IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

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

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

Plaintiffs,

v.

DONETTA DAVIDSON, Secretary of State for the State of Colorado,

Defendant.

DEFENDANT DONETTA DAVIDSON'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFFS' PETITION CLAUSE CLAIM

Following oral argument on June 20, 2005, this Court dismissed with prejudice Plaintiffs' first claim for relief under U.S. Const. art. I, § 4. At that time, Defendant Donetta Davidson, the Colorado Secretary of State, by and through her attorneys, the Office of the Colorado Attorney General, orally moved to dismiss Plaintiffs' second claim for relief (the "Petition Clause claim") as a matter of law. The Court ordered the parties to submit simultaneous supplemental briefs on this matter. Accordingly, the Secretary respectfully submits this supplemental brief in support of her motion to dismiss Plaintiffs' Petition Clause claim under Fed. R. Civ. P. 12(b)(6).

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INTRODUCTION

In *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), the Colorado Supreme Court held that Colo. Const. art. V, § 44 does not permit the implementation of a second congressional redistricting plan in a single census period where an otherwise constitutional plan is already in place; moreover, this state constitutional limitation does not violate U.S. Const. art. I, § 4. In light of this Court's bench ruling on June 20, 2005, *see* Tr. Hrg. 6/20/05 at 33-34, the Secretary understands that Plaintiffs' sole remaining claim is grounded strictly in Plaintiffs' individual rights under the First Amendment, and that this remaining claim neither challenges the holdings in *Salazar* nor otherwise concerns the legislature's institutional authority to redistrict under art. I, § 4.

Plaintiffs' remaining claim for relief alleges that art. V, § 44, as interpreted in *Salazar*, violates the Plaintiffs' First Amendment rights to petition the government for redress of grievances. Plaintiffs contend that the Petition Clause requires that the government entity petitioned be "capable" of providing the redress requested by the petition. Specifically, Plaintiffs argue that their First Amendment rights empower the General Assembly to provide the particular redress that Plaintiffs seek here: the enactment of a mid-decade congressional redistricting plan before 2010 to replace an otherwise constitutional court-approved plan.

Thus, Plaintiffs contend that, even where the legislature lacks the *institutional* authority under art. V, § 44 or art. I, § 4 to draw an enforceable mid-decade congressional redistricting plan, Plaintiffs' *individual rights under the Petition Clause* nevertheless must

empower the legislature to enact such a plan. In other words, under Plaintiffs' view, the First Amendment guarantees the (immediate) *availability* of the particular redress sought by a petition. It does not.

As set forth below, Plaintiffs' novel view of the Petition Clause runs counter to U.S. Supreme Court precedent. Indeed, Plaintiffs' view of the Petition Clause would elevate that provision above all others in the U.S. Constitution. To the contrary, the right to petition ensures simply that a citizen may make her grievance known to the government without fear of punishment or retaliation. That is, the First Amendment assures a particular freedom of expression by shielding a citizen's access to the doors of government. However, once the citizen crosses the threshold and communicates her grievance, the First Amendment does not infuse the government with power to act that it does not otherwise have.

Plaintiffs' remaining claim fails as a matter of law to state a violation of the Petition Clause. Therefore, the Court should dismiss this claim with prejudice under Fed. R. Civ. P. 12(b)(6). *See, e.g., Montgomery v. City of Ardmore*, 365 F.3d 926, 935 (10th Cir. 2004) (discussing standards for Rule 12(b)(6) motions).

ARGUMENT

Plaintiffs fail to state a claim for relief under the Petition Clause[1]

Plaintiffs' Petition Clause claim alleges that art. V, § 44's limitation on the General Assembly's ability to enact an enforceable mid-decade redistricting plan violates Plaintiffs'

[1] To avoid repeating at length here the arguments previously made regarding Plaintiffs' Petition Clause claim, the Secretary incorporates by reference the arguments and authorities in her Opening Brief at pp. 18-21, & 34, and in her Reply Brief at pp. 2-3, 6, 10, & 20-33.

rights "to petition the Colorado General Assembly, and to otherwise participate in and communicate about the political process, for redress of 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; *see also id.* at ¶¶ 43-46.

Of critical importance here, Plaintiffs do *not* allege that art. V, § 44 prohibits their redistricting-related petitions or otherwise obstructs their access to the General Assembly, nor do they allege that art. V, § 44 penalizes them for lobbying the legislature for new districts. Rather, Plaintiffs' alleged injury stems solely from the unavailability of the specific redress they seek, *i.e.*, implementation of the General Assembly's mid-decade redistricting plan found in SB 03-352. *See, e.g.*, Plaintiffs' Response Brief (hereinafter, "Resp.") at 3 ("Because the Petition Clause protects the right to petition for *redress* of grievances, the legislature's inability to redress the grievance is a *de facto* abridgment of the very essence of the petition right."); *id.* (The "ability to petition" does not "vindicate[]" the right to petition "when the object of the petition – the state legislature – cannot itself act."); *id.* at 15 (The purported fact that "no petition regarding any redistricting grievance *can be redressed.*… constitutes a *per se* violation of the Petition Clause and constitutes a content based prior restraint that substantially chills petition activity.").

In effect, Plaintiffs assert that the Petition Clause guarantees them not only a right "to petition the government for a redress of grievances," but also a *right to the availability of the*

particular redress requested in their petition. Plaintiffs cite no authority recognizing such an expansive view of the right to petition.

A. The right to petition merely assures a particular freedom of expression.

The First Amendment provides that "Congress shall make no law…abridging…the right of the people…to petition the Government for a redress of grievances." U.S. Const. amend. I. The U.S. Supreme Court has held that the right to petition is "cut from the same cloth" as the other guarantees of the First Amendment, and is simply "an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). The Petition Clause guarantees only that people may "petition" – *i.e.*, communicate with – the government. *See id.* In turn, the government may not infringe upon this right by prohibiting certain forms of advocacy or by imposing sanctions for expressing particular views. *Smith v. Arkansas State Highway Employees, Local 1315, et al.*, 441 U.S. 463, 464 (1979).

Contrary to Plaintiffs' theory, the First Amendment provides no guarantee that speech or a particular petition will be effective. *See Smith*, 441 U.S. at 465. 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) ("Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."); *see also* cases cited in the Secretary's Opening Br. at 19-20 & n.8; Reply Br. at 28-29 & n.11.

B. The right to petition does not guarantee the availability of the particular redress requested.

Plaintiffs' alleged injury is that the General Assembly may not respond to their advocacy for new congressional districts until after 2010 (the point at which the General Assembly may draw new districts consistent with art. V, § 44). This does not state a violation of the Petition Clause.

As stated above, the Petition Clause ensures merely that citizens may communicate with the government. The First Amendment does not, however, vest a citizen with the power, through a petition, to instruct or bind the government to take particular action. *See generally* Note, *A Short History of the Right to Petition Government for Redress of Grievances*, 96 Yale L.J. 142 (1986). Whether and how to respond to a petition are decisions that ultimately rest with the government. The government operates, of course, subject to myriad other constraints, both legal (*e.g.*, constitutional and statutory limits) as well as practical (*e.g.*, political and budgetary pressures). As such, the First Amendment does not guarantee the availability of the redress requested or even that the entity petitioned will have the power to respond. Given that the First Amendment confers no right on a citizen to receive any reply from the government at all, it makes no constitutional difference (for purposes of the Petition Clause) whether the government entity petitioned fails to provide the requested redress because it opts not to in the exercise of its discretion, or because it lacks the power to provide the particular redress requested. In other words, the government's inability to provide the redress requested in a citizen's petition does not violate that citizen's constitutional right to petition.

As set forth in the Secretary's earlier briefs, Plaintiffs' view that the right to petition requires that the government must be "capable" of providing the redress requested (*i.e.*, that the specific redress be in fact available) wholly lacks precedential support. Indeed, it would transform the Petition Clause into a sort of "superprovision" that would trump every other provision of the First Amendment. The Supreme Court, however, has expressly rejected the attempt to "elevate the Petition Clause to special First Amendment status." *McDonald v. Smith*, 472 U.S. 479, 485 (1985). Because the Petition Clause "was inspired by the same ideals of liberty and democracy that gave us the freedoms to speak, publish, and assemble," these various First Amendment rights are "inseparable," and there is "no sound basis for granting greater constitutional protection or force to statements made in a petition" than that granted to other First Amendment expressions. *Id.*

In addition, under Plaintiffs' view, the Petition Clause would eclipse every other part of the constitution. That is, under Plaintiffs' view, even if the government ordinarily lacks the power to take a certain act (because another constitutional provision forbids it, for example), the Petition Clause must be understood nevertheless to give the government the power to take that act in response to a citizen's petition – otherwise, the citizen's Petition Clause right to the availability of redress is violated. Plaintiffs' view has no logical bounds, and would grant the government and individual citizens virtually limitless power. This fact, in addition to the absence of textual support in the First Amendment, explains why no court has ever endorsed such a sweeping view of the Petition Clause.

Innumerable examples demonstrate the extraordinary scope of Plaintiffs' theory: assume a citizen petitioned the legislature to pass a law that disenfranchised all non-white citizens, or that dissolved all Article III courts, or that abolished the office of President of the United States. Under Plaintiffs' view, the right to petition guarantees that the legislature would have the power to enact – *and expect the enforcement of* – such laws, regardless of whether they run afoul of other constitutional provisions.[2] Otherwise, the citizen's Petition Clause right to the availability of "potential" redress is meaningless and therefore violated. Put differently, to deny the legislature the power to pass such laws is to deny a citizen's right to petition the legislature to enact those laws – just as Plaintiffs assert that art. V, § 44's limits on the General Assembly's power to enact a mid-decade redistricting law denies their rights to petition the legislature to enact such a law.

As discussed in the Secretary's Reply Brief, several cases hold that the government's failure to redress a grievance does not violate the Petition Clause, even where such failure is based on the government's inability to provide the requested redress. *See* Reply at 29-31 (discussing *Christensen v. Ward*, 916 F.2d 1462 (10th Cir. 1990) and *Bowman v. Niagara*

[2] This "enforceability" aspect is essential to Plaintiffs' view of the Petition Clause. As discussed below in Part D, the *Salazar* decision did not "enjoin" the legislature from passing another mid-decade redistricting plan. Thus, the General Assembly is free to pass such a plan. As a practical matter, of course, under *Salazar*, such a plan may not be enforced because it runs afoul of art. V, § 44. (A redistricting plan that violated some other constitutional provision, such as equal protection, likewise would not be enforced.) In this case, Plaintiffs' alleged injury is not that the General Assembly is literally enjoined from passing the legislation Plaintiffs want, but rather, that such legislation would not be *enforceable*.

Machine & Tool Works, Inc., 832 F.2d 1052 (7th Cir. 1987)). Just as the plaintiffs in those cases failed to state a claim under the First Amendment, Plaintiffs fail to do so here.[3]

C. Plaintiffs' reliance on *BE&K Construction* is misplaced.

In their Response to the Secretary's Motion to Dismiss and at oral argument before this Court, Plaintiffs relied on *BE & K Construction Company v. National Labor Relations Board*, 536 U.S. 516 (2002), to support their view of the Petition Clause. According to Plaintiffs, *BE & K Construction* held that "an injunctive action constitutes prior restraint on speech or on First Amendment rights." Tr. Hrg. 6/20/05 at 13-14. In their Response Brief, Plaintiffs quoted the following passage from that case: "enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning." Resp. at 2-3 (quoting *BE & K Construction*, 536 U.S. at 530). Plaintiffs' reliance on *BE & K Construction* is misplaced.

[3] The Secretary also notes that Plaintiffs' view of the Petition Clause necessarily would permit multiple redistricting in a decade. If the legislature's power to redistrict flows from a citizen's rights under the Petition Clause (and *not* art. I, § 4), then there is no logical limit to the frequency with which the General Assembly must be able to redistrict. Where, as here, the citizen's "grievance" is that she does not like how the lines are drawn because they divide or relocate certain communities, a citizen may petition the General Assembly (and, in Plaintiffs' view, the General Assembly must be able to provide) a new set of districts more to that citizen's liking. This is true regardless of *when* the citizen petitions for new districts, and regardless of whether the *existing plan* the citizen is petitioning to change was created by a court or a legislature. Under Plaintiffs' theory, the General Assembly must always be "capable" of providing the new plan, else the citizen's right to petition is violated. Thus, although Plaintiffs contend that they are not asking this Court to hold that the General Assembly can redistrict multiple times in a decade, *see* Resp. at 15 n.2, that is the inevitable effect of their Petition Clause theory.

First, the holding of *BE & K Construction* was very narrow. The Court addressed the question of whether the National Labor Relations Board (the "Board") may impose liability on a company for a retaliatory lawsuit that was unsuccessful even if it was not objectively baseless. *See BE & K Construction*, 536 U.S. at 529. The Court held that the Board may not do so, but the Court's holding was based on its interpretation of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) ("NLRA"). The Court concluded:

> Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline do so. Because the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid.

BE & K Construction, 536 U.S. at 529.

The Court's statutory interpretation allowed it to *avoid* the "difficult constitutional question" of "whether a class of petitioning [retaliatory lawsuits] may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine [reasonably based rather than sham litigation]." *Id.* at 535 (emphasis in original). Hence, to the extent that Plaintiffs extract a constitutional holding from *BE & K Construction*, they are mistaken.

Second, even if the Court had held in *BE & K Construction* that the Board, by imposing liability for unsuccessful retaliatory lawsuits, violates the Petition Clause rights of those who file such lawsuits, the Court's holding would not support Plaintiffs' Petition Clause claim here. Such a hypothetical holding would be based on the premise that a person may not be punished for simply filing a reasonably based lawsuit (*i.e.*, a person may not be punished for exercising his or her right to petition the government). *Cf. BE & K*

Construction, 536 U.S. at 525 (discussing *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 511 (1972)). However, art. V, § 44 does not impose liability for (*i.e.*, punish) any petitioning activity. Plaintiffs, like all citizens, may freely petition the legislature to enact new congressional districts without fear of liability or punishment imposed by art. V, § 44.

Importantly, nothing in *BE & K Construction* supports Plaintiffs' notion that the Petition Clause guarantees the *success* of a petition, or that the government must have the power to grant every petition. Although the Court intimated that the government could not constitutionally punish the petitioner therein for the act of filing its lawsuit, the Court did not suggest that the *relief* requested by the petitioner's lawsuit must be granted. Indeed, the Court gave contrary signals. After noting that its prior cases construing the Petition Clause were not concerned with whether a petition is successful, the Court declared, "Nor does the text of the First Amendment speak in terms of successful petitioning, it speaks simply of 'the right of the people…to petition the Government for a redress of grievances.'" *BE & K Construction*, 536 U.S. at 532.

Thus, *BE & K Construction* actually undermines Plaintiffs' contention that the Petition Clause guarantees a right to redress of a petition.

D. Plaintiffs are not foreclosed from potential redress.

The Secretary notes that, even if this Court agrees with Plaintiffs that the right to petition assumes a right of "potential" redress – *i.e.*, a government entity "capable" of providing the redress requested, such "potential" redress in fact exists here.

Plaintiffs assert that "the legislative processes of the State of Colorado are denied any right to enact any redistricting plan to redress *any grievance* due to the operation of Colo. Const. art. V, § 44," and that art. V, § 44 prohibits the "Colorado state government from taking *any action whatsoever* with respect to redistricting prior to the next census." Resp. at 7, 13 (emphasis added); *see also id.* at 13, 15. Plaintiffs also believe that the Colorado Supreme Court "enjoined" the General Assembly from enacting any new redistricting statute. *See* Resp. at 1, 3, 7 (contending that the "court prohibited a state legislature from enacting a legislative plan at least once during a decennial period"; that art. V, § 44 "enjoins any new redistricting law in advance of its enactment"; and that "the legislative processes of the State of Colorado are denied any right to enact any redistricting plan.").

Plaintiffs' assertions are inaccurate. Article V, § 44, as interpreted in *Salazar*, does not deny effect to any and all new redistricting plans that may be enacted prior to 2010. As discussed in the Secretary's Reply Brief at 22-23, the Colorado Supreme Court made clear that if current districts are shown to be unconstitutional because they violate equal protection or the one-person/one-vote principle, for example, the legislature, consistent with art. V, § 44, may enact a new enforceable redistricting plan. *Salazar*, 79 P.3d at 1243 n.16.

Moreover, the *Salazar* court did not "enjoin" the legislature from performing any act. Rather, the court found SB 03-352, a provision already enacted, to be "unconstitutional and void." *Salazar*, 79 P.3d at 1243. As a result, the court enjoined the Secretary, an executive branch officer, from enforcing SB 03-352, and ordered the Secretary to use the district map unanimously approved in *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002). *See Salazar*, 79

P.3d at 1243. The Colorado Supreme Court did not (and could not) order the legislature to take any action or enjoin the legislature from enacting legislation in the future. Hence, the General Assembly may enact a new redistricting statute at any time. Whether such a law could be enforced depends on whether it could survive a constitutional challenge (including whether it would comport with art. V, § 44). While the practical difference between enactment and enforcement may be small, for purposes of establishing "potential" redress via a government entity "capable" of responding, the difference is significant. In other words, the "potential" for redress exists to the extent that the General Assembly is still free to pass Plaintiffs' requested mid-decade plan. Furthermore, such a plan would be enforceable if it were passed to replace a current plan determined to be substantively unconstitutional (*e.g.*, violative of equal protection).

Finally, even Plaintiffs recognize that, *after* the next census, the legislature may enact an enforceable redistricting law consistent with art. V, § 44 that redresses the "grievances" Plaintiffs assert here – the division and/or relocation of their particular communities under the current map. Thus, potential redress *is* available; that art. V, § 44 may temporarily delay that redress does not foreclose the potential for such redress.

E. Plaintiffs are not entitled to injunctive relief.

In their Amended Complaint, Plaintiffs requested an injunction requiring the Secretary to implement SB 03-352, the legislature's redistricting plan enacted in 2003. *See* Am. Compl. at p. 9 (requesting "an injunction requiring the Colorado Secretary of State to implement C.R.S. § 2-1-101 (2003) [SB 03-352]."). It is not clear to the Secretary whether

the Court's bench ruling dismissing Plaintiffs' art. I, § 4 claim encompassed Plaintiffs' request for injunctive relief. In any event, the Secretary notes that, even if this Court accepted Plaintiffs' view that the Petition Clause empowers the legislature to enact a new congressional redistricting plan whenever a citizen petitions for such a plan, Plaintiffs would not be entitled to the injunctive relief they request here.

Under Plaintiff's Petition Clause theory, the legislature's authority to redistrict derives from a citizen's petition for new districts. Thus, in order to be constitutionally valid under Plaintiffs' theory, the legislature's authority to enact (and to expect the enforcement of) SB 03-352 in May 2003 existed only if triggered by a citizen's petition. In their Amended Complaint, however, Plaintiffs do not allege that they (or any other citizen) petitioned the legislature to replace the 2001 court-ordered districting plan or to enact the specific plan found in SB 03-352. Therefore, even under Plaintiffs' novel constitutional theory, the legislature lacked the authority to enact SB 03-352, and there is no basis for an injunction requiring the enforcement of that statute. In sum, even if this Court agrees with Plaintiffs' view of the Petition Clause, Plaintiffs may obtain at most a declaration that the legislature may enact an enforceable mid-decade redistricting law in the future, if and only if a citizen has actually petitioned for such a law.

CONCLUSION

Article V, § 44 does not proscribe, penalize, or otherwise regulate a citizen's speech or other expression in any way. The one-time redistricting rule found in art. V, § 44 is not tantamount to a prohibition on a petition or a penalty for submitting the petition. As such, it

is consistent with longstanding U.S. Supreme Court precedent interpreting the scope of the Petition Clause. In short, art. V, § 44 allows Plaintiffs to "communicate their will" to the General Assembly at any time. The Petition Clause requires no more.

For all of the reasons and authorities herein and argued in the Secretary's prior briefs in support of her original motion to dismiss, Plaintiffs fail to state a claim upon which relief can be granted under the First Amendment. Accordingly, the Secretary of State respectfully requests that the Court dismiss with prejudice the second claim for relief asserted in Plaintiffs' Amended Complaint under Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 11th day of July, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2005, I electronically filed **DEFENDANT DONETTA DAVIDSON'S SUPPLEMENTAL BRIEF IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFFS' PETITION CLAUSE CLAIM** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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