

<p>DISTRICT COURT, EL PASO COUNTY, COLORADO          Court address: 270 South Tejon St.          Colorado Springs, CO 80903          Phone Number: (719) 452-5000</p>	<p>DATE FILED: September 26, 2022 2:16 PM          FILING ID: 15BA3A0B4CCD9          CASE NUMBER: 2022CV31462</p>
<p><b>TIMOTHY J. KIRKWOOD</b> and <b>PAUL T. PRENTICE</b>,          Petitioners,          v.  <b>HOLLY WILLIAMS, CARRIE GEITNER, STAN VANDERWERF, LONGINOS GONZALEZ, JR. and CAMI BREMER</b> in their official capacities as members of Respondent <b>BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY</b>; and <b>CHUCK BROERMAN</b>, in his official capacity as <b>El Paso County Clerk and Recorder</b>,          Respondents.</p>	<p>▲ COURT USE ONLY ▲</p>
<p><b>Nathan Whitney, Esq., #39002</b>          First Assistant County Attorney  <b>Steven Klaffky, Esq. #44836</b>          Chief Deputy County Attorney  <b>Steven Martyn, Esq., #47429</b>          Assistant County Attorney</p> <p>Office of the County Attorney          of El Paso County, Colorado          200 S. Cascade Avenue          Colorado Springs, CO 80903          (719) 520-6485, Fax (719) 520-6487</p>	<p>Case Number: 2022CV31462</p> <p>Div. 14</p>
<p align="center"><b>RESPONDENTS' REPLY IN SUPPORT OF MOTION TO DISMISS          PURSUANT TO C.R.C.P. 12(b)(5)</b></p>	

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, offer this reply in support of their Motion to Dismiss under C.R.C.P. 12(b)(5) (“the Motion”).

## I. INTRODUCTION

This case is essentially identical to *Crossman v. Davis*, No. 22CV30323 (D. Ct. Mesa Cnty.).<sup>1</sup> The District Court for Mesa County dismissed *Crossman* just last Friday because “Petitioners have sued the wrong entities” and “asked for relief that is not authorized by any rule, case, or statute.” This Court should dismiss the case at bar for the same reasons. The Court should also find that this case is barred by laches.

## II. ARGUMENT

### A. **The *Crossman* court correctly found that the Secretary of State has sole authority to decertify electronic voting equipment**

In their Response, Petitioners double down on their contention that the Clerk and the BOCC have various duties with respect to El Paso County’s electronic voting systems. *See Resp.* at 4-11. But the *Crossman* court found that the Secretary of State, rather than county officials like the Respondents, has authority to decertify electronic voting equipment via C.R.S. § 1-5-621. *Crossman* at 4-6; *see Motion* at 5-9. Neither the petitioners in *Crossman* nor the Petitioners here have pursued this avenue. Instead, they “seek to skip over the requirements [of] C.R.S. § 1-5-621” and ask the Court to impose new election rules in the Secretary’s place. *Crossman* at 6. The Court should halt Petitioners’ search for a statutory shortcut by dismissing this case.

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<sup>1</sup> Respondents attached a copy of the *Crossman* decision to their Notice of Supplemental Authority, which was filed with this Court on September 23, 2022.

Petitioners' efforts to bypass C.R.S. § 1-5-621 highlight another flaw in their case: the Respondents are not the right parties to sue. During the status conference before this Court on September 23, counsel for the Petitioners said he may file a complaint with the Secretary under C.R.S. § 1-5-621. If counsel does so and the Secretary denies his complaint, the Secretary's decision—rather than any decision made by the Respondents—may be subject to further judicial review under C.R.S. § 1-1-113. *See Crossman* at 6 (describing a complaint under C.R.S. § 1-5-621 as “a condition precedent to C.R.S. § 1-1-113 being triggered.”). This reinforces Respondents' argument that they should not be subject to this lawsuit because they do not wield the authority to decertify electronic voting systems or choose to conduct a hand count of an election. *See Motion* at 5-9. The Court should follow the *Crossman* court's lead and dismiss this case.

Petitioners also contend that the complaint process described in C.R.S. § 1-5-621 is “cumulative” with the remedy provided by C.R.S. § 1-1-113. Resp. 11-12. The Court should reject Petitioners' construction of the statutes. If this construction prevailed, it would create an “either/or” system in which a party could pursue remedies under one statute, see if they receive a favorable outcome, and then pursue remedies under the other statute if they lose. This either/or system would waste judicial and administrative resources by duplicating controversies. Instead, the Court should follow the *Crossman* court's analysis and hold that C.R.S. § 1-5-621 is the first step when challenging the Secretary's certification of voting equipment, followed by judicial review under C.R.S. § 1-1-113. *Crossman* at 6.

Petitioners go on to argue that their request for a hand count of ballots cast in the November General Election is consistent with a substantial compliance order under C.R.S. § 1-1-113(1). Resp. 13. In support, Petitioners cite C.R.S. § 1-7-507(6), which discusses manual ballot counts in

the event of a software or hardware malfunction. But this statute says that the Secretary of State “may permit” a manual count after conferring with the designated election official. *Id.* This statute reinforces the Secretary’s authority to conduct elections and the Clerk’s responsibility to follow her guidance. *See* C.R.S. §§ 1-1-110(1), 1-7.5-104. In other words, the Secretary chooses the music that the Clerk must play. If Petitioners do not like the music, they must take it up with the conductor—the Secretary of State.

**B. Laches bars untimely election disputes, including this one**

The Court should not only dismiss this case on statutory grounds, but also because laches bars this untimely lawsuit. Motion at 9-11. Petitioners contend that laches does not apply to actions under C.R.S. § 1-1-113. Resp. at 14. Petitioners are incorrect. Laches has been analyzed specifically in the election context by the courts. Indeed, a division of this Court held that laches barred a purported action under C.R.S. § 1-1-113 in *Klingenschmitt v. Broerman*, No. 2020CV184 (D. Ct. El Paso Cnty. May 26, 2020) (attached as Ex. A). There, Judge Catherine Helton observed that laches “‘bars a party’s dilatory claim’ and ‘stems from the principle that equity aids the vigilant and not those who slumber on their rights.’” *Id.* at 12, quoting *Biodiversity Conservation Alliance v. Jiron*, 762 F.3d 1036, 1090-91 (10th Cir. 2014) and *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Judge Helton found that laches barred the plaintiffs’ case where they had the information underlying their claims “weeks before a claim was filed with this court.” Ex. A at 12.

Here, the Petitioners’ delay in bringing this action is even more glaring. As the Petitioners admit, the Secretary performed the trusted build in El Paso County around June 1, 2021—14 months before Petitioners filed this suit. Am. Pet. at ¶ 50. Alternatively, Petitioners allege they gave evidence to the Clerk showing that Mesa County’s voting systems did not comply with

election laws on September 18, 2021—11 months before Petitioners filed this suit. Resp. at 14-15. Either way, Petitioners slumbered on their rights far longer than the plaintiffs in *Klingenschmitt*. The Court should thus hold that laches bars Petitioners’ case.

Petitioners go on to allege that the Respondents have not shown prejudice, the third laches factor. Resp. at 14; see *Hickerson v. Vessels*, 316 P.3d 620, 623 (Colo. 2014). In Petitioners’ view, ten and a half weeks is “ample time to arrange for a hand count” while the Clerk performs a raft of other duties leading up to the November General Election. Resp. 14.<sup>2</sup> But the Clerk cannot simply conjure an army of election judges. Election judges require training, must have minimum qualifications, and must pass background investigations. Election Judges, El Paso Cnty. Clerk & Recorder, <https://clerkandrecorder.elpasoco.com/elections/election-judges/> (last visited Sept. 26, 2022). Forcing the Clerk to draft a platoon of election judges in the event this Court orders a hand count is clearly prejudicial. Further, the Petitioners should have pursued remedies under C.R.S. § 1-5-621 immediately once their alleged grievances became known, which was on or about June 1, 2021. This Court should not allow the Petitioners to pursue their arguments piecemeal, when they should have been raised over a year ago. Accordingly, the Court should accept the Respondents’ laches argument and dismiss Petitioners’ case.

### **III. CONCLUSION**

The *Crossman* court already rejected the arguments that Petitioners make here. The Court should decline to step into the shoes of the Secretary of State, just as Judge Barrett did in Mesa County, and dismiss this case for the same reasons. It should also find that laches bars this action

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<sup>2</sup> Petitioners arrive at ten and a half weeks based on the date their Petition was filed. Resp. at 14. At the time this Reply was filed, six weeks and one day remain until the November General Election on November 8, 2022.

because Petitioners unreasonably delayed and waited for over a year to bring suit, until election preparations were already underway. Dismissing this case now will spare both the Clerk and this Court a superfluous trial that threatens to upend the looming General Election.

RESPECTFULLY SUBMITTED this 26th day of September 2022.

OFFICE OF THE COUNTY ATTORNEY  
OF EL PASO COUNTY, COLORADO

BY: s/ Nathan Whitney  
Nathan Whitney, #39002  
First Assistant County Attorney  
200 S. Cascade Ave.  
Colorado Springs, CO 80903  
(719) 520-6485  
Fax (719) 520-6487

BY: s/ Steven Klaffky  
Steven Klaffky, #44836  
Chief Deputy County Attorney  
200 S. Cascade Ave.  
Colorado Springs, CO 80903  
(719) 520-6485  
Fax (719) 520-6487

BY: s/ Steven Martyn  
Steven Martyn, #47429  
Assistant County Attorney  
200 S. Cascade Ave.  
Colorado Springs, CO 80903  
(719) 520-6485  
Fax (719) 520-6487

*Attorneys for Respondents*

**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 26th day of September 2022.

s/ Casey Campbell  
Paralegal