

Albany
Atlanta
Brussels
Denver
Los Angeles
Miami
New York

McKenna Long & Aldridge^{LLP}

1400 Wewatta Street • 7th Floor
Denver, CO 80202
Tel: 303.634.4000
mckennalong.com

Northern Virginia
Orange County
Rancho Santa Fe
San Diego
San Francisco
Seoul
Washington, DC

DAVID SKAGGS
Direct Phone: 303.634.4306
Direct Fax: 303.634.4400

EMAIL ADDRESS
dskaggs@mckennalong.com

December 16, 2013

FILED VIA ECF SYSTEM

Ms. Elisabeth A. Shumaker
Clerk, U. S. Court of Appeals for the 10th Circuit
Byron White U.S. Courthouse
1823 Stout Street
Denver, CO 80257

Re: Response to Governor's Second Citation of Supplemental Authorities,
Fed. R. App. P. 28(j)
Kerr, et al., v. Hickenlooper, No. 12-1445

Dear Ms. Shumaker:

This letter responds to Appellant's second Rule 28(j) letter, discussing Proposition AA and Amendment 66, which appeared on the November Colorado ballot. AA passed, taxing the sale of marijuana (legalized by Amendment 64 in 2012). 66, which failed, would have funded implementation of public school reforms the legislature enacted earlier in 2013 in SB 13-213.¹

Appellant asserts that the passage of AA exemplifies "the legislature's continuing authority and ability, under TABOR, to operate in the area of taxation." In a footnote, Appellant dismisses the defeat of 66 as irrelevant. To the contrary, these examples demonstrate the essential helplessness of the legislature to address effectively major policy and related fiscal needs of the state.

Most of the reforms prescribed in SB 13-213 depended on enactment of tax increases requiring a statewide plebiscite under TABOR. The defeat of 66 demonstrates the extent to which TABOR thwarts the policy-making powers of the legislature.

During oral argument, Appellant's counsel stated that the legislature's role in taxation remains constitutionally sufficient because it can refer tax proposals to a plebiscite, and that only

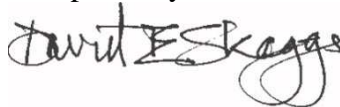
¹ Text attached.

Ms. Elisabeth A. Shumaker
December 16, 2013
Page 2

losing such a referendum would support legislator standing.² He claimed the residual legislative role left under TABOR is materially different from what is left under Amendment 64, because Amendment 64 "stripped the legislature" of any authority to re-criminalize marijuana.³ While only TABOR directly implicates the essence of a Republican Form of Government, TABOR and Amendment 64 each strips the legislature of subject matter jurisdiction, and each can be overcome only by submitting a new constitutional proposal to the people.

Appellant's analysis of Amendment 64's deprivation of legislative authority is accurate and pertains equally to TABOR. The legislature's only residual role under either is that of supplicant, with real legislative power available by plebiscite only, through initiative or referendum. This total deprivation of essential legislative powers more than suffices as the basis for legislator standing under *Coleman v. Miller*, 307 U.S. 433 (1939).

Respectfully submitted,



Attorney for Plaintiffs-Respondents

cc

Attorneys for Defendant-Appellant
Daniel D. Domenico (dan.domenico@state.co.us)
Frederick R. Yarger (fred.yarger@state.co.us)
Bernie Buescher (bernie.buescher@state.co.us)
William Allen (will.allen@state.co.us)
Jonathan Patrick Fero (jon.fero@state.co.us)
Stephanie Lindquist Scoville (stephanie.scoville@state.co.us)
Megan Paris Rundlet (megan.rundlet@state.co.us)
Kathleen Spalding (kit.spalding@state.co.us)
Office of the Colo. Attorney General
1300 Broadway, 10th Floor
Denver, CO 80203

Attorneys for Amici Curiae:
Melissa Hart (melissa.hart@colorado.edu)
David Benjamin Kopel (david@i2i.org)
John M. Bowlin (john.bowlin@dgsllaw.com)

² See transcript of oral argument (attached) at 18, ll. 8-25; 19, ll. 1-2.

³ *Id.* at 5, ll. 11-25; 6, ll. 9-18.

Ms. Elisabeth A. Shumaker
December 16, 2013
Page 3

Emily L. Droll (emily.droll@dgsllaw.com)
Andrew M. Low (andrew.low@dgsllaw.com)
D' Arcy Winston Straub (dstraub@ecentral.com)
Ilya Shapiro (ishapiro@cato.org)
James Martin Manley (jmanley@mountainstateslegal.com)
Harold Haddon (hhaddon@hmflaw.com)
Laura Kastetter (lkastetter@hmflaw.com)
Matthew Douglas (matthew.douglas@aporter.com)
Nathaniel J. Hake (nathaniel.hake@aporter.com)
Paul Rodney (paul.rodney@aporter.com)
Holly Elizabeth Sterrett (holly@sterrett@aporter.com)
Joseph Guerra (jguen-a@sidley.com)
Kathleen Moriarty Mueller (kmueller@sidley.com)
Catherine Carla Engberg (engberg@smwllaw.com)
Richard A. Westfall (rwestfall@halewestfall.com)

DN 32259170.10