

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' STATUS REPORT**

---

Pursuant to the Court's Order of March 1, 2006, the Plaintiffs hereby submit this status report.

1. On February 21, 2006, the United States Supreme Court remanded this matter to this Honorable Court. *Lance v. Dennis*, 546 U.S. \_\_\_\_; 163 L.Ed. 2d 1059 (2006).
2. The Supreme Court held that the *Rooker-Feldman* doctrine does not bar plaintiffs from proceeding, and vacated the District Court's judgment. *Id.* at 1062. The Supreme Court did not pass on the District Court's resolution of the merits of plaintiffs' Petition Clause claim. *Id.* at 1066, n. 3.
3. In prior proceedings before this Court, Defendant moved for dismissal of both claims under the doctrine of issue preclusion and for dismissal of the Petition Clause claim under Fed.

R. Civ. P. 12(b)(6). This Court granted Defendant's 12(b)(6) motion, but properly observed that "issue preclusion is not jurisdictional and is instead an affirmative defense asserted after the court already has jurisdiction over a claim." 379 F. Supp. 2d 117, 1122, note 3 (internal citations omitted.) This Court also suggested that "the appropriate vehicle for dismissal on the basis of issue preclusion is Fed. R. Civ. P. 12(b)(6)." *Id.*

4. Plaintiffs' counsel has conferred with counsel for Defendant, who has indicated a desire to address issue preclusion as a preliminary matter for this Court prior to any argument or briefing on the merits of Plaintiffs' art. I, § 4 claim. However, given the fact that issue preclusion must be addressed in a 12(b)(6) motion, briefing on the merits of the art. I, § 4 claim is appropriate.

5. Furthermore, given the fact that both parties are certain to appeal any adverse ruling, which appeal must be heard by the Supreme Court, it is in the interests of judicial economy for this Court to issue a ruling on the merits of the art. I, § 4 claim as well as the impending 12(b)(6) motion to dismiss.<sup>1</sup>

6. All of Plaintiffs' claims turn on a pure question of law: whether Article V, Section 44 of the Colorado Constitution, as interpreted by the Colorado Supreme Court, violates the federal constitution's Elections Clause and the First Amendment's Petition Clause. This question can be

---

<sup>1</sup>The Supreme Court's opinion, and particularly Justice Ginsburg's concurring opinion, demonstrates the Court's unwillingness to adopt the arguments made in Justice Stevens' dissent. Thus, judicial economy dictates that this Court provide the Supreme Court with a full briefing on all issues and with a final decision on the merits of the Plaintiffs' claims so that an additional remand is not necessary.

decided based on briefing and oral argument, which the parties can begin forthwith.

7. Plaintiffs believe that the most expeditious manner for the parties to brief this issue is for Plaintiffs to file a motion for summary judgment. Defendant can then file a joint motion to dismiss and opposition to summary judgment based on the affirmative defense of issue preclusion.

8. Plaintiffs suggest that the Court set a briefing schedule which allows 30 days for Plaintiffs to file and serve a motion for summary judgment, an additional 30 days for Defendant to file and serve a response, and an additional 15 days for Plaintiffs to file and serve a reply. It would be most efficient for Defendant to file a single brief setting forth arguments in opposition to summary judgment and in support of dismissal, and for Plaintiffs to brief arguments in support of summary judgment and in opposition to dismissal.

9. Although the Supreme Court did not pass on this Court's resolution of the merits of Plaintiffs' Petition Clause claim, it did vacate this Court's judgment. Therefore, Plaintiffs renew their Petition Clause claim and urge this Court to reconsider its previous decision. Plaintiffs can, therefore, include this issue in their proposed motion for summary judgment. As the Court has already ruled, this claim is not barred by issue preclusion or Rooker-Feldman and is, thus, appropriately decided on summary judgment.

10. However, if the Court is inclined to follow the Defendant's suggested approach, i.e., dealing first with only the issue preclusion motion under Fed. R. Civ. P. 12(b)(6), Plaintiffs strenuously object to filing simultaneous briefs. The supplemental briefing for the Petition Clause claim is inapposite because such briefs were filed in response to oral argument. Second,

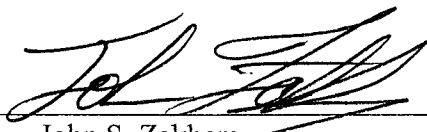
Defendant quotes Justice Ginsburg's concurrence stating that the issue is "best left for full airing and decision on remand." Defendant's March 9, 2006 Status Report at 2. "Full airing" means that a full briefing schedule, i.e., a motion, response and reply, are appropriate.

11. Therefore, in this instance, Plaintiffs suggest that the Court set a briefing schedule which allows 30 days for Defendant to file and serve a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), an additional 30 days for Plaintiffs to file and serve a response, and an additional 15 days for Defendant to file and serve a reply.

12. The Court's order, dated November 22, 2004, is better served by Plaintiffs' suggested approach because issue preclusion necessarily requires an evaluation of the merits of Plaintiffs' Elections Clause claim and because issue preclusion is an affirmative defense, as this Court has already concluded.

13. In light of the various contingencies that will affect how this case is to proceed, Plaintiffs respectfully request that the Court schedule a status conference at its earliest convenience.

Respectfully submitted this March 10, 2006.

By:   
John S. Zakhem  
Brett R. Lilly  
Doyle Zakhem Suhre & Lilly LLC  
700 17<sup>th</sup> Street, Suite 2000  
Denver, Colorado 80202

*Attorneys for Plaintiffs Keith Lance, Carl Miller,  
Renee Nelson, Nancy O'Connor*

CERTIFICATE OF SERVICE

I certify that on this March 10, 2006, the foregoing was served by facsimile and US Mail, properly addressed to:

*Attorneys for Defendant Gigi Dennis:*

Jon Suthers, Esq.  
Attorney General  
Monica M. Marquez, Esq.  
Anthony J. Navarro, Esq.  
Assistant Attorney Generals  
1525 Sherman Street, 5<sup>th</sup> Floor  
Denver, Colorado 80203  
Facsimile: (303) 866-4765

Courtesy Copy to:

*Attorneys for Defendants Colorado General Assembly and Governor Bill Owens in U.S.D.C. Civil Action No. 03-Z-1482 (CBS):*

Allan L. Hale, Esq.  
Richard Westfall, Esq.  
Hale Hackstaff Friesen, LLP  
1430 Wynkoop, Suite 300  
Denver, CO 80202  
Facsimile: (720) 904-6000

Courtesy Copy to:

*Attorneys for Plaintiffs Maryanne Keller, Pauline York, Douglas Garrett, John W. Singletary and Lila Pedroza in U.S.D.C. Civil Action No. 03-Z-1482 (CBS) :*

David R. Fine, Esq.  
Edwin S. Kahn, Esq.  
Martha M. Tierney, Esq.  
Kelly Haglund Garnsey & Kahn LLC  
1441 Eighteenth Street, Suite 300  
Denver, Colorado 80202  
Facsimile: (303) 293-8705

Courtesy Copy to:

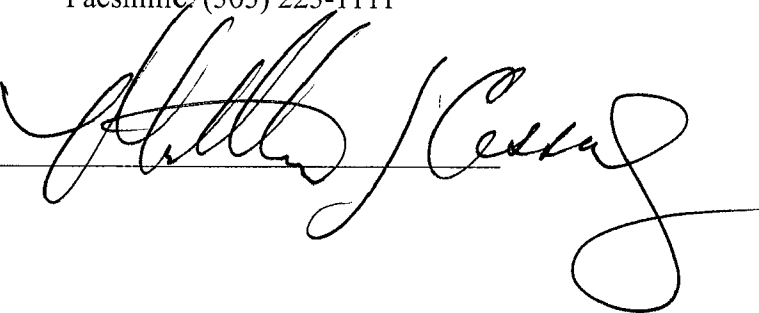
*Attorneys for Plaintiff Diana DeGette in U.S.D.C. Civil Action No. 03-Z-1482 (CBS)*

Edgar Neel, Esq.  
Michelle Merz, Esq.  
Pendleton, Friedberg, Wilson & Hennessey  
303 E. 17<sup>th</sup> Avenue, #1000  
Denver, CO 80203-1263  
Facsimile: (303) 831-0786

Courtesy Copy to:

*Attorneys for Rep. Mark Udall:*

Lynn Hufnagel, Esq  
Brownstein Hyatt & Farber, P.C.  
410 17<sup>th</sup> Street, Ste. 2200  
Denver, CO 80202  
Facsimile: (303) 223-1111

A handwritten signature in black ink, appearing to read "Lynn Hufnagel", is written over a horizontal line. The signature is highly stylized and cursive.