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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**
Petitioners' Attorney: John Case, Atty reg. # 2431 John Case, P.C. 5460 S. Quebec St. #330 Greenwood Village CO 80111 Phone: (303) 667-7407 FAX: (303) 648-4786 E-mail: brief@johncaselaw.com	Case No: 2022CV031462 Div: 21

PETITIONERS' SURREPLY OPPOSING MOTION TO DISMISS

Respondents rely on two Colorado district court orders to persuade the Court that the Amended Verified Petition and the Second Amended Verified Petition (hereafter "Petition") [1] fail to state a claim for relief. Neither order is precedent binding this Court. First, Respondents cite the Order of dismissal in *Crossman v. Davis* (Mesa County District Court September 23,

[1] Counsel have agreed that the filing of the Second Amended Verified Petition on September 28, 2022, does not moot the pending Motion to Dismiss.

2022) for the proposition that only the Colorado Secretary of State has authority to decertify a voting system (Reply at 2).

1. Petitioners are not asking the Court to decertify the voting system.

Respondents claim plaintiffs seek decertification of the El Paso County voting system. This is incorrect and not based on anything in the petition. The petition seeks an order that the system not be used in the November election in El Paso County because it violates state and federal law. Decertification is not necessary for this Court to issue that order. Certification of a system does not require its use. It only permits its use. As an example, San Juan County has a system that is certified but not used except by disabled voters.

The fact issue before the Court is simple: whether the voting system in this county destroys records that must be preserved according to state and federal statutes.[2] The remedy sought is also simple: if the voting system is illegal, Petitioners ask the Court to order Respondents to stop using it (Petition at 10). Such relief affects no other aspect of the election.

2. C.R.S. § 1-5-621(1) does not require Petitioners to file an administrative complaint.

Respondents, and the district court in Mesa County, misread C.R.S. § 1-5-621(1), which states:

> 1-5-621 (1) Notwithstanding any provision of law to the contrary, upon filing of a complaint, the secretary of state shall investigate the complaint and may review or inspect the electronic or electromechanical voting

[2] 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"). 2002 VSS §2.2.5.1 requires preservation of electronic records to conduct a post-election audit. The purposes of an audit trail are "for public confidence in the accuracy of the vote tally, for recounts, and for evidence in the event of criminal or civil litigation" *Id.* C.R.S. § 1-7-802 requires election records to be preserved for 25 months. 52 USC 20701 requires election records to be preserved for 22 months.

> system of a political subdivision at any time, including election day, to determine whether the system complies with the applicable requirements of this part 6 or deviates from a certified system.

The statute is mandatory as to the Secretary, who "shall investigate" any complaint, but it is not mandatory on the complainant. The language "notwithstanding any provision of law to the contrary," indicates that complainant can seek all remedies available simultaneously, including under C.R.S. § 1-1-113. The *Crossman* court erroneously concluded that a concerned citizen must file an administrative complaint with the Secretary as a condition precedent to filing an action under C.R.S. § 1-1-113:

> Moreover, there is a specific procedure that I find must first be followed before a petition like the one at issue here can be filed. This procedure requires action, or inaction, from the SOS. That procedure is plainly laid out in C.R.S. § 1-5-621. If an individual has a concern with a voting machine, a complaint must be lodged with the SOS. If the SOS responds in a way that is violative of applicable law, or the SOS fails to respond as required by law, then C.R.S. § 1-1-113 could be implicated. The specific statutory provision in C.R.S. § 1-5-621 controls over the broader provision in C.R.S. § 1-1-113. *Carson*, 370 P.3d at 1141–42. It's also, as applicable to the allegations here, a condition precedent to C.R.S. § 1-1-113 being triggered. Petitioners, for whatever reason, seek to skip over the requirements C.R.S. § 1-5-621. This they cannot do, and it is fatal to their Petition.

Crossman Order at 6 (underline added). The Court failed to cite any authority for its "finding" that a concerned citizen must file an administrative complaint with the Secretary of State and wait for that process to conclude as a "condition precedent" to filing a verified petition under C.R.S. § 1-1-113. Nothing in C.R.S. § 1-5-621(1) states that a concerned citizen must file an administrative complaint. C.R.S. § 1-1-113 does not mention filing an administrative complaint, let alone require it as a "condition precedent" to filing a verified petition. The district court

invented the "condition precedent" requirement, which is not found in the statutes or decisional law.

Upon reflection, the *Crossman* ruling makes no sense. If every concerned citizen must first file an administrative complaint with the Secretary before filing an action under § 1-1-113, the Secretary can run out the clock during administrative proceedings, until it is too late to file a 113 petition. This would defeat the purpose of the election controversy statute, which is to provide the exclusive remedy for controversies arising prior to an election:

> C.R.S. § 1-1-113 (4). Except as otherwise provided in this part 1, the procedure specified in this section shall be the exclusive method for the adjudication of controversies arising from a breach or neglect of duty or other wrongful act that occurs prior to the day of an election.

(underline added). Note that the only exceptions from subsection 4 exclusivity, must be found in part 1 of Title 1, Article 1. C.R.S. § 1-5-621(1) is contained in part 6 of Article 5 of Title 1. Accordingly, that provision is not an exception to the exclusivity of § 1-1-113 (4). Thus, filing an administrative complaint pursuant to § 1-5-621(1) cannot be a condition precedent for filing a verified petition under § 1-1-113(1).

In any event, if this Court agrees with *Crossman* that Petitioners must file an administrative complaint, they meet that requirement. On September 27, 2022, Petitioner Kirkwood filed an administrative complaint with the Secretary. See Second Amended Verified Petition, filed September 28, 2022, paragraphs 67 and 68 at page 10 of the petition, and Exhibit 3 attached thereto, which is a copy of Mr. Kirkwood's administrative complaint.

3. The Secretary of State is not a necessary party

Respondents argue that they "are not the right parties to sue," citing *Crossman*, because "they do not wield the authority to decertify electronic voting systems or to conduct a hand count of an election." Reply at 3. If Petitioners were asking the Court to decertify the voting system, the Secretary would be a necessary party. In that event, Petitioners would have sued the Secretary. But again, Petitioners are not asking to decertify the voting system.

C.R.C.P. 19(a) spells out the procedure to determine whether a party who has not been joined is necessary. Rule 19(a) does not instruct the Court to dismiss the case. It requires the Court to order a necessary party to be joined.

> **C.R.C.P. 19(a). Persons to be Joined if Feasible.** A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. <u>If he has not been so joined, the court shall order that he be made a party</u>. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

Without performing an analysis of relevant factors under C.R.C.P. 19(a), *Crossman* found that "SOS is a necessary party to this case" (*Crossman* at 5). The *Crossman* court then violated Rule 19(a) by failing to order that that the Secretary be joined as a party.

Respondents do not argue that the Secretary is a necessary party under Rule 19(a), nor do they claim that complete relief cannot be accorded between the parties in the absence of the

Secretary, nor have they asked this Court to join the Secretary as a party. However, if this Court finds that the Secretary is a necessary party, then it should follow Rule 19(a), and order that the Secretary be joined. The remedy is not to dismiss the case for failure to state a claim.

4. If the computer voting system cannot be used, the only alternative is to count votes by hand.

Respondents argue that only the Secretary may order a hand count, implying that the Court lacks such authority (Reply at 4). In support of their argument, Respondents cite three statutes, C.R.S. §§ 1-7-507(6), 1-1-110(1), and 1-7.5-104 (*Id).*

C.R.S. § 1-7-507(6) states:

> If a software or hardware malfunction makes it impossible to count all or a part of the ballots with electronic vote-tabulating equipment, the secretary of state, after consultation with the designated election official, may permit the designated election official to direct that such ballots be counted manually, following as far as practicable the provisions governing the counting of paper ballots as provided in 1-7-307.

Nothing in the statute prevents this Court from ordering a hand count. C.R.S. § 1-1-110(1) requires the county clerk and recorder to consult with the Secretary and follow her rules and orders concerning elections. Nothing in that statute prevents this Court from ordering a hand count. C.R.S. § 1-7.5-104 specifies that the CCR shall conduct elections by mail under the supervision of the Secretary. Again, nothing in that statute prevents this Court from ordering a hand count.

If, after trial on the merits, the Court finds that the computer voting system destroys records that must be preserved, it must then decide how to conduct the November 8 election in substantial compliance with the election code. The legislature has provided that the only alternative to machine tabulation, is to count votes by hand, as described in C.R.S. § 1-7-307.

Regardless of the Court's decision on Petitioners' request to order a hand count, the issue is not grounds for granting the motion to dismiss. Petitioners' fundamental request is for an order not to use the illegal electronic voting system in the November election. That relief is squarely within the Court's jurisdiction under C.R.S. § 1-1-113(1) to order Respondents to adhere to the Election Code.

5. Laches cannot be raised by motion to dismiss; it must be pled as an affirmative defense, and proven at trial.

Respondents incorrectly cite *Klingenschmitt v. Broerman*, an El Paso County District Court opinion by Judge Helton, as authority for the proposition that the equitable defense of laches can be raised by motion to dismiss (Reply at 4). *McPherson v. McPherson, Jr*., 145 Colo. 170, 172, 358 P.2d 478, 479 (1960) holds that laches cannot be raised by motion to dismiss, and it must be affirmatively pleaded in an answer. *McPherson* is still good law. *Klingenschmitt* is consistent with *McPherson*, and easily distinguishable from this case. First, Judge Helton did not consider the defense of laches in ruling on Respondents' 12(b)(5) motion to dismiss. Instead, she denied the motion to dismiss (*Klingenschmitt* Order at 8). Second, Judge Helton conducted a trial on the merits, after which she found that the plaintiffs had presented no credible evidence to support their claims, and they failed to meet their burden of proof under C.R.S. § 1-1-113 (Order at 11). Third, based on the evidence at trial, Judge Helton found that the defense of laches barred relief even if plaintiffs had met their burden (Order at 12). Judge Helton found that the defendants suffered actual prejudice because the plaintiffs asked the Court to order that plaintiffs' names be placed on the ballot, but plaintiffs waited to file suit until ballots were being prepared for printing (*Id*). This case is factually distinguishable from *Klingenschmitt*, because

these Respondents have suffered no prejudice. They still have adequate time to prepare for a hand count, and any failure to prepare is their own fault. Respondents had even more time when the Petition was filed. Before the Court may consider the defense of laches, Respondents must plead it as an affirmative defense in an answer, and then prove it at trial. Laches is not a basis to dismiss this case under C.R.C.P. 12(b)(5). *McPherson,* 358 P.2d at 479.

CONCLUSION

For the reasons stated above, the Court should deny Respondents' Motion to Dismiss.

Respectfully submitted September 29, 2022

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s/John Case
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CERTIFICATE OF SERVICE

The undersigned certifies that on September 29, 2022, he filed and served the foregoing document via ICCES to the following:

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