No. 06-___

IN THE

Supreme Court of the United States

KEITH LANCE, CARL MILLER, RENEE NELSON, AND NANCY O'CONNOR,

Appellants,

v.

GIGI DENNIS, SECRETARY OF STATE FOR THE STATE OF COLORADO, IN HER OFFICIAL CAPACITY ONLY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

MICHAEL A. CARVIN
LOUIS K. FISHER
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939

BRIAN J. MURRAY
JONES DAY
77 W. Wacker Dr., Ste. 3500
Chicago, IL 60601
(312) 782-3939

BRETT R. LILLY
Counsel of Record
JOHN S. ZAKHEM
DOYLE ZAKHEM SUHRE & LILLY, LLC
700 17th Street, Ste. 2000
Denver, CO 80202
(303) 228-1200

Counsel for Appellants

QUESTIONS PRESENTED

1. Where various state officials litigated in state court a suit concerning the meaning of state law, and the only party in that case purporting to represent state citizens sought to *deny* those citizens their individual rights secured by federal law, does the doctrine of issue preclusion deprive state citizens, who were not parties to the prior state-court litigation, of their ability to bring a federal suit to vindicate their individual federal rights?

2. Is the Constitution's Elections Clause (Article I, Section 4, Clause 1), which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," violated by a provision of state law that disables the state legislature from prescribing congressional districts for an entire decade, and transfers that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes?

3. Is the First Amendment's Petition Clause, as incorporated against the States by the Fourteenth Amendment, violated by a state constitutional provision that prohibits any legislation on a specific subject matter—here, congressional redistricting—and thereby renders void *ab initio* any effort by citizens to petition the government for redress of their grievances in that area?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the district court included Keith Lance, Carl Miller, Renee Nelson, Nancy O'Connor, and Gigi Dennis, Secretary of State for the State of Colorado, in her Official Capacity Only.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONS, STATUTES & RULES

TREATISES

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court is reported at 444 F. Supp. 2d 1149 (D. Colo. 2006) and reprinted at pages 1a-24a of the Appendix to this jurisdictional statement.

JURISDICTION

The decision of the district court was issued on August 11, 2006, by a three-judge court convened pursuant to 28 U.S.C. § 2284. Appellants filed their Notice of Appeal from the decision of the three-judge court on September 5, 2006. App. 25a-27a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the United States Constitution, U.S. CONST. art. I, § 4, cl. 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Petition Clause of the United States Constitution, U.S. CONST. amend. I, provides:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

1. The Elections Clause provides that congressional districts "shall be prescribed in each State by the *Legislature* thereof." U.S. CONST. art. I, § 4, cl. 1 (emphasis added). Acting pursuant to its authority and duty under that provision, the Colorado General Assembly passed Senate Bill 03-352, codified at Colo. Rev. Stat. § 2-1-101 (2003), which

establishes congressional districts to be used "until the congressional districts are again reapportioned." Colo. Rev. Stat. § 2-1-101(8). The bill was signed by the Governor and fully complies with federal law. Nevertheless, absent federal court intervention, Colorado will conduct the 2006, 2008, and 2010 congressional elections under a remedial plan that was crafted by a state judge in 2002, before the General Assembly exercised its Elections Clause authority.

On December 3, 2003, immediately after Colorado determined that § 2-1-101 will never be used, four voters (Appellants here) filed the instant suit against the Colorado Secretary of State in federal court. Invoking 42 U.S.C. § 1983, Appellants claimed that (1) the use of the judicial plan instead of the legislative plan would violate their individual rights to vote for congressional representatives in districts authorized by the Elections Clause, and (2) by disabling the General Assembly from enacting redistricting legislation for this decade, the State deprived them of their rights to petition for redress of their grievances, secured by the Constitution's First and Fourteenth Amendments. A three-judge district court was convened pursuant to 28 U.S.C. § 2284.

2. Defendant initially moved the district court to dismiss both the Elections Clause claim and the Petition Clause claim on jurisdictional and claim preclusion grounds. The district court dismissed the Elections Clause claim on *Rooker-Feldman* grounds and dismissed the Petition Clause claim for failure to state a claim upon which relief could be granted. *Lance v. Davidson,* 379 F. Supp. 2d 1117 (D. Colo. 2005) (hereafter "*Lance I"*). Because the district court "erroneously conflated preclusion law with *Rooker-Feldman,"* this Court vacated *Lance I* and remanded this matter for further proceedings. *Lance v. Dennis*, 126 S. Ct. 1198, 1201 (2006) (hereafter "*Lance II*").

3. On remand, Defendant moved to dismiss the Elections Clause claim on issue preclusion grounds based on the Colorado Supreme Court's decision in *Salazar v. Davidson*,

79 P.3d 1221 (Colo. 2003). *Salazar* was an original action filed in the Supreme Court of Colorado by Colorado's then-Attorney General against the Secretary of State, seeking to require continued use of the court-approved plan instead of § 2-1-101, solely on the ground that state law deprived the General Assembly of redistricting authority.

The Colorado Supreme Court interpreted Article V, Section 44 of the Colorado Constitution, which provides that "[w]hen a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly," as prohibiting the "general assembly" from redistricting more than once per decade. Section 2-1-101 is the first and only post-2000-census redistricting plan enacted by the Colorado General Assembly, but the *Salazar* majority also interpreted "general assembly" to include courts ordering remedial plans when the General Assembly fails to enact a valid plan. *Cf. Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari). Because the "general assembly" supposedly had redistricted already—that is, because a court had entered a remedial plan in 2002—the General Assembly was precluded from redistricting for the remainder of the decade, and § 2-1-101 was "unconstitutional and void." 79 P.3d at 1242.

In holding that "the state constitution limits redistricting to once per census, no matter which body creates the districts," the *Salazar* majority concluded that "[n]othing in . . . federal law negates this limitation." 79 P.3d at 1226. Even though the Elections Clause grants authority to "the Legislature," *Salazar* held that it "delegates congressional redistricting power to the states to carry out as they see fit, and not exclusively to the state legislatures." *Id.* at 1232. The *Salazar* majority purported to rely upon *Smiley v. Holm*, 285 U.S. 355 (1932) , and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), which held that the legislature's actions under the Elections Clause can be made subject to the same legisla-

tive processes, including gubernatorial veto and popular referendum, that apply to all legislative enactments in the state. Under the majority's view, these cases announced a sweeping rule: "The United States Supreme Court has interpreted the word 'legislature' in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature." 79 P.3d at 1242. The majority concluded that "the word 'legislature,' as used in Article I of the federal Constitution, encompasses court orders," and that disabling the legislature is valid "regardless of the method by which the districts are created." *Id.*

The *Salazar* Court enjoined the implementation not only of § 2-1-101, but also of *any other* legislatively enacted redistricting plan through the 2010 elections. Instead, the Court ordered: "Until Congress apportions seats to Colorado after the next federal census, the Secretary of State is ordered to conduct congressional elections according to the [court-ordered] plan." 79 P.3d at 1243. The Colorado General Assembly's petition for certiorari was denied, albeit over the dissent of three of this Court's members. *See* 541 U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari).

4. On remand, the district court concluded that *Salazar* found that COLO. CONST. art. V, § 44 limited redistricting to once per decade and did not violate the federal Constitution. App. 12a-14a. The district court determined that Appellants had Article III standing to bring their Elections Clause claim because the right to vote was a "judicially cognizable interest" such that they alleged an injury to a protected right. App. 5a-9a. However, the district court concluded that issue preclusion barred Appellants' Elections Clause claim because (1) the issue of who could redistrict under the Elections Clause was actually litigated and necessarily adjudicated in *Salazar*, App. 12a-14a; (2) Appellants were in privity with the Secretary of State and the General Assembly since the right to vote was a matter of general and public in-

terest, App. 14a-20a; and (3) the Appellants were not denied a full and fair opportunity to litigate the issue. App. 20a-21a. The district court granted the Secretary's motion to dismiss the Elections Clause claim pursuant to issue preclusion and dismissed the Petition Clause claim for failure to state a claim. Accordingly, in an order filed August 11, 2006, the district court dismissed the suit with prejudice. App. 22a-23a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The result of the decision below is that no *federal* voter can mount a *federal* constitutional challenge in *federal* court to Colorado's congressional voting districts, based on the erroneous conclusion that the same issue was resolved in *state* court litigation among various officials of *state* government concerning the meaning of the *state* Constitution. Specifically, voters here sought to challenge the use of congressional voting districts in the State of Colorado for the rest of this decade that were drawn by a single state-court trial judge, rather than the districts duly enacted by the Colorado General Assembly.

The district court erroneously held that the individual right to vote is a matter of general and public interest and concluded that the doctrine of privity bars Appellants' Election Clause claim. App. 20a. The district court compounded that error by even further expanding the notion of privity to include the situation of a legislature and its electing constituents—holding that the former could bind the latter in litigation. The district court so held, moreover, even though the state official who purported to litigate on behalf of the people was not a legislator but the Attorney General, who was *adverse* to the legislature in the prior case and, along with the Secretary of State, is adverse to Appellants here. The district court proceeded to ignore the fundamental fact that the General Assembly, which in *Salazar* asserted only *its* power to redistrict under the Elections Clause, did not and could not litigate Appellants' *individual* rights to vote in

constitutionally-compliant congressional districts. This individual right to vote is distinct from the institutional power, either under the Colorado or the United States Constitution, to create congressional districts in the first place. But, according to the district court, the Elections Clause confers no distinct individual rights—and, even if it did, such rights would be merely "derivative of the governmental right vested in the Legislature by the Elections Clause." App. 18a.

Art. V, § 44 of the Colorado Constitution allows a court plan to have the effect of law for an entire decade until Congress apportions seats to Colorado after the next federal census, even if the legislature subsequently enacts a new redistricting plan, and this result cannot be squared with the recent pronouncement in *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594, 2607-09 (2006) (opinion of Kennedy, J.). The decision below means that no individual who has cast, or will cast, a vote for Colorado's federal representatives has ever been heard, or can ever be heard, by a federal court on the merits of this federal constitutional issue—and Coloradans will have to vote in elections illegally carried out under the state-court plan until, at the earliest, 2012.

Art. V, § 44 also prohibits mid-decade redistricting once a redistricting plan is enacted, and thus prevented the mid-decade plan adopted by the General Assembly from having the effect of law. *See id.* at 2608 (opinion of Kennedy, J.) ("With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition."); *cf. id.* at 2632 (Stevens, J., concurring in part and dissenting in part) ("Constitution places no *per se* ban on mid-cycle redistricting . . ."); *id.* at 2647 (Souter, J., concurring in part and dissenting in part) (rejecting one-person, one-vote challenge "based simply on its mid-decade timing . . . ."). The district court tries to distinguish this holding on the grounds that a state constitution may impose more stringent restrictions on redistricting than the federal Constitution.

App. 13a n.12. This, of course, ignores the point that "the Framers intended the Elections Clause to grant States authority to create procedural regulations," *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995), and forbids states from attempting to "dictate electoral outcomes." *Cook v. Gralike*, 531 U.S. 510, 526 (2001) (internal quotation marks and citations omitted); *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

Indeed, it is crucial that this Court intervene because, since the district court's dismissal of Appellants' Elections Clause claim rested *solely* on its flawed issue preclusion and privity analysis, even a summary disposition upholding that judgment here would mean *precedential* ratification of that conclusion. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance has precedential value as to "the precise issues necessarily presented and necessarily decided"). And, particularly given the district court's obvious disinclination to resolve the merits of this suit in a timely manner, the need for this Court to decide the merits of this case—the purely legal question of whether the Elections Clause means what it says when it requires voting procedures to be established by "the Legislature"—is acute.

I. THE DISTRICT COURT WAS WRONG TO HOLD THAT THE DOCTRINE OF ISSUE PRECLUSION REQUIRED DISMISSAL OF APPELLANTS' ELECTIONS CLAUSE CLAIM.

A. The People Are Entitled To Litigate Their Individual Rights Under The Election Clause.

The district court concluded that nothing in the language nor the history of the Elections Clause "suggests that the Framers intended to confer a freestanding individual right to vote in congressional districts created under that Clause." App. 9a. This flawed understanding of the Elections Clause permeates the decision below. A review of the Framers' understanding as well as this Court's precedent demonstrates

that the people have an individual right to enforce the structural guarantees of the Elections Clause.

The Framers well understood the nature of the fundamental and individual rights of the people secured by Article I in general and the Elections Clause in particular. In The Federalist No. 54, when Madison describes the standard for regulating the apportionment of those who are to represent the people of each State, he speaks of the rule that "is understood to refer to the *personal rights of the people*, with which it has a natural and universal connection." The Federalist No. 54, at 366 (James Madison) (J. Cooke ed., 1961) (emphasis added). In The Federalist No. 60, Hamilton characterizes the right as "so fundamental a privilege" in the course of arguing that any partial scheme of elections that served an overbearing majority would occasion "a popular revolution . . . ." The Federalist No. 60, at 404 (Alexander Hamilton) (J. Cooke ed., 1961). In fact, the Elections Clause was defended during the state ratifying conventions by Theophilus Parsons as guarding against state legislatures that might "introduce such regulations as would render the rights of the people insecure and of little value" such as a regulation "making an unequal and partial division of the states into districts for the election of representatives." Jamal Greene, Note, *Judging Partisan Gerrymanders Under the Elections Clause*, 114 Yale L.J. 1021, 1038 (2005) (internal quotation marks omitted).

The Framers naturally conceived of the people's individual rights as part of the checks and balances under the Elections Clause because the House of Representatives was the body that was totally responsive to the will of the people. The Federalist No. 57, at 386 (James Madison) (J. Cooke ed., 1961); The Federalist No. 60, at 406, 408 (Alexander Hamilton) (J. Cooke ed., 1961).[1] The first instance of these checks

[1] Part and parcel of this total dependence of the House of Representatives on the people is the possibility that there would be periods where the

and balances resides in the discretionary power over elections that the Elections Clause vests primarily in the state legislatures and ultimately in the national legislature. Hamilton explains in The Federalist No. 59 that as long as "no improper views prevail," local administration is preferable, but Congress reserves a right "to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety." The Federalist No. 59, at 399 (Alexander Hamilton) (J. Cooke ed., 1961).

But the checks and balances between Congress and the state legislatures is only part of the scheme of Article I. The ultimate check resides with the people. Hamilton speaks of the "positive advantage" of uniformity in the time of elections for the House of Representatives which allows for a "total dissolution or renovation of the body at one time" as "a cure for the diseases of faction." The Federalist No. 61, at 413 (Alexander Hamilton) (J. Cooke ed., 1961). There can be little doubt that the Framers intended this ultimate check and balance to reside in the people in the first and last instance. Madison likewise is clear that the state legislature and the House of Representatives both answer to the people, as the electors of the House of Representatives "are to be the great body of the people of the United States. They are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State." The Federalist No. 57, at 385 (James Madison) (J. Cooke ed., 1961); *see also Smiley*, 285 U.S. at 365 ("A Legislature was then the *representative body* which made the laws of the people.") (citation and internal quotation marks omitted) (emphasis added). Thus, in the Elections Clause's tri-partite

---

people would demand frequent reapportionment. The Federalist No. 56, at 382 (James Madison) (J. Cooke ed., 1961); The Federalist No. 58, at 391, 394 (James Madison) (J. Cooke ed., 1961).

scheme between the state legislature, Congress and the people, ultimate accountability always resides in the people. The people can petition the state legislature for new or different congressional districts. The people can petition the federal legislature to correct improper state election regulations. The people can vote out the state legislature and the federal legislature. And, pursuant to Congressional will, the people can obtain a three-judge court with a right of direct appeal to this Court for cases involving congressional reapportionment. 28 U.S.C. § 2284 (2006).[2]

In our Republic, there can be no more fundamental right of the people under the Constitution than the right of the people to choose congressional representatives and the concurrent right to enforce the structural checks and balances of the Elections Clause. Accordingly, this Court has long recognized that the right to choose representatives in Congress is secured by Article I, § 2 and § 4. "At least since *Ex parte Yarbrough*, [110 U.S. 651 (1884)], and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, §§ 2 and 4 of the Constitution." *United States v. Classic*, 313 U.S. 299, 323 (1941). This right of the people to choose requires that the mode of its exercise be prescribed by state action that is in "*conformity* with the Constitution . . . ." *Id.* at 314 (emphasis added). Section 4 of Article I thus guarantees "the integrity of that choice" made by the people under § 2 "because § 4

[2] Significant in this regard is that the Chief Justice of the United States Supreme Court had called for the total elimination of the requirement for three-judge district courts. *See* Pub. L. No. 94-381, S. REP. NO. 94-204, at 3 (1975). Despite this, 28 U.S.C. § 2284 as currently codified preserved three-judge courts for cases involving congressional reapportionment or the reapportionment of a state-wide legislative body because it was the judgment of the Judiciary Committee of the Senate that "these issues are of such importance that they ought to be heard by a three-judge court . . . ." S. REP. NO. 94-204, at 9 (1975), s*ee* Pub. L. No. 94-381.

of Article I, [is] a *means* of securing a free choice of representatives by the people . . . ." *Id.* at 316-17 (emphasis added). [3]

Under Colorado law, "[a]n issue is necessarily adjudicated when the determination of an issue was necessary to a judgment," *Michaelson v. Michaelson*, 884 P.2d 695, 701-02 (Colo. 1994), and Colorado applies the "necessarily adjudicated" standard to limit, not expand, issue preclusion. "[U]nder this limiting approach to 'necessarily adjudicated,' issues that were actually litigated and decided, but were not necessary to the final outcome of the case, are *not* subject to collateral estoppel in a future case." *Bebo Constr. Co., v Mattox & O'Brien, P.C.*, 990 P.2d 78, 86 (Colo. 1999) (emphasis in original). The litigants in *Salazar* argued their institutional rights under U.S. CONST. art. I, § 4 and represented their statutory or constitutional duties as administrators and executive authorities under Colorado law. Specifically, the Secretary of State participated in her capacity as administrator of the election laws and the General Assembly represented its "institutional legal interest." *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1179-80 (D. Colo. 2004). These *institutional* interests stand in stark contrast to Appellants' *individual right* to vote for congressional representatives in districts authorized by the Elections Clause. Likewise, the *Salazar* Court made no mention of any individual right under U.S. CONST. art. I, § 4—there is not one point in *Salazar* regarding the contour of any individual right, what the individual right is, or what it protects—there is simply no adjudication at all on this right. Thus, Appellants are entitled to liti-

[3] *Ex parte Yarbrough* and its progeny are applicable to a § 1983 claim as well, as the language of then U.S. Rev. Stat. §§ 5508 and 5520 mirrors the language creating a cause of action under § 1983, i.e., "any right or privilege secured to him by the Constitution or laws of the United States . . . ." *Ex Parte Yarbrough*, 110 U.S. 651, 654-56 (1884).

gate their Elections Clause issue even though the General Assembly litigated that issue in *Salazar*.

B. The Conclusion That Appellants Were In Privity With The Colorado Secretary of State and the General Assembly In *Salazar* Cannot Be Correct.

The privity "rule" announced by the district court is self-evidently wrong, poses grave risks to voting and other fundamental rights, and is irreconcilable with this Court's binding precedent. There is no doubt that Appellants were not parties to *Salazar*, and there is no substantial identity of interests between Appellants and the parties in *Salazar* to find privity under Colorado law. *Cruz v. Benine*, 894 P.2d 1173, 1176 (Colo. 1999). While it is true that parties in *Salazar* also sought to effect an outcome with respect to the redistricting map to be used in subsequent elections, they actually argued and represented institutional interests and responsibilities under Colorado law. Conversely, the federal rights sought to be vindicated by Appellants are unique to individual citizens of Colorado who could not be in privity with or "virtually represented" by governmental litigants litigating institutional claims. As such, the privity "rule" in the opinion below raises serious due process concerns.

The district court concludes that the Appellants are in privity with the Secretary of State, who is adverse to Appellants here, and the Colorado General Assembly, and cite *McNichols v. City & County of Denver*, 101 Colo. 316, 322, 74 P.2d 99, 102 (Colo. 1937), and *Atchison, T. & S.F.R. Co. v. Bd. of County Comm'rs of County of Frement*, 95 Colo. 435, 441, 37 P.2d 761, 764 (Colo. 1934), for such proposition. *McNichols* held that a judgment against public officials compelling them to levy a tax for the issuance of a bond is binding against all citizens and taxpayers because it is a matter of general interest to all the citizens. *McNichols*, 101 Colo. at 322. Citing *Freeman on Judgments*, the court stated that the position between government officials and citizens is analogous to that of a trustee towards beneficiaries of the

trust "when they are numerous and the management and control of their interests are by the terms of the trust committed to his care." *Id*. at 322-23. In *Atchison*, the Colorado Supreme Court held that there is privity between a county or school district and its taxpayers and that a decree against the former is conclusive on the latter. *Atchison*, 95 Colo. at 435. The court reasoned that there is privity between a school district or county and its taxpayers just as between a private corporation and its stockholders. *Id*. at 440-41. The Court stated that a judgment against a county or its legal representatives, "in a matter of general interest to all the people, as, for example, one respecting the levy and collection of a tax, is binding, not only on the county and its official representatives named as defendants, but also upon all taxpayers of the county" though not named as defendants in the case. *Id*. (citations omitted). *McNichols* and *Atchsion* can be distinguished from the facts present here because they involved the validity of a bond issue and a judgment, and the court found privity because levying taxes to issue a bond or satisfy a judgment is a matter of general interest to all the citizens. By contrast, for purposes of privity analysis, voting rights are not something that the state or any sub-section thereof can assume management and control of because the interest lies in the individual and is thus inalienable, i.e., it is sovereign to the individual and cannot devolve to the state. Thus, the cases cited by the district court are distinguishable because (1) here it is the state that is denying the Appellants' rights, and (2) here the state was not represented, but rather there were different public officials taking different views.

A more instructive case is *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259 (1977), where a group of New York voters challenged the constitutionality of certain state laws requiring the approval of both a majority of voters living within city limits, and a majority of voters living outside of city limits, before a new county charter could be adopted. Before a three-judge dis-

trict court, the defendants raised preclusion, contending that an earlier suit brought by the County of Niagara, "purportedly on behalf of citizens and voters raising substantially the same issues," barred the later suit by individuals. *Citizens for Community Action at Local Level, Inc. v. Ghezzi*, 386 F. Supp. 1 5 (W.D.N.Y. 1974). That court rejected the defense, however, because (1) "the plaintiffs" in the later suit "were not parties to" the earlier action; (2) "the County had no valid authority to sue on behalf of its citizens and voters," and (3) "the prior action was not a proper class action brought pursuant to Rule 23." *Id.* at 6. On appeal, this Court affirmed, holding: "The District Court properly rejected th[e] defense [of *res judicata*] upon the ground that the plaintiffs [in the later suit] had not been parties to the earlier suit and *were not in privity with* the county of Niagara, which had brought it." *Town of Lockport*, 430 U.S. at 1051 n.7 (emphasis added). *See also Cleveland County Ass'n for Gov't by People v. Cleveland Bd. of Comm'rs*, 142 F.3d 468, 474 & n.11 (D.C. Cir. 1998) (rejecting argument that individuals could not challenge consent decree as to method of electing county commissioners because the individuals were represented in the litigation that produced the decree by elected county board); *Patterson v. Burns*, 327 F. Supp. 745, 749 (D. Haw. 1971) (three-judge court).

This is a far easier case than *Lockport* for a number of obvious reasons. There, the county was challenging the state's interference with the right of county citizens to amend the charter that governed their affairs. Thus, there was an obvious commonality of interest between the county and its citizens relative to the state's encroachment on their self-government. Here, the constitutional entity allegedly in privity with the citizens—*i.e.*, the state—is the same entity that, through its Constitution, *caused* the deprivation of federal constitutional rights. Moreover, unlike Niagara *County,* here it is one *subunit* of the government—the legislative branch—that purportedly represents all of the state's citizens. Even

assuming arguendo that "[a] judgment against [the government] . . . in a matter of general interest to all its citizens is binding upon the latter" no case anywhere has suggested that the state's *legislative branch* may engage in such preclusive "representation." App. 17a-18a.

The fact that Appellants were not even allegedly "represented" by the state, but only the General Assembly, is enough, standing alone, to render completely inapposite this Court's cases holding that if citizens are "represented by the *State*," they may be bound in litigation involving "common public rights as citizens of the State." *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958); *see also Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979). Here, there is no contention that the "State" of Colorado represented, or is in privity with, Appellants. To the contrary, the State, through its Constitution, established the scheme for conducting the federal elections that violates the Elections Clause. Indeed, here, it would be impossible for the *State* to speak for its citizens on the Elections Clause question, since the State was at war with itself on that very issue. As the *Salazar* opinion noted, the Attorney General, who took a position adverse to the General Assembly on the Elections Clause (and everything else), is vested with the power "to protect the rights of the public" and, "as the chief legal officer of the state, is here in the interest of the people to promote the public welfare." 79 P.3d at 1230 (internal quotation marks omitted). This confirms the obvious point that the General Assembly is not the entity of state government that represents the State or its citizens in court. And the state actor that does fill that role—the Attorney General—is obviously not in privity with the Appellants, since he was and is adverse to them on their view of the Elections Clause, as is the Secretary of State. *Lance II,* 126 S. Ct. at 1199 n.1; *Lance I,* 379 F. Supp. 2d at 1124 n.8. The three-judge court sought to avoid this dispositive point through a semantic play on the

word "representation," asserting that the "very nature of the relationship between that of the legislature and its constituents is one of representation." App. 15a. But, of course, the fact that the legislature represents the citizens' interests when enacting legislation hardly suggests the legislature can bind those citizens by taking part in *litigation*.

In any event, the voting rights advanced by Appellants here are not "common public rights" where the State can speak for and bind its citizens. Here, Appellants plainly are not asserting derivative rights, stemming from the State, for two straightforward reasons. First, again, the *State* never advanced a position in the state-court litigation intended to *enhance* the constitutional right Appellants assert in federal court. The State, through its Constitution, is the instrument that infringed the asserted federal right.

Second, the "*individual's* right to vote" in federal elections conducted in accordance with the Constitution is not some common public right derived from the State, or a situation where the State is authorized to speak for its citizens. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring) ("[T]he federal right to vote . . . in a congressional election . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.").[4] Rather, it is a personal right, guaranteed by the federal Constitution with

[4] *See also Burson v. Freeman*, 504 U.S. 191, 199 (1992) ("[T]he right to vote freely for the candidate of one's choice is the essence of a democratic society.") (internal quotation marks omitted); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges."); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (holding that the standing of certain members of a legislature to represent that body's interests in voting legislation "sheds no light on whether the voters in this case, who are individually subject to and affected by the election scheme they challenge, have standing.").

which the State may not interfere. *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 842 (Kennedy, J., concurring) ("Nothing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("[T]he right of qualified voters within a state to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution" and "is secured against the action of . . . states."). For this reason, of course, the vast majority of voting rights cases challenge encroachments by the states, or their instrumentalities, on the constitutional right to vote.

Nevertheless, the district court contended that the right to have elections conducted in accordance with the federal Constitution—*i.e.*, in the manner prescribed by the legislature thereof—is not "some sort of distinct individual right" but is one that is "necessarily derivative of the governmental right vested in the legislature by the Elections Clause." App. 18a. This astonishing assertion is premised on a profound misunderstanding of both the right to vote and the nature of challenges based on the Constitution's structural guarantees.

Individual rights can be affected directly—by, for example, denying a criminal defendant due process—or through structural manipulation to disrupt the checks and balances that were designed to protect citizens against an oppressive government—such as by being subject to adjudication or prosecution by entities not authorized to perform those functions. *See Edmond v. United States*, 520 U.S. 651, 655-56 (1997); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982); *Glidden v. Zdanok*, 370 U.S. 530, 533 (1962); *cf. Morrison v. Olson*, 487 U.S. 654, 670-97 (1988). For this reason, persons subject to prosecution or regulation by an improper authority have an individual right to mount a separation-of-powers challenge—not some right *derivative* of the right of the President to appoint

federal officers or to execute the law. This is why candidate Buckley and Mr. Olson had an individual right to challenge the composition of the Federal Elections Commission and the Independent Counsel, regardless of what litigation position was taken by the Executive Branch concerning the Presidential prerogatives that were allegedly being infringed. *See Buckley v. Valeo*, 424 U.S. 1, 68 (1976); *Morrison*, 487 U.S. at 680-81. This is because separation-of-powers guarantees are not designed merely to protect the occupants of the respective branches, but to ensure the liberty of citizens against branches unlawfully exceeding their assigned responsibilities. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (noting that "the principal function of the separation-of-powers" is "to maintain the tripartite structure of the Federal Government" and "thereby protect individual liberty"). This Court has been quite wary of the notion that the branches whose prerogatives have allegedly been infringed have standing to challenge that infringement in court (*e.g.*, *Raines v. Byrd*, 521 U.S. 811, 828-30 (1997)), and, indeed, all separation-of-powers challenges resolved by this Court have been brought by citizens challenging the misallocation of governmental authority.

Like the separation-of-powers guarantees at the federal level, the Elections Clause specifies which entity within the state may prescribe the manner of federal elections. Voters plainly have a right to challenge state laws that violate the constitutionally guaranteed method for holding federal elections. Just as they may challenge defects in the methodology itself, they may challenge deficiencies in *who prescribes* the methods. Accordingly, in redistricting cases, voters routinely invoke an independent individual right to challenge plans drawn by federal courts that have impermissibly "preempt[ed] the legislative task" of making reapportionment policy. *White v. Weiser*, 412 U.S. 783, 795 (1973). In *Upham v. Seamon*, 456 U.S. 37 (1982), for example, the Court held that in devising a remedial plan, the district court

was "not free . . . to disregard the political program of the Texas State Legislature," unless it violated federal law. *Id.* at 43. Although they were "supported [in their] appeal by the State of Texas," named appellants in the case were individuals asserting their rights to have the state use a legal redistricting plan. *Id.* at 41 & n.5.[5] Just as voters have a right to challenge federal court plans that invade state legislative prerogatives, the voters here have a right to challenge the plan drawn by state courts, because it invades the legislature's prerogatives set forth in the text of the Elections Clause. In resolving these challenges to a federal court's interference with a state legislature's reapportionment policies, no case has ever hinted that a right to a legislatively-drawn plan was somehow "derivative" or that the litigation posture of state officials could somehow "bind" voters. In *Growe*, for example, the federal court was free to determine *de novo* whether the previously-drawn state-court plan violated the Voting Rights Act, without giving any preclusive effect to the state court's prior determination, supported by state election officials, that the plan complied with the Act. *Growe*, 507 U.S. at 29. For the same reason, Presidential candidates have an independent right to insist that the manner for choosing Presidential electors be done by the "Legislature" under

[5] *See also Lawyer v. Dep't of Justice*, 521 U.S. 567, 575-78 (1997) (entertaining individual voter's claim that federal district court's order of redistricting plan "impaired the State's interest in exercising primary responsibility for apportionment of its federal congressional and state legislative districts and had the derivative effect of eviscerating the individual rights of appellant, as a citizen and voter . . .") (internal citations, quotation marks and brackets omitted); *Growe v. Emison*, 507 U.S. 25, 30 (1993) (noting that Court, upon application of individual voters, had vacated federal district court order that impermissibly encroached upon state redistricting authority by enjoining enforcement of orders of Minnesota Special Redistricting Panel); *Scott v. Germano*, 381 U.S. 407 (1965) (vacating federal district court order that denied application by individual voters and state officials for stay of federal proceedings so as to avoid encroachment upon state redistricting processes).

Article II, § 1, cl. 2. *Bush v. Gore*, 531 U.S. 98 (2000). In short, whatever the scope of a state's ability to bind citizens concerning "common public rights," it cannot possibly extend to a situation where the state *denies* federally-guaranteed *voting* rights.[6]

Finally, in *Salazar*, the General Assembly did not *purport* to act as the representative of Colorado's citizens in litigation. Rather, the General Assembly intervened to protect its institutional right to enact a redistricting plan. Thus, "to contend that [it] . . . somehow represented [Appellants], let alone represented them in a constitutionally adequate manner, would be to 'attribute to them a power that it cannot be said that they had assumed to exercise.'" *Richards v. Jefferson County*, 517 U.S. 793, 802 (1996) (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940)).[7] Indeed, *Richards* held that Due Process *requires*, at a minimum, that the state official *purport* to represent citizens before it can be in privity with, or bind, the citizens. *Id.*

---

[6] Indeed, there is no privity here even under the standards articulated by the three-judge court itself. According to the court below, states cannot represent or bind citizens with respect to a "purely private interest," which is defined as a "claim that the state has no standing to raise." App. 15a (quoting *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993)). *See* 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure*, § 4458.1 (1981) (where rights are "individual and private," "the government . . . clearly cannot foreclose private remedies"). Here, the state legislature had no standing because it could not bring a § 1983 suit to challenge the state Constitution's violation of the Elections Clause. 15 Am. Jur. 2d *Civil Rights* § 85 (2004) ("a state is not an entity capable of bringing suit as a plaintiff under 42 U.S.C. § 1983"). Nor did the court below offer any hint as to how the General Assembly could get into any court to mount a federal challenge to the state Constitution that created the General Assembly.

[7] The only party that in *Salazar* purported to be acting as the public's representative in litigation, and was found by the Colorado Supreme Court to be acting as such, was the Colorado Attorney General. *See Salazar*, 79 P.3d 1221 at n.4.

Under the district court's analysis, the federal courts cannot hear federal-law challenges to such plans so long as a state official invoked the same federal provision in state court. That cannot be the law. Federal courts must remain open to hear such claims. *Cf. Hibbs v. Winn*, 124 S. Ct. 2276, 2281 (2004) (holding the Tax Injunction Act did not bar federal court action to vindicate federal constitutional rights, in part because, when States circumvented *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), by manipulating their tax laws, it was "the federal courts" that "upheld the Constitution's equal protection requirement" by "adjudicat[ing] . . . challenges[] instituted under 42 U.S.C. § 1983"); *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (with enactment of § 1983 and general federal-question jurisdiction statute, "the lower federal courts . . . became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States") (internal quotation marks omitted).

At a minimum, the manner in which the decision below barred the doors of a federal court to plaintiffs who plainly satisfied all requirements for jurisdiction and standing, solely because of the plaintiffs' alleged "privity" with a unit of state government, raises serious due process concerns. It is well-established that "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918); *see also Richards*, 517 U.S. at 797 n.4 (collecting cases). Consequently, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Such strangers "may not be collaterally estopped . . . without litigating the issue," even if "one or more existing adjudications of the identical issue . . . stand squarely against their position," because "[t]hey have never had a chance to present their evidence and arguments on the claim." *Blonder-Tongue Labs.,*

Inc. v. Univ. of Ill. Found., 402 U.S. 313, 329 (1971). This rule "is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting Wright, Miller & Cooper, *supra*, § 4449).

Because the result of a conclusion of "privity" is depriving the party to the second case of his day in court, this Court has found privity—consistent with constitutional limitations—to exist only "in certain limited circumstances." *Id*. As relevant to the instant case, these include: (1) "class" or "representative" suits, and (2) suits where the party to a second suit "control[led]" the earlier litigation "on behalf of one of the parties in the litigation." *Wilks*, 490 U.S. at 762 n.2; *see Richards*, 517 U.S. at 802. Neither of these situations, however, exists here: (1) *Salazar*, an original proceeding in the Colorado Supreme Court initiated by Colorado's Attorney General, was not a class action, and (2) as the three-judge court expressly stated in the context of Appellants' Petition Clause claim, there is no evidence here of Appellants' "substantial participation in the *Salazar* litigation," nor that "the instant suit was merely part of a larger tactical scheme" *Lance I*, 379 F. Supp. 2d at 1129[8], let alone that Appellants "control[led]" *Salazar* "on behalf of" the Colorado legislature. *Wilks*, 490 U.S. at 762 n.2.[9] Privity should be limited to those narrow situations in which this Court has found liti-

[8] This lack of "tactical maneuvering" undercuts the district court's reliance on *Tyus v. Schoemehl*, 93 F.3d 449, 457 (8th Cir. 1996); App. 17a. Further, Appellants have alleged, in their amended complaint and in their affidavits submitted in support of standing, different private rights unique to their congressional districts that are not shared in common with members of the public in other congressional districts. App. 6a n.5.

[9] Nor does it matter whether Appellants could have intervened in *Salazar*. "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.*

gation by one party to deprive another of his day in court, consistent with the requirements of Due Process. Because neither of those situations is present here, the district court's finding of privity was error.

C. Appellants Did Not Have A Full And Fair Opportunity to Litigate An Issue.

The district court fails to explain how Appellants received any opportunity to litigate their distinct individual voting rights claims. Furthermore, Appellants' challenge to COLO. CONST. art. V, § 44 could not have been represented and protected by any *Salazar* litigants as this provision had yet to be interpreted or applied at the time *Salazar* was briefed and argued. For this reason, this Court should find that Appellants have yet to be afforded a full and fair opportunity to litigate their claims.

II. ARTICLE V, § 44 OF THE COLORADO CONSTITUTION IS UNCONSTITUTIONAL.

A. Article V, § 44 Of The Colorado Constitution Violates The Elections Clause; The Court Should Reach The Merits Of This Claim.

If the Court agrees the district court erred in holding that the doctrine of issue preclusion barred their Elections Clause claim, it should then address that claim. The exigencies of the circumstances, precedent, and the strength of Appellants' case on the merits all support that course.

The exigencies are clear enough. Although Colorado violated the Elections Clause by failing to use § 2-1-101 for the 2004 and 2006 elections, there is cause to hope that the legislative plan could be used for the 2008 elections if this Court reaches the merits and issues its opinion in the normal course. If instead there is a remand followed by a third appeal, there is a real possibility that the 2008 elections will be conducted under the same illegal plan used for the 2004 and

2006 elections before this Court can finally settle the issue. Given that no election in this decade has yet to be conducted in accordance with the law, the need for quick, decisive action by this Court is thus plain.

Moreover, Appellants' Elections Clause claim presents a pure question of law, with no record development required: Whether the Elections Clause, which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," permits a state to disable its legislature from prescribing congressional districts for an entire decade, and transfer that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes. Indeed, the Colorado Supreme Court in *Salazar* addressed the Elections Clause issue in an original action decided on briefs without any record development. In such circumstances, where the issue presented is legal and is not in need of record development, this Court has not hesitated to simply adjudicate the issue, rather than remand for the district court to offer its view. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982)). The result should be no different here. Indeed, if anything, the nature of this case—committed by statute to a three-judge panel, from which there is an automatic right of appeal, on this legal question which would be reviewed by this Court *de novo*—makes this Court's addressing the merits now arguably even more appropriate than in *Mitchell* and *Nixon*, both of which reached this Court on petitions for certiorari.

Finally, Appellants' Elections Clause claim squarely presents an issue worthy of this Court's review. Indeed, three members of this Court have already so signaled, in dissenting from this Court's denial of the petition for writ of certiorari filed by the Colorado legislature in *Salazar*. *See* 541

U.S. 1093 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari).

As that dissent noted, Article V, Section 44 of the Colorado Constitution "exclude[s] the legislature itself in favor of the courts" for purposes of congressional redistricting. Thus, "participation in the process by a body representing the people, or the people themselves in a referendum," is "[c]onspicuously absent." 541 U.S. at 1095. This is directly contrary to the Elections Clause's mandate that "the *Legislature*" set the times, places, and manner of congressional elections.

As this Court has emphasized, the term "Legislature" was not one "of uncertain meaning when incorporated into the Constitution," and, thus, "[t]here can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states." *Hawke v. Smith*, 253 U.S. 221, 227-28 (1920). "What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Id.* at 227; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) ("[T]he text of the Elections Clause suggests that . . . an initiative system, in which popular choices regarding the manner of state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislatures.'").

While the Court has correctly held that the legislature can be required to follow the ordinary lawmaking *process* to enact a binding law governing federal elections, it has emphasized that the lawmaking *body* for federal elections must be the state legislature. As Chief Justice Rehnquist succinctly explained in his *Salazar* dissent, in *Smiley*, 285 U.S. 355, the state legislature's congressional redistricting plan could be vetoed by the Governor because "the function referred to by Article I, § 4, was the lawmaking process, which is defined

by state law" and, "[i]n Minnesota, . . . included the participation of the Governor." 541 U.S. at 1095. Similarly, in *Ohio ex rel. Davis*, 241 U.S. 565, "referend[a] to approve or disapprove by popular vote *any* law enacted by the General Assembly" were "consistent with Article I, § 4." 541 U.S. at 1095 (emphasis added). But "there was no question" in those cases that congressional redistricting was being accomplished by the "'body' the term 'legislature' describes." *Id.*; *see Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227).[10] State law in those cases was merely imposing the same requirements that applied to *all* lawmaking, rather than a unique restriction for congressional redistricting.

Thus, *Smiley* and *Hildebrant* are fully consistent with the principle that the Elections Clause's delegation to "the *Legislature*" must impose "some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." 541 U.S. at 1095. While a State normally can organize its internal powers as it deems fit, the Elections Clause is one of the "few exceptional cases in which the

[10] The power of courts to engage in redistricting as part of their remedial authority does not, of course, suggest that a court is a "Legislature" under the Elections Clause. A state court that enjoins implementation of malapportioned districts created during the prior decade, and enters a constitutionally prescribed remedy, is acting pursuant to the judicial power to remedy constitutional violations, since state courts have concurrent jurisdiction with federal courts to prevent such violations of Article I, Section 2. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In doing so, courts are not exercising any delegated legislative power under the Elections Clause, as evidenced by this Court's repeated holdings that judicial redistricting plans may be ordered only in the face of legislative inaction and exist only so long as the legislature does not fulfill its duty to redistrict. *See, e.g.*, *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action*.") (internal citation omitted) (emphasis added)).

Constitution imposes a duty or confers a power on a particular branch of the State's government." *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring). Equally important, states have no inherent power reserved under the Tenth Amendment to regulate federal elections. *See Cook v. Gralike,* 531 U.S. 510, 522 (2001); *U.S. Term Limits*, 514 U.S. at 804-05. Accordingly, "the words 'shall be prescribed in each State by the *Legislature* thereof' operate as a limitation on the State." *Salazar*, 541 U.S. at 1095; *see McPherson v. Blacker*, 146 U.S. 1, 25 (1892); *see also Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000) (remanding because there were "expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Elections Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power'") (quoting *McPherson*, 146 U.S. at 25); *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 46 (1866) ("Where there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount.").

These precedents demonstrate that the Colorado Constitution impermissibly circumscribes legislative power by effectively transferring Elections Clause authority from the state legislature to the courts if the legislature fails to adopt congressional redistricting legislation before the expiration of a severe time limit inapplicable to any other legislation. Chief Justice Rehnquist's statement—that Article V, Section 44 of the Colorado Constitution merits review by this Court—remains as true today as it was then. Indeed, because *Salazar* involved various discretionary judgments concerning the Court's certiorari docket, this direct appeal is an even more attractive vehicle for the Court to address the Elections Clause issue.

B. Article V, § 44 of the Colorado Constitution Also Violates The Petition Clause.

Alternatively, Art. V, § 44 violates the Petition Clause because it is a content-based prior restraint that enjoins the enforcement of any new redistricting law in advance of its enactment. Further, Art. V, § 44 has a chilling effect on redistricting petitioning activity because there is active discouragement to petition the legislature for redistricting grievances if no redress can be enacted.

Far from merely requiring that a law not, for example, dilute minority votes or divide counties between districts, the Colorado Constitution prohibits the General Assembly from enacting *any* redistricting legislation after the artificial "deadline." This absolute barrier to lawmaking indisputably "prohibit[s] or discourage[s]" petitioning for redress of redistricting grievances, since any such petitioning is entirely meaningless no matter what particular redistricting outcome a citizen might seek. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 466 (1979). And governmental prohibition or discouragement is the "type of impairment" of petitioning "that the Constitution prohibits." *Id.* (internal quotation marks omitted). Indeed, this Court has recognized that serious constitutional concerns are raised when a state "removes the authority to address" a particular type of problem "from the existing decisionmaking body." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 474 (1982).

The absolute ban on legislative redistricting makes this case more closely akin to another in which this Court struck down a Colorado constitutional provision barring all legislation on a specific subject matter. *Romer v. Evans*, 517 U.S. 620 (1996). The Court there recognized that "[i]t is not within our constitutional tradition to enact laws of this sort"—even where such laws do not implicate protected groups or fundamental rights. *Id.* at 633; *see id.* at 631. Indeed, the instant case is easier than *Romer* because the Colo-

rado Constitution's unique bar to redistricting implicates the fundamental right to vote and, moreover, prevents the legislature from acting in an area where it has at least the primary, if not the exclusive, authority and duty under the federal Constitution.

The violation in this case is no different than a state law prohibiting the results of votes cast for a certain proposition or candidate. *See Cook v. Gralike*, 531 U.S. 510 (2001) (Elections Clause does not grant states power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints); *see also id.,* at 530 (Rehnquist, C.J., and O'Connor., J., concurring in the judgment) (state constitution provision that was content-based and discriminated on the basis of viewpoint violated First Amendment rights of political candidates). The defense to such laws that there is no First Amendment violation because there was no restriction on the ability to cast a vote completely ignores the prohibition on the effect of the vote. *Cf. BE & K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 530 (2002) ("enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning"). There is likewise no meaningful distinction between prohibiting the object of redress in redistricting grievances and prohibiting the petitioning activity in the first place. *Cf. Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 139 (1961) (construction of the Sherman Act that would disqualify people from taking a public position in matters in which they are financially interested violates Petition Clause). The effect is the same; the right is left meaningless in either instance. Inherent in the Petition Clause is the fundamental right of citizens to challenge and effect change in their government. *U.S. v. Cruikshank*, 92 U.S. 542, 552 (1876) ("The very idea of government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to pub-

lic affairs and to petition for a redress of grievances."). The checking function of the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of *political and social change* desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957) (emphasis added). Thus, a petitioning grievance concerning redistricting is expression essential "to the end that government may be *responsive to the will of the people and that changes may be obtained by lawful means.*" *Stromberg v. California*, 283 U.S. 359, 369 (1931) (emphasis added).

Art. V, § 44 nullifies the ability of the legislature to consider and provide relief to citizens on what is perhaps the most important and fundamental action affecting representation in our Republic—the nature and geographic delineation of legislative districts. Certainly the First Amendment does not guarantee that the government will even listen to, much less adopt, a particular solution as petitioned for by a citizen or group of citizens. But the Right to Petition does mean that the state may not seal off citizens from the ability to make their voices heard, or declare the legislature powerless to provide a remedy where the petitioning activity concerns core political expression regarding redistricting, and the petition is directed at the legislature, which is specifically granted the power to redistrict pursuant to U.S. CONST. art. I, § 4.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

MICHAEL A. CARVIN
LOUIS K. FISHER
JONES DAY
51 Louisiana Avenue NW
Washington, DC 20001
(202) 879-3939

BRIAN J. MURRAY
JONES DAY
77 W. Wacker Dr., Ste. 3500
Chicago, IL 60601
(312) 782-3939

November 3, 2006

BRETT R. LILLY
Counsel of Record
JOHN S. ZAKHEM
DOYLE, ZAKHEM, SUHRE & LILLY, LLC
700 17th Street, Ste. 2000
Denver, CO 80202
(303) 228-1200

Counsel for Appellants

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-cv-02453-ZLW-CBS

KEITH LANCE,
CARL MILLER,
RENEE NELSON,
NANCY O'CONNOR,

Plaintiffs,

v.

GIGI DENNIS, SECRETARY OF STATE FOR
THE STATE OF COLORADO, in her Official Capacity
only,

Defendant.

MEMORANDUM OPINION AND ORDER

Case 1:03-cv-02453-ZLW-DME — Document 82
Filed 08/11/2006

Before **EBEL**, Senior Circuit Judge of the United States Court of Appeals for the Tenth Circuit, **PORFILIO**, Senior Circuit Judge of the United States Court of Appeals for the Tenth Circuit, and **WEINSHIENK**, Senior District Judge of the United States District Court for the District of Colorado.

EBEL, Senior Circuit Judge.

This case is a continuation of one of several rounds of litigation based on Colorado's congressional redistricting after the 2000 census which resulted in dueling electoral maps—one created by the Colorado state courts in 2002, after the General Assembly failed to pass a plan in the allotted time, and the other created by the General Assembly after the 2002 election. The *Lance* Plaintiffs brought suit against then-Secretary of State Davidson, asserting that Colo. Const. Art. V, § 44, as interpreted by the Colorado Supreme Court, violated Art. I, § 4 of the U.S. Constitution (the "Elections Clause" claim) and the First and Fourteenth Amendments of the U.S. Constitution (the "Petition Clause" claim). *Lance v. Davidson* [hereinafter "*Lance I*"], 379 F. Supp. 2d 1117, 1122 (D. Colo. 2005). The Supreme Court reversed our prior decision dismissing the complaint and action and remanded the case to us for further consideration. *See Lance v. Dennis*, [hereinafter "*Lance II*"], 126 S. Ct. 1198 (2006). Exercising jurisdiction pursuant to 28 U.S.C. § 2284, we again DISMISS with prejudice Plaintiffs' Amended Complaint and cause of action.

BACKGROUND

The first round of litigation following Colorado's redistricting involved two suits: 1) an original action in the Colorado Supreme Court by the state attorney general, *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), in which the Colorado Supreme Court held that Colo. Const. Art. V, § 44, consistent with the federal Constitution, limited redistricting to once per decade, such that the legislative plan passed in 2003—after the state court's adoption of a plan in 2002—violated the state constitution,

id. at 1226, 1231-32, 1243; and 2) a federal court action brought by proponents of the court-ordered plan, *Keller v. Davidson*, 299 F. Supp. 2d 1171 (D. Colo. 2004), in which this three-judge district court ruled that defendants' original counterclaims, which also raised the issue of whether Colo. Const. Art. V, § 44 violates Article I, § 4 of the Federal Constitution, were precluded under Colorado issue preclusion law by the judgment in *Salazar*, *see Keller*, 299 F. Supp. 2d at 1181-83.

Prior to the dismissal in *Keller*, the *Lance* Plaintiffs brought this suit. In our previous order in this suit, we ruled that the Plaintiffs' Elections Clause claim was jurisdictionally barred by the *Rooker-Feldman* doctrine, relying upon the Plaintiffs' privity status with litigants in *Salazar*. *Lance I*, 379 F. Supp. 2d at 1125-27. Additionally, we ruled that Plaintiffs' Petition Clause claim failed to state a claim upon which relief may be granted because Colo. Const. Art. V, § 44, as interpreted in *Salazar*, does not prohibit political speech or petition for redress. *Id*. at 1131-32.

On appeal from that order, the Supreme Court disagreed with our *Rooker-Feldman* ruling,[1] vacated our judgment, and remanded the case to us. *Lance II*, 126 S. Ct. at 1202-03. Because we dismissed Plaintiffs' Petition Claim on grounds other than *Rooker-Feldman*, our prior adjudication of that claim stands. *See Lance I*, 379 F. Supp. 2d at 1131-32 (dismissing for failure to state a claim upon which relief may be granted); *see also Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting) ("[Plaintiffs'] spurious Petition Clause claim was also properly dismissed by the District

---

[1] Specifically, the Supreme Court held that "[t]he *Rooker-Feldman* doctrine does not bar actions by nonparties to [an] earlier state-court judgment simply because, for purposes of [issue] preclusion law, they could be considered in privity with a party to the judgment." *Lance II*, 126 S. Ct. at 1202.

Court."). Accordingly, only Plaintiffs' Elections Clause is before us again on remand. We had not previously considered whether issue preclusion barred that claim, *see Lance I*, 379 F. Supp. 2d at 1127 n.14, and thus ordered the parties to address that defense in an initial motion to dismiss by Defendant (now Secretary of State Dennis), accompanied by supporting and responsive briefing.[2] We held a hearing

[2] In a footnote to their supplemental brief to this court, Plaintiffs purport to conditionally "move to amend their complaint by interlineation pursuant to F.R.C.P. 15(a) and (b) to incorporate [Article I,] § 2 into their claim for relief under [§ 4 of] Article I," "if we [the court] deem it necessary." Plaintiffs have failed to file a formal motion meeting the requirements of Fed. R. Civ. P. 7(b). *See Calderon v. Kan. Dep't of Soc. & Rehab. Servs.*, 181 F.3d 1180, 1186 (10th Cir. 1999) (noting that "it [is] insufficient [for] the plaintiffs [to] ma[k]e a bare request in their response to a motion to dismiss 'that leave be given to the Plaintiffs to amend their Complaint'") (citation omitted). Additionally, Plaintiffs' request does not comply with local rules requiring parties to confer before the court will consider a motion to amend. See D.C. Colo. L. Civ. R. 7.1A. Plaintiffs' informal request for leave to amend, which does not comply with federal or local rules, does "not place[] a motion before th[is] court." *Calderon*, 181 F. 3d at 1186 (quotations omitted).

To the extent that Plaintiffs' failure to file a proper motion under federal or local rules is not fatal, see id., we would in any event deny their request. The general rule that "leave [to amend] shall be freely given when justice so requires," Fed. R. Civ. P. 15(a), does not "permit plaintiffs to wait until the last minute to ascertain and refine the theories on which they intend to build their case." Orr v. City of Albuquerque, 417 F.3d 1144, 1153 (10th Cir. 2005) (quotations omitted); *see also Duncan v. Manager, Dept. of Safety, City and County of Denver*, 397 F.3d 1300, 1315 (10th Cir. 2005) ("In the Tenth Circuit, untimeliness alone is an adequate reason to refuse leave to amend."). Plaintiffs filed their amended complaint over two years ago. Since then, the parties have conducted discovery and briefed and argued this case before both this court and the United States Supreme Court. In light of the untimeliness of Plaintiffs' attempt to add Art. I, § 2 as a new basis for their Elections Clause claim, and the considerable time and resources expended by the courts and the parties addressing the claims in the context presented by the Plaintiffs, we deny Plaintiffs' request to amend.

on that motion on July 26, 2006, and we now GRANT Defendant's motion to dismiss Plaintiffs' Elections Clause claim as barred by issue preclusion.

DISCUSSION

Plaintiffs assert that their interest under the Elections Clause as private citizens constitutes an "individual" right—the right to vote in congressional districts authorized by the Elections Clause—that is independent and distinct from any "institutional" right—the powers and rights of the state legislatures to draw congressional districts—previously asserted by the litigants in *Salazar* or *Keller*. Defendant argues that Plaintiffs' Elections Clause claim should be dismissed 1) for lack of standing; 2) for failure to state a claim;[3] and 3) based on the defense of issue preclusion.

I. Standing

We properly begin by determining whether the Plaintiffs have Article III standing to bring their Elections Clause claim, which requires the Plaintiffs to "allege (and ultimately prove) that they have suffered an 'injury in fact,' that the injury is fairly traceable to the challenged action of the Defendants, and that it is redressable by a favorable decision." *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (en banc). Only the injury-in-fact requirement—defined as "an invasion of a concrete and particularized legally protected interest," *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 227 (2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992))—

[3] The litigants agree that the merits of Defendant's Rule 12(b)(6) motion were adequately briefed and argued and are therefore properly before us.

is questionable here.[4] Plaintiffs allege that "conducting congressional elections under the Court's Plan instead of the General Assembly's Plan" injures the Plaintiffs' individual right "to vote for congressional representatives in districts authorized by th[e] [Elections Clause]"—that is, in districts created by the General Assembly.[5] Defendant argues that this allegation fails to state an "injury in fact" because the right to vote in districts authorized by the Elections Clause is not a "legally protected interest." Although we disagree with Plaintiffs on the merits, we conclude that they have presented a justiciable case or controversy.

Despite the confusion generated by the phrase "legally protected interest," two recent cases warn against conflating standing with the merits. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006); *Initiative & Referendum*, 450 F.3d at 1092-97. "For purposes of the standing inquiry, the question is *not* whether the alleged injury rises to the level of a constitutional violation. That is the issue on the merits." *Initiative & Referendum*, 450 F.3d at 1088 (emphasis added). Thus, in this case, whether the Elections Clause vests powers and rights only in the state legislature and Congress rather than conferring distinct individual rights in private citizens, and whether the Elections Clause is violated by conducting elections under a court's rather than the legislature's plan, are merits issue [sic: issues].

---

[4] Assuming Plaintiffs have a right to vote under the Elections Clause in congressional districts created by the state legislature, their alleged injury to that right is 1) fairly traceable to the Defendant's manner of conducting Colorado's congressional elections— that is, under the Court's rather than the General Assembly's plan— and 2) redressable because an injunction will remove any impediment to the legislature enacting its own redistricting plan.

[5] Plaintiffs' request to strike the incorrect affidavits submitted in support of their standing allegations and to replace them with the revised affidavits submitted to this court is granted.

The relevant standing question is whether Plaintiffs have "present[ed] a nonfrivolous legal challenge, alleging an injury to a protected right," even if "the underlying interest is not legally protected." *Id*. at 1093. Although it is not always clear which injuries will suffice, we have stated that "once an interest has been identified as a 'judicially cognizable interest' in one case, it is such an interest in other cases as well;" this is so even if it is abundantly clear that the interest [asserted] is indeed not protected by any law [because] that lack of protection goes to the merits, not standing." *In re Special Grand Jury 89-2*, 450 F.3d at 1172; *see also Bennett v. Spear*, 520 U.S. 154, 167 (1997) (substituting "judicially cognizable interest" for "legally protected interest" in the definition of "injury in fact").

It can hardly be doubted that the Supreme Court has recognized the right to vote as a "judicially cognizable interest." *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 33, 554 (1964) ("[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."); *United States v. Classic*, 313 U.S. 299, 314 (1941) ("The right of the people to choose . . . is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right."). In fact, as one prominent treatise describes, "[e]lectoral interests are among the abstract interests that support standing in a wide variety of settings." 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure*, § 3531.4.[6] Whether the right to vote is protected by Article I,

---

[6] Voters have established standing, inter alia, to challenge districting that violates the "one person one vote" standard, *see Baker v. Carr*, 369 U.S. 186, 206-07 (1962); to defend or attack at-large voting schemes, *see Meeks v. Metro. Dade County*, 985 F.2d 1471, 1480 (11th Cir. 1993); *McGill v. Gadsden County Comm'n.*, 535 F.2d 277, 279 (5th Cir. 1976); to protect the right to vote, *see Rice v. Cayetano*, 146 F.3d 1075, 1076 n.

§ 2,[7] the First and Fourteenth Amendments,[8] or some other

3 (9th Cir. 1998), *vacated on other grounds by* 528 U.S. 495 (2000), *opinion vacated on remand*, 208 F.3d 1102 (9th Cir. 2000); to challenge acts claimed to dilute the right to vote, *see Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 329-34 (1999); *Michel v. Anderson*, 14 F.3d 623, 626 (D.C. Cir. 1994); *Carey v. Klutznick*, 637 F.2d 834, 838 (2d Cir. 1980); to question election by plurality, *see Jose v. Mesa*, 503 F.2d 1048, 1048 (9th Cir. 1974); to attack limits on the methods of casting votes, *see Burdick v. Takushi*, 937 F.2d 415, 417-18 (9th Cir. 1991), *aff'd on other grounds* 504 U.S. 428 (1992); to facilitate registration as voters, *see Coalition for Sensible & Humane Solutions v. Wamser*, 771 F.2d 395, 399 (8th Cir. 1985); to question the composition of government boards, *see Quinn v. Millsap*, 491 U.S. 95, 102-03 (1989); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1275-80 (11th Cir. 2000); *Cleveland County Assn. v. Cleveland County Bd. of Comm'rs.*, 142 F.3d 468, 472-473 (D.C. Cir. 1998); *League of Women Voters v. Nassau County Bd. of Supervisors*, 737 F.2d 155, 162 (2d Cir. 1984); to protect the free flow of information, *see Fed. Elections Comm'n v. Akins*, 524 U.S. 11, 20-21 (1998); to help candidates, *see Lerman v. Bd. of Elections*, 232 F.3d 135, 142-43 (2d Cir. 2000); *Joseph v. United States Civil Serv. Comm'n*, 554 F.2d 1140, 1145-49 (D.C. Cir. 1977); to protest acts that injure a preferred candidate, *see Miller v. Moore*, 169 F.3d 1119, 1123 (8th Cir. 1999); to challenge contribution limits, *see Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521 (8th Cir. 1998), *vacated on other grounds*, 528 U.S. 1148 (2000); and to set aside term limits, *see Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 920 (6th Cir. 1998). *See* 13 Wright *et al.*, *supra*, § 3531.4.

[7] *See White v. Weiser*, 412 U.S. 783, 786, 792 (1973) (affirming a federal district court's rejection of a legislative reapportionment plan as violative of the plaintiff's rights under Art. I, § 2); *see also Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, 665 (1966) ("[T]he right to vote in federal elections is conferred by Art. I, § 2 of the Constitution . . . .").

[8] *See Burdick*, 504 U.S. at 434 ("A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'") (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); see also James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political*

constitutional provision, it is a "judicially cognizable interest" such that Plaintiffs have "alleg[ed] an injury to a protected right," *Initiative & Referendum*, 450 F.3d at 1093, sufficient to establish standing. It is irrelevant for standing purposes, however, that Plaintiffs do not specifically raise their right to vote claim under Article I, § 2 or the First or Fourteenth Amendments of the U.S. Constitution because "there is no requirement that the legal basis for the interest of a plaintiff that is 'injured in fact' be the same as, or even related to, the legal basis for the plaintiff's claim, at least outside the taxpayer-standing context." *In re Special Grand Jury 89-2*, 450 F.3d at 1173.

II. Defendant's Rule 12(b)(6) Motion to Dismiss

The Elections Clause states: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." U.S. CONST. art. I, § 4, cl. 1. Neither the language nor the history of the Elections Clause suggests that the Framers intended to confer a freestanding individual right to vote in congressional districts created under that Clause.[9]

Influence: A Reconsideration of the Right to Vote, 145 U. Pa. L. Rev. 893, 963 (1997).

[9] As we noted in Lance, the Elections Clause "by its language vests power in the legislature, not in ordinary citizens." 379 F. Supp. 2d at 1126 n.13 (emphasis added). A review of the history behind the ratification of the Elections Clause indicates that the various debates within the state ratifying conventions focused on federalism concerns and "suggests that the structure of the Elections Clause is meant to allow Congress to police state legislative affronts to republican government." Jamal Green, *Judging Partisan Gerrymanders under the Elections Clause*, 114 Yale L.J. 1021, 1039 (2005); *see also id*. at 1026 (indicating that the fundamental purpose of the Elections Clause was to limit "the

Furthermore, none of the cases cited by Plaintiffs has recognized (or even suggested) that such a right exists. While we therefore doubt whether the specific interest asserted by Plaintiffs—a right to vote in a congressional district created by the legislature under the Elections Clause—is constitutionally protected, we need not decide that issue if Plaintiffs' claim is in any event barred by the *Salazar* decision pursuant to Colorado state issue preclusion law.

Under Colorado law, issue preclusion (or "collateral estoppel") applies if the Defendant demonstrates the following four requirements:

> (1) The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding;
> (2) The party against whom estoppel was sought was a party to or was in privity with a party to the prior proceeding;
> (3) There was a final judgment on the merits in the prior proceeding; [and]
> (4) The party against whom the doctrine is asserted had a full and fair opportunity to litigate the issues in the prior proceeding.

---

ability of state legislatures to manipulate the outcomes of congressional elections"). Accordingly, the Elections Clause is described as vesting power in the state legislature to regulate the times, places, and manner of holding elections for representatives subject to the authority conferred on Congress to make or alter such regulations. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995) ("The[] [Elections] Clause[] [is] [an] express delegation[] of power to the States to act with respect to federal elections."); id. at 834 ("The Elections Clause gives States authority 'to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.'") (citation omitted).

Lance I, 379 F. Supp. 2d at 1129-30 (quoting *Michaelson v. Michaelson*, 884 P.2d 695, 700-01 (Colo. 1994)); *see also id*. (indicating that Colorado issue preclusion law controls in this case); 28 U.S.C. § 1739 (Full Faith and Credit Statute). Plaintiffs attempt to avoid any preclusive effects of *Salazar* by asserting that the *Salazar* litigants asserted only an *institutional rights* claim under the Elections Clause, whereas Plaintiffs have instead raised an *individual rights* claim under that Clause.[10] But the fact that Plaintiffs raise a different claim than the *Salazar* litigants does not per se negate the defense of issue preclusion.

Under Colorado law, the doctrine of issue preclusion "is broader than the doctrine of res judicata [or claim preclusion] because it applies to claims for relief different from those litigated in the first action, but narrower in that it applies only to issues actually litigated." *S.O.V. v. People*, 914 P.2d 355, 359 (Colo. 1996). In other words, under the doctrine of issue preclusion, even though a plaintiff asserts a different claim, a prior determination of an issue is conclusive in the subsequent action between the parties (or their privies) if the "'issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination [of the issue] is essential to the judgment.'" *City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824, 831 (Colo. 1991) (quoting Restatement (Second) of

---

[10] In their Amended Complaint, Plaintiffs asserted that "Article V, § 44 of the Colorado Constitution, as interpreted by the Colorado Supreme Court in *Salazar*, impermissibly usurps the power properly reserved to the Colorado legislature by the federal Elections Clause." Although that claim can be construed as asserting an institutional rights claim, Plaintiffs appear to have foregone that claim on remand arguing only that their individual rights claim is not barred by issue preclusion. In any event, even if Plaintiffs were continuing to allege an institutional rights claim, we would find such a claim barred by the decision in *Salazar* pursuant to the defense of issue preclusion based on our analysis in *Keller* and *Lance I*, as well as our analysis in this memorandum opinion and order.

Judgments § 27 (1980)).

As they do now before us, Plaintiffs characterized their claim before the Supreme Court as an individual rights claim separate and distinct from any institutional rights claim asserted in a prior proceeding. On appeal, Justice Stevens nevertheless concluded that "all of the requirements under Colorado law for issue preclusion have been met, and appellants' Elections Clause claim should therefore be dismissed." *Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting); *see also id*. at 1203 (Ginsburg, J., concurring; joined by Souter, J.) (agreeing that Justice Stevens "persuasively urged that issue preclusion warrants affirmance"). For the reasons discussed below, we agree.

A. The issue precluded is identical to an issue "actually litigated" and "necessarily adjudicated" in *Salazar*

Because issue preclusion bars relitigation of issues, whether part of the same or a different claim, *see Block 173 Assocs.*, 814 P.2d at 831; *S.O.V.*, 914 P.2d at 358-59, we need to determine only whether an essential *issue* of Plaintiffs' individual rights claim was "actually litigated" and "necessarily adjudicated" in *Salazar*.[11] In order for an issue to be "actually litigated," "the parties must have raised the issue in a prior action." *In re Water Rights of Elk Dance Colo., LLC*, — P.3d — , 2006 WL 1737826, at *6 (Colo. 2006). "An issue is 'necessarily adjudicated' when a determination on that issue was necessary to the judgment." *Id*.

Here, Plaintiffs' individual rights claim is that

[11] The third element of issue preclusion—final judgment on the merits—is easily met, *see Keller*, 299 F. Supp. 2d at 1182, and undisputed in this case.

"conducting congressional elections under the Court's Plan instead of the General Assembly's Plan [pursuant to Colo. Const. Art. V, § 44, as interpreted in *Salazar*,] . . . violate[s] . . . the rights of Plaintiffs . . . to vote for congressional representatives in districts authorized by [the Elections Clause]"—i.e., in districts created by the General Assembly. An irreducibly necessary issue—indeed, a sine qua non—to adjudicating this asserted individual rights claim is deciding who may redistrict under the Elections Clause. That issue was "actually litigated" and "necessarily adjudicated" in *Salazar*.

In *Salazar*, the Colorado Supreme Court noted that the Secretary of State and General Assembly relied on the Elections Clause to "argue that . . . the United States . . . Constitution[] grant[s] the General Assembly the exclusive authority to draw congressional districts." 79 P.3d at 1232. Additionally, that issue was decided by the state court. *See id*. at 1231-32; *Lance I*, 379 F. Supp. 2d at 1125-26 ("The Colorado Supreme Court appears ultimately to hold that the restriction they find in Colo. Const. Art. V, § 44— granting the General Assembly one, and only one, chance to create congressional districts through legislation— does not violate the federal Constitution . . . .") (quotations omitted);[12] *Keller*, 299 F. Supp. 2d at 1182 (concluding that the *Salazar* court

[12] Recently in *League of United Latin American Citizens v. Perry*, — S. Ct. — , 2006 WL 1749637 (June 28, 2006), a plurality of the Court noted that "the Constitution and Congress state no explicit prohibition" to middecade redistricting changes. *Id*. at *12; *see also id*. at 37 (Stevens, J., concurring in part) ("[The district court] correctly found that the [federal] Constitution does not prohibit a state legislature from redrawing congressional districts in the middle of a census cycle."). That statement does not affect the validity of the Colorado Supreme Court's decision in *Salazar*, determining that the Colorado Constitution prohibited mid-decade redistricting, *see* 79 P.3d at 1243, because a state constitution may impose more stringent restrictions on redistricting than the federal Constitution.

decided whether Colorado's prohibition of middecade redistricting violated the Elections Clause). And that decision was necessary to the *Salazar* court's judgment. *See Keller*, 299 F. Supp. 2d at 1182. Accordingly, the first requirement for issue preclusion under Colorado law is satisfied. *See Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting) ("The Elections Clause claim advanced by citizen-appellants in this case is the same as that advanced by their official representatives and decided by the Colorado Supreme Court in . . . *Salazar* . . . .).

B. Party to or in privity with a party to the prior proceeding

Although the *Lance* Plaintiffs were not parties to *Salazar*, issue preclusion applies if they were in privity with one or more of the litigants to that decision. *Michaelson*, 884 P.2d at 700-01. "Privity between a party and a nonparty requires both a substantial identity of interests and a working or functional relationship in which the interests of the nonparty are presented and protected by the party in the litigation." *Elk Dance Colo.*, 2006 WL 1737826, at *7 (quotations, alteration omitted).

Where the party to an earlier action is an official or agency invested by law with authority to represent the person's interest, then a sufficiently close relationship exists to permit a finding of privity between the parties. *See* Restatement (Second) of Judgments § 41(1)(d) (stating that a person is represented by a party who is "[a]n official or agency invested by law with authority to represent the person's interests") (quoted with approval in *People in re M.C.*, 895 P.2d 1098, 1102 (Colo. Ct. App. 1994), aff'd on other grounds, 914 P.2d 355 (Colo. 1996) (en banc)). In *Salazar*, the Secretary of State participated in her capacity as administrator of the election laws, representing the voters of

Colorado. *See Salazar*, 79 P.3d at 1230-31 (citing Colo. Rev. Stat. § 11107(1)(a)(2003)). Further, as we described in *Lance I*, "[t]he very nature of the relationship between the legislature and its constituents is one of representation." 379 F. Supp. 2d at 1125. Thus, Plaintiffs had a sufficiently close relationship with both the Secretary of State and the General Assembly to permit a finding of privity.[13]

Most precedent indicates, however, that a state's earlier representation cannot deprive a private individual, not a party to the prior action, of the opportunity to litigate "intensely individual rights," 18A Charles Alan Wright et al., *supra*, § 4458.1, or "purely private interests," *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993). For example, one Colorado court has specifically stated that "when the interests of the sovereign are different from those of the private individual, maintenance of an action by the state may not preclude litigation by the individual affected. Rather, both the public agency and the private party may pursue enforcement of their interests." *People in re M.C.*, 895 P.2d at 1102. Preclusion based on a prior action involving a state official or agency will thus ordinarily apply against citizens of the state in a subsequent suit only when the prior suit involved "'a matter of general interest to all its citizens.'" *McNichols v. City & County of Denver*, 74 P.2d 99, 102 (Colo. 1937) (en banc) (emphasis added) (quoting 1 *Freeman on Judgments*, 1090 (5th ed.)); *see also Atchison, Topeka & Santa Fe. Ry. Co. v. Bd. of County Comm'rs*, 37 P.2d 761, 764 (Colo. 1934) (en banc) ("[A] judgment against a county or its legal representatives, in a matter of general interest to all the people . . . is binding,

---

[13] Because we ultimately conclude, for reasons explained more fully below, that Plaintiffs stand in privity with the Secretary of State and the General Assembly, we need not decide whether Plaintiffs also stand in privity with the Attorney General or the Governor, both of whom were also *Salazar* litigants.

not only on the county and its official representatives named as defendants, but also upon all taxpayers of the county though not named as defendants in the case.") (emphasis added).[14] Accordingly, under Colorado law, the extent to which individuals are privies of the state depends on whether the issue asserted by the private citizen and previously asserted by a public entity that represents the private citizen "is a matter of general interest to all the people," *Atchinson*,

---

[14] *Compare Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692-93 & 692 n.32 (1979) (holding that Washington's participation in earlier litigation over public fishing rights precluded later suit brought by individual citizens because the state represented its citizens "in their common public rights") (quotations omitted) (emphasis added); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (holding that taxpayer plaintiffs were barred from contesting validity of bond issued by the city to pay for construction of dam based on prior action by state objecting to issuance of dam license because the taxpayer plaintiffs "in their common public rights as citizens of the State, were represented by the State") (emphasis added); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) (holding that sport-fishermen plaintiffs were in privity with state for purposes of relitigating damages caused by Exxon Valdez oil spill), with *Richards v. Jefferson County*, 517 U.S. 793, 803 (1996) (distinguishing between cases in which the taxpayer seeks redress for the "misuse of public funds, "or about other public action that has only an indirect impact on his interests," and cases in which taxpayers "present[] a federal constitutional challenge to a State's attempt to levy personal funds," for purposes of determining the applicability of state res judicata principles) (emphasis added); *Town of Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 263 n.7 (1977) (approving of district court determination that voter plaintiffs' challenge was not barred by county's prior suit where voter plaintiffs asserted that the worth of their individual vote was diluted, in violation of the "one man, one vote principle" under the Equal protection clause); *Satsky*, 7 F.3d at 1470 (holding that a consent judgment in a prior state action barred claims for injuries to "common public rights" but not injuries to "purely private interests," defined as claims the state has no standing to raise). *See generally Lucas v. Planning Bd.*, 7 F. Supp. 2d 310, 327-28 (S.D.N.Y. 1998) (gathering cases).

37 P.2d at 764; *see also McNichols*, 74 P.2d at 102, and whether "the interests of the sovereign are different from those of the private individual," *People in re M.C.*, 895 P.2d at 1102.

Plaintiffs again rely on the characterization of their Elections Clause claim as an individual rights claim to argue that privity does not exist. While the right to vote clearly belongs to the individual, not the state, *see Burdick*, 504 U.S. at 433 (referring to the "individual's right to vote") (emphasis added); *Thornton*, 514 U.S. at 844 (1995) (Kennedy, J., concurring) ("[T]he federal right to vote . . . in a congressional election . . . *belong[s] to the voter* in his or her capacity as a citizen of the United States.") (emphasis added), a voting rights claim may nevertheless constitute a matter of public interest, *see Tyus v. Schoemehl*, 93 F.3d 449, 457 (8th Cir. 1996) ("The [voter] plaintiffs do not allege that they have been denied the individual right to vote. Rather, they allege that the strength of the black vote in general has been diluted. Because the [voter] plaintiffs do not allege that they have a different private right not shared in common with the public, the plaintiffs raise an issue of *public law* . . . .") (citations, quotations omitted; emphasis added).

Here, the *Lance* Plaintiffs do not assert an injury to a distinct individual right not shared in common with the public. Instead, the particular interest asserted by the *Lance* Plaintiffs here— the right to vote in districts created by the legislature in accordance with the Elections Clause— is a matter of general and public interest (if it is a constitutionally protected interest at all). *See id*. As a result, the mere fact that Plaintiffs articulate their Elections Clause claim as an individual rights claim, or characterize it as based on the right to vote, does not itself exempt the Plaintiffs from the general principle under Colorado law that "[a] judgment against [the government] or its legal representative in a matter of general interest to all its citizens is binding upon

the latter, though they are not parties to the suit." *McNichols*, 74 P.2d at 102 (quotations omitted); *cf*. *Lance I*, 379 F. Supp. 2d at 1128 (noting that privity between the state and its citizens "is limited to claims involving institutional rights"—not "purely private interest[s]") (citing *Satsky*, 7 F.3d at 1470).[15]

Plaintiffs' Elections Clause claim is not based on individual interests that are "more far-reaching" or "of a different and broader nature" than the interests of the state asserted in the prior litigation. *People in re M.C.*, 895 P.2d at 1101-02 (holding that a child plaintiff did not stand in privity with the state in an original paternity proceeding because the child's interests in the action were "different and more far-reaching" or "of a different and broader nature" than those of the state). As we explained in *Lance I*, to the extent that the Elections Clause confers any individual rights, "th[ose] right[s] would be necessarily derivative of the governmental right vested in the legislature by the Elections Clause." 379 F. Supp. 2d at 1126; *see also id*. at 1127 n.13. Consequently, any individual rights of the Plaintiffs under the Elections

---

[15] We note that a leading treatise has described voting rights as "important individual interests in public rights that warrant relitigation after unsuccessful government litigation." 18A Wright et al., *supra*, § 4458.1; *see also* 18 Moore's Federal Practice § 131.40(3)(e)(B) ("[I]ndividuals asserting violations of their civil rights frequently are permitted to bring private actions despite past or pending litigation by the government addressing the same acts or practices by the defendants."). However, in each of the cases cited in support of this principle, privity between the governmental official and the voter plaintiffs was lacking either because the voter plaintiffs in those cases asserted a distinct, private voting interest or because the voter plaintiffs' interests diverged from the governmental official's interest. As we have already determined, the Lance Plaintiffs do not assert a distinct individual right, and the interests asserted in *Salazar* by the Secretary of State and the General Assembly did not diverge from the Lance Plaintiffs' interests, which are necessarily derivative of the governmental right vested in (and asserted by) the General Assembly.

Clause cannot be greater than the legislature's rights under that Clause, and Plaintiffs are thus entitled to no greater relief than the relief to which the legislature is entitled—*i.e.*, to have the legislature draw the congressional districts. The General Assembly's rights under the Elections Clause cannot be considered merely "supplemental" to the Plaintiffs' rights, *see* Restatement (Second) of Judgments § 41(1)(d) cmt. d (cited with approval in *People in re M.C.*, 895 P.2d at 1102); *see also People in re M.C.*, 895 P.2d at 1101 (describing that "the state ha[s] a monetary purpose in bringing a paternity action, [whereas] the child's interests in bringing a paternity action also include such matters as right to inheritance, custody, and the determination of an accurate family medical history."); *cf. Brown & Williamson Tobacco Corp. v. Gault*, 627 S.E.2d 549, 552-53 (Ga. 2006) (holding that individual plaintiffs and state were not in privity for purposes of compensatory damages but were privies for purposes of punitive damages). We therefore conclude that the general concept of privity between a state and its citizens in a matter of public interest should apply in this case.

We find further support for this conclusion in the various opinions issued by the Supreme Court in *Lance II*. Despite Plaintiffs' articulation of their claim as based on individual rights, Justice Stevens concluded that "as a matter of Colorado law, [Plaintiffs] are clearly in privity with both then-Colorado Attorney General Salazar, who brought the suit on behalf of the people of Colorado, and the Colorado General Assembly, which was also a party to the *Salazar* litigation." *Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting) (citing *McNichols*, 74 P.2d at 102; *Atchinson*, 37 P.2d at 764). Justices Ginsburg and Souter agreed that "Justice Stevens has persuasively urged that issue preclusion warrant[ed] affirmance." *Id.* at 1203 (Ginsburg, J., concurring). And the majority did not challenge our conclusion that Plaintiffs stand in privity with the General

Assembly, but rather merely held that we "erroneously conflated preclusion law with *Rooker-Feldman*." *Id*. at 1202; *see also Lance I*, 379 F. Supp. 2d at 1125.

In short, Plaintiffs' articulation of their Elections Clause claim as an individual rights claim does not negate the fact that Plaintiffs' asserted interest of voting in congressional districts authorized by the Elections Clause is "a matter of general interest to all the people," *Atchinson*, 37 P.2d at 764, and is neither "broader in nature" nor "more far-reaching" than the General Assembly's interests under the Elections Clause, because any individual rights under that Clause are necessarily derivative of the state legislatures rights, *People in re M.C.*, 895 P.2d at 1102-02 [sic]. Accordingly, we conclude that Plaintiffs stand in privity with the Secretary of State and the General Assembly for the purposes of asserting a claim under the Elections Clause of the Constitution and that the second requirement of issue preclusion under Colorado is thus satisfied.

C. Full and fair opportunity

Under Colorado law, we look to the following in determining whether a party had a full and fair opportunity to litigate an issue:

> "(1) whether the remedies and procedures of the first proceeding are substantially different from those in the proceeding in which collateral estoppel is asserted;
> (2) whether the party . . . against whom collateral estoppel is sought had sufficient incentive to litigate vigorously; and
> (3) the extent to which the issues [being litigated] are identical."

Keller, 299 F. Supp. 2d at 1183 (quoting *Antelope Co. v. Mobil Rocky Mountain, Inc.*, 51 P.3d 995, 1003 (Colo. Ct. App. 2001)). As the panel in *Keller* concluded, "we have been given no reason to believe [the public officials in *Salazar*] lacked strong incentives to litigate their federal claims vigorously before the Colorado Supreme Court." *Id*. And, even if the constitutional claim here is not framed in exactly the same terms as it was in *Salazar*, "the arguments presented to the state court adequately raised the same *issue* [Plaintiffs] seek to litigate before this panel." *Id*. (emphasis added). Thus, Plaintiffs were not denied a full and fair opportunity to litigate the issue of the state legislature's powers and rights to redistrict under the Elections Clause. *See Lance II*, 126 S.Ct. at 1204 (Stevens, J., dissenting) ("[A]ppellants' second question presented is literally the same question presented by the General Assembly on certiorari review (and denied) in *Salazar*.") (quotation omitted).[16]

---

[16] The General Assembly's First Question Presented in *Salazar* asked:

> Whether the Constitution's Elections Clause (Article I, Section 4, Clause 1), . . . permits a State to disable the state legislature from prescribing congressional districts for an entire decade, and transfer that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes?

The *Lance* Plaintiffs' Second Question Presented to the United States Supreme Court in their recent appeal asked:

> Is the Constitution's Elections Clause (Article I, Section 4, Clause 1), . . . violated by a provision of state law that disables the state legislature from prescribing congressional districts for an entire decade, and transfers that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe,

D. Conclusion

The Colorado Supreme Court held in *Salazar* that "the restriction [it found] in Colo. Const. Art. V, § 44—granting the General Assembly one, and only one, chance to create congressional districts through legislation—does not violate the federal Constitution." *See Keller*, 299 F. Supp. 2d at 1182 (citing *Salazar*, 79 P.3d at 1231-32). By arguing, as Plaintiffs do, that "conducting congressional elections under the Court's Plan instead of the General Assembly's Plan violates their right to vote for congressional representatives in districts authorized by th[e] [Elections Clause]," Plaintiffs are functionally seeking to relitigate an identical issue advanced by the Secretary of State and the General Assembly, with whom the Plaintiffs are in privity, that was necessarily decided by the valid and final judgment in *Salazar*. The Colorado Supreme Court's decision on that issue is conclusive pursuant to Colorado state issue preclusion law, despite Plaintiffs' articulation of their claim as an individual rather than an institutional rights claim. *See Block 173 Assocs.*, 814 P.2d at 831. Accordingly, we find Plaintiffs' Elections Clause claim barred by issue preclusion.

CONCLUSION

For the reasons stated above, we GRANT Defendant's motion to dismiss Plaintiffs' Elections Clause claim for relief under Art. I, § 4 of the Constitution pursuant to issue preclusion. We DISMISS Plaintiffs' Petition Clause claim for failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

---

oneyear time limit uniquely applicable to congressional redistricting statutes?

IT IS ORDERED that the Plaintiffs' Amended Complaint and cause of action are dismissed with prejudice.

PORFILIO, Senior Circuit Judge concurring in the result.

I believe the court has correctly concluded to dismiss this action, but because I also believe the Plaintiffs lack standing to pursue the merits of their claim, I cannot join in all the court's reasoning. I neither need nor desire to prolong the disposition, so I shall briefly explain my premise.

The "merits" of the case presented by the Plaintiffs consist only of a claim that a constitutionally protected individual right to vote has been violated by the Colorado Supreme Court in *People ex rel. Salazar v. Davidson*, 79 P. 3d 1221 (Colo. 2003). They limit this claim, however, to rights established in Art. I, § 4 of the U.S. Constitution. Yet, as we pointed out in *Lance I* and reiterated in this order, section 4 creates no individual right to vote, "independent and distinct from any 'institutional' right." Order, p. 5. Indeed, Plaintiffs have provided no precedential support for their assumption of such an individual right.

Yet, the law of this Circuit requires that we take care not to conflate the merits of a case with a plaintiff's standing. *In re Special Grand Jury 89-2*, 450 F.3d 1159, 1172 (10th Cir. 2006) and *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1092-97 (10th Cir. 2006) (en banc). Indeed, this court relies upon those cases in reaching the conclusion that the Plaintiffs have standing here.

Nonetheless, neither case is apposite because the conclusion reached in both was based upon an unquestionable individual constitutional right asserted by the plaintiffs: the right of free speech, and the right to propose initiated legislation, respectively. Here, however, Plaintiffs' legally protected interest stands upon a right that is not merely contested, it simply does not exist. *See Initiative and Referendum*, 450 F.3d at 1093.

Moreover, neither *Special Grand Jury* nor *Initiative and Referendum* suggests standing must be automatically conferred upon every plaintiff who asserts the violation of a First Amendment right. We may test the premise of any First Amendment claim, albeit carefully. *See Initiative and Referendum*, 450 F.3d at 1089. Remembering how the merits of this case are circumscribed, I believe predicating dismissal on lack of standing does not cross a boundary into improper conflation. Plaintiffs must first establish they have a right protected by section 4 before they may argue that right was aggrieved by the Colorado Supreme Court. Because they have not, even though presented with the opportunity to do so, their action must be dismissed for lack of standing.

Docket Number: _____

IN THE SUPREME COURT OF THE UNITED STATES

Keith Lance,
Carl Miller,
Renee Nelson,
Nancy O'Connor,

PLAINTIFFS

v.

Gigi Dennis, Secretary of State for the State of Colorado

DEFENDANT

ON DIRECT APPEAL FROM A THREE JUDGE PANEL IN THE FEDERAL DISTRICT COURT FOR THE DISTRICT OF COLORADO

NOTICE OF APPEAL PURSUANT TO 28 U.S.C. § 1253

Brett R. Lilly, Esq. #25662
Counsel of Record for Plaintiffs Lance, Miller, Nelson and O'Connor
Doyle Zakhem Suhre & Lilly, LLC
John S. Zakhem, Esq. #30089
700 17th Street, Suite 2000
Denver, Colorado 80202
(303) 228-1200

COME NOW the Plaintiffs, Carl Miller, Keith Lance, Renee Nelson, and Nancy O'Connor, by and through their

counsel, Brett R. Lilly and John S. Zakhem, and file the following Notice of Appeal pursuant to 28 U.S.C. § 1253:

PARTIES

1. All parties to this matter, and that in the court below, are designated in the caption above.
2. The parties appealing the Order of the United States District Court for the District of Colorado are the Plaintiffs, Keith Lance, Carl Miller, Renee Miller and Nancy O'Connor.

JUDGMENT APPEALED FROM

3. MEMORANDUM OPINION AND ORDER filed August 11, 2006, by a three judge panel of the United States District Court for the District of Colorado in Civil Action No. 03-cv-02453-ZLW-CBS.

STATUTE UNDER WHICH APPEAL IS TAKEN

4. Appeal is taken in the United States Supreme Court pursuant to 28 U.S.C. § 1253 (2006).

RESPECTFULLY SUBMITTED this 5th day of September, 2006,

By:_____

Brett R. Lilly, Esq. #25662
Counsel of Record for Plaintiffs
Lance, Miller, Nelson and O'Connor
Doyle Zakhem Suhre & Lilly, LLC
John S. Zakhem, Esq. #30089
700 17th Street, Suite 2000
Denver, Colorado 80202
(303) 228-1200

CERTIFICATE OF SERVICE

Pursuant to USCS Supreme Ct. R. 29(5)(b), I, Brett R. Lilly, hereby certify that on this 5th day of September, 2006, I electronically served the foregoing **Notice of Appeal Pursuant to 28 U.S.C. 1253** upon all individuals required to be served as noted below:

Counsel for the Defendant, Gigi Dennis

Monica Marquez
Anthony J. Navarro
1525 Sherman Street, 5th Floor
Denver, CO 80203
(303) 866-4500

_____
Brett R. Lilly, counsel for Plaintiffs