

DISTRICT COURT, MESA COUNTY, COLORADO Court address: 125 N. Spruce St. Grand Junction, CO 81501		DATE FILED: September 12, 2022 7:42 PM FILING ID: E81BE3CCC4403 CASE NUMBER: 2022CV30323
<b>Barbara Crossman and Brian Timothy Fenwick</b>  Petitioners,  v.  <b>Cody Davis, Scott McInnis, and Janet Rowland in their official capacities as members of Respondent Board of County Commissioners of Mesa County; and Brandi Bantz, in her official capacity as Designated Election Official of Mesa County.</b>  Respondents.		▲ COURT USE ONLY ▲
Attorneys for Cody Davis, Scott McInnis, Janet Rowland, and Brandi Bantz: Todd Starr, #27641 Mesa County Attorney Andrea Nina Atencio, #33351 First Assistant County Attorney John R. Rhoads, #44022 David Schwenke, #47868 Assistant County Attorney P.O. Box 20,000/Dept. 5004 Grand Junction, CO 81502-5001 Phone: (970) 244-1612 Fax: (970) 255-7196 <a href="mailto:todd.starr@mesacounty.us">todd.starr@mesacounty.us</a> <a href="mailto:nina.atencio@mesacounty.us">nina.atencio@mesacounty.us</a> <a href="mailto:john.rhoads@mesacounty.us">john.rhoads@mesacounty.us</a>		Case Number: 2022CV30323  Div.: 9  Courtroom: Barrett
<b>RESPONDENTS' MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(b)(5)</b>		

ATTORNEY CERTIFICATION: Per C.R.C.P. 121, the undersigned conferred with the  
  
 Petitioners' attorney and Petitioners object to this motion.

The Board of County Commissioners of Mesa County (the “BOCC”) and Brandi Bantz, the Mesa County Designated Election Official (“DEO”) (collectively “Mesa County” or “Respondents”), by and through the Office of the County Attorney of Mesa County, Colorado, respectfully move this Court to dismiss this case under C.R.C.P. 12(b)(5) based upon the following:

## **I. INTRODUCTION**

The Petitioners in this matter seek a “substantial compliance” order under C.R.S. § 1-1-113 allowing them to “examine” Mesa County’s election equipment to their satisfaction and requiring Mesa County to stop using this election equipment in lieu of a “hand count” during the 2022 November General and beyond. *Petition*, p. 10-11. In doing so, the Petitioners repeat arguments that their same counsel has 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 forwards nothing but conclusory allegations; fails to establish good cause for believing that a breach of the election code has, or will, occur; and relies on a “report” that is fruit of an ongoing criminal matter. *See People v. Peters*, Mesa Cnty. Dist. Ct. Case No. 2022CR000371 (arrest warrant for former Mesa County Clerk and Recorder Tina Peters filed March 9, 2022, detailing applicable Colorado election law and rules). Moreover, the equitable doctrine of laches bars this action because Petitioners waited to bring this suit until statewide 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 DEO is responsible for conducting the upcoming 2022 Colorado General Election in Mesa County. *See, e.g.*, C.R.S. §§ 1-1-104(17), 1-4-110(3). Her duties are extensive. They range from ensuring ballot drop-boxes and Voter Service Polling Centers are available, to laying out, proofing, and creating the 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 Colorado Secretary of State has authority to supervise and administer the conduct of Colorado elections as well as to promulgate regulations in furtherance of that authority. C.R.S. §1-1-107(1), (2). A county DEO must adhere to the rules and orders promulgated by the Secretary of State. §1-1-110(1).

The DEO must complete her ballot-related duties within a strict timeframe leading up to the General Election. This year's General Election is November 8, 2022. *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. 1, 2022). The Clerk must mail ballots to military and overseas voters by September 24, 2022. Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302(a)(8)(A). Prior to that, the DEO must ensure that production of Mesa County's ballots begins once the Colorado Secretary of State certifies the County's ballot content on or around September 12, 2022. *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 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 request the Court 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**.<sup>1</sup>

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

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<sup>1</sup> Publicly accessible at <https://www.coloradosos.gov/pubs/elections/VotingSystems/DVS-DemocracySuite513/certificationLetter.pdf> (last visited Sept. 1, 2022).

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 look also “to the specific 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 Respondents**

Petitioners improvidently named the Respondents in this matter. C.R.S. § 1-1-113 is a specially crafted 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 ¶¶ 36-37 (Colo. 2018). A Court reviewing a petition originating under this statute must find that there is “good cause” that “any official charged with any duty or function” under Title 1, C.R.S., has committed, or is about to commit, a breach or neglect of duty or other wrongful act. The burden of proof is on the petitioner. The statutes the Petition cites allegedly relating to the BOCC are

C.R.S. § 1-5-603, C.R.S. § 1-5-612, C.R.S. § 1-1-104(18), and C.R.S. § 1-1-111. *Pet.* ¶¶ 5-6, 26, 41. None of these statutes provide for an avenue against the BOCC.

First, C.R.S. § 1-5-603 allows the governing body of a political subdivision to adopt for use at elections any kind of voting machine fulfilling the requirements of C.R.S. §§ 1-5-601 *et seq.* 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 election. The BOCC has complied with these laws. Counsel for the Petitioners, in a related matter, recognized as much and requested voluntary dismissal of counterclaims against the Colorado Secretary of State with substantially similar, or identical, allegations in the Amended Petition. *See Exhibit B- Griswold v. Schroeder*, Elbert Dist. Ct. Case No. 2022CV30016 (Amended Response to Petition for Enforcement and Counter Claims, p. 17, filed April 1, 2022); Exhibit C- *Id.* (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.”)). If any citizen is concerned with the use of such equipment or believes that the equipment does not meet state standards, then the proper avenue is to file a complaint with the Colorado Secretary of State under C.R.S. § 1-5-621(1). This section gives the Secretary of State broad authority to ensure voting equipment is working in compliance with the law, including the power to decertify election equipment that does not meet applicable standards.

The Petitioners in this matter essentially ask the Court to step in the shoes of the Secretary and order that Mesa County's voting equipment be "decertified" under a "substantial compliance order" issued 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 relating to noncompliance with required standards.

The Colorado Supreme Court addressed a similar circumstance 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 C.R.S. § 1-4-501(3). In the case of C.R.S. § 1-4-501(3), the statute requires that any challenges to the qualification of any candidate must be brought "within five days after the designated election official's statement is issued that certifies the candidate to the ballot." The Court ultimately ruled that the more specific provisions of C.R.S. § 1-4-501(3) controlled, noting that a ruling otherwise would render the five-day deadline "superfluous, serving no purpose whatsoever." *Carson*, ¶ 18. Similarly, if the Court were to adopt the Petitioners' argument, it would render C.R.S. § 1-5-621(1) superfluous, serving no purpose whatsoever. *See also* C.R.S. § 2-4-205 (special or local provision prevails over general).

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 the election.

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, in Mesa County, the DEO is the 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. Consequently, C.R.S. § 1-1-104(18) and C.R.S. § 1-1-111 are inapplicable and do not support Petitioners’ contentions. The Amended Petition fails to state any claim for relief against the BOCC and must be dismissed with prejudice.



**B. Respondents must adhere to the election rules and directives of the Colorado Secretary of State, and therefore the Petitioners fail to state a claim against the named Respondents upon which relief can be granted.**

The Colorado Secretary of State is vested with expansive authority to supervise and administer the conduct of elections, and the Secretary promulgates regulations to exercise such authority. C.R.S. §1-1-107(1) (Secretary has duty to supervise elections, enforce provisions of election code, interpret code, among others); (2) (Secretary has power to promulgate rules for the proper administration and enforcement of election laws). Mesa County has no independent discretionary authority to take any action regarding an election in the face of Colorado's statutes and the Secretary's regulations and orders. C.R.S. §1-1-110(1); §1-7.5-104. County governments conducting elections must use electronic systems for tabulating votes. C.R.S. §1-5-612(1)(b).

Petitioners are seeking to use this C.R.S. §1-1-113 action to circumvent these statutes. This Court is limited in a 113 action to order substantial compliance with the provisions of the election code. C.R.S. §1-1-113. The Petitioners request this Court to issue orders to allow third parties not authorized by Mesa County or the Secretary to have access to Mesa County voting systems, to discontinue using electronic voting systems required to be used under Colorado election statutes and regulations, and to require the Mesa County elections to use a hand count to tabulate votes. *Petition* at 10-11. None of these prayers for relief are allowed or otherwise required by Colorado law.

Petitioners' alleged grievances all appear to relate to actions of the Secretary. The Secretary is responsible for certifying election systems and for conducting the trusted build process including any records retention that occurs. Exhibit A. C.R.S. §1-5-601.5(2); §1-5-612(2); §1-5-616; 8 CCR 1505-1:21 ("Voting Systems Standards for Certification"); *id.* at 21.5.2(g) (trusted build to be completed by Secretary of State or a federally accredited entity that conducts certification testing); *id.* at 1.1.59 (trusted build installation disks chain-of-custody established by the Secretary of State); *id.* at 21.3.6 (trusted build established by way of software and installation provided to the Secretary of State by the voting system provider). Mesa County plays no role in what specific files are being removed or installed as part of the trusted build process, and only serves to aid the Secretary in the final installation of the trusted build. Mesa County has no discretion as to which files to delete. Yet Mesa County is named in this action and the Secretary is not. Petitioners have purposefully brought action against Mesa County who does not have the independent discretion to address their claims, and not brought action against the Secretary, who does. The Petitioners, in pursuing an action against Respondents, have failed to state a claim upon which relief can be granted, and their petition should be dismissed.

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

Additionally, Petitioners' late request for relief under C.R.S. § 1-1-113 should be denied because any attempt to require Mesa County to suddenly cease to use lawful election equipment, and instead conduct an election by "hand count" would cause extreme prejudice to Colorado's administration of its election. The counsel for the Petitioners has had previous and nearly identical arguments raised in other related matters as noted in this Motion. The Petition itself states the "trusted build" was conducted in May 2021 which gives rise to their alleged grievances. *Pet.* ¶¶

10-12, 54-58. Now, over a year later, the Petitioners seek relief, based upon unsubstantiated and conclusory allegations, to attempt to throw out Dominion Voting machines utilized in Mesa County.

Indeed, ballots do not “magically materialize” out of thin air. *Perry v. Judd*, 471 Fed. App’x 219, 226 (4th Cir. 2012). To the contrary, extensive advance preparation is needed to allow the election to proceed on time in each of Colorado’s 64 counties and for its thousands of overseas and military voters. To that end, and to the extent the Court entertains Petitioners’ request, said relief is barred by the doctrine of laches.

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). Laches may bar a party’s constitutional challenge to a state law if the challenge is not brought within a reasonable time. *See Thatcher Enterprises v. Cache County Corp.*, 902 F.2d 1472, 1476 (10th Cir. 1990) (untimely constitutional challenge to a zoning ordinance barred by laches). In the election context, laches has been applied to situations that are factually indistinguishable from this case to bar tardy requests for emergency injunctive relief. *See Perry*, 471 Fed. App’x 219 (4th Cir. 2012).

The *Perry* court explained that the challenged state provisions were “unambiguous and available for all to see,” as demonstrated by two other candidates who had “no difficulty discerning or fulfilling” their requirements. *Id.* at 224–25. Nonetheless, the candidate delayed in bringing suit until just 25 days before the federal UOCAVA deadline for transmitting ballots overseas to military personnel. *Id.* at 222, 227. “Ballot and elections do not magically materialize,” the court

said. *Id.* at 226. “They require planning, preparation, and studious attention to detail if the fairness and integrity of the electoral process is to be observed.” *Id.* “Challenges that c[o]me immediately before or immediately after the preparation and printing of ballots [are] particularly disruptive and costly for state governments.” *Id.* at 225. When a candidate delays bringing suit until after he or she is formally denied a place on the ballot, “hapless state election boards [are] forced to halt their scheduled election processes to wait for a ruling.” *Id.* In *Perry*, the 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.

Here, and even more egregious, the Petitioners seek to essentially halt the election despite knowing they felt there was an issue as early as May 2021, or perhaps earlier. Such blatant delay is inexcusable given that Petitioners knew of the allegations in May 2021, unreasonably delayed in this action for more than a year’s time, and now in the midst of preparation for the 2022 General election, they seek a “substantial compliance” order based upon unsuccessful, debunked, and untrue allegations. Accordingly, this Court should dismiss the Petition under the equitable doctrine of laches.

## **VI. CONCLUSION**

As outlined in this Motion, the Petitioners have sat on their hands for over a year’s time, counsel for the Petitioners has unsuccessfully attempted similar arguments in other matters, and now seeks to misuse C.R.S. § 1-1-113 as an avenue in which to get this Court to issue an order which would have the effect of decertifying voting equipment which is lawful and certified for use by the Colorado Secretary of State. The Colorado Secretary of State has the sole authority to

decertify voting equipment under C.R.S. § 1-5-621. Petitioners’ attempt to use C.R.S. § 1-1-113 is a tortuous reading of a “substantial compliance order”. Furthermore, the Petitioners incorrectly seek to challenge the BOCC by mischaracterizing its actual authority under Colorado law.

If this Court were to entertain the Petitioners’ legally misplaced arguments, it would have grave consequences with real potential of severe delays at enormous cost to taxpayers and voters in Mesa County. Therefore, for the reasons set forth in this Motion, the BOCC and DEO respectfully request that this Honorable Court dismiss the Petition, in full, with prejudice for failure to state a cognizable claim against either the BOCC or the DEO.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2022.

MESA COUNTY ATTORNEY’S OFFICE

By: /s/ Todd M. Starr

Todd M. Starr, #27641  
Andrea Nina Atencio, #33351  
John R. Rhoads, # 44022  
David Schwenke, #47868

**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 12<sup>th</sup> day of September, 2022, to include:

John Case  
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By: s/ John Rhoads