

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-Z-2453 (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,

Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs, by and through their attorneys, Brett R. Lilly, John S. Zakhem, and the law firm of Doyle Zakhem Suhre & Lilly, LLC, respectfully submit their Response to Defendant's Motion to Dismiss, and as grounds therefore state as follows:

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I. Introduction

Plaintiffs, federal voters, seek 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 Defendant seeks to dismiss Plaintiffs suit based on the doctrine of issue preclusion and the concept of privity. Of the various state officials that litigated in state court a suit concerning the meaning of state law, the only party in that case purporting to represent state citizens sought to *deny* those citizens their individual rights secured by federal law. Accordingly, the doctrine of issue preclusion and specifically the concept of privity does not apply to bar this later suit filed by state citizens, who were not parties to the prior state-court litigation, seeking to vindicate their individual federal rights.

The state official who purported to litigate on behalf of the people was the Attorney General, who is obviously not a legislator; and who was in fact *adverse* to the General Assembly in the prior case, and is adverse to Plaintiffs here. Thus, to grant the Defendant's motion would mean that no *federal* voter can mount a *federal* constitutional challenge to Colorado's congressional voting districts in *federal* court, merely because the same issue was resolved in *state* court litigation among various officials of *state* government concerning the meaning of the *state* Constitution. Such a decision would mean 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.

Accordingly, this Court should reject Defendant's Motion, reach the merits of this important voting rights case, and hold that the Constitution's Elections Clause¹ is 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.

II. Background

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, 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 this Court's 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 (Plaintiffs here) filed the instant suit against the Colorado Secretary of State. Invoking 42 U.S.C. § 1983, Plaintiffs claim that (1) the use of the judicial plan instead of the legislative plan violates their individual rights to vote for congressional representatives in districts authorized by the Elections Clause, and (2) by disabling the General Assembly from

¹ Article I, Section 4, Clause 1, 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 . . ." (Emphasis added).

enacting redistricting legislation for this decade, the State has deprived them of their rights to petition for redress of their grievances, secured by the Constitution's First and Fourteenth Amendments. This three-judge district court was convened pursuant to 28 U.S.C. § 2284.

Initially, Defendant moved the court to dismiss both the Elections Clause claim and the Petition Clause claim based on *Rooker-Feldman* (see *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983)) and claim preclusion. Defendant argued that even though Plaintiffs were not parties to any prior litigation, they are seeking appellate review of 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 Colo. Rev. Stat. § 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. Colo. Rev. Stat. § 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, 124 S. Ct. 2228 (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 Colo. Rev. Stat. § 2-1-101 was “unconstitutional and void.” *Salazar*, 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.” *Id.* 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 legislative processes, including gubernatorial veto and popular referendum, that apply to all legislative enactments in the state. The *Salazar* 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 Colo. Rev. Stat. § 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.” *Salazar*, 79 P.3d at 1243. The Colorado General Assembly’s petition for certiorari was denied, albeit over the dissent of three of the Supreme Court’s members. *See* 541 U.S. 1093, 124 S. Ct. 2228 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari).

This Court granted the motion to dismiss the Elections Clause claim on *Rooker-Feldman* grounds. In holding that the Elections Clause claim is an impermissible appeal of *Salazar*, this Court concluded that Plaintiffs' injury—the conduct of elections under an unconstitutional voting district plan—was caused by the Colorado Supreme Court's judgment in the prior case. *Lance v. Davidson*, 379 F. Supp. 2d 1117, 1123 (D. Colo. 2005). While recognizing that *Rooker-Feldman* generally “may not be invoked against a federal-court plaintiff who was not actually a party to the prior state-court judgment,” *id.* at 1124, this Court stated that it would apply the concept of “privity” from preclusion law and, accordingly, that “[t]he key inquiry here is whether Plaintiffs,” four registered Colorado voters, “stand in privity with . . . the General Assembly,” a party on the losing side of *Salazar*. *Id.*

In answering that question in the affirmative, this Court offered the following syllogism: (1) “One relationship long held to fall within the concept of privity is that between a nonparty and a party who acts as the nonparty's representative”; (2) “[t]he very nature of the relationship between the legislature and its constituents is one of representation”; *ergo*, (3) there must be privity between the General Assembly in *Salazar* and Plaintiffs here. *Id.* at 1125.²

The United States Supreme Court vacated *Lance* and remanded this matter for further proceedings. *Lance v. Dennis*, 126 S. Ct. 1198 (2006).

² With all due respect, the flaw in step three of this reasoning is that, unlike a class representative, for example, whom a court designates as the class members' representative for purposes of specific litigation, a legislature is the people's representative only in *legislative* affairs. As will be argued below, there is insufficient identity of interests between the General Assembly and Plaintiffs here to support a finding of privity for purposes of issue preclusion.

III. Standard of Review

A. Fed. R. Civ. P. 12(b)(6)

The Defendant brings her Motion pursuant to Fed. R. Civ. P. 12(b)(6). When a complaint is challenged under Fed. R. Civ. P. 12(b)(6), the court presumes that all well-pleaded allegations are true, resolves all doubts and inferences in the pleader's favor, and views the pleading in the light most favorable to the non-moving party. *See Albright v. Oliver*, 510 U.S. 266, 267 (1994). The Federal Rules erect a powerful presumption against dismissing pleadings for failing to state a cognizable claim for relief. *Maez v. Mountain States Tel. & Tel., Inc.*, 54 F.3d 1488, 1496 (10th Cir. 1995). Such dismissals are disfavored and are not routinely granted, as the Federal Rules only require "notice pleadings." *Morse v. Regents of Univ. of Colo.*, 154 F.3d 1124, 1127 (10th Cir. 1998). Thus, the burden of proof lies with the moving party, and this burden is substantial. *See Anyanwu v. Columbia Bd. Sys., Inc.*, 887 F. Supp. 690, 692 (S.D.N.Y. 1995); *see also Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119, 1125 (10th Cir. 1994) (noting that the Federal Rules erect a powerful presumption against rejecting pleadings for failure to state a claim).

Claims will only be dismissed under Fed. R. Civ. P. 12(b)(6) if it appears beyond doubt that the pleader can prove no set of facts in support of the claim that would entitle the pleader to relief. *Conley v. Gibson*, 355 U.S. 41, 78 (1957). Thus, the stated legal theory and specific requests for relief are not necessarily dispositive in ruling on a Fed. R. Civ. P. 12(b)(6) motion. *See Barrett v. Tallon*, 30 F.3d 1296, 1299 (10th Cir. 1994). A claim generally will not be dismissed, even though the asserted legal theories are not cognizable or the relief sought is unavailable, so long as other tenable legal claims are evident on the face of the complaint, *see id.*, or the pleader is otherwise entitled to any type of relief under another possible legal theory.

Carparts Distrib. Ctr. v. Auto. Wholesaler's Ass'n of New England, Inc., 37 F.3d 12, 17 (1st Cir. 1994) (“[T]he possibility of a claim is enough to defeat dismissal.”).

The Supreme Court has also rejected the practice of applying a “heightened pleading standard” to civil rights claims under 42 U.S.C. § 1983, holding that, with the exception of fraud, mistake, and certain conditions precedent governed by Fed. R. Civ. P. 9(b) and 9(c), the federal notice pleading standards apply universally. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

B. Issue Preclusion

In order to successfully raise issue preclusion, the Defendant must meet four conditions:

1. The issue precluded is identical to an issue actually litigated and necessarily adjudicated in the prior proceeding;
2. The party against whom estoppel is sought was a party to or is 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.

Michaelson v. Michaelson, 884 P.2d 695, 700-01 (Colo. 1994); *Wilkinson v. Pitkin County Bd. of County Com'rs*, 142 F.3d 1319, 1322 (10th Cir. 1998).

Defendant bears the burden of proving issue preclusion applies to Plaintiffs' claims. “Preclusion is a drastic step, which grants summary judgment against a party whose allegations are to be taken as true.” *Knox By and Through Hagberg v. Lederle Laboratories*, 4 F.3d 875, 880 (10th Cir. 1993). As a result, preclusion “must be watched in its application lest a blind adherence to it tend to defeat the even firmer established policy of giving every litigant a full and

fair day in court.” *United States v. Silliman*, 167 F.2d 607, 614 (3rd Cir. 1948), *cert. denied*, 335 U.S. 825 (1948). A party seeking to benefit from issue preclusion has the burden of establishing the elements of the claim. *Valley Imperial Ass’n, Inc. v. U.S. Fidelity & Guaranty Corp.*, 129 F.3d 1108, 1120 (10th Cir. 1997); *See also Bebo Constr. Co. v. Mattox & O’Brien, P.C.*, 990 P.2d 78, 85 (Colo. 1999) (“The burden of establishing these elements rests with the party seeking preclusion.”). Defendant cannot meet this burden.

IV. Argument

A. Plaintiffs’ Claims are Not Identical to the Issues Presented in *Salazar*.

Although the Defendant argues that the Plaintiffs’ claims resemble those made by the defendants in *Salazar*, for purposes of issue preclusion “mere resemblance is not enough.” *Fahra v. F.D.I.C.*, 963 F.2d 283, 286 (10th Cir. 1992). Defendant concedes that 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, the General Assembly represented its “institutional legal interest,” *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1179-80 (D. Colo. 2004), and the Governor represented the “supreme executive power of the state . . .” *Secretary of State’s Brief in support of her Motion to Dismiss Plaintiffs’ Election Clause Claim* at 20-21. These *institutional* interest stand in stark contrast to Plaintiffs *individual right* to vote for congressional representatives in districts authorized by the Elections Clause. There was no mention in any brief or during any argument to the *Salazar* Court of an individual right under U.S. Const. art. I, § 4, as Plaintiffs bring here. Likewise, the *Salazar* Court made no mention of any individual right under U.S. Const. art. I, § 4.

B. There is no Privity Between Plaintiffs and the Parties in *Salazar*.

There is no doubt that Plaintiffs were not parties to *Salazar*, and there is no substantial identity of interests between Plaintiffs 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 affect 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 Plaintiffs are unique to individual citizens of Colorado who could not be in privity with or “virtually represented” by governmental litigants litigating institutional claims. Furthermore, Plaintiffs’ 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.

Plaintiffs are seeking judgment under the United States Constitution that will operate to prohibit governmental limitations and mandate due process *vis-a-vis individual* voting rights, i.e., the right to vote for congressional representatives in districts authorized by the Elections Clause. 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. Therefore, Defendant has failed to demonstrate privity, and this Court cannot find privity pursuant to Colorado law.

- ***Washington and City of Tacoma do not apply to this case***

This Court has previously held that *Washington v. Washington State Commercial Passenger Fishing Vessel Ass’n*, 443 U.S. 658, 693 n.32 (1979) (holding that Washington State’s participation in earlier litigation over common public fishing rights precluded later suit brought by citizens), and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (holding

that outcome of Washington State’s litigation regarding validity of Tacoma’s federal license to construct power plant on river precluded later suit brought by taxpayers), stand for the broad principle that “the outcome of the government’s litigation over a matter of public concern binds its citizens” *Lance*, 379 F. Supp. 2d at 1125.

According to this 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.” *Id.* at 1126. Thus, the Elections Clause right asserted by Plaintiffs, instead of being an individual right, supposedly “is as much a matter of public concern and as much of a common public right as a State’s ability to control the use and development of its navigable waters and streams.” *Id.* at 1125.

- ***Lockport* rejects finding Privity in this case**

This privity “rule” announced in *Lance* poses grave risks to voting and other fundamental constitutional rights and is irreconcilable with the Supreme Court’s binding precedent. In *Town of Lockport v. Citizens for Cmty. Action at Local Level, Inc.*, 430 U.S. 259 (1977), 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 district 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 Cmty. 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, the Supreme 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).

Lockport compels this Court to reach the same conclusion in this case for a number of reasons. In *Lockport*, 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 State—the legislative branch—that purportedly represents all of the State’s citizens. Even assuming *arguendo* that “[w]hen a *state* litigates common public rights, the citizens of that state are bound by the judgment,” no case anywhere has suggested that the state’s *legislative branch* may engage in such preclusive “representation.” *Lance*, 379 F. Supp. 2d at 1128 (quoting *Satsky v. Paramount Comm’ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (emphasis added)).

- **No Representation by the State**

The fact that Plaintiffs were not even allegedly “represented” by the State, but only the General Assembly, is enough, standing alone, to render completely inapposite any 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.” *Tacoma*, 357 U.S. at 341; *see also Washington*, 443 U.S. at 693 n.32. Here, there is no contention that the “State” of Colorado represented, or is in privity with, Plaintiffs. 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, because the State had several factions fighting within 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, 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.” *Salazar*, 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 Plaintiffs, since he was and is adverse to them on their view of the Elections Clause. *Lance*, 379 F. Supp. 2d at 1125, n.8.

The argument that the “very nature of the relationship between that of the legislature and its constituents is one of representation.” *Id.* at 1125, is a semantic play on the word “representation.” However, 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*. This argument also ignores 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 Plaintiffs' *individual* rights to vote in constitutionally-compliant congressional districts. 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 [Plaintiffs], 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)).

Importantly, there is no privity here even under the standards articulated by *Lance*. According to *Lance*, states cannot represent or bind citizens with respect to a "private interest," which is defined as a "claim that the state has no standing to raise." *Lance*, 379 F. Supp. 2d at 1128 (quoting *Satsky*, 7 F.3d at 1470). See Wright, Miller & Cooper, *supra*, § 4458.1 (where rights are "individual and private," "the government . . . clearly cannot foreclose private remedies"). Here, *none* of the parties in *Salazar* would have standing because neither the Attorney General nor the Governor nor the General Assembly could 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 does Defendant offer any hint, for example, as to how the General Assembly or the Attorney General could get into any court to mount a federal challenge to the state Constitution that created the General Assembly and/or the Attorney General.

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. *Richards*, 517 U.S. at 802. As such, under *Richards*, the only party that could, for purposes of analysis, be in privity

with Plaintiffs would be the Attorney General. The Colorado Attorney General was the only party in *Salazar* that purported to be acting as the public's representative in litigation, and the Colorado Supreme Court found the same to be true. However, the Attorney General then and now continues to *oppose* Plaintiffs' position, both in terms of institutional power in *Salazar* and in this case terms of individual rights under the Elections Clause. This is obviously not the substantial identity of interests required to find privity under Colorado law.

Another flaw in this argument is the unique application of the facts of *Salazar* to the notion that "government" can be viewed as having a position. In fact, every branch of Colorado government was involved in *Salazar*. Two separate divisions of the Executive Branch were opposing parties. Certainly, the Attorney General, who now represents the Defendant in this action and earlier sought to intervene as a party against Plaintiffs' claims, cannot honestly argue that his office was representing Plaintiffs' interests in *Salazar*. There was no clear position of the "government" in the prior cases, so no one position can be attributed as mandating privity between government and Plaintiffs.

The very notion of privity requires "both 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 in the [previous] litigation.'" *S.O.V. v. People ex rel. M.C.*, 914 P.2d 355, 360 (Colo. 1996) (quoting *Public Serv. Co. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 787 (Colo. App. 1991)). Neither requirement can be met by drawing bits and pieces from multiple parties in a previous litigation, especially when several of those parties were arguing conflicting positions. Further, there is a vast difference in terms of Constitutional dimension between the State interest in creating congressional districts and the Plaintiffs individual right to vote in congressional districts that comport with the mandates of the Elections Clause, not to mention

the Plaintiffs individual right to vote for and/or hold accountable the legislature vested with creating such congressional districts under the Elections Clause.

- **Voting Rights are not “common public rights”**

In any event, the voting rights advanced by Plaintiffs here are not “common public rights” where the State can speak for and bind its citizens. In *Washington* and *Tacoma*, the State was asserting *its* control over, respectively, navigable waters and a state-owned fish hatchery, against encroachments and assertions of eminent domain by other sovereign entities—the United States and Indian tribes in *Washington* and the City of Tacoma in *Tacoma*.³ In such border or property disputes, the State is obviously asserting its *own* interests as a State. Indirectly affected citizens—the fishermen in *Washington* and the “taxpayers” in *Tacoma*—had no independent rights, but only a derivative right stemming from their enjoyment of the state-controlled property (or the reduced tax burden stemming from the State’s asserted prerogative). This is why the *Tacoma* opinion cited only original jurisdiction, border-dispute cases between States, for the proposition that a State can bind its citizens concerning “common public rights.” *Tacoma*, 357 U.S. at 341.

Here, Plaintiffs plainly are not asserting derivative rights, stemming from the State, for two reasons. First, the *State* never advanced a position in the state-court litigation intended to *enhance* the constitutional right Plaintiffs assert in federal court. The State (Colorado), 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

³ In the second suit in the *Tacoma* litigation, which resulted in the *Tacoma* opinion, the taxpayers of the City of Tacoma were adverse to the City, and aligned with the State’s position in the prior state suit. The City had commenced the second suit to secure a judgment that it could issue bonds to pay for a dam project that the State had sued to prevent (and lost) in the first suit, and Washington law required that “representative” taxpayers be named as defendants in the later suit. *Tacoma*, 357 U.S. at 329.

not some common public right derived from the state, like a shared interest in natural resources, or a situation where the state is authorized to speak for its citizens, such as tax or bond matters. *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 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.

- **Individual Rights under the Election Clause**

This Court recognized this truism with respect to the Petition Clause claim, holding that the State could hardly be in privity with, or bind, those citizens claiming that the state Constitution had violated their federal constitutional right to petition for redress of grievances. *Lance*, 379 F. Supp. 2d at 1126. However, this Court contended that the right to have elections conducted in

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”).

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.” *Id.* at 1126; *see id.* at 1127, n.13 (“Article I, § 4 of the Federal Constitution by its language vests power in the legislature, not in ordinary citizens, and . . . [r]eapportionment is necessarily a governmental act rather than an individual act.”). With all due respect, this argument is premised on a 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—for example, by 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—it is 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”); Montesquieu, *The Spirit Of The Laws* 157 (1752) (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (“When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them.”). Indeed, the Supreme 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)). Significantly, *all* separation-of-powers challenges resolved by the Supreme 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 which 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 Plaintiffs 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 *Grove*, 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. *Grove v. Emison*, 507 U.S. 25, 29 (1993).

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 U.S. Const. art. 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.

To demonstrate this point, consider that under Defendant’s concept of privity, state officials supporting a redistricting plan could simply seek a declaratory judgment that the plan complies

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); *Grove 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).

with state and federal law, naming other state officials as nominal defendants.⁶ As here, a favorable state court adjudication in litigation between such public officials would forever foreclose all the State's citizens from mounting a federal court challenge to the plan. Even absent any gamesmanship, a redistricting plan often will be ordered into effect by a state court in litigation to which state officials are party. *See Growe*, 507 U.S. at 25 (federal court must give state court first opportunity to devise plan to remedy "one person, one vote" violation).

Under the Defendant'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 Educ.*, 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).

- **The Defendant's Case Law is Distinguishable**

Defendant and Justice Stevens argue that Plaintiffs here were in privity with both the then Colorado Attorney General Salazar and the Colorado General Assembly, and cite *McNichols v. City & County of Denver*, 101 Colo. 316, 322, 74 P.2d 99, 102 (1937), and *Atchison, T. & S.F.R. Co. v. Bd. of County Comm'rs of County of Fremont*, 95 Colo. 435, 441, 37 P.2d 761, 764

⁶ Forty-three states have adopted the Uniform Declaratory Judgments Act, which would allow such a suit. *See* U.D.J.A. §§ 1, 2, 13; 12 Uniform Laws Annotated (U.L.A.) 309.

(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 its citizens is analogous to that of a trustee towards his 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. There is privity between a school district or county and its taxpayers just as between a private corporation and its stockholders, the court reasoned. *Id.* at 440-41. Citing numerous cases from other states, the Court stated “it has been held repeatedly 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 *Atchison* 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.

Defendant also cites *Snyder v. Munro*, 721 P.2d 962 (Wash. 1986), which has been distinguished by the First Circuit Court of Appeals in *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003). In *Perez-Guzman*, an individual citizen and member of a political party brought an action alleging violations of freedom of speech and due process. The court, refusing to find preclusion, rejected the Plaintiffs' argument that individual members of a political party were in privity with the political party as a whole. Noting that Perez's complaint emphasized a personal right, the court stated, "individuals have constitutionally protected interests in free association and electoral participation" (quoting *Cruz v. Melecio*, 204 F.3d 14, 22 (1st Cir. 2000)). Furthermore, the U.S. Supreme Court has held that "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Postal Tele. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918).

In a case with similar underlying facts as the instant case, a federal district court held that res judicata did not apply where the lieutenant governor (the person responsible for the enforcement of Hawaii's election laws) merely tested the state law interpretation of election rules. There, a private citizen was not precluded from bringing a claim that alleged a violation of a constitutional right. *Patterson v. Burns*, 327 F. Supp. 745, 749 (D. Haw. 1971) ("Under the circumstances of this case, it would be unjust to hold the voters of the Fourth District bound by a decision in which their specific interest was neither championed nor resolved.").

Finally, the state law cases cited by Defendant are distinguishable because (1) here it is the State that is denying the plaintiffs' rights, and (2) here the State was not represented, but rather

there were different public officials taking different views. Also, the state cases are consistent with the *Tacoma* and *Washington* cases. Thus, the state cases are distinguishable and do not affect the *Lockport* rule, just as the *Tacoma* and *Washington* cases are distinguishable and do not affect the *Lockport* rule.

- **There was no “Virtual Representation” for Plaintiffs’ Claims**

Because this Court has rejected the application of the “virtual representation” doctrine on the facts of this case, *Lance*, 379 F. Supp. 2d at 1129, Defendant relegates the “virtual representation” argument to a footnote. In addition to properly rejecting the application of this doctrine on the facts of this case, this notion itself is highly suspect. *See Tice v. Am. Airlines*, 162 F.3d 966, 971 (7th Cir. 1998) (“We think the term ‘virtual representation’ has cast more shadows than light on the problem to be decided. As a matter of fact, a finding that nonparties were virtually represented in earlier litigation has rarely been used actually to bar litigation.”). At most, “virtual representation” has been described as “a common-law kind of class action.” *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996), that applies only when there is a practical identity of interests between the former litigant and the present one.” *Id.*

Finally, it can hardly be argued that there is a “practical identity of interests” between the Plaintiffs and the Attorney General in *Salazar*. Here, Plaintiffs seek to protect individual rights to petition the government and to vote for congressional representatives in districts authorized pursuant to U.S. Const. art. I, § 4, while the Attorney General previously and currently argued against this position.

- **A finding of Privity would violate Due Process**

Barring the doors of a federal court to plaintiffs who plainly satisfied all requirements for jurisdiction, 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.*, 247 U.S. at 476; *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, the Supreme 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, exist 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 this Court expressly stated in the context of Plaintiffs' Petition Clause claim, there is no evidence here of Plaintiffs' "substantial participation in the *Salazar*

litigation,” nor that “the instant suit was merely part of a larger tactical scheme” *Lance*, 379 F. Supp. 2d. at 1129, let alone that Plaintiffs “control[led]” *Salazar* “on behalf of” the Colorado legislature. *Wilks*, 490 U.S. at 762 n.2.⁷

Every government law or action, especially one which deprives an individual of a constitutional right, is subject to a due process challenge by any citizen whose constitutional rights it violates. U.S. Const. amends. V and XIV; *Marbury v. Madison*, 5 U.S. 137, 163 (1803). This action represents the first challenge to Colo. Const. art. V, § 44. It is certainly the first based on the claims made by Plaintiffs. By virtue of *Salazar*, there is no other forum for Plaintiffs to bring their constitutional challenge to Colo. Const. art. V, §44. Therefore, due process requires that this Court provide a forum for the constitutional issues presented by Plaintiffs’ claims.

C. Plaintiffs’ Claims Were Not Necessarily Adjudicated in *Salazar*

The *Salazar* Court repeatedly stresses that it decided the case strictly on Colorado law, without resolving any issue of federal law. No less than seven times did the Colorado Supreme Court emphasize that its decision was a matter of state, not federal, law. This is likely the reason that the United States Supreme Court denied certiorari, i.e., there was no federal question, only an interpretation of the Colorado Constitution at issue. Nonetheless, this Court found that *Salazar* “necessarily adjudicated the issue of federal constitutional law raised by [the *Keller*

⁷ Nor does it matter whether Plaintiffs 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.*

defendants].” *Keller*, 299 F. Supp. 2d at 1174; *Lance*, 379 F. Supp. 2d at 1126. Plaintiffs urge the Court to reconsider this point.

Regardless, Plaintiffs believe they have a good faith basis to argue issue preclusion does not apply to Plaintiffs’ claims in the instant case because the *Salazar* Court did not necessarily adjudicate individual federal constitutional rights under U.S. Const. art I, § 4. As stated earlier, the litigants in *Keller* argued institutional rights—as opposed to the individual rights asserted in the instant case—under U.S. Const. art I, § 4. Furthermore, the *Salazar* Court did not necessarily adjudicate an individual voting rights claim pursuant to U.S. Const. art. I, § 4.

Under Colorado law, “[a]n issue is necessarily adjudicated when the determination of an issue was necessary to a judgment,” *Michaelson*, 884 P.2d at 701-02, 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.*, 990 P.2d at 86 (emphasis in original).

D. Plaintiffs Did Not Have a Full & Fair Opportunity to Litigate Their Claims in *Salazar*

As to this element of the preclusion analysis, Defendant’s brief states only that the *Keller* Court determined that the General Assembly, Governor and Defendant had a full and fair opportunity to litigate their claims before the Colorado Supreme Court. Defendant fails to distinguish how Plaintiffs received the same opportunity on their distinct individual voting rights claims.

Further, it was logically impossible for Plaintiffs' claims to have been represented in *Salazar*, because Colo. Const. art. V, § 44 had yet to be interpreted or applied against Plaintiffs until *Salazar* was decided. Plaintiffs believe that this Court would err to find that the challenge brought here against Colo. Const. art. V, § 44 is precluded by the judgment of the first court to provide the meaning of that law. In addition, Plaintiffs were not required to intervene in *Salazar*. *United States v. Owens*, 54 F.3d 271, 274 (6th Cir.1995). For this reason, this Court should find that Plaintiffs have yet to be afforded a full and fair opportunity to litigate their claims.

V. Conclusion

This case invokes the primary function of the lower federal courts, to wit, interpreting general federal constitutional issues of first impression. As a result, Defendant's arguments under the issue preclusion doctrine lack the authority and persuasion sufficient to overcome the Court's obligation to hear Plaintiffs' claims on the merits. Defendant's Motion to Dismiss and the Brief filed in support thereof fails to show that the claims in the instant case are identical to claims actually litigated and necessarily adjudicated by the *Salazar* litigation. Furthermore, Defendant's Brief fails to adequately establish that Plaintiffs have already had the full and fair opportunity to litigate their claims in previous litigation. Finally, and perhaps most glaringly, Defendants fail to set forth sufficient allegations to establish privity between Plaintiffs in the instant case and any specific party in *Salazar*. This Court should deny the pending motion to dismiss and promptly permit the parties to provide briefs on the dispositive issues of law as they regard to the merits of Plaintiffs' Complaint.

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss.

Respectfully submitted this 26th day of May, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses: anthony.navarro@state.co.us ; monica.marquez@state.co.us

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