**No. 06-641**

# IN THE
# SUPREME COURT OF THE UNITED STATES

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

*Appellants,*

v.

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

*Appellee*.

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

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## MOTION TO AFFIRM

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## QUESTIONS PRESENTED

1. Whether the district court correctly dismissed Appellants' Elections Clause claim, where Appellants lack standing to bring this claim, and the claim is barred under Colorado law of issue preclusion.

2. Whether the district court correctly dismissed Appellants' Petition Clause claim for failure to state a claim upon which relief may be granted.

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## MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, Appellee Gigi Dennis, the Colorado Secretary of State (the "Secretary")[1] respectfully moves this Court to summarily affirm the judgment of the three-judge district court on the ground that the arguments presented are so insubstantial as not to warrant further argument. Sup. Ct. R. 18.6.

## STATEMENT

This appeal is the culmination of three related lawsuits brought against the Colorado Secretary of State regarding a mid-decade congressional redistricting plan passed by the Colorado General Assembly in 2003.

Appellants present here the identical Elections Clause issue that was litigated to final judgment in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied sub nom. Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004) – namely, the scope of the Colorado General Assembly's power to draw congressional districts. Indeed, Appellants' Second Question Presented (*i.e.*, the "merits" of their Election Clause claim) replicates the Elections Clause question presented in the General Assembly's unsuccessful petition for certiorari review in *Salazar*.[2]

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[1]Appellee Gigi Dennis succeeded Donetta Davidson as Colorado Secretary of State in the fall of 2005. Because this is an official capacity suit, this brief will simply refer to "the Secretary."

[2] The General Assembly's First Question Presented in *Salazar* was:

> Whether 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," 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

The district court dismissed Appellants' Elections Clause claim as barred under Colorado issue preclusion law. The district court also dismissed Appellants' Petition Clause claim for failure to state a claim. This appeal followed.

1. After the 2000 census, Colorado gained a seventh seat in the U.S. House of Representatives. *Salazar*, 79 P.3d at 1226. When the General Assembly failed to pass a new redistricting plan in time for the 2002 elections, a group of voters asked the Denver District Court to create a plan. *Beauprez v. Avalos*, 42 P.3d 642, 646 (Colo. 2002). The court held a trial during which it considered more than a dozen proposed plans, but refrained from issuing a decision in order to allow the General Assembly a final chance to agree on a plan. *Id.* When the General Assembly failed to act, the district court adopted a redistricting map and ordered that it be used for Colorado's congressional elections "in 2002 and thereafter." *Avalos v. Davidson*, No. 01CV2897, 2002 WL 1895406, at *13 (Denver Dist. Ct. Jan. 25, 2002).

The Colorado Supreme Court unanimously affirmed the district court's congressional district boundaries, concluding that the proceedings were "thorough, inclusive, and non-partisan." *Avalos*, 42 P.2d at 647. The *Avalos* districts were used in the 2002 elections.

2. Following the 2002 elections, the Republican party assumed control of the Colorado legislature and the Governor's office. *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1174 (D. Colo. 2004). The newly-elected General Assembly passed S.B. 03-352, a new redistricting bill intended to supplant the *Avalos* districts. *Salazar*, 79 P.3d at 1224, 1227. The bill was codified at Colo. Rev. Stat. § 2-1-101 (2006). *Keller*, 299 F. Supp. 2d at 1174.

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> redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes?

3. On May 14, 2003, then-Colorado Attorney General Ken Salazar,[3] brought an original action in the Colorado Supreme Court against the Secretary of State, seeking an injunction prohibiting the enforcement of S.B. 03-352. The Attorney General argued that Colo. Const. art. V, § 44 limits congressional redistricting to once per decade and that the mid-decade plan was therefore invalid. The Colorado Supreme Court permitted the General Assembly to intervene as a respondent, and invited briefs from "any interested persons." The Secretary, along with the General Assembly and the Governor (appearing as *amicus*), argued that the mid-decade plan was a lawful exercise of the General Assembly's power to redistrict under the federal Elections Clause, U.S. Const. art. I, § 4, cl. 1.[4]

On December 1, 2003, the Colorado Supreme Court held that art. V, § 44 restricts congressional redistricting to once per decade following reapportionment; that nothing in state or federal law (including the Elections Clause) contradicts that limitation; and that the General Assembly's mid-decade plan violated the Colorado Constitution because it was the second redistricting plan after the 2000 census. The court ordered the Secretary to use the *Avalos* districts until the next apportionment by Congress following the 2010 census. *Salazar*, 79 P.3d at 1231-35, 1243.

4. The General Assembly's mid-decade redistricting statute was challenged on separate grounds in *Keller v. Davidson*, No. 03CV3452 (Denver Dist. Ct.). In *Keller*, citizens sued the Secretary and the General Assembly in state court, alleging that the General Assembly violated state laws regarding legislative procedures for introducing, reading,

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[3] John W. Suthers succeeded Ken Salazar as Colorado Attorney General in January 2005.

[4] Congressman Mark Udall and Pitkin County, Colorado, intervened in support of the Attorney General, and several other entities and individual citizens filed briefs asserting their arguments. *Salazar*, 79 P.3d at 1221.

debating, and passing bills. *Salazar*, 79 P.3d at 1227 & n.2. The Governor was later added as a defendant.

The *Keller* suit was removed to federal court when the plaintiffs added federal law claims. *Keller v. Davidson*, No. 03-Z-1482 (CBS) (D. Colo.). The Secretary, the General Assembly, and the Governor filed counterclaims requesting a declaratory judgment that S.B. 03-352 was a lawful exercise of the General Assembly's power under the Elections Clause. *Keller*, 299 F. Supp. 2d at 1174-75. The three-judge district court panel deferred action in *Keller* pending the outcome in *Salazar*. *Id.* at 1175, 1178 n.4.

5. On December 3, 2003 (two days after the Colorado Supreme court issued its decision in *Salazar*), Appellants filed this (third) lawsuit against the Secretary, seeking a declaration that Colo. Const. art. V, § 44 violates the Elections Clause, as well as their rights under the Petition Clause, U.S. Const. amends. I, XIV. Appellants also sought an injunction prohibiting the Secretary from enforcing the Colorado Supreme Court's order in *Salazar*. The case was assigned to the same three-judge panel in *Keller*.

The day after Appellants filed this suit, the General Assembly and Governor requested leave to file amended counterclaims in *Keller* that were strikingly similar to the claims set forth in Appellants' complaint filed the day before.[5] Both pleadings requested identical declaratory and injunctive relief. The General Assembly and Governor also

[5] There is extensive overlap between the allegations, claims, and requests for relief in Appellants' original complaint and the General Assembly and Governor's proposed amended counterclaims in *Keller*. Paragraphs 12-13, 16-17, 23-24, 26, 28, 30-31, 33, 35-39, 41, 43-49, 58-60, 62-63, 66, 68 & 70 of the original *Lance* complaint correspond, verbatim, with paragraphs in the General Assembly and Governor's proposed amended counterclaims in *Keller*. Subsequent discovery in this case established that Appellants were recruited to join this lawsuit by members and officers of the Republican party, and that Appellants' counsel conferred with counsel for the General Assembly and Governor about Appellants' claims before filing this case.

urged the district court to consolidate *Keller* and *Lance*, noting in a status report that Appellants had asserted "the same federal claim asserted by the General Assembly and the Governor based on U.S. Const. art. I, § 4."

6. The *Keller* panel denied the General Assembly and Governor's request to amend their counterclaims, concluding that these parties' requests violated the *Rooker-Feldman*[6] doctrine. *Keller*, 299 F. Supp. 2d at 1178-80, 1184. The *Keller* panel retained jurisdiction over the original claims and counterclaims and stayed the case pending the outcome of *Salazar* on certiorari review. *Id.* at 1184. The panel also stayed the *Lance* litigation pending the outcome of *Salazar*.

7. Shortly thereafter, the General Assembly filed a petition for writ of certiorari in *Salazar*. The Secretary filed a brief in support of the petition; Attorney General Salazar filed a brief in opposition. This Court denied the petition. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004).

8. Following the denial of certiorari review in *Salazar*, the district court dismissed the Secretary's and the General Assembly's original (Election Clause) counterclaims in *Keller* as barred by issue preclusion, and dismissed the plaintiffs' claims as moot. In October 2004, the district court lifted the stay in this case, and the litigation proceeded. The Secretary acknowledged in a status report that, because the decision in *Salazar* was final, she was duty-bound to enforce that law. Thus, for purposes of the *Lance* litigation, the Secretary would be defending the decision in *Salazar*, rather than challenging that ruling as she had in *Salazar* and *Keller*. The Secretary agreed to have the Attorney General's office represent her. *Lance v. Davidson*, 379 F. Supp. 2d 1117, 1122 n.3 (D. Colo. 2005) (hereinafter "*Lance I*").

9. Following limited discovery, the Secretary moved to dismiss Appellants' Elections Clause and Petition Clause

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[6] *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983).

claims as barred by *Rooker-Feldman* and issue preclusion. *Id.* at 1120. On July 27, 2005, the district court held that Appellants' Elections Clause claim was barred by *Rooker-Feldman*. The court did not address whether issue preclusion also required dismissal of the claim. *Id.* at 1123-27 & n.14. The district court also dismissed Appellants' Petition Clause claim for failure to state a claim for relief. *Id.* at 1130-32. Appellants filed a direct appeal to this Court.

10. On February 21, 2006, this Court vacated the judgment in this matter and remanded the case to the district court. *Lance v. Dennis*, 126 S. Ct. 1198 (2006) (hereinafter "*Lance II*"). This Court concluded that the district court "erroneously conflated preclusion law with *Rooker-Feldman*," and held that the "*Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, for purposes of preclusion law, they could be considered in privity with a party to the judgment." *Lance II*, 126 S. Ct. at 1202.

In a dissenting opinion, Justice Stevens reasoned that the district court's judgment should have been affirmed because Appellants' Elections Clause claim is barred by Colorado law of issue preclusion, and their Petition Clause claim was properly dismissed. *Id.* at 1204 (Stevens, J., dissenting).

Justice Stevens observed that Appellants' Elections Clause claim "is the same as that advanced by their official representatives and decided by the Colorado Supreme Court in *People ex rel. Salazar v. Davidson*" and that, "as a matter of Colorado law, appellants are clearly in privity with both then-Colorado Attorney General Salazar … and the Colorado General Assembly." He therefore concluded that "all of the requirements under Colorado law for issue preclusion have been met." *Id.*

In a concurring opinion, Justices Ginsburg and Souter agreed that Justice Stevens "persuasively urged that issue preclusion warrants affirmance," but concluded that this issue was "best left for full airing and decision on remand." *Id.* at 1203 (Ginsburg, J., concurring).

11. On remand, the Secretary again moved to dismiss Appellants' Elections Clause claim as barred by Colorado law of issue preclusion.[7] Following briefing and oral argument, the district court again dismissed Appellants' amended complaint with prejudice. J.S. App. 1a-23a.

The district court concluded that Appellants had standing to bring their Elections Clause claim.[8] J.S. App. 5a-9a. Though the court expressed doubt that the specific interest asserted by Appellants (a right to vote in congressional districts created by the legislature under the Elections Clause) is constitutionally protected, J.S. App. 10a, the court concluded that the claim was barred in any event by Colorado law of issue preclusion. J.S. App. 10a-23a. The court held that Appellants raise here the same issue that was actually litigated and necessarily decided in *Salazar*, J.S. App. 12a-14a; that under Colorado issue preclusion law, Appellants stand in privity with the General Assembly and the Secretary, J.S. App. 14a-20a; and that the Elections Clause issue was fully and fairly litigated in *Salazar*, J.S. App. 20a-21a. In a concurring opinion, Senior Circuit Judge John C. Porfilio concluded that Appellants also lack standing to pursue their Elections Clause claim. J.S. App. 23a-24a.

## THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THIS COURT SHOULD SUMMARILY AFFIRM THE RULING BELOW

Appellants overstate the reach of the district court's ruling concerning their Elections Clause claim. *See* J.S. 5, 12. The ruling does not foreclose all constitutional challenges in federal court to Colorado's congressional districts. It means

[7] The parties did not reargue the Petition Clause claim. J.S. App. 3a.

[8] The district court raised the standing issue *sua sponte* in an order dated July 6, 2006, directing the parties to address at oral argument "whether Plaintiffs have standing to assert an individual rights claim, rather than a governmental or institutional rights claim, under the Elections Clause."

simply that Appellants cannot re-litigate here the *identical federal constitutional issue* previously litigated to conclusion in *Salazar*. The district court correctly applied Colorado issue preclusion law in dismissing Appellants' Elections Clause claim, and correctly dismissed Appellants' Petition Clause claim for failure to state a claim.

## I. The District Court correctly dismissed Appellants' Elections Clause Claim.

Appellants seek to relitigate in federal court the identical Elections Clause issue already litigated to final judgment in *Salazar* by numerous state officials. The district court correctly ruled that Appellants may not do this. Under Colorado issue preclusion law, where government officials litigate a matter of general interest to all citizens (*e.g.*, the scope of the legislature's power to draw congressional districts for the State of Colorado), the judgment is binding not only on the government officials but on all citizens, even though such citizens were not parties to the suit. *McNichols v. City & County of Denver*, 74 P.2d 99, 102 (Colo. 1937); *Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County*, 37 P.2d 761, 764 (Colo. 1934). Thus, Appellants, like all Colorado citizens, are bound by the *Salazar* judgment. Because a Colorado court would find Appellants' Elections Clause claim barred by issue preclusion, the Full Faith and Credit Act required the district court to give the same preclusive effect to the *Salazar* judgment here. 28 U.S.C. § 1738.

### A. Appellants lack standing to pursue the merits of their Elections Clause claim.

The district court correctly held that Appellants' Elections Clause claim is barred by issue preclusion. However, the lower court's dismissal of the Elections Clause claim can be

summarily affirmed because Appellants also lack standing to bring this claim.[9] *See Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) (prevailing party may assert in a reviewing court any ground in support of his judgment).

To establish standing, Appellants must demonstrate that they have suffered an "injury in fact," defined by this Court as "an invasion of a legally protected interest which is … concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "'Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, … it often turns on the nature and source of the claim asserted." *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 227 (2003) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (internal quotations and citations omitted). If the claim does not involve a "legally cognizable right," the plaintiff cannot establish standing. *See id*. at 226-27 (concluding plaintiffs lacked standing because their claim of injury was "not to a legally cognizable right").

Here, Appellants lack standing because they have failed to establish any injury in fact to a legally cognizable individual right arising under the Elections Clause.

The Secretary does not disagree with Appellants' extensive recitation of the importance that the individual "right to vote" holds in our democracy. However, the textual source for the "right to vote for congressional representatives" lies not in the Elections Clause, but in art. I, § 2. *See* U.S. Const. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the Several States…."); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 665 (1966) ("the right to vote

[9] In his concurring opinion below, Senior Judge Porfilio concluded that Appellants lack standing to pursue their Elections Clause claim. J.S. App. 23a-24a. Judge Porfilio observed that Appellants limit their claim to a purported individual right under the Elections Clause. J.S. App. 23a. However, the Elections Clause confers no "individual right to vote." *Id.* Thus, he concluded, Appellants' "legally protected interest" rests upon a purported right that "simply does not exist." J.S. App. 23a-24a.

in federal elections is conferred by Art. I, § 2 of the Constitution"). Appellants do *not* assert a claim under art. I, § 2,[10] and that provision is not at issue here.

Furthermore, Appellants conflate a general right to vote for congressional representatives with a purported additional individual right to vote in districts that are designed by a particular method. J.S. 2; J.S. App. 5a-6a. Appellants cite no case law[11] or other authority[12] recognizing such an individual right. *See* J.S. 1, 10. Indeed, "[n]either 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." J.S. App. 9a. This is because the Elections Clause is an "express delegation[] of power to the *States* to act with respect to federal elections." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 805 (1995).

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[10] On July 24, 2006, in a supplemental brief filed two days before oral argument, Appellants attempted to amend their Complaint to incorporate U.S. Const. art. I, § 2 into their Elections Clause claim. The district court denied Appellants' request because it violated federal and local rules of civil procedure, and it was untimely. J.S. App. 4a n.2.

[11] Appellants' reliance on *United States v. Classic* is misplaced. J.S. 10. Read in context, *Classic* consistently discusses the constitutional "right to choose" as deriving from art. I, § 2. *See Classic*, 313 U.S. at 314 (citing art. I, § 2 for the "right of the people to choose"); *id.* at 320 (referring to "the right of choice by the people of representatives in Congress secured by § 2 of Article I"); *see also Ex parte Yarbrough*, 110 U.S. 651, 663 (1884) (referring to art. I, § 2 as the source of the "right to vote for a member of congress"), *cited in Classic*, 313 U.S. at 323.

[12] The Federalist Papers cited by Appellants, *see* J.S. 8-9, do not suggest that the Elections Clause confers specific individual rights. The Madison essays cited defend the structure of the House of Representatives generally, and do not concern art. I, § 4. *See* The Federalist Nos. 54, 57 (James Madison). The Hamilton essays focus on the *institutional* balance of power between Congress and state legislatures under the Elections Clause, and the advantages of leaving to legislative discretion the issues of "time" and "place" for elections. *See* The Federalist Nos. 59, 60, 61 (Alexander Hamilton).

Even assuming, *arguendo*, that Appellants assert a general "right to vote" protected by art. I, § 2, Appellants still fail to allege a concrete and particularized injury to that right.

The "right to vote" recognized under art. I, § 2 is essentially the right of a qualified voter to cast a ballot and have it counted equally. *See Gray v. Sanders*, 372 U.S. 368, 380 (1963); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *United States v. Classic*, 313 U.S. 299, 315 (1941). Appellants do not claim that art. V, § 44 prevents qualified Colorado voters from voting in a congressional election. Appellants claim their right to vote is violated because they are forced to vote under an "illegal" redistricting plan. J.S. 6, 23-24. However, Appellants do not allege that the current districts are discriminatory or that they otherwise dilute Appellants' vote; the *only* alleged infirmity with Colorado's congressional districts is that they were drawn by a court. Yet, "who" designs the districts (the legislature or a court) does not impair the "right to vote" if the districts preserve the voter's right to cast a ballot and have it counted equally.[13]

Finally, while the "right to vote" clearly belongs to the individual, J.S. 13, 16-17, the interest actually articulated by Appellants is a generalized interest in having congressional districts that are drawn in accordance with the Elections Clause. *See* J.S. App. 17a, 20a. Appellants' allegations amount to an abstract injury to a generalized interest in constitutional governance shared in common with every other Colorado citizen.[14] This is insufficient to establish

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[13] Appellants have no right to vote in a particular district. *See Mirrione v. Anderson*, 717 F.2d 743, 744 (2d Cir. 1983), *cert. denied*, 465 U.S. 1036 (1984) ("Neither federal statutes nor the Constitution assures any voter that the portion of the community in which he lives will not be separated from the rest of the community and joined in neighboring areas in the formation of an election district.").

[14] Similarly, Appellants appear to assert an individual right "to enforce the structural guarantees of the Elections Clause." J.S. 8, 10, 17. At best, Appellants appear to contend that separation of powers principles provide standing to bring their claim. *See* J.S. 17-19. However, Appellants do

standing. *See, e.g.*, *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220 (1974); *Ex parte Levitt*, 302 U.S. 633, 636 (1937).

### B. Appellants' claim is barred under Colorado law of issue preclusion.

Even assuming Appellants have standing to pursue their Elections Clause claim, summary affirmance is still warranted because the lower court correctly ruled that Colorado issue preclusion law bars this claim.

Collateral estoppel, or "issue preclusion," is an "'equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action.'" *Natural Energy Resources Co. v. Upper Gunnison River Water Conservancy Dist.*, 142 P.3d 1265, 1279 (Colo. 2006) (quoting *Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001)). The doctrine protects litigants from the cost and vexation of multiple suits, conserves judicial resources, and promotes reliance on the judicial system by preventing inconsistent decisions. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *In re Water Rights of Elk Dance Colo., LLC*, 139 P.3d 660, 667 (Colo. 2006); *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999).

Appellants complain that the decision below precludes a federal court from hearing the merits of their federal constitutional issue. J.S. 6. Yet, one of the purposes served by collateral estoppel is to promote the comity between state and federal courts that has been recognized as a bulwark of the federal system. *See Allen*, 449 U.S. at 95-96. Indeed, the Full Faith and Credit Act, 28 U.S.C. § 1738, "embodies the view that it is more important to give full faith and credit to state court judgments than to ensure separate forums for

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not bring a separation of powers claim here; in fact, they chose to drop such a claim from their original complaint. *Lance I*, 379 F. Supp. 2d at 1122 n.4.

federal and state claims." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984); *see also San Remo Hotel, L.P. v. City and County San Francisco*, 545 U.S. 323, 347 (2005) ("We are not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum."). Accordingly, where an issue has been decided in a valid state-court judgment, a plaintiff has no inherent "right" to relitigate this issue in a federal court. *See San Remo Hotel*, 545 U.S. at 341.

In arguing that their Elections Clause claim is not barred here, Appellants rely almost exclusively on federal cases that do not concern Colorado issue preclusion law. *See* J.S. 13-16, 20-23. However, *Colorado* law governs the analysis in this case. *See Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985) (Full Faith and Credit Act directs a federal court to refer to the preclusion law of the state in which the judgment was rendered).

Under Colorado law, issue preclusion bars litigation of an issue if: 1) the issue is identical to an issue actually and necessarily adjudicated in a prior proceeding; 2) the party against whom estoppel is asserted was a party to or was in privity with a party to a prior proceeding; 3) there is a final judgment on the merits in the prior proceeding; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *Natural Energy Resources*, 142 P.3d at 1280; *Elk Dance*, 139 P.3d at 667; *Michaelson v. Michaelson*, 884 P.2d 695, 700-01 (Colo. 1994); J.S. App. 10a.

The Colorado Supreme Court has noted that issue preclusion is broader than claim preclusion to the extent that it may apply to bar claims for relief different from those litigated in the first action. *See S.O.V. v. People in the Interest of M.C.*, 914 P.2d 355, 359 (Colo. 1996). Thus, even though a plaintiff asserts a different *claim*, a prior determination of an *issue* is conclusive in a subsequent action between the parties 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 Judgments § 27 (1980)).

As the district court found, all of the requirements of issue preclusion are met here. *See* J.S. App. 21a, 22a; *see also Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting).

### 1. Appellants' Elections Clause claim presents the same issue that was litigated to conclusion in *Salazar*.

The first criterion of issue preclusion is met because Appellants' Elections Clause claim presents the same issue of federal constitutional law that was "actually litigated and necessarily adjudicated" in *Salazar*. J.S. App. 12a-14a.

For an issue to have been "actually litigated," it must have been raised by the parties in the prior action; an issue is "necessarily adjudicated" when the determination of the issue is necessary to a judgment. *See Elk Dance*, 139 P.3d at 667; *Michaelson*, 884 P.2d at 701-02; *Bebo Constr. Co.*, 990 P.2d at 86.

In *Salazar*, the General Assembly and the Secretary specifically argued the claim that the Attorney General's interpretation of Colo. Const. art. V, § 44 violated the Elections Clause. *See Lance I*, 379 F. Supp. 2d at 1126 n.11 (citing *Keller*, 299 F. Supp. 2d at 1182). The *Salazar* court concluded that the one-time redistricting limitation in art. V, § 44 does not violate the federal constitution. *Salazar*, 79 P.3d at 1232 ("Nothing in state or federal law contradicts this limitation."); *see also Lance I*, 379 F. Supp. 2d at 1125 (concluding that the issue was raised and decided in *Salazar*); *Keller*, 299 F. Supp. 2d at 1181 (same). This conclusion was a necessary component of the *Salazar* decision. "[A]s a matter of pure logic, the *Salazar* court could not in good faith have relied upon a provision of the Colorado Constitution to invalidate the legislature's

congressional redistricting plan if it believed that provision was invalid under the federal Constitution." *Keller*, 299 F. Supp. 2d at 1182. Thus, this issue was actually and necessarily decided by the Colorado Supreme Court. *See Salazar*, 79 P.3d at 1232; *Keller*, 299 F. Supp. 2d at 1182.

Appellants attempt to distinguish their Elections Clause claim as a distinct "individual right to vote" inherent in art. I, § 4 that is independent of the General Assembly's institutional authority to redistrict under that provision. J.S. 11-13, 16-17, 20. Even if this asserts a legitimately different *claim*, it nevertheless presents precisely the same *issue* that was litigated to conclusion in *Salazar*. J.S. 23-28.

Appellants' asserted "individual right to vote" claim ultimately rests on their contention that art. V, § 44 violates the Elections Clause by interfering with the *legislature's* authority to redistrict.[15] Appellants' Second Question Presented here is especially revealing: it is literally the same question presented by the General Assembly on certiorari review (and denied) in *Salazar*. J.S. i, 24. That is, to resolve the "merits" of their Elections Clause claim, Appellants ask this Court to decide the *identical question of law* posited by the General Assembly in its unsuccessful petition in *Salazar*: whether the one-time redistricting limitation in Colo. Const. art. V, § 44 violates the Elections Clause by interfering with the *General Assembly's* authority to redistrict. [16]

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[15] In their Amended Complaint, Appellants' Elections Clause claim is titled "Legislative responsibility for congressional redistricting, U.S. Const. art. I, § 4." Am. Compl. at p.7. This claim states that the Elections Clause "expressly empowers state legislatures" to "draw congressional districts." Am. Compl. ¶¶ 33-35. Appellants allege that art. V, § 44 "as interpreted by the Colorado Supreme Court in *Salazar*, impermissibly usurps the power properly reserved to the Colorado legislature by the federal Elections Clause." Am. Compl. ¶ 37.

[16] Appellants candidly acknowledge their Elections Clause claim raises the same issue litigated in *Salazar*. J.S. 11-12 ("Appellants are entitled to litigate their Elections Clause issue *even though the General Assembly litigated that issue* in *Salazar*.") (emphasis added).

Appellants' own articulation of the merits of their claim exposes the fact that an "irreducibly necessary issue – indeed, a sine qua non – to adjudicating [their] asserted individual rights claim is deciding *who* may redistrict under the Elections Clause." J.S. App. 13a (emphasis added). Appellants make clear that if this case were to proceed to the merits, the parties would be (re)litigating the scope of the *General Assembly's* authority to redistrict under the Elections Clause. Whether or not one agrees with the outcome in *Salazar*, it cannot be denied that this issue was actually litigated and necessarily adjudicated in the *Salazar* litigation. J.S. App. 13a.

### 2. Appellants are in privity with parties to *Salazar*.

The second requirement of issue preclusion is satisfied because Appellants are in privity with the parties to the *Salazar* litigation. J.S. App. 14a-20a.

Under Colorado law, privity between a party and a non-party requires a substantial identity of interests and a working or functional relationship in which the interests of the non-party are presented and protected by the party to the litigation. *See Elk Dance*, 139 P.3d at 668; *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999); *see also Natural Energy Resources*, 142 P.3d at 1281 ("Privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is virtually represented in litigation.") (quoting *People in the Interest of M.C.*, 914 P.2d 1098, 1100 (Colo. App. 1994)).

Colorado law has long recognized the broad preclusive effect of a judgment where public officials have litigated a "matter of general interest to all citizens." *See McNichols v. City & County of Denver*, 74 P.2d 99, 102 (Colo. 1937); *Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County*, 37 P.2d 761, 764 (Colo. 1934).

In *McNichols*, the Colorado Supreme Court held that, where various public officials and public entities litigated the validity of a public bond issue, "a judgment rendered therein is res judicata as to the validity of the bonds against all persons, including taxpayers, even though they are not parties to the suit." *Id.* at 102. The court's holding was rooted in the theory that a judgment against the government or its legal representatives "in a *matter of general interest to all its citizens* is binding on the latter, though they are not parties to the suit." *Id.* (quoting 1 *Freeman on Judgments*, at 1090 (5th ed.)) (emphasis added); *see also Atchison*, 37 P.2d at 764 ("[A] judgment against a county or its legal representatives, in a *matter of general interest to all the people*…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.") (emphasis added).

In *Salazar*, the Attorney General, Secretary, General Assembly, and Governor litigated an issue of common public concern – namely, the powers and rights of the State to draw congressional districts. Without question, this issue constituted a "matter of general interest" to all Colorado citizens. *See Salazar*, 79 P.3d at 1228 ("There can be no question that the Attorney General's case involves an extraordinary matter of public importance."). The General Assembly and the executive branch officials who participated in *Salazar* are clearly bound by the judgment in that case. Under *McNichols* and *Atchison*, Appellants are in privity with the government officials who were parties in *Salazar* because those officials represented the interests of all Colorado citizens, including those of Appellants. Thus, Appellants are equally bound by the *Salazar* judgment.

The principle of Colorado law announced in *McNichols* and *Atchison* is analogous to a form of privity between a government and its citizens found in federal preclusion law cases where the government litigates an issue of broad public concern. In *City of Tacoma v. Taxpayers of Tacoma*, 357

U.S. 320 (1958), this Court held that, in Washington State's litigation regarding the validity of Tacoma's federal license to construct a power project, the State represented all of its citizens in enforcing "common public rights." Thus, the judgment was binding on all Washington citizens and precluded their subsequent litigation of the same public issue. *Id.* at 340-41; *see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979) (quoting *City of Tacoma*, 357 U.S. at 340-41); *Snyder v. Munro*, 721 P.2d 962, 964 (Wash. 1986) (applying *City of Tacoma* to bar private parties' constitutional challenge to the state's legislative districts, where state officials litigated same issue in prior case).

That said, the Secretary points to *Washington* and *City of Tacoma* only to shed additional light on the state law principle announced in *McNichols* and *Atchison*. Ultimately Colorado law, not federal law, governs the analysis here. It is for this reason that Appellants' exclusive reliance on *federal* preclusion law cases is misplaced. Appellants do not cite to such cases to elucidate or add to Colorado preclusion law principles. Rather, Appellants' federal cases comprise the substance of their privity arguments. J.S. 13-15 (citing *Town of Lockport v. Citizens for Community Action at a Local Level, Inc.*, 430 U.S. 259 (1977); *Cleveland County Ass'n for Gov't by the People v. Cleveland Bd. of Comm'rs*, 142 F.3d 468 (D.C. Cir. 1998); *Citizens for Community Action at a Local Level, Inc. v. Ghezzi*, 386 F. Supp. 1 (W.D.N.Y. 1974); *Patterson v. Burns*, 327 F. Supp. 745 (D. Haw. 1971)); *id.* at 20-22 (citing, *e.g.*, *Richards v. Jefferson County*, 517 U.S. 793 (1996)). Because the courts' privity analyses in these cases are not based on Colorado preclusion law, these cases are not relevant here.[17]

[17] These federal cases are distinguishable in any event. In *Patterson v. Burns*, the federal court found that the constitutional issue raised by the voter-plaintiff was "neither briefed, argued, nor resolved" in the earlier state court action. *See Patterson*, 327 F. Supp. at 747-49. By contrast,

Appellants contend they are not in privity with parties in *Salazar* primarily because they assert an individual voting rights claim under the Elections Clause that is distinct from the institutional interests at stake in *Salazar*. J.S. 11-13, 16-17, 20. However, as discussed *supra*, Part I.A, the Elections Clause does not confer rights to individual citizens. In any event, while the "right to vote" clearly belongs to the individual, J.S. 13, 16-17, the actual "right" articulated by Appellants (in having congressional districts drawn in accordance with the Elections Clause) states a "matter of general interest" shared in common with every other Colorado citizen. J.S. App. 17a, 20a.

Even assuming Appellants have an individual "right to vote for representatives in districts authorized by the Elections Clause," the parameters of that right are coextensive with the right asserted by the General Assembly in *Salazar*. That is, the interest asserted by Appellants is the

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Appellants' arguments here regarding the federal constitutionality of art. V, § 44 were both "championed" and "resolved" in *Salazar*. *Town of Lockport* is also distinguishable. Appellants' citation of *Town of Lockport* refers to the related prior federal district court judgment in *Ghezzi*. J.S. 14 (citing *Town of Lockport*, 430 U.S. at 263 & n.7). The district court's "no privity" ruling in *Ghezzi* was based on its rejection of the county defendant's argument that the prior case was intended to be a "class action." The *Ghezzi* court found that the prior case was not brought pursuant to Fed. R. Civ. P. 23 and the court was never called upon to make critical procedural determinations under that Rule. *Ghezzi*, 386 F. Supp. at 6. The Secretary makes no such "class action" argument here, but instead relies on the privity principles expressed in *McNichols* and *Atchison*. In similar vein, the county taxpayers in *Richards v. Jefferson County* were not bound by the judgment in a prior suit brought by three individual taxpayers and a city finance director, where those prior litigants did not sue on behalf of a class, and the *city* official could not purport to represent the pecuniary interests of *county* taxpayers in any event. *See Richards*, 517 U.S. at 799, 801-02. Here, by contrast, the elected state officials in *Salazar* collectively represented all Colorado citizens concerning a matter of general interest – the scope of the General Assembly's power to draw congressional districts. Under *McNichols* and *Atchison*, all Colorado citizens are now bound by that judgment.

right to vote in districts drawn by the General Assembly. This interest logically cannot exceed the interest the *General Assembly* has in exercising the authority conferred on it by the Elections Clause. The district court therefore correctly concluded that Appellants' Elections Clause claim is not based on uniquely 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. *Compare People in the Interest of M.C.*, 914 P.2d at 1101-02 (holding that plaintiff did not stand in privity with the state in a prior proceeding where the plaintiff's interests were "different and more far-reaching" or "of a different and broader nature" than those of the state). Indeed, here there is a "substantial identity of interests" between citizens and the government litigants in *Salazar* concerning the scope of the power to draw congressional districts for Colorado. *See Natural Energy Resources*, 142 P.3d at 1281. Thus, that Appellants articulate their Elections Clause claim as an individual rights claim does not exempt Appellants from the principle under Colorado law that a judgment against the government "in a matter of general interest" is binding on all citizens. *See McNichols*, 74 P.2d at 102; J.S. App. 17a-18a.

Appellants also contend that the "State" did not represent their interests in *Salazar* because the "State" did not present a unified position in that case. J.S. 15 (citing *City of Tacoma* and *Washington*). They further claim they cannot be bound by the *Salazar* judgment because the Attorney General took a position adverse to Appellants' view in that case. *Id.* However, the principle of Colorado law articulated in *McNichols* and *Atchison* is not qualified in either respect. Nothing in those cases suggests that the principle applies only when the "State" takes a unified position on a matter. Logically, where multiple officials or agencies litigate different sides of a matter of general interest to all citizens (which was the very situation in *McNichols*), the resulting judgment is just as binding as when the "State" takes a unified position. Similarly, nothing in *McNichols* or *Atchison*

indicates that a citizen may deem himself exempt from a judgment otherwise binding on all citizens, just because he disagreed with the position taken by the government representative in the prior litigation.

In any event, the district court held that Appellants stood in privity specifically with the *Secretary of State* and the *General Assembly*. J.S. App. 20a.[18] In *Salazar*, both of these governmental parties presented the identical arguments urged by Appellants challenging the federal constitutionality of art. V, § 44. As the executive branch official responsible for the conduct of elections, the Secretary represented all Colorado voters, including Appellants. *See Salazar*, 79 P.3d at 1230-31 (citing Colo. Rev. Stat. § 1-1-107(1)(a) (2003)). And, as observed by the district court, "'[t]he very nature of the relationship between the legislature and its constituents is one of representation.'" J.S. App. 15a (quoting *Lance I*, 379 F. Supp. 2d at 1125). Given that the General Assembly represents the citizens when it passes legislation – including S.B. 03-352 – there is no reason why the legislature cannot represent the citizens' interests when it litigates the constitutionality of that very legislation, particularly where the General Assembly's and the citizens' core legal interest (concerning the scope of the General Assembly's power to pass S.B. 03-352) is substantially the same. These elected legislative and executive branch officials properly served as representatives of the citizens and voters of Colorado in litigating a "matter of general interest" in *Salazar*. The fact that Appellants' views of the Elections Clause did not prevail in *Salazar* is immaterial; Appellants' interests were still represented in that suit.

Appellants' narrow view of privity in the context of government litigation leads to potentially endless litigation through successive attempts to overturn a court decision in

[18] The district court did not decide whether Appellants were also in privity with the Attorney General and Governor. J.S. App. 15a n.13.

important public law cases such as these. As a matter of public policy, this is a highly undesirable result. For this reason, the notion of government-citizen privity is "particularly appropriate for public law cases" because otherwise, there would be no limit to the number of successive citizen suits that could be brought in attempts to relitigate the same issue. *See Tyus v. Schoemehl*, 93 F. 3d 449, 456 (8th Cir. 1996) (observing that public law claims "would assume immortality" if parties were allowed continually to raise issues already decided, as the number of plaintiffs is "potentially limitless"); *see also Gustafson v. Johns*, 434 F. Supp. 2d 1246, 1257 (S.D. Ala. 2006) ("Redistricting lawsuits are precisely the type of public law issue to which virtual representation should be applied."); *id.* at 1258 ("Without virtual representation, there is no limit to the number of potential plaintiffs who could bring successive lawsuits against a state for redistricting. A state should not face an endless stream of lawsuits after each redistricting.").

For all of these reasons, the district court correctly concluded that Appellants stand in privity with parties in *Salazar*, and are equally bound by that judgment.

### 3. The Elections Clause issue was fully and fairly litigated in *Salazar*.

Finally, the fourth criterion of issue preclusion is satisfied here because the parties in *Salazar* had a full and fair opportunity to litigate the Elections Clause issue in that case.[19] J.S. App. 21a.

To determine whether a party against whom estoppel is asserted had a "full and fair opportunity to litigate" the issue in a previous proceeding, a Colorado court will consider: 1) whether the remedies and procedures of the first proceeding

[19] The third criterion of issue preclusion – that *Salazar* represents a final judgment on the merits in a prior proceeding – is undisputed in this case. J.S. App. 12a n.11.

are substantially different from the proceeding in which issue preclusion is asserted; 2) whether the party in the prior proceeding had sufficient incentive to litigate vigorously; and 3) the extent to which the issues are identical. *See Elk Dance*, 139 P.3d at 669; *Bebo Constr. Co.*, 990 P.2d at 87.

Appellants do not appear to argue that if their case goes forward the remedies and procedures (other than the forum court) will differ in any substantial way from the previous litigation. Nor do they provide any reason to believe that the General Assembly and Secretary, who presented this same issue in *Salazar*, lacked strong incentives to litigate it vigorously before the Colorado Supreme Court or this Court. *Keller*, 299 F. Supp. 2d at 1883; J.S. App. 21a. And, as discussed *supra* Part I.B.i, the issue presented is identical to that already litigated. Thus, the government representatives with whom Appellants stand in privity received a full and fair opportunity to litigate this issue before the Colorado Supreme Court and presented the issue to this Court in a petition for writ of certiorari. *See Keller*, 299 F. Supp. 2d at 1883; *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004).

## II. Review of the Elections Clause claim is unwarranted.

Appellants' request to have this Court to address the merits of their Elections Clause claim is unwarranted. J.S. 23.

### A. The merits of Appellants' Elections Clause claim were not litigated below.

Appellants' Second Question Presented reiterates the question presented by the General Assembly on certiorari review in *Salazar*. While Appellants urge this Court to address this claim here (*i.e.*, the very issue this Court declined to review in *Salazar*), J.S. 23-27, the district court never passed on the merits of this claim. Ordinarily, this

Court does "not decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

On remand, the district court directed the parties to limit their initial briefing to issue preclusion, and stated that consideration of the merits of Plaintiffs' Elections Clause claim would be postponed until after the court considered the defense of issue preclusion. Because the district court ultimately dismissed the Elections Clause claim on issue preclusion grounds, the merits of Appellants' Elections Clause claim (as described in Appellants' Second Question Presented) were never briefed, argued, or resolved in the district court below. Consequently, the Court does not have before it a merits ruling on this claim. Even if this Court disagrees with the issue preclusion ruling, it should remand the case for resolution of the merits in the district court.

### B. This claim is unsuitable for plenary review.

This Court declined to review the very Elections Clause issue raised in this case when it denied certiorari review in *Salazar*. Several factors that weighed against certiorari review of this issue in *Salazar* remain salient here and render this claim unsuitable for plenary review.

First, Colorado's state constitutional limitation on the frequency of congressional redistricting has no legal effect outside the state. The Colorado Supreme Court did not hold that the *federal* constitution limits redistricting to once per reapportionment cycle; rather, *state law* imposes this limitation.[20] Hence, the critical holding in *Salazar* does not

[20] Appellants' reliance on *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006), is inapposite. J.S. 6. The quotations cited state only that the *federal* constitution imposes no explicit prohibition on mid-decade redistricting, and in any event do not purport to reflect a majority holding in that case. Nothing in *Perry* casts doubt on the *state* constitutional limitation at issue in *Salazar*. J.S. App. 13a n.12.

apply to any other state, and will have no impact on other states' congressional redistricting processes.

Second, the *Salazar* decision is the product of unprecedented events in Colorado. The holding in *Salazar* will be relevant in some future decade only if, following reapportionment, the Colorado legislature fails to pass a redistricting plan in time for the next congressional election; as a last resort, a court adopts a valid plan for use in an election; and after an intervening election the General Assembly enacts a new redistricting plan aimed at supplanting the court-ordered plan. The recurrence of such a combination of events is unlikely.

Third, Congress is free to alter the fundamental result of *Salazar* under the "make or alter" provision of the Elections Clause. *See Foster v. Love*, 522 U.S. 67, 69 (1997) ("[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States.") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995)). Accordingly, Congress may preempt Colorado's choice and set a contrary national rule, which mitigates the need for this Court's intervention here.

Finally, the *Salazar* decision is consistent with the Elections Clause and this Court's precedents. The narrow federal question presented here is whether Colorado's state constitutional limit on the frequency of redistricting violates the Elections Clause or conflicts with this Court's precedents. It does not.

This Court's decisions in *State of Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), and *Smiley v. Holm*, 285 U.S. 355 (1932), leave no doubt that state constitutions constrain the exercise of redistricting power under the Elections Clause. *See Hildebrant*, 241 U.S. at 567-68 (legislative power to redistrict is subject to referendum requirement in state constitution); *Smiley*, 285 U.S. at 368 (finding "no suggestion in [Article I, § 4] of an attempt to endow the Legislature of the state with power to enact laws

in any manner other than that in which the Constitution of the state has provided that laws shall be enacted.").

Appellants acknowledge that the legislature's redistricting power is subject to state constitutional constraints, but assert that such constraints are strictly limited to those involving the general "lawmaking process." J.S. 25. However, there is no reason to conclude from *Smiley* that art. I, § 4 *forbids* other types of state constitutional constraints on the legislature's exercise of redistricting power – *e.g.*, constraints on the timing or frequency of redistricting. Accordingly, when the General Assembly draws congressional districts pursuant to the Elections Clause, it necessarily acts subject to the constraints imposed by the Colorado Constitution, including art. V, § 44.

Moreover, this Court's precedents plainly acknowledge the legitimacy of judicial redistricting. *See Branch v. Smith*, 538 U.S. 254, 272 (2003) (Congress' mandate to the States to provide single member districts for the election of Representatives "embraces action by state and federal courts when the prescribed legislative action has not been forthcoming"); *id.* at 271 (the phrase "by law" in 2 U.S.C. § 2c refers not only to legislative action, but "encompasses judicial decisions as well"); *Growe v. Emison*, 507 U.S. 25, 34 (1993) ("reapportionment is primarily the duty and responsibility of the State through its legislature or other body") (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *id.* (holding that the federal district court erroneously "ignor[ed] the possibility and legitimacy of state judicial redistricting"); *Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to … formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged."); *id.* (directing the federal district court to set a "reasonable time within which the appropriate agencies of the State of Illinois, including its Supreme Court, may validly redistrict" the state senate).

In sum, this Court has recognized that Congress, pursuant to the Elections Clause, has empowered entities other than a state legislature to establish a state's congressional districts. More specifically, Congress has authorized state courts to complete redistricting in the wake of legislative failure to do so. *See Branch*, 538 U.S. at 272. Where a court is forced to step in under such circumstances, it properly fulfills the federal mandate to redistrict. *See id.* at 276 ("the District Court properly completed the redistricting of Mississippi pursuant to 2 U.S.C. § 2c"); *see also Connor v. Finch*, 431 U.S. 407, 415 (1977) (in the wake of a legislature's failure to promulgate a valid plan, a court is "left with the unwelcome obligation of performing in the legislature's stead"). Here, after a Colorado court undertook the task of redistricting as a last resort before a congressional election, Colorado had in place a valid redistricting plan, subject to the limits the people of Colorado have placed on further redistricting efforts in art. V, § 44. Though Appellants may not prefer this method of redistricting, it is not unconstitutional.

### C. This Court's intervention will have little practical consequence.

Finally, this Court should decline plenary review because its intervention would have limited practical effect.

Appellants claim that current exigencies justify review of their Elections Clause claim. Specifically, they contend that S.B. 03-352 could be implemented for the 2008 elections. J.S. 23. This contention fails as a matter of law because Appellants cannot obtain the injunctive relief they seek here (an order requiring the Secretary to implement S.B. 03-352). The Colorado Supreme Court declared S.B. 03-352 "unconstitutional and void" in *Salazar*. J.S. 3; *Salazar*, 79 P.3d at 1243. A statute that has been declared unconstitutional by Colorado courts is void and of no effect. *See People v. Larkin*, 517 P.2d 389, 390 (Colo. 1973); *Coulter v. Board of County Comm'rs of Routt County*, 11 P.

199, 204 (Colo. 1886). Appellants do not dispute that *Salazar* resulted in a final judgment on the merits. J.S. App. 12a n.11. Thus, the holding in *Salazar* remains: S.B. 03-352 is void, and Appellants cannot resurrect that statute through this litigation.

Even a favorable declaratory judgment would not alter the status of S.B. 03-352, but at most, would allow the General Assembly to start anew and pass another mid-decade plan. Unless and until a new plan is passed by the General Assembly, however, the current (and otherwise valid) court-approved plan will remain in place for the rest of this decade. Moreover, the political landscape in Colorado has changed: When S.B. 03-352 was passed in 2003, the Republican party controlled both chambers of the General Assembly and the Governor's office. Now, the Democratic party controls the legislature, and a Democratic Governor was just elected, whose term will last through 2010. Given these changed circumstances, it is highly unlikely that the Republican-sponsored plan embodied in S.B. 03-352 will be re-enacted, even if Appellants obtain declaratory relief.

## III. The District Court correctly dismissed Appellants' Petition Clause claim.

The district court also properly dismissed Appellants' Petition Clause claim on the merits. J.S. App. 3a-4a. *See Lance II*, 126 S. Ct. at 1204 (Stevens, J., dissenting) ("Appellants' spurious Petition Clause claim was … properly dismissed by the District Court.") (citing *Lance I*, 379 F. Supp. 2d at 1130-32).

Appellants maintain that art. V, § 44 violates the Petition Clause because it is a "content-based prior restraint" that enjoins the enforcement of any new redistricting law, and that it therefore has a "chilling effect on redistricting petitioning activity." J.S. 28.

Appellants mischaracterize the *Salazar* holding and the reach of art. V, § 44, claiming that the "Colorado

Constitution prohibits the General Assembly from enacting *any* redistricting legislation after the artificial 'deadline.'" J.S. 28. This is inaccurate. If, for example, current districts were shown to be racially discriminatory (and therefore unconstitutional), the legislature could, consistent with art. V, § 44, enact a new, enforceable redistricting plan. *Salazar*, 79 P.3d at 1243 n.16.

In addition, contrary to Appellants' characterization of art. V, § 44, *see* J.S. 29, nothing in that provision (or its interpretation in *Salazar*) prohibits Appellants' redistricting-related petitions or otherwise obstructs their access to the General Assembly. As the district court observed, Appellants are still free to ask the legislature for new congressional districts without fear of retaliation. *See Lance I*, 379 F. Supp. 2d at 1131. Appellants' alleged injury is simply that the General Assembly may not respond to their advocacy until after the next census (the point at which the legislature may draw new districts consistent with art. V, § 44). At that time, the legislature may enact an enforceable redistricting law that redresses the "grievances" Appellants assert in their Complaint – the division and relocation of their particular communities.[21] Thus, "any such petitioning" is *not* rendered "entirely meaningless." J.S. 28. That art. V, § 44 may temporarily delay that redress does not foreclose the potential for such redress.

In effect, Appellants assert that the Petition Clause guarantees them a *right to the immediate availability of the particular redress* requested in their petition. This claim fails. This Court has held that the right to petition is simply "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). The First Amendment provides no guarantee that a particular petition

[21] Appellants seek "redress for the grievance that the Court's Plan divides their respective counties or municipalities between two congressional districts, or separates their respective communities from their traditional communities of interest[.]" Am. Compl. ¶ 8; *id.* at ¶¶ 43-46.

will be effective. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 452, 465 (1979). Indeed, none of the guarantees of the First Amendment imposes an affirmative obligation on the government to listen or to respond. *See id.*; *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271, 285 (1984). While the Petition Clause ensures that a citizen may communicate with the government, it does not vest a citizen with the power to instruct or bind the government to take particular action.

Under Appellants' view, the "right to petition" requires that the legislature *must* be empowered to provide the remedy a citizen requests. J.S. 30. The effect of Appellants' theory is extraordinary: if taken seriously, it would mean that anytime a constitutional provision prevents the government from providing the redress desired by a citizen, the citizen's right to petition is violated. Imagine, for example, that a citizen petitions the legislature to pass a redistricting plan that gives two votes to property owners, or one that disenfranchises all female citizens. Under Appellants' view of the Petition Clause, the legislature *must* be empowered to pass such a law; otherwise, the citizen's right to petition is "left meaningless." J.S. 29. As the district court observed, such an interpretation is not only unsupported by precedent, it would "eviscerate all limits on governmental powers." *Lance I*, 379 F. Supp. 2d at 1131.

Article V, § 44 does not proscribe, penalize, or otherwise regulate a citizen's speech or expression in any way. Appellants may "communicate their will" to the General Assembly at any time. The Petition Clause requires no more. Consequently, Appellants' claim fails as a matter of law.

## CONCLUSION

For the foregoing reasons, the Court should summarily affirm the judgment of the district court. Sup. Ct. R. 18.12.

Respectfully submitted,

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