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' SUPPLEMENTAL AUTHORITY REGARDING STANDING

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 Supplemental Authority Regarding Standing, and as grounds therefore state as follows:

I. Introduction

This supplemental authority is presented pursuant to this Court's Order setting oral argument and directing the Parties to address the issue of Plaintiffs' standing to bring an individual claim under the Elections Clause, U.S. Const. art. I, § 4, cl. 1.

The Plaintiffs have standing to raise such an individual claim because they have each suffered injury in fact to their rights secured by Article I of the Constitution as citizens and qualified voters of the State of Colorado to have congressional districts created in a manner that comports with the Elections Clause and to choose congressional representatives in districts that comport

with the Elections Clause.

II. Standard of Review

Standing under Article III of the Constitution to maintain a suit is jurisdictional. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 93-102, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998).

A plaintiff must meet three requirements in order to establish Article III standing. First, she must demonstrate "injury in fact" -- a harm that is both "concrete" and "actual or imminent, not conjectural or hypothetical." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990) (internal quotation marks and citation omitted). Second, she must establish causation -- a "fairly . . . traceable" connection between the alleged injury in fact and the alleged conduct of the defendant. *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41, 48 L. Ed. 2d 450, 96 S. Ct. 1917 (1976). And third, she must demonstrate redressability -- a "substantial likelihood" that the requested relief will remedy the alleged injury in fact. *Id.*, at 45. These requirements together constitute the "irreducible constitutional minimum" of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). The party invoking the jurisdiction of the court bears the burden of establishing these elements. *Lujan*, 504 U.S. at 561; *see also Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995).

III. Argument

A. Injury in Fact

The injury-in-fact element requires that the plaintiff have suffered "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) 'actual or imminent, not

conjectural or hypothetical.'" *Lujan*, 504 U.S. at 560 (citations omitted).

Plaintiffs legally protected interest lies in the right to choose representatives in Congress secured by Article I, § 2 and § 4. "At least since *Ex parte Yarbrough*, [110 U.S. 651], and no member of the Court seems ever to have questioned it, the right to participate in the choice of representatives in Congress has been recognized as a right protected by Art. I, §§ 2 and 4 of the Constitution." *United States v. Classic*, 313 U.S. 299, 323 (1941). This right of the people to choose requires that the mode of its exercise be prescribed by state action that is in "conformity with the Constitution . . ." *Id.* at 314. Section 4 of Article I thus guarantees "the integrity of that choice" made by the people under § 2 "because § 4 of Article I, [is] a means of securing a free choice of representatives by the people . . . ." *Id.* at 316-17. *Ex parte Yarbrough* and its progeny are applicable to a § 1983 claim as well, as the language of then U.S. Rev. Stat. §§ 5508 and 5520 mirrors the language creating a cause of action under § 1983, i.e., "any right or privilege secured to him by the Constitution or laws of the United States . . . ." *Ex Parte Yarbrough*, 110 U.S. 651, 654-56 (1884).

In response to the Defendant's argument that Plaintiffs' claim is based on Art. I, § 2, Plaintiffs contend that pleading § 4 is sufficient and appropriate because §4 is the *means* to secure the right of the people to choose Congressional representatives. *Classic*, 313 U.S. at 317. Further, § 4 requires that any state law regarding the peoples right to participate in the choice of Congressional representatives "*conform* with the Constitution . . ." *Id.* at 314 (emphasis added)[1].

The Elections Clause specifies which entity within the State may prescribe the manner of

[1]However, if the Court deems it necessary, Plaintiffs move to amend their complaint by inter-lineation pursuant to F.R.C.P. 15 (a) and (b) to incorporate § 2 into their claim for relief under Article I.

federal elections – the legislature. 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.[2] 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. The Supreme Court has long held that nothing in the language of Art. I, § 4 "gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the

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

constitutional rights of individuals from legislative destruction . . . ." *Wesberry v. Sanders*, 376 U.S. 1, 6 (1964).

Please see the attached affidavits of Plaintiffs, attesting to the injury-in-fact element by affidavit and other evidence of specific facts which for purposes of the summary judgment will be taken to be true. *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1572 (10th Cir. 1995); *citing Lujan*, 504 U.S. at 561 (citing Fed. R. Civ. P. 56(e)); *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 2891-92 n.3, 120 L. Ed. 2d 798 ("Injury-in-fact at the *summary judgment stage* requires specific facts to be adduced by sworn testimony.") (emphasis in original).

B. Causation

These injuries are fairly traceable to the Defendant's conduct, *i.e.,* Article V, Section 44 of the Colorado Constitution, because "the state constitution limits redistricting to once per census, no matter which body creates the districts," *Salazar v. Davidson*, 79 P.3d 1221, 1226 (Colo. 2003). Therefore, 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." *Id.,* at 1242. Accordingly, Art. V, § 44 of the Colorado Constitution is directly responsible for Plaintiffs' injuries: the existence of districts that are not authorized by the Elections Clause, and voting in districts that are not authorized by the Elections Clause.

There can be little dispute that the operation of Art. V, § 44 of the Colorado Constitution is the cause of Plaintiffs injuries in fact. Art. V, § 44 of the Colorado Constitution violates Art. I, §

4 of the United Sates Constitution because Art, V, § 44 allows a court plan to have the effect of law for an entire decade until Congress apportions seats to Colorado after the next federal census, even if the legislature subsequently enacts a new redistricting plan.

> [D]rawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance. That Congress is the federal body explicitly given constitutional power over elections is also a noteworthy statement of preference for the democratic process. As the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts.
>
> It should follow, too, that if a legislature acts to replace a court-drawn plan with one of its own design, no presumption of impropriety should attach to the legislative decision to act. As the District Court noted here, *Session,* 298 F. Supp. 2d, at 460-461, our decisions have assumed that state legislatures are free to replace court-mandated remedial plans by enacting redistricting plans of their own. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 44, 102 S. Ct. 1518, 71 L. Ed. 2d 725 (1982) (per curiam); *Wise, supra*, at 540, 98 S. Ct. 2493, 57 L. Ed. 2d 411 (principal opinion) (quoting *Connor, supra*, at 415, 97 S. Ct. 1828, 52 L. Ed. 2d 465); *Burns v. Richardson*, 384 U.S. 73, 85, 86 S. Ct. 1286, 16 L. Ed. 2d 376 (1966); *Reynolds v. Sims*, 377 U.S. 533, 587, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Underlying this principle is the assumption that to prefer a court-drawn plan to a legislature's replacement would be contrary to the ordinary and proper operation of the political process.

League of United Latin Am. Citizens v. Perry, 548 U.S. ____, (2006); 2006 U.S. LEXIS 5178 (U.S. 2006); (Slip. Op. at 8) (Opinion of Kennedy, J). Hence, Plaintiffs are harmed by the operation of Art. V, § 44 because it allows a court plan to override a legislative plan. *Smiley v. Holm*, 285 U.S. 355, 365 (1932) ("A Legislature was then the *representative body* which made the laws of the people.") (citation and internal quotation marks omitted) (emphasis added).

Art. V, § 44 also prohibits mid-decade redistricting once a redistricting plan is enacted. Hence, the Plaintiffs are harmed by the operation of Art. V, § 44 because such Article prevented the mid-decade plan adopted by the General Assembly from having the effect of law. *Cf. League of United Latin Am. Citizens v. Perry*, 548 U.S. ____, (2006); 2006 U.S. LEXIS 5178 (U.S.

2006); (Slip. Op. at 8) (Opinion of Kennedy, J) ("With respect to a mid-decade redistricting to change districts drawn earlier in conformance with a decennial census, the Constitution and Congress state no explicit prohibition."); Slip. Op. at 12 (Opinion of Stevens, J.) ("Constitution places no *per se* ban on midcycle redistricting . . ."); Slip Op. at 1 (Opinion of Souter, J.) (rejecting one-person, one-vote challenge "based simply on its mid-decade timing . . . .").

C. Redressability

Finally, Plaintiffs' requested relief will remedy the injury in fact. Plaintiffs' requested injunctive relief will restore Colo. Rev. Stat. § 2-1-101, the first and only post-2000-census redistricting plan enacted by the Colorado General Assembly. At a minimum, declaring Art. V, § 44 of the Colorado Constitution unconstitutional and void will remove the impediment to the legislature enacting a mid-decade redistricting plan, and will reinstate Colo. Rev. Stat. § 2-1-101. *Salazar*, 79 P.3d at 1243 ("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.").

IV. Conclusion

Accordingly, this Court should find that Plaintiffs have standing to raise an individual claim under the Elections Clause; that such claim is not barred by collateral estoppel; and order the Parties to brief the merits of Plaintiffs' Election Clause claim forthwith.

Respectfully submitted this 24th day of July, 2006

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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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