

<p>SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203</p>	
<p>ORIGINAL PROCEEDING PURSUANT TO COLO. CONST. ART. VI, § 3</p>	
<p>Petitioner: PEOPLE OF THE STATE OF COLORADO, <i>EX REL.</i> KEN SALAZAR, in his official capacity as Attorney General for the State of Colorado,</p> <p>Petitioners-in-Intervention: MARK UDALL, individually as a citizen of Colorado, and in his capacity as the elected representative to the United States House of Representatives for the Second Congressional District of the State of Colorado; and BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITKIN,</p> <p>Respondent: DONETTA DAVIDSON, in her official capacity as Secretary of State for the State of Colorado,</p> <p>Respondent-in-Intervention: COLORADO GENERAL ASSEMBLY.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Case Number: 03 SA133</p>
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<p style="text-align: center;">BRIEF <i>AMICUS CURIAE</i> OF THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF ATTORNEY GENERAL'S PETITION</p>	

Proposed Amicus Curiae, the Brennan Center for Justice at NYU School of Law (“Brennan Center”), on behalf of itself and through its co-counsel, O’Melveny & Myers LLP, and pursuant to this Court’s *Order and Rule to Show Cause*, dated May 15, 2003, hereby submits its brief in support of the *Petition Pursuant to Colo. Const. Art. VI, § 3*, filed by the Attorney General (the “Petition”).

IDENTITY AND INTEREST OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Through the Brennan Center’s Voting and Representation Project, which is part of its Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and political participation. Along with working on issues raised by legislative redistricting, the Voting and Representation Project has also addressed census policy, voter turnout, and the restoration of ex-felons’ voting rights. The Brennan Center takes an interest in this case because of its important implications for the ability of voters in all states to have a meaningful voice in their government in light of increasingly sophisticated methods of creating partisan gerrymanders.

INTRODUCTION

The extent to which partisan advantage can permissibly serve as one of several goals in post-census redistricting is among the most difficult questions in election law, one that the Supreme Court will wrestle with once again this coming Term. *See Vieth v. Jubelirer*, 71 U.S.L.W. 3709, 3793, 3798 (U.S. June 27, 2003) (No. 02-1580) (noting probable jurisdiction).

This case does not present that question. Instead, it raises the far simpler question of whether a legislature can alter election rules midstream for the *sole* purpose of partisan advantage and justify the discrimination against disfavored voters by labeling it “redistricting.”

Periodic redistricting is constitutionally required. It serves the crucial function of restoring legality to old districts that no longer satisfy the “one person, one vote” standard. Partisan considerations inevitably play a role in the necessary process of redrawing the lines, along with other criteria such as respecting county and municipal boundaries to the extent possible, keeping communities of interest united, and so on. Determining when partisan motives and effects become so dominant as to invalidate the entire process is a difficult judgment, and courts naturally tend to defer to the legislature. But in this novel “re-redistricting” in which the majority forthrightly announces that partisan motives are the *only* purpose of the enactment, and when the *only* effect is differentially to alter voters’ ability to elect candidates of their choice based on the voters’ political affiliations, no deference is required: the act is unconstitutional.

It is this aspect of S.B. 03-352—its replacement of valid districts that this Court had approved with a new map designed to enhance one political party’s electoral prospects—that distinguishes it from a standard redistricting statute. The scrutiny that should be applied to this sort of enactment should be no different from the scrutiny that would be applied to acts that use the political affiliations of voters in different precincts as the basis for preferential rules governing poll opening times, voting machines, or voter registration requirements. These hypothetical laws would obviously be unconstitutional; the differing political affiliations of voters in different areas could not justify treating some better than others.

The Secretary of State and the General Assembly both argue that because S.B. 03-352 is a redistricting measure, it is essentially insulated from review. Even if that were true of an ordinary redistricting, it would not be true of this extraordinary re-redistricting whose sole purpose is to entrench a narrowly elected Congressman by making it virtually impossible for constituents who oppose the dominant party to remove him at any of the next four elections.

To assure “one person, one vote” through periodic redistricting, some might view the attendant partisan and incumbent entrenchment as a necessary evil. But in this case, it was not necessary.

STATEMENT OF FACTS

When the General Assembly failed to redistrict after the 2000 census in time for the 2002 elections, Judge John Coughlin of the Denver District Court promulgated the present set of congressional districts. *Avalos v. Davidson*, No. 01 CV 2897, 2002 WL 1895406 (Colo. Dist. Ct. Jan. 25, 2002). In issuing this map, Judge Coughlin applied traditional, neutral redistricting criteria, and the other applicable Constitutional and legal principles forth in *Carstens v. Lamm*, 543 F. Supp. 68 (D. Colo. 1982). *Avalos*, 2002 WL 1895406, at *2. More specifically, Judge Coughlin drew seven congressional districts with equal population, avoided minority vote dilution, and, to the extent possible, created compact and contiguous districts that preserved political subdivision boundaries and communities of interest. *Id.* Judge Coughlin’s map was affirmed by this Court on appeal. *Beauprez v. Avalos*, 42 P.3d 642, 649-53 (Colo. 2002). No subsequent action was taken by the General Assembly, and the 2002 election proceeded under the map affirmed in *Avalos*.

One critical feature of the *Avalos* plan was the benefit afforded all voters in Congressional District 7, irrespective of their political preference. District 7 was a new district created after the 2000 Census to reflect Colorado’s population growth. Consisting of parts of Jefferson, Adams, and Arapahoe Counties, it was expected from its promulgation to be a competitive district in which voters of all affiliations—Democrats, Republicans, and independents—would have a comparable opportunity to see their candidate of choice win election. *Avalos*, 2002 WL 1895406, at *7. And so it was, as the voters of Congressional District 7 participated in the closest congressional race in the United States during the 2002 election cycle, eventually won by Republican Bob Beauprez by 121 votes. *See* Gregory L. Giroux, *Beauprez, a Narrow Winner in 2002, May Campaign in a More GOP-Friendly District*, Congressional Quarterly Daily Monitor, May 16, 2003.

The 2002 election cycle also gave the Republican Party control over both houses of the General Assembly and the Governorship. Although Judge Coughlin’s order in *Avalos* provided that the current map would remain in place until the next census, *see Avalos*, 2002 WL 1895406, at *13 (ordering that congressional elections “in 2002 and *thereafter* be conducted in and from the congressional district[s] established in this opinion”) (emphasis added), and there have been no challenges to the legality of the current map, the General Assembly decided to enhance the political influence of some voters—and weaken the votes of others—by revising the map during the final week of the 2003 legislative session. *See* Michael Riley, *Dems Blast Plan to Alter Congressional District Lines*, The Denver Post, May 5, 2003, at B6. After several hotly contested parliamentary maneuvers, the General Assembly passed S.B. 03-352 on May 7, 2003,

and the bill was signed into law by Governor Bill Owens on May 9, 2003. See T.R. Reid, *GOP Redistricting: New Boundaries of Politics?*, Wash. Post., July 2, 2003, at A04.

S.B. 03-352 principally altered the boundaries of District 7 to make it more likely that Republican voters in District 7 could elect their candidate of choice, and less likely that Democrats would have such an opportunity. It did so by singling out areas based on the predominant political affiliation of residents in that area, and then changing voters' district assignment based on that factor. Predominantly Democratic areas of Jefferson County were removed from District 7 under S.B. 03-352, and Elbert County, traditionally regarded as a Republican stronghold, was added. See John J. Sanko, *Redistricting Passes; Senate GOP Votes 18-0 for New Map After Dems Walk Out*, Denver Rocky Mountain News, May 6, 2003, at 12A. Thus, some voters were advantaged, and others disadvantaged, based solely on their political affiliation and that of their neighbors.¹ See Julia C. Martinez & Mike McPhee, *Battle Flares Anew as Dems File Suit Over Redistricting*, The Denver Post, May 11, 2003, at A1.

The leadership of the General Assembly has been strikingly candid about the fact that there was no legitimate "state interest" for enacting S.B. 03-352, at least as that term has been traditionally understood. See Reid, *GOP Redistricting*, at A04 ("The sole purpose [of S.B. 03-352], as leaders of the Republican-controlled legislature confirm, was to strengthen the party's majority in the state's congressional delegation."). In an op-ed piece published in the *Denver Rocky Mountain News*, State Senate President John Andrews (R-Centennial) observed frankly:

"I decided, as a Republican leader from Colorado, that if voters put us back in the legislative majority for 2003, one of our goals should be to blunt the Democratic drive for

¹ A similar, albeit less dramatic, alteration was made to District 3. Half of predominantly Democratic Pueblo County was moved out of the district and replaced with predominantly Republican areas. Sanko, *Redistricting Passes*, at 12A.

recapturing Congress through districts drawn in their favor [*i.e.*, the map this Court approved in *Avalos*]....

“A decision in the public interest? Darn right. Political parties embody competing visions of that public interest. My party’s vision emphasizes individual freedom and individual responsibility. We believe that approach best serves everyone

“America is better served by Congress as it is [*i.e.*, with a Republican majority]. To help keep it that way, we set our sights on correcting the many flaws in Coughlin’s map

“There are only two kinds of Congress to choose from—one where Scott McInnis and other Republicans hold the majority, or one where Diana DeGette and other Democrats do. Nonpartisanship is not an option. And that’s why SB 352 is the right map for Colorado’s congressional delegation in this decade.”

Sen. John Andrews, *Districts Remapped in Public Interest*, Denver Rocky Mountain News, June 9, 2003, at 30A.² It therefore is beyond dispute that the driving purpose of S.B. 03-352 was to enhance the Republican Party’s electoral prospects in congressional elections over the remainder of this decade.

No one doubts the sincerity of the General Assembly majority’s belief that the “public interest” is served by a Republican Congress. The question is whether that belief is a legitimate basis for giving some voters a better chance than others to choose their representatives.

ARGUMENT

I. “RE-REDISTRICTING” FOR PARTISAN ADVANTAGE VIOLATES THE COLORADO CONSTITUTION.

As the Attorney General explains, Article V, Section 44 of the Colorado Constitution permits a new redistricting only once after each decennial allocation of congressional seats among the States. Petition at 16-20. Section 44, on its own terms, thus prohibits the General Assembly’s unprecedented re-redistricting.

² Senator Andrews’s op-ed is attached as an appendix to this brief.

While the Brennan Center agrees with the Attorney General’s analysis, we submit this Brief to point out that if Section 44 were read otherwise, it would conflict with several other provisions of the State’s Constitution (and of the federal Constitution, as explained below). When a possibly transient majority changes electoral boundaries to dilute the power of voters with disfavored views, it violates Colorado’s constitutional commitment to equal protection under the law, free political expression and association, and a republican form of government. Construing Section 44 to authorize this attack on the State’s fundamental constitutional values would needlessly place different constitutional provisions in conflict. Considering that Section 44 can be read to avoid this conflict—indeed, that its natural and logical reading avoids the conflict—basic principles of construction require it to be interpreted in harmony with the rest of the Constitution. *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994) (“[A]n interpretation which harmonizes different constitutional provisions is favored over one that would create a conflict between them.”).

A. S.B. 03-352 Violates The Colorado Constitution’s Guarantee Of Equal Protection Under The Law And Discriminates Against Voters Based On Their Exercise Of Their Protected Speech Rights.

The right to due process of law guaranteed by Article II, Section 25 of the Colorado Constitution includes the right to equal protection under the law. *Western Metal Lath v. Acoustical & Constr. Supply, Inc.*, 851 P.2d 875, 880 (Colo. 1993). Indeed, Section 25 affords greater protection than the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution. *See May v. Town of Mountain Village*, 969 P.2d 790, 792 (Colo. Ct. App. 1998); *Colorado v. Young*, 814 P.2d 834, 842 (Colo. 1991) (“We have . . . determined that the Colorado Constitution provides more protection for our citizens than do similarly or identically worded

provisions of the United States Constitution.”). The equal protection guarantee at its most basic prohibits the state from treating citizens differently without a legitimate reason. *Mayo v. National Farmers Union Prop. & Cas. Co.*, 833 P.2d 54, 57 (Colo. 1992). In a democracy, the fact that citizens have differing political beliefs is decidedly not a legitimate reason for treating some worse than others, yet that is the sole motivation of S.B. 03-352.

Differential treatment must always serve a legitimate state interest. Laws that differentially burden the exercise of fundamental rights must meet a higher test: they must serve a compelling state interest. S.B. 03-352 is designed to burden disfavored citizens’ exercise of their rights of political association and expression and their right to vote. *See MacGuire v. Houston*, 717 P.2d 948, 952 (Colo. 1986) (“It is undisputed that the freedom to associate for the advancement of political beliefs is a fundamental right.”); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 58 (Colo. 1991) (“Article II, Section 10 of the Colorado Constitution necessarily enhances the already preferred position of speech under the First Amendment of the United States Constitution.”); *Fabec v. Beck*, 922 P.2d 330, 341 (Colo. 1996) (observing that the right to vote is fundamental). This purpose, far from being a legitimate state interest, is so suspect that it ordinarily would trigger strict scrutiny. *See Evans v. Romer*, 854 P.2d 1270, 1279 (Colo. 1993) (“[The] law may not create unequal burdens on identifiable groups with respect to the right to participate in the political process absent a compelling state interest.”). But there is no compelling interest served by purely partisan re-redistricting. Indeed, the act serves no interest at all other than to “create unequal burdens on identifiable groups with respect to the right to participate in the political process.”

Ordinary redistricting serves compelling governmental interests of constitutional magnitude: it replaces districts that, by virtue of a new census, would otherwise violate the “one person, one vote” guarantee. Occasionally, because of a judicial ruling, the process must be repeated; but again, this is because the existing districts are illegal, perhaps even unconstitutional. In ordinary redistricting, the differential treatment of voters according to political preference *may be* offset by the need to create lawful districts. Even then, striking an appropriate balance is difficult, with constitutional interests on both sides of the scales.³ But here, there is nothing to weigh in the balance, because S.B. 03-352 serves no legitimate, let alone compelling, interest. Rather it changes the rules mid-decade merely to punish some voters—to lessen their prospect of electing their candidate of choice—because of the exercise of their fundamental rights.

Nor can it be doubted that voters’ fundamental rights are at stake. Voting is the most basic form of political expression there is in a democracy. The General Assembly, concededly acting on the basis of voters’ past political expression, seeks to make it difficult or impossible for

³ See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132-34 (1986) (concluding that redistricting of Indiana Legislature was not unconstitutional partisan gerrymandering because plan did not “substantially disadvantage[] certain voters in their opportunity to influence the political process effectively”); *Karcher v. Daggett*, 462 U.S. 725, 744 (1983) (concluding that New Jersey congressional map that had been gerrymandered to favor Democrats was unconstitutional because New Jersey had not made a good-faith effort to achieve equally populated congressional districts and it could not justify population deviations among districts with reference to legitimate state interest); *Gaffney v. Cummings*, 412 U.S. 735, 751-54 (1973) (concluding that Connecticut’s use of a “political fairness” principle in drawing legislative districts to achieve rough approximations of political parties’ statewide political strength was constitutional); *Republican Party v. Martin*, 980 F.2d 943, 955-59 (4th Cir. 1992) (finding that plaintiffs had stated a valid partisan gerrymandering claim in challenging the use of statewide elections to elect local trial judges); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 543-47 (M.D. Pa. 2002) (dismissing partisan gerrymandering claim with respect to Pennsylvania congressional map that

some voters to elect candidates of their choice. The re-redistricting punishes one class of voters solely because of the viewpoints they have expressed; such viewpoint discrimination, however, is “virtually per se unconstitutional.” Steven G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 Const. Comment. 149, 209 (1999); see also *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 828-29 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional. . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.”). S.B. 03-352 also infringes on the right of expressive association of voters of the disfavored political party; it “fences” an identifiable political group out of the normal political process, deliberately, to frustrate that group’s ability to pursue its legislative agenda. See *Evans*, 854 P.2d at 1280-82 (concluding that laws that “distort governmental processes” and place special burdens on independently identifiable groups’ ability to pass favored legislation violate Equal Protection Clause). Finally, the re-redistricting squarely attacks disfavored citizens’ right to vote, deliberately making their votes less meaningful and their participation in the democratic process less effective by assigning them to districts in a manner that purposefully minimizes the impact of their votes. See *id.* at 1278 (observing that the right to vote consists not simply of the ability to cast ballot, but includes “participatory effectiveness, i.e., the right to have one’s vote be as meaningful as the votes of others”).

The goal of S.B. 03-352 is no secret: to redraw the map to favor the majority party in future elections. But ensuring the success of one political party at the polls—no matter how strongly Senator Andrews and his colleagues believe their party’s policies to be in the “public

heavily favored Republican candidates because Democrats were not “shut out” of the political

interest”—has no reasonable relationship to a legitimate government end. The State’s interest, as distinct from the interest of the individuals who currently occupy its legislature, is in providing free and fair elections, not in guaranteeing a particular result.

Indeed, if advantaging one political party over another is a legitimate state purpose, what is the limiting principle? Could a new legislative majority seek to entrench itself by keeping the polls open longer in precincts where its supporters were more numerous? Could it increase the number of polling places in friendly counties and not in those partial to its adversaries? Could it provide better voting machines to some precincts for the sole purpose of making it easier for its own supporters to vote? All of these acts would be blatantly discriminatory, but all would seemingly be permissible if the General Assembly’s purpose of maintaining one party in power could trump the constitutional rights of the disadvantaged voters.

The only difference between these clearly invalid hypothetical enactments and the one at hand is the General Assembly’s contention that by labeling its action “redistricting,” it can command exceptional deference from this Court. *See* Brief of Proposed Intervenor Colorado General Assembly in Opposition to the Attorney General’s Petition (“Leg. Br.”) at 14-15; Sec’y of State Davidson’s Answer and Brief in Opposition to the Petitioner’s Request for Relief at 22-24. But a legislature’s characterization of its action does not alone determine its validity. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38, 59-61 (1985). Unprecedented legislative action to advantage some voters over others cannot be spared legal scrutiny merely by the General Assembly’s *ipse dixit* that it is “redistricting” rather than “discriminating.” S.B. 03-352 should be seen for what it is—indeed, for what the General Assembly’s leadership has admitted it to

process).

be: the use of state power to harm voters with disfavored political views. Drawing districts raises difficult questions; but *redrawing* districts absent a legitimate state interest in doing so (and, under Secretary Davidson’s view, the General Assembly can redraw them a limitless number of times) does not: it is simply invalid.

B. A Law Intended To Entrench A Political Party In Power Violates Colorado’s Commitment To A Republican Form Of Government Pursuant To Article II, Section 1 Of The Colorado Constitution And Article IV, Section 4 Of The United States Constitution.

Under Article IV, Section 4 of the Constitution of the United States, Colorado must and does provide its citizens a “republican form of government.” *Morrissey v. State*, 951 P.2d 911, 916-17 (Colo. 1998). “A republican form of government is one in which the supreme power rests in all the citizens entitled to vote and is exercised by representatives elected, directly or indirectly, by them and responsible to them.” *Id.* (citation and quotations omitted). Thus, a republican form of government requires that “all citizens entitled to vote” have an opportunity to elect representatives. Article II, Section 1 of the Colorado Constitution makes express the State’s commitment to popular sovereignty: “All political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and *is instituted solely for the good of the whole.*” (emphasis added).

Periodic redistricting is clearly a necessary aspect of a republican form of government. Without it, control of governmental power could come to rest perpetually with a minority of the populace. *See Reynolds v. Sims*, 377 U.S. 533, 567 (1964) (“The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. Representation schemes once fair and equitable become archaic and outdated.”). But the sort of manipulation of the electoral process at issue here violates “[a]

fundamental precept of this nation's democratic electoral process ...that the government may not 'take sides' in election contests or *bestow an unfair advantage on one of several competing factions.*" *Mountain States Legal Found. v. Denver School Dist. #1*, 459 F. Supp. 357, 360 (D. Colo. 1978) (emphasis added). Using the government's power to advantage one party over another, as the re-redistricting's backers admit they intended to do, is not acting "solely for the good of the whole," Colo. Const. art. II, § 1; by definition, it is an action designed to "bestow an unfair advantage on one of several competing factions," *Mountain States*, 459 F. Supp. at 360.

Just as *failing* to redistrict periodically can invest a minority of the populace with perpetual control of the government, *re-redistricting* for the sole purpose of perpetuating the current majority's power threatens to create eventual minority control of the government. *See id.* ("A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office.") (citation omitted); *El-Amin v. State Bd. of Elections*, 717 F. Supp. 1138, 1141 (E.D. Va. 1989) ("[F]ew prospects are so antithetical to the notion of rule [of law] by the people as that of a temporary majority entrenching itself by cleverly manipulating the system through which voters, in theory, can register their dissatisfaction by choosing new leadership.") (quoting Laurence Tribe, *Constitutional Law* § 13-18 (2d ed. 1988)). This country was founded on the notion that the people must be able to "throw the rascals out." *See* The Declaration of Independence para. 2 (U.S. 1776) ("Governments are instituted among Men, deriving their just powers from the consent of the governed, [and] whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government . . ."). The use of state power to prevent political change is at war with the "root

philosophy” of republicanism. *Mountain States*, 459 F. Supp. at 361; *see also* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643, 673-74 (1998) (advocating that election laws not be permitted to increase “the costs of mobilizing [an] effective challenge” to existing political authority to a point that the system is no longer sufficiently responsive to the will of the electorate).

II. “RE-REDISTRICTING” FOR PARTISAN ADVANTAGE VIOLATES THE UNITED STATES CONSTITUTION.

There is no need to look beyond Colorado law to decide this case. S.B. 03-352 violates several provisions of the Colorado Constitution. It may also be noted, however, that interpreting Article V, Section 44 of the Colorado Constitution to permit the re-redistricting would violate the federal Constitution. Because it is well established that the Colorado Constitution should be construed so as to not conflict with the Constitution of the United States, consideration of federal law supports the conclusion that is already plain from Colorado law: S.B. 03-352 is invalid. *See Millis v. Board of County Comm’rs of Larimer County*, 626 P.2d 652, 657 (Colo. 1981) (observing that federal constitutional rights cannot be restricted by Colorado Constitution).

A. S.B. 03-352 Is An Unconstitutional Partisan Gerrymander.

In *Davis v. Bandemer*, the Supreme Court of the United States established that a redistricting plan could be unconstitutional if it excessively manipulated the electoral system to favor one party’s voters over another’s. 478 U.S. 109, 119-27 (1986) (plurality opinion). Under normal circumstances, lower courts have struggled when applying the Supreme Court’s holding to the complicated process of decennial redistricting. *See supra* n.3. But these are far from normal circumstances, and the hard-to-define (and thus hard-to-apply) *Bandemer* test does not govern. Rather, what applies is the Supreme Court’s repeated instruction that legislation

discriminating against particular viewpoints is virtually always invalid. *See, e.g., Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998); *Rosenberger*, 515 U.S. at 829. Nonetheless, it is worth considering why *Bandemer* found it possible for even normal redistricting to be unconstitutional in order to understand why this re-redistricting is particularly objectionable.

The evils condemned in *Bandemer* are precisely those embodied in S.B. 03-352. The Equal Protection Clause prohibits “intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” *Bandemer*, 478 U.S. at 127. More concretely, a partisan gerrymander may be unconstitutional if it “substantially disadvantages certain voters in their opportunity to influence the political process effectively.” *Id.* at 133. That, in a nutshell, is the purpose of the re-redistricting: to “substantially disadvantage” Democrats in District 7 by making it much more difficult for them than for the Republican neighbors “to influence the political process effectively.”

But unlike the decennial redistricting at issue in *Bandemer* and in the lower-court cases following it, here the forbidden purpose is not merely one among many reasons why the lines were drawn as they were; it is the only reason. S.B. 03-352 thus runs afoul of the federal Constitution’s general prohibition on exercising governmental power to punish members of an out-of-power party or to burden a particular viewpoint. *See, e.g., O’Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712 (1996) (prohibiting partisan discrimination in city contracting); *Elrod v. Burns*, 427 U.S. 347 (1976) (prohibiting partisan discrimination in public employment); *City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its

subject matter, or its content.”). When a legislative enactment has as its only purpose the frustration of the will of certain voters based on their political affiliation, it is per se unconstitutional. *See Reynolds*, 377 U.S. at 567 (“To the extent that a citizen’s right to vote is debased, he is that much less a citizen.”).

B. The Re-Redistricting Exceeds Colorado’s Authority To Regulate The “Times, Places, And Manner” Of Congressional Elections Under The Elections Clause.

States have no inherent authority over federal elections. Rather, their power to hold elections for federal offices arises from the federal Constitution. *See Cook v. Gralike*, 531 U.S. 510, 522 (2001) (“Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power ‘had to be delegated to, rather than reserved by, the States.’”) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). A State cannot exercise any powers with respect to federal elections beyond that delegated authority. *U.S. Term Limits*, 514 U.S. at 805. The Supreme Court has made clear that hamstringing a particular group of candidates is not part of the authority delegated to the States.

The power of a State to draw Congressional district lines derives from the Elections Clause of Article I, Section 4 of the Constitution, which permits States to regulate the “Times, Places, and Manner” of Congressional elections. *See Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964). The Framers feared that a faction dominating a State’s government would abuse its power to help that same faction dominate the House of Representatives.⁴ Hence, they severely

⁴ For example, Madison explained the purpose of the Elections Clause—to prevent factional control of State Legislatures from frustrating the will of the people in House elections—as follows:

circumscribed the States’ power under the Elections Clause. “[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.” *U.S. Term Limits*, 514 U.S. at 833-34 (emphasis added); see also *id.* at 836 (striking down a ballot access requirement as unconstitutional “when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly”).

Even ostensibly procedural laws can exceed the power delegated to the States if they have the purpose and effect of influencing the outcome of Congressional elections. In *U.S. Term Limits*, for example, the Court held that a law prohibiting incumbent Representatives who had served three terms from appearing on the ballot was not a valid exercise of State authority under the Elections Clause because it was “undertaken for the twin goals of disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clauses.” *Id.* at 835.⁵ The Elections Clause did not give the States *carte blanche* to create whatever election procedures they pleased. Even when a state law relates to election procedure—as the banning of term-limited Representatives from the ballot clearly did, since the affected Representatives could still

It was impossible to foresee all the abuses that might be made of the discretionary power....Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their [electoral] regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter.

² Max Farrand, *The Records of the Federal Convention of 1787* 240-41 (1911).

⁵ The Qualifications Clause provides: “Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members.” U.S. Const. art. I, § 5, cl. 1.

be elected by write-in votes—it can exceed the States’ delegated power over Congressional elections. Only regulations of election procedures that serve the state interest of protecting “the integrity and reliability of the electoral process itself” are valid under the Elections Clause. *U.S. Term Limits*, 514 U.S. at 834 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)).

Sham procedural regulations that purport to set election procedures, but really are intended to dictate election results, violate the Elections Clause. Here, there is not even a sham: the majority concedes that its purpose in re-redistricting the state was to alter the outcome of future Congressional elections. Secretary Davidson’s contention that the Colorado Constitution places no limit on the number of times a legislature can change districting schemes must be wrong. Otherwise, the General Assembly could change a U.S. Representative’s district on a daily basis, rendering it more or less favorable to that Representative based on his or her votes in Congress, his or her responsiveness to local party leaders, or any other factor the General Assembly majority wished. Nothing would be more at odds with the limited role in administering federal elections that the Framers intended the State Legislatures to exercise. *See* *The Federalist* No. 60 (Hamilton), p. 371 (C. Rossiter ed. 1961).

CONCLUSION

For the foregoing reasons, S.B. 03-352 contravenes the Colorado Constitution and the relief sought in the Petition of the Attorney General should be granted.

Dated: July 15, 2003

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of July, 2003, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* OF THE BRENNAN CENTER FOR JUSTICE IN SUPPORT OF ATTORNEY GENERAL'S PETITION was served by United States Mail, first-class postage prepaid to the following:

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