

DISTRICT COURT, EL PASO COUNTY, COLORADO
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TIMOTHY J. KIRKWOOD and PAUL T. PRENTICE,

Petitioners,

v.

HOLLY WILLIAMS, CARRIE GEITNER, STAN VANDERWERF, LONGINOS GONZALEZ, JR. and CAMI BREMER in their official capacities as members of Respondent **BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY**; and **CHUCK BROERMAN**, in his official capacity as **El Paso County Clerk and Recorder**,

Respondents.

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Case Number: 2022CV31462

Div. 14

RESPONDENTS' MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)

Holly Williams, Carrie Geitner, Stan VanderWerf, Longinos Gonzalez, Jr., and Cami Bremer, in their official capacity as members of the Board of County Commissioners of El Paso

County (the “BOCC”), and Chuck Broerman, the El Paso County Clerk and Recorder (the “Clerk”), by and through the Office of the County Attorney of El Paso County, Colorado, respectfully move this Court to dismiss this case under C.R.C.P. 12(b)(5).

Certificate of Compliance with C.R.C.P. 121, Section 1-15(8)

Counsel for the Respondents conferred with counsel for the Petitioners about the relief requested in this motion. Petitioners oppose this Motion.

I. INTRODUCTION

The Petitioners seek a “substantial compliance” order under C.R.S. § 1-1-113 allowing them to “examine” El Paso County’s election equipment to their satisfaction and requiring El Paso County to stop using this election equipment in lieu of a “hand count” during the November 2022 General Election and beyond. *Amended Verified Petition for Relief Under C.R.S. § 1-1-113* (the “Petition”), pp. 3, 10. Petitioners rely on arguments their same counsel unsuccessfully made in other matters. *See Hanks v. Griswold*, Denver Dist. Ct. Case No. 2021CV33691; *Griswold v. Schroeder*, Elbert Dist. Ct. Case No. 2022CV30016. Thankfully, the Court does not need to sift through Petitioners’ recycled arguments because it can dismiss this matter. As explained below, the Petition offers conclusory allegations; fails to establish good cause to believe the election code has, or will, be breached; and is barred by the equitable doctrine of laches because Petitioners waited for over a year to bring this suit, when preparations for the 2022 General Election were already underway. Accordingly, the Court should dismiss the Petition with prejudice and award such costs and fees as the Court deems appropriate.

II. RELEVANT ELECTION LAW

The Clerk acts as the “designated election official” under C.R.S. §§ 1-1-110(3) and 1-1-104(8). As such, the Clerk is responsible for conducting the upcoming 2022 General Election in El Paso County. *See, e.g.*, C.R.S. §§ 1-1-104(17), 1-4-110(3). The Clerk’s duties are extensive. They range from ensuring ballot drop-boxes and Voter Service Polling Centers are available; to laying out, proofing, and creating over 400,000 ballots; to making sure those ballots are delivered to all eligible electors, including military and overseas voters. *See, e.g.*, C.R.S. §§ 1-5-101 to -908 (notice of and preparation for elections), 1-7-101 to -1004 (conduct of elections), 1-7.5-101 to -210 (mail ballot elections).

The Clerk must complete his ballot-related duties within a strict timeframe leading up to the General Election. This year’s General Election is November 8, 2022.¹ The Clerk must mail ballots to military and overseas voters by September 24, 2022. *See Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”), 52 U.S.C. § 20302(a)(8)(A)*. Furthermore, the Clerk is already preparing El Paso County’s ballots for production now that the Colorado Secretary of State (the “Secretary”) has certified the ballot order and content. *See C.R.S. § 1-5-203*. This background is critical for the Court to understand given the extraordinary relief the Petitioners seek.

III. REQUEST FOR JUDICIAL NOTICE

“When considering a motion to dismiss for failure to state a claim, [a court] may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by

¹ *See* 2022 Election Calendar, Colo. Sec’y of State, available at <https://www.sos.state.co.us/pubs/elections/calendars/2022ElectionCalendar.pdf> (last visited Sept. 14, 2022).

reference, and matters proper for judicial notice.” *Fry v. Lee*, 2013 COA 100, ¶ 19 (citing *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011)). Furthermore, this Court may consider documents attached to, or specifically referenced in, the Complaint when ruling on a motion to dismiss. *Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (“[I]f a document is referred to in the complaint and is central to the plaintiff’s claim, the defendant may submit an authentic copy to the court to be considered on a motion to dismiss, and the court’s consideration of the document does not require conversion of the motion to one for summary judgment.”). Accordingly, the Respondents respectfully ask the Court to take judicial notice of the following, which are appropriately considered under this standard:

- *Hanks et al. v. Griswold*, Denver Dist. Ct. Case No. 2021CV33691.
- *Griswold v. Schroeder*, Elbert Dist. Ct. Case No. 2022CV30016.
- Certification of DVS Democracy Suite 5.13, dated April 26, 2021, from Christopher P. Beall, Deputy Secretary of State, attached as **Exhibit A**.²

IV. DISMISSAL UNDER C.R.C.P. 12(b)(5)

A motion to dismiss under Rule 12(b)(5) is properly granted when a complaint provides “no more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, (2007); *see Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (adopting federal pleading standards in Colorado). The inquiry is “whether the complaint contains ‘enough facts to state a claim to relief that is plausible on its face.’” *Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting *Twombly*, 550 U.S. at 570). While a court must accept well-pled facts as true, it should also look “to the specific

² Publicly accessible at <https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/certificationLetter.pdf> (last visited Sept. 14, 2022).

allegations in the complaint to determine whether they plausibly support a legal claim for relief.” *Pace v. Swerdlow*, 519 F.3d 1067, 1072 (10th Cir. 2008). “[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation, quotation, and alterations omitted).

V. ARGUMENT

A. Petitioners fail to state a cognizable claim for relief against the BOCC

Petitioners improvidently named the BOCC in this matter. C.R.S. § 1-1-113 is a special remedy that provides for expedited judicial review of election-related matters under a substantial compliance standard. *See, e.g., Kuhn v. Williams*, 418 P.3d 478, 485 (Colo. 2018). Relief is only available under C.R.S. § 1-1-113 if a reviewing court finds “good cause” to believe that “any official charged with any duty or function” under Colorado’s election code (Title 1, C.R.S.) has committed, or is about to commit, a breach or neglect of duty or other wrongful act. The Petition alleges that several election code statutes apply to the BOCC, including C.R.S. §§ 1-5-603, 1-5-612, 1-1-104(18), and 1-1-111. Petition, ¶¶ 5-6, 22, 37. These statutes, however, cannot support Petitioners’ § 1-1-113 action against the BOCC for two reasons.

First, C.R.S. § 1-5-603 “allows” the governing body of a political subdivision to adopt voting machines that fulfill the requirements of C.R.S. §§ 1-5-601 *et seq*; however, C.R.S. § 1-5-612(1)(b) **requires** the BOCC to adopt an electronic or electromechanical voting system for use in all elections conducted under the Uniform Election Code of 1992, which includes the

November 2022 General Election. The BOCC has complied with these laws.³ If any citizens, including Petitioners, think the voting equipment adopted by the BOCC does not meet state standards, the proper avenue for redress is to file a complaint with the Colorado Secretary of State under C.R.S. § 1-5-621(1). This section gives the Secretary broad authority to ensure voting equipment complies with the law, including the power to decertify voting equipment that does not meet applicable standards. Petitioners have not pursued this course of action.

Instead, the Petitioners essentially ask the Court to step into the Secretary's shoes and decertify El Paso County's voting equipment under C.R.S. § 1-1-113. Such relief is unavailable because the specific provisions of C.R.S. § 1-5-621 control over the broader provisions of C.R.S. § 1-1-113. The Colorado Supreme Court addressed a similar situation in *Carson v. Reiner*, 370 P.3d 1137 (2016). In that case, the Court analyzed the interplay between C.R.S. § 1-1-113 and another statute, C.R.S. § 1-4-501(3). C.R.S. § 1-4-501(3) requires that any challenge to the qualification of any candidate must be brought "within five days" after the candidate is certified to the ballot. The Court held that the more specific provisions of C.R.S. § 1-4-501(3) controlled over the broader provisions of C.R.S. § 1-1-113, noting that a contrary ruling would render the five-day deadline "superfluous, serving no purpose whatsoever." *Carson*, 370 P.3d at 1142. Similarly, if the Court were to adopt the Petitioners' argument, it would render C.R.S. § 1-5-621(1)

³ Counsel for the Petitioners recognized as much in a related matter and voluntarily dismissed counterclaims against the Colorado Secretary of State that involved identical or substantially similar arguments to those in the Amended Petition. See *Griswold v. Schroeder*, Elbert Dist. Ct. Case No. 2022CV30016 (Amended Response to Petition for Enforcement and Counter Claims, p. 17, filed April 1, 2022); (Motion to Withdraw Counterclaims Without Prejudice, filed May 9, 2022, noting that "[t]he passage of Senate Bill 22-153 by the Colorado General Assembly on May 4, 2022 appears to change the statutory law that governs Respondent's First Counterclaim.")).

superfluous, serving no purpose whatsoever. *See also* C.R.S. § 2-4-205 (special or local provision prevails over general). The Court should refuse to vitiate election laws and instead dismiss Petitioners' claims.

Second, the Petitioners cite C.R.S. § 1-1-104(18) and C.R.S. § 1-1-111, neither of which supports their argument. C.R.S. § 1-1-104(18) defines a “governing body” as a board of county commissioners, a city council, a board of trustees, a board of directors, or any other entity **which is responsible for calling and conducting an election**. Similarly, C.R.S. § 1-1-111 recognizes that political subdivisions which are **entitled to call elections** have further duties, including supervising the conduct of regular and special elections **which they are authorized to call**. C.R.S. § 1-1-111(2) allows political subdivisions to contract with the county clerk and recorder to perform the duties required in conducting such elections.

Importantly, the BOCC does not “call” a coordinated election. *See* C.R.S. § 1-1-104(6.5) (defining coordinated election). A coordinated election occurs when one or more political subdivisions participate in the general election held in November. Indeed, C.R.S. § 1-7-116(1)(a) states:

If more than one political subdivision holds an election on the same day in November and the eligible electors for each such election are the same or the boundaries overlap, **the county clerk and recorder is the coordinated election official and, pursuant to section 1-5-401, shall conduct the elections on behalf of all political subdivisions whose elections are part of the coordinated election, utilizing the mail ballot procedure set forth in article 7.5 of this title.** As used in this subsection (1), “political subdivision” includes the state, counties, municipalities, school districts, and special districts formed pursuant to title 32, C.R.S. (emphasis added).

Accordingly, the Clerk is El Paso County’s coordinated election official responsible for conducting the general election on behalf of all participating political subdivisions. The BOCC is

not authorized to call the November General Election. C.R.S. § 1-1-104(18) and C.R.S. § 1-1-111 are thus inapplicable and do not support Petitioners' contentions. The Court should dismiss the Petition with prejudice because it has not stated a claim for relief against the BOCC.

B. Respondents must follow the Secretary's election rules and directives

The Secretary has expansive authority to supervise and administer elections, including by promulgating regulations. C.R.S. §1-1-107(1) (Secretary supervises elections, enforces election code, and interprets code); (2) (Secretary has power to promulgate rules for the proper administration and enforcement of election laws). In contrast, the Clerk has no discretionary authority and must follow Colorado's statutes and the Secretary's regulations and orders. C.R.S. §§ 1-1-110(1), 1-7.5-104.

Here, Petitioners' claims appear to stem from actions taken by the Secretary rather than the Clerk. *See* Petition, ¶¶ 47-52 (describing vote tabulator software, the trusted build process, and the alleged deletion of files). The Secretary is responsible for certifying election systems and conducting the trusted build process. *See* Exhibit A; C.R.S. §§ 1-5-601.5(2), -612(2), -616 (describing the certification process); 8 CCR 1505-1:21.5.2(g) (trusted build completed by Secretary or a federally accredited entity); *id.* at 1:1.1.59 (chain of custody for trusted build installation disks established by the Secretary); *id.* at 1:21.3.6 (describing the establishment of the trusted build). The Clerk does not control what files, if any, are removed or installed during the trusted build process, and only aids the Secretary in the final installation of the trusted build. In

other words, the Clerk has no discretion during the trusted build process, yet the Clerk and the BOCC are parties to this action while the Secretary is not.

This reveals a fundamental flaw in Petitioners' case. Petitioners' hope to circumvent the Clerk's limited authority by going through the courts and inappropriately seeking to obtain a "substantial compliance" order of unprecedented nature. The Petitioners ask this Court to allow third parties who are not authorized by El Paso County or the Secretary to access the County's voting systems; order the County to stop using electronic voting systems that are required by law; and require the County to tabulate votes by hand in future elections, including the November General Election. Petition, pp. 9-10. But Petitioners' fanciful claims for relief are not allowed under C.R.S. § 1-1-113(1) because the Court can only "issue an order requiring substantial compliance" with Colorado's election code. Indeed, the Respondents are following exactly what Colorado's election code requires, and the relief the Petitioners seek is precisely the opposite. To be clear, the so-called "substantial compliance" order the Petitioners seek would be in direct contradiction to the clear text of Colorado law. Accordingly, rather than grant Petitioners' wish list of relief, the Court should grant this Motion to Dismiss.

C. Petitioners' relief must be denied under the equitable doctrine of laches.

Finally, Petitioners' untimely request for relief under C.R.S. § 1-1-113 should be denied because it would inflict extreme prejudice on El Paso County's administration of elections, including the November General Election. As Petitioners admit, the trusted build of El Paso County's vote tabulators occurred on June 1, 2021. Petition, ¶¶ 10-11, 50. Petitioners waited **over 14 months** to file this lawsuit challenging the trusted build process and conveniently left out the Secretary in this action. Granting the Petition now would upend ballot preparations that are already

underway—less than two months before the November General Election, with UOCAVA ballots to be mailed out to military and overseas voters by **September 24, 2022**. *See* 52 U.S.C. § 20302(a)(8)(A). Additionally, also on September 24, the Clerk is required to provide a mail ballot to any registered elector requesting one. *See* C.R.S. § 1-7.5-107(2.7). If the Petitioners were to obtain the order they seek, then it would halt all election efforts in El Paso County which would disenfranchise hundreds of thousands of voters and cause a violation of federal law by not meeting UOCAVA requirements. The Court should thus find that laches bars Petitioners’ claims.

Laches is an equitable doctrine that “may be asserted to deny relief to a party whose unconscionable delay in enforcing his rights has prejudiced the party against whom relief is sought.” *Robbins v. People*, 107 P.3d 384, 388 (Colo. 2005). The elements of laches are: (1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another. *Herald Co. v. Seawell*, 472 F.2d 1081, 1099 (10th Cir. 1972); *Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014). In the election context, courts have applied laches to controversies similar to this one to bar untimely requests for relief.

For example, in the 2012 case *Perry v. Judd*, the Fourth Circuit considered a candidate’s emergency motion for a preliminary injunction requesting either that his name appear on Virginia primary ballots or that the preparation and distribution of ballots be halted until his appeal was resolved. 471 F. App’x 219, 220 (4th Cir. 2012) (unpublished). The *Perry* court highlighted that the candidate did not sue until just 25 days before the federal UOCAVA deadline for transmitting ballots overseas to military personnel. *Id.* at 220, 226-27. “Ballot and elections do not magically materialize,” but instead “require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed.” *Id.* at 226. The court went on to

find that the state elections board “clearly suffered prejudice” from the candidate’s lack of diligence, including disrupting the board’s “carefully planned schedule for meeting [UOCAVA’s] demanding 45-day requirement, [and] creating confusion for election officials across the state.” *Id.* at 227. The *Perry* court thus held that the candidate’s motion was properly denied based on laches.

This Court should similarly find that laches precludes Petitioners’ claims for relief. Petitioners knew of the trusted build process that occurred in June 2021. Petition, ¶ 50. Despite this knowledge, Petitioners inexcusably waited to bring suit for more than 14 months. And Petitioners seek extraordinary remedies just weeks before the November General Election, while preparations to print and distribute ballots are already in motion. The Court should find that the elements of laches are satisfied and “decline to disrupt an orderly election process by granting [Petitioners’] belated request for relief.” *Perry*, 471 F. App’x at 228.

VI. CONCLUSION

Petitioners sat on their hands for over a year before filing this suit. They now ask the Court to grant them a panacea for their alleged election woes, regardless of the disruption it would cause to an election that is just weeks away. Rather, such “relief” would be anathema to the fair and orderly administration of elections, and the Court should dismiss the Petition because it improvidently named the BOCC, seeks relief under C.R.S. § 1-1-113 that is inconsistent with a substantial compliance order, and is barred by laches. Dismissing the Petition with prejudice will dissuade similar lawsuits in the future that “seek at a tardy and belated hour to change the rules of the game.” *Perry*, 471 F. App’x at 221.

RESPECTFULLY SUBMITTED this 15th day of September 2022.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed with Court and all Parties of record via ICCES on this 15th day of September 2022.

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