

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO</p> <p>Denver City and County Building 1437 Bannock Street Denver, CO 80202 (720) 865-8301</p>	
<p><b>Plaintiffs:</b></p> <p>COLORADO COMMON CAUSE, a non-profit corporation, and</p> <p>COLORADO ETHICS WATCH</p> <p>v.</p> <p><b>Defendant:</b></p> <p>SCOTT GESSLER, in his capacity as Colorado Secretary of State</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Jennifer H. Hunt, # 29964 Nathan P. Flynn, # 39336 Hill &amp; Robbins, P.C. 1441 18th Street, Suite 100 Denver, CO 80202-1256 Phone: (303) 296-8100 Fax: (303) 296-2388 E-mail: <a href="mailto:jhunt@hillandrobbs.com">jhunt@hillandrobbs.com</a> <a href="mailto:nflynn@hillandrobbs.com">nflynn@hillandrobbs.com</a> <i>Attorneys for Plaintiff Colorado Common Cause</i></p> <p>Luis Toro, #22093 Colorado Ethics Watch 1630 Welton Street, Suite 415 Denver, Colorado 80202 Telephone: (303) 626-2100 Fax: (303) 626-2101 E-mail: <a href="mailto:lto@coloradoforethics.org">lto@coloradoforethics.org</a> <i>Attorney for Plaintiff Colorado Ethics Watch</i></p>	<p>Case Number: _____</p> <p>Ctrm/Div: _____</p>
<p style="text-align: center;"><b>COMPLAINT FOR JUDICIAL REVIEW OF AGENCY ACTION</b></p>	

Plaintiffs Colorado Common Cause and Colorado Ethics Watch, by and through their attorneys, submit this Complaint for Judicial Review of an Agency Action and allege as follows:

**PARTIES, JURISDICTION AND VENUE**

1. Colorado Common Cause (“CCC”) is the state chapter of the national organization Common Cause. It is a non-profit organization qualified to conduct business in Colorado.
2. Ethics Watch is the registered trade name of Citizens for Responsibility and Ethics in Washington, a nonprofit corporation qualified to conduct business in Colorado.
3. Respondent Scott Gessler, in his official capacity (“the Secretary” or “Respondent”), is the duly elected Secretary of State of the State of Colorado with responsibility for enforcing Colorado’s campaign finance laws and enacting rules governing the same.
4. Judicial review of Rule 4.27 is available under the Colorado Administrative Procedures Act, C.R.S. § 24-4-106.
5. Rule 4.27 was adopted by the Secretary on May 13, 2011. This petition for judicial review is timely filed pursuant to C.R.S. § 24-4-106(4).
6. CCC’s members are adversely affected or aggrieved by Respondent’s action. CCC is a non-profit, non-partisan grassroots membership organization dedicated to open and accountable government, including campaign finance reform. CCC’s members are approximately 5300 Colorado residents in 51 counties across the state. All of CCC’s members are impacted by Rule 4.27’s creation of a loophole allowing certain financial contributions to issue committees to remain undisclosed. The issues in this case and the interests sought to be protected are germane to CCC’s purpose. Per its mission statement, part of CCC’s mission is to: “strengthen public participation and public faith in our institutions of self-government;” “promote fair and honest elections;” and “protect the civil rights of all Americans.” There is no doubt that the interests CCC seeks to protect in this action are germane to CCC’s purpose.
7. Ethics Watch is also adversely affected or aggrieved by Respondent’s action. Ethics Watch is a “person” for purposes of Colo. Const. art. XXVIII, § 9, which authorizes “any person” to file complaints for violations of Colorado’s campaign finance laws. Ethics Watch has exercised this right on several occasions, including in a case involving an issue committee found to have violated campaign finance laws. *Colorado Ethics Watch v. Safe Streets Colorado*, Office of Administrative Courts Case No. OS 20100032. Ethics Watch will be harmed by the Rule because the Rule conflicts with the Colorado Constitution and will make Ethics Watch’s efforts to enforce campaign finance laws in issue committee elections more difficult.
8. Venue is proper in this Court pursuant to C.R.S. § 24-4-106(4).

## GENERAL ALLEGATIONS

9. This is an action for judicial review and declaratory judgment regarding a rulemaking by the Colorado Secretary of State. The Secretary has exceeded his authority to administer and enforce campaign finance laws by dramatically increasing the constitutional threshold for regulation of issue committees. Purportedly in response to a decision of the Tenth Circuit Court of Appeals on an as-applied challenge to campaign finance disclosure provisions of article XXVIII of the Colorado Constitution, the Secretary adopted a rule that nullifies provisions of the Colorado Constitution and duly enacted statutes and replaces them with weaker disclosure rules enacted by the Secretary. Plaintiffs ask the Court to set aside the Secretary's unlawful action.

10. Article XXVIII, § 1 of the Colorado Constitution states that the "interests of the public are best served by ... providing for full and timely disclosure of campaign contributions." Consistent with this purpose, Section 7 affirms and extends disclosure requirements set forth in the Fair Campaign Practices Act to, among other persons and entities, issue committees.

11. The definition of "issue committee" in Article XXVIII provides that a person or organization becomes an issue committee, among other things, when it "has accepted or made contributions or expenditures **in excess of two hundred dollars** to support or oppose any ballot issue or ballot question." Colo. Const. art. XXVIII, § 2(10)(a)(II) (emphasis added). Issue committees are required to disclose all contributions and expenditures. Colo. Const. art. XXVIII, § 7; C.R.S. § 1-45-108(1)(a)(I).

12. On November 5, 2010, the Tenth Circuit Court of Appeals issued its decision in *Sampson v. Buescher*, Case Nos. 08-1398 and 08-1415, determining that, as applied to the facts presented in that case (involving a municipal annexation election), the \$200 threshold for regulation as an issue committee was unduly burdensome. The *Sampson* case did not decide that Colorado Constitution article XXVIII, §2(10)(a)(II) was unconstitutional on its face.

13. Respondent initiated the rulemaking process for Rule 4.27 by issuance of a Notice of Rulemaking Hearing and Proposed Statement of Basis, Purpose and Specific Statutory Authority dated December 10, 2010 ("December 10 Notice"). The December 10 Notice indicated that the addition of a new Rule 4.27 was intended to provide guidance in light of the ruling in the *Sampson* case. A hearing pursuant to the December 10 Notice was held on January 26, 2011.

14. On March 30, 2011, Respondent issued a Notice of Second Rulemaking Hearing and Revised Proposed Statement of Basis, Purpose, and Specific Statutory Authority ("March 30 Notice"). The revised proposed Rule 4.27 raised the threshold for regulation as an issue committee from \$200 to \$5,000 and exempted issue committees from all disclosure requirements for any contributions or expenditures up to \$5,000. A second rulemaking hearing was held on May 6, 2011.

15. CCC and Ethics Watch participated in the rulemaking proceedings before the Secretary leading to the adoption of Rule 4.27, including the submission of written comments on

the proposed rule. Ethics Watch provided oral testimony at the January 26, 2011 hearing and CCC provided testimony at both hearings. Plaintiffs' comments included the assertion that the adoption of Rule 4.27 exceeded the Secretary's authority, and was inconsistent with the Colorado Constitutional provisions governing campaign finance and contrary to the statutory disclosure requirements of the Fair Campaign Practices Act.

### **FIRST CLAIM FOR RELIEF**

#### **(Judicial Review of Agency Action – Declaratory Judgment – \$5,000 Threshold)**

16. Plaintiffs incorporate paragraphs 1 through 15 above.

17. Under Article XXVIII, § 2(10) of the Colorado Constitution, any person or group supporting or opposing a ballot issue or ballot question becomes an "issue committee" subject to constitutional and statutory reporting requirements upon the receipt of \$200 in contributions or the expenditure of \$200.

18. Rule 4.27 changes the threshold for regulation as an issue committee under the Colorado Constitution and the Fair Campaign Practices Act to \$5,000.

19. The Secretary's enactment of Campaign and Political Finance Rule 4.27 is contrary to Article XXVIII, §14 of the Colorado Constitution, and Colorado case law, and exceeds the Secretary of State's authority to promulgate rules to "administer and enforce" campaign finance laws. Colo. Const. art. XXVIII, § 9; *see also* C.R.S. §§ 1-1-107(2)(a) and 1-45-111.5(1). The Secretary of State has no authority to promulgate rules that add, modify or conflict with constitutional provisions. *Sanger v. Dennis*, 148 P.3d 404, 408 (Colo. App. 2006).

20. Because the *Sampson* case involved an as-applied challenge to Article XXVIII, § 2(10), its holding does not "affect other provisions or applications of the article which can be given effect without the invalid provision or application." Colo. Const. art. XXVIII, §14. Rule 4.27 violates Article XXXVIII, § 14, because it does affect other provisions and applications of article XXXVIII that are not implicated by the holding in the *Sampson* case.

21. Any regulation that is inconsistent with or contrary to statute is void. C.R.S. § 24-4-103(8)(a). Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. C.R.S. § 24-4-106(7). Campaign and Political Finance Rule 4.27 must be set aside to the extent it purports to relieve organizations who meet the \$200 threshold from Colorado reporting requirements.

### **SECOND CLAIM FOR RELIEF**

#### **(Judicial Review of Agency Action – Declaratory Judgment – Disclosure of Contributions and Expenditures)**

22. Plaintiffs incorporate paragraphs 1 through 21 above.

23. The Colorado Constitution requires “full and timely disclosure of campaign contributions.” Colo. Const. art. XXVIII, §§ 1 and 7. The Fair Campaign Practices Act specifically requires issue committees to report all contributions, the names and addresses of all persons who contribute twenty dollars or more, and all expenditures. C.R.S. § 1-45-108(1)(a)(I).

24. Paragraph A of Rule 4.27 states that “contributions to and expenditures made prior to reaching the \$5,000 threshold are not required to be reported.” Rule 4.27 violates Art. XXVIII, Art. 7 of the Colorado Constitution and C.R.S. § 1-45-108(1)(a)(I) by impermissibly removing the first \$5,000 in campaign contributions and expenditures from constitutional and statutory reporting requirements.

25. The Secretary’s enactment of Paragraph A of Campaign and Political Finance Rule 4.27 is contrary to Colorado law and beyond the Secretary of State’s authority to promulgate rules to “administer and enforce” campaign finance laws. Colo. Const. art. XXVIII, § 9; see also C.R.S. §§ 1-1-107(2)(a) and 1-45-111.5(1). The Secretary of State has no authority to promulgate rules that add, modify or conflict with constitutional provisions. *Sanger*, 148 P.3d at 408.

26. The Secretary’s enactment of paragraph A of Rule 4.27 is arbitrary and capricious in that there is no rational basis in the record to exempt certain contributions to and expenditures by issue committees from disclosure.

27. Any regulation that is inconsistent with or contrary to statute is void. C.R.S. § 24-4-103(8)(a). Any agency action that is arbitrary or capricious, contrary to a constitutional right, in excess of statutory authority, an abuse of discretion, unsupported by the record, or otherwise contrary to law shall be held unlawful and set aside. C.R.S. § 24-4-106(7). Campaign and Political Finance Rule 4.27 must be set aside to the extent it purports to relieve organizations who meet the \$200 threshold from Colorado reporting requirements.

### **PRAYER FOR RELIEF**

Plaintiff requests that this Court hold unlawful and set aside the agency action adopting Secretary of State Rule 4.27, 8 CCR 1505-6, pursuant to § 24-4-106(7) and/or declare the rule unlawful and void under C.R.C.P. 57, and for other such relief as the Court deems proper.

Dated: June 9, 2011.

Respectfully submitted,

*signed original on file at Hill & Robbins, P.C.*

*/s/ Jennifer H. Hunt*

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Respectfully submitted,

*signed original on file at Colorado Ethics Watch*

*/s/ Luis Toro*

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**Plaintiff's Address**

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