No. 05-___

IN THE

Supreme Court of the United States

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

Appellants,

v.

GIGI DENNIS, SECRETARY OF STATE FOR THE STATE OF COLORADO, IN HER OFFICIAL CAPACITY ONLY,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Where various state officials litigated in state court a suit concerning the meaning of state law, and the only party in that case purporting to represent state citizens sought to *deny* those citizens their individual rights secured by federal law, does the *Rooker-Feldman* doctrine deprive federal courts of jurisdiction over a later suit filed by state citizens who were not parties to the prior state-court litigation and who seek to vindicate their individual federal rights?

2. 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," 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?

3. Is the First Amendment's Petition Clause, as incorporated against the States by the Fourteenth Amendment, violated by a state constitutional provision that prohibits any legislation on a specific subject matter—here, congressional redistricting—and thereby renders void *ab initio* any effort by citizens to petition the government for redress of their grievances in that area?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the district court included Keith Lance, Carl Miller, Renee Nelson, Nancy O'Connor, and Donetta Davidson, Secretary of State for the State of Colorado, in her Official Capacity Only. Gigi Dennis has succeeded Donetta Davidson as Secretary of State.

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JURISDICTION

The decision of the district court was issued on July 27, 2005, by a three-judge court convened pursuant to 28 U.S.C. § 2284. Appellants filed their Notice of Appeal from the decision of the three-judge court on August 26, 2005. App. 24a-25a. This Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Elections Clause of the United States Constitution, U.S. Const. art. I, § 4, cl. 1, provides:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Petition Clause of the United States Constitution, U.S. Const. am. I, provides:

> Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

1. The Elections Clause provides that congressional districts "shall be prescribed in each State by the *Legislature* thereof." U.S. Const. art. I, § 4, cl. 1 (emphasis added). Acting pursuant to its authority and duty under that provision, the Colorado General Assembly passed Senate Bill 03-352, codified at Colo. Rev. Stat. § 2-1-101, which establishes

congressional districts to be used "until the congressional districts are again reapportioned." Colo. Rev. Stat. § 2-1-101(8). The bill was signed by the Governor and fully complies with federal law. Nevertheless, absent federal court intervention, Colorado will conduct the 2006, 2008, and 2010 congressional elections under a remedial plan that was crafted by a state judge in 2002, before the General Assembly exercised its Elections Clause authority.

On December 3, 2003, immediately after Colorado determined that § 2-1-101 will never be used, four voters (Appellants here) filed the instant suit against the Colorado Secretary of State in federal court. Invoking 42 U.S.C. § 1983, Appellants claimed that (1) the use of the judicial plan instead of the legislative plan would violate their individual rights to vote for congressional representatives in districts authorized by the Elections Clause, and (2) by disabling the General Assembly from enacting redistricting legislation for this decade, the State deprived them of their rights to petition for redress of their grievances, secured by the Constitution's First and Fourteenth Amendments. A three-judge district court was convened pursuant to 28 U.S.C. § 2284.

2. Defendant moved the court to dismiss both the Elections Clause claim and the Petition Clause claim based on *Rooker-Feldman* (*see Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923); *Dist. of Columbia Ct. of App. v. Feldman*, 460 U.S. 462 (1983)) and claim preclusion. Defendant argues that even though Appellants were not parties to any prior litigation, they are seeking appellate review of the Colorado Supreme Court's decision in *Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003). *Salazar* was an original action filed in the Supreme Court of Colorado by Colorado's then-Attorney General against the Secretary of State, seeking to require continued use of the court-approved plan instead of § 2-1-101, solely on the ground that state law deprived the General Assembly of redistricting authority.

The Colorado Supreme Court interpreted Article V, Section 44 of the Colorado Constitution, which provides that "[w]hen a new apportionment shall be made by congress, the general assembly shall divide the state into congressional districts accordingly," as prohibiting the "general assembly" from redistricting more than once per decade. Section 2-1-101 is the first and only post-2000-census redistricting plan enacted by the Colorado General Assembly, but the *Salazar* majority also interpreted "general assembly" to include courts ordering remedial plans when the General Assembly fails to enact a valid plan. *Cf. Colorado Gen. Assembly v. Salazar*, 541 U.S. 1093, 124 S. Ct. 2228 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from denial of certiorari). Because the "general assembly" supposedly had redistricted already—that is, because a court had entered a remedial plan in 2002—the General Assembly was precluded from redistricting for the remainder of the decade, and § 2-1-101 was "unconstitutional and void." 79 P.3d at 1242.[1]

In holding that "the state constitution limits redistricting to once per census, no matter which body creates the districts," the *Salazar* majority concluded that "[n]othing in . . . federal law negates this limitation." 79 P.3d at 1226. Even though the Elections Clause grants authority to "the Legislature," *Salazar* held that it "delegates congressional redistricting power to the states to carry out as they see fit, and not exclusively to the state legislatures." *Id.* at 1232. The *Salazar* majority purported to rely upon *Smiley v. Holm*, 285 U.S.

[1] Individual voters also challenged § 2-1-101 in an action that was filed in Colorado district court and subsequently removed to federal district court. *See Keller v. Davidson*, No. 03-CV-3452 (Colo. Dist. Ct. filed May 9, 2003); *Keller v. Davidson*, No. 03-Z-1482 (CBS) (D. Colo. filed Sept. 25, 2003). The federal court stayed its proceedings pending the outcome of *Salazar*. The *Salazar* decision left the *Keller* plaintiffs with little to litigate, and the federal court dismissed the defendants' counterclaims. *See* 299 F. Supp. 2d 1171, 1182-84 (D. Colo. 2004).

355 (1932), and *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565 (1916), which held that the legislature's actions under the Elections Clause can be made subject to the same legislative processes, including gubernatorial veto and popular referendum, that apply to all legislative enactments in the State. Under the majority's view, these cases announced a sweeping rule: "The United States Supreme Court has interpreted the word 'legislature' in Article I to broadly encompass any means permitted by state law, and not to refer exclusively to the state legislature." 79 P.3d at 1242. The majority concluded that "the word 'legislature,' as used in Article I of the federal Constitution, encompasses court orders," and that disabling the legislature is valid "regardless of the method by which the districts are created." *Id.*

The *Salazar* Court enjoined the implementation not only of § 2-1-101, but also of *any other* legislatively enacted redistricting plan through the 2010 elections. Instead, the Court ordered: "Until Congress apportions seats to Colorado after the next federal census, the Secretary of State is ordered to conduct congressional elections according to the [court-ordered] plan." 79 P.3d at 1243. The Colorado General Assembly's petition for certiorari was denied, albeit over the dissent of three of this Court's members. *See* 541 U.S. 1093, 124 S. Ct. 2228 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari).

3. The district court in this case granted the motion to dismiss the Elections Clause claim on *Rooker-Feldman* grounds. In holding that the Elections Clause claim is an impermissible appeal of *Salazar*, the district court concluded that Appellants' injury—the conduct of elections under an unconstitutional voting district plan—was caused by the Colorado Supreme Court's judgment in the prior case. App. 8a. While recognizing that *Rooker-Feldman* generally "may not be invoked against a federal-court plaintiff who was not actually a party to the prior state-court judgment," *id.* at 7a, the court stated that it would apply the concept of "privity"

from preclusion law and, accordingly, that "[t]he key inquiry here is whether Plaintiffs," four registered Colorado voters, "stand in privity with . . . the General Assembly," a party on the losing side of *Salazar*. *Id.* at 9a.

Amazingly, the court answered that question in the affirmative. The court acknowledged that there was no "evidence of Plaintiffs' substantial participation in the *Salazar* litigation nor . . . evidence establish[ing] that the instant suit was merely part of a larger tactical scheme." *Id.* at 18a. Nevertheless, the court offered the following syllogism: (1) "One relationship long held to fall within the concept of privity is that between a nonparty and a party who acts as the nonparty's representative"; (2) "[t]he very nature of the relationship between the legislature and its constituents is one of representation"; *ergo*, (3) there must be privity between the General Assembly in *Salazar* and Appellants here. *Id.* at 11a. Of course, the flaw in step three of this reasoning is readily apparent—unlike a class representative, for example, whom a court designates as the class members' representative for purposes of specific litigation, a legislature is the people's representative only in *legislative* affairs.

In addition, drawing on "cases dealing with privity in the context of issue and claim preclusion," *id.* at 10a, the court read this Court's decisions in *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 693 n.32 (1979) (holding that Washington State's participation in earlier litigation over common public fishing rights precluded later suit brought by citizens), and *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (holding that outcome of Washington State's litigation regarding validity of Tacoma's federal license to construct power plant on river precluded later suit brought by taxpayers), as announcing the broad principle that "the outcome of the government's litigation over a matter of public concern binds its citizens . . . ." App. 10a.

The district court proceeded to ignore the fundamental fact that the General Assembly, which in *Salazar* asserted only *its* power to redistrict under the Elections Clause, did not and could not litigate Appellants' *individual* rights to vote in constitutionally-compliant congressional districts. According to the district court, the Elections Clause confers no distinct individual rights—and, even if it did, such rights would be merely "derivative of the governmental right vested in the Legislature by the Elections Clause." App. 13a. Thus, the Elections Clause right asserted by Appellants, instead of being an individual right, supposedly "is as much a matter of public concern and as much of a common public right as a State's ability to control the use and development of its navigable waters and streams." *Id.* at 11a. The court held that this was sufficient for *Rooker-Feldman* to bar federal jurisdiction over Appellants' Elections Clause claim.

By contrast, the district court declined to invoke the *Rooker-Feldman* doctrine to bar the Petition Clause claim because "a suit brought by a state cannot preclude private interests." *Id.* at 16a. Because "a citizen's individual claim under the Petition Clause" is such a private, rather than a public, right, the district court refused to find "that the sort of privity between a state government and its citizens" that it held barred Appellants' Elections Clause claim also barred their Petition Clause claim. *Id.* at 17a. The court also held that there could be no claim preclusion because "the issue presented by this claim was not actually decided by the Colorado Supreme Court in *Salazar*." *Id.* at 15a. However, the court did dismiss the Petition Clause claim under Fed. R. Civ. P. 12(b)(6). As the court saw it, "[b]ecause there is no particular right to redress implicated in the Petition Clause, Plaintiffs . . . failed to state a claim upon which relief may be granted." *Id.* at 23a.

Accordingly, in an order filed July 27, 2005, the court dismissed the suit with prejudice. *Id.*

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The result of the decision below is that no *federal* voter can mount a *federal* constitutional challenge in *federal* court to Colorado's congressional voting districts, merely because the same issue was resolved in *state* court litigation among various officials of *state* government concerning the meaning of the *state* Constitution. Specifically, voters here sought to challenge the use of congressional voting districts in the State of Colorado for the rest of this decade that were drawn by a single state-court trial judge, rather than the districts duly enacted by the Colorado General Assembly; the Colorado Supreme Court had interpreted the State's Constitution to require that result. Notwithstanding its "virtually unflagging obligation . . . to exercise the jurisdiction given" it (*Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)), the lower court barred its doors to a lawsuit that fell squarely within the plain language of the statutory grant of jurisdiction. The lower court accomplished this result by engrafting onto the *Rooker-Feldman* doctrine the notion that not only litigants in prior state-court proceedings, but also their "privies," can (somehow) be thought to be bringing impermissible "*de facto* appeals" of the judgments reached in those state-court proceedings. The court compounded that error by expanding this notion of *Rooker-Feldman* privity to include not just those kinds of privity permitted by due process, but also the situation of a legislature and its electing constituents—holding that the former could bind the latter in litigation. The court so held, moreover, even though the state official who purported to litigate on behalf of the people was not a legislator but the Attorney General, who was *adverse* to the legislature in the prior case and is adverse to Appellants here. The decision means that no individual who has cast, or will cast, a vote for Colorado's federal representatives has ever been heard, or can ever be heard, by a federal court on the merits of this federal constitutional issue—and Coloradans will have to vote in

elections illegally carried out under the state-court plan until, at the earliest, 2012.

Indeed, it is crucial that this Court intervene because, since the district court's dismissal of Appellants' Elections Clause claim rested *solely* on its flawed *Rooker-Feldman* analysis, even a summary disposition upholding that judgment here would mean *precedential* ratification of that conclusion. *See Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (summary affirmance has precedential value as to "the precise issues necessarily presented and necessarily decided"). And, particularly given the district court's obvious disinclination to resolve the merits of this suit in a timely manner, the need for this Court to decide the merits of this case—the purely legal question of whether the Elections Clause means what it says when it requires voting procedures to be established by "the Legislature"—is acute.

I. THE DISTRICT COURT WAS WRONG TO HOLD THAT THE *ROOKER-FELDMAN* DOCTRINE DEPRIVED IT OF JURISDICTION OVER APPELLANTS' ELECTIONS CLAUSE CLAIM.

A. The District Court's Decision Cannot Be Squared With This Court's Decision In *Exxon Mobil*.

Last Term, in *Exxon Mobil Corporation v. Saudi Basic Industries Corporation*, this Court directly focused on the application of the *Rooker-Feldman* doctrine for the first time since *Rooker* and *Feldman* themselves. 125 S. Ct. 1517 (2005). The Court noted with disapproval that "the doctrine has sometimes been construed [in the lower federal courts] to extend far beyond the contours of the *Rooker* and *Feldman* cases," *id.* at 1521, with the effect of wrongfully depriving plaintiffs of a day in federal court. Accordingly, the Court emphasized that the doctrine "is *confined* to cases of the kind from which the doctrine acquired its name: cases brought *by state-court losers* complaining of injuries caused *by state-court judgments* rendered before the district court proceed-

ings commenced and inviting district court review and rejection of those judgments." *Id.* at 1521-22 (emphasis added).

Lest there be any ambiguity, this Court went on to explain again that *Rooker-Feldman* does not

> stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case *to which he was a party*, ... then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.

Id. at 1527 (emphasis added and internal quotation marks omitted). The Court therefore refused to "expand *Rooker-Feldman*'s jurisdictional bar to include federal actions that simply raise claims previously litigated in state court." *Id.* at 1524 n.2.

Thus, federal courts plainly have jurisdiction, *Rooker-Feldman* notwithstanding, to entertain identical claims by the *same* parties to the state court proceeding, even if the claim "denies a legal conclusion that a state court has reached" previously. Any issues concerning duplicative or inconsistent judgments are dealt with under state law preclusion principles. *See also Growe v. Emison*, 507 U.S. 25, 32 (1993) ("Of course federal courts and state courts often find themselves exercising concurrent jurisdiction over the same subject matter, and when that happens a federal court generally need neither abstain (*i.e.*, dismiss the case before it) nor defer to the state proceedings.").

Even more obviously, the *Rooker-Feldman* doctrine "has *no* application to a federal suit brought by a nonparty to the state suit." *Exxon Mobil*, 125 S. Ct. at 1523 (emphasis added) (citing *Johnson v. DeGrandy*, 512 U.S. 997, 1005-1006 (1994)); *Johnson*, 512 U.S. at 1006 (*Rooker-Feldman*

is "inapt" if sought to be applied to a federal party that "was not a party in the state court"). In keeping with this straightforward rule, this Court has *never* applied the doctrine to a non-party to state-court litigation.[2]

The court below nonetheless blithely found that *Rooker-Feldman did* apply to non-parties to the state court proceeding, by barring the courthouse door to those "in privity" with state court parties, as determined under claim and issue preclusion concepts. App. 8a. It was fundamental error to utilize privity concepts derived from common-law preclusion principles to resolve the separate question of whether the court had *jurisdiction* to decide the case. The decision below's expansion of *Rooker-Feldman* to encompass non-parties to the state court proceeding was contrary to the plain

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[2] In general, lower courts have also "adhered to the rule that a nonparty to the state action can invoke federal jurisdiction free of the *Rooker-Feldman* bar[.]" 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4469.1 (1981); *see, e.g., Valenti v. Mitchell*, 962 F.2d 288, 297 (3d Cir. 1992) ("We have found no authority which would extend the *Rooker-Feldman* doctrine to persons not parties to the proceedings before the state . . . court and are referred to none."); *Gross v. Weingarten*, 217 F.3d 208, 218 n.6 (4th Cir. 2000); *United States v. Owens*, 54 F.3d 271, 274 (6th Cir. 1995) ("[A] party cannot be said to be appealing a decision by a state court when it was not a party to the case."); *Kamilewicz v. Bank of Boston Corp.*, 100 F.3d 1348, 1351 (7th Cir. 1996); *Bennett v. Yoshina*, 140 F.3d 1218, 1224 (9th Cir. 1998); *Johnson v. Riddle*, 305 F.3d 1107, 1116 & n.7 (10th Cir. 2002); *Amos v. Glynn Cty. Bd. of Tax Assessors*, 347 F.3d 1249, 1265-66 n.11 (11th Cir. 2003). Some courts have suggested that the concept of privity applies in the *Rooker-Feldman* context where the party in the federal action was actually represented by a party in the state litigation. *See, e.g., Kenmen Eng'g v. City of Union*, 314 F.3d 468, 481 (10th Cir. 2002); *Perez-Guzman v. Gracia*, 346 F.3d 229, 234-38 & n.5 (1st Cir. 2003), *cert. denied*, 541 U.S. 960 (2004); *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005); *Marran v. Marran*, 376 F.3d 143, 151-52 (3d Cir. 2004); *T.W. by Enk v. Brophy*, 124 F.3d 893, 898 (7th Cir. 1997). None of these courts has held that non-parties can be barred under *Rooker-Feldman* by litigants who, like the General Assembly here, did not purport to represent non-parties in state court.

language of *Exxon Mobil* and inconsistent with its basic holding that the subject-matter jurisdiction inquiry under *Rooker-Feldman* is separate and distinct from an analysis of whether the federal claim is precluded by *res judicata*. "[N]either *Rooker* nor *Feldman* supports the notion that properly invoked concurrent jurisdiction vanishes if a state court reaches judgment on the same or related question while the case remains *sub judice* in a federal court." 125 S. Ct. at 1527. Rather, the constraints on a state-court party bringing the same claim to federal court are "governed by preclusion law" and "[p]reclusion, of course, is not a jurisdictional matter." *Id.*

Indeed, by definition, the principles underlying *Rooker-Feldman* cannot reasonably be applied to non-parties, regardless of whether or not they are in privity with a state-court party. The "*Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court." *Verizon Md. Inc. v. PSC*, 535 U.S. 635, 644 n.3 (2002) (citing 28 U.S.C. § 1257(a)); *see also Exxon Mobil*, 125 S. Ct. at 1526 (same). Specifically, *Rooker* and *Feldman* held that the district courts' lack of jurisdiction to hear appeals encompassed actions "seeking what in substance would be appellate review of the state judgment," even if the action was not styled as such. *Johnson*, 512 U.S. at 1005-1006. Since Appellants, as state-court non-parties, obviously were "in no position to ask this Court to review the state court's judgment" under § 1257 (*Johnson*, 512 U.S. at 1006), allowing an original action by them in district court cannot resemble a § 1257 appeal, or in any way "undermine" this Court's exclusive appellate jurisdiction.[3]

[3] As non-parties to the prior case, Appellants could not have suffered—and are not now "complaining of"—the type of "injuries caused by [a] state-court judgment[]" that are within the contemplation of the *Rooker-Feldman* doctrine. *Exxon Mobil*, 125 S. Ct. at 1521-22. In the instant

Rather, like the United States in *Johnson*, Appellants "merely seek[] to litigate [their voting rights] case for the first time." *Id.* at 1006. Whether a state court party was in privity with Appellants, therefore, does not afford a basis for denying district courts the jurisdiction granted by the explicit terms of § 1331. Thus, regardless of whether Colorado's preclusion principles require federal courts to abide by the state court's resolution of the Elections Clause question, it was erroneous to conclude that the federal court was without jurisdiction to entertain that claim.

B. Even If "Privity" Were Properly Part Of A *Rooker-Feldman* Analysis, The Conclusion That Appellants Were In Privity With The Colorado Legislature In *Salazar* Cannot Be Correct.

Even assuming that *res judicata* "privity" principles govern whether the court below has jurisdiction to decide Appellants' claim, the privity "rule" created by that court is self-evidently wrong, poses grave risks to voting and other fundamental constitutional rights and is irreconcilable with this Court's binding precedent. In *Town of Lockport v. Citizens for Community Action at Local Level, Inc.*, 430 U.S. 259 (1977), a group of New York voters challenged the constitutionality of certain state laws requiring the approval of both a majority of voters living within city limits, and a majority of voters living outside of city limits, before a new county charter could be adopted. Before a three-judge district court, the defendants raised preclusion, contending that

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suit, Appellants seek to vindicate through 42 U.S.C. § 1983 their individual constitutional right to vote in elections under districts drawn by the correct entity (the legislature). To be sure, a favorable ruling for Appellants here would "den[y] a legal conclusion that [the] state court . . . reached" in *Salazar*, but that is of no moment because it does not, by itself, implicate *Rooker-Feldman*. *Exxon Mobil*, 125 S. Ct. at 1527.

an earlier suit brought by the County of Niagara, "purportedly on behalf of citizens and voters raising substantially the same issues," barred the later suit by individuals. *Citizens for Community Action at Local Level, Inc. v. Ghezzi*, 386 F. Supp. 1, 5 (W.D.N.Y. 1974). That court rejected the defense, however, because (1) "the plaintiffs" in the later suit "were not parties to" the earlier action; (2) "the County had no valid authority to sue on behalf of its citizens and voters"; and (3) "the prior action was not a proper class action brought pursuant to Rule 23." *Id.* at 6. On appeal, this Court affirmed, holding: "The District Court properly rejected th[e] defense [of *res judicata*] upon the ground that the plaintiffs [in the later suit] had not been parties to the earlier suit and *were not in privity with* the county of Niagara, which had brought it." *Town of Lockport*, 430 U.S. at 1051 n.7 (emphasis added); *see also Cleveland County Ass'n for Gov't by People v. Cleveland Bd. of Comm'rs*, 142 F.3d 468, 474 & n.11 (D.C. Cir. 1998) (rejecting argument that individuals could not challenge consent decree as to method of electing county commissioners because the individuals were represented in the litigation that produced the decree by elected county board); *Patterson v. Burns*, 327 F. Supp. 745, 749 (D. Haw. 1971) (three-judge court).

This is a far easier case than *Lockport* for a number of obvious reasons. There, the county was challenging the State's interference with the right of county citizens to amend the charter that governed their affairs. Thus, there was a commonality of interest between the county and its citizens relative to the State's encroachment on their self-government. Here, the constitutional entity allegedly in privity with the citizens—*i.e.*, the State—is the same entity that, through its Constitution, *caused* the deprivation of federal constitutional rights. Moreover, unlike Niagara *County,* here it is one *subunit* of the State—the legislative branch—that purportedly represents all of the State's citizens. Even assuming *arguendo* that "[w]hen a *state* litigates common public rights, the

citizens of that state are bound by the judgment," (App. 16a (quoting *Satsky v. Paramount Comm'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (emphasis added))), no case anywhere has suggested that the State's *legislative branch* may engage in such preclusive "representation."

The fact that Appellants were not even allegedly "represented" by the State, but only the General Assembly, is enough, standing alone, to render completely inapposite this Court's cases holding that if citizens are "represented by the *State*," they may be bound in litigation involving "common public rights as citizens of the State." *Tacoma*, 357 U.S. at 341; *see also Washington*, 443 U.S. at 693 n.32. Here, there is no contention that the "State" of Colorado represented, or is in privity with, Appellants. To the contrary, the State, through its Constitution, established the scheme for conducting the federal elections that violates the Elections Clause. Indeed, here, it would have been impossible for the *State* to speak in *Salazar* for its citizens on the Elections Clause question, since the State was at war with itself on that very issue. As the *Salazar* opinion noted, the Attorney General, who took a position adverse to the General Assembly on the Elections Clause (and everything else), is vested with the power "to protect the rights of the public" and, "as the chief legal officer of the state, is here in the interest of the people to promote the public welfare." 79 P.3d at 1230 (internal quotation marks omitted). This confirms the obvious point that the General Assembly is not the entity of state government that represents the State or its citizens in court. And the state actor that does fill that role—the Attorney General—is obviously not in privity with Appellants, since he was and is adverse to them on their view of the Elections Clause. App. 9a n.8. The three-judge court sought to avoid this dispositive point through a semantic play on the word "representation," asserting that the "very nature of the relationship between that of the legislature and its constituents is one of representation." *Id.* at 11a. But, of course, the fact

that the legislature represents the citizens' interests when enacting legislation hardly suggests the legislature can bind those citizens by taking part in *litigation*.

In any event, the voting rights advanced by Appellants here are not "common public rights" where the State can speak for and bind its citizens. In *Washington* and *Tacoma*, the State was asserting *its* control over, respectively, navigable waters and a state-owned fish hatchery, against encroachments and assertions of eminent domain by other sovereign entities—the United States and Indian tribes in *Washington* and the City of Tacoma in *Tacoma*.[4] In such border or property disputes, the State is obviously asserting its *own* interests as a State. Indirectly affected citizens—the fishermen in *Washington* and the "taxpayers" in *Tacoma*—had no independent rights, but only a derivative right stemming from their enjoyment of the state-controlled property (or the reduced tax burden stemming from the State's asserted prerogative). This is why the *Tacoma* opinion cited only original jurisdiction, border-dispute cases between States, for the proposition that a State can bind its citizens concerning "common public rights." 357 U.S. at 341.

Here, Appellants are plainly not asserting derivative rights, stemming from the State, for two straightforward reasons. First, again, the *State* never advanced a position in the state-court litigation intended to *enhance* the constitutional right Appellants assert in federal court. The State, through its Constitution, is the instrument that infringed the asserted federal right.

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[4] In the second suit in the *Tacoma* litigation, which resulted in the *Tacoma* opinion, the taxpayers of the City of Tacoma were adverse to the City, and aligned with the State's position in the prior state suit. The City had commenced the second suit to secure a judgment that it could issue bonds to pay for a dam project that the State had sued to prevent (and lost) in the first suit, and Washington law required that "representative" taxpayers be named as defendants in the later suit. 357 U.S. at 329.

Second, the "*individual's* right to vote" in federal elections conducted in accordance with the Constitution is not some common public right derived from the State, or a situation where the State is authorized to speak for its citizens. *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see U.S. Term Limits Inc. v. Thornton*, 514 U.S. 779, 844 (1995) (Kennedy, J., concurring) ("[T]he federal right to vote . . . in a congressional election . . . do[es] not derive from the state power in the first instance but . . . belong[s] to the voter in his or her capacity as a citizen of the United States.").[5] Rather, it is a personal right, guaranteed by the federal Constitution with which a State may not interfere. *Cf. U.S. Term Limits, Inc.*, 514 U.S. at 842 (Kennedy, J., concurring) ("Nothing in the Constitution or The Federalist Papers . . . supports the idea of state interference with the most basic relation between the National Government and its citizens, the selection of legislative representatives."); *United States v. Classic*, 313 U.S. 299, 315 (1941) ("[T]he right of qualified voters within a state to cast their ballots and have them counted at Congressional elections . . . is a right secured by the Constitution" and "is secured against the action of . . . states."). For this reason, of course, the vast majority of voting rights cases challenge encroachments by the States, or their instrumentalities, on the constitutional right to vote.

The court below recognized this truism with respect to the Petition Clause claim, holding that the State could hardly be

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[5] *See also Burson v. Freeman*, 504 U.S. 191, 199 (1992) ("[T]he right to vote freely for the candidate of one's choice is the essence of a democratic society.") (internal quotation marks omitted); *Evans v. Cornman*, 398 U.S. 419, 422 (1970) ("[T]he right to vote, as the citizen's link to his laws and government, is protective of all fundamental rights and privileges."); *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000) (holding that the standing of certain members of a legislature to represent that body's interests in voting legislation "sheds no light on whether the voters in this case, who are individually subject to and affected by the election scheme they challenge, have standing").

in privity with, or bind, those citizens claiming that the state Constitution had violated their federal constitutional right to petition for redress of grievances. App. 20a-21a. Nevertheless, the court contended that the right to have elections conducted in accordance with the federal Constitution—*i.e.*, in the manner prescribed by the legislature thereof—is not "some sort of distinct individual right" but is one that is "necessarily derivative of the governmental right vested in the legislature by the Elections Clause." App. 13a; *see id.* at 13a n.13 ("Article I, § 4 of the Federal Constitution by its language vests power in the legislature, not in ordinary citizens, and . . . [r]eapportionment is necessarily a governmental act rather than an individual act."). This astonishing assertion is premised on a profound misunderstanding of both the right to vote and the nature of challenges based on the Constitution's structural guarantees.

Individual rights can be affected directly—by, for example, denying a criminal defendant due process—or through structural manipulation to disrupt the checks and balances that were designed to protect citizens against an oppressive government—such as by being subject to adjudication or prosecution by entities not authorized to perform those functions. *See Edmond v. United States*, 520 U.S. 651, 655-56 (1997); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982); *Glidden v. Zdanok*, 370 U.S. 530, 533 (1962); *cf. Morrison v. Olson*, 487 U.S. 654, 670-97 (1988). For this reason, persons subject to prosecution or regulation by an improper authority have an individual right to mount a separation-of-powers challenge—not some right *derivative* of the right of the President to appoint federal officers or to execute the law. This is why candidate Buckley and Mr. Olson had an individual right to challenge the composition of the Federal Elections Commission and the Independent Counsel, regardless of what litigation position was taken by the Executive Branch concerning the Presidential prerogatives that were allegedly being infringed.

See Buckley v. Valeo, 424 U.S. 1, 68 (1976); *Morrison*, 487 U.S. at 680-81. This is because separation-of-powers guarantees are not designed merely to protect the occupants of the respective branches, but to ensure the liberty of citizens against branches unlawfully exceeding their assigned responsibilities. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 482 (1998) (noting that "the principal function of the separation-of-powers" is "to maintain the tripartite structure of the Federal Government" and "thereby protect individual liberty"); Montesquieu, *The Spirit Of The Laws* 157 (1752) (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) ("When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them."). Indeed, this Court has been quite wary of the notion that the branches whose prerogatives have allegedly been infringed have standing to challenge that infringement in court (*e.g., Raines v. Byrd*, 521 U.S. 811, 828-30 (1997)), and, indeed, all separation-of-powers challenges resolved by this Court have been brought by citizens challenging the misallocation of governmental authority.

Like the separation-of-powers guarantees at the federal level, the Elections Clause specifies which entity within the State may prescribe the manner of federal elections. Voters plainly have a right to challenge state laws which violate the constitutionally guaranteed method for holding federal elections. Just as they may challenge defects in the methodology itself, they may challenge deficiencies in *who prescribes* the methods. Accordingly, in redistricting cases, voters routinely invoke an independent individual right to challenge plans drawn by federal courts that have impermissibly "preempt[ed] the legislative task." *White v. Weiser*, 412 U.S. 783, 795 (1973). In *Upham v. Seamon*, 456 U.S. 37 (1982), for example, the Court held that in devising a remedial plan, the district court was "not free . . . to disregard the political

program of the Texas State Legislature," unless it violated federal law. *Id.* at 43. Although they were "supported [in their] appeal by the State of Texas," the named appellants in the case were individuals asserting their rights to have the State use a legal redistricting plan. *Id.* at 41 & n.5.[6] Just as voters have a right to challenge federal court plans that invade state legislative prerogatives, the voters here have a right to challenge the plan drawn by state courts, because it invades the legislature's prerogatives set forth in the text of the Elections Clause. In resolving these challenges to a federal court's interference with a state legislature's reapportionment policies, no case has ever hinted that a right to a legislatively-drawn plan was somehow "derivative" or that the litigation posture of state officials could somehow "bind" voters. In *Growe*, for example, the federal court was free to determine *de novo* whether the previously-drawn state-court plan violated the Voting Rights Act, without giving any preclusive effect to the state court's prior determination, supported by state election officials, that the plan complied with the Act. *Growe*, 507 U.S. at 29.

Indeed, this Court's prior Elections Clause cases directly confirm that this specific provision confers individual rights. For example, in *Ohio ex rel. Davis v. Hildebrant*, 241 U.S.

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

565 (1916), the Court adjudicated an individual's claim that the Elections Clause required enforcement of the state legislature's enactment. *See also Smiley v. Holm*, 285 U.S. 355 (1932) (dispute between voter and state official concerning power of state legislature under Elections Clause); *Cook v. Gralike*, 531 U.S. 510 (2001) (same). For the same reason, Presidential candidates have an independent right to insist that the manner for choosing Presidential electors be set by the "Legislature" under Article II, § 1, cl. 2. *Bush v. Gore*, 531 U.S. 98 (2000); *cf.* App. 13a n.12 (acknowledging that decision below would mean there was no standing under Article II in *Bush*, and seeking to distinguish *Bush* on grounds that "the Supreme Court never discussed Governor Bush's standing"). *See also McPherson v. Blacker*, 146 U.S. 1 (1892) (suit by nominees for presidential electors concerning validity of elections under same clause).

In short, whatever the scope of a State's ability to bind citizens concerning "common public rights," it cannot possibly extend to a situation where the State *denies* federally-guaranteed *voting* rights.[7]

Finally, in *Salazar*, the General Assembly did not *purport* to act as the representative of Colorado's citizens in litigation. Rather, the General Assembly intervened to protect its

[7] Indeed, there is no privity here even under the standards articulated by the three-judge court itself. According to the court below, States cannot represent or bind citizens with respect to a "private interest," which is defined as a "claim that the state has no standing to raise." App. 17a (quoting *Satsky*, 7 F.3d at 1470). *See* Wright, Miller & Cooper, *supra*, § 4458.1 (where rights are "individual and private," "the government . . . clearly cannot foreclose private remedies"). Here, the state legislature had no standing because it could not bring a § 1983 suit to challenge the state Constitution's violation of the Elections Clause. 15 Am. Jur. 2d *Civil Rights* § 85 (2004) ("a state is not an entity capable of bringing suit as a plaintiff under 42 U.S.C. § 1983"). Nor did the court below offer any hint as to how the General Assembly could get into any court to mount a federal challenge to the state Constitution—which, of course, created the General Assembly.

institutional right to enact a redistricting plan. Thus, "to contend that [it] . . . somehow represented [Appellants], let alone represented them in a constitutionally adequate manner, would be to 'attribute to [it] a power that it cannot be said that [it] had assumed to exercise.'" *Richards v. Jefferson County*, 517 U.S. 793, 802 (1996) (quoting *Hansberry v. Lee*, 311 U.S. 32, 46 (1940)).[8] Indeed, *Richards* held that due process *requires*, at a minimum, that the state official *purport* to represent citizens before it can be in privity with, or bind, the citizens. *Id.* *See infra* pp. 22-23.

Consequently, for all the reasons stated, affirmance of the decision below would dramatically distort both *Rooker-Feldman* and privity principles. Equally important, it creates the clear potential for barring the courthouse door to meritorious voting rights claims and would greatly disrupt the already complicated litigation surrounding each redistricting cycle. Under this decision, state officials supporting a redistricting plan can simply seek a declaratory judgment that the plan complies with state and federal law, naming other state officials as nominal defendants.[9] As here, a favorable state court adjudication in litigation between such public officials would forever foreclose all the State's citizens from mounting a federal court challenge to the plan. Even absent any gamesmanship, a redistricting plan often will be ordered into effect by a state court in litigation to which state officials are party. *See Growe*, 507 U.S. at 25 (federal court must give state court first opportunity to devise plan to remedy "one person, one vote" violation). Under the district court's analysis, the federal courts cannot hear federal-law chal-

[8] The only party that in *Salazar* purported to be acting as the public's representative in litigation, and was found by the Colorado Supreme Court to be acting as such, was the Colorado Attorney General. *See Salazar*, 79 P.3d at 1229-30.

[9] Forty-three States have adopted the Uniform Declaratory Judgments Act, which would appear to allow such a suit. *See* U.D.J.A. §§ 1, 2, 13; 12 U.L.A. 309.

lenges to such plans so long as a state official invoked the same federal provision in state court. That cannot be the law. Federal courts must remain open to hear such claims. *Cf. Hibbs v. Winn*, 124 S. Ct. 2276, 2281 (2004) (holding the Tax Injunction Act did not bar federal court action to vindicate federal constitutional rights, in part because, when States circumvented *Brown v. Bd. of Ed.*, 347 U.S. 483 (1954), by manipulating their tax laws, it was "the federal courts" that "upheld the Constitution's equal protection requirement" by "adjudicat[ing] . . . challenges[] instituted under 42 U.S.C. § 1983"); *Steffel v. Thompson*, 415 U.S. 452, 464 (1974) (with enactment of § 1983 and general federal-question jurisdiction statute, "the lower federal courts . . . became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States") (internal quotation marks omitted).

C. The Decision Below Violated The Due Process Clause Or, At A Minimum, Raises Serious Constitutional Questions That Foreclose Its Expansion Of *Rooker-Feldman*.

At a minimum, the manner in which the decision below barred the doors of the federal courts to plaintiffs who plainly satisfied all requirements for jurisdiction, solely because of the plaintiffs' alleged "privity" with a unit of state government, raises serious due process concerns. It is well-established that "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings." *Postal Tel. Cable Co. v. City of Newport*, 247 U.S. 464, 476 (1918); *see also Richards*, 517 U.S. at 797 n.4 (collecting cases). Consequently, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Such strangers "may not be collaterally estopped . . . without litigating the issue," even if "one or more existing adjudications of the identical issue . . . stand squarely against their position," be-

cause "[t]hey have never had a chance to present their evidence and arguments on the claim." *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971). This rule "is part of our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Richards*, 517 U.S. at 798 (quoting Wright, Miller & Cooper, *supra*, § 4449).

Because the result of a conclusion of "privity" is depriving the party to the second case of his day in court, this Court has found privity—consistent with constitutional limitations—to exist only "in certain limited circumstances." *Id.* As relevant to the instant case, these include: (1) "class" or "representative" suits, and (2) suits where the party to a second suit "control[led]" the earlier litigation "on behalf of one of the parties in the litigation." *Wilks*, 490 U.S. at 762 n.2; *see Richards*, 517 U.S. at 802. Neither of these situations, however, exists here: (1) *Salazar*, an original proceeding in the Colorado Supreme Court initiated by Colorado's Attorney General, was not a class action, and (2) as the three-judge court expressly stated in the context of Appellants' Petition Clause claim, there is no evidence here of Appellants' "substantial participation in the *Salazar* litigation," nor that "the instant suit was merely part of a larger tactical scheme" (App. 18a)—let alone that Appellants "control[led]" *Salazar* "on behalf of" the Colorado legislature. *Wilks*, 490 U.S. at 762 n.2.[10]

The due process requirements that override state preclusion law also must limit, *a fortiori*, the scope of the exception that the *Rooker-Feldman* doctrine reads into federal jurisdictional statutes. When "a serious doubt of constitution-

[10] Nor does it matter whether Appellants could have intervened in *Salazar*. "The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.*

ality is raised, it is a cardinal principle that [courts] will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *McConnell v. FEC*, 540 U.S. 93, 180 (2003) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). Such constitutional avoidance is particularly warranted here since *Rooker-Feldman* is not based on any express statutory limits on jurisdiction, but on a negative inference derived from § 1257's grant of exclusive appellate jurisdiction. It is plainly impermissible to engraft onto *Rooker-Feldman* the *broad* notion of privity endorsed by the three-judge court; if privity even belongs in a *Rooker-Feldman* analysis, it should be limited to those narrow situations in which this Court has found litigation by one party to deprive another of his day in court, consistent with the requirements of due process. Because neither of those situations is present here, that court's finding of privity was error.

II. ARTICLE V, § 44 OF THE COLORADO CONSTITUTION IS UNCONSTITUTIONAL.

A. Article V, § 44 Violates The Elections Clause; The Court Should Decide This Claim.

If the Court agrees the district court erred in holding that *Rooker-Feldman* barred the Elections Clause claim, it should then address that claim. The exigencies of the circumstances, precedent, and the strength of Appellants' case on the merits all support that course.

The exigencies are clear enough. Although Colorado violated the Elections Clause by failing to use § 2-1-101 for the 2004 elections, there is cause to hope that the legislative plan could be used for the 2006 elections if this Court reaches the merits and issues its opinion in the normal course. If instead there is a remand followed by a second appeal, there is a real possibility that both the 2006 and 2008 elections will be conducted under the same illegal plan used for the 2004 elections before this Court can finally settle the issue—leaving only one election in this entire decade, the

2010 election, to be conducted in accordance with law. The need for quick, decisive action by this Court is thus plain.

Moreover, Appellants' Elections Clause claim presents a pure question of law, with no record development required: Whether the Elections Clause, 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" (emphasis added), permits a State to disable its 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. Indeed, the Colorado Supreme Court in *Salazar* addressed the Elections Clause issue in an original action decided on briefs without any record development. In such circumstances, where the issue presented is legal and is not in need of record development, this Court has not hesitated to simply adjudicate the issue, rather than remand for the district court to offer its view. *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) (holding that a court's denial of a claim of qualified immunity is an appealable "final decision" to the extent that it turns on an issue of law, then proceeding to address the merits of petitioner's claim of qualified immunity, because "that question was one of the questions presented in the petition for certiorari which we granted without limitation," and "the purely legal question on which [the] claim of immunity turns is appropriate for our immediate resolution notwithstanding that it was not addressed by the Court of Appeals") (citing *Nixon v. Fitzgerald*, 457 U.S. 731, 743 n.23 (1982)) (internal quotation marks omitted). The result should be no different here. Indeed, if anything, the nature of this case—committed by statute to a three-judge panel, from which there is an automatic right of appeal, on this legal question which would be reviewed by this Court *de novo*—makes this Court's addressing the merits now arguably even more appropriate than

in *Mitchell* and *Nixon*, both of which reached this Court on petitions for certiorari.[11]

Finally, the Elections Clause claim squarely presents an issue worthy of this Court's review. Indeed, three members of this Court have already so signaled, in dissenting from this Court's denial of the petition for writ of certiorari filed by the Colorado legislature in *Salazar*. *See* 541 U.S. 1093, 124 S. Ct. 2228 (2004) (Rehnquist, C.J., joined by Scalia and Thomas, JJ., dissenting from the denial of certiorari).

As that dissent noted, Article V, Section 44 of the Colorado Constitution "exclude[s] the legislature itself in favor of the courts" for purposes of congressional redistricting. Thus, "participation in the process by a body representing the people, or the people themselves in a referendum," is "[c]onspicuously absent." 124 S. Ct. at 2230. This is directly contrary to the Elections Clause's mandate that "the *Legislature*" set the times, places, and manner of congressional elections.

As this Court has emphasized, the term "Legislature" was not one "of uncertain meaning when incorporated into the Constitution," and, thus, "[t]here can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states." *Hawke v. Smith*, 253 U.S. 221, 227-28 (1920). "What it meant when adopted it still means for the purpose of interpretation. A Legislature was then the representative body which made the laws of the people." *Id.* at 227; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 602 (2000) (Stevens, J., dissenting) ("[T]he text of the Elections Clause suggests that . . . an initiative system, in which popular choices regarding the manner of

[11] Should this Court agree with Appellants' view of the *Rooker-Feldman* question, but not be inclined to reach the merits of the Elections Clause claim in this appeal, Appellants respectfully request, in the interest of time, a summary reversal and remand.

state elections are unreviewable by independent legislative action, may not be a valid method of exercising the power that the Clause vests in state 'Legislatures.'").

While the Court has correctly held that the legislature can be required to follow the ordinary lawmaking *process* to enact a binding law governing federal elections, it has emphasized that the lawmaking *body* for federal elections must be the state legislature. As Chief Justice Rehnquist succinctly explained in his *Salazar* dissent, in *Smiley*, 285 U.S. 355, the state legislature's congressional redistricting plan could be vetoed by the Governor because "the function referred to by Article I, § 4, was the lawmaking process, which is defined by state law" and, "[i]n Minnesota, . . . included the participation of the Governor." 124 S. Ct. at 2230. Similarly, in *Ohio ex rel. Davis*, 241 U.S. 565, "referend[a] to approve or disapprove by popular vote *any* law enacted by the General Assembly" were "consistent with Article I, § 4." 124 S. Ct. at 2230 (emphasis added). But "there was no question" in those cases that congressional redistricting was being accomplished by the "'body' the term 'legislature' describes." *Id.* at 2229; *see Smiley*, 285 U.S. at 365 (quoting *Hawke*, 253 U.S. at 227).[12] State law in those cases was merely imposing

[12] The power of courts to engage in redistricting as part of their remedial authority does not, of course, suggest that a court is a "Legislature" under the Elections Clause. A state court that enjoins implementation of malapportioned districts created during the prior decade, and enters a constitutionally prescribed remedy, is acting pursuant to the judicial power to remedy constitutional violations, since state courts have concurrent jurisdiction with federal courts to prevent such violations of Article I, Section 2. *See Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). In doing so, courts are not exercising any delegated legislative power under the Elections Clause, as evidenced by this Court's repeated holdings that judicial redistricting plans may be ordered only in the face of legislative inaction and exist only so long as the legislature does not fulfill its duty to redistrict. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("Legislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it

the same requirements that applied to *all* lawmaking, rather than a unique restriction for congressional redistricting.

Thus, *Smiley* and *Hildebrant* are consistent with the principle that the Elections Clause's delegation to "the *Legislature*" must impose "some limit on the State's ability to define lawmaking by excluding the legislature itself in favor of the courts." 124 S. Ct. at 2230. While a State normally can organize its internal powers as it deems fit, the Elections Clause is one of the "few exceptional cases in which the Constitution imposes a duty or confers a power on a particular branch of the State's government." *Bush*, 531 U.S. at 112 (Rehnquist, C.J., concurring). Equally important, States have no inherent power reserved under the Tenth Amendment to regulate federal elections. *See Cook*, 531 U.S. at 522; *U.S. Term Limits*, 514 U.S. at 804-05. Accordingly, "the words 'shall be prescribed in each State by the *Legislature* thereof' operate as a limitation on the State." *Salazar*, 124 S. Ct. at 2230; *see McPherson*, 146 U.S. at 25; *see also Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70, 77 (2000) (remanding because there were "expressions in the opinion of the Supreme Court of Florida that may be read to indicate that it construed the Florida Elections Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, § 1, cl. 2, 'circumscribe the legislative power'") (quoting *McPherson*, 146 U.S. at 25); *Baldwin v. Trowbridge*, 2 Bartlett Contested Election Cases, H.R. Misc. Doc. No. 152, 41st Cong., 2d Sess., 46, 46 (1866) ("Where there is a conflict of authority between the constitution and legislature of a State in regard to fixing place of elections, the power of the legislature is paramount.").

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becomes the 'unwelcome obligation' of the federal court to devise and impose a reapportionment plan *pending later legislative action.*") (internal citation omitted) (emphasis added)).

These precedents demonstrate that the Colorado Constitution impermissibly circumscribes legislative power by transferring Elections Clause authority from the state legislature to the courts if the legislature fails to adopt congressional districts before the expiration of a severe time limit inapplicable to any other legislation. Chief Justice Rehnquist's statement—that Article V, Section 44 of the Colorado Constitution merits review by this Court—remains as true today as it was then. Indeed, because *Salazar* involved various discretionary judgments concerning the Court's certiorari docket, this direct appeal is an even more attractive vehicle for the Court to address the Elections Clause issue.

B. Article V, § 44 Also Violates The Petition Clause.

Even the court below did not believe *Rooker-Feldman* could be stretched to bar Appellants' Petition Clause claim. It erred, however, in rejecting this claim on the merits. For reasons similar to those set out above regarding the Elections Clause, the Petition Clause prohibits the continued use of the court-drawn congressional districts in Colorado elections.

Far from merely requiring that a law not, for example, dilute minority votes or divide counties between districts, the Colorado Constitution prohibits the General Assembly from enacting *any* redistricting legislation after the artificial "deadline." This absolute barrier to lawmaking indisputably "prohibit[s] or discourage[s]" petitioning for redress of redistricting grievances, since any such petitioning is entirely meaningless no matter what particular redistricting outcome a citizen might seek. *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 466 (1979). And governmental prohibition or discouragement is the "type of impairment" of petitioning "that the Constitution prohibits." *Id.* (internal quotation marks omitted).

Indeed, this Court has recognized that serious constitutional concerns are raised when a State "removes the authority to address" a particular type of problem "from the existing decisionmaking body." *Washington v. Seattle Sch. Dist.*

No. 1, 458 U.S. 457, 474 (1982). In such cases, the Court emphasizes the "simple but central principle" that only "laws structuring political institutions or allocating power according to 'neutral principles'—such as the executive veto, or the typically burdensome requirements for amending state constitutions—are not subject to [constitutional] attack." *Id.* at 469-70. The barrier imposed by the Colorado Constitution here, like the law struck down in *Washington*, does not apply evenhandedly to all types of legislation but instead singles out one area, redistricting, for different treatment. In addition, the constitutional violation is even more palpable here than in *Washington*, where authority to enact the type of legislation at issue simply was transferred from local school boards to the state legislature. *Id.* at 474. Those seeking to have the issue addressed through legislation had "to surmount a considerably higher hurdle" but, unlike here, did not have their efforts rendered void *ab initio*. *Id.*

The absolute ban on legislative redistricting makes this case more closely akin to another in which this Court struck down a Colorado constitutional provision barring all legislation on a specific subject matter. *Romer v. Evans*, 517 U.S. 620 (1996). The Court there recognized that "[i]t is not within our constitutional tradition to enact laws of this sort"—even where such laws do not implicate protected groups or fundamental rights. *Id.* at 633; *see id.* at 631. Indeed, the instant case is easier than *Romer* because the Colorado Constitution's unique bar to redistricting implicates the fundamental right to vote and, moreover, prevents the legislature from acting in an area where it has at least the primary, if not the exclusive, authority and duty under the federal Constitution. *See supra* Section II.A. For these reasons, too, Article V, § 44 is unconstitutional.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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