

DISTRICT COURT, EL PASO COUNTY, COLORADO
270 S. Tejon St. Colorado Springs CO 80903

Petitioners: **TIMOTHY J. KIRKWOOD and
PAUL T. PRENTICE**

v.

Respondents: **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 County Clerk and Recorder**

COURT USE ONLY

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Case No: 2022CV031462

Div: 14

PETITIONERS' BRIEF OPPOSING MOTION TO DISMISS

I. SUMMARY OF ARGUMENT

A petition will survive dismissal under C.R.C.P. 12(b)(5) if it alleges facts that, taken as true, on their face plausibly entitle the plaintiff to relief. *Warne v. Hall*, 2016 CO 50, ¶ 24. C.R.S. §1-1-113(1) requires a verified petition to allege facts that plausibly establish three elements: (1) Petitioners are eligible electors; (2) Respondents are persons charged with a duty under the Election Code; and (3) Respondents have committed or are about to commit a breach or neglect of duty or other wrongful act. The Amended Verified Petition (hereafter "Petition") alleges facts

that, when taken as true, on their face plausibly establish the existence of the above three elements. Therefore, the Petition may not be dismissed under C.R.C.P. 12(b)(5). The Court should deny Respondents' motion and proceed to trial as scheduled.

II. APPLICABLE LEGAL STANDARD

A complaint states a claim if it alleges facts that, when taken as true, plausibly establish plaintiff's entitlement to relief. *Warne v. Hall*, 2016 CO 50, ¶ 24. When considering the sufficiency of a pleading under C.R.C.P. 12(b)(5), the Court must accept all factual allegations as true and view them in the light most favorable to the plaintiff. *Norton v. Rocky Mountain Planned Parenthood, Inc.*, 2018 CO 3, ¶ 7.

III. FACTS THAT PETITIONERS MUST ALLEGE UNDER C.R.S. §1-1-113(1)

C.R.S. §1-1-113(1) states:

(1) When any controversy arises between any official charged with any duty or function under this code and any candidate, or any officers or representatives of a political party, or any persons who have made nominations or when any eligible elector files a verified petition in a district court of competent jurisdiction alleging that a person charged with a duty under this code has committed or is about to commit a breach or neglect of duty or other wrongful act, after notice to the official which includes an opportunity to be heard, upon a finding of good cause, the district court shall issue an order requiring substantial compliance with the provisions of this code. The order shall require the person charged to forthwith perform the duty or to desist from the wrongful act or to forthwith show cause why the order should not be obeyed. The burden of proof is on the petitioner.

As pertinent here, Petitioners must allege facts that, if taken as true, establish the following three elements:

- (1) Petitioners are eligible electors;
- (2) Respondents are persons charged with a duty under the Election Code;

(3) Respondents have committed or are about to commit a breach or neglect of duty or other wrongful act.

IV. THE VERIFIED PETITION STATES A CLAIM FOR RELIEF

Respondents aver that the Petition “offers conclusory allegations.” (Mtn. p. 2); belying their assertion, Respondents fail to identify a single “conclusory allegation.”

Next, Respondents claim the Petition “fails to establish good cause to believe the election code has or will be breached” (Mtn. p. 2). To the contrary, a careful reading of the Petition shows that it alleges specific facts establishing that (1) Petitioners are eligible electors; (2) Respondents are charged with a duty under the Election Code to use a voting system that preserves election records; and (3) Respondents have used an illegal voting system that destroys election records, and, unless the Court orders Respondents to stop using the illegal voting system, they intend to use it to count votes in the election November 8, 2022.

1. The Petition alleges that Mr. Kirkwood and Mr. Prentice are eligible electors.

- a. Timothy J. Kirkwood. Paragraph 20 of the Petition alleges that Timothy J. Kirkwood is an eligible elector and a resident of El Paso County. These are plausible facts, not legal conclusions. Mr. Kirkwood verified the Petition under penalty of perjury.
- b. Paul T. Prentice. Paragraph 21 of the Petition alleges that Brian Timothy Fenwick is an eligible elector and a resident of El Paso County. These are plausible facts, not legal conclusions. Mr. Prentice verified the Petition under penalty of perjury.

2. The Petition alleges that Respondents are persons charged with a duty under the Election Code.

The Petition alleges facts that establish all Respondents are persons charged with a duty under the Election Code to preserve electronic election records, so that audits can be performed, evidence is preserved for potential litigation, and the public can have confidence in election results. Paragraph 26 alleges that each Respondent is a person charged with official responsibilities and has corresponding legal duties arising under both the Election Code and federal law. These duties relate to obtaining computerized voting systems and maintaining records relating to elections. The specific duties with which each Respondent is charged are set forth in detail in separate individually numbered paragraphs.

a. The Petition alleges Respondent Broerman's duty to preserve election records.

Paragraph 25 alleges that Respondent Chuck Broerman is the Clerk and Recorder of El Paso County. Paragraph 38 alleges that Mr. Broerman is the “designated election official” of El Paso County. Paragraph 33 sets forth his statutory duty to preserve election records:

C.R.S. §1-7-802 Preservation of election records (underline added).
The designated election official shall be responsible for the preservation of any election records for a period of at least twenty-five months after the election or until time has expired for which the record would be needed in any contest proceedings, whichever is later. Unused ballots may be destroyed after the time for a challenge to the election has passed. If a federal candidate was on the ballot, the voted ballots and any other required election materials shall be kept for at least twenty-five months after the election.

Paragraph 39 alleges that, pursuant to Election Code provision C.R.S. § 1-7-802, Respondent Broerman has the duty to preserve “election records” for a period of at least 25 months. Concerning the types of electronic voting system records that must be preserved, paragraph 34

alleges that the definition of “election records” as used in C.R.S. § 1-7-802 is non-exclusive and therefore does not exclude electronic files, including log files and other electronic files on the computerized voting system, that relate to any event that happened on any component of the computerized voting system during an election. In addition to electronic records required under state law, C.R.S. § 1-7-802 states that “if a federal candidate was on the ballot” then the DEO must also preserve not only voted ballots, but also “any other required election materials” for 25 months. Thus C.R.S. § 1-7-802 incorporates federal record retention standards into state law. Because federal candidates were on the ballot in November, 2020, and federal candidates will be on the ballot November 8, 2022, C.R.S. § 1-7-802 requires Respondent Broerman to preserve records described in 52 USC §20701 and DOJ publication July 28, 2021. This includes electronic records and “all records and papers . . . relating to any . . . act requisite to voting.” 52 USC §20701. Paragraphs 33-45 of the Petition allege that Respondent Broerman has a duty to preserve all election records, including electronic records, whether required by state or federal law.

- b. The Petition alleges that the Respondent Board of County Commissioners (“BOCC”) has a duty to purchase or lease a voting system that preserves election records, as required by 2002 Voting Systems Standards.

Election Code provision C.R.S. § 1-1-104(18) includes the board of county commissioners in the definition of “governing body.” C.R.S. § 30-11-03 provides that the county commissioners of a county “exercise the powers” of a county as a “body politic.” Paragraphs 22-23 allege that BOCC is the governing body of El Paso County, and that Respondents Williams, Geitner, Vanderwerf, Longinos-Gonzalez Jr., and Bremer are members

of BOCC. Paragraph 24 alleges that BOCC authorized the purchase or lease of the current El Paso County computer voting system.

Paragraph 31 alleges that “pursuant to C.R.S. § 1-5-601.5 (July 22, 2022) and Election Rules 21.4.1 and 21.4.2 (8 CCR 1505-1), all county computerized voting systems must, at a minimum, meet the objective performance and functional criteria contained in Federal Election Commission publication “2002 Voting System Standards” (hereafter “2002 VSS”).” Pertinent language from C.R.S. § 1-5-601.5 is quoted below.¹

Paragraph 5 alleges that C.R.S. §1-5-603 authorizes the governing body of a county to purchase or lease computer voting systems or components, but only if the system or component conducts elections in compliance with the part of the Election Code relating to electronic and electromechanical voting systems (Part 6 of Article 5 of Title 1). Part 6 of Article 5 of Title 1 includes a requirement to adhere to the 2002 VSS. Thus, BOCC has a statutory duty to purchase or lease a voting system that complies with 2002 VSS. Pertinent language from C.R.S. § 1-5-603 is quoted below.²

Paragraph 32 alleges that 2002 VSS and C.R.S. § 1-5-601.5 impose a duty on all Respondents to preserve electronic records generated by the El Paso County computerized voting system during an election.

¹ C.R.S. § 1-5-601.5 effective July 1, 2022. “All voting systems and equipment offered for sale on or after May 28, 2004 shall meet the voting systems standards that were promulgated in 2002 by the federal election commission.”

² C.R.S. § 1-5-603 effective July 1, 2022. “The governing body of any political subdivision may adopt for use at elections any kind of voting machine fulfilling the requirements for voting machines set forth in this part 6.”

When read together, paragraphs 5, 22, 23, 24, 31, and 32 allege that BOCC has a duty to purchase or lease a voting system that preserves election records and other data, as required by 2002 VSS.

- c. The Petition alleges that state and federal statutes and the 2002 VSS require voting systems to preserve all electronic records of an election.

Paragraphs 1, 5, 7, 8, 9, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 49, 56, and 57, when read together, allege that specific provisions of the Election Code and federal statutes and the 2002 VSS require voting systems to preserve all electronic records of an election.

Paragraph 57 incorporates by reference the sworn Declaration of Doug Gould, a qualified computer system and cyber-security expert. At page 2 of his Declaration, Mr. Gould quotes the specific 2002 VSS sections that require retention of all electronic records of an election. Section 2.2.11 requires preservation of all electronic audit trail information in original format, including in-process logs. Section 2.2.5.2.1(e) forbids termination or alteration of audit record entries.

VSS Section 2.2.5.1 states the important public purposes of preserving audit trails:

2.2.5.1. Election audit trails provide the supporting documentation for verifying the correctness of reported election results. They present a concrete, indestructible archival record of all system activity related to the vote tally, and are essential for public confidence in the accuracy of the tally, for recounts, and for evidence in the event of criminal or civil litigation.”
of the VSS that require record retention

(Exh. 1, p. 2) (underline added). Thus, the Petition alleges, with specificity, facts demonstrating that all Respondents are persons charged with a duty under the Election Code to preserve electronic election records, for recounts, for evidence in the event of criminal or civil litigation, and so that the public can have confidence in election results.

3. The Petition alleges that Respondents have committed or are about to commit a breach or neglect of duty or other wrongful act.

Paragraphs 13, 49, 54 and 55 of the Petition, taken together, allege that the computerized voting system that would be used in the November, 2022 election in El Paso County (Democracy Suite DVS software Version 5.13-CO) is identical to the system used in 62 other Colorado counties including Mesa County. The Petition alleges that the voting system software (Democracy Suite DVS software Version 5.13-CO and Microsoft Windows operating system) of the computerized voting systems used in El Paso and Mesa Counties are identical and, therefore, that deviations from state and federal law and 2002 VSS observed in the Mesa County system exists in the El Paso system.

Paragraph 46 alleges that Respondents have breached and will continue to breach their duty by using, and continuing to use, a computerized voting system in El Paso County that violates state and federal law. Paragraph 9(a) alleges that El Paso County's voting system, during normal operation, destroys electronic files that are essential for audits, recounts, and potential prosecution of election crimes or violations of civil rights. The sworn Declaration of Doug Gould, which is incorporated in the Petition, explains how the El Paso County voting system destroys essential records during normal operation:

Forensic analysis revealed that (a) DVS does not retain all of these records in their original format, and (b) retains only excerpts from some of these logs (the “EMS Logger”) rather than complete records on the EMS Server. Forensic analysis further revealed that the DVS EMS Server overwrites operating system logs (original format records, i.e., logfiles) and fails to retain these data as required by VSS §2.2.4.1 (h). The DVS EMS overwrites operating system logfiles because, with the maximum logfile size configured at 20 megabytes, when the logfile exceeds 20 megabytes, record preservation is overridden and the disk file space is re-used, erasing earlier

records. This setting ensures that much logfile data automatically will be deleted in the normal operation of the system.

(Exh. 1, p. 6)

Paragraphs 47-49 allege that Respondents used Democracy Suite DVS software Version 5.13-CO to tabulate votes in the November, 2021, election and in the June 28, 2022, primary election, and that Respondents intend to use such software to tabulate votes in the upcoming election November, 8, 2022 election.

The foregoing allegations and expert declaration more than support a plausible claim that the El Paso County voting system violates 2002 VSS standards in the same ways that the Mesa County voting system violates 2002 VSS standards. Unless the Court orders Respondents to discontinue using the illegal voting system in El Paso County, votes in the November 8 election will be counted on an illegal computerized voting system.

Paragraph 9(b) alleges that before an election, a procedure called “trusted build” destroys records of previous elections that federal and state law require computerized voting systems to preserve. Paragraph 50 alleges that a trusted build was performed on the El Paso County computerized voting system on or about June 1, 2021. Mr. Gould’s Declaration explains that the trusted build performed in May of 2021 in Mesa County reformatted the hard drive of the Mesa County Election Management Server, which deleted a total of 505 Microsoft Windows operating system logfiles, and 190 Windows event logfiles, all of which the law requires the system to preserve. (Exh. 1, pp. 7-8). Based on his forensic examination of the EMS Server, Mr. Gould reached the following findings and conclusions:

1. As delivered to the State of Colorado by Dominion Voting Systems, the DVS EMS Server (version 5.13-CO and version 5.11-CO) is configured to erase (overwrite) critical election records, audit trails, and operational logfile records.

Destruction of these data makes it impossible to detect election crimes or civil rights violations. Destruction of data makes it impossible to audit or reconstruct an election.

2. As delivered, the DVS Voting System operating system is configured for a maximum log file size of 20 megabytes. Both the DVS versions 5.11-CO and 5.13-CO contain this same configuration maximum size limit. This logfile size is inadequate to ensure the preservation of election data.
3. DVS software contains an “EMS logger” program that does not “preserve all records that may be relevant to the detection and prosecution of federal civil rights or election crimes,” specifically omitting detailed software executions, alterations and deletions of files and external connections to the EMS Server.
4. No audit of the electronic voting and tabulation of ballots is possible because the data necessary to audit, reconstruct the election or detect election crimes have been destroyed, both by configuring the maximum logfile size to be too small, and by deletion of records not otherwise preserved using the “trusted build” process.
5. It is impractical to attempt to correct or even mitigate the effects of the system deficiencies and non-compliance with the VSS.
6. The DVS system does not substantially comply with VSS requirements.

(Exh. 1, pp. 8-9).

The foregoing allegations and expert declaration more than support a plausible claim that the June, 2021 trusted build in El Paso County destroyed data required to be maintained under Colorado and federal law and 2002 VSS.

V. RESPONDENTS’ ARGUMENTS FAIL

At pages 3-4 of their motion, Respondents pointlessly ask the Court to take judicial notice of two pending cases that involve different parties and different issues, *Hanks v. Griswold*, 2021CV33691 (Denver), and *Griswold v. Schroeder*, 2022CV30016 (Elbert County). Final judgment has not entered in either case. Interlocutory rulings of those trial courts have no precedential value. See *FSDW, LLC, v. First National Bank*, 94 P.3d 1260, 1263-64 (Colo. App. 2004) (discussing that judgment must be final before it is *res judicata*). Moreover, since the Denver

and Elbert County cases involve different parties, any pleadings and orders in those cases have no preclusive effect on Petitioners.

Respondents make four legal arguments. First, Respondents claim that the Colorado Secretary of State (hereafter “Secretary”) administers elections, and that Respondents have no discretion or duty to refrain from using an illegal voting system (Mtn. pp. 8-9). Respondents’ premise is wrong: The Secretary “supervises the conduct of”—but does not administer—elections. C.R.S. §1-1-107(1)(a). County officials administer elections. Respondents are not immunized or excused from their own independent duty to obey the law simply because the Secretary has a supervisory function that she may have failed to exercise. C.R.S. § 1-7-802 and 52 U.S.C. § 20701 impose independent statutory duties on Respondents to preserve election records for twenty-five and twenty-two months after an election, respectively. Respondents continue to breach these preservation duties by using a computerized system that destroys election records and other data required to be maintained. C.R.S. § 1-5-603 (as in effect both before and after July 1, 2022) requires any electronic voting system adopted by the BOCC to fulfill “requirements for voting machines” that include compliance with the Federal Election Commission’s 2002 VSS, which the system in use does not. The fact that nonparty Secretary certified an illegal voting system is irrelevant as a matter of law. Respondents are subject to their own independent duties to comply with state and federal laws.

Second, Respondents imply that the exclusive remedy for Petitioners to challenge El Paso County’s illegal computerized voting system is to file an administrative “complaint” with the Secretary pursuant to C.R.S. § 1-5-621(1) (Mtn. pp. 6-7). This argument fails because the administrative duty to investigate that is imposed on the Secretary by § 1-5-621(1) is on its face

cumulative with “any provision of law to the contrary,”—meaning it is not meant to supplant other remedies such as the legal remedy provided by C.R.S. § 1-1-113.

Respondents rely on *Carson v. Reiner*, 2016 CO 38 (Mtn. p. 7), in which the Supreme Court construed C.R.S. §2-4-205.³ *Carson* held that provisions of C.R.S. § 1-4-501(3) (specifying procedures to challenge a candidate’s qualifications to be on the ballot), control over general provisions of C.R.S. § 1-1-113(1). The Court found irreconcilable conflict between the two statutes because specific requirements of one statute could not be satisfied in an action under the other (*Id* at ¶ 18). *Carson* bears no resemblance to this case. Filing an administrative complaint with the Secretary pursuant to C.R.S. § 1-5-621(1), does not conflict with seeking judicial relief in this Court pursuant to C.R.S. § 1-1-113(1). The requirements of both can be satisfied without conflict. Even in a case of conflict between two statutes, C.R.S. § 2-4-205 requires the Court to construe the statutes “so that effect is given to both.” But here there is no conflict. Petitioners’ remedies are optional and cumulative, not mutually exclusive. They can file an administrative complaint with the Secretary under C.R.S. § 1-5-621(1), and they can bring this action for judicial relief under C.R.S. § 1-1-113(1).

Third, Respondents argue that the Board of County Commissioners (“BOCC”) cannot be sued because they did not “call” the November 2022 election (Mtn. pp. 7-8). Respondents name no individual, officer, or body other than the BOCC that can “call” an election of non-statewide offices

³ C.R.S. §2-4-205. If a general provision conflicts with a special or local provision, it shall be construed, if possible, so that effect is given to both. If the conflict between the provisions is irreconcilable, the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.

and ballot questions, many of which will be on the November, 2022 ballot in El Paso County.

According to the Merriam-Webster Collegiate Dictionary, “call” means “to give the order for.” The BOCC *is* the only body that can give the order for an election of the many non-statewide issues on the November ballot.

But the argument about “calling” an election is only a diversion. Whether Respondents’ “call” an election in any technical sense has no bearing on their independent duties created by state and federal law. Those duties are explained with particularity in the Petition and this brief. BOCC is the governing body that adopted, leases, has possession and control of, and (through its agents and employees) has been and will be operating El Paso County’s illegal voting system. BOCC thus is an indispensable party under C.R.C.P. 19(a), and its members cannot be dismissed.

Concerning the remedy sought, Respondents argue that “the so-called ‘substantial compliance’ order the Petitioners seek would be in direct contradiction to the clear text of Colorado law” (Mtn. p. 9). This is incorrect. In paragraph C of the prayer for relief, Petitioners ask the Court to “Order Respondents to discontinue using a computer voting system that does not substantially comply with 2002 VSS standards or comply with election-record-preservation requirements.” (Petition p. 10). If the Court grants the relief requested, no change will be required in the design and printing of ballots, and no change will be required in the distribution and collection of ballots. All existing arrangements can proceed up to the point of counting. Petitioners simply request hand counting the votes as state law currently provides for under certain circumstances. *See, e.g.,* C.R.S. § 1-7-507(6) (software or hardware malfunction); C.R.S. § 1-13.5-811(4) (impracticality of counting on electronic vote counting equipment in local elections), and C.R.S. § 1-1-104(22.7) (defining “manual count”).

Finally, Respondents assert the affirmative defense of laches (Mtn. pp. 9-11). But laches is only a defense to untimely equitable causes of action. To the extent this C.R.S. § 1-1-113 Petition (timely filed according to statute) is an action at law, laches cannot be a defense. Even if laches applied, it “cannot be raised by motion to dismiss,” *McPherson v. McPherson, Jr.*, 145 Colo. 170, 172, 358 P.2d 478, 479 (1960) (holding that laches must be affirmatively pleaded in an answer). Even if capable of being raised, laches may not be dispositive of a motion to dismiss because laches is an affirmative factual defense on which Respondents bear the burden of proof at trial. The Court cannot make findings of fact based on unverified and unsupported assertions of counsel in a Motion to Dismiss. Lastly, Respondents have not alleged, let alone demonstrated, the third element of laches, which requires them to substantiate (not just argue) that granting relief will prejudice their ability to count votes this November. They have pointed to the many preparatory steps for an election, such as preparing and mailing ballots, none of which will be affected by the relief sought here. On August 26, 2022, ten and one-half weeks before the November 8 election, all Respondents were personally served a copy of the Verified Petition asking for a hand count. Ten and one-half weeks (74 days) is ample time to arrange for a hand count—especially where Colorado law presumes that hand counts can and will be conducted virtually without any notice if electronic voting machines malfunction. *See, e.g.*, C.R.S. § 1-7-507(6).

The only delay has been on the part of the Respondents. Petitioners will prove at trial that on September 18, 2021, Respondent Broerman reviewed Doug Gould’s analysis of the Mesa County voting system. The analysis showed that the Mesa County voting system destroyed election records during the trusted build and normal operation of the system, in violation of the Election

Code and federal law. Respondent Broerman should have informed El Paso County BOCC that the computerized voting system violated the Election Code. In the twelve months since they were informed of the problem, neither Mr. Broerman nor BOCC took steps to bring the voting system into compliance with the law. In light of this neglect, it is ironic that Respondents invoke the equitable defense of laches, when their own hands are unclean.

Even now, Respondents take refuge behind time-consuming procedural maneuvers. Respondents are not required to move to dismiss this Petition. They could choose to move straight to adjudication on the merits at trial, and plan to follow the Court's ruling or—better still—recognize that the Petition has merit, and promptly perform their statutory duties by preparing to conduct a hand count in the November election.

VI. CONCLUSION

The Petition plainly alleges facts that, taken as true, plausibly establish each of the three elements of a valid claim under C.R.S. § 1-1-113(1). Thus the Petition, on its face, states a sufficient claim for relief. Respondents' Motion to Dismiss should be denied.

Respectfully submitted September 22, 2022

JOHN CASE, P.C.
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s/John Case
John Case, #2431

CERTIFICATE OF SERVICE

The undersigned certifies that on September 22, 2022, he filed and served the foregoing document via ICCES to the following:

Clerk of the District Court of El Paso County
270 S. Tejon St.
Colorado Springs CO 80903

Nathan Whitney
First Assistant County Attorney
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s/John Case

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