EXHIBIT E

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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**

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Case No: 2022CV

Courtroom:

AMENDED VERIFIED PETITION FOR RELIEF UNDER C.R.S. § 1-1-113

Petitioners state:

INTRODUCTION

1. This petition is narrowly focused on the illegality of the El Paso County electronic, computer-based voting system. The system is illegal because it systematically deletes records in the normal course of its operation. The records it deletes are required to be preserved under Colorado and federal law. Accordingly, it is illegal to continue to use the system.

2. Because this petition is focused on the failure of the system to retain required records, it is entirely practical to consider and resolve the issue under the accelerated process of C.R.S. §1-1-113 in time to make arrangements to conduct the November, 8, 2022 general

election in El Paso County (hereafter "November 2022 election"), by hand count without using the computer voting system.

3. The Uniform Election Code of 1992, C.R.S. §1-1-101, *et seq.* ("Election Code"), authorizes the Colorado Secretary of State (hereafter "Secretary") to certify computer voting systems for use by counties, but only if the systems comply with standards and conditions of use imposed by state and federal law. C.R.S. §1-5-608.5.

4. In addition to complying with state and federal law standards, C.R.S. §1-5-615(1)(p) provides "(1) The secretary of state shall not certify any electronic or electromechanical voting system unless such system: . . . (p) Saves and produces the records necessary to audit the operation of the electronic or electromechanical voting system, including a permanent paper record with a manual audit capacity."

5. C.R.S. §1-5-603 authorizes the governing body of a political subdivision of the state, including 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 of the C.R.S.). 8 CCR 1505-1 (Rule 11.8.6) (Aug. 26, 2021).

6. C.R.S. §1-5-612 authorizes the governing body of a political subdivision of the state, including a county, in consultation with the designated election official, to use computer voting systems, but only if the systems have been certified by the Secretary "in accordance with this part 6." Part 6 of Article 5 of Title 1 of the C.R.S. relates to electronic and electromechanical voting systems.

7. While the Secretary did certify Dominion Voting Systems DVS Version 5.13-CO, such certification was not "in accordance with this part 6" because DVS Version 5.13-CO violates C.R.S. §1-5-615(1)(p) in that it does not "[Save] and [produce] the records necessary to audit the operation of the electronic or electromechanical voting system, including a permanent paper record with a manual audit capacity.

8. It is a violation of the Election Code, and in particular Part 6 of Article 5 of Title 1, for any county official to permit the use of a computer voting system that does not comply with standards and conditions of use imposed by state or federal law.

9. The computer voting system in El Paso County violates standards and conditions of use imposed by state and federal law because:

    (a) normal operation of the system destroys electronic files that federal and state law require computer voting systems to preserve for audits, recounts, and potential prosecution of election crimes or violations of civil rights; and

(b) before an election, updating system software in a procedure called "trusted build" destroys records of previous elections that federal and state law require computer voting systems to preserve.

10. On or about June 1, 2021 personnel from Dominion Voting Systems and the office of the Secretary performed a "trusted build" on the El Paso County computer voting system.

11. As a result of the June, 2021 "trusted build," data previously stored on the voting system was destroyed, including data necessary for any audit of elections that had occurred within 22 months before the "trusted build."

12. As a result of the June, 2021 "trusted build," the El Paso County voting system was loaded with Dominion Voting Systems DVS version 5.13-CO and the Microsoft Windows 2016 operating system.

13. The images of DVS version 5.13-CO and the Microsoft Windows 2016 operating system installed on the El Paso County voting system are standard images used by Dominion Voting Systems and the Secretary to install on DVS system components in 62 Colorado counties, including El Paso County.

14. Respondents intend to use the El Paso County computer voting system to record and tabulate votes that will be cast in the November 8, 2022 general election (hereafter "November, 2022 election.") and all future elections to be held thereafter in El Paso County.

15. The November, 2022 election will involve races for federal office including members of Congress and United States Senator.

16. Respondents intend to permit future "trusted builds" that will delete election data required to be maintained under state and federal law.

17. Court intervention is necessary to prevent Respondents from breaching and neglecting their duties and from committing unlawful acts by using an illegal voting system to record and tabulate votes in each upcoming election in El Paso County.

18. Petitioners seek an order pursuant to C.R.S. § 1-1-113 (1) that obtains substantial compliance with the Election Code by prohibiting the use of the current illegal computer voting system to process ballots, tabulate votes, or perform other functions prescribed by the Election Code in El Paso County.

19. Respondents' past, ongoing, and impending breaches and neglect of duty should and can most effectively be addressed if this Court orders substantial compliance with the Election Code in time for such relief to apply to the conduct of the November, 2022 election.

PARTIES, JURISDICTION, AND VENUE

Petitioners

20. Petitioner Timothy J. Kirkwood is an eligible elector and a resident of El Paso County, and thus has standing to file this petition under C.R.S. §1-1-113. Petitioner intends to vote in all upcoming elections in El Paso County for which he is eligible.

21. Petitioner Paul T. Prentice is an eligible elector and a resident of El Paso County, and thus has standing to file this petition under C.R.S. §1-1-113. Petitioner intends to vote in all upcoming elections in El Paso County for which he is eligible.

Respondents

22. The Board of County Commissioners is the governing body of El Paso County, a subdivision of the state. C.R.S. § 1-1-104 (18).

23. Respondents Holly Williams, Carrie Geitner, Stan VanderWerf, Longinos Gonzalez, Jr., and Cami Bremer are members of the El Paso County Board of County Commissioners.

24. Respondent El Paso County Board of County Commissioners authorized the purchase or lease the current El Paso County computer voting system.

25. Respondent Chuck Broerman is the Clerk and Recorder of El Paso County.

26. Each Respondent is a person charged with official responsibilities and has corresponding legal duties arising under both the Election Code and federal law.

27. Each Respondent is sued in his or her official capacity

Jurisdiction and Venue

28. This Court has jurisdiction pursuant to C.R.S. § 1-1-113 (1).

29. As set forth fully below, all Respondents have committed or are about to commit breaches and neglect of duty, and they intend to continue to commit breaches and neglect of duty, by using, or authorizing the use of, a computer voting system in El Paso County that violates state and federal statutory standards for computer voting systems.

30. Venue is proper pursuant to C.R.S. § 1-1-113 and C.R.C.P. 98.

APPLICABLE LAW

Requirements for Compliance with 2002 Voting System Standards

31. 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").

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

Requirements for Preservation of Election Records

Colorado law

33. C.R.S. § 1-7-802 (underline added) states:

> **1-7-802 Preservation of election records.**
>
> 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.

34. 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. C.R.S. § 1-1-104(11).

35. Definitions in C.R.S. § 1-1-104 that are exclusive use the term "means" instead of "includes."

Federal law

36. 52 USC § 20701 (underline added) states:

> Every officer of election shall retain and preserve, for a period of twenty-two months from the date of any general, special, or primary election of which candidates for the office of President, Vice President, presidential elector, Member of the Senate, Member of the House of Representatives, or Resident Commissioner from the Commonwealth of Puerto Rico are voted for, all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election, except that, when required by law, such records and papers may be delivered to another officer of election and except that, if a State or the Commonwealth of Puerto Rico designates a custodian to retain and

> preserve these records and papers at a specified place, then such records and papers may be deposited with such custodian, and the duty to retain and preserve any record or paper so deposited shall devolve upon such custodian. Any officer of election or custodian who willfully fails to comply with this section shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Legal Duties of Respondents

37. C.R.S. § 1-1-111(1) provides that Respondents Williams, Geitner, VanderWerf, Gonzalez, and Bremer have the duties:

> (a) To supervise the conduct of regular and special elections which it is authorized or required to call; and
>
> (b) Where appropriate, to consult and coordinate with the county clerk and recorder of the county in which the political subdivision is located and with the secretary of state in regard to conducting elections and rendering decisions and interpretations under this code.

38. Respondent Broerman is the "designated election official" of El Paso County, Colorado.

39. Pursuant to C.R.S. § 1-7-802, Respondent Broerman has the duty to preserve "election records" for a period of at least 25 months.

40. Respondents are "officers of election" within the meaning of 52 USC § 20701

41. Respondents have the duty in federal elections to preserve for at least 22 months the materials described in 52 USC § 20701.

42. The November 3, 2020, general election and the June 28, 2022, primary election included the election of candidates for federal offices such as United States president, United States senator, and representatives to the United States House of Representatives.

43. Pursuant to 52 USC § 20701, Respondents have duties to preserve "all records and papers which come into his possession relating to any application, registration, payment of poll tax, or other act requisite to voting in such election" for a period of 22 months after an election involving a federal candidate.

44. The U.S. Department of Justice ("DOJ") interprets the phrase "all records and papers" in 52 USC § 20701 to include electronic files related to an election.

45. Exhibit 2, attached hereto and incorporated herein, is a DOJ publication dated July 28, 2021. It states in pertinent part:

> The materials covered by [52 USC § 20701] extend beyond "papers" to include other "records." Jurisdictions must therefore also retain and preserve records created in digital or electronic form."

(Exhibit 2, p. 3 of 8, underline added)

46. The foregoing provisions of state and federal law that impose legal duties upon Respondents have been and are at risk of being breached or neglected as further described below in this Complaint.

FACTUAL ALLEGATIONS

El Paso County's Voting System

47. El Paso County possesses and intends to use in the November, 2022 election computer voting systems equipment and software version Democracy Suite DVS Version 5.13-CO provided by non-party Dominion Voting Systems, Inc. and/or non-party U.S Dominion, Inc. (hereafter "Dominion').

48. El Paso County election officials used Democracy Suite DVS Version 5.13-CO to tabulate votes in the November, 2021 election and in the June 28, 2022 primary election.

49. Respondents intend to use Democracy Suite DVS Version 5.13-CO to tabulate votes in the November, 2022 election.

Non-Compliance with Record-Retention Requirements

50. 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 (server 1) called a "trusted build." On information and belief, 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.

51. The installation of the 2021 trusted build reformatted the hard drives of the El Paso County voting system computers. The reformatting effectively deleted all information present on the drive either by rendering the data difficult to programmatically reference, read, and retrieve or by actually overwriting and replacing the data with new values.

52. 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.

53. Douglas Gould, a qualified computer system and cyber-security expert, examined forensic images of the Mesa County election management server hard drive which were made before and after the May, 2021 trusted build in Mesa County.

54. The Dominion voting system software in El Paso County is identical to the Dominion voting system software in Mesa County.

55. Because the Dominion voting system software in El Paso County is identical to the Dominion voting system software in Mesa County, the El Paso County voting system violates VSS standards in the same ways that the Mesa County voting system violates VSS standards.

56. Based on his examination of the Mesa County voting system, Mr. Gould made the following findings, among others:

    a) 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.

    b) Erasure of the records occurs as a normal consequence of operating the system and can be avoided only by not using the system.

    c) Destruction of these data makes it impossible to detect election crimes or civil rights violations.

    d) Destruction of these data makes it impossible to audit or reconstruct an election.

    e) 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.

    f) 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," as required by the Federal Election Commission's 2002 Voting System Standards.

    g) The EMS logger specifically omits detailed software executions, alterations and deletions of files and external connections to the EMS Server.

    h) 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.

i) It is impractical to attempt to correct or even mitigate the effects of the system deficiencies and non-compliance with the VSS.

j) The DVS system does not substantially comply with VSS requirements.

k) Overwriting log files substantially violates 2002 VSS standards because overwriting deletes election records that federal and state statutes require to be preserved.

57. A copy of Mr. Gould's Declaration is attached to this Petition and incorporated herein as Exhibit 1.

58. A copy of Mr. Gould's resume is attached as Exhibit 1.1.

59. Exhibits 1 and 1.1 are incorporated in this petition by reference.

Non-Compliance with 2002 VSS Requirements

60. Mr. Gould's report explains how the following VSS requirements, among others, are violated by the Dominion DVS Version 5.13-CO that is installed on Server 2.:

VSS §2.2.4.1 (h) (System Integrity)

VSS §2.2.11 (Data Retention)

VSS §2.2.5.1 (System Audit Purpose and Context)

VSS §2.2.5.2.1 (e) (Audit Records)

VSS §2.2.5.3 (Status Messages)

61. Respondents' continued authorization and use of El Paso County's electronic voting system to conduct upcoming elections will result in the failure to preserve, and active destruction of, both (1) election records that must be preserved under Colorado law and (2) required election materials that must be preserved under federal law.

62. No further elections should be conducted in El Paso County on any electronic voting system about which there is reasonable doubt that the system complies with the 2002 VSS standards.

Compliance with the Election Code Can Provide Relief.

63. El Paso County's electronic voting system cannot lawfully or practicably be used to tabulate votes in the November, 2022 election because the voting system, in its current configuration, does not substantially comply with 2002 VSS standards; because the deficiencies cannot be corrected; and because the voting system cannot be operated

without causing Respondents to violate Colorado and federal election-records-retention laws.

64. The Election Code permits a designated election official to direct the tabulation of votes by hand in an election otherwise conducted by electronic voting system if "for any reason it becomes impracticable to count all or part of the ballots with electronic vote-tabulating equipment." C.R.S. 1-7-507(6); C.R.S. 1-13.5-811(4) (local elections); *see also* C.R.S. 1-1-104(22.7) (defining "manual count").

65. The Secretary's rules likewise envisage and provide for the tabulation of votes by hand under these and other circumstances. *See* 8 CCR 1505-1 (Rules 10.13.1, 10.13.4) (Rule 18.2) (Rules 25.1.7, 25.2.3(c) & (e))

66. Hand counting votes is a reliable method of tabulating votes. Canada, Israel, France, and most countries in western Europe count votes by hand. Moreover, all political jurisdictions across the entire United States, including *every* jurisdiction in the State of Colorado, universally tabulated votes by hand until only relatively recently.

WHEREFORE, Petitioners pray that the Court enter an Order pursuant to C.R.S. § 1-1-113(1) requiring Respondents to comply with provisions of the Election Code in the following respects:

A. Order as part of discovery that independent experts may examine the El Paso County voting system to determine if it substantially complies with 2002 VSS standards;

B. After trial on the merits, enter judgment declaring that (1) the El Paso County voting system does not substantially comply with 2002 VSS standards; (2) the routine operation of the El Paso County voting system, as currently configured, violates Colorado and federal election-record-preservation requirements;

C. 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;

D. Order Respondents to use a hand count to tabulate votes cast in El Paso County in the November, 2022 election and in elections thereafter.

Petitioner prays that the court award petitioners their costs and expert witness fees, reasonable attorney fees, and grant such additional relief as the court deems just and appropriate.

Respectfully submitted August 20, 2022

JOHN CASE, P.C.
Counsel for Petitioners

s/John Case
John Case, #2431

VERIFICATION

I declare under penalty of perjury pursuant to the law of Colorado that the factual allegations set forth in the foregoing verified petition for relief under C.R.S. section 1-1-113 are true and correct to the best of my knowledge, information, and belief.

Executed on August *20*, 2022, in the County of El Paso, state of Colorado.

Petitioner Timothy J. Kirkwood

s/Timothy J. Kirkwood

I declare under penalty of perjury pursuant to the law of Colorado that the factual allegations set forth in the foregoing verified petition for relief under C.R.S. section 1-1-113 are true and correct to the best of my knowledge, information, and belief.

Executed on August *20*, 2022, in the County of El Paso, state of Colorado.

Co-Petitioner Paul T. Prentice

s/Paul T. Prentice