.2d 549, 554 (Colo. 1999) ("[A] court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial "Bluebook," which is the analysis of ballot proposals prepared by the legislature.").

Despite this limited mandate, the commission has increasingly claimed jurisdiction over any state law or regulation brought before it, treating all state laws to be "other standards of conduct or reporting requirements as provided by law." Colo. Const. art. XXIX, § 5(1). This generalized phrase has been held to reach all "laws in existence," App. 15a, 34a, giving the commission the authority to investigate and fine government workers for any conceivable transgression.

Making matters worse, the commission in this case imposed a penalty against the Secretary of State over a political dispute under the guise that the Secretary violated the hortatory public benefit statute. That aspirational statement provides none of the specificity or guidance needed for individuals to know, in advance, what conduct may result in a quasi-criminal monetary sanction. The Colorado courts, however, have steadfastly refused to adopt a limiting interpretation of the commission's jurisdiction, so as

to avoid constitutional concerns of vagueness. *See* App. 15a-16a; 33a-34a.

The statute the Secretary of State was penalized under is sufficiently broad and undefined, and likely undefinable, that any conduct by any state employee could be implicated:

> A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

C.R.S. § 24-18-103(1). The spirit behind such a broad statement is certainly laudatory. But it does not contain any specific guidance for the tens of thousands of employees of the State of Colorado who, day-by-day, carry out duties of the most diverse sort. Consider the sheer breadth of "duties" undertaken by employees and officers of the State of Colorado that fall under this statute. Even department policies about a dress code or work attendance could fall under this statute. Every aspect of work can be understood as one of the "duties" in the words of C.R.S. § 24-18-103(1).

The structure and context of this statute confirms that the public benefit language was never intended to create a scheme for imposing penalties on employees. The next subsection is the only enforceable aspect of C.R.S. § 24-18-103(2) where the statute gives district attorneys the ability to enforce violations of fiduciary duties, a concept with a rich legal tradition and understood meaning.

B. Due Process protects against vague laws in the quasi-criminal context of civil penalties.

This Court has long warned, "[v]ague laws will trap the innocent by not offering fair warning." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Critically, "to prevent arbitrary and discriminatory enforcement, laws must provide explicit standards for those who apply them." *Id.* When a law includes a penalty, courts are particularly diligent at enforcing vagueness standards. *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999) (applying more stringent vagueness test because civil law inhibited exercise of constitutional rights).

This past term this Court applied vagueness standards to the civil immigration statute in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), where a provision of the INA that was similar to the "violent felony" definition in the Armed Career Criminal Act, was found to violate Due Process on account of vagueness. *See also Johnson v. United States*, 135 S. Ct. 2551 (2015) (striking down criminal "violent felony" definition).

The Court should clarify that civil laws imposing a penalty are subject to the traditional standard applied to criminal laws. But even the older standard of applying stricter vagueness requirements on a law that "threatens to inhibit the exercise of constitutionally protected rights," such as free speech or freedom of association at the core of the Secretary's attendance and presentation at an election law event, provides a sound basis to find Colorado's vague ethics

laws violate Due Process principles. *See Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982) (describing vagueness application in various contexts); *Grayned*, 408 U.S. at 108 (vagueness applied in civil context).

This Court looks to two features to test the constitutional vagueness of a law: fair notice and arbitrary enforcement. The laws subjecting the Secretary of State to penalty and censure in this case fail on both counts. *See Johnson*, 135 S. Ct. at 2557.

The laws fail to provide fair notice to those subject to legal enforcement. Whether taken as an example of violating the benefit of the state aphorism, violating the discretionary fund statute, or tracing back to the commission's claim to enforce "other standards of conduct … as provided by law," there is little doubt the law applied against the Secretary failed to give any meaningful notice. The void-for-vagueness doctrine "guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes." *Dimaya*, 138 S. Ct. at 1212 (citing *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972)) (opinion of Kagen, J.); *see also Excel Corp. v. U.S. Dep't of Agric.*, 397 F.3d 1285, 1297 (10th Cir. 2005) (explaining lack of fair notice in administrative context).

C. This case shows why it is essential to apply strict vagueness standards to the growing administrative state.

Under the commission's unbounded interpretation of "other standards of conduct," it is impossible for anyone to know what standards they

must actually follow—at the cost of an individualized double penalty and censure. Here, the Secretary of State, Colorado's chief election officer, chose to use his discretionary funds to pay for travel to present and attend educational legal seminars on election law. To put it mildly, no government official of ordinary intelligence could predict that attending such an activity, approved by the Colorado Supreme Court as an educational legal class, violates a command to act for the "benefit of the state."

Taken apart from the facts of the case, the vagaries of being told to act "for the benefit of the people of the State," C.R.S. § 24-18-103(1) does not give any specificity to guide conduct and put government employees or officials on notice of what violates the law. Does failure to adhere to an office dress code violate the broad command? What about showing up late for work? If going to a politically disfavored educational class can be held to violate the broad command, then there is no limit (other than the whim of the commission) to what can be sanctionable conduct in Colorado.

Furthermore, the ethics commission has a thoroughgoing record of arbitrary enforcement. In this case the Secretary was penalized and censured for attending the 2012 RNLA-sponsored national election law conference, since the use of discretionary funds to travel to the event was deemed to violate the law. As this case was pending, however, the same Secretary of State and the deputy Secretary of State requested advisory opinions about attending the 2014 RNLA-sponsored national election law conference. The commission inexplicably declared the attendance

at the 2014 event (including use of non-discretionary state funds for the deputy Secretary of State) to be ethical and comply with the law. The relevant facts of this case and the 2014 request are indistinguishable:

Commission Decision	**This case**	**Adv. Opp. 14-10, 14-13**
Event to attend	2012 RNLA CLE	2014 RNLA CLE
Sponsor of event	Republican Nat'l Lawyers Ass'n	Republican Nat'l Lawyers Ass'n
Covered Individual	Sec. of State	Sec. of State; Deputy Sec. of State
Issue	Does a "republican" connection prevent it from being "official business"?	Does a "republican" connection prevent a gift to attend and use of state funds from being and "official business"?
Result	Penalty imposed	Ethical; IEC approved

App. 43a; *see also* IEC Advisory Opinion 14-10 (July 23, 2014); and IEC Advisory Opinion 14-13 (July 23, 2014), *available at* https://www.colorado.gov/pacific/iec/opinions-indexed-date-2014.

For all the reasons the 2014 RNLA was deemed to be relevant to the duties of the Secretary, the 2012 RNLA was likewise relevant to the duties of the Secretary. As the commission itself explained,

> Among other things, the Secretary of State is charged by statute with the duty to enforce the provisions of Colorado's elections code, supervise the conduct of congressional vacancies and state wide ballot issues in Colorado, to serve as the chief state election official under the federal law "Help America Vote Act of 2002", to coordinate Colorado's responsibilities under the federal "National Voter Registration Act of 2002", to promulgate rules for the proper administration and enforcement of Colorado's election laws and to review practices and procedures of county clerk and recorders and election officials in the conduct of congressional vacancies and the registration of electors in Colorado. § 1-1-107, C.R.S.

Id. (IEC Adv. Op. 14-13). This conclusion cannot be squared with the conclusion in this case that the Secretary must be penalized and censured for speaking at the very same event, two years earlier, where the commission found the Secretary "breached

the public trust for private gain in using public funds for personal and political purposes." App. 73a. The two findings are utterly inconsistent. "Vague laws invite arbitrary power." *Dimaya*, 138 S. Ct. at 1223 (Gorsuch, J., concurring). It is hard to imagine a more arbitrary enforcement pattern than the commission reviewing the Secretary of State's attendance at two successive CLE events.

Arbitrary enforcement stands as evidence of the unconstitutionally vague nature of a law. *See Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (citation omitted). The dearth of standards governing conduct, in turn, enables arbitrary enforcement. *See Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1051 (1991) ("The prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement…").

Vague standards facilitated a less than law-like enforcement action in this case. Consider how the driving force behind the ethics commission's conclusion was a statute that expressly gives the Secretary of the State "discretion" as he "sees fit" to spend limited funds. C.R.S. § 24-9-105. In the face of this grant of discretion the commission substituted its own judgment and deemed the decision unethical for not being in pursuance of official business, in the eyes of the commission. App. 73a. There is no possible way an elected secretary of state could predict, before this commission's action, that attending an election law CLE using discretionary funds would violate a legal ethics standard. That election law relates to the official business of the state's chief election officer would, under any reasonable standard, pursue official

business; it would not be viewed as potentially illegal conduct.

Indeed, the commission's explanation for how the Secretary violated the discretionary fund statute was arbitrary or capricious. The entire explanation:

> Secretary Gessler spent $1278.90 of his discretionary account primarily for partisan purposes, and therefore personal purposes, to fly to Florida to attend the RNLA conference and thereafter attend the RNC. As a result, Secretary Gessler violated the ethical standard of conduct contained in C.R.S. section 24-9-105, by using funds from his discretionary account for other than official business. By so doing, Secretary Gessler breached the public trust for private gain in violation of C.R.S. section 24-18-103(1).

App. 73a. All that can be gleaned from this finding is that attending the CLE conference organized by the RNLA was "primarily for partisan purposes, and therefore personal purposes" and thus was "for other than official business." *Id.* The commission did not even attempt to explain how legal education about election law was not, itself, the business of the Secretary (or how something that was at least *partly* for official business violated the rule, or how an officer should know where such a line is). There are at least three reasons the commission's conduct against the Secretary fails to pass basic Due Process standards.

First, it is uncontested that the Colorado Supreme Court Board of Continuing Legal and Judicial

Education authorized CLE credit for the RNLA program the Secretary attended. The Supreme Court Board thus found the RNLA national seminar on election law was an "education activity which has as its primary objective the increase of professional competence of registered attorneys and judges." See Regulation 103, Bd. of Continuing Legal and Judicial Educ., http://www.coloradosupremecourt.com/pdfs/CLE/Rules.pdf. That the conference was organized by a Republican lawyers group was irrelevant to the educational value and benefit of the conference, as determined by the Colorado Supreme Court board.

Second, uncontroverted evidence showed how the Secretary, then serving as Colorado's Chief Election Official, benefited from attending a national election-law seminar. For example, the Secretary participated on a panel entitled "The Department of Justice, the Role of the States, and Voter ID."[2] The relation to the Secretary's official business is clear. The U.S. Department of Justice has the legal authority and practice of investigating state election law practices and enforcing various federal statutes against States. Generally, the Secretary testified at length, without contradiction, about the benefits of the conference. The testimony showed how the event manifestly related to the work of Colorado's Chief Election Official. The Secretary complied with the requirements of the discretionary fund statute.[3]

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[2] IEC Compl. 12-07, Ex. 2, *available at* https://www.colorado.gov/pacific/sites/default/files/Complaint%2012-07.pdf

[3] While not the focus of the case, the commission also found the Secretary erred by using $117 of the discretionary fund for

Third, the commission's findings in this case are arbitrary—the same conduct declared "partisan" and unethical in this case was later deemed to be ethical, raising no legal violations. For all the reasons the 2014 RNLA was deemed to be relevant to the duties of the Secretary, the 2012 RNLA was likewise relevant to the duties of the Secretary.

II. Summary reversal is warranted to protect the rule of law from erosion by the administrative state.

In this case, the commission adopted a trial-first, law-later approach. A prominent political figure was subject to a lawless commission acting as judge and prosecutor, unmoored from any law or regulation in the state, yet empowered to punish manufactured quasi-crimes. The growing reach of the commission is only made possible by flaunting basic void-for-vagueness standards. With no enforceable standards, the commission likewise failed to provide meaningful pre-hearing notice, as required by longstanding Due Process precedent. This Court's sharp correction will

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mileage reimbursement what it admits was travel on official business. The commission focused on whether the back-up documents for work travel were submitted contemporaneous with the request. This was clear legal error. Reimbursement for miles driven on official business easily satisfies the requirements of the law. The Secretary's request complied with the State Controller's standards and every reasonable expectation of the legal requirements for reimbursement. The commission had no legitimate basis to conclude the Secretary's reimbursement of $117 for miles driven on official business was somehow a violation of an "ethics issue" merely because of the timing of his request.

send an important signal to agencies and commissions alike that due process cannot be ignored when citizens are being subject to personal penalty.

A. The commission also flaunted basic Due Process requirements for pre-hearing notice.

In addition to enforcing vague standards incorporated into vague standards, the commission below ignored Due Process requirements for pre-hearing notice. This compounded the injury from the enforcement of unconstitutionally vague laws.

Due Process requires that an accused should be provided with notice of the charges prior to the hearing. Rather than provide the Secretary with the specific charges that the commission alleged he had violated, it listed over 150 separate legal rules that the Secretary "may" have violated and reserved for itself the right to allege further violations after the hearing, depending on the evidence presented.

In effect, the commission waved its hand over a large swath of fiscal rules and said to the Secretary, "We're not sure exactly what you did, but surely you must have violated one of these rules—we'll figure out that minor technicality after the hearing." The Secretary was left to prepare for a hearing that included investigation of potential criminal conduct using his best judgment to guess where the commission's investigation may lead.

Such clear administrative overreach has implications for myriad administrative proceedings.

The open threat of unconstitutional enforcement justifies the intervention of this Court to further define the applicability of Due Process notice to agency actions. This is hardly the first time a commission in Colorado has acted capriciously. *See Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018) (finding Colorado Civil Rights Commission to have acted with hostility that "was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion."); *see also* Amy B. Wang, *Baker claims religious persecution again – this time after denying case for transgender woman*, Wash. Post, Aug. 15, 2018 (noting Colorado Civil Rights Commission ruled Masterpiece Cakeshop could not decline to create a cake just two weeks after Supreme Court decision in *Masterpiece Cakeshop*), available at https://goo.gl/CaEYz2.

In this case, the commission violated the Secretary's right to procedural due process in two ways. First, the commission failed to notify the Secretary of the legal charges against him before his hearing. Second, the commission "reserve[d] the right to consider additional standards of conduct and/or reporting requirements, depending on the evidence presented, and the arguments made, at the hearing …." App. 6a.

In *Cole v. Arkansas*, this Court held, "No principle of procedural due process is more clearly established than that notice of the specific charge . . . [is amongst] the constitutional rights of every accused." 333 U.S. 196, 201 (1948). Since that holding, due process rights to adequate pre-hearing notice have frequently been

applied in non-criminal contexts. *See, e.g.*, *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (due process notice applied to suspension of high school students); *Hunt v. Anderson*, 794 F. Supp. 1557, 1566 (M.D. Ala.), aff'd, 976 F.2d 744 (11th Cir. 1992) (reviewing due process application to ethics commission).

The commission failed to give the Secretary adequate notice of the legal charges against him before the hearing. With only one month prior to the hearing, the commission's pre-hearing order completely altered the agency's allegations against the Secretary to include over 150 new legal standards that "may" apply to the Secretary's case. App. 6a. Making matters worse, the commission gave no guidance as to which of those 150 rules may apply to its investigative proceedings. Notifying the Secretary of such expansive potential charges underscores the reality that he could not know the legal basis for his hearing. No wonder the hearing, where no serious facts were disputed, took 11 hours.

It is hard to imagine that the Secretary could defend himself against such nebulous legal charges. Even worse, the Secretary requested that the commission clarify the legal charges against him on at least five separate occasions, but never received a sufficient answer from the commission.

This Court has clearly held that an adjudicative body may not change legal charges during or after a hearing commences or reserve the right to do so. *See, e.g.*, *In re Ruffalo*, 390 U.S. 544, 551 (1968) (noting, in the context of a lawyer's disbarment proceedings, "[t]he charge must be known before the proceedings

commence"); *In re Gault*, 387 U.S. 1, 33-34 (1967) (explaining that "[n]otice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity'"). That is exactly what the commission did here when it "reserve[d] the right to consider additional standards of conduct and/or reporting requirements" depending on what was said at the hearing.

The direct violation of Due Process—threatening to add new charges after the hearing—was only ever defended by claiming the Secretary was not prejudiced since no new charges were added, and therefore the Secretary was not prejudiced. App. 25a. The failure to follow basic Due Process requirements only makes the use of unconstitutionally vague standards to penalize citizens for laudable conduct all the more troubling.

This goes to the bedrock rationale for providing fair notice. "A primary purpose of the notice required by the Due Process Clause is to ensure that the opportunity for a hearing is meaningful." *City of W. Covina v. Perkins*, 525 U.S. 234, 240 (1999). In this case in particular, notice of everything provided notice of nothing. Surely an agency listing over 150 rules that "may" apply—even though that agency later determined that only a fraction of those legal theories actually applied—constitutes inadequate notice as a matter of Due Process.

B. Growing conflicts with the administrative state make this a recurring and important form of Due Process violation.

Both the state and federal levels have witnessed an unprecedented expansion in the number of agencies with ever-increasing roles and influence over the average citizen. *See City of Arlington v. F.C.C.*, 569 U.S. 290, 313 (2013) (Roberts, CJ., dissenting) (describing the increasing role of administrative agencies and noting that Congress had launched 50 new agencies between 1998 and 2012). The commission is itself a relatively new agency, having been created by the passage of a voter-initiated Amendment to the Colorado Constitution in 2006.

The administrative state has increasing power of the lives of individuals. *See, e.g.*, *Dimaya*, 138 S. Ct. at 1229 (Gorsuch, J., concurring) ("… shouldn't we also take account of the fact that today's civil laws regularly impose penalties far more severe than those found in many criminal statutes? Ours is a world filled with more and more civil laws bearing more and more extravagant punishments."). While the growth of federal crimes has long been the source of academic ridicule, *e.g.,* Harvey Silvergate, *Three Felonies a Day: How the Feds Target the Innocent* (2011), the growth in state and federal administrative and commission penalties for offences with similar consequences has increased even more so. *See* Glenn Harlan Reynolds, *You are Probably Breaking the Law Right Now*, USA Today, March 29, 2015 (comparing approximate number of regulatory crimes, 300,000, to estimated number of federal crimes, 4,500).

More alarming is that state agencies, such as the commission, may be more susceptible to procedural abuse in the absence of clear guidance on the proper application of procedural due process protections to the workings of those agencies. *See* Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 Harv. L. Rev. 338, 345–46 (2016) (noting that "the lion's share of challenges to agency action on procedural due process grounds seem to arise at the state level because applicable statutory safeguards at that level tend to be more uneven than those at the federal level").

Given the exponential growth of the administrative state, the nation needs reinvigorated guidance to ensure that agencies abide by basic procedural due process. This case provides a perfect opportunity for the Court to affirm the importance for agencies and commissions alike to carefully follow this Court's Due Process standards for vagueness. The commission in this case exemplifies the power of state agencies to employ potentially abusive tactics to the detriment of those under investigation.

III. This case provides a good vehicle for plenary review of vagueness standards for civil penalties.

Absent summary reversal this case should be granted plenary review to address important principles of Due Process protection against vague laws. With a well-developed factual record and extensive lower court decisions below (three levels of appellate review in the state courts), this case provides a clean vehicle to address the question

presented. Throughout the proceedings below there have not been disputes about the core facts; what the Secretary did is not disputed.

Furthermore, the Colorado courts and ethics commission clearly erred in penalizing and censuring a Secretary of State for attending an educational legal conference. With the proliferation of vague civil laws imposing penalties at least as harsh as some criminal laws, it is critically important to affirm that vague laws cannot be used to punish government employees who lack any ability to predict before a hearing that mundane conduct will subject them to arbitrary enforcement.

The prejudice and harm from allowing civil penalties to be imposed based on vague standards are sharp in this case. The arbitrariness of the commission in persecuting a sitting Secretary of State (at the time running for Governor) for attending an accredited election law CLE could not be more obvious. The ethics commission itself confirmed its arbitrary enforcement by finding, without a hint of irony, that the same Secretary of State was free to attend the same organization's subsequent CLE without any legal issue (once he was no longer running for Governor, notably). The use of Colorado's generic public benefit statute as the legal basis for penalizing the Secretary cannot stand as a serious exercise in applying laws with sufficient guidance to put relevant individuals on notice of what conduct could result in public censure, fine, and political humiliation.

Enforcement of fair due process standards is exceptionally important where, as here, there is a

mandatory enforcement scheme where the ethics commission "shall" investigate any complaints that are deemed non-frivolous. Colo. Const. art. XXIX, § 5. Without the requisite standards to overcome vagueness concerns, citizens will be forever subject to the vagaries and political predilections of a legal system lacking any fair notice.

With a well-developed record, simple facts, and demonstrably unfair and arbitrary enforcement of the ethics laws against the Secretary for the same conduct (inconsistent results for the 2012 and 2014 CLE conferences), this case presents an excellent opportunity to affirm the application of rigorous void-for-vagueness standards to civil laws that impose a personal penalty.

CONCLUSION

For the foregoing reasons, the opinion of the Colorado Supreme Court should be summarily reversed; or, alternatively, the petition should be granted.

Respectfully submitted,

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September 4, 2018

APPENDIX

TABLE OF APPENDICES

Appendix A

SUPREME COURT OF THE STATE OF COLORADO

Case No. 15SC462

SCOTT GESSLER, individually and in his official capacity as Colorado Secretary of State,

Petitioner,

v.

MATT SMITH, APRIL JONES, WILLIAM LEONE, GARY REIFF, and JO ANN SORENSEN, in their official capacities as members of the Independent Ethics Commission, and the INDEPENDENT ETHICS COMMISSION,

Respondents.

Judgement Affirmed

en banc

June 4, 2018

JUSTICE MÁRQUEZ delivered the Opinion of the Court.

JUSTICE GABRIEL does not participate.

¶2 Under section 24-9-105(1), C.R.S. (2017), each of Colorado's five statewide elected officials, including the Secretary of State, has access to a modest annual discretionary fund to spend "in pursuance of official

business." In August 2012, then-Secretary of State Scott Gessler ("the Secretary") used $1,278.90 from this discretionary fund to travel to Florida to attend an election law seminar hosted by the Republican National Lawyers Association and thereafter attend the Republican National Convention. Before his trip to Florida, the Secretary also requested "any remaining funds" in his discretionary fund account as reimbursement, without submitting documentation of mileage or other expenses incurred. Colorado Ethics Watch filed a complaint about these activities with the state's Independent Ethics Commission ("the IEC"), which has authority to address complaints on "ethics issues arising under [article XXIX of the Colorado Constitution] and under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX, § 5(1).

¶2 Following an investigation and evidentiary hearing, the IEC determined that the Secretary breached the public trust by using his discretionary funds for partisan and personal purposes. It ordered the Secretary to personally pay a penalty of $1,514.88.

¶3 The Secretary sought judicial review of the IEC's ruling, arguing that the IEC lacked jurisdiction over the case and violated his procedural due process rights. Both the district court and the court of appeals affirmed the IEC's ruling. We granted the Secretary's petition for certiorari review.[1]

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[1] We granted certiorari to review the following issues:

1. Whether the Independent Ethics Commission has jurisdiction under the phrase "any other standards of conduct" in Colo. Const. art. XXIX, section5(1) to

¶4 The Secretary argues that the IEC's jurisdiction is limited to matters involving gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to the IEC. We disagree.

¶5 The IEC was created in 2006 by Amendment 41, a voter initiative that added article XXIX ("Ethics in Government") to the Colorado Constitution. The overarching focus of article XXIX is the regulation of activities that allow covered individuals working in government, including elected officials, to gain improper personal financial benefit through their public employment. Given this focus, we hold that the reference in article XXIX, section 5 to the IEC's authority to hear complaints under "any other standards of conduct... as provided by law" means ethical standards of conduct relating to activities that could allow covered individuals to improperly benefit financially from their public employment. We further hold that section 24-18-103, C.R.S. (2017), which appears in part1 ("Code of Ethics") of article 18 ("Standards of Conduct") establishes an ethical standard of conduct subject to the IEC's jurisdiction. This provision establishes that the holding of public

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penalize any public employee for violating any Colorado law.

2. Whether the phrase "other standards of conduct" in Colo. Const. art. XXIX, section 5(1) is unconstitutionally vague.

3. Whether procedural due process requires pre-hearing notice to explain how laws are violated, or may notice simply list laws and reserve the right to add charges after the hearing.

office or employment is a public trust, and that a public official "shall carry out his duties for the benefit of the people of the state." § 24-18-103(1). Because the allegations against the Secretary clearly implicated this standard, we hold that the complaint here fell within the IEC's jurisdiction. Further, because we conclude that the IEC's jurisdiction over this case was proper and that the allegations against the Secretary were within the scope of the IEC's jurisdiction, we reject the Secretary's jurisdictional challenge, as well as his vagueness challenge. Finally, we reject the Secretary's procedural due process claim because he failed to demonstrate that he suffered any prejudice as a result of the allegedly deficient notice. Accordingly, we affirm the judgment of the court of appeals.

I. Facts and Procedural History

¶6 In August 2012, the Secretary flew to Tampa, Florida to attend and speak at the "National Election Law Seminar," a two-day continuing legal education conference sponsored by the Republican National Lawyers Association ("the RNLA"). From August 23 through August 25, the Secretary stayed at a hotel in Sarasota, where the RNLA conference was held. On August 26, the Secretary traveled to Tampa, Florida, to attend the Republican National Convention ("the RNC"). The total cost of the Secretary's airfare to Florida and his lodging from August 23 through August 25 in Sarasota was $1,278.90. The Secretary paid this amount out of his discretionary fund established by section 24-9-105, C.R.S. (2017). The Secretary paid for his lodging and meal expenses

associated with his attendance of the RNC from his campaign funds.

¶7 In July 2012, before traveling to Florida, the Secretary requested reimbursement of "any remaining discretionary funds" in his discretionary fund account but did not provide any receipts or documentation supporting this request at the time. The Secretary received $117.99 as a result of this request.

¶8 Colorado Ethics Watch filed a complaint against the Secretary with the IEC, alleging that he had misappropriated state funds for personal or political uses and made false statements on travel expense reimbursement requests. Colorado Ethics Watch's complaint, which effectively consisted of a letter it had sent to the chief of police and the district attorney,[2] claimed that the Secretary's conduct may have violated certain provisions of the Colorado Criminal Code, including section 18-8-404, C.R.S. (2017) (first degree official misconduct); section 18-8-407, C.R.S. (2017) (embezzlement of public property); and section 18-8-114, C.R.S. (2017) (abuse of public records). The complaint argued that the fact that some payments for the Secretary's Florida trip apparently came from his statutory discretionary fund "d[id]not alter the analysis," because those funds maybe spent only in pursuance of official business, and the Florida trip was "manifestly personal and political." The IEC determined that the complaint

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[2] The chief of police and district attorney declined to charge the Secretary with any wrongdoing.

was nonfrivolous and appointed an independent investigator.

¶9 Following the investigation, the IEC set a hearing on the complaint and issued a prehearing order that listed the "standards of conduct and/or reporting requirements" that "may apply to this case." The order made no reference to the criminal code provisions originally cited by Colorado Ethics Watch in its complaint. Instead, as relevant here, the order listed section 24-18-103, C.R.S. (2017), which states that the holding of public office is a "public trust," and that "[a] public officer . . . shall carryout his [or her] duties for the benefit of the people of the state." In addition, the order listed section 24-9-105, which establishes discretionary funds for Colorado's five statewide elected officials[3] to use for "expenditure[s]in pursuance of official business as each elected official sees fit," and also listed the state fiscal rules concerning travel.[4] The order noted that "the IEC reserves the right to consider additional standards of conduct and/or reporting requirements, depending on the evidence presented, and the arguments made, at the hearing in this matter."

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[3] The discretionary fund statute identifies the following as Colorado's five statewide elected officials: the Governor, the Lieutenant Governor, the Attorney General, the Secretary of State, and the State Treasurer. §24-9-105(1)(a)–(e).

[4] The prehearing order also cited section 24-17-102(1), C.R.S. (2017) (requiring principal departments in the executive branch to institute and maintain systems of internal accounting), and section 24-30-202(26), C.R.S. (2017) (requiring the State Controller to promulgate fiscal rules concerning travel policies applicable to state employees).

¶10 At an evidentiary hearing, the IEC heard over eleven hours of testimony from eight witnesses and received over sixty exhibits. Documents submitted into evidence reflected that the RNLA's mission "includes support for Republican Party ideals, platforms and candidates"; that the seminar registration form required participants to state that they support the RNLA's mission; and that more than one of the topics at the conference "were concerned primarily with partisan values and/or politics." With respect to his attendance at the RNLA seminar, the Secretary claimed he incurred expenses "while meeting with constituents, county clerks, lobbyists, staff and legislators to discuss state business," but could not recall specific meetings with county clerks, staff, or legislators. The Secretary also testified that he sought the "remaining discretionary funds" in the account essentially as a mileage reimbursement, but did not submit documentation because "to go through every single penny and mile and whatnot it just ended up being a waste of time." So, he accepted the remaining $117.99 in the fund, intending to treat it as additional taxable compensation.

¶11 In a written order, the IEC found that the Secretary's use of $1,278.90 in funds from his discretionary account "to fly to Florida to attend the RNLA conference and thereafter attend the RNC" was primarily for partisan, and therefore personal, purposes. The Commission further found that the Secretary's acceptance of reimbursement of the $117.99 balance of his discretionary account, without documentation or detail of expenses incurred, was personal and not in pursuance of official business. The IEC concluded that the Secretary's actions

"violated the ethical standard of conduct contained in C.R.S. section 24-9-105" by using funds from his discretionary account for other than official business. In so doing, the Secretary "breached the public trust for private gain in violation of C.R.S. section 24-18-103(1)" by using public funds for personal and political purposes. The IEC imposed a penalty of $1,514.88.[5]

¶12 The Secretary sought judicial review of the IEC's order, asserting that the IEC exceeded its jurisdiction; that its findings of fact were arbitrary and capricious; and that it violated the Secretary's rights to due process, free speech, and assembly. The district court rejected these arguments, and affirmed the IEC's decision in a detailed written order.

¶13 The Secretary appealed the district court's decision to the court of appeals. Relevant here, the Secretary argued that the IEC lacked jurisdiction over this case because article XXIX, section 5 of the Colorado Constitution should be construed to limit the IEC's jurisdiction to matters involving gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to the IEC. The Secretary further argued that these limitations must be read into section 5 to avoid unconstitutional vagueness and overbreadth. Finally, the Secretary argued that the IEC violated

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[5] This penalty represented the discretionary fund amounts at issue, which were doubled in accordance with article XXIX, section 6 of the Colorado Constitution (($1278.90 x 2) + ($117.99 x 2) = $2793.78), minus a credit for $1278.90 that the Secretary returned to the state shortly before the IEC hearing.

his procedural due process rights by failing to provide adequate notice of the claims against him.

¶14 In a unanimous, published opinion, the court of appeals affirmed the judgment of the district court. *Gessler v. Grossman*, 2015 COA 62. The court concluded that the plain language of article XXIX, section 5 "contains no requirement that the referenced standards of conduct and reporting requirements expressly delegate enforcement to the IEC." *Id.* at ¶16. The court further reasoned that, even assuming that section 5 requires specific standards of conduct, both section 24-18-103 (the public trust statute) and section 24-9-105 (the discretionary fund statute) prescribe such standards, and thus fall within the ambit of the IEC's jurisdiction. *Id.* at ¶¶ 18–31. Based on its interpretation of the scope of the IEC's jurisdiction, the court rejected the Secretary's vagueness and overbreadth challenges. *Id.* at ¶¶ 32–36. The court also concluded that the IEC did not violate the Secretary's procedural due process rights because the commission provided him with adequate notice of the claims against him. *Id.* at ¶¶ 54–57. It reasoned that the record belied any claim of prejudice to the Secretary in any event. *Id.* at ¶ 58.

¶15 We granted the Secretary's petition for certiorari review.

II. Analysis

¶16 This case requires us to consider the meaning of language in article XXIX, section 5 giving the IEC authority to hear complaints on "other standards of conduct . . . as provided by law." In light of the overarching focus of article XXIX, we conclude that

this phrase is most naturally read to mean ethical standards of conduct relating to activities that could allow covered individuals to improperly benefit financially from their public employment.

¶17 Next, we conclude that section 24-18-103 (providing that the holding of public office or employment is a public trust, and that a public official "shall carry out his duties for the benefit of the people of the state") establishes an ethical standard of conduct subject to IEC jurisdiction. The allegations against the Secretary clearly implicated this standard. Accordingly, we hold that the complaint fell within the IEC's jurisdiction. Because we conclude that the IEC's jurisdiction over this case was proper and that the allegations against the Secretary were within the scope of the IEC's jurisdiction, we reject the Secretary's jurisdictional challenge, as well as his vagueness challenge. Finally, we reject the Secretary's procedural due process claim because he failed to demonstrate that he suffered any prejudice from the allegedly deficient notice.

A. Standard of Review

¶18 The interpretation of a constitutional provision is a question of law that we review de novo. *Bruce v. City of Colorado Springs*, 129 P.3d 988, 992 (Colo. 2006). Because article XXIX was added to the state constitution through a constitutional amendment adopted by citizen initiative, our duty is to give effect to the electorate's intent in enacting the amendment. *See Colorado Ethics Watch v. Senate Majority Fund, LLC*, 2012 CO 12, ¶ 20, 269 P.3d 1248, 1253; *Davidson v. Sandstrom*, 83 P.3d 648, 654 (Colo. 2004). To determine the voters' intent, we "give words their

ordinary and popular meaning." *Colorado Ethics Watch*, ¶ 20, 269 P.3d at 1253–54 (quoting *Davidson*, 83 P.3d at 654). If the language of the constitutional provision is clear and unambiguous, then it must be enforced as written. *Id.* at 1254. "If, however, the language of an amendment is susceptible to multiple interpretations, then we 'construe the amendment in light of the objective sought to be achieved and the mischief to be avoided by the amendment.'" *Id.* (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996)). We consider a constitutional amendment "as a whole and, when possible, adopt an interpretation of the language which harmonizes different constitutional provisions rather than an interpretation which would create a conflict between such provisions." *Zaner*, 917 P.2d at 283.

B. Article XXIX of the Colorado Constitution

¶19 In 2006, the voters of Colorado approved Amendment 41, which added article XXIX to the Colorado Constitution, titled "Ethics in Government." Colo. Const. art. XXIX. Section 1 of article XXIX sets forth the purposes of Amendment 41. It emphasizes that "[t]he conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people" and that these individuals must "carry out their duties for the benefit of the people of the state." Id. at § 1(1)(a)–(b); see also Developmental Pathways v. Ritter, 178 P.3d 524, 526 (Colo. 2008). Covered individuals "shall, therefore, avoid conduct that is in violation of their public trust." Colo. Const. art. XXIX, § 1(1)(c). Importantly, "[a]ny effort" by covered individuals to "realize personal

financial gain through public office other than compensation provided by law is a violation of that trust." *Id.* at § 1(1)(d).

¶20 Section 2 of article XXIX defines various terms in the Amendment, including identifying the individuals to whom the article applies. Relevant here, section 2 defines "public officer" to mean "any elected officer, including all statewide elected officeholders, the head of any department of the executive branch, and elected and appointed members of state boards and commissions." Id.at § 2(6). As a statewide elected officeholder, the Secretary of State is a public officer for purposes of article XXIX. *See id.*

¶21 Consistent with the declaration in section 1 that "[a]ny effort" by covered individuals to realize improper "personal financial gain "through public office is a violation of their public trust, sections 3 and 4 of article XXIX expressly prohibit certain conduct that could lead to such improper gain. Section 3 creates a "gift ban," subject to limited exceptions, which prohibits public officers, General Assembly members, local government officials, or government employees from soliciting, accepting, or receiving money or gifts from any person without such person receiving lawful consideration of equal or greater value in return. *Id.* at §3. Section 4 creates a lobbying restriction, which prohibits a statewide elected officeholder or General Assembly member from representing "another person or entity for compensation before any other statewide elected officeholder or member of the general assembly" within two years of vacating office. *Id.* at § 4.

¶22 Section 5 of article XXIX, which lies at the heart of this case, creates the IEC. The purpose of the

commission is to "hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, *on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law*." *Id.* at § 5(1) (emphasis added). Article XXIX does not further define "other standards of conduct" for purposes of the IEC's jurisdiction. The remainder of section 5 addresses other aspects of the IEC and its duties, including the commission's rulemaking authority, how members to the commission are appointed, and the commission's process for investigating and hearing a complaint. *See id.* at § 5(1)–(5).

¶23 Section 6 of article XXIX provides that covered individuals who "breach[] the public trust for private gain" are liable for "double the amount of the financial equivalent of any benefits obtained by such actions." *Id.* at § 6.

¶24 The final three sections of article XXIX permit counties and municipalities to adopt nonconflicting ordinances or provisions pertaining to ethics matters, *see id.* at § 7; declare any conflicting statutory provisions to be preempted by article XXIX, *see id.* at §8; and authorize the General Assembly to enact legislation to facilitate the article's operation, *see id.* at §9.

¶25 Viewed as a whole, the overarching focus of article XXIX is the regulation of activities that allow covered individuals working in government, including elected officials, to gain improper personal financial benefit through their public employment. Section 1 requires covered individuals to "carry out their duties for the benefit of the people of the state" and to "avoid

conduct that is in violation of their public trust." *Id.* at §1(1)(b)–(c). It further provides that "[a]ny effort" by covered individuals to "realize personal financial gain through public office other than compensation provided by law is a violation of that trust." *Id.* at §1(1)(d). Sections 3 and 4 target certain conduct that could allow covered individuals to use their positions to gain personal financial benefit. Specifically, section 3 discourages individuals working in government from using their influence to improperly solicit gifts, while section 4 discourages elected officials from leveraging their current positions to achieve financial benefits in the form of favorable future employment. Finally, section 6 provides that covered individuals who "breach[] the public trust for private gain" are financially liable for such improper conduct. *Id.* at § 6.

¶26 Viewed in isolation, the phrase "other standards of conduct . . . as provided by law" in section 5 may appear ambiguous. But in light of the overarching focus of article XXIX, we conclude that the phrase "other standards of conduct . . . as provided by law" is most naturally read to refer to ethical standards of conduct concerning activities that could allow covered individuals to improperly benefit financially from their public employment. This construction considers article XXIX as a whole and aligns with "the objective sought to be achieved and the mischief to be avoided by the amendment." *Zaner*, 917 P.2d at 283.

¶27 The Secretary argues that section 5 limits the IEC's jurisdiction to matters involving restrictions on conduct expressly articulated in article XXIX—i.e., the gift ban and the lobbying restriction set forth in sections 3 and 4, respectively. The Secretary

construes the phrase "any other standards of conduct and reporting requirements as provided by law" in section 5 to mean that issues arising under standards of conduct and reporting requirements outside of article XXIX fall within the IEC's jurisdiction only if such provisions expressly delegate enforcement to the IEC. Thus, the Secretary argues, only issues arising under sections 3 and 4 of article XXIX are currently within the commission's purview because the General Assembly has yet to expressly expand the IEC's jurisdiction beyond provisions contained in article XXIX. The Secretary concludes that the IEC lacked jurisdiction over this case because the allegations against him did not implicate the gift ban or the lobbying restriction under sections 3 and 4.

¶28 We are unpersuaded by the Secretary's narrow construction of section 5. First, we disagree with the Secretary's interpretation of the phrase "as provided by law." Nothing in article XXIX expressly requires the referenced "standards of conduct" or "reporting requirements" to delegate enforcement to the IEC. The Secretary cites no authority for his interpretation of the phrase "as provided by law." Instead, we conclude that the phrase "as provided by law" refers to laws already in existence. *See Provided by Law*, Black's Law Dictionary (6th ed. 1990) (defining "provided by law" to mean "prescribed or provided by some statute"). The Secretary's interpretation of the IEC's jurisdiction creates potential conflicts between section 5 and other provisions within article XXIX, which do not limit improper conduct to the activities described in sections 3 and 4. For instance, section 1 provides that "[a]ny effort" by covered individuals to improperly realize personal financial gain through

public office violates the public trust. Colo. Const. art. XXIX, § 1(1)(d). Similarly, section 6 imposes liability on covered individuals for "breaches [of] the public trust for private gain," without limiting such breaches to conduct prohibited under sections 3 and 4. *Id.* at § 6. In construing constitutional amendments, we avoid interpretations that would lead to such potential conflicts. *See Zaner*, 917 P.2d at 283.

¶29 Having concluded that "other standards of conduct ...as provided by law" in article XXIX, section 5 means ethical standards of conduct concerning activities that could allow covered individuals to improperly benefit financially from their public employment, we next consider whether the allegations against the Secretary implicated any such ethical standards of conduct.

C. Section 24-18-103

¶30 Decades before voters approved Amendment 41, the General Assembly added article 18 to title 24 of the Revised Statutes. *See* Ch. 169, sec. 1, 1988 Colo. Sess. Laws 899, 899–907.[6] Notably, article 18 is titled "Standards of Conduct." According to its legislative declaration, the article seeks to prescribe "standards of conduct common to those citizens involved with government." §24-18-101, C.R.S. (2017). Part 1 of the article, spanning sections 101 through 113, is titled "Code of Ethics." The provisions in part 1 focus on improper financial benefit.

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[6] Article 18 of title 24 was initially codified as article 17 of that title; it was later moved to its current location.

¶31 Section 24-18-103, titled "Public trust—breach of fiduciary duty," establishes a broad duty owed by all public officers, General Assembly members, local government officials, and government employees to the people of the state.[7] It provides that "[t]he holding of public office or employment is a public trust" and that a covered individual "shall carry out his [or her] duties for the benefit of the people of the state." §24-18-103(1). Section 103 also establishes that a breach of the public trust constitutes a breach of fiduciary duty, stating that

> [a]public officer, member of the general assembly, local government official, or employee whose conduct departs from his [or her] fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his [or her] trust.

§ 24-18-103(2).

¶32 Section 24-18-104 provides that proof of the commission of any act expressly listed therein by a covered individual "is proof that the actor has

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[7] For purposes of article 18, a "public officer" means "any elected officer, the head of a principal department of the executive branch, and any other state officer," but "does not include a member of the general assembly, a member of the judiciary, any local government official, or any member of a board, commission, council, or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses." §24-18-102(8), C.R.S. (2017). The Secretary of State is therefore a public officer for purposes of article 18.

breached his [or her] fiduciary duty and the public trust." § 24-18-104(1), C.R.S. (2017). In other words, the commission of an act identified in section 104 is a per se breach of an actor's section 103 duty. Such acts include, with limited exceptions, the use of confidential information acquired in the course of official duties to substantially further one's personal financial interests; accepting a gift that would tend to improperly influence a reasonable person to depart from the faithful and impartial discharge of one's public duties; and accepting a gift that a reasonable person should know primarily constitutes a reward for taking a particular official action. *Id.*

¶33 We conclude that section 24-18-103, when read in conjunction with the rest of part 1 of article 18, establishes an ethical standard of conduct concerning activities that could allow covered individuals to improperly benefit financially from their public employment. Thus, allegations that a public official breached his or her fiduciary duty under section 103 by using public employment for improper personal financial gain fall within the ambit of the IEC's jurisdiction under article XXIX, section 5. The core duty in section 103 to act "for the benefit of the people of the state" encompasses an obligation to not use public employment for improper personal financial gain. This obligation is confirmed by section 104's description of specific conduct that would breach the section 103 duty, such as using confidential information for personal financial benefit or accepting a gift under improper circumstances. *See* §24-18-104(1). Although section 104 identifies examples of activities that amount to a breach of the section 103 duty, section 24-18-101 makes clear that the Code of

Ethics in part 1 of article 18 sets forth only "some standards of conduct" and does not purport to be an exhaustive list of prohibited activities. *See* §24-18-101.

¶34 Given the allegations against the Secretary, we have no difficulty concluding that the IEC properly exercised jurisdiction over this case. The claims here were predicated on allegations that the Secretary improperly used his discretionary funds for personal financial gain—specifically, that he used state funds for partisan purposes and that he accepted a reimbursement for personal purposes. Such allegations clearly implicate the ethical standard of conduct set forth in section 24-18-103and thus fall within the IEC's jurisdiction under article XXIX, section 5. We therefore reject the Secretary's contention that the IEC lacked jurisdiction to hear this case.[8]

D. Vagueness

¶35 The Secretary also argues that if we decline to limit the IEC's jurisdiction to activities identified in

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[8] We reject the Secretary's argument that the IEC lacked jurisdiction because the moneys in his discretionary fund undersection 24-9-105 constituted "compensation." First, the salaries of elected state officials are set forth in a different statutory provision, section 24-9-101, C.R.S. (2017). Second, the Secretary's argument that the statute permits him to use the funds as he "sees fit," see §24-9-105(1), suggests there are no restrictions on the expenditure of such funds. This is not the case. The discretionary fund statute expressly requires funds to be expended "in pursuance of official business." *Id.* Accordingly, statutorily-provided discretionary funds cannot be considered compensation akin to salary or wages.

sections 3 and 4 of article XXIX, then the IEC will be allowed to reach any law or rule in existence, rendering the phrase "other standards of conduct... as provided by law" in article XXIX, section 5 unconstitutionally vague. We disagree.

¶36 As we have explained in recent cases, the vagueness doctrine is rooted in principles of procedural due process. *See Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 2017 CO 33, ¶ 20, 393 P.3d 533, 539; *People v. Graves*, 2016 CO 15, ¶ 17, 368 P.3d 317, 324. These principles require that laws give fair warning of prohibited conduct so that individuals may conform their actions accordingly. *Rocky Mountain Retail Mgmt.*, ¶ 20, 393 P.3d at 539; *Graves*, ¶ 17, 368 P.3d at 324. However, a law is not unconstitutionally vague simply because it could have been drafted with greater precision. *Rocky Mountain Retail Mgmt.*, ¶ 21, 393 P.3d at 539. Rather, a law is unconstitutionally vague only if it is vague "in the sense that no standard of conduct is specified at all." *Id.* (quoting *Bd. of Educ. of Jefferson Cty. Sch. Dist. R-1 v. Wilder*, 960 P.2d 695, 703 (Colo. 1998)).

¶37 Because vagueness challenges are predicated on a lack of notice, "such challenges cannot succeed in a case where reasonable persons would know that their conduct puts them at risk." *Graves*, ¶ 19, 368 P.3d at 325.When presented with a vagueness challenge, we first examine whether the challenged law put the challenger on reasonable notice of its application before analyzing other hypothetical applications of the law. *See id.* If the law clearly applies to the challenger, then his or her facial vagueness challenge necessarily fails. *See Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly

applies may not successfully challenge it for vagueness."); *Graves*, ¶ 19, 368 P.3d at 325 ("A litigant who engages in conduct that is clearly proscribed by a statute cannot complain of the vagueness of the law as applied to the conduct of others.").

¶38 Because the Secretary contends *jurisdictional* language in section 5 is impermissibly vague, the question here is not whether any relevant ethical statutes, such as section 24-18-103, clearly proscribe his conduct. Indeed, the IEC's determination that the Secretary's conduct violated these ethical statutes is not before this court.[9] Rather, the question is whether the Secretary had reasonable notice that the IEC had *jurisdiction* to investigate and adjudicate the allegations against him. If the Secretary had such reasonable notice, then he cannot complain of the vagueness of the IEC's jurisdiction as to himself or to others. *See Parker*, 417 U.S. at 756; *Graves*, ¶ 19, 368 P.3d at 325.

¶39 We conclude that the Secretary's vagueness challenge to section 5 necessarily fails because he had reasonable notice that the IEC had jurisdiction to investigate and adjudicate the allegations against him. As we concluded above, the phrase "other

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[9] Because the Secretary's petition for certiorari review did not challenge the IEC's factual findings or conclusions of law, including its determination that his conduct violated the discretionary fund statute and breached the public trust, we do not address these issues. *See People v. Naranjo*, 2017 CO 87, 401 P.3d 534, 538 n.2 (stating that this court "need not address issues not raised in the petition for certiorari review"); *Berge v. Berge*, 536 P.2d 1135, 1136 (Colo. 1975) (declining to consider issue not raised in petition for certiorari review).

standards of conduct... as provided by law" refers to ethical standards of conduct concerning activities that could allow covered individuals to improperly benefit financially from their public employment. Section 24-18-103—which appears in a part titled "Code of Ethics" under an article titled "Standards of Conduct"—constitutes one such standard, and the allegations against the Secretary regarding his use of public funds for partisan and personal purposes clearly implicate this standard. Thus, the relevant constitutional and statutory provisions put the Secretary on reasonable notice of the IEC's jurisdiction over this case. Accordingly, the Secretary cannot complain that the jurisdictional language in section 5 is unconstitutionally vague, either as applied to him or to others.

E. Procedural Due Process

¶40 Finally, we consider the Secretary's contention that the IEC provided insufficient notice of the claims against him, thereby violating his constitutional right to procedural due process. The Secretary contends that, while the IEC's prehearing notice listed statutory provisions and rules that he may have violated, the notice failed to sufficiently explain how or why his conduct violated these provisions or rules. He further contends that the IEC's prehearing notice unconstitutionally reserved the right to add legal claims against him. According to the Secretary, these notice defects limited his ability to craft his defense in this case.

¶41 The court of appeals evaluated the Secretary's procedural due process challenge under section 24-4-105(2), C.R.S. (2017), the statutory provision of

Colorado's Administrative Procedure Act ("the APA") governing prehearing notice for adjudicatory proceedings conducted by administrative agencies. See Gessler, ¶¶52–54. Applying this standard, the court of appeals concluded that the Secretary received more than ample notice of the claims asserted against him, and the court therefore concluded that the Secretary received constitutionally adequate notice. *Id.* at ¶¶54–55. In so ruling, the court of appeals assumed that the IEC is an administrative agency subject to the prehearing notice requirements contained in the APA. See § 24-4-102(3), C.R.S. (2017) (defining "agency" as "any board, bureau, commission, department, institution, division, section, or officer of the state, except those in the legislative branch or judicial branch, "with limited exceptions); § 24-4-105(2) (establishing prehearing notice requirements for "agency adjudicatory hearing[s]").

¶42 After the court of appeals issued its decision in this case, we decided *Colorado Ethics Watch v. Indep. Ethics Comm'n*, 2016 CO 21, ¶ 7, 369 P.3d 270, 272, in which we held that the General Assembly may not constitutionally enact legislation pertaining to the IEC's decisions *not* to enforce matters within its jurisdiction. There, we observed that the IEC "is not an executive agency," but "is instead an independent, constitutionally created commission that is 'separate and distinct from both the executive and legislative branches.'" *Id.* at ¶ 11, 369 P.3d at 272 (quoting *Developmental Pathways*, 178 P.3d at 532). We further stated that "any authority that the General Assembly may exercise regarding [the] IEC's operations derives exclusively from Amendment 41

itself, not from standard principles of administrative agency law." *Id.* Although we did not expressly hold in *Colorado Ethics Watch* that the APA has no bearing whatsoever on the IEC, our opinion in *Developmental Pathways* calls into question whether APA provisions apply to the IEC's adjudicatory proceedings.

¶43 However, we need not resolve that question here because we agree with the court of appeals' determination that, even if the notice here was insufficient, the Secretary has not shown how he was prejudiced. In both criminal and non-criminal contexts, we have long adhered to the principle that, in order to prevail on a procedural due process claim, a party must show that it has suffered prejudice as a result of the alleged violation. *See e.g.*, *People v. Rodriguez*, 914 P.2d 230, 301 (Colo. 1996) (holding that "to obtain relief on a due process claim arising from an incomplete record, a [criminal] defendant must *always* demonstrate specific prejudice resulting from the state of that record"); *Ward v. Indus. Comm'n*, 699 P.2d 960, 969 (Colo. 1985) (holding that unemployment benefits claimant's due process rights were not violated "because the record discloses that he was not prejudiced by the notice or lack of bill of particulars to which he objects"); *Ricci v. Davis*, 627 P.2d 1111, 1122 (Colo. 1981) ("It is axiomatic that a party's due process rights are not infringed unless he has been prejudiced by the administrative procedures to which he objects."). We see no reason to depart from this well-established principle in this case.

¶44 Here, the record is insufficient to support the Secretary's claim that he suffered prejudice as the result of the allegedly deficient prehearing notice

issued by the IEC. Crucially, the Secretary of State identifies no examples of facts, provisions, or rules that were raised at or after the hearing for which the Secretary did not have the opportunity to prepare a defense. Contrary to the Secretary's assertions, the record indicates that he was aware of why his conduct allegedly constituted an ethical violation—i.e., that he improperly used his discretionary fund for personal financial gain. The record demonstrates that he mounted a vigorous defense to this theory at the hearing: through counsel, the Secretary examined witnesses, introduced documentary evidence, and presented argument regarding why he believed he "legally, ethically, and appropriately utilized" the discretionary funds at issue in this case. Moreover, nothing in the record indicates that the IEC actually considered any additional standards of conduct or reporting requirements not listed in the prehearing order. Under these circumstances, we conclude that the Secretary has failed to establish that he suffered any prejudice from the allegedly deficient notice. Therefore, we conclude that his procedural due process rights were not violated.

III. Conclusion

¶45 We hold that the reference in article XXIX, section 5 to the IEC's authority to hear complaints under "any other standards of conduct... as provided by law" means ethical standards of conduct relating to activities that could allow covered individuals to improperly benefit financially from their public employment. We hold that the IEC properly exercised its jurisdiction in this case because the relevant language in article XXIX, section 5 authorizes it to hear allegations implicating the ethical standard of conduct set forth in section 24-18-103, which

requires public officials to carry out their duties "for the benefit of the people of the state," and here, a public official was alleged to have misused discretionary funds for personal gain. Because we conclude that the IEC's jurisdiction in this case was proper and that the allegations against the Secretary clearly fell within the scope of the IEC's jurisdiction, we reject the Secretary's jurisdictional and vagueness challenges. Finally, we reject the Secretary's procedural due process claim because he failed to demonstrate that he suffered any prejudice from the allegedly deficient notice. Accordingly, we affirm the judgment of the court of appeals.

JUSTICE GABRIEL does not participate.

Appendix B

COLORADO COURT OF APPEALS, DIVISION 1

Case No. 14CA0670

SCOTT GESSLER, individually and in his official capacity as Colorado Secretary of State,

Plaintiff-Appellant,

v.

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,

Defendants-Appellees.

JUDGMENT AFFIRMED

Opinion by JUDGE GABRIEL

Taubman and Booras, JJ., concur

Announced May 7, 2015

Filed May 15, 2015

Plaintiff, former Colorado Secretary of State Scott Gessler, appeals the district court's judgment affirming the Colorado Independent Ethics Commission's (IEC's) determination that he breached the public trust by using public funds for personal and

political purposes. We conclude that the IEC (1) had jurisdiction over this matter; (2) did not make an arbitrary or capricious decision; and (3) did not violate Gessler's due process rights with respect to the notice of the charges against him. Accordingly, we affirm.

I. Background

¶2 At all times pertinent here, Gessler was Colorado's Secretary of State. In August 2012, he traveled to Florida to attend and present at the "National Election Law Seminar," a two-day program sponsored by the Republican National Lawyers Association (RNLA), and then to attend the Republican National Convention (RNC), which was being held in a different Florida city. The RNLA seminar ended during the day on August 25, 2012, and Gessler stayed an additional night at an increased hotel rate and at the state of Colorado's expense. The next day, he traveled to the RNC.

¶3 As pertinent here, Gessler used his statutorily provided discretionary fund, see § 24-9-105, C.R.S. 2014 (the discretionary fund statute), to pay the $1278.90 in documented travel and meal expenses that he incurred to attend the RNLA seminar. In addition, he requested the reimbursement of "any remaining discretionary funds" in his discretionary account. He did not, however, initially provide any documentation supporting this request. Notwithstanding the absence of documentation, he ultimately received $117.99 as a result of his request.

¶4 Amicus curiae, Colorado Ethics Watch, subsequently filed a complaint against Gessler with the IEC. In this complaint, Colorado Ethics Watch alleged that Gessler had made false statements on

travel expense reimbursement requests submitted to the state and had misappropriated state funds for personal or political uses. The IEC determined that the complaint was not frivolous and, after investigation, conducted an evidentiary hearing at which Gessler appeared through counsel and testified.

¶ 5 The IEC ultimately found, among other things, that (1) Gessler spent $1278.90 of his discretionary account primarily for partisan, and therefore personal, purposes, in violation of the discretionary fund statute's requirement that the fund be used in pursuance of official business; (2) Gessler's acceptance of reimbursement of the balance of his discretionary account without any documentation or detail of expenses incurred violated the discretionary fund statute because the payment was personal in nature and not in pursuance of official business; and (3) by committing each of the foregoing violations, Gessler had also breached the public trust for private gain, in violation of the public trust statute, § 24-18-103, C.R.S. 2014.

¶6 Gessler sought judicial review of the IEC's findings, asserting that (1) the IEC's enabling provision was unconstitutionally vague and overbroad; (2) the IEC's jurisdiction is limited to investigating improper gifts to public officers and, thus, the IEC exceeded its jurisdiction here; (3) the IEC's findings of fact were arbitrary or capricious; and (4) the IEC violated Gessler's due process rights by, among other things, providing insufficient notice of the charges against him. The district court ultimately rejected these contentions, either expressly or implicitly, in a detailed and thorough written opinion.

¶ 7 Gessler now appeals.

II. Jurisdiction

¶ 8 Gessler first contends that the district court erred in concluding that the IEC had jurisdiction over this case because (1) article XXIX, section 5 of the Colorado Constitution (section 5) applies only to gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to the IEC; (2) neither the discretionary fund statute nor the public trust statute falls within the ambit of section 5; and (3) the IEC has construed its jurisdiction so broadly as to render section 5 vague and overbroad. We are not persuaded by these arguments.

A. Standard of Review and Rules of Construction

¶9 On appeal from a district court's review of a final agency action, we apply the same standard of review as the district court, namely, the standard set forth in section 24-4-106(7), C.R.S. 2014. *See Idowu v. Nesbitt*, 2014 COA 97, ¶ 21, 338 P.3d 1078, 1082.

¶10 Section 24-4-106(7) provides, in pertinent part:

> If the court finds no error, it shall affirm the agency action. If it finds that the agency action is arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitations, not in accord with the procedures or procedural limitations of this

> article or as otherwise required by law, an abuse or clearly unwarranted exercise of discretion, based upon findings of fact that are clearly erroneous on the whole record, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the agency action and . . . afford such other relief as may be appropriate. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party.

¶11 In applying this standard, we presume the validity and regularity of administrative proceedings and resolve all reasonable doubts as to the correctness of administrative rulings in favor of the agency. *Idowu*, ¶ 21, 338 P.3d at 1082. ¶ 12 In addition, a reviewing court must give deference to the reasonable interpretations of the administrative agency that is authorized to administer and enforce the statute at issue. *See Coffman v. Colo. Common Cause*, 102 P.3d 999, 1005 (Colo. 2004). However,

> Constitutional interpretation and statutory interpretation present questions of law that we review de novo. As part of our de novo review, "we may consider and defer to an agency's interpretation of its own enabling statute and [of] regulations the agency has promulgated."
>
> Such deference, however, is not warranted where . . . the agency's interpretation is contrary to constitutional and statutory law.

Gessler v. Colo. Common Cause, 2014 CO 44, ¶ 7, 327 P.3d 232, 235 (quoting *Bd. of Cnty. Comm'rs v. Colo. Pub. Utils. Comm'n*, 157 P.3d 1083, 1088 (Colo. 2007); other citations omitted); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1871 (2013) (noting that the deferential standard of review normally afforded agency determinations applies equally to an agency's construction of a jurisdictional provision of a statute that the agency administers).

¶ 13 With respect to constitutional construction,

> our obligation is to give effect to the intent of the electorate that adopted it. In giving effect to that intent, we look to the words used, reading them in context and according them their plain and ordinary meaning. Where ambiguities exist, we interpret the constitutional provision as a whole in an attempt to harmonize all its parts.

Harwood v. Senate Majority Fund, LLC, 141 P.3d 962, 964 (Colo. App. 2006). If the language is unambiguous, we must enforce it as written. *Colo. Ethics Watch v. Senate Majority Fund, LLC*, 275 P.3d 674, 682 (Colo. App. 2010), *aff'd*, 2012 CO 12, 269 P.3d 1248. If the language contained in a citizen-initiated measure is ambiguous, "a court may ascertain the intent of the voters by considering other relevant materials such as the ballot title and submission clause and the biennial 'Bluebook,' which is the analysis of ballot proposals prepared by the legislature." *In re Submission of Interrogatories on House Bill 99-1325*, 979 P.2d 549, 554 (Colo. 1999).

B. Scope of Section 5

¶ 14 Applying the foregoing principles of constitutional construction here, we first reject Gessler's assertion that section 5 applies only to gifts, influence peddling, and standards of conduct and reporting requirements that expressly delegate enforcement to the IEC.

¶ 15 Section 5 provides, in pertinent part, "The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article *and under any other standards of conduct and reporting requirements as provided by law*." Colo. Const. art. XXIX, § 5(1) (emphasis added). That section further provides that the IEC "shall have authority to adopt such reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of this article *and any other standards of conduct and reporting requirements as provided by law*." *Id.* (emphasis added). And section 5(3)(a) provides that any person may file a written complaint with the IEC asking whether a public officer "has failed to comply with this article *or any other standards of conduct or reporting requirements as provided by law* within the preceding twelve months." Colo. Const. art. XXIX, § 5(3)(a) (emphasis added).

¶ 16 Gessler's assertion that section 5 applies only to gifts, influence peddling, and other standards of conduct and reporting requirements that expressly delegate enforcement to the IEC appears to be based on his view that "as provided by law" refers to the IEC's ability to hear ethics complaints arising under "any other standards of conduct or reporting requirements." The plain language of section 5,

however, contains no requirement that the referenced standards of conduct and reporting requirements expressly delegate enforcement to the IEC. Nor does Gessler cite any applicable authority supporting his interpretation of "as provided by law," and we have seen none. To the contrary, authority construing that phrase in other contexts has concluded that "as provided by law" invokes laws already in existence. *See, e.g., Wells Fargo Bank, N.A. v. Kopfman*, 226 P.3d 1068, 1073-74 (Colo. 2010) (interpreting the phrase "revived as provided by law," which appears in the statute concerning the revival of judgments, as referring to the revival of judgments pursuant to C.R.C.P. 54(h)); *see also McCasland v. Miskell*, 890 P.2d 1322, 1326 (N.M. Ct. App. 1994) ("We think the phrases 'in the manner specially provided by law,' or 'in the manner provided by law' . . . mean in accordance with existing statutory procedure."); *Black's Law Dictionary* 1224 (6th ed. 1990) (defining "provided by law" to mean "prescribed or provided by some statute").

¶ 17 Accordingly, Gessler's jurisdictional challenge based on the language of section 5 fails.

C. Public Trust Statute

¶ 18 Gessler further contends that the public trust statute does not fall within the ambit of section 5 because it is "hortatory" only and does not provide a specific standard of conduct. Again, we disagree.

¶ 19 The public trust statute, which appears in an article entitled "Standards of Conduct" and a part entitled "Code of Ethics," provides in pertinent part:

> The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

§ 24-18-103(1).

¶ 20 This language creates a fiduciary duty in public officials, an interpretation confirmed by the title of the section, "Public trust – breach of fiduciary duty," and the remaining provision of the statute, which focuses on remedies available when a public officer's conduct departs from his or her fiduciary duties. *See* § 24-18- 103(2) ("A public officer . . . whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust."). Accordingly, the public trust statute sets forth specific standards of conduct.

¶ 21 In addition, we note that article XXIX, section 6 of the Colorado Constitution provides an express remedy for violations of the public trust for private gain. Gessler's interpretation of the public trust statute would arguably render that constitutional provision superfluous or a nullity, and we must avoid any such construction. *See Colo. Educ. Ass'n v. Rutt*, 184 P.3d 65, 80 (Colo. 2008) (noting that we must avoid any construction that would render a

constitutional provision either superfluous or a nullity).

¶ 22 Accordingly, we conclude that the public trust statute falls within the ambit of section 5.

D. The Discretionary Fund Statute

¶ 23 Gessler likewise contends that the discretionary fund statute does not fall within the ambit of section 5. That statute makes funds available to certain elected state officials "for expenditure in pursuance of official business as each elected official sees fit." § 24- 9-105. Gessler asserts that (1) the statute relates to compensation, and compensation is expressly excluded from article XXIX; (2) he has unfettered discretion over the use of his discretionary funds; and (3) the statute provides no specific standard of conduct as required by article XXIX. We reject each of these arguments in turn.

¶ 24 First, we disagree with Gessler's premise that article XXIX excludes standards of conduct related to compensation. In support of his argument, Gessler cites to article XXIX, section 1(d) of the Colorado Constitution. That section provides, "Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of [the public] trust." The section, however, is a general statement of the purposes of article XXIX, not a limitation on the IEC's jurisdiction. Indeed, the section does not even mention the IEC.

¶ 25 Moreover, section 1(d) does not exempt compensatory standards from consideration. Rather, it makes clear that public officials may properly be compensated as provided by law for their work but

that any effort to realize personal financial gain beyond such lawful compensation violates the public trust. *See id.*

¶ 26 Even if section 1(d) could be read as excluding standards of conduct regarding compensation from the IEC's jurisdiction, however, we disagree with Gessler's assertion that the discretionary fund constitutes compensation.

¶ 27 Compensation is defined as "[r]emuneration and other benefits received in return for services rendered; esp., salary or wages." *Black's Law Dictionary* 342 (10th ed. 2009). The discretionary funds, which are provided in statutorily fixed amounts, are not received in return for services rendered. Nor do they reflect remuneration, given that the money remains the property of the state and may only be used "in pursuance of official business." *See* § 24-9-105; *see also* § 24-21-104(3)(c), C.R.S. 2014 ("[W]henever moneys appropriated to the department of state during the prior fiscal year are unexpended, said moneys shall be made a part of the appropriation to the department of state for the next fiscal year . . . ."); § 24-75-102(1)(a), C.R.S. 2014 ("Except as otherwise provided by law, any moneys unexpended or not encumbered from the appropriation to each department for any fiscal year shall revert to the general fund or, if made from a special fund, to such special fund."). Accordingly, the discretionary fund does not constitute "compensation" under the plain meaning of that term.

¶ 28 We are not persuaded otherwise by Gessler's argument that the discretionary fund is necessarily compensation because the discretionary fund statute

appears within an article entitled "Compensation of State Officers." The same article also has a section addressing mileage reimbursements. *See* § 24-9-104, C.R.S. 2014. Mileage reimbursements, by definition, are repayments for money advanced, not compensation. *See Black's Law Dictionary* at 1476 (defining "reimbursement" as "[r]epayment" or "[i]ndemnification"). Accordingly, the mere fact that the discretionary fund statute appears within the title relating to compensation does not necessarily mean that the fund constitutes compensation.

¶ 29 Second, the discretionary fund statute, on its face, did not give Gessler unfettered discretion over the use of the Secretary of State's discretionary funds. To the contrary, the use of those funds was (and is) limited to the "pursuance of official business." § 24-9-105. Moreover, we perceive no language in the discretionary fund statute indicating that Gessler was the sole and exclusive arbiter of what uses were "in pursuance of official business," regardless of his use of those funds. Indeed, to construe the statute as Gessler does would lead to absurd results because it would allow the Secretary of State to spend the funds on anything he or she wishes, as long as he or she says the use is in the pursuance of official business. We cannot follow a statutory construction that would lead to an absurd result. *Town of Erie v. Eason*, 18 P.3d 1271, 1276 (Colo. 2001).

¶ 30 Third, assuming without deciding that article XXIX requires sufficiently specific standards of conduct, for the reasons discussed above, we disagree with Gessler's assertion that in the circumstances presented here, the discretionary fund statute provides no specific standard of conduct. To the

contrary, that statute limits the use of the discretionary funds to the "pursuance of official business," and as the IEC concluded, by using funds from his discretionary account for other than official business, Gessler breached the public trust for public gain in violation of the public trust statute.

¶ 31 For these reasons, we reject Gessler's assertion that the discretionary fund statute does not fall within the ambit of section 5.

E. Vagueness and Overbreadth

¶ 32 With respect to Gessler's contingent argument that the IEC has construed its jurisdiction so broadly as to render section 5 vague and overbroad, we first note that to establish the unconstitutionality of a provision of the Colorado Constitution, a plaintiff bears the "heavy burden" of proving that the provision is unconstitutional beyond a reasonable doubt. *See Bollier v. People*, 635 P.2d 543, 545 (Colo. 1981).

¶ 33 To establish that a constitutional provision is unconstitutionally vague on its face, a plaintiff must show that the provision is impermissibly vague in all of its applications. *Table Servs., LTD v. Hickenlooper*, 257 P.3d 1210, 1215 (Colo. App. 2011). A law is impermissibly vague if it forbids or requires the doing of an act in terms so vague that persons of common intelligence must necessarily guess as to its meaning and differ as to its application. *Id.* at 1214. Terms need not, however, be defined with mathematical precision. *Id.* Rather, the provision must be sufficiently specific so as to give fair warning of the conduct prohibited. *Id.*

¶ 34 To establish that a constitutional provision is unconstitutionally overbroad, a plaintiff must show that the law punishes a substantial amount of protected free speech, judged in relation to the provision's plainly legitimate sweep. *Dallman v. Ritter*, 225 P.3d 610, 625 (Colo. 2010).

¶ 35 Here, we need not determine the outer limits of the IEC's jurisdiction. Rather, we need only note that we have construed section 5 so as to recognize the applicable limits to the IEC's jurisdiction. Having thus construed section 5, we need not address Gessler's contingent assertion that a different construction might raise vagueness or overbreadth concerns.

¶ 36 For all of the foregoing reasons, we conclude that the IEC had jurisdiction here.

III. Arbitrary or Capricious

¶ 37 Gessler next contends that if the IEC had jurisdiction here, then its decision was arbitrary or capricious because he properly used his discretionary funds to attend the RNLA seminar and to reimburse himself for unreported mileage. We are not persuaded.

A. Standard of Review

¶ 38 As noted above, on appeal from a district court's review of a final agency action, we apply the same standard as the district court, namely, the above-quoted standard set forth in section 24-4-106(7). *See Idowu*, ¶ 21, 338 P.3d at 1082. Under this standard, a final agency decision may not be reversed

unless, as pertinent here, it is arbitrary or capricious. *Id.*; *accord* § 24-4-106(7).

¶ 39 In order to conclude that an administrative agency has acted arbitrarily or capriciously, we must determine that no substantial evidence exists in the record to support the agency's decision. *Moya v. Colo. Ltd. Gaming Control Comm'n*, 870 P.2d 620, 624 (Colo. App. 1994). There must be a clear error of judgment, and we may not substitute our judgment for that of the agency. *See id.* An agency decision is not arbitrary or capricious if it reflects a "conscientious effort to reasonably apply legislative standards to particular administrative proceedings." *Id.*

B. RNLA Seminar and the RNC

¶ 40 Here, substantial evidence in the record supports the IEC's determination that Gessler improperly used his discretionary fund to attend the RNLA seminar and the RNC. The RNLA's mission statement includes the goal of advancing Republican ideals and provides, "The RNLA further builds the Republican Party goals and ideals through a nationwide network of supportive lawyers who understand and directly support Republican policy, agendas and candidates." Moreover, the IEC found, and Gessler does not appear to dispute, that the RNLA seminar registration form required attendees to state that they support the RNLA's mission.

¶ 41 In addition, several sessions at the seminar addressed partisan political issues, and Gessler testified that he could not specifically recall details of what was discussed at the seminar, including the contents of the session at which he was a scheduled

speaker. He testified at some length, however, regarding his assumptions as to what subjects might have been addressed.

¶ 42 And when Gessler submitted his request to be reimbursed for his attendance at the RNLA seminar and the RNC, he stated, "These expenses were incurred while meeting with constituents, county clerks, lobbyists, staff and legislators to discuss state business." He, however, could only recall three (and perhaps five) Coloradans with whom he met at the seminar, and none were county clerks, staff, or legislators.

¶ 43 In light of this evidence, we conclude that the IEC's finding that Gessler misused his discretionary fund to attend the RNLA seminar and the RNC was not arbitrary or capricious.

¶ 44 We are not persuaded otherwise by the subsequent IEC advisory opinions that Gessler cites in his appellate briefs. Gessler cites these opinions in the context of his argument that the IEC's findings were arbitrary and capricious. Because these opinions were not part of the administrative record or the judicial review action, however, we generally may not consider them. *See Sierra Club v. Billingsley*, 166 P.3d 309, 316 (Colo. App. 2007) (noting that an appellate court may not review on appeal a document that was not part of the administrative record).

¶ 45 Even if we could consider these opinions by way of taking judicial notice, as Gessler asserted for the first time during oral argument, they do not persuade us that the IEC's findings were arbitrary and capricious. One of the two advisory opinions covered whether Gessler could properly accept a

registration waiver to attend the RNLA's next National Election Law Seminar, and the other addressed whether Gessler's Deputy Secretary of State could properly accept travel expenses from her office to accompany Gessler to the seminar. *See Acceptance of Travel Expenses Paid by a Third Party*, Advisory Op. No. 14-10 (IEC July 23, 2014); *Acceptance of Travel from the State*, Advisory Op. No. 14-13 (IEC July 23, 2014). Neither of these opinions directly addressed either the discretionary fund statute or the public trust statute. Moreover, the latter opinion expressly noted that it was limited to the "specific facts presented by the Deputy Secretary to the Commission," none of which mentioned any partisan political activities. *See Acceptance of Travel from the State*, Advisory Op. No. 14-13, at 4. Accordingly, the opinions are not pertinent here, where the IEC's decision did not turn on the fact that Gessler attended the RNLA seminar, but rather on his having used his discretionary fund primarily for partisan political, and thus personal, purposes, including attending the RNC.

¶ 46 For the same reasons, we are not persuaded by Gessler's argument that his conduct could not have violated any applicable standards of conduct because the Colorado Supreme Court had approved his attendance at the RNLA seminar for continuing legal education (CLE) credit. Again, the IEC did not sanction Gessler for attending the seminar. It sanctioned him because he used his discretionary fund primarily for partisan political purposes, even though a portion of the trip involved an approved CLE program.

C. Mileage

¶ 47 Substantial evidence in the record also supports the IEC's determination that Gessler improperly used his discretionary fund to reimburse himself for what he now claims was undocumented mileage.

¶ 48 Gessler testified that he submitted a lot of mileage reimbursement requests, but he explained that he did not do so with respect to the reimbursement at issue here because "to go through every single penny and mile and whatnot it just ended up being a waste of time when there is no benefit from it." Thus, he stated that he took the remainder of his discretionary fund as an unsubstantiated personal payment "because it was $117, and it was downright easier to pay the taxes since my tax rate is so low nowadays than to reconstruct my entire calendar to find out what could have been in there." For this reason alone, we conclude that the IEC did not act arbitrarily or capriciously in refusing to credit Gessler's assertion that the reimbursement request was for mileage. Gessler chose to treat those funds as additional compensation, not as a mileage reimbursement, and he cannot fault the IEC for doing the same.

¶ 49 Likewise, although Gessler claims that he later produced documentation to support his claim for unreimbursed mileage, the IEC was not required to credit that documentation, especially given that his conduct here was different from how he had proceeded on prior occasions, when he supported reimbursement requests with attached receipts or other contemporaneous documentation. *See Baldwin*

v. Huber, 223 P.3d 150, 152 (Colo. App. 2009) ("[D]eterminations concerning the credibility of the witnesses, the weight to be given to the evidence, and the resolution of any evidentiary conflicts are factual matters solely within the province of the [agency] to decide as the trier of fact.").

¶ 50 Accordingly, we conclude that the IEC's finding that Gessler improperly used his discretionary fund to reimburse himself for undocumented expenses was not arbitrary or capricious.

IV. Procedural Due Process

¶ 51 Finally, Gessler contends that he was denied procedural due process because he was not given advance and adequate notice of the standards of conduct that he was accused of having violated. We disagree.

> ¶ 52 Procedural due process requires that a respondent be notified of the nature of the proceedings and apprised of the right to present evidence in his or her own behalf. *Colo. State Bd. of Med. Exam'rs v. Boyle*, 924 P.2d 1113, 1117 (Colo. App. 1996). For purposes of agency adjudicatory proceedings, [a]ny person entitled to notice of a hearing shall be given timely notice of the time, place, and nature thereof, the legal authority and jurisdiction under which it is to be held, and the matters of fact and law asserted. Unless otherwise provided by law, such notice shall be served . . . at least thirty days prior to the hearing.

§ 24-4-105(2)(a), C.R.S. 2014.

¶ 53 Even if the notice provided is insufficient, however, errors in administrative proceedings do not require reversal unless the complaining party can show that he or she was prejudiced. *Joseph v. Mieka Corp.*, 2012 COA 84, ¶ 67, 282 P.3d 509, 520.

¶ 54 Here, we conclude that Gessler received more than ample notice of the claims asserted against him. Although the initial complaint filed by Colorado Ethics Watch alleged the violation of three criminal statutes, those violations were premised on Gessler's violation of the discretionary fund statute, which Gessler addressed at length in his response to the complaint. In addition, Gessler received both a pre-hearing order and an amended pre-hearing order over one month before the hearing. The amended pre-hearing order set forth six standards of conduct or reporting requirements that the IEC felt were potentially applicable, including the discretionary fund and public trust statutes that Gessler was ultimately found to have violated.

¶ 55 Accordingly, we conclude that Gessler received constitutionally adequate notice here. *See* § 24-4-105(2)(a); *Boyle*, 924 P.2d at 1117.

¶ 56 We are not persuaded otherwise by Gessler's argument that the IEC's notice was constitutionally deficient because some of the standards of conduct identified by the IEC were not actually ruled upon. Gessler cites no authority to support this proposition, and we are aware of none.

¶ 57 Nor are we persuaded by Gessler's assertion that he was denied adequate notice because in the IEC's amended pre-hearing order, the IEC reserved

the right "to consider additional standards of conduct and/or reporting requirements, depending on the evidence presented, and the arguments made, at the hearing in this matter." Although we agree that considering new standards of conduct after the close of evidence could violate due process, *see In re Ruffalo*, 390 U.S. 544, 551 (1968) ("The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused."), Gessler concedes that no additional charges were added here. Accordingly, the IEC's reservation of the right to consider additional standards of conduct did not result in any actual deprivation of notice.

¶ 58 In any event, the record belies any claim of prejudice to Gessler. Gessler, through experienced and able counsel, mounted a vigorous defense to the charges against him, including in his pre- hearing efforts to have the case dismissed and at the evidentiary hearing. His pleadings and the evidence presented at the hearing amply demonstrate that he was well aware of the charges against him and that he was able to defend against them fully and appropriately. See Joseph, ¶¶ 67-68, 282 P.3d at 520.

V. Conclusion

¶ 59 For these reasons, the judgment is affirmed.

JUDGE TAUBMAN and JUDGE BOORAS concur.

Appendix C

DISTRICT COURT, DENVER COLORADO

Case No. 13CV030421

SCOTT E. GESSLER,

Appellant,

v.

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,

Appellees.

Court's Order Re: Appeal

Filed March 12, 2014

This matter is before the Court on Appellant Scott E. Gessler's ("Gessler") appeal of Colorado Independent Ethics Commission's Findings of Fact and Conclusions of Law on Complaint No. 12-07 ("IEC's Order"), pursuant to C.R.S. § 24-18.5-101(9) and the Colorado Administrative Procedure Act.

The Colorado Independent Ethics Commission ("IEC") issued its Findings of Fact and Conclusions of Law ("IEC's Order") on June 13, 2013 and found that Gessler had committed ethical infractions by

violating the State Fiscal Rules, C.R.S. § 24-9-105, and C.R.S. § 24-18-103(1).

The Court having considered applicable law, having reviewed the pleadings, and being fully advised, hereby enters the following findings and order:

I. Statement of Facts

On Thursday, August 23, 2012, Gessler flew to Tampa, Florida to attend a continuing legal education ("CLE") conference sponsored by the Republican National Lawyer's Association ("RNLA") in Sarasota. Gessler attended the National Election Law Seminar as a participant and as a speaker.

While in Sarasota, Gessler stayed at the Ritz Carlton at the conference's room rate for the two nights of the conference and for one additional night at an increased rate. Gessler paid $1,278.90 out of his office's discretionary fund for his airfare and stay at the Ritz Carlton.

On August 23, 2013, Gessler travelled to the Republican National Convention ("RNC") in Tampa, Florida. Gessler paid for lodging and meals out of his campaign funds.

Gessler planned to stay in Florida until September 1, 2013, however, because the Secretary of State's office received threats against Gessler's wife and daughter, Chief of Staff Gary Zimmerman advised Gessler to return to Colorado early. Accordingly, Gessler returned early, and this change to his airline reservation cost the State an additional $422. The IEC did not find any ethical violations in Gessler's reimbursement of the $422 for his early return to

Colorado after his family was threatened, because that expense was directly related to his work as Secretary of State.

On July 5, 2012, Gessler requested reimbursement of "any remaining discretionary funds," Gessler did not include any documentation, such as receipts, along with his request. The amount reimbursed was $117.99.

Gessler repaid the $1,278.90 on May 21, 2013, seventeen days before his hearing with the IEC.

II. Statement of the Case

On October 15, 2012, the CEW filed a complaint, along with supporting documentation, against Gessler with the IEC. In Gessler's response to the CEW Complaint, he did not dispute the CEW's factual allegations.

The IEC determined that the CEW Complaint was non-frivolous and appointed an independent investigator. After the investigation, the IEC held an eleven-hour hearing at which Gessler and the CEW appeared through counsel on June 7, 2013. After the hearing, the parties submitted written closings to the IEC on June 12, 2013.

On June 19, 2013, the IEC issued the IEC's Order, finding that Gessler spent $1,278.90 of his discretionary account primarily for partisan purposes, and therefore personal purposes, to fly to Florida to attend the RNLA conference then the RNC. This conduct violated the ethical standard of conduct described in C.R.S. § 24-9-105, because Gessler used the discretionary funds for other than "official business." The IEC also found that this conduct

breached the public trust for private gain in violation of C.R.S. § 24-18-103(1).

The IEC found that Gessler's acceptance of the balance of the discretionary account, $117.99, without documentation or itemization, violated C.R.S. § 24-9-105, because the reimbursement was not in pursuance of official business but was personal in nature. Thus the acceptance of the balance violated C.R.S. § 24-18-103(1) by breaching the public trust for private gain.

The IEC imposed the following penalties:

1) Gessler was penalized for the $1,278.90, which was doubled pursuant to Colorado Constitution §6 for a total of $2,557.80,

2) Gessler was penalized for $117.99, which was also doubled for a total of $235.98,

3) and, Gessler was given credit for $1,278.90, the amount he returned to the state, prior to the hearing.

After the credit, the IEC found that Gessler owed a penalty of $1,514.88.

Gessler is appealing on the following grounds: (1) the IEC exceeded its jurisdiction; (2) the IEC's findings of fact were arbitrary and capricious; (3) the IEC violated Gessler's due process rights; and, (4) the IEC violated Gessler's right to free speech and assembly.

III. Standard of Review

C.R.S. § 24-4-106 of the Administrative Practice Act ("APA") governs and provides the standard of judicial review of agency actions. *In re Application for*

Water Rights of Well Augmentation Subdistrict of the Cent. Colo. Water Conservancy Dist., 221 P.3d 399, 417 (Colo. 2009). Pursuant to the statute and Colorado case law, reviewing courts accord deference to the IEC. *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009); *Developmental Pathways v. Ritter*, 178 P.3d 524, 535 (Colo. 2008). The reviewing court will uphold the agency's decision unless that decision is, among other factors: arbitrary and capricious; an abuse or clearly unwarranted exercise of discretion; based upon findings of fact that are clearly erroneous on the whole record; unsupported by substantial evidence when the record is considered as a whole; or otherwise contrary to law. C.R.S. § 24-4-106(7). Reviewing courts will uphold an agency's actions unless a "reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion." *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1106 (Colo. App. 2009).

IV. Analysis of Claims of Appeal

A. Whether the IEC's enabling statute in unconstitutionally vague.

Gessler argues that the phrase "other standards of conduct" is so vague that elected officials cannot determine what type of conduct would invite prosecution by the IEC. (Gessler's Opening Brief at 30-31). The Court is unconvinced. The IEC's enabling statute is not unconstitutionally vague simply because it directs the agency to investigate ethics issues arising under published legal standards and

reporting requirements applicable to the public official in question.

Constitutional provisions and statutes are presumed to be constitutional. *Table Servs., LTD v. Hickenlooper*, 257 P.3d 1210, 1214-15 (Colo. App. 2011). A provision satisfies the requirements of due process when it provides fair notice of unlawful conduct. *Charnes*, 728 P.2d 1287 at 1290. "A statute that forbids or requires the doing of an act so vague that persons of common intelligence must necessarily guess as to its meaning" is unconstitutionally vague. *Smith v. Charnes*, 728 P.2d 1287, 1290 (Colo. 1986). Statutes are often worded broadly so that they apply to a variety of circumstances, but "generality is not the equivalent of vagueness, and statutory terms used need not be defined with mathematical precision in order to withstand a vagueness challenge." *Stamm v. City & Cnty. of Denver*, 856 P.2d 54,56 (Colo. App. 1993). The publication of enacted laws is considered sufficient notice to satisfy due process requirements for individuals affected by those laws. *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1108 (Colo. App. 2009).

The IEC was created to govern the Gift Ban, Revolving Door Prohibition, and "ethics issues arising … under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX. While on its own, the phrase "other standards of conduct" appears vague, it is limited by "and reporting requirements as provided by law." This limiting phrase means the IEC can only prosecute public officers who have violated applicable legal standards. That qualification means that public

officers are, therefore, on notice for any infraction that could prompt an IEC investigation.

The IEC investigated Gessler for violations of specific State Fiscal Rules; C.R.S. § 24-9-105, the Colorado statute concerning discretionary funds for elected officials; and, C.R.S. § 24-18-103, the Colorado statute charging public officers to carry out their duties "for the benefit of the people of the state." (IEC's Order at 11-12). These rules and statutes clearly apply to public officers and elected officials such as Gessler. A law is unconstitutionally vague if a person of common intelligence must guess at its meaning. *Charnes*, 728 P.2d 1287 at 1290. Gessler previously demonstrated understanding of the meaning of the statute when he cited to it in a reply in another case. (IEC's Answer at 22). The statute's language limits the IEC to only investigating and penalizing individuals for violations of published standards of conduct and reporting requirements. For these reasons, the Court finds that the enabling statute is not unconstitutionally vague.

B. Whether the IEC exceeded its jurisdiction.

Gessler asserts that the IEC is limited to investigating improper gifts to public officers. (Gessler's Opening Brief at 9). The Court finds that this interpretation contravenes the plain language of the IEC's enabling statute and the applicable provisions in the Colorado Constitution. The IEC's enabling statute grants the commission authority to inquire into other areas.

The IEC was created to govern the Gift Ban, Revolving Door Prohibition, and "ethics issues arising

… under any other standards of conduct and reporting requirements as provided by law." Colo. Const. art. XXIX, §5. The IEC should begin investigating when "any person" files a complaint "asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months." Colo. Const. art. XXIX, §5(3)(a). Colorado case law also supports the idea that the IEC was created to govern the ethical behavior of employees of the executive branches, among others, and to conduct investigations when concerned parties bring ethics complaints to its attention. *Developmental Pathways*, 178 P.3d 524 at 527 – 8. Additionally, once the IEC begins its investigation, its inquires are not restricted to the violations alleged in the complaint. "The scope of the hearing shall be determined by the IEC and may be limited to specific factual, ethical or legal issues." IEC Rule of Procedure 8.A.2. The IEC is also charged with ensuring "that those within its coverage 'avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated.'" *Developmental Pathways*, 178 P.3d 524 at 532.

The IEC was well within its jurisdiction. The commission complied with the applicable constitutional provisions and its own rules of procedure. The CEW's initial complaint alleged ethical violations by Gessler that the IEC subsequently investigated. Based on the results of that investigation, the IEC held a hearing on the

matter, eventually concluding that Gessler had violated the State Fiscal Rules, C.R.S. § 24-9-105, and C.R.S. § 24-18-103. Consequently, the IEC levied penalties pursuant to those statutes. The IEC's actions mirrored the procedural requirements set out for the agency in Colo. Const. art. XXIX, §5 and in the agency's own procedural rules. Thus based on the plain language of the IEC's enabling statute and the Constitutional provisions that govern the commission, the Court finds that the IEC was within its jurisdiction when it prosecuted Gessler for alleged ethical violations.

C. Whether the IEC violated Gessler's right to due process.

Gessler asserts that his due process rights were violated because the IEC: (1) failed to remove biased commissioners from the investigatory panel; (2) failed to provided sufficient notice of the charges; and, (3) failed to allow Gessler to introduce al of the testimony and present all the evidence he needed to mount an adequate defense.

1. Whether Gessler's right to due process was violated because Commissioners Marshall and Grossman failed to recuse themselves.

Gessler's right to due process was not violated because Commissioners Rosemary Marshall and Dan Grossman failed to recuse themselves. Reviewing courts accord deference to the IEC's decisions. *Developmental Pathways*, 178 P.3d 524 at 535. Administrative Law Judges ("ALJ") are accorded a presumption of honesty, integrity, and impartiality. *Mountain States Tel. & Tel. Co. v. Pub. Utilities*

Comm'n of State of Colo., 763 P.2d 1020, 1028 (Colo. 1988). While an ALJ may be disqualified for personal bias, the decision is within the discretion of the ALJ. *Rice v. Dep't of Corr.*, 950 P.2d 676, 681 (Colo. App. 1997). Reviewing courts should examine the record for evidence of a judge's manifestation of ill will, bias, favoritism, impropriety, or other conduct that would overcome the presumption of impartiality. *Kilwein v. Indus. Claim Appeals Office*, 198 P.3d 1274, 1277 (Colo. App. 2008); *Brewster v. Dist. Court of the Seventh Judicial Dist.*, 811 P.2d 812, 814 (Colo. 1991). Even when the subject of a disciplinary proceeding alleges that an ALJ is biased, if the respondent fails to provide evidence to substantiate the respondent's suspicion that bias impermissibly influenced the commission, the presumption of impartiality will not be overcome. *Lopez-Samoyoa v. Colorado State Bd. Of Medical Examiners*, 868 P.2d 1110, 1113 (Colo. App. 1993) (reversed on other grounds). Hallmarks of fair proceedings conducted by unbiased ALJs include: notice of the charges; an opportunity for the accused to present witnesses and evidence; and, a written opinion by the ALJ supported by evidence in the record. *Snyder v. Colorado Podiatry Bd.*, 100 P.3d 496, 501-01 (Colo. App. 2004).

Gessler asserts that Commissioner Marshall, a former Democratic state representative, had interactions with Gessler prior to the IEC's investigation that could be construed as evidence of bias. (Gessler's Opening Brief at 40). Specifically, Gessler cited an instance when Commissioner Marshall appeared to rule hastily in an IEC vote against the Secretary and then made remarks about the action to the media. (Gessler's Opening Brief at

41). Also, Gessler stated that amongst other politically motivated actions, Commissioner Marshall donated to the campaign of Gessler's opponent for Secretary of State in 2010. (Gessler's Opening Brief at 41).

Gessler states that Commissioner Grossman, a former Democratic state representative and senator, contributed to the campaign of Gessler's opponents, or potential opponents, in 2010 and 2014. (Gessler's Opening Brief at 41). Gessler asserts that Commissioner Grossman had opposed him in other political ways and that Commissioner Grossman had referred negatively to the Deputy Secretary of State as "The Dragon Lady." (Gessler's Opening Brief at 41-2).

The Court has reviewed the records of the IEC's hearings on this matter as well as the IEC's Order, and despite Gessler's allegations of bias, the Court does not find sufficient evidence to overcome the IEC's presumption of impartiality. The IEC was purposefully structured so that Republicans and Democrats would be equally represented. The applicable provisions in the Colorado Constitution allow for no more than two members of a single political party to serve at the same time. Colo. Const. art. XXIX § 5(2)(b). The IEC states that Commissioner Marshall said on the record in a meeting on March 4, 2013 that she could be fair and impartial. Her fellow Commissioners agreed unanimously. (IEC's Response at 29).

The transcripts and orders from the IEC evidence no manifestations of ill will, bias, or other conduct that would overcome the presumption of impartiality.

(*See* Gessler's Complaint, Ex. D; IEC's Opposition Brief to Motion for Temporary Restraining Order and/or Preliminary Injunction w/attach, Ex. 6; IEC's Response, Ex. 1). The IEC's Order is well-reasoned and based on substantial factual evidence properly entered into the record. During the eleven-hour hearing on June 7, 2013, Gessler was accorded a fair opportunity to make his case. He was represented by counsel, allowed to present evidence, allowed to put on his own witnesses, and allowed to cross-examine the CEW's witnesses. (IEC's Answer at 3-4). After the hearing, both parties submitted written closings to the IEC, which deliberated and then wrote a detailed, fact-based opinion. (IEC's Answer at 4; IEC's Order). For these reasons, the Court finds no evidence in the record of bias or ill will sufficient to overcome the commissioners' presumption of impartiality. Thus, it was not an abuse of discretion for the IEC to allow Commissioners Marshall and Grossman to remain on the commission during Gessler's hearing. Accordingly, the IEC did not violated Gessler's right to due process by not forcing Commissioners Marshall and Grossman to recuse themselves.

2. Whether Gessler's right to due process was violated because the IEC failed to provide sufficient notice of the charges.

Gessler's right to due process was not violated because the IEC documents provided sufficiently detailed information of the facts underlying Gessler's alleged violations for him to prepare a defense. There are not specific requirements or rules of procedure to ensure that a defendant's due process rights are preserved, especially in an administrative hearing. *Snyder v. Colorado Podiatry Bd.*, 100 P3d 496, 501

(Colo. App. 2004); *Bourie v. Dep't of Higher Educ.*, 929 P.2d 18, 22 (Colo. App. 1996). Rather, "[d]ue process is satisfied by providing adequate notice of opposing claims, a reasonable opportunity to defend against those claims, and a fair and impartial decision." *Snyder v. Colorado Podiatry Bd.*, 100 P3d 496 at 501. The IEC's decision is entitled to a presumption of validity. *Snyder v. Colorado Podiatry Bd.*, 100 P3d 496 at 501. An agency need only give a respondent notice of "the legal authority and jurisdiction under which [the hearing] is to be held, and the matters of fact and law asserted." C.R.S. § 24-4-105(2)(a). Notice is adequate if it informs the respondent in a timely way of the nature of the charges and the matters of fact and law to be asserted, allowing the respondent an opportunity (Colo. Ct. Capp. 1996); *Bourie*, 929 P.2d 18 at 22. Due process in an administrative hearing may be preserved even if the specificity and detail required in criminal proceedings is absent. *Bourie*, 929 P.2d 18 at 22. "When the government implements laws that adversely affect individual interests, the publication of those laws provides adequate notice to satisfy constitutional due process." *Cendant Corp. & Subsidiaries v. Dep't of Revenue*, 226 P.3d 1102, 1108 (Colo. App. 2009).

Gessler alleges that his due process right to notice was violated because the IEC did not inform him of the specific statutes that he was accused of violating prior to the hearing. (Gessler's Opening Brief at 35). However, the IEC sent Gessler a copy of the formal complaint against him, which contained all of the CEW's allegations and exhibits supporting the CEW's claims. (Gessler's Opening Brief, Ex. A). The complaint's attached exhibits included Gessler's flight

information, expense reports, relevant calendar entries, information about the RNLA, and Gessler's itinerary for the Sarasota trip. Gessler submitted a Motion to Dismiss to the IEC on December 20, 2012, in which he incorporated many of the facts included in the initial complaint. (Gessler's Opening Brief, Ex. B). The IEC sent Gessler a Pre-Hearing Order informing him that he was suspected of having violated the State Fiscal Rules and that the exact rules he violated, if any, would be determined once the hearing was over and the parties had presented evidence and testimony. (Gessler's Opening Brief at 26). Gessler's own filings and the responses from the IEC indicate that Gessler was aware of the nature of the suspected conduct, who was accusing him and, generally, what statues and rules he was accused of violating. Due process requirements are satisfied when an agency tells a respondent the matters of fact and law asserted. C.R.S. § 24-4-105(2)(a). Thus, even though Gessler began the hearing unaware of the specific rules and statutes that the IEC ultimately found he violated, because he was aware of the facts and the conduct the IEC found suspect, the Court finds that the IEC provided Gessler sufficient notice to satisfy the due process requirements under the APA.

3. Whether Gessler's right to due process was violated because the IEC excluded some witnesses and evidence.

Gessler alleges that his due process rights were violated because the IEC excluded some of the witnesses and evidence that he wanted to present during the hearing. The Court disagrees.

Trial courts have broad discretion in deciding what evidence and testimony to admit during the proceedings, and reviewing courts will uphold the trial court's ruling absent an abuse of discretion. *People in Interest of Martinez*, 841 P.2d 383, 384 (Colo. App. 1992). The APA allows for relaxed evidentiary rules in administrative hearings and states that the individual conducting the hearing "may exclude incompetent and unduly repetitious evidence." C.R.S. § 24-4-105. Evidence at an administrative hearing is admissible if a reasonably prudent person would consider that it has probative value. *Craddock v. Colorado State Bd. of Assessment Appeals*, 819 P.2d 1100, 1103 (Colo. App. 1991).

Gessler asserts that he was prevented from mounting an adequate defense during the hearing, because the IEC did not allow him to call the following witnesses: Kevin Collins, a governmental accounting expert, who would conclude that the uses of funds at issue were completely proper; former Secretaries of State, who would talk about ways they spent their own discretionary funds; and, other current office holders with discretionary accounts. (Gessler's Opening Brief at 38-9). Gessler also stated that he was unable to mount an adequate defense, because the IEC did not allow him to present evidence that he was in compliance with state accounting standards. (Gessler's Opening Brief at 9).

Chairman Grossman reasoned that because governmental accounting expert Kevin Collins did not have knowledge of the State Fiscal Rules, his testimony would not assist the trier of fact. (IEC's Response, Ex. 1, Hearing Tr. p. 245 1.1 – p. 246, 1.14). Ultimately, the IEC rules by unanimous decision that

the testimony would be irrelevant because Collins' expertise lay in auditing, not the state fiscal rules. (IEC's Response, Ex. 1, Hearing Tr. p. 244 1.17 – p. 254, 1.19).

Even though the IEC did not allow Gessler to present Collins' testimony, Gessler did have a chance to cross examine all of the CEW's witnesses including: Ellis Arimistead, the IEC's investigator who confirmed the factual allegations in the CEW's report; State Controller Robert Jaros, who discussed a variety of topics including the permitted uses of a discretionary fund; former Deputy Secretary of State William Hobbs, who worked for five Secretaries of State and discussed reimbursement policies and the proper use of discretionary funds; and Colorado Chief Financial Officer Heather Lizotte, who explained, among other things, that political expenditures should not be reimbursed.

Gessler, himself, testified and presented testimony from Gary Zimmerman, his Chief of Staff. Zimmerman stated that Gessler had spent the funds from his discretionary account in a typical fashion and that the expenses from the Florida trip were appropriate. (IEC's Response, Ex. 1, Hearing Tr. p. 96 1.1 – p. 108, 1.23).

In light of all of the testimony that was presented concerning the use of discretionary funds by Secretaries of State, including testimony from a former Secretary of State and the testimony from a former Deputy Secretary of State who had served five different Secretaries of State during his tenure, the Court finds that the record supports the IEC's determination that further testimony on that subject

from additional former Secretaries of State would be cumulative. The Court also finds that it was not an abuse of discretion for the IEC to disallow the testimony of Keith Collins, who lacked direct knowledge of the fiscal rules. Similarly, the Court finds that, considering the extensive evidence Gessler presented, it was not an abuse of discretion for the IEC to exclude further evidence concerning the accounting practices of Gessler's offices. Accordingly, the Court finds that the IEC did not abuse its discretion or deprive Gessler of his right to due process by limiting Gessler's presentation of evidence and testimony.

D. Whether the IEC violated Gessler's right to free speech and assembly.

Gessler alleges that the IEC's policies make it hard to determine what CLEs and conferences public officers may pay for out of their discretionary funds. (Gessler's Opening Brief at 44 – 48). Gessler argues that this uncertainty violates his First Amendment right to free speech and assembly by creating a chilling effect, because he would fear possible sanctions by the IEC whenever he used his discretionary fund to pay for CLEs and conferences. (Gessler's Opening Brief at 44-8).

The Court is unconvinced, and accordingly finds the IEC did not violate Gessler's First Amendment rights.

E. Oral Argument

The Court recognizes that the parties have requested oral argument. The request is declined as the Court finds the written pleadings and the record

provide sufficient information upon which to base its decision.

V. Conclusion

The IEC's decision is AFFIRMED.

DATED this 12th day of March 2014

BY THE COURT:

/s/ Herbert L Stern III
Herbert L. Stern, III

District Court Judge

CC: Counsel of Record by e-filing

Appendix D

INDEPENDENT ETHICS COMMISSION

Complaint No. 12-07

COLORADO ETHICS WATCH,

Complainant,

v.

SCOTT E. GESSLER,

Respondent.

Finding of Facts and Conclusions of Law

Filed June 19, 2013

On June 7, 2013 the Independent Ethics Commission ("IEC" or "Commission") conducting a hearing as required by Colorado Constitution Article XXIX, section 5(3)(c) regarding Complaint 12-07 filed with the Commission. The IEC heard testimony over 11 hours, heard from eight witnesses, and reviewed and received approximately 66 exhibits into evidence. The parties submitted written closing arguments on June 12, 2013. The Commission met and deliberated on June 13, 2013.

The Commission makes the following findings of facts and conclusions of law, based upon the preponderance of the evidence.

I. Finding of Fact

A. Republican National Lawyers Association Conference

1. On Thursday, August 23, 2012, Secretary Gessler flew to Tampa, Florida to attend a continuing legal education ("CLE") conference sponsored by the Republican National Lawyer's Association ("RNLA"). Secretary Gessler was invited to attend the conference and participated as a speaker by the conference sponsors. The conference took place on Friday, August 24 and Saturday, August 25 in Sarasota, Florida. Exhibit N. Secretary Gessler requested and received 12 general CLE credits and 1.2 ethics credits for attending the conference.[1] See Exhibits K and L.

2. The conferences was titled "National Election Law Seminar." During his testimony, Secretary Gessler did not recall details or specifics of the conference, including what he discussed as a scheduled speaker.

3. According to documents submitted into evidence, RNLA's mission "includes support for

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[1] Colorado attorneys with an active license to practice law are required to take 45 hours of general credits and 7 hours of ethics credits every three years.

Republican Party ideals, platforms and candidates." The conference registration form requires participants to state that they support the RNLA's mission. More than one of the topics at the conference did not pertain to the law in Colorado and were concerned primarily with partisan values and/or politics. One session at the conference was a reception for the Romney for President Campaign, although Secretary Fessler did not recall if he attended that event. See Exhibit C, attachments 4-6, and Exhibit N, Exhibits 14 and 15.

4. Secretary Gessler stayed at the Ritz Carlton hotel on Thursday, Friday and Saturday nights (August 23, 24 and 25, 2012). The conference ended during the day on August 25, and Mr. Gessler stayed an additional night at the State's expense at an increased rate. Exhibit D.

5. The total cost of the airfare to Florida and the lodging for August 23, 24, and 25 was $1278.90. Secretary Gessler paid the $1278,90 out of the discretionary funds provided to the Secretary of State pursuant to C.R.S. section 24-5-109.

6. Secretary Gessler testified that he used discretionary funds for this trip, rather than Department travel funds, because he knew that given that the sponsor had the word Republican in its name, the conference could be subject to scrutiny, and he believed that he had more leeway with the use of these funds than with monies from the Department of State's travel budget.

7. On August 26, 2013, Mr. Gessler travelled to the Republican National Convention ("RNC") in Tampa, Florida. He had planned to return to Denver on September 1. Costs of lodging and meals associated with his stay at the RNC were paid for out of campaign funds.

8. The Secretary of State in Colorado is not required to be a licensed attorney.

9. Secretary Fessler repaid the $1278.90 on May 21, 2013, 17 days before the scheduled hearing date. Exhibit XX.

B. Early returns from the Republican National Convention

1. On Friday, August 24, while Secretary Gessler was in Floriday, the Secretary of State's office ("SOS") received a threatening vulgar email directed against Secretary Gessler's wife and daughter who remained in Colorado.

2. On Tuesday, August 28, Ms. Padron, staff member of the SOS, received a threatening phone call addressed to the Secretary and his family. The staff of the SOS informed the Colorado Bureau of Investigation ("CBI"), and the Denver Police Department. CBI conducted an investigation, and the person responsible was arrested on August 29, 2012. Exhibits E-G., KK.

3. On Thursday, August 30, the SOS Chief of Staff, Garry Zimmerman, in consultation with the other staff members, advised the Secretary to return to Colorado early. Secretary Gessler returned to Denver on Friday, August 31, a day earlier than planned. Secretary Fessler incurred additional airfare costs for the change in plans. These additional charges were paid for out of the Secretary of State's General Fund appropriation. Exhibits P-R.

4. The cost of the early returned flight appears to have been $422. Exhibits LL, Q. Testimony at the hearing indicated that a portion of the hotel stay for the RNC may have been reimbursed to the Secretary from the General Fund. However, no additional evidence to support this separate payment is in the record.

C. Discretionary Account Funds

1. On July 5, 2012, Secretary Gessler requested reimbursement of "any remaining discretionary funds." See Exhibit BB. No reimbursement receipts or other information was provided in the request. Other requests for reimbursement from the discretionary fund in evidence contained receipts and/or documentation. Exhibits T-V, X, Y, Z, AA, DD, EE, FF.

2. The Department of State had been advised by the State Controller in November and December 2011 that receipts and other documentation are required for reimbursement

from the Discretionary Funds, and that expenses must be in pursuance of state business. See Exhibit 3, also Exhibit BB.

3. Secretary Gessler testified that he knew that without receipts, amounts paid to him from his discretionary account would be viewed as personal income subject to taxation. He did not know if that money was added to his W-2. Secretary Fessler therefore treated and intended to treat the reimbursement of the balance of his discretionary fund as personal income.

4. The amount of this payment was $117.99.

II. Applicable Law

A. Colorado Constitution Article XXIX, Section 5(1).

Section 5(1) of Article XXIX provides in relevant part:

> The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties . . . on ethics issues arising under this article and any other standards of conduct and reporting requirements as provided by law.

B. C.R.S §24-18-103(1) Public Trust-Breach of Fiduciary Duty

"…A public officer…shall carry out his duties for the benefit of the people of the state."

C. C.R.S. §24-9-105(1)(d) Elected State Officials-Discretionary Funds

(1) Beginning with the fiscal year commencing July 1, 1985, and for each fiscal year thereafter, subject to annual appropriation by the general assembly, there is hereby available the following amounts for expenditure in pursuance of official business as each elected official sees fit:

***

(d) Secretary of State, five thousand dollars.

D. State Fiscal Rule

Although the statute does not define "official business," the Commission looks to definitions in the State Fiscal Rules as guidance. See, 1 CCR 101. In Chapter 5 (Travel), Rule 3.2.2. states that "travel charged to the State, regardless of the funding source, shall be for the benefit of the State, …and is only for the time period necessary." The definitions in that chapter define Political Expenses as expenses "incurred in relation to activities that are primarily designed to further the interests of a candidate, political party, or special interested during travel that are primarily for the benefit of the Traveler, and not directly related to State Business (Rule 5-1.7.3), and Political Expenses (Rule 5-1.7.4). Rule 5.11-7 specifically requires an allocation of costs when a trip is partially for State business and partially for personal or political purposes.

III. Conclusions of Law

After reviewing the relevant facts and law, the Commission finds as follows:

1. Secretary Gessler is a "public officer" as defined by Colorado Constitution Article XXIX section 2(6), and was subject to the Commission's jurisdiction at the time of the events in question.

2. Secretary Gessler spent $1278.90 of his discretionary account primarily for partisan purposes, and therefore personal purposes, to fly to Florida to attend the RNLA conference and thereafter attend the RNC. As a result, Secretary Gessler violated the ethical standards of conduct contained in C.R.S. section 24-9-105, by using funds from his discretionary account for other than official business. By so doing, Secretary Gessler breached the public trust for private gain in violation of C.R.S. section 24-18-103(1).

3. Secretary Gessler's acceptance of reimbursement of the "balance of the discretionary account" without any documentation or detail of expenses incurred, violated the ethical standard of conduct contained in C.R.S. section 24-9-105 in that such reimbursement was not in pursuance of official business but was personal in nature. By so doing, Secretary Gessler breached the public trust for private gain in violation of C.R.S. section 24-18-103(1).

4. Secretary Gessler's acceptance of reimbursement from state funds for the travel expenses incurred as a result of his early return to Denver in the wake of threats to him

and his family does not violate any ethical standards of conduct provided by law. The necessity of the early return was directly related to Mr. Gessler's position as Secretary of State. See Exhibit S. To the extent that such payment was for the hotel stay paid for out of campaign funds, the IEC concludes that nay such reimbursement would be for personal purposes and not for official business.

IV. Penalties

The Commission finds that Secretary Gessler breached the public trust for private gain in using public funds for personal and political purposes. As a result, the Commission imposed the following penalties.

1. Secretary Gessler is penalized the amount of $1278.90, which is doubled pursuant to section 6 of the Colorado Constitution for a total of $2557.80.
2. Secretary Gessler is penalized the amount of $117.99, which is doubled pursuant to section 6 of the Colorado Constitution for a total of $235.98.
3. Secretary Gessler shall be given a credit for the amount he returned to the state in the amount of $1278.90.

Total penalty amount – $1514.88

The Independent Ethics Commission

Matt Smith Chair (dissenting from the double penalty in Part IV.1.)

Rosemary Marshall, Vice Chair

Don Grossman, Commissioner

Sally Hopper, Commissioner, (dissenting from Parts I. C., III.3 and IV.)

Bill Pinkham, Commissioner

Dated this 19th day of June, 2013

Appendix E

HEARTLAND INVESTIGATIVE GROUP

Report of H. Ellis Armistead

Colorado Independent Ethics Commission,

Case Number 12-07

April 22, 2013

I was contacted by First Assistant Attorney General Lisa Brenner Freimann and requested to conduct an independent investigation into allegations made by Colorado Ethics Watch regarding the conduct of Secretary of State Scott Gessler. I am not a lawyer and cannot offer legal opinions, and the results of this investigation are only factual.

I was given this investigation with the instructions to investigate the allegations as I saw fit. No input was received nor has anyone sought to have input into the investigative process.

The allegations generally were that Secretary Gessler used state funds from his discretionary account for political activities. Most, if not all, of the facts of this case are uncontested.

It is alleged that Secretary Gessler:

1. Attended the Republican National Lawyers Association National Elections Seminar in Sarasota, Florida on August 24 and 25, 2012, using state funds.

2. Attended the Republican National Convention in Tampa, Florida the week of August 26-30, 2012, using state funds.

3. Used state funds to buy a replacement plane ticket so he could come home early from the Republican National Convention.

4. Received two payments from $8.99 and $109.00 labeled "official functions discretionary funds" on July 9, 2012, and the entries appeared to have been reversed on July 27, 2012, and re-characterized as "employee non-cash incentives" with no named employee.

Outside of the complaint, I also looked into the issue of the ADT Security System at Secretary Gessler's home. It appears that the ADT System was reactivated on August 30, 2012, and continues to this day at a cost of $40.49, per month. These funds appear, according to the documentation, to be paid out of the Secretary's discretionary account.

Investigation

In the course of this investigation I have examined numerous documents provided by Secretary Gessler's attorneys and the previous investigator, as well as documents that I requested from the Secretary of State and Colorado Ethics Watch. On March 28, 2013, I interviewed Chief Administrative Officer Gary Zimmerman, Deputy Secretary of State Suzanne Staiert, and former Deputy Secretary of State, Bill Hobbs. (Attachment 1)

Through his attorney, Patrick Ridley, Secretary Gessler declined to be interviewed for this investigation.

I have also had contact with the other lawyers representing Secretary Gessler; David Land and Robert Bruce, as well as Luis Toro, director of Colorado Ethics Watch.

I will address the allegations in the order that I previously outlined.

Attendance at the Republican National Lawyers Association Meeting

The investigation revealed that Secretary Fessler did attend and was a speaker at the Republican National Lawyers Association National Election Seminar in Sarasota, Florida on August 24th to 25th. The plane ticket and his expenses were paid out of the discretionary fund allotted annually to the Secretary of State in the amount of $5,000.00. The total amount paid out of the discretionary fund for his attendance at the Republican National Lawyers Association meeting was $1278.90. The plane ticket was $498.78. (Attachment 2)

I noted that in requesting reimbursement for these expenses, as well as some others, the Secretary, on September 6, 2012, in a letter to Ms. Lizotte indicated, "These expenses were incurred while meeting with constituents, county clerks, lobbyists' staff and legislators to discuss state business."

I have also reviewed the notebook from the conference. I noted that Secretary Gessler received CLE's as a result of his attendance at the conference.

I requested further information from the RNLA and received a response indicating that Secretary Gessler was not a member of the RNLA at the time he spoke at the RNLA National Election Seminar in August of 2012. Secretary Gessler was formally a member of RNLA up until 2006. The response states that the RNLA seminars are generally open to all attorneys regardless of party affiliation and indicates that members are required to agree with the RNLA Mission Statement. (Attachment 3)

The Mission Statement of the RNLA is included with this report. (Attachment 4) The application for membership is included in this report. (Attachment 5) I noted that at the bottom of the application there is a box to check indicated, "I agree with the RNLA Mission Statement."

I noted that in a promotional flier that Lee Rudofsky, Deputy General Counsel for Romney for President, Inc. was a special guest at the closing reception. (Attachment 6)

Attendance at the Republican National Convention

It appears that Secretary Gessler did attend the Republican National Convention in Tampa, Florida, and his expenses were paid from his campaign funds, with the exception of his plane ticket. The cost of his plane ticket to Tampe does not appear to have been *prorated* between the Republican National Lawyers Association meeting and his attendance at the Republican National Convention. This ticket was paid for entirely from the discretionary fund. The cost of this ticket was $498.78. (Attachment 7)

Purchase of ticket to return to Denver early

It is clear that a ticket in the amount of $422.00 was purchased so that Secretary Gessler could return to Colorado early, allegedly because of threats made against him and his family. These threats were documented and at least one of them was investigated by the Colorado Bureau of Investigation and the Colorado State Patrol. Reimbursement from this trip was made from the operating budget of the Secretary of State. In interviews with the Secretary's staff, I learned it was a unanimous decision on their part to have the Secretary return home early because of the threats. (Attachment 7)

July 9th, 2012 payments

In interviews with the Secretary's staff I learned that staff advised the Secretary to submit these expense items for incidental expenses he had incurred, but for which he had not sought reimbursement. I was told that these funds were not used for personal gain. I was told by staff that these funds were used for incidental expenses incurred in the performance of his duties as the Secretary of State. (Attachment 8)

Alarm System

According to staff, the alarm system was activated after the threats were made to Secretary Gessler and his family. (Attachment 9)

The Discretionary Fund

In reviewing the documents and interviewing witnesses it appears the discretionary fund allotted to certain state officials and in this particular case, the Colorado Secretary of State's Office, has been used for various purposes by former Secretaries of State.

Those uses include, but are not limited to, cocktail receptions for county clerks, personal clothing, overseas travel, etc. There appears to have been no real accounting of these funds and there is not a history of receipts being submitted for expenses incurred and charged against the discretionary fund. One Secretary of State allegedly took the entire $5,000 as W-2 income while other Secretaries of State have expensed their items.

There appears to be a history of no real control over the discretionary fund, no procedures for vouchers and/or receipts and no specific direction as to how the discretionary fund is to be used as directed by CRS § 24-9-105(1) (d) for expenditures pursuant to official business as each elected official sees fit.

I noted that in many of Secretary Gessler's requests for reimbursement, he included receipts, while in some cases the requests were submitted using memos.

It should be noted that in interviews with Secretary of State's staff it appears that attempts are being made to put policies and procedures in place with respect to the use of discretionary funds.

Conclusion

This report only reflects the facts regarding the allegations made against Secretary Gessler. It is not a legal opinion and no conclusions are draw as to the propriety of the Secretary's activities.

I reserve the right to amend this report should more information become available to me.

Appendix F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.

U.S. Const. amend. XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male

inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Colo. Const. art. XXIX

Section 1. Purposes and findings

(1) The people of the state of Colorado hereby find and declare that:

(a) The conduct of public officers, members of the general assembly, local government officials, and government employees must hold the respect and confidence of the people;

(b) They shall carry out their duties for the benefit of the people of the state;

(c) They shall, therefore, avoid conduct that is in violation of their public trust or that creates a justifiable impression among members of the public that such trust is being violated;

(d) Any effort to realize personal financial gain through public office other than compensation provided by law is a violation of that trust; and

(e) To ensure propriety and to preserve public confidence, they must have the benefit of specific standards to guide their conduct, and of a penalty mechanism to enforce those standards.

(2) 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 integrity of the office, such costs of a reasonable and necessary nature should be born by the state or local government.

Section 2. Definitions.

As used in this article, unless the context otherwise requires:

(1) "Government employee" means any employee, including independent contractors, of the state executive branch, the state legislative branch, a state agency, a public institution of higher education, or any local government, except a member of the general assembly or a public officer.

(2) "Local government" means county or municipality.

(3) "Local government official" means an elected or appointed official of a local government but does not include an employee of a local government.

(4) "Person" means any individual, corporation, business trust, estate, trust, limited liability company, partnership, labor organization, association, political party, committee, or other legal entity.

(5) "Professional lobbyist" means any individual who engages himself or herself or is engaged by any other person for pay or for any consideration for lobbying. "Professional lobbyist" does not include any volunteer lobbyist, any state official or employee acting in his or her official capacity, except those designated as lobbyists as provided by law, any elected public official acting in his or her official capacity, or any individual who appears as counsel or advisor in an adjudicatory proceeding.

(6) "Public officer" means any elected officer, including all statewide elected officeholders, the head of any department of the executive branch, and elected and appointed members of state boards and

commissions. "Public officer" does not include a member of the general assembly, a member of the judiciary, any local government official, or any member of a board, commission, council or committee who receives no compensation other than a per diem allowance or necessary and reasonable expenses.

Section 3. Gift ban.

(1) No public officer, member of the general assembly, local government official, or government employee shall accept or receive any money, forbearance, or forgiveness of indebtedness from any person, without such person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who accepted or received the money, forbearance or forgiveness of indebtedness.

(2) No public officer, member of the general assembly, local government official, or government employee, either directly or indirectly as the beneficiary of a gift or thing of value given to such person's spouse or dependent child, shall solicit, accept or receive any gift or other thing of value having either a fair market value or aggregate actual cost greater than fifty dollars ($50) in any calendar year, including but not limited to, gifts, loans, rewards, promises or negotiations of future employment, favors or services, honoraria, travel, entertainment, or special discounts, from a person, without the person receiving lawful consideration of equal or greater value in return from the public officer, member of the general assembly, local government official, or government employee who

solicited, accepted or received the gift or other thing of value.

(3) The prohibitions in subsections (1) and (2) of this section do not apply if the gift or thing of value is:

(a) A campaign contribution as defined by law;

(b) An unsolicited item of trivial value less than fifty dollars ($50), such as a pen, calendar, plant, book, note pad or other similar item;

(c) An unsolicited token or award of appreciation in the form of a plaque, trophy, desk item, wall memento, or similar item;

(d) Unsolicited informational material, publications, or subscriptions related to the recipient's performance of official duties;

(e) Admission to, and the cost of food or beverages consumed at, a reception, meal or meeting by an organization before whom the recipient appears to speak or to answer questions as part of a scheduled program;

(f) Reasonable expenses paid by a nonprofit organization or other state or local government for attendance at a convention, fact-finding mission or trip, or other meeting if the person is scheduled to deliver a speech, make a presentation, participate on a panel, or represent the state or local government, provided that the non-profit organization receives less than five percent (5%) of its funding from for-profit organizations or entities;

(g) Given by an individual who is a relative or personal friend of the recipient on a special occasion.

(h) A component of the compensation paid or other incentive given to the recipient in the normal course of employment.

(4) Notwithstanding any provisions of this section to the contrary, and excepting campaign contributions as defined by law, no professional lobbyist, personally or on behalf of any other person or entity, shall knowingly offer, give, or arrange to give, to any public officer, member of the general assembly, local government official, or government employee, or to a member of such person's immediate family, any gift or thing of value, of any kind or nature, nor knowingly pay for any meal, beverage, or other item to be consumed by such public officer, member of the general assembly, local government official or government employee, whether or not such gift or meal, beverage or other item to be consumed is offered, given or paid for in the course of such lobbyist's business or in connection with a personal or social event; provided, however, that a professional lobbyist shall not be prohibited from offering or giving to a public officer, member of the general assembly, local government official or government employee who is a member of his or her immediate family any such gift, thing of value, meal, beverage or other item.

(5) The general assembly shall make any conforming amendments to the reporting and disclosure requirements for public officers, members of the general assembly and professional lobbyists, as provided by law, to comply with the requirements set forth in this section.

(6) The fifty-dollar ($50) limit set forth in subsection (2) of this section shall be adjusted by an

amount based upon the percentage change over a four-year period in the United States bureau of labor statistics consumer price index for Denver-Boulder-Greeley, all items, all consumers, or its successor index, rounded to the nearest lowest dollar. The first adjustment shall be done in the first quarter of 2011 and then every four years thereafter.

Section 4. Restrictions on representation after leaving office.

No statewide elected officeholder or member of the general assembly shall personally represent another person or entity for compensation before any other statewide elected officeholder or member of the general assembly, for a period of two years following vacation of office. Further restrictions on public officers or members of the general assembly and similar restrictions on other public officers, local government officials or government employees may be established by law.

Section 5. Independent ethics commission.

(1) There is hereby created an independent ethics commission to be composed of five members. The purpose of the independent ethics commission shall be to hear complaints, issue findings, and assess penalties, and also to issue advisory opinions, on ethics issues arising under this article and under any other standards of conduct and reporting requirements as provided by law. The independent ethics commission shall have authority to adopt such reasonable rules as may be necessary for the purpose of administering and enforcing the provisions of this article and any other standards of conduct and reporting requirements as provided by law. The

general assembly shall appropriate reasonable and necessary funds to cover staff and administrative expenses to allow the independent ethics commission to carry out its duties pursuant to this article. Members of the commission shall receive no compensation for their services on the commission.

(2) (a) Members of the independent ethics commission shall be appointed in the following manner and order:

(I) One member shall be appointed by the Colorado senate;

(II) One member shall be appointed by the Colorado house of representatives;

(III) One member shall be appointed by the governor of the state of Colorado;

(IV) One member shall be appointed by the chief justice of the Colorado supreme court; and

(V) One member shall be either a local government official or a local government employee appointed by the affirmative vote of at least three of the four members appointed pursuant to subparagraphs (I) to (IV) of this paragraph (a).

(b) No more than two members shall be affiliated with the same political party.

(c) Each of the five members shall be registered Colorado voters and shall have been continuously registered with the same political party, or continuously unaffiliated with any political party,

for at least two years prior to appointment to the commission.

(d) Members of the independent ethics commission shall be appointed to terms of four years; except that, the first member appointed by the Colorado senate and the first member appointed by the governor of the state of Colorado shall initially serve two year terms to achieve staggered ending dates.

(e) If a member is appointed to fill an unexpired term, that member's term shall end at the same time as the term of the person being replaced.

(f) Each member shall continue to serve until a successor has been appointed, except that if a member is unable or unwilling to continue to serve until a successor has been appointed, the original appointing authority as described in this subsection shall fill the vacancy promptly.

(3) (a) Any person may file a written complaint with the independent ethics commission asking whether a public officer, member of the general assembly, local government official, or government employee has failed to comply with this article or any other standards of conduct or reporting requirements as provided by law within the preceding twelve months.

(b) The commission may dismiss frivolous complaints without conducting a public hearing. Complaints dismissed as frivolous shall be maintained confidential by the commission.

(c) The commission shall conduct an investigation, hold a public hearing, and render findings on each

non-frivolous complaint pursuant to written rules adopted by the commission.

(d) The commission may assess penalties for violations as prescribed by this article and provided by law.

(e) There is hereby established a presumption that the findings shall be based on a preponderance of evidence unless the commission determines that the circumstances warrant a heightened standard.

(4) Members of the independent ethics commission shall have the power to subpoena documents and to subpoena witnesses to make statements and produce documents.

(5) Any public officer, member of the general assembly, local government official, or government employee may submit a written request to the independent ethics commission for an advisory opinion on whether any conduct by that person would constitute a violation of this article, or any other standards of conduct or reporting requirements as provided by law. The commission shall render an advisory opinion pursuant to written rules adopted by the commission.

Section 6. Penalty

Any public officer, member of the general assembly, local government official or government employee who breaches the public trust for private gain and any person or entity inducing such breach shall be liable to the state or local jurisdiction for double the amount of the financial equivalent of any benefits obtained by such actions. The manner of

recovery and additional penalties may be provided by law.

Section 7. Counties and municipalities.

Any county or municipality may adopt ordinances or charter provisions with respect to ethics matters that are more stringent than any of the provisions contained in this article. The requirements of this article shall not apply to home rule counties or home rule municipalities that have adopted charters, ordinances, or resolutions that address the matters covered by this article.

Section 8. Conflicting provisions declared inapplicable.

Any provisions in the statutes of this state in conflict or inconsistent with this article are hereby declared to be preempted by this article and inapplicable to the matters covered by and provided for in this article.

Section 9. Legislation to facilitate articles.

Legislation may be enacted to facilitate the operation of this article, but in no way shall such legislation limit or restrict the provisions of this article or the powers herein granted.

Colo. Rev. Stat. § 24-9-105

(1) Beginning with the fiscal year commencing July 1, 1985, and for each fiscal year thereafter, subject to annual appropriation by the general assembly, there is hereby available the following amounts for elected state officials for expenditure in pursuance of official business as each elected official sees fit:

(a) Governor, twenty thousand dollars;

(b) Lieutenant governor, five thousand dollars;

(c) Attorney general, five thousand dollars;

(d) Secretary of state, five thousand dollars;

(e) State treasurer, five thousand dollars.

(2) The appropriations made by paragraphs (a), (b), (c), and (e) of subsection (1) of this section shall be out of any moneys in the general fund not otherwise appropriated, and the appropriation made by paragraph (d) of subsection (1) of this section shall be out of any moneys in the department of state cash fund not otherwise appropriated.

Colo. Rev. Stat. § 24-17-102

(1) Each principal department of the executive department of the state government listed in section 24-1-110 shall institute and maintain systems of internal accounting and administrative control within said department, which shall be applicable to all agencies within said department and which shall provide for:

(a) A plan of organization that specifies such segregation of duties as may be necessary to assure the proper safeguarding of state assets;

(b) Restrictions permitting access to state assets only by authorized persons in the performance of their assigned duties;

(c) Adequate authorization and record-keeping procedures to provide effective accounting control over state assets, liabilities, revenues, and expenditures;

(d) Personnel of quality and integrity commensurate with their assigned responsibilities;

(e) An effective process of internal review and adjustment for changes in conditions.

Colo. Rev. Stat. § 24-18-103

(1) The holding of public office or employment is a public trust, created by the confidence which the electorate reposes in the integrity of public officers, members of the general assembly, local government officials, and employees. A public officer, member of the general assembly, local government official, or employee shall carry out his duties for the benefit of the people of the state.

(2) A public officer, member of the general assembly, local government official, or employee whose conduct departs from his fiduciary duty is liable to the people of the state as a trustee of property and shall suffer such other liabilities as a private fiduciary would suffer for abuse of his trust. The district attorney of the district where the trust is violated may bring appropriate judicial proceedings on behalf of the people. Any moneys collected in such actions shall be paid to the general fund of the state or local government. Judicial proceedings pursuant to this section shall be in addition to any criminal action which may be brought against such public officer, member of the general assembly, local government official, or employee.