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 REPLY BRIEF IN SUPPORT OF HER MOTION TO DISMISS PLAINTIFFS' ELECTIONS CLAUSE CLAIM

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 reply brief in further support of her motion to dismiss Plaintiffs' claim for relief under U.S. Const. art. I, § 4 (the "Elections Clause claim") on grounds that this claim is barred by issue preclusion.

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INTRODUCTION

Although Plaintiffs portray their Elections Clause claim as involving the "individual right to vote", the legal merits of their claim hinge inescapably on the General Assembly's institutional power to redistrict under U.S. Const. art. I, § 4. This is true because the Elections Clause delegates the power to redistrict to States, not to individuals. Thus, any purported individual rights under art. I, § 4 are necessarily derivative of the State's authority to redistrict under that provision.

Indeed, Plaintiffs' Response Brief confirms that if this case were to proceed to the merits, the parties would not be litigating the "right to vote." Rather, Plaintiffs quite candidly ask this Court to determine the scope of the General Assembly's power to redistrict under the Elections Clause. *See* Resp. at 2 (urging the Court to reach the merits and "hold that the Constitution's Elections Clause 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.").

Plaintiffs' own articulation of the "merits" of their claim (both in this Court and before the U.S. Supreme Court) reveals that this claim presents literally the identical "issue" 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): namely, the scope of the General Assembly's authority to redistrict under art. I, § 4. This issue was

vigorously litigated by Plaintiffs' official government representatives and posited by the General Assembly in its unsuccessful petition for certiorari review.

Under Colorado law, where government officials litigate a matter of general interest to all citizens, the judgment is binding not only on the government officials but on all citizens, even though such citizens were not parties to the suit. *McNichols v. City & County of Denver*, 74 P.2d 99, 102 (Colo. 1937); *Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County*, 37 P.2d 761, 764 (Colo. 1934). Thus, Plaintiffs, like all Colorado citizens, are bound by the *Salazar* judgment. Because a Colorado court would find Plaintiffs' Elections Clause claim barred by issue preclusion, the Full Faith and Credit Act requires this Court to give the same preclusive effect to the *Salazar* judgment here.

ARGUMENT

Colorado law of issue preclusion bars Plaintiffs' Elections Clause claim.

For the reasons below, Plaintiffs' Elections Clause claim is barred by issue preclusion under Colorado law and must be dismissed.

A. Colorado preclusion law governs here.

Plaintiffs properly cite to Colorado law for the four criteria of issue preclusion. *See* Resp. at 7. However, in arguing that their Elections Clause claim is not barred here, Plaintiffs rely virtually exclusively on federal court cases that do not concern Colorado law of issue preclusion. *See* Resp. at 10-20, 22-25.

The Full Faith and Credit Act, 28 U.S.C. § 1738, 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). Thus, Colorado preclusion law, not federal preclusion law, governs the determination of collateral estoppel in this case. Accordingly, the Colorado case law relied on by the Secretary is controlling here.

Under 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* Secretary's Opening Brief at 10 (citing cases).

The Colorado Supreme Court has noted that collateral estoppel (or issue preclusion) is broader than res judicata (or claim preclusion) to the extent that it may apply to bar claims for relief different from those litigated in the first action. *See City and County of Denver v. Block 173 Assocs.*, 814 P.2d 824, 831 (Colo. 1991); *see also F.D.I.C. v. Refco Group, Ltd.*, 989 F. Supp. 1052, 1082 (D. Colo. 1997) (citing *S.O.V. v. People in the Interest of M.C.*, 914 P.2d 355, 359 (Colo. 1996)). Thus, "when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *Block 173 Assocs.*, 814 P.2d at 831 (quoting Restatement (Second) of Judgments, § 27 (1980)).

As discussed in the Secretary's Opening Brief and below, all four criteria of issue preclusion under Colorado law are met here.

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

Plaintiffs do not dispute that the *Salazar* decision culminated in a final judgment on the merits. Thus, the third criterion of issue preclusion is met.

C. Plaintiffs' Elections Clause claim presents the same constitutional issue that was actually and necessarily adjudicated in *Salazar*.

The first criterion of issue preclusion is met because Plaintiffs' Elections Clause claim presents the same issue of federal constitutional law that was "actually litigated and necessarily adjudicated" in *Salazar*. *See Michaelson v. Michaelson*, 884 P.2d 695, 700-02 (Colo. 1994) (an issue has been "actually litigated" if it was raised by the parties in the prior action; an issue is "necessarily adjudicated" when the determination of the issue is necessary to a judgment).

Plaintiffs suggest that the Elections Clause issue was not necessarily adjudicated in *Salazar*, speculating that the lack of a federal question prompted the U.S. Supreme Court to deny certiorari review. Resp. at 25-26. Plaintiffs ignore this Court's conclusion to the contrary both here and in *Keller*, as well as the fact that all parties to *Salazar* agreed in the briefs before the U.S. Supreme Court that the Elections Clause issue was decided in that case. *See Lance v. Davidson*, 379 F. Supp. 2d 1117, 1126 n.11 (D. Colo. 2005); *Keller v. Davidson*, 299 F. Supp. 2d 1171, 1182 (D. Colo. 2004); *see also Salazar*, 79 P.3d at 1232 (discussing the Secretary and General Assembly's claim regarding the Elections Clause). Moreover, the three dissenting Justices who obviously voted to grant review in *Salazar* could not have done so if the federal question had not been decided below.

Because it is clear that the scope of the General Assembly's authority to redistrict under the Elections Clause was "actually raised and necessarily decided" in *Salazar*, the first criterion of issue preclusion turns on whether the Elections Clause issue raised by Plaintiffs in this case is the "same" as that in *Salazar*.

The Elections Clause claim here more than "merely resembles" the issue in *Salazar*. *See* Resp. at 8 (citing *Fahra v. F.D.I.C.*, 963 F.2d 283, 286 (10th Cir. 1992)). Indeed, Plaintiffs ask this Court to decide the identical question of law posited by the General Assembly and Secretary in *Salazar*: whether the one-time redistricting limitation in Colo. Const. art. V, § 44 violates U.S. Const. art. I, § 4 by interfering with the General Assembly's authority to redistrict. *See* Secretary's Opening Brief at 3 n.2 (quoting General Assembly's First Question Presented to the U.S. Supreme Court in *Salazar*); *id.* at 6 n.3 (quoting Plaintiffs' Second Question Presented to the U.S. Supreme Court in their recent appeal); *see also* Am. Compl. ¶¶ 32-42; Resp. at 2; Secretary's Opening Brief at 13-14 (citing Plaintiffs' Response to the Secretary's original motion to dismiss).

In their Response Brief, Plaintiffs seek to distinguish their Elections Clause claim here by asserting that their claim strictly concerns "individual voting rights" and not any institutional power to redistrict. Specifically, Plaintiffs submit that they have a freestanding "right to vote for congressional representatives" under art. I, § 4. Resp. at 8. They then discuss at length the individual nature of the right to vote. Resp. at 15-23.

While the right to vote is protected by several provisions of the federal Constitution, the source of this individual "right" does not lie in the Elections Clause. Rather, the

Elections Clause expressly delegates power to the States to regulate elections – here, to draw congressional districts – subject to the power of Congress to "make or alter" such regulations. *See, e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995) (the Elections Clause is an "express delegation[] of power to the States"). Simply put, the Elections Clause does not confer rights to individuals.[1] *See Lance*, 379 F. Supp. 2d at 1126.

None of the cases cited by Plaintiffs recognizes a freestanding "individual right to vote" inherent in the Elections Clause, which is the specific claim they assert here. Plaintiffs' "right to vote" cases instead concern claims based on other constitutional and statutory provisions. *See, e.g.*, *Lawyer v. Department of Justice*, 521 U.S. 567, 572 (1997) (Equal Protection Clause);[2] *U.S. Term Limits*, 514 U.S. 779 (Qualifications Clauses); *Burdick v. Takushi*, 504 U.S. 428, 430 (1992) (First and Fourteenth Amendments); *Burson v. Freeman*, 504 U.S. 191, 193 (1992) (First and Fourteenth Amendments); *Upham v. Seamon*, 456 U.S. 37, 38 (1982) (Voting Rights Act); *White v. Weiser*, 412 U.S. 783, 786 (1973) (art.

[1] Indeed, if there is any actual textual source for the individual citizen's constitutional "right to vote for congressional representatives," it lies not in the Elections Clause, but rather, in art. I, § 2, cl.1, which provides in relevant part: "The House of Representatives shall be composed of Members chosen every second Year by the People of the Several States . . . ." *See, e.g.*, *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (art. I, § 2 gives persons qualified to vote a constitutional right to vote for representatives and to have their votes counted); *United States v. Classic*, 313 U.S. 299, 315 (1941) (referring to the "right to choose representatives secured by Article I, § 2"); *Ex parte Yarbrough*, 110 U.S. 651, 663 (1884) (right to vote for a member of congress appears to derive from Article I, § 2).

[2] Contrary to Plaintiffs' characterization of this case, *see* Resp. at 19 n.5, the Supreme Court interpreted the voter's claim in *Lawyer v. Department of Justice* as "nothing other than the rule . . that state redistricting responsibility should be accorded primacy to the extent possible when a federal court exercises remedial power." *Lawyer*, 521 U.S. at 576.

I, § 2 and Equal Protection Clause); *Evans v. Cornman*, 398 U.S. 419 (1970) (Equal Protection Clause); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1273 (11th Cir. 2000) (Voting Rights Act).

Moreover, the cases cited by Plaintiffs that do mention the Elections Clause typically discuss that provision as a source of State and Congressional power to structure and regulate elections. This government authority properly serves as a limit on the individual citizen's right to vote, not a source of that right. *See, e.g., U.S. Term Limits*, 514 U.S. at 834 (the Elections Clause gives States authority "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental right involved.") (quoting *Smiley v. Holm*, 285 U.S. 355, 366 (1932)); *Burdick*, 504 U.S. at 433 (right to vote is not absolute; States retain the power under Elections Clause to regulate their own elections; election laws invariably impose some burden on individual voters and affect the individual's right to vote); *Classic*, 313 U.S. at 310 ("Such right as is secured by the Constitution to qualified voters to choose members of the House of Representatives is thus to be exercised in conformity to the requirements of state law subject to restrictions prescribed by § 2 and to the authority conferred on Congress by § 4, to regulate the times, places and manner of holding elections for representatives.") (emphasis added).

Furthermore, even assuming that a hypothetical individual "right to vote" might be inferred from art. I, § 4, the Secretary contends (and this Court has held) that any such right "would be necessarily derivative of the governmental rights vested in the legislature by the Elections Clause." *Lance*, 379 F. Supp. 2d at 1126. This is because redistricting is

"necessarily a governmental act rather than an individual act." *See id.* at 1126 n.13.

Plaintiffs cannot establish how their voting rights claim presents a separate "issue" here for purposes of issue preclusion because they cannot explain how their purported individual right to vote under the Elections Clause is not inherently tethered to, and derivative of, the State's power to redistrict under that provision. The parties appear to agree that redistricting is necessarily a governmental act; indeed, Plaintiffs maintain that the Elections Clause delegates redistricting power exclusively to the General Assembly. Am. Compl. ¶¶ 34-38. As a matter of logic, Plaintiffs' purported individual "right to vote" for representatives in "districts authorized by the Elections Clause" (*i.e.*, drawn by the General Assembly) is necessarily circumscribed by the limits of the authority conferred by the Elections Clause to the General Assembly to draw such districts. In short, any individual right to vote in districts authorized by the Elections Clause is contingent upon, and limited by, the State's power to redistrict under the Elections Clause. Thus, for purposes of issue preclusion under Colorado law, Plaintiffs cannot establish that their challenge to Colo. Const. art. V, § 44 actually presents a different "issue" not litigated in *Salazar*.[3]

[3] There is no claim here of a violation of the actual "right to vote." Plaintiffs do not assert that they are denied the opportunity to vote, or that their votes will be diluted by virtue of how the current congressional district lines are drawn. As long as the districts drawn are racially neutral and equipopulous (which is the case here), the question of which State entity draws the district lines in no way impinges upon individual voters' opportunity to cast a meaningful ballot for a congressional candidate of their choice in an election. In this sense, who draws the districts simply does not infringe on the right to vote.

Plaintiffs also rely on a series of separation of powers cases to argue that they must be permitted to bring their Elections Clause claim here. *See* Resp. at 17-18. However, Plaintiffs do not assert any separation of powers claim here. In fact, Plaintiffs chose to eliminate their original separation of powers claim when they filed their Amended Complaint. *Lance*, 379 F. Supp. 2d at 1122 n.4. Consequently, this case law is inapposite.

Finally, Plaintiffs' own articulation of the merits of their claim furnishes the clearest proof that their Elections Clause claim presents the same issue litigated in *Salazar*. Unquestionably, if this case were to proceed to the merits, the parties would be (re)litigating the scope of the delegation of redistricting authority under the Elections Clause – not the right to vote. Plaintiffs' preview of these merits, as articulated in their early filings in this Court as well as recently in the U.S. Supreme Court, make clear that Plaintiffs have always intended to make the same arguments regarding the Elections Clause as were made by the General Assembly and Secretary in *Salazar*. *See* Plaintiffs' Brief in Support of Opposition to Colorado Attorney General Ken Salazar's Motion to Intervene at 4-5 (filed 12/26/03); Jurisdictional Statement at 25-29; Opposition to Motion to Affirm at 9-10.

In sum, the claim asserted here is identical to the claim in *Salazar*, down to its very wording, and if this case were to proceed to the merits, the arguments raised would be substantially the same as those in the prior litigation. Both of these factors favor a finding that the "issue" involved in the two proceedings is the same. *See* Restatement (Second) of

Judgments § 27 cmt. c (substantial overlap in the argument to be advanced and closely related claims indicate "issue" is same).[4]

D. 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 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. Moreover, Colorado law has long recognized the broad preclusive effect of a judgment where public officials have litigated a matter of general interest to all citizens. *See McNichols v. City & County of Denver*, 74 P.2d 99, 102 (Colo. 1937); *Atchison, Topeka & Santa Fe Ry. Co. v. Board of County Comm'rs of Fremont County*, 37 P.2d 761, 764 (Colo. 1934). As stated by the Colorado Supreme Court, a judgment against the government or its legal representatives "in a matter of general interest

[4] The Colorado Supreme Court has cited the Restatement (Second) of Judgments § 27 in discussing issue preclusion. *See Michaelson*, 884 P.2d at 701 & n.7 (citing § 27 cmt. d). The Tenth Circuit also recently quoted § 27 cmt. c in a federal collateral estoppel analysis. *See B-S Steel of Kansas, Inc. v. Texas Indus., Inc.*, 439 F.3d 653, 663 (10th Cir. 2006).

to all its citizens is binding on the latter, though they are not parties to the suit." *McNichols*, 74 P.2d at 102 (quoting 1 Freeman on Judgments, at 1090 (5th ed.)).

In *Salazar*, the Attorney General, Secretary, General Assembly and Governor litigated an issue of common public concern – namely, the powers and rights of the State to draw congressional districts. This issue most certainly was "a matter of general interest to all [Colorado] citizens." *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."). These state officials are clearly bound by the judgment in *Salazar*. As discussed in the Secretary's Opening Brief, under the principles announced in *McNichols* and *Atchison*, Plaintiffs are in privity with the government officials who were parties in *Salazar* because those officials collectively represented the interests of all Colorado citizens, including those of Plaintiffs. Thus, Plaintiffs, like all Colorado citizens, are equally bound by the *Salazar* judgment.

In general, Plaintiffs contend they are not in privity with parties in *Salazar* because they raise an individual voting rights claim under the Elections Clause that is distinct from the institutional interests at issue in *Salazar*. Resp. at 9-10, 14-19, 21-22. For the reasons discussed above in Part C, this contention fails: the Elections Clause does not confer individual rights, and even if it did, any purported right to vote under the Elections Clause would be necessarily derivative of the institutional power to redistrict under that provision. Thus, Plaintiffs' interests here are <u>not</u> distinct from the institutional interests at issue in *Salazar*. Indeed, they are subsumed by the institutional interests at stake.

Plaintiffs also contend that the "State" did not represent their interests in *Salazar* because it did not present a unified position. Plaintiffs further assert that they cannot be bound by the judgment in *Salazar* because they take a different view of the General Assembly's power to redistrict from that presented by the Colorado Attorney General in that case. Resp. at 12. However, the principle articulated in *McNichols* and *Atchison* is not qualified in either respect. Rather, the preclusive effect of the judgment holds irrespective of whether certain citizens may have disagreed with the position taken by the government representative. If anything, a finding of privity here is particularly justified, because the "government" in *Salazar* presented not merely one side of the constitutional issue at stake, but numerous government representatives vigorously presented all sides of the issue – including the identical arguments concerning the federal constitutionality of art. V, § 44 brought by Plaintiffs here. The fact that those government representatives who presented Plaintiffs' view of art. V, § 44 (*i.e.*, the General Assembly, Secretary and Governor) lost in *Salazar* does not mean that Plaintiffs' interests were not represented in that prior litigation.

Plaintiffs also submit that they are not in privity with the General Assembly because the General Assembly purportedly can represent Plaintiffs only in "legislative" matters. Resp. at 5 n.2, 12-13. This contention is ironic given that the thrust of Plaintiffs' entire case is that congressional redistricting is inherently an "exercise of legislative lawmaking powers" and that the one-time redistricting rule in art. V, § 44 "impermissibly usurps the power properly reserved to the Colorado legislature by the federal Elections Clause." Am. Compl. ¶¶ 35-37. If redistricting is inherently a "legislative" matter (as plaintiffs allege), and if the

General Assembly represents citizens when it acts in legislative matters, then the General Assembly can represent citizens in matters concerning redistricting. There is no reason to believe that the General Assembly can litigate the scope of its power to redistrict, yet not represent citizens' derivative interests in so doing.[5]

Although the Secretary relies on Colorado law (as she must), she observed in her Opening Brief that the principle of Colorado law announced in *McNichols* and *Atchison* is analogous to a principle found in federal preclusion law that similarly recognizes the broad preclusive effect of judgments arising from litigation in which public officials have participated. Opening Br. at 17-18 (citing *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979); *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958); *Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993); *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 951 (10th Cir. 1952); *State Police for Automatic Ret. Ass'n v. Difava*, 164 F. Supp. 2d 141, 150-51 (D. Mass. 2001); *Lucas v. Planning Bd. of Town of LaGrange*, 7 F. Supp. 2d 310, 327-29 (S.D.N.Y. 1998)). The Secretary also noted that the Washington Supreme Court has applied the federal preclusion law version of this principle in a redistricting case to bind all citizens

[5] The Secretary also notes that, contrary to Plaintiffs' assertions, *see* Resp. p. 23, the Secretary fully maintains her contention that 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*. Opening Brief at 22 n.9. This Court concluded in its earlier decision that there was no virtual representation with respect to Plaintiffs' Petition Clause claim, *see Lance*, 379 F. Supp. 2d at 1129, but made no such ruling with respect to Plaintiffs' Elections Clause claim – the claim to which the argument was intended to apply. Thus, the Secretary preserves the argument.

of Washington to a prior judgment, where the heads of the state's political parties and several state officials (including the Secretary of State, Lieutenant Governor, and Attorney General) had collectively litigated the same Equal Protection Clause issue. Opening Br. at 18-19 (citing *Snyder v. Munro*, 721 P.2d 962, 963-64 (Wash. 1986)).[6]

That said, the Secretary's citation of these cases serves simply to shed additional light on the state law principle announced in *McNichols* and *Atchison*. Because the determination of issue preclusion here is a matter of state law, ultimately Colorado law, not federal law, is dispositive. *See 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).

It is for this reason that Plaintiffs' exclusive reliance on federal preclusion law cases is misplaced. In contrast to the Secretary, Plaintiffs cite to such cases not to elucidate or add to Colorado preclusion law. Rather, Plaintiffs' federal preclusion law cases comprise the substance of Plaintiffs' privity arguments. *See* Resp. at 10-11 (citing *Town of Lockport v. Citizens for Community Action at a Local Level, Inc.*, 430 U.S. 259 (1977); *Cleveland County Ass'n for Gov't by the People v. Cleveland Bd. of Comm'rs*, 142 F.3d 468 (D.C. Cir.

[6] Plaintiffs contend that *Snyder* was distinguished by *Perez-Guzman v. Gracia*, 346 F.3d 229 (1st Cir. 2003). Resp. at 22. *Perez-Guzman* was a claim preclusion case decided under the law of Puerto Rico, and the decision makes no mention of *Snyder* but for a footnote reference that "[t]he discussion in [*Snyder*] is dictum and, in all events, unhelpful." *Id.* at 237 n.4. The court fails to identify what part of *Snyder* it believed to be dictum, however. Here, the Secretary cites *Snyder* for the court's ruling that the citizen-plaintiffs in the second suit "had their interests represented in the prior judgment." *Snyder*, 721 P.2d at 964.

1998); *Citizens for Community Action at a Local Level, Inc. v. Ghezzi*, 386 F. Supp.1 (W.D.N.Y. 1974); *Patterson v. Burns*, 327 F. Supp. 745 (D. Haw. 1971); Resp. at 13 (citing *Richards v. Jefferson County*, 517 U.S. 793 (1996)). The problem is that the courts' privity analyses in these cases are not based on Colorado preclusion law, nor do these cases purport to add to Colorado preclusion law principles. Therefore, these cases are not binding here.

Plaintiffs' federal preclusion law cases are distinguishable on other grounds as well. For example, in *Patterson v. Burns*, the federal court found that the constitutional issue raised by the voter-plaintiff was "neither briefed, argued, nor resolved" in the earlier state court action. *See Patterson v. Burns*, 327 F. Supp. 745, 747-49 (D. Haw. 1971). By contrast, Plaintiffs' interest here in the federal constitutionality of art. V, § 44 was clearly both "championed" and "resolved" in *Salazar*. *Compare Patterson*, 327 F. Supp. at 749.

Town of Lockport v. Citizens for Community Action at a Local Level, Inc., is also factually distinguishable from this case. Plaintiffs' citation of *Town of Lockport* refers to the related prior federal district court judgment in *Citizens for Community Action at a Local Level, Inc. v. Ghezzi*. *See* Resp. at 11 (citing *Town of Lockport*, 430 U.S. at 263 & n.7). As an initial matter, while the Supreme Court states in a footnote that the district court properly rejected the county defendant's res judicata defense, this observation is not a "holding" in *Lockport*, given that the Supreme Court vacated that district court judgment in *Ghezzi* and the privity question does not appear to have been before the Court in the *Lockport* appeal after remand. *See Town of Lockport*, 430 U.S. at 263. Moreover, the district court's "no privity" ruling in *Ghezzi* was based on its rejection of the county defendant's argument that

the prior case was intended to be a "class action." The *Ghezzi* court found that the prior case was never brought pursuant to Fed. R. Civ. P. 23. As such, the prior court was never called upon to make critical determinations under Rule 23 as to whether the county could fairly and adequately protect the interests of the class, nor did it consider procedural matters such as notice. *Ghezzi*, 386 F. Supp. at 6. The Secretary makes no such "class action" argument here, but instead relies on the privity principles expressed in *McNichols* and *Atchison*.

In a similar vein, the class of county taxpayers in *Richards v. Jefferson County* were not bound by the judgment in a prior suit brought by three individual taxpayers and a city finance director, where those prior litigants did not purport to sue on behalf of a class; they failed to provide any notice to county taxpayers that a suit was pending that would conclusively resolve their legal rights; and the city official could not purport to represent the pecuniary interests of county taxpayers in any event. *Richards*, 517 U.S. at 799, 801-02. Here, by contrast, the elected Colorado officials in *Salazar* collectively represented all Colorado citizens concerning a matter of general interest – the scope of the General Assembly's power to redistrict. Under *McNichols* and *Atchison*, all Colorado citizens are now bound by that judgment.

Plaintiffs contend that a finding of privity here would pose "grave risks to voting and other fundamental constitutional rights," Resp. at 10, and that under the Secretary's view of privity, state officials could seek a declaratory judgment that a redistricting plan complies with federal and state law, and forever foreclose all citizens from mounting a federal court challenge to the plan. Resp. at 1, 19.

Plaintiffs greatly overstate the effect of an issue preclusion ruling here. A finding of issue preclusion in this case would not forever foreclose any and all constitutional challenges in federal court to Colorado's congressional districts. Rather, such a ruling would mean simply that Plaintiffs cannot relitigate the identical federal constitutional issue previously litigated to conclusion by state officials in a state court case, where, as here, that issue involved a matter of statewide public concern. And, any future challenge would be barred by issue preclusion only if all four criteria of the doctrine were met.

Furthermore, 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. *See Tyus v. Schmoel*, 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"). Thus, the principle announced in *McNichols* and *Atchison* promotes the policy justifications of preclusion law.

In its earlier ruling here, 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 *City of Tacoma* and *Washington*, nothing in Colorado preclusion law dictates a different conclusion here. *See* Opening Br. at 22-23. In sum, under Colorado law, Plaintiffs are in privity with parties in *Salazar*, and are equally bound by that judgment.

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

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. v. Mattox & O'Brien, P.C.*, 990 P.2d 78, 87 (Colo. 1999); *see also Keller*, 299 F. Supp.2d at 1183.

In *Keller*, this Court concluded that 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. Plaintiffs do not take issue with this Court's conclusion in *Keller*, nor do they respond to the Secretary's Opening Brief arguments under *Bebo Construction* that the parties in *Salazar* had a full and fair opportunity to litigate the Elections Clause issue in that case. *See* Opening Br. at 23-24. Rather, Plaintiffs contend they had no opportunity to litigate their claim in *Salazar* because they raise a distinct individual voting rights claim here. *See* Resp. at 26-27. Should this Court agree with the Secretary, however, that Plaintiffs' claim instead presents the same federal constitutional issue litigated to conclusion in *Salazar*, then this Court should conclude, as it did in *Keller*,

that the "full and fair opportunity to litigate" criterion of issue preclusion is met here, as Plaintiffs have offered no other response to the Secretary's arguments on this point.

CONCLUSION

Plaintiffs urge this federal Court to reach the merits of their claim, asserting that "by virtue of *Salazar*, there is no other forum for Plaintiffs to bring their constitutional challenge to Colo. Const. art. V, § 44." Resp. at 25. This assertion effectively concedes the Secretary's position that the "issue" raised here is the same as in *Salazar* and is therefore barred. If Plaintiffs truly present a new, individual rights claim never actually litigated in *Salazar*, then nothing prevents Plaintiffs from bringing such a claim in a Colorado court. State courts have a constitutional obligation to safeguard personal liberties and uphold federal law, and the U.S. Supreme Court has long expressed confidence in the ability of state courts to do so. *See Allen v. McCurry*, 449 U.S. 90, 105 (1980) (citing *Stone v. Powell*, 238 U.S. 465, 493-94 n.35 (1976)); *see also Robb v. Connelly*, 111 U.S. 624, 637-38 (1884)). Presumably, then, Plaintiffs' view that they have no state forum for their Elections Clause claim (by virtue of *Salazar*) stems from their expectation that a Colorado court would find this claim barred by issue preclusion. Yet, if a Colorado court would bar Plaintiffs' claim under state law of issue preclusion (as Plaintiffs apparently believe), then this Court likewise must bar the claim under the Full Faith and Credit Act. *See* 28 U.S.C. § 1738.

As the U.S. Supreme Court has made clear, federal courts are "not free to disregard the full faith and credit statute solely to preserve the availability of a federal forum." *San Remo Hotel, L.P. v. City and County of San Francisco*, 125 S. Ct. 2491, 2507 (2005). 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." *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 84 (1984). Accordingly, where, as here, the issue raised by Plaintiffs has been actually litigated and necessarily decided in a valid state-court judgment, Plaintiffs have no inherent "right" to relitigate this issue in a federal court. *See San Remo Hotel*, 125 S. Ct. at 2504 ("[I]ssues actually decided in valid state-court judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court.").

As set forth in the Secretary's Opening Brief and herein, Plaintiffs' Elections Clause claim is barred by Colorado preclusion law. Accordingly, the Secretary of State 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, then, as stated in her principal brief in support of her motion to dismiss, 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 26th day of June, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2006, I electronically filed the within **SECRETARY OF STATE'S REPLY 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:

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