

<p>DISTRICT COURT, DENVER COUNTY, COLORADO</p> <p>1437 Bannock Street, Room 256 Denver, CO 80202 720-865-8301</p> <hr/> <p>Petitioners/Plaintiffs:</p> <p>THE LIBERTARIAN PARTY OF COLORADO, RICHARD N. ANGLUND and GORDON ROY BUTT</p> <p>vs.</p> <p>Respondents/Defendants:</p> <p>SCOTT GESSLER, in his official capacity as Secretary of State of the State of Colorado; WAYNE W. WILLIAMS, in his official capacity as El Paso County Clerk and Recorder; and GILBERT ORTIZ, in his official capacity as Pueblo County Clerk and Recorder</p> <hr/> <p>Attorney for Petitioners/Plaintiffs:</p> <p>William F. Robinson, III Atty. Reg. No.: 4010 Robinson & Robinson, PC. 4105 E Girard Ave Denver, Colorado 80222</p> <p>Phone Number: 303.758.1125 E-mail: williamfrobinsoniii@gmail.com</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number:</p> <p>13 CV _____</p>
<p>PETITION FOR EMERGENCY RELIEF UNDER § 1-1-113(1), C.R.S., AND COMPLAINT FOR DECLARATORY JUDGMENT</p>	

COME NOW Petitioners/Plaintiffs, by and through their attorney, William F. Robinson, III, pursuant to § 1-1-113, C.R.S., and 28 U.S.C. § 1983, and for their Petition and Complaint against the Respondent/Defendant Scott Gessler (hereinafter “the Secretary”), Respondent

Wayne W. Williams (“Clerk and Recorder Williams”) and Respondent Gilbert Ortiz (“Clerk and Recorder Ortiz”), allege and aver as follows:

I. INTRODUCTION

1. This is a ballot access case involving the September 10, 2013, recall elections of State Senator Angela Giron for State Senate District 3 (“SD-3”) and John Morse for State Senate District 11 (“SD-11”). Pursuant to Article XXI, Section 3 of the Colorado Constitution, the deadline for filing successor candidate petitions is “not less than fifteen days before such recall election,” which in this case is August 26, 2013. However, Defendant Scott Gessler, acting in his official capacity as the Secretary of State, relying on § 1-12-117(1), C.R.S., set July 29, 2013, as the deadline for filing candidate petitions for these two recall elections. Because the constitutional provision directly addresses the deadline for filing successor candidate petitions, it controls that deadline.

2. Petitioners/Plaintiffs are seeking an order from this Court directing the Secretary to impose the constitutional deadline for successor candidate petitions for these two recall elections and directing Respondents Clerk and Recorder Williams and Clerk and Recorder Ortiz to refrain from instituting any procedures for circulating ballots or sample ballots or ballot content until after the Secretary determines whether any successor candidate petitions filed on or before August 26, 2013 are valid.

3. This case impacts upon the fundamental freedoms of political expression and association of both the candidates seeking access to the special recall election ballots as well as the electors of SD-3 and SD-11.

II. PARTIES

4. Petitioner/Plaintiff The Libertarian Party of Colorado (“LPC”) is qualified as a Minor Political Party under the laws of the State of Colorado, § 1-4-1301, *et seq.* There are members of the LPC who are eligible electors in both SD-3 and SD-11.

5. Petitioner/Plaintiff Richard N. Anglund is a resident of Pueblo County, Colorado and an eligible elector for Senate District 3. Mr. Anglund has been a registered member of the Democrat Party at all times pertinent hereto, including since before January 1, 2013 and continuing through today. Mr. Anglund is qualified to run as a candidate in the recall election for Senate District 3 that is scheduled for September 10, 2013.

6. Petitioner/Plaintiff Gordon Roy Butt is a resident of El Paso County, Colorado and an eligible elector for Senate District 11. Mr. Butt has been a registered member of the Libertarian Party of Colorado at all times pertinent hereto, including since before January 1, 2013 through today. Mr. Butt is qualified to run as a candidate in the recall election for Senate District 11 that is scheduled for September 10, 2013.

7. Respondent/Defendant Scott Gessler is the Secretary of State of the State of Colorado. Secretary Gessler is the chief election officer for the state of Colorado and pursuant to § 1-1-107(1), C.R.S., is responsible for enforcing the election statutes. Petitioners/Plaintiffs are suing Secretary Gessler in his official capacity only.

8. Respondent Clerk and Recorder Ortiz is the Pueblo County Clerk and Recorder. All of Pueblo County encompasses all of SD-3. In his capacity as the Pueblo County Clerk and Recorder, pursuant § 1-12-107(1), C.R.S., Mr. Ortiz is charged with administering the recall election in SD-3 in Pueblo County and, in doing so, must comply with the Colorado

Constitution. Petitioners/Plaintiffs are suing Clerk and Recorder Mr. Ortiz in his official capacity only.

9. Respondent Clerk and Recorder Williams is the El Paso County Clerk and Recorder. All of El Paso County encompasses all of SD-11. In his capacity as the El Paso County Clerk and Recorder, pursuant § 1-12-107(1), C.R.S., Mr. Williams is charged with administering the recall election in SD-11 in El Paso County and, in doing so, must comply with the Colorado Constitution. Petitioners/Plaintiffs are suing Clerk and Recorder Mr. Williams in his official capacity only.

III. JURISDICTION AND VENUE

10. Pursuant to § 1-1-113(1), a district court has jurisdiction over a controversy between election officials and a candidate and/or elector alleging that the official is about to breach or neglect a duty or commit a wrongful act.

11. Because the Secretary of State is the Respondent/Defendant in this action, venue is proper in this Court pursuant to C.R.C.P. 98(b)(2).

IV. GENERAL ALLEGATIONS

A. FACTUAL ALLEGATIONS

12. On June 18, 2013, the Secretary issued a Statement of Sufficiency that the petition to recall Senator John Morse (SD-11) received more than enough valid signatures.

13. On June 24, 2013, the Secretary issued a Statement of Sufficiency that the petition to recall Senator Angela Giron (SD-3) received more than enough valid signatures.

14. On July 18, 2013, pursuant to Article XXI, Section 2 of the Colorado Constitution, Governor Hickenlooper issued Executive Order D 2013-021 declaring September 10, 2013, as the date for the special recall elections in Senate District 11 and Senate District 3. (A copy of Executive Order D 2013-021 is attached hereto as Exhibit 1).

15. Mr. Anglund seeks nomination as a successor candidate for the SD-3 recall election. (A copy of Mr. Anglund's Candidate Affidavit is attached hereto as Exhibit 2).

16. On August 1, 2013, Mr. Anglund submitted his successor candidate petition to the Secretary for approval of the format of his petition.

17. On August 2, 2013, Ben Schler of the Elections Division in the Secretary's office issued a letter to Mr. Anglund in which he stated "[u]nder section 1-12-117(1), C.R.S., and Election Rule 32.6, a recall successor candidate must submit his or her candidate petitions with the requisite number of valid signatures to the Secretary of State 'no later than ten calendar days after the designated election official sets the election date . . . ' " (A copy of Ben Schler's August 2, 2013, letter to Mr. Anglund is attached hereto as Exhibit 3).

18. Mr. Schler informed Mr. Anglund that under section 1-12-117(1), C.R.S., and Election Rule 32.6, the deadline for filing successor candidate petitions was July 29, 2013. *See* Ex. 3.

19. Thus, Mr. Schler informed Mr. Anglund that because the deadline for filing successor candidate petitions had passed, that "the Secretary of State cannot approve your petition format." *Id.*

20. Gordon Roy Butt seeks nomination as a successor candidate for the SD-11 recall election. (A copy of Mr. Butt's Candidate Affidavit is attached hereto as Exhibit 4).

21. On July 30, 2013, Mr. Butt submitted his successor candidate petition to the Secretary for approval of the format of his petition.

22. On August 1, 2013, Ben Schler of the Elections Division in the Secretary's office issued a letter to Mr. Butt in which he stated "[u]nder section 1-12-117(1), C.R.S., and Election Rule 32.6, a recall successor candidate must submit his or her candidate petitions with the requisite number of valid signatures to the Secretary of State 'no later than ten calendar days after the designated election official sets the election date . . .'" (A copy of Ben Schler's August 1, 2013, letter to Mr. Butt is attached hereto as Exhibit 5).

23. Mr. Schler informed Mr. Butt that under section 1-12-117(1), C.R.S., and Election Rule 32.6, the deadline for filing successor candidate petitions was July 29, 2013. *See* Ex. 5.

24. Thus, Mr. Schler informed Mr. Butt that because the deadline for filing successor candidate petitions had passed, that "the Secretary of State cannot approve your petition format." *Id.*

25. On August 6, 2013, the Secretary issued a Notice of Recall for State Senate District No. 11. (A copy of the Notice of Recall is attached hereto as Exhibit 6.)

26. On August 6, 2013, the Secretary issued a Notice of Recall for State Senate District No. 3. (A copy of the Notice of Recall is attached hereto as Exhibit 7.)

B. THE CONSTITUTIONAL, STATUTORY AND REGULATORY FRAMEWORK FOR RECALL ELECTIONS

27. The protocol for conducting recall elections is set forth in Article XXI of the Colorado Constitution. Section 3 of Article XXI provides, in pertinent part, that:

Candidates for the office may be nominated by petition, as now provided by law, which petition shall be filed in the office in which petitions for nomination to office are required by law to be filed ***not less than fifteen days before such recall election.*** (Emphasis supplied.)

28. Thus, pursuant to Section 3 of Article XXI, the deadline for filing successor candidate petitions for the September 10, 2013 recall elections for SD-3 and SD-11 is August 26, 2013.

29. Section 1-12-117(1), C.R.S., provides, in pertinent part, that:

Nomination petitions may be circulated beginning the first date of which a protest may be filed and shall be filed no later than ten calendar days after the designated election official sets the election date as provided in section 1-12-111.

30. Election Rule 32.6 provides that:

In accordance with section 3 of article XXI of the Colorado constitution and section 1-12-117 (1), C.R.S., for partisan recall elections involving a state officer, in order to appear on the ballot a successor candidate must file a nomination petition with the Secretary of State no later than ten calendar days after the Governor sets the election date. A write-in candidate must file an affidavit of intent to run as a write-in candidate no later than the fifteenth day before the election.

31. Thus, pursuant to Section 1-12-117(1), C.R.S., and Election Rule 32.6, the deadline for filing successor candidate petitions for the September 10, 2013 recall elections for SD-3 and SD-11 was July 29, 2013.

32. Section 1-12-123 C.R.S., provides that:

To the extent that the provisions of this part 1 concerning the recall of state officers conflict with the provisions of article XXI of the state constitution, the provisions of article XXI of the state constitution shall control.

FIRST CAUSE OF ACTION

ORDER UNDER § 1-1-113, C.R.S., THAT THE SECRETARY'S IMPOSITION OF THE DEADLINE FOR FILING SUCCESSOR CANDIDATE PETITIONS IS INVALID AND THAT THE DEADLINE FOR FILING SUCCESSOR CANDIDATE PETITIONS FOR THE RECALL ELECTIONS FOR SD-3 AND SD-11 IS AUGUST 26, 2013

33. By this reference, Petitioners incorporate each and every allegation and averment set forth in paragraphs 1 through 32 as though fully set forth herein.

34. An actual controversy exists between Petitioners, on the one hand, and the Secretary, on the other hand, with regard to the deadline for filing successor candidate petitions for September 10, 2013, recall elections for SD-3 and SD-11. The Petitioners contend that Art. XXI, Section 3 of the Colorado Constitution, which sets the deadline for filing successor candidate petitions controls and that, accordingly, the deadline for filing such petitions is August 26, 2013. The Secretary, on the other hand, contends that § 1-12-117(1), C.R.S., controls and as such the deadline was July 29, 2013.

35. Art. XXI, Section 3 of the Colorado Constitution specifically addresses the deadline for filing successor candidate petitions for recall elections. As a matter of fundamental constitutional law, a constitutional provision that directly addresses an issue controls over any conflicting statutory or regulatory provision. Moreover, § 1-12-123 C.R.S., specifically provides that “[t]o the extent that the provisions of this part 1 concerning the recall of state officers conflict with the provisions of article XXI of the state constitution, the provisions of article XXI of the state constitution shall control.”

36. Petitioners are entitled to an order directing Defendant Secretary of State Scott Gessler to comply with Art. XXI, Section 3 of the Colorado Constitution and, pursuant to Section 3, to set August 26, 2013 as the deadline for submitting successor candidate petitions for

approval and for approving successor candidate petitions for the September 10, 2013, SD-3 and SD-11 recall elections.

SECOND CAUSE OF ACTION

ORDER UNDER § 1-1-113, C.R.S., RESTRAINING THE SECRETARY, CLERK AND RECORDER ORTIZ AND CLERK AND RECORDER WILLIAMS FROM INSTITUTING ANY PROCEDURES FOR CIRCULATING BALLOTS UNTIL AFTER THE SECRETARY DETERMINES WHETHER ANY SUCCESSOR CANDIDATE PETITIONS FILED ON OR BEFORE AUGUST 26, 2013 ARE VALID

37. By this reference, Petitioners incorporate each and every allegation and averment set forth in paragraphs 1 through 36 as though fully set forth herein.

38. As set forth above, an actual controversy exists between Petitioners, on the one hand, and the Secretary, on the other hand, with regard to the deadline for filing successor candidate petitions for September 10, 2013, recall elections for SD-3 and SD-11.

39. If the Petitioners argument is correct and Secretary Art. XXI, Section 3 of the Colorado Constitution controls the deadline for filing successor candidate petitions for recall elections, then the Secretary, Clerk and Recorder Ortiz and Clerk and Recorder Williams must refrain from instituting any procedures for circulating ballots or the contents of the ballot or a sample ballot until after the Secretary determines whether any successor candidate petitions filed on or before August 26, 2013, are valid.

40. The Secretary has sent a Notice of Recall Election to Clerk and Recorder Ortiz for SD-3 and to Clerk and Recorder Williams for SD-11. These notices are invalid because the deadline for filing successor candidate petitions for the recall elections has not yet passed. If Clerk and Recorder Ortiz and/or Clerk and Recorder Williams begin to circulate ballots or the

contents of the ballot or a sample ballot based on the Secretary's invalid Notices, it will cause massive vote confusion and have the potential of tainting the entire election.

41. Petitioners are entitled to an order directing Defendant Secretary of State Scott Gessler, Clerk and Recorder Ortiz and Clerk and Recorder Williams to comply with Art. XXI, Section 3 of the Colorado Constitution and, refrain from circulating ballots for the September 10, 2013, SD-3 and SD-11 recall election until after the Secretary determines whether any successor candidate petitions filed on or before August 26, 2013, are valid.

THIRD CAUSE OF ACTION

ORDER UNDER § 1-1-113, C.R.S., DECLARING THAT RECALL ELECTIONS CANNOT BE HELD BY A MAIL BALLOT ELECTION

42. By this reference, Petitioners incorporate each and every allegation and averment set forth in paragraphs 1 through 41 as though fully set forth herein.

43. As set forth above, an actual controversy exists between Petitioners, on the one hand, and the Secretary, on the other hand, with regard to the deadline for filing successor candidate petitions for September 10, 2013, recall elections for SD-3 and SD-11. This controversy also leads to another actual controversy between Petitioners, on the one hand, and the Secretary and Clerk and Recorder Ortiz and Clerk and Recorder Williams on the other hand, with regard to whether a recall election can be held by mail ballot election under § 1-7.5-101, C.R.S., *et seq.*

44. There is no dispute that pursuant to §1-7.5-107(3)(a)(I), C.R.S., ballots for a mail ballot election must be sent 18-22 days before the election.

45. If, as the Petitioners/Plaintiffs contend, the deadline for filing successor candidate petitions for recall elections is not less than fifteen days before the special recall election, then the Article 7.5 of Title 1 would not be operative for recall elections.

46. Clerk and Recorder Williams has indicated that he intends to conduct a mail ballot election under § 1-7.5-101, C.R.S., *et seq.* See Unopposed Motion to Intervene Clerk and Recorder Williams filed in *Gessler v. Hickenlooper*, Case No. 2013 CV 033098, a copy of which is attached hereto as Exhibit 8. Clerk and Recorder Williams has also indicated that military ballots will be mailed no later than August 9, 2013. See Media Advisory, a copy of which is attached hereto as Exhibit 9.

47. Petitioners are entitled to an order directing Defendant Secretary of State Scott Gessler, Clerk and Recorder Ortiz and Clerk and Recorder Williams to comply with Art. XXI, Section 3 of the Colorado Constitution and not to conduct either of the recall elections as mail ballot elections under § 1-7.5-101, C.R.S., *et seq.*

FOURTH CAUSE OF ACTION

DECLARATORY RELIEF SEEKING A JUDGMENT AGAINST DEFENDANT DECLARING THAT THE SETTING OF THE DEADLINE OF JULY 29, 2013 VIOLATES THE FIRST AMENDMENT RIGHTS OF THE PLAINTIFFS AND THE PLAINTIFFS' RIGHT TO EQUAL PROTECTION OF THE LAWS

48. By this reference, Plaintiffs incorporate each and every allegation and averment set forth in paragraphs 1 through 47 as though fully set forth herein.

49. As set forth above, an actual controversy exists between Plaintiffs, on the one hand, and the Secretary, on the other hand, with regard to the deadline for filing successor candidate petitions.

50. The Secretary's imposition of the arbitrary and capricious and legally invalid deadline for filing successor candidate petitions infringes upon the right of political expression and association of Mr. Anglund and Mr. Butt, as potential candidates in the recall elections, and infringes upon the right of political expression and association of the voters in SD-3 and SD-11, including members of the LPC who are eligible electors in SD-3 and SD-11.

51. This cause of action arises under the First Amendment of the United States Constitution, as incorporated into the Fourteenth Amendment, that guarantees the freedoms of political expression and political association.

52. This lawsuit seeks to redress the deprivation under color of state law of rights secured by the United States Constitution. This lawsuit is authorized by 42 U.S.C. §§ 1983 and 1988.

53. Pursuant to 42 U.S.C. § 1983, *et seq.*, Plaintiffs are entitled to a declaratory judgment declaring their rights and to their reasonable attorneys' fees and costs in this case.

WHEREFORE, premises submitted, Petitioners/Plaintiffs pray for judgment in their favor and against Respondent/Defendant Secretary of State Scot Gessler as follows:

- A. An order issued pursuant to § 1-1-113(1), C.R.S., ordering Respondent Secretary of State Scott Gessler to approve the format of successor candidate petitions and to accept successor candidate petitions up to and including August 26, 2013;
- B. An order issued pursuant to § 1-1-113(1), C.R.S., ordering Respondent Secretary of State Scott Gessler, Clerk and Recorder Ortiz and Clerk and Recorder Williams from instituting any procedures for circulating ballots or sample ballots or ballot content until after the Secretary determines whether any successor candidate petitions filed on or before August 26, 2013 are valid;
- C. A declaratory judgment in favor of Plaintiffs and against Defendant Secretary of State Scott Gessler declaring that the

COLO. CONST. art. XXI, section 3, controls the deadline for filing successor candidate petitions in a recall election and pursuant to Section 3, successor candidate petitions in a recall election are due fifteen days before such recall election;

- D. A declaratory judgment in favor of Plaintiffs and against Defendant Secretary of State Scott Gessler declaring that the COLO. CONST. art. XXI, section 3, controls the deadline for filing successor candidate petitions in a recall election and because Section 3 provides that successor candidate petitions in a recall election are due fifteen days before such recall election, recall elections cannot be conducted as mail ballot elections under § 1-7.5-101, C.R.S., *et seq.*;
- E. A declaratory judgment in favor of Plaintiffs and against Defendant Secretary of State Scott Gessler declaring that his imposition of an arbitrary and capricious and constitutionally invalid deadline for filing successor candidate petitions for the SD-3 and SD-11 recall elections violates the right of political expression and association of Mr. Anglund and Mr. Butt, as potential candidates in the recall elections, and infringes upon the right of political expression and association of the voters in SD-3 and SD-11, including members of the LPC who are eligible electors in SD-3 and SD-11;
- F. For costs of suit herein, including Plaintiffs' reasonable attorney's fees pursuant to 42 U.S.C. § 1988 against Defendant Secretary of State Scott Gessler; and,
- G. For such other and further relief as the Court may deem just and reasonable under the circumstances.

Respectfully submitted, this 7th day of August, 2013.

/s/ William F. Robinson, III

By: _____

William F. Robinson, III

Address of Petitioners/Plaintiffs:

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In accordance with C.R.C.P. 121, Section 1-26(9), a printed copy of this document with the original signature is maintained at counsel's office and available for inspection.