IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 03-CV-02453-ZLW-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 only,

Defendant.

SECRETARY OF STATE'S BRIEF IN SUPPORT OF HER
MOTION TO DISMISS PLAINTIFFS' ELECTIONS CLAUSE CLAIM

Pursuant to Fed. R. Civ. P. 12(b)(6) and this Court's Order dated March 21, 2006, Defendant Gigi Dennis, the Colorado Secretary of State (the "Secretary"), by and through her attorneys, the Office of the Colorado Attorney General, respectfully submits this brief in support of her motion to dismiss Plaintiffs' first claim for relief under U.S. Const. art. I, § 4 (the "Elections Clause claim") on grounds that this claim is barred by issue preclusion.

TABLE OF CONTENTS

TABLE OF AUTHORITIES **PAGE**

INTRODUCTION 1

BACKGROUND 2

ARGUMENT 6

Plaintiffs' Elections Clause claim is barred by issue preclusion. 6

A. Preclusion under the Full Faith and Credit Act, 28 U.S.C. § 1738. 7

B. Colorado law of issue preclusion. 9

C. *Salazar* constitutes a final judgment on the merits. 10

D. The constitutional issue raised by Plaintiffs here was actually and necessarily adjudicated in *Salazar*. 11

E. Plaintiffs are in privity with parties to *Salazar*. 15

F. The parties with whom Plaintiffs are in privity had a full and fair opportunity to litigate the constitutional issue in *Salazar*. 23

CONCLUSION 24

TABLE OF AUTHORITIES

PAGE

CASES

Aerojet-General Corp. v. Askew, 511 F.2d 710 (5th Cir. 1975) 16

Allen v. McCurry, 449 U.S. 90 (1980) 8

Argus Real Estate, Inc. v. E-470 Public Highway Auth., 97 P.3d 215 (Colo. App. 2003), aff'd, 109 P.3d 604, 608 (Colo. 2005) 16

Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County, 37 P.2d 761 (Colo. 1934) 17

Beauprez v. Avalos, 42 P.3d 642 (Colo. 2002) 2

Bebo Constr. Co. v. Mattox & O'Brien, P.C., 990 P.2d 78 (Colo. 1999) 8, 10, 11, 23

Benson v. Town of Nunn, Colorado, 52 F. Supp. 2d 1210 (D. Colo. 1999) 9, 10, 16

Berman v. Denver Tramway Corp., 197 F.2d 946 (10th Cir. 1952) 18

City of Tacoma v. Taxpayers of Tacoma, 357 U.S. 320 (1958) 5, 17, 22, 23

Colorado General Assembly v. Salazar, 541 U.S. 1093 (2004) 3

Cruz v. Benine, 984 P.2d 1173 (Colo. 1999) 16, 22

Daigle v. Portsmouth, 534 A.2d 689 (N.H. 1987) 15

F.D.I.C. v. Refco Group, Ltd., 989 F. Supp. 1052 (D. Colo. 1997) 8, 10

Keller v. Davidson, 299 F. Supp. 2d 1171 (D. Colo. 2004) 3, 7, 10, 11, 12, 13, 20, 23, 24

Lance v. Davidson, 379 F. Supp. 2d 1117 (D. Colo. 2005) 4, 11, 12, 14, 15, 22, 23

Lance v. Dennis, 126 S. Ct. 1198 (2006) 4, 5, 6

Lucas v. Planning Bd. of Town of LaGrange, 7 F. Supp. 2d 310 (S.D.N.Y. 1998) 18

Marrese v. American Academy of Orthopaedic Surgeons, 470 U.S. 373 (1985) 9

McNichols v. City & County of Denver, 74 P.2d 99 (Colo. 1937) 16, 17, 22

Michaelson v. Michaelson, 884 P.2d 695 (Colo. 1994) 10, 11

Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75 (1984) 7, 8, 9

People ex rel. Salazar v. Davidson, 79 P.3d 1221 (Colo. 2003), cert. denied sub nom. Colorado General Assembly v. Salazar, 541 U.S. 1093 (2004) ..... passim

People in the Interest of M.C. 16

People v. Tool, 86 P. 224 (Colo. 1905) 20

Public Service Co 16

TABLE OF AUTHORITIES

PAGE

Public Service Co. of Colo. v. Osmose Wood Preserving, Inc., 813 P.2d 785 (Colo. App. 1991) 15, 22

Rantz v. Kaufman, 109 P.3d 132 (Colo. 2005) 8, 10

Ryan v. City of Shawnee, 13 F.3d 345 (10th Cir. 1993) 7

S.O.V. v. People in the Interest of M.C., 914 P.2d 355 (Colo. 1996) 10

San Remo Hotel, L.P. v. City and County of San Francisco, 125 S. Ct. 2491 (2005) 7, 9

Satsky v. Paramount Commc'ns, Inc., 7 F.3d 1464 (10th Cir. 1993) 18

Snyder v. Munro, 721 P.2d 962 (Wash. 1986) 18, 19

Southern Pac. R. Co. v. United States, 168 U.S. 1 (1897) 7

St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp., 605 F.2d 1169 (10th Cir. 1979) 2

State Police for Automatic Ret. Ass'n v. Difava, 164 F. Supp. 2d 141 (D. Mass. 2001), aff'd, 317 F.3d 6 (1st Cir. 2003) 18

State R.R. Comm'n v. People ex rel. Denver & R.G.R., Co., 98 P. 7 (Colo. 1908) 20

Sunny Acres Villa, Inc. v. Cooper, 25 P.3d 44 (Colo. 2001) 8, 10

Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996) 19

United States v. Novotny, 184 F. Supp. 2d 1071 (D. Colo. 2001) 10, 16

Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979) 5, 17, 22, 23

Wilkinson v. Pitkin County Bd. of County Comm'rs, 142 F.3d 1319 (10th Cir. 1998) 9

CONSTITUTIONS

Colo. Const. art. IV, § 2 21

Colo. Const. art. V, § 44 ..... 1, 2, 3, 11, 12, 13, 14, 20, 21, 22, 23, 24

U.S. Const. art. I, § 4 ..... 1, 3, 11, 12, 13, 14, 15, 20, 24

STATUTES

28 U.S.C. § 1253 4

28 U.S.C. § 1738 ..... 7, 25

42 U.S.C. § 1983 8

Colo. Rev. Stat. § 1-1-107(1)(a) (2003) 20

TABLE OF AUTHORITIES

PAGE

Colo. Rev. Stat. § 2-1-101 (2005)..... 1
S.B. 03-352 ..... 1, 2, 13, 22

RULES

Colo. App. R. 21.1(a)..... 25
Fed. R. Civ. P. 12(b)(6) 4

OTHER AUTHORITIES

Black's Law Dictionary 582 (6th ed. 1990) 20
1 Freeman on Judgments 1090 (5th ed.)..... 17

INTRODUCTION

Plaintiffs ask this Court to declare that Colo. Const. art. V, § 44 is null and void because it violates the Elections Clause, U.S. Const. art. I, § 4. Plaintiffs further ask this Court for an injunction requiring the Secretary to implement the General Assembly's 2003 mid-decade redistricting plan set forth in S.B. 03-352 (codified at Colo. Rev. Stat. § 2-1-101 (2005)).

Under Colorado law, Plaintiffs' claim is barred by the doctrine of issue preclusion. Plaintiffs present the identical issue of federal constitutional law that was litigated to final judgment in *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), *cert. denied sub nom. Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). The issue advanced by Plaintiffs here was briefed, argued, and vigorously litigated in *Salazar* by numerous interested state authorities, including the Colorado Attorney General, the Secretary of State, the General Assembly, and the Governor. Where, as here, such Colorado government officials litigate an extraordinary matter of broad public importance, all Colorado citizens are represented in that litigation and are consequently bound by the judgment. Moreover, other circumstances in this litigation also support a finding that Plaintiffs stand in privity specifically with the General Assembly for purposes of the Elections Clause claim Plaintiffs seek to revive here. For the reasons set forth below, Plaintiffs' Elections Clause claim must be dismissed with prejudice.

BACKGROUND[1]

Salazar v. Davidson

In *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), the Colorado Supreme Court held that Colo. Const. art. V, § 44 restricts congressional redistricting in Colorado to one time per decade following reapportionment. *Salazar*, 79 P.3d at 1226, 1231-32. On the basis of this ruling, the Colorado Supreme Court concluded that the General Assembly's 2003 mid-decade redistricting plan embodied in S.B. 03-352 violated art. V, § 44 because it was the state's second redistricting plan established after the 2000 census. The supreme court therefore ordered the Secretary to conduct congressional elections according to the existing plan approved in *Beauprez v. Avalos*, 42 P.3d 642 (Colo. 2002), until the next apportionment by Congress following the 2010 census. *Salazar*, 79 P.3d at 1243.

In its opinion, the Colorado Supreme Court also held that the restriction in art. V, § 44 does not violate the federal Constitution. *See id.* at 1232 ("Nothing in state or federal law contradicts this limitation."). As this Court concluded in *Keller v. Davidson*, "This statement can reasonably be taken as a holding that Colo. Const. Art. V, § 44 does not violate Article I, § 4 of the federal Constitution." *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1182 (D. Colo.

[1] To avoid repeating at length the factual background set forth in the Secretary's brief in support of her original motion to dismiss, the Secretary incorporates by reference the "Background" section of that brief (filed January 3, 2005) at pp. 3-12. The Secretary also asks this Court to take judicial notice of the prior proceedings in *Beauprez v. Avalos*, *People ex rel. Salazar v. Davidson*, and *Keller v. Davidson*. *See St. Louis Baptist Temple, Inc. v. Federal Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (10th Cir. 1979) (federal district court may take judicial notice of its own records and files of prior litigation closely related to the case before it).

2004); *see also id.* at 1181 ("We conclude that the *Salazar* court did in fact decide that Colo. Const. Art. V, § 44 did not violate Article I, § 4 of the U.S. Constitution.").

In January 2004, the General Assembly filed a petition for writ of certiorari in *Salazar* in the U.S. Supreme Court, arguing that Colo. Const. art. V, § 44 violates the federal Elections Clause.[2] The Secretary filed a brief in support of the General Assembly's petition. In June 2004, the Supreme Court denied certiorari review. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). Following the denial of certiorari review in *Salazar*, the Secretary acknowledged in a status report filed in *Keller* that, because the decision in *Salazar* was final, she was duty-bound to enforce that law. Thus, for purposes of the *Lance* litigation, the Secretary would be *defending* the *Salazar* decision rather than challenging that ruling, as she did previously in *Salazar* and *Keller*.

Previous proceedings in *Lance v. Davidson*

Given the complex history of the previous litigation in *Salazar* and *Keller*, in November 2004, this Court adopted a scheduling order in this case that directed the Secretary to address only jurisdictional and preclusion issues in her initial motion to dismiss. *Lance v.*

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

> Whether the Constitution's Elections Clause (Article I, Section 4, Clause 1), which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," permits a State to disable the state legislature from prescribing congressional districts for an entire decade, and transfer that power to the state judiciary, unless the legislature enacts a redistricting plan within a severe, one-year time limit uniquely applicable to congressional redistricting statutes?

Davidson, 379 F. Supp. 2d 1117, 1120 (D. Colo. 2005). Following limited discovery, the Secretary moved to dismiss Plaintiffs' Elections Clause and Petition Clause claims as barred by *Rooker-Feldman* and/or issue preclusion. *Id.* In a bench ruling following a hearing on June 20, 2005, this Court dismissed Plaintiffs' Elections Clause claim. *Id.* at 1120, 1122. The Secretary then orally moved to dismiss Plaintiffs' remaining Petition Clause claim under Fed. R. Civ. P. 12(b)(6). *Id.* at 1120, 1122. On July 27, 2005, this Court issued a written opinion holding that Plaintiffs' Elections Clause claim was barred by the *Rooker-Feldman* doctrine. *Lance*, 379 F. Supp. 2d at 1123-27. Because the Court dismissed the Elections Clause claim under *Rooker-Feldman*, it did not address whether issue preclusion also requires dismissal of the claim. *Id.* at 1127 n.14. In the same opinion, this Court concluded that Plaintiffs' Petition Clause claim was not barred by *Rooker-Feldman* or issue preclusion. *Id.* at 1127-30. Nevertheless, the Court concluded that the Petition Clause claim failed as a matter of law to state a claim for relief. *Id.* at 1130-32. Accordingly, it dismissed this claim on the merits. Plaintiffs filed a direct appeal to the U.S. Supreme Court pursuant to 28 U.S.C. § 1253.

U.S. Supreme Court's ruling

On February 21, 2006, the U.S. Supreme Court vacated the judgment in this matter and remanded the case to this Court. *Lance v. Dennis*, 126 S. Ct. 1198 (2006). The Supreme Court concluded that, by applying *Rooker-Feldman* against Plaintiffs on the ground that they were in privity with a party to the earlier state-court action, this Court "erroneously conflated preclusion law with *Rooker-Feldman*." *Dennis*, 126 S. Ct. at 1202. The Supreme Court held

that the "*Rooker-Feldman* doctrine does not bar actions by nonparties to the earlier state-court judgment simply because, *for purposes of preclusion law*, they could be considered in privity with a party to the judgment." *Id.* (emphasis added).

In vacating the judgment, the Supreme Court did not address whether issue preclusion requires dismissal of Plaintiffs' Elections Clause claim. Notably, the Supreme Court took no exception to this Court's conclusion that Plaintiffs were in privity with the General Assembly, nor did it object to this Court's reliance on *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), and *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979), to reach that conclusion. Rather, the Supreme Court simply held that privity principles, derived from preclusion law, do not apply in the *Rooker-Feldman* context. *See Dennis*, 126 S. Ct. at 1202.

In a dissenting opinion, Justice Stevens reasoned that this Court's judgment dismissing the cause with prejudice should have been affirmed because Plaintiffs' Elections Clause claim is barred by issue preclusion and the Petition Clause claim was properly dismissed. *Dennis*, 126 S. Ct. at 1204 (Stevens, J., dissenting). Justice Stevens observed that Plaintiffs' Elections Clause claim "is the same as that advanced by their official representatives and decided by the Colorado Supreme Court in *People ex rel. Salazar v. Davidson.*" *Id.* Indeed, he noted that Plaintiffs' second question presented in their appeal before the U.S. Supreme Court was "'literally the same question presented by the General Assembly on *certiorari* review (and denied) in *Salazar.*'" *Id.*

(quoting Motion to Affirm 12).[3] Justice Stevens also observed that, "as a matter of Colorado law, appellants are clearly in privity with both then-Colorado Attorney General Salazar . . . and the Colorado General Assembly." He concluded, "Thus, all of the requirements under Colorado law for issue preclusion have been met, and appellants' Elections Clause claim should therefore be dismissed." *Id.* In a separate concurring opinion, Justices Ginsburg and Souter agreed that Justice Stevens "persuasively urged that issue preclusion warrants affirmance," but concluded that this issue is "best left for full airing and decision on remand." *Dennis*, 126 S. Ct. at 1203 (Ginsburg, J., concurring).

ARGUMENT

Plaintiffs' Elections Clause claim is barred by issue preclusion.

Under Colorado law, Plaintiffs' Elections Clause claim is barred by the doctrine of issue preclusion and must be dismissed. The Elections Clause claim raised by Plaintiffs in this case is the same as that advanced by Plaintiffs' official government representatives and decided by the Colorado Supreme Court in *Salazar*, and the circumstances of this

[3] In their recent appeal to the U.S. Supreme Court, Plaintiffs' Second Question Presented (*i.e.*, the "merits" of their Elections Clause claim) was:

> Is the Constitution's Elections Clause (Article I, Section 4, Clause 1), which provides that "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the *Legislature* thereof," 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?

redistricting litigation establish that Plaintiffs are in privity with the parties in *Salazar*. As such, Plaintiffs are bound by the judgment in that case and cannot relitigate this claim here.

A. Preclusion under the Full Faith and Credit Act, 28 U.S.C. § 1738.

Under the Full Faith and Credit Act, 28 U.S.C. § 1738, federal courts must give the same preclusive effect to state-court judgments that would be afforded such prior judgments by other courts in that state. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984); *Ryan v. City of Shawnee*, 13 F.3d 345, 347 (10th Cir. 1993); *Keller*, 299 F. Supp. 2d at 1181. The general rule of *res judicata* implemented by the Full Faith and Credit Act – that parties should not be permitted to relitigate issues that have been resolved by courts of competent jurisdiction – predates the Republic and is derived from Roman law. *See San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491, 2501 (2005). As explained by the U.S. Supreme Court, the rule:

> is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.

Id. (quoting *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897)).

One recognized form of preclusion is collateral estoppel, or issue preclusion. "The doctrine of issue preclusion . . . provides that a court's final decision on an issue actually litigated and decided in a previous suit is conclusive of that issue in a subsequent suit."

Rantz v. Kaufman, 109 P.3d 132, 138 (Colo. 2005); *see also Sunny Acres Villa, Inc. v. Cooper*, 25 P.3d 44, 47 (Colo. 2001) (issue preclusion is an equitable doctrine that operates to bar relitigation of an issue that has been finally decided by a court in a prior action). The doctrine protects litigants from the cost and vexation of multiple lawsuits, conserves judicial resources, and promotes reliance on the judicial system by preventing inconsistent decisions. *See Allen v. McCurry*, 449 U.S. 90, 95 (1980); *F.D.I.C. v. Refco Group, Ltd.*, 989 F. Supp. 1052, 1082 (D. Colo. 1997); *Sunny Acres Villa*, 25 P.3d at 47; *Bebo Constr. Co. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 84 (Colo. 1999). Moreover, because the Full Faith and Credit Act requires federal courts to give preclusive effect to issues decided by state courts, collateral estoppel not only reduces unnecessary litigation and fosters reliance on adjudication, but it also promotes the comity between state and federal courts that has been recognized as a bulwark of the federal system. *Allen*, 449 U.S. at 95-96.

Collateral estoppel principles apply with equal force to a case such as this brought under 42 U.S.C. § 1983. *See Allen*, 449 U.S. at 97. "[I]ssues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra*, 465 U.S. at 83. This is because there is no inherent or universal "right" to relitigate a federal claim in a federal forum if the issue has been decided by a state court. *See Allen*, 449 U.S. at 103-05 (rejecting notion that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the claim arises). Rather, the "weighty interests in finality and comity" trump the

interest in giving unsuccessful litigants access to an additional (federal) tribunal. *San Remo Hotel*, 125 S. Ct. at 2505. Federal courts are simply "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum." *Id.* at 2507; *see also Migra*, 465 U.S. at 84 (the Full Faith and Credit Act "embodies the view that it is more important to give full faith and credit to state court judgments than to ensure separate forums for federal and state claims. This reflects a variety of concerns, including notions of comity, the need to prevent vexatious litigation, and a desire to conserve judicial resources."). Thus, the U.S. Supreme Court has repeatedly held that "issues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court." *San Remo Hotel*, 125 S. Ct. at 2504.

B. Colorado law of issue preclusion.

The Full Faith and Credit Act directs a federal court to refer to the preclusion law of the state in which the judgment was rendered. *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Wilkinson v. Pitkin County Bd. of County Comm'rs*, 142 F.3d 1319, 1322 (10th Cir. 1998) (preclusive effect of a state court decision in a § 1983 action in federal court is a matter of state law); *Benson v. Town of Nunn, Colorado*, 52 F. Supp. 2d 1210, 1213 (D. Colo. 1999) (same). Accordingly, Colorado preclusion law governs here.

Under well-established Colorado law, issue preclusion bars relitigation of an issue if: 1) the issue is identical to an issue actually litigated and necessarily adjudicated in a prior proceeding; 2) the party against whom estoppel is asserted was a party to or was in privity

with a party to the prior proceeding; 3) there was a final judgment on the merits in the prior proceeding; and 4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issues in the prior proceeding. *See, e.g.*, *Rantz*, 109 P.3d at 139; *Sunny Acres Villa*, 25 P.3d at 47 (same); *Bebo Constr. Co.*, 990 P.2d at 84-85 (same); *S.O.V. v. People in the Interest of M.C.*, 914 P.2d 355, 359 (Colo. 1996) (same); *Michaelson v. Michaelson*, 884 P.2d 695, 700-01 (Colo. 1994) (same); *see also Keller*, 299 F. Supp. 2d at 1181 (discussing Colorado law of issue preclusion); *United States v. Novotny*, 184 F. Supp. 2d 1071, 1086 (D. Colo. 2001) (same); *Benson*, 52 F. Supp. 2d at 1214 (same); *Refco Group, Ltd.*, 989 F. Supp. at 1082 (same).

As discussed below, all four requirements of issue preclusion are met in this case. Therefore, the *Salazar* judgment precludes litigation of Plaintiffs' Elections Clause claim.

C. *Salazar* constitutes a final judgment on the merits.

As an initial matter, "[i]t is beyond question that the Colorado Supreme Court's *Salazar* decision culminated in a final judgment on the merits." *Keller*, 299 F. Supp. 2d at 1182. Plaintiffs conceded this point in their response to the Secretary's original motion to dismiss. *See* Plaintiffs' Response to Defendant's Motion to Dismiss (filed Feb. 14, 2005) at 18 ("There is no doubt that *Salazar* represents a final judgment on the merits in a prior proceeding."). Thus, the third criterion of issue preclusion is met.

D. The constitutional issue raised by Plaintiffs here was actually and necessarily adjudicated in *Salazar*.

Plaintiffs' art. I, § 4 claim merely repeats the federal constitutional issue actually litigated and necessarily adjudicated in *Salazar*. Thus, the first criterion of issue preclusion is met.

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

In *Salazar*, the General Assembly and the Secretary specifically raised, briefed, and argued the claim that the Attorney General's interpretation of art. V, § 44 (which was ultimately adopted by the Colorado Supreme Court) would violate art. I, § 4.[4] Brief of Proposed Intervenor Colorado General Assembly in Opposition to Attorney General's Petition at 7-15; Secretary of State Davidson's Answer and Brief in Opposition to the Petitioner's Request for Relief at 16-22; *see also Lance*, 379 F. Supp. 2d at 1126 n.11 ("The respondents in *Salazar* explicitly raised the claim that the interpretation of Art. V, § 44 which was ultimately adopted by the Colorado Supreme Court would violate Art. I, § 4 of the federal Constitution.") (citing *Keller*, 299 F. Supp. 2d at 1182).

[4] The Governor's brief in *Salazar* did not address the art. I, § 4 issue. However, at oral argument before the Colorado Supreme Court, counsel for the Governor expressly addressed this issue and supported the General Assembly's position.

The *Salazar* court concluded that the one-time redistricting limitation in art. V, § 44 does not run afoul of the federal constitution. *Salazar*, 79 P.3d at 1232 ("Nothing in state or federal law contradicts this limitation."). As this Court observed in *Keller*, "This statement can reasonably be taken as a holding that Colo. Const. Art. V, § 44 does not violate Article I, § 4 of the federal Constitution." *Keller*, 299 F. Supp. 2d at 1182. Thus, "the *Salazar* court did in fact decide that Colo. Const. Art. V, § 44 did not violate Article I, § 4 of the U.S. Constitution." *Id.* at 1181.

Moreover, this Court determined in *Keller* that "the conclusion that the Colo. Const. Art. V, § 44 does not violate Art. I, § 4 of the federal Constitution appears to be a *necessary component* of the Colorado Supreme Court's decision in *Salazar*." *Id.* at 1182 (emphasis added). "[A]s a matter of pure logic, the *Salazar* court could not in good faith have relied upon a provision of the Colorado Constitution to invalidate the legislature's congressional redistricting plan if it believed that provision was invalid under the federal Constitution." *Id.* Thus, this Court concluded, "[W]e find ourselves logically compelled to conclude that the federal constitutional question was actually and necessarily decided by the Colorado Supreme Court." *Id.*; *see also Lance*, 379 F. Supp. 2d at 1125 ("As we noted in *Keller*, it appears that this very question was raised and decided by the Colorado Supreme Court in *Salazar*.").

In this case, Plaintiffs' first claim for relief is identical to the Elections Clause issue that was actually and necessarily decided in *Salazar*. Plaintiffs assert that their interest under the Elections Clause as private citizens constitutes an "individual" right that is independent

and distinct from the governmental interest asserted by the General Assembly and Secretary in *Salazar* and *Keller*. However, Plaintiffs' filings before this Court and the U.S. Supreme Court reveal that the principal issue in this case remains the institutional power of the General Assembly to redistrict.

First, Plaintiffs' Amended Complaint expresses Plaintiffs' view that the federal constitution delegates the power to redistrict to state legislatures – not individual citizens. Plaintiffs' first claim is titled, "*Legislative* responsibility for congressional redistricting, U.S. Const. art. I, § 4." Am. Compl. ¶¶ 32-42. Plaintiffs allege that "Article V, § 44 of the Colorado Constitution, as interpreted by the Colorado Supreme Court in *Salazar*, impermissibly usurps the *power properly reserved to the Colorado legislature*" under art. I, § 4 of the U.S. Constitution. *Id.* ¶ 37 (emphasis added). Moreover, Plaintiffs request the identical relief sought by the Secretary and General Assembly in *Salazar* and *Keller*: implementation of S.B. 03-352. In short, Plaintiffs contend that the *Salazar* court's interpretation of art. V, § 44 deprives the *General Assembly* of its authority to enact a mid-decade redistricting plan, in violation of art. I, § 4.

Plaintiffs' Response to the Secretary's original motion to dismiss confirms their conviction that the power under art. I, § 4 to draw congressional districts resides solely with the General Assembly as an institution. *See* Plaintiffs' Response to Secretary's Motion to Dismiss at 5 ("U.S. art. I, § 4 delegates the obligation . . . and thus the responsibility to act . . . to the *legislative branch.*") (emphasis added). Plaintiffs repeatedly contend, throughout their Response, that the *Salazar* court's interpretation of art. V, § 44 interferes with this

inherently legislative power. *See, e.g.*, Plaintiffs' Response at 15 (art. V, § 44 "acts to prohibit the *General Assembly* from conducting redistricting at any time subsequent to court action"); *id.* at 19 (art. V, § 44 allows courts to "unconstitutionally *act as a legislature* for redistricting purposes, to permanently deny the *General Assembly* and the Governor the ability *to exercise their powers under U.S. Const. art. I, § 4*"); *id.* at 6 (court orders "cannot usurp the 'primary responsibility' of the state *legislative body* to enact a redistricting plan") (emphases added).

In their earlier response brief, Plaintiffs argued to this Court that art. I, § 4 confers rights to "individual citizens" to "hold their representatives accountable for their political decisions in governance." Plaintiffs' Response at 4. Plaintiffs cited no authority for these purported "individual" rights inherent in art. I, § 4, however, and the Secretary is aware of none. To the extent Plaintiffs suggest that the Elections Clause confers rights upon individual citizens, such rights are not apparent in the text of this provision. Indeed, in its previous ruling in this case, this Court expressly declined to interpret art. I, § 4 as "creating some sort of distinct individual right." *Lance*, 379 F. Supp. 2d at 1126 & n.13 ("Article I, § 4 of the federal Constitution by its language vests power in the legislature, not in ordinary citizens, and only the legislature is authorized to determine the manner of holding congressional elections. Reapportionment is necessarily a governmental act rather than an individual act.").

In their appeal to the U.S. Supreme Court, Plaintiffs recharacterized their art. I, § 4 claim as an "individual right to vote" independent of the General Assembly's institutional

authority to redistrict under that provision. This fiction collapsed, however, when Plaintiffs offered the merits of their Elections Clause claim. Their Second Question Presented was especially revealing: it replicated, almost verbatim, the Elections Clause question presented in the General Assembly's unsuccessful petition for *certiorari* review in *Salazar*. *See* notes 2-3, *supra.*

In any event, any purported "individual" right under art. I, § 4 "would be necessarily derivative of the governmental rights vested in the legislature by the Elections Clause." *Lance*, 379 F. Supp. 2d at 1126. As such, Plaintiffs' asserted interest is nothing more than a restatement of the General Assembly's institutional interest in redistricting. Thus, Plaintiffs' so-called "individual" claim under the Elections Clause remains a claim about the General Assembly's *institutional* power to redistrict.

E. Plaintiffs are in privity with parties to *Salazar*.

The second requirement of issue preclusion is satisfied because Plaintiffs are in privity with the parties to the *Salazar* litigation.

"A finding of privity is simply a conclusion that something in the relationship of a party and non-party justifies holding the latter to the result reached in litigation in which only the former was named." *Public Service Co. of Colo. v. Osmose Wood Preserving, Inc.*, 813 P.2d 785, 788 (Colo. App. 1991) (quoting *Daigle v. Portsmouth*, 534 A.2d 689 (N.H. 1987)), *cert. denied* (Colo. 1991).

Under Colorado law, privity between a party and a non-party requires a substantial identity of interests and a working or functional relationship in which the interests of the

non-party are presented and protected by the party to the litigation. *Cruz v. Benine*, 984 P.2d 1173, 1176 (Colo. 1999). That is, "privity exists when there is a substantial identity of interests between a party and a non-party such that the non-party is 'virtually represented' in litigation." *Public Service Co.*, 813 P.2d at 787 (quoting *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975)).[5]

In this case, Plaintiffs are in privity with the Colorado government officials who were parties in *Salazar* because these government officials represented all Colorado citizens regarding an issue of common public concern. The Colorado Supreme Court has recognized that a form of privity exists between a government and its citizens when a government official acting in his or her official capacity as representative of the public litigates an issue of public concern, regardless of whether the citizens were named as parties to the litigation. *McNichols v. City & County of Denver*, 74 P.2d 99 (Colo. 1937).

In *McNichols*, the Colorado Supreme Court held that, where various public officials and public entities litigated the validity of a public bond issue, "a judgment rendered therein is res judicata as to the validity of the bonds against all persons, including taxpayers, even though they are not parties to the suit." *Id.* at 102. The court's holding was rooted in the

[5] The Colorado Court of Appeals' discussion of privity in *Public Service Co.* has been cited with approval by the Colorado Supreme Court, by later panels of the court of appeals, and by this federal Court. *See, e.g.*, *Benson v. Town of Nunn, Colo.*, 52 F. Supp. 2d 1210, 1214 (D. Colo. 1999) (concluding that although plaintiffs were not parties to the prior state court litigation, they stood in privity with those litigants because their interests in the constitutionality of a challenged zoning ordinance were identical); *see also Novotny*, 184 F. Supp. 2d at 1086; *Cruz*, 984 P.2d at 1176-77; *People in the Interest of M.C.*, 914 P.2d at 360; *Argus Real Estate, Inc. v. E-470 Public Highway Auth.*, 97 P.3d 215, 217 (Colo. App. 2003), *aff'd*, 109 P.3d 604, 608 (Colo. 2005).

theory that a judgment against the government or its legal representatives "in a matter of general interest to all its citizens is binding on the latter, though they are not parties to the suit." *Id.* (quoting 1 *Freeman on Judgments*, at 1090 (5th ed.)); *see also Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County*, 37 P.2d 761, 764 (Colo. 1934) ("[A] judgment against a county or its legal representatives, in a matter of general interest to all the people . . . is binding, not only on the county and its official representatives named as defendants, but also upon all taxpayers of the county though not named as defendants in the case.").

This principle of Colorado law is consistent with federal case law that similarly recognizes the broad preclusive effect of judgments arising from litigation in which public officials have participated. In *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320 (1958), the U.S. Supreme Court held that, in Washington state's litigation regarding the validity of Tacoma's federal license to construct a power project, the state represented all of its citizens. Thus, the judgment was binding on all Washington citizens and precluded their subsequent litigation of the same public issue. *Id.* at 340-41. The Court explained: "The final judgment [of the first case] was effective, not only against the State, but also against its citizens, including the taxpayers of Tacoma, for they, in their common public rights as citizens of the State, were represented by the State in those proceedings, and, like it, were bound by the judgment." *Id.; see also Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979) (holding that Washington state's earlier litigation over public fishing rights precluded subsequent suit by individual citizens).

Other federal courts, including the Tenth Circuit, have recognized the preclusive effect of prior government litigation. *See, e.g.*, *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("When a state litigates common public rights, the citizens of that state are represented in such litigation by the state and are bound by the judgment.") (holding that private claims based on injuries to public rights were barred by the state's prior litigation on that subject); *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 951 (10th Cir. 1952) ("[A] valid judgment or decree of a court of competent jurisdiction in an action by or against the municipality determining the validity and amount of [public tramway] fares is binding upon the public."); *State Police for Automatic Ret. Ass'n v. Difava*, 164 F. Supp. 2d 141, 150-51 (D. Mass. 2001) (discussing *City of Tacoma* principles and concluding that the Massachusetts Attorney General could bind the citizens of Massachusetts through her representation of the Commonwealth in litigation), *aff'd*, 317 F.3d 6 (1st Cir. 2003); *Lucas v. Planning Bd. of Town of LaGrange*, 7 F. Supp. 2d 310, 327-29 (S.D.N.Y. 1998) (holding that prior litigation by a town regarding common public rights of the town residents precluded subsequent litigation by individual citizens).

The Washington Supreme Court has applied these principles to a case factually similar to this one. In *Snyder v. Munro*, 721 P.2d 962 (Wash. 1986), private parties brought a constitutional challenge to the state's legislative districts in state court. The Washington Supreme Court held that the state court challenge was precluded by a prior federal court judgment addressing the constitutionality of these same legislative districts. The state supreme court explained:

> The parties in the prior judgment were the acknowledged heads of the major political parties in Washington state and several state officials (including Secretary of State, Lieutenant Governor, and Attorney General). Arguably, all citizens of Washington state were well represented in this agreed judgment by the parties with the authority to do so.

Id. at 964 (emphasis added). Relying on *City of Tacoma*, the Washington Supreme Court concluded that "plaintiffs had their interests represented in the prior judgment" with regard to their constitutional challenge raised in the second litigation. *Id.* at 963-64.

As a matter of public policy, the notion of government-citizen privity is "particularly appropriate for public law cases" because otherwise, there would be no limit to the number of successive citizen suits that could be brought in attempts to relitigate the same issue. *Tyus v. Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996) (observing that public law claims "would assume immortality" if parties were allowed to continually raise issues already decided, as the number of plaintiffs is "potentially limitless").

Applying the above-stated principles to this case, it is clear that the numerous public officials who participated in the *Salazar* litigation represented all Colorado citizens concerning a matter of common public concern, namely, the powers and rights of the State to draw congressional districts. *See Salazar*, 79 P.3d at 1228 ("There can be no question that the Attorney General's case involves an extraordinary matter of public importance.").

The Colorado Attorney General brought the original action on behalf of the citizens of Colorado. Specifically, the petitioner was the "People of the State of Colorado, *ex rel.* Ken Salazar, in his official capacity as Attorney General for the State of Colorado." *Salazar*, 79 P.3d at 1221. "*Ex rel.*" means "*ex relatione*," or upon relation or information; *ex*

relatione proceedings are those "instituted by the attorney general (or other proper person) in the name and behalf of the state[.]" *Black's Law Dictionary* 582 (6th ed. 1990). The Colorado Supreme Court recognized that the Attorney General was the "chief legal officer of the state" and, as such, appeared in the case "in the interests of the people to promote the public welfare." *Salazar*, 79 P.3d at 1230 (quoting *State R.R. Comm'n v. People ex rel. Denver & R.G.R., Co.*, 98 P. 7, 11 (Colo. 1908)). The court also noted that "it is the function of the Attorney General…to protect the rights of the public." *Id.* at 1229 (quoting *People v. Tool*, 86 P. 224, 227 (Colo. 1905)). The Attorney General, along with amici Congressman Mark Udall and Pitkin County, argued that the once-per-decade redistricting limitation of art. V, § 44 was consistent with art. I, § 4, regardless of which entity (the legislature or a court) determined the districts.

Opposing this view, the General Assembly, the Governor, and the Secretary of State argued that, under the Attorney General's interpretation, art. V, § 44 of the Colorado Constitution violated art. I, § 4 of the U.S. Constitution. These public officials also appeared in their official capacities, representing the public interest as they deemed appropriate. In addition to representing the public, the Secretary of State participated in her capacity as administrator of the election laws;[6] the General Assembly vigorously represented its "institutional legal interest" in its ability to draw congressional districts;[7] and the Governor

[6] *Salazar*, 79 P.3d at 1230-31 (citing Colo. Rev. Stat. § 1-1-107(1)(a) (2003)).

[7] *Keller*, 299 F. Supp. 2d at 1179-80.

represented the "supreme executive power of the state," whose duty was to ensure the faithful execution of the laws.[8]

Because of the *Salazar* case's importance to all Colorado citizens, the Colorado Supreme Court also invited and received *amicus* briefs from "any interested persons," including other public officials and private citizens. The supreme court received the written views of Congresswoman Diana DeGette, the House Minority Caucus of the General Assembly, Fremont County, and members of the University of Colorado's Board of Regents. After consideration of these many views, the Colorado Supreme Court accepted the Attorney General's constitutional interpretation and rejected the position presented by the General Assembly and Secretary.

Hence, numerous elected state officials vigorously participated in *Salazar*, and, collectively, presented all sides of the constitutional issue raised by Plaintiffs in this case (*i.e.*, the federal constitutionality of art. V, § 44). These government officials thoroughly represented the interests of all Colorado citizens, including those of Plaintiffs. As discussed above, Plaintiffs' claim is nothing more than a restatement of the claim litigated by the General Assembly in *Salazar*. Accordingly, Plaintiffs, as citizens and voters in this State,

[8] Colo. Const. art. IV, § 2.

were in privity with the officials who litigated the federal constitutionality of art. V, § 44 in the *Salazar* case.[9]

In its earlier ruling in this matter, this Court expressly held that Plaintiffs, as individual citizens, "stand in privity with the General Assembly for purposes of asserting a claim under the Elections Clause of the Constitution." *Lance*, 379 F. Supp. 2d at 1125. While this Court's ruling was based on the *City of Tacoma/Washington* line of federal case law and sought to determine whether privity existed for purposes of applying *Rooker-Feldman*, nothing in Colorado state preclusion law dictates a different conclusion here. The privity principles applied by this Court were derived from the context of issue and claim

[9] In addition to an identity of interests and adequate representation in *Salazar*, this case presents other circumstances giving rise to an inference that this lawsuit was coordinated by the same group supporting the General Assembly in *Salazar* and *Keller* as part of a broader litigation strategy. Specifically, as argued in the Secretary's opening brief in support of her original motion to dismiss at pp. 28-31, and her reply brief at pp. 15-18, which the Secretary incorporates by this reference, the circumstances surrounding this case suggest that this suit was a calculated effort to preserve the General Assembly's principal arguments regarding the Elections Clause by asserting the identical claim in a new suit with nominally different plaintiffs. These unusual circumstances include the timing of this lawsuit; the striking and extensive overlap between the allegations of the Elections Clause claim filed in this case and the General Assembly's proposed amended counterclaims filed in *Keller* less than 24 hours later; and Plaintiffs' deposition testimony reflecting that each of them has ties to (and/or was recruited to join this lawsuit by) members of the Republican party, which formed the majority in the General Assembly when S.B. 03-352 was passed and when the General Assembly was litigating both *Salazar* and *Keller*. The nearly identical claims presented by the General Assembly and Plaintiffs, and the close association and common interests between these parties, further support a finding of privity here.

Hence, even if Plaintiffs were not bound by the judgment in *Salazar* as ordinary citizens under the principles articulated in *McNichols*, the circumstances of this case establish a substantial identity of interests and a working or functional relationship between Plaintiffs and the General Assembly, in which the interests of Plaintiffs were presented and protected by the General Assembly in *Salazar*. *Cf. Cruz*, 984 P.2d at 1176. At the very least, the General Assembly "virtually represented" Plaintiffs in *Salazar*. *Cf. Public Serv. Co.*, 813 P.2d at 787.

preclusion. *See Lance*, 379 F. Supp. 2d at 1125. And as discussed above, Colorado case law is consistent with the principles articulated in *City of Tacoma* and *Washington.* Thus, under federal and Colorado law, Plaintiffs are in privity with parties in *Salazar*, and are equally bound by the judgment in that case.

F. The parties with whom Plaintiffs are in privity had a full and fair opportunity to litigate the constitutional issue in *Salazar*.

Finally, the fourth criterion of issue preclusion is satisfied because the parties in *Salazar* had a full and fair opportunity to litigate the federal constitutionality of art. V, § 44.

To determine whether a party against whom estoppel is asserted had a "full and fair opportunity to litigate" the issue in the previous proceeding, a Colorado court will consider: 1) whether the remedies and procedures of the first proceeding are substantially different from the proceeding in which issue preclusion is asserted; 2) whether the party in the prior proceeding had sufficient incentive to litigate vigorously; and 3) the extent to which the issues are identical. *See Bebo Constr. Co.*, 990 P.2d at 87; *see also Keller*, 299 F. Supp. 2d at 1183.

As this Court concluded in *Keller*, the parties who presented Plaintiffs' view of the Elections Clause issue in *Salazar* (*i.e.*, the General Assembly and the Secretary), received a full and fair opportunity to litigate the issue before the Colorado Supreme Court. *See Keller*, 299 F. Supp. 2d at 1183. The remedies sought here are essentially the same, and Plaintiffs, like the General Assembly in *Keller*, acknowledge that the Elections Clause claim is a purely

legal issue. Consequently, the unavailability of discovery or other means of collecting evidence in the original proceeding in *Salazar* is irrelevant. *See id.*

Furthermore, there is no reason to believe that the Secretary and General Assembly lacked strong incentives to litigate their federal claims vigorously before the Colorado Supreme Court. *See id.* Indeed, the General Assembly argued to the Colorado Supreme Court that it must be permitted to intervene in the *Salazar* litigation because it had a "fundamental interest" in drawing congressional districts under art. V, § 44 and art. I, § 4. It contended that, as members of the executive branch, neither the Secretary nor the Governor could represent the General Assembly's "constitutional mandate to enact laws and policy for the State of Colorado," and that because the General Assembly had the "exclusive role" in drawing congressional districts, it was the "real party in interest" in the case. Motion by the Colorado General Assembly to Intervene as a Respondent at 2.

Thus, the factors present here favor preclusion because the remedies and procedures of both proceedings are not substantially different, the General Assembly and Secretary had sufficient incentive to litigate vigorously in *Salazar*, and the issue is virtually identical, down to the very wording of the claim.

CONCLUSION

In sum, several Colorado public officials participated in *Salazar*, and, collectively, presented all sides of the constitutional issue raised by Plaintiffs here. These government officials thoroughly represented the interests of all Colorado citizens, including those of Plaintiffs, and vigorously litigated the issue to a final judgment. Under Colorado law of

privity and preclusion attendant to government litigation of public issues, Plaintiffs were in privity with the government officials who litigated the *Salazar* case. Hence, the Colorado Supreme Court's judgment in *Salazar* is binding on Plaintiffs, and under Colorado law, Plaintiffs' Elections Clause claim is barred by issue preclusion. Accordingly, under the Full Faith and Credit Act, Plaintiffs are precluded from litigating the same constitutional issue in federal court. *See* 28 U.S.C. § 1738. For all of the foregoing reasons and authorities, the Secretary of State respectfully requests that the Court dismiss with prejudice Plaintiffs' Elections Clause claim.

Finally, should this Court harbor doubts about the preclusive effect of the *Salazar* decision under Colorado law, the Secretary respectfully urges the Court to certify this question to the Colorado Supreme Court in accordance with Colo. App. R. 21.1(a) ("The Supreme Court may answer questions of law certified to it by . . . a United States District Court . . . when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court.").

Respectfully submitted this 20th day of April, 2006.

JOHN W. SUTHERS
Attorney General

s/ Monica M. Márquez
MAURICE KNAIZER
Deputy Attorney General
MONICA M. MÁRQUEZ
Assistant Attorney General

Attorneys for Defendant Gigi Dennis, Colorado Secretary of State
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
maurie.knaizer@state.co.us
monica.marquez@state.co.us
Phone: 303-866-4500
Facsimile: 303-866-5671

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2006, I electronically filed the within **SECRETARY OF STATE'S BRIEF IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFFS' ELECTIONS 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:

John S. Zakhem, Esq.
Brett R. Lilly, Esq.
Doyle Sakhem Suhre & Lilly, LLC
950 S. Cherry St., Suite 312
john@doyleandzakhem.com
Denver, Colorado 80246
Attorneys for Plaintiffs

Courtesy copies sent via facsimile to:

David R. Fine, Esq.
Kelly Haglund Garnsey & Kahn LLC
1441 Eighteenth Street, Suite 300
Denver, Colorado 80202
FAX: 303-293-8705

Thomas M. Rogers III, Esq.
Rothgerber Johnson & Lyons, LLP
One Tabor Center, 30th Floor
1200 Seventeenth Street
Denver, Colorado 80202
FAX: 303-623-9222

s/Pamela Ponder