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'S MOTION TO DISMISS PLAINTIFFS' ELECTION 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 renews her motion to dismiss Plaintiffs' first claim for relief under U.S. Const. art. I, § 4 (the "Elections Clause claim").

In support of her motion, the Secretary states as follows:

1. This action concerns the Colorado General Assembly's mid-decade congressional redistricting plan passed in May 2003 (S.B. 03-352, codified at C.R.S. § 2-1-101 (2005)). In December 2003, the Colorado Supreme Court held S.B. 03-352 unconstitutional under art. V, § 44 of the Colorado Constitution. *People ex rel. Salazar v.*

Davidson, 79 P.3d 1221 (Colo. 2003). In reaching this holding, the Colorado Supreme Court concluded that Colo. Const. art. V, § 44 does not violate art. I, § 4 of the U.S. Constitution. *Id.* at 1231-32**.** The United States Supreme Court denied the General Assembly's petition for writ of certiorari, thus ending the *Salazar* litigation. *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004).

2. Here, Plaintiffs assert that art. V, § 44, as interpreted in *Salazar*, violates art. I, § 4 because art. V, § 44 prohibits the General Assembly from drawing a mid-decade redistricting plan (*i.e.*, S.B. 03-352). Plaintiffs seek a declaration that art. V, § 44, as interpreted by the Colorado Supreme Court in *Salazar*, is null and void because it violates art. I, § 4. Plaintiffs also seek an injunction requiring the Secretary to implement S.B. 03-352.

3. This action represents the third lawsuit filed against the Secretary of State regarding the constitutionality of S.B. 03-352 and art. V, § 44. In addition to the *Salazar* case, the Secretary was a party to *Keller v. Davidson*, Civ. Action No. 03-Z-1482 (CBS) (D. Colo.). In *Keller*, this Court dismissed counterclaims raised by the General Assembly, Governor and Secretary alleging that art. V, § 44 violated art. I, § 4. This Court reasoned that such claims were fully litigated in *Salazar* and, therefore, were barred by the *Rooker-Feldman* doctrine and by issue preclusion. *Keller v. Davidson*, 299 F. Supp.2d 1171 (D. Colo. 2004).

4. As demonstrated in the supporting brief submitted with this motion, which is incorporated herein by this reference, Plaintiffs' claim under art. I, § 4 was fully and finally

adjudicated in *Salazar* by parties with whom Plaintiffs stand in privity. Therefore (and just as this Court found in *Keller*), this claim is barred under Colorado law by the doctrine of issue preclusion. Accordingly, Plaintiffs' Elections Clause claim must be dismissed with prejudice under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. *See McArthur v. San Juan County*, 309 F.3d 1216, 1220-21 (10th Cir. 2002) (discussing standards for Rule 12(b)(6) motions).

WHEREFORE, for the foregoing reasons, the Secretary of State respectfully moves this Court to dismiss with prejudice Plaintiffs' first claim for relief under the Elections Clause, U.S. Const. art. I, § 4.

Respectfully submitted this 20th day of April, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2006, I electronically filed the within **SECRETARY'S MOTION TO DISMISS PLAINTIFFS' ELECTION 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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