

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

August 26, 2013

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

FILED VIA ECF SYSTEM

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

Dear Madam Clerk:

The following cases, decided since the Plaintiffs-Respondents' Response to Governor's Opening Brief (the "Response") was filed, are brought to the Court's attention pursuant to Fed. R. App. P. 28(j). The opinions address questions of standing and justiciability under the political question doctrine ("PQD"), which are discussed in the Response at 36-54 (standing) and 20-26 (justiciability/PQD).

In *United States v. Windsor*, 133 S. Ct. 2675 (2013), the Court accorded appellate standing and allowed the amicus/intervenor, Bipartisan Legal Advisory Group, to defend the constitutionality of the Defense of Marriage Act. The Court invoked the concept of "prudential standing," not to further *limit* standing, as in *Warth v. Seldin*, 422 U.S. 490 (1975), but to *expand* what is permissible under traditional Article III standing jurisprudence. See *Windsor*, 133 S. Ct. at 2684-89. This approach contrasts with the Appellant's reliance on *Warth*. See Governor's Opening Brief at 28.

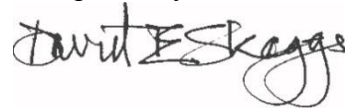
The *Windsor* opinion transitions to a treatment of justiciability, citing *Zivotofsky v. Clinton*, 132 S. Ct. 1421 (2012), for courts' duty to decide the constitutionality of acts of Congress, without using possible political implications and the PQD as an excuse to avoid that duty. See *Windsor*, 133 S. Ct. at 2688. The justiciability of the statutory question in *Windsor* is analogous to the justiciability of the constitutionality of the Colorado Taxpayer Bill of Rights here.

NLRB v. New Vista Nursing & Rehabilitation, 719 F.3d 203 (3d Cir. 2013), includes an instructive treatment of certain of the six PQD criteria set out in *Baker v. Carr*, 396 U.S. 186, 198 (1962). Quoting *Zivotofsky*, the Third Circuit explained that deciding what a particular

Clerk, U. S. Court of Appeals for the 10th Circuit
August 26, 2013
Page 2

constitutional provision means is “. . . merely an exercise of our judicial authority ‘to say what the law is.’” *See New Vista*, 719 F.3d at 218. That exercise implied no “disrespect” for a coordinate branch, violated no explicit assignment to a political branch, and was informed by manageable judicial standards. A similar analysis should obtain in this case regarding interpretation of Article IV, Section 4 of the U. S. Constitution and of the Colorado Enabling Act.

Respectfully submitted,



Attorney for Plaintiffs-Respondents

DES/lfk

cc: Attorneys for Defendant-Petitioner:
William Allen (will.allen@state.co.us)
Jonathan Patrick Fero (jon.fero@state.co.us)
Stephanie Lindquist Scoville (Stephanie.scoville@state.co.us)
Kathleen Spalding (kit.spalding@state.co.us)
Daniel D. Domenico, Esq. (dan.domenico@state.co.us)
Frederick R. Yarger, Esq. (fred.yarger@state.co.us)
Bernie Buescher, Esq. (Bernie.buescher@state.co.us)
Megan Paris Rundlet, Esq. (megan.rundlet@state.co.us)

Attorneys for Amici Curiae:
Melissa Hart(melissa.hart@colorado.edu)
David Benjamin Kopel(david@i2i.org)
John M. Bowlin (john.bowlin@dgslaw.com)
Emily L. Droll (Emily.droll@dgslaw.com)
Andrew M. Low (Andrew.low@dgslaw.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 (jguerra@sidley.com)
Kathleen Moriarty Mueller ([kmuellet@sidley.com](mailto:kmueller@sidley.com))
Catherine Carla Engberg (engberg@smwlaw.com)
Richard A. Westfall (rwestfall@halewestfall.com)