

DISTRICT COURT, EL PASO COUNTY, COLORADO 270 S. Tejon Street Colorado Springs, Colorado 80903-2209 Mailing address: P.O. Box 2980 Colorado Springs, CO 80901--2980	DATE FILED: October 10, 2022 8:18 AM CASE NUMBER: 2022CV31462
<p><b>TIMOTHY J. KIRKWOOD and PAUL T. PRENTICE,</b></p> <p>Petitioners,</p> <p>v.</p> <p><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></p> <p>Respondents.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
	District Ct. Case # 22CV31462  Division 21 Courtroom W450
<b>RULING ON RESPONDENTS' MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)</b>	

Nature of the Case

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. They have sued the Board of County Commissioners in El Paso County (BOCC), as well as the Clerk and Recorder, (Clerk).

Specifically, Petitioners allege El Paso County intends to use election computer voting systems and software (Democracy Suite DVS Version 5.13-CO provided by non-party Dominion Voting Systems, Inc.) in the 2022 election.

They allege that on or about June 1, 2021, agents of the Secretary and employees of Dominion, acting within the scope of Dominion’s authority as an agent of the Secretary, installed a software

upgrade of the El Paso County voting system called a “trusted build.” They allege neither the Secretary nor Dominion backed up, copied, or imaged the hard drives of any El Paso County voting system components to preserve their contents before this upgrade was installed. They allege the June, 2021, “trusted build” deleted electronic records of the November 3, 2020, election that were stored on the hard drives of El Paso County’s electronic voting system hardware components. They allege Respondents’ continued authorization and use of El Paso County’s electronic voting system to conduct upcoming elections will result in the failure to preserve both (1) election records that must be preserved under Colorado law and (2) required election materials that must be preserved under federal law. They seek to force a hand counting of ballots in the upcoming election.

### Election Law and Analysis

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).

Respondents ask the Court to take judicial notice of the Certification of DVS Democracy Suite 5.13, dated April 26, 2021, from Christopher P. Beall, Deputy Secretary of State, which is Publicly accessible at <https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/certificationLetter.pdf>, and the court grants this request and has done so.

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.

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.

If any citizens, including Petitioners, believe 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 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.

This court concludes that such relief is unavailable. 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), where 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 more specific statute "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) superfluous, serving no purpose.

Further, 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 to the BOCC.

The Secretary of State 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 stem from actions taken by the Secretary rather than the Clerk. The Secretary is responsible for certifying election systems and conducting the trusted build process. 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 court specifically rules that only 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.

In addition, it should be noted that the Respondents are not the correct parties. 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.

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. The court rejects 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.

Noteworthy is the fact that C.R.S. § 1-7-507(6) directly addresses manual ballot counts in the event of a software or hardware malfunction. This statute provides that the Secretary of State “may permit” a manual count after conferring with the designated election official. *Id.* This reinforces the Secretary’s authority to conduct elections and the Clerk’s responsibility to follow the Secretary’s guidance. *See* C.R.S. §§ 1-1-110(1), 1-7.5-104.

Petitioner Kirkwood has filed a sur-reply to the motion to dismiss in which new issues have been raised. Petitioner Kirkwood filed an administrative complaint with the Secretary of State while this motion to dismiss was pending. Also see Second Amended Verified Petition filed September 28, 2022. Petitioners argue they are not seeking to decertify the voting system, however, as noted, this court disagrees. As such, the Secretary of State is a necessary party. Neither party seeks to join the Secretary of State, and this court concludes that the interests of justice dictate this action should not proceed among the parties in this action for the reasons described in this ruling. See C.R.C.P. 19(b). Specifically, the court rules that any judgment rendered in the Secretary’s absence would be inadequate, because only the Secretary is empowered to conduct the trusted build, and Petitioners have had adequate alternate remedies but have chosen to wait until the eve of the election to seek piecemeal remedies in various counties in Colorado rather than involving the Secretary of State directly. As Petitioners admit, the trusted build of El Paso County’s vote tabulators occurred on June 1, 2021. Petition, ¶¶ 10-11. 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 may significantly interfere with election preparations that are already underway, less than a month before the November General Election.

### Conclusion

This court hereby rules that Petitioners’ 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. This court specifically finds that the Respondents are following Colorado’s election code, and the relief Petitioners seek would thwart the code. The so-called “substantial compliance” order the Petitioners seek would be in direct contradiction to the clear text of Colorado law. Accordingly, the Court hereby dismisses the complaint under CRCP 12(b)(5) for failure to state a claim. The trial scheduled for October 17, 2022, is hereby vacated.

DONE THIS 10<sup>th</sup> DAY OF OCTOBER, 2022.  
BY THE COURT:



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Michael P. McHenry  
District Court Judge