Case No. 12-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al*., Plaintiffs-Appellees, v. JOHN HICKENLOOPER, Governor of Colorado, in his official capacity, Defendant-Appellant.	

On Appeal from
The United States District Court For the District of Colorado
D.C. No. 11-cv-01350-WJM-BNB
Hon. William J. Martinez, United States District Judge

SUPPLEMENTAL BRIEF OF AMICUS CURIAE CENTER FOR CONSTITUTIONAL JURISPRUDENCE SUPPORTING THE DEFENDANT-APPELLANT AND REVERSAL

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RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. Rule 29(c)(5), amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life, including the proposition that the ultimate source of governmental authority is the consent of the governed. In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated on behalf of the parties as amicus curiae before the U.S. Supreme Court in several cases of constitutional significance addressing the Guarantee Clause and other structural provisions of the Constitution, including *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Bond v. United States*, 134 S. Ct. 2077 (2014); *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012); *Reisch v. Sisney*, 560 U.S. 925 (2010); *Cutter v. Wilkinson*, 544 U.S. 709 (2005); and *Angle v. Guinn*, 541 U.S. 957 (2004).

I. PRELIMINARY STATEMENT

This brief is limited to a discussion of plaintiffs' claims under the Guarantee Clause, U.S. CONST. art. 4, § 4. However, Amicus' standing analysis applies with equal force to the plaintiffs' claim under the Colorado Enabling Act, ch. 139, § 4, 18 Stat. 474, 474 (1875). See *Kerr v. Hickenlooper*, 744 F.3d 1156, 1182 (10th Cir. 2014) cert. granted, judgment vacated, No. 14-460, 2015 WL 2473514 (U.S. June 30, 2015). Accordingly, if this Court finds that plaintiffs lack standing under the Guarantee Clause, it should dismiss plaintiffs' Enabling Act claim on the same grounds. Similarly, Amicus' standing analysis is limited to a discussion of Article III standing, though Amicus agrees with appellant that plaintiffs lack prudential standing for the reasons set forth in appellant's briefs.

II. SUMMARY OF ARGUMENT

The United States Supreme Court's recent decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. __ (2015) (slip op.) (hereinafter *ASL*), requires this Court to reconsider its holding in *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014). In *Arizona State Legislature*, the Court held that the Constitutional grant of power to "the Legislature" of each State to prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," see U.S. CONST. art. I, § 4, encompasses the power of "the people" to establish, by voter referendum, a commission independent of the state

legislature for the purpose of drawing voting districts. In reaching this conclusion, the Court offered a rationale that if faithfully applied requires this court to reverse its holding below and dismiss the *Kerr* plaintiff-legislators' claims on the dual grounds that they lack standing and that their claims present nonjusticiable political questions.

With respect to the issue of standing, the *Arizona State Legislature* Court's analysis on both the standing question therein *and on the merits* amounts to a resounding endorsement for the proposition that the "ultimate sovereignty" of a State lies with its people. *ASL*, *supra* at *31. Accordingly, no judicially cognizable injury is incurred by the agents of the sovereign (state legislators) when the principal itself (the people) places limitations on the representative capacity of its agents via popular referendum. Because Colorado's Taxpayers Bill of Rights ("TABOR") simply manifests the people's desire to curtail the power of those who represent them, there is neither an injury to the people, nor to the plaintiff-legislators who, in this case, have no cognizable interests apart from those of the people.

The panel's earlier decision finding standing for the plaintiffs was largely based on the idea that TABOR jeopardized "the effectiveness" of the legislator-plaintiffs' ability to vote on certain tax matters. *Kerr*, 744 F.3d at 1171. However, neither of the Supreme Court's principal cases finding for legislative

standing—*Arizona State Legislature* and *Coleman v. Miller*, 307 U.S. 433 (1939)—support the notion that an injury is actionable when the effectiveness of a legislator's vote is limited *by the people* acting pursuant to their lawful authority under their state and federal constitutions. In *Arizona State Legislature*, legislative standing was proper because the plaintiff-legislators sought to vindicate an express right of "the Legislature" pursuant to the Elections Clause of the U.S. Constitution. Because the Elections Clause specifically commits to "the Legislature" the right to control redistricting, the petitioners properly had standing to argue that the term "Legislature" operated to dispossess the people of a popular check on the legislature's will. *ASL*, *supra* at *2. The instant case does not implicate a similarly actionable claim because nothing in the Guarantee Clause specifically commits any rights or power to "the Legislature" of a particular state; it simply guarantees "to every State" (read: the people) a "Republican Form of Government." See U.S. CONST. art. 4, § 4.

As for *Coleman*, there the Court simply found that legislative standing could lie where another *representative* organ of the State government—the office of the lieutenant governor—took action that prevented the majority of the legislature from ratifying an amendment. See 307 U.S. 433. *Coleman's* logic should not extend here, where the impediment to the legislature is not imposed by another elected official, but rather is imposed by the sovereign itself.

Aside from the overarching idea that legislators should have no standing to contest limitations properly placed upon them by the people, this Court should also find that the plaintiffs here do not share the critical attributes of the Arizona Legislature on which the Court relied in finding standing: the participation of more than a small group of legislators, which commands power sufficient to enact or defeat specific legislation. See *ASL*, *supra* at *12. Because this case was brought by only five active members of the Colorado State Assembly[1], then even assuming that legislators *could* have standing to contest limitations placed upon them via TABOR, the injury at this point is entirely theoretical and the efficacy of judicial relief is entirely speculative. "The legislator-plaintiffs have not voted in favor of a successful tax measure that was subsequently denied in a referendum." *Kerr v. Hickenlooper*, 759 F.3d 1186, 1191 (10th Cir. 2014) (Tymkovich, J., dissenting from denial of rehearing *en banc*). If this Court were to permit these plaintiffs to contest, and if successful, nullify, TABOR without first taking the politically unpopular step of attempting to raise taxes, this Court would improperly shield the plaintiff-legislators from the political accountability central to any "Republican

[1] *See Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1140 (D. Colo. 2012) opinion amended and supplemented, No. 11-CV-01350-WJM-BNB, 2012 WL 4359076 (D. Colo. Sept. 21, 2012) and aff'd and remanded, 744 F.3d 1156 (10th Cir. 2014) cert. granted, judgment vacated, No. 14-460, 2015 WL 2473514 (U.S. June 30, 2015) (noting that the legislator-plaintiffs are only five members of Colorado's 100 member General Assembly).

Form of Government." Consistent with the idea that the judicial power in our Republic extends only to actual "Cases" and "Controversies", U.S. CONST. art. III, §1, this Court should insist that before invoking the power of the judicial branch, the plaintiffs first concretely show how a specific tax measure that they support was stymied by the people. Because the plaintiffs have not made this showing, they lack standing to bring their claim.

In addition, the central holding of *Arizona State Legislature* confirms that *this case* also presents a nonjusticiable political question. The Court reinvigorates Justice O'Connor's statement in *New York v. United States*, 505 U.S. 144, 185 (1992), that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." See *ASL*, *supra* at *5 n.3. Although amicus agrees with this sentiment, as reflected in the panel's conclusion that some Guarantee Clause claims are justiciable, this is not such a claim. Amicus contends that the subset of claims that are justiciable is limited to those "actions wresting control of government (whether such control is direct or through elected representatives) from the electorate" because such actions necessarily "imperil the Republican Form of Government." Brief for Center for Constitutional Jurisprudence as *Amicus Curiae* in Support of Petitioners at 6, *Hickenlooper v. Kerr*, No. 14-460, 2015 WL 2473514 (U.S. June 30, 2015) (hereinafter *Brief for CCJ*). *Arizona State Legislature* implicitly endorses this view, as the Court

repeatedly emphasized that "We the People" wield the ultimate power in our system. Consequently, it is easy to envision Guarantee Clause claims of disenfranchisement brought by the electorate that can be remedied by Court order.[2]

By contrast, the claims in this case raise the question of *how much* direct democracy is compatible with the constitutionally guaranteed "Republican Form of Government." U.S. CONST. art. IV, § 4. The holding of *Arizona State Legislature* strongly suggests that claims of this sort are nonjusticiable: if the word "Legislature" in the Elections Clause—a specific term ordinarily thought to mean a "representative institution," *ASL*, *supra* at *5 (Roberts, C.J., dissenting)—is broad enough to include popular action by the people, then surely the even more general phrase "Republican Form of Government" encompasses a larger and more indeterminate amount of direct democracy. As such, "judicially discoverable and manageable standards" with which to determine how much direct democracy is compatible with the Guarantee Clause are lacking. See *Baker v. Carr*, 369 U.S. 186, 216 (1962).

Further, if this Court were to entertain the question of how much direct democracy is compatible with a republican form of government, it would require

[2] Indeed, some would argue that the apportionment claim that the Supreme Court found justiciable in *Baker v. Carr*, 369 U.S. 186 (1961), also presented an example of justiciable Guarantee Clause claim. *See id.* at 297 ("[The claim] is, in effect, a Guarantee Clause claim masquerading under a different label.") (Frankfurter, J., dissenting).

"an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 216. Plaintiffs' question does not lend itself to a clear answer, and political scientists have debated the merits of varying forms of voter participation since our founding. See, e.g., The Federalist No. 10 (James Madison) (describing the differences between republics and democracies); see also Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 825, 818-19, 835 & n.155 (2002) (noting that one framer contemplated even "monarchical republics"). Because the judiciary lacks the institutional competence to answer this policy question, this Court must find that the plaintiffs' claim presents a nonjusticiable political question.

III. ARGUMENT

A. UNDER A FAITHFUL READING OF *ARIZONA STATE LEGISLATURE*, THIS COURT MUST FIND THAT PLAINTIFFS LACK STANDING.

To establish standing, a plaintiff must show an injury to a legally protected interest that has a causal relationship to the challenged action of the defendant and that it is likely—not merely speculative—that the injury will be redressed by a favorable court order. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). With respect to the alleged injury, it must be both (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. *Id.*

Applying the teachings of *Arizona State Legislature*, it is clear that plaintiffs have suffered no injury to a legally protected interest under the Guarantee Clause. Nonetheless, even if plaintiffs' asserted claim could give rise to a cognizable injury, the injury at this point is entirely hypothetical and the efficacy of judicial relief entirely speculative. For these reasons, further detailed below, standing cannot be established.

1. *ARIZONA STATE LEGISLATURE* CONFIRMS THAT LEGISLATORS SUFFER NO INJURY WHERE LEGISLATIVE POWER IS LIMITED BY AN EXERCISE OF DIRECT DEMOCRACY BY THE PEOPLE.

The Court's opinion in *Arizona State Legislature* strongly supports the proposition that a "legislator in a republican system wields his voting power solely on behalf of the governed, and therefore suffers no cognizable injury if the governed instead choose to wield that power for themselves." Brief for CCJ at 3. There, the Court emphasized that "it is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *ASL*, *supra* at *27. Quoting James Madison's explanation in The Federalist No. 43, at 272, the Court reaffirmed that "[w]henever the States may choose to substitute other republican forms, they have a right to do so." *Id*. at *27-28. In establishing its own unique governmental processes, the state engages in self-definition: "Through the structure of its government, and the character of those who exercise government authority, a State defines itself as a sovereign." *Id*. at *28 (citing

Gregory v. Ashcroft, 501 U.S. 452, 460 (1991)). The people of Arizona thus exercised their sovereign prerogative of self-definition "when its people placed both the initiative power and the AIRC's redistricting authority in the portion of the Arizona Constitution delineating the State's legislative authority." *Id*.

In *Kerr*, this Court found that the plaintiffs suffered a cognizable injury sufficient to confer standing because TABOR operated to "disempower[]" the elected representatives. See *Kerr*, 744 F.3d at 1169. The Court must reconsider this holding in light of the *Arizona State Legislature* Court's confirmation that legislators hold their power only "as trustee for [their] constituents, not as a prerogative of personal power," *Raines v. Byrd*, 521 U.S. 811, 821 (1997). Under this logic, the people suffer no injury when their constituents use direct democracy to place limits on that authority. John Locke articulated the relationship between the legislature and the people with similar language: "[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still in the People a Supream Power to remove or alter the Legislative . . . ." Two Treatises of Government § 149, p. 385 (P. Laslett ed. 1964). Thus, where "the legislator's constituents choose to take power from the legislator, and where his loss in power is offset by their gain, the constituents have suffered no loss." Brief for CCJ at 13. It therefore follows that where a legislator's constituents suffer no injury, the legislator, as "trustee" for those constituents, likewise suffers no injury.

Indeed, the *Arizona State Legislature* Court confirmed the legitimate power of the electorate ***to reserve for itself*** lawmaking authority that might otherwise be vested in a legislature. See *ASL*, *supra* at *24-25 (citing *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976) ("In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."). The Court further confirmed the place of the initiative and referendum process in American political history: "Almost all state constitutions were adopted by conventions and ratified by voters at the ballot box, without involvement or approval by 'the Legislature.' . . . Again, the States' legislatures had no hand in making these laws and may not alter or amend them." *Id*. at *33-34. In light of this history, a state legislature suffers no judicially cognizable injury when the electorate to which it owes its existence uses direct democracy to place limits upon its power.

Although the aforementioned principle should control here, Amicus does not contend that members of a state legislature can *never* have standing to contest restrictions upon their power imposed by the people. Neither the legislature *nor the people* can wield power in violation of the constitution. See The Federalist No. 78 (Alexander Hamilton) ("No legislative act, therefore, contrary to the Constitution, can be valid. To deny this, would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the

representatives of the people are superior to the people themselves; that men acting by virtue of powers, may do not only what their powers do not authorize, but what they forbid.").

Accordingly, *Arizona State Legislature* thus confirms that legislative standing will lie in the narrow circumstances where the plaintiffs can credibly claim[3] that the people have acted in a manner that deprives the "Legislature" of a right expressly granted to it under U.S. Constitution. Specifically, in *Arizona State Legislature,* the legislature sought to vindicate its Constitutional prerogative to control redistricting under the Elections Clause. See U.S. CONST. art I, § 4. It presented the reasonable argument—one adopted by 4 Justices–that the Elections Clause of the federal Constitution operated *to dispossess* the people of a right to effect redistricting other than through the Legislature. See *ASL*, *supra* at *2-5 (Roberts, C.J., dissenting). Because the people of Arizona divested the legislature of a right specifically and exclusively granted to it by the federal Constitution, that body suffered a cognizable injury in its Constitutional capacity as "the Legislature" under our national governing charter.

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[3] "In determining whether there is standing, the court assumes arguendo that [appellants have] pleaded and could prove a violation of substantive law, and asks only whether [they have] alleged a concrete injury and a sufficient causal relationship between the injury and the violation." *United States v. Nichols*, 841 F.2d 1485, 1498 (10th Cir. 1988) (internal quotations omitted).

The language of the Guarantee Clause confers no such exclusive power on the Legislature. That clause "guarantee[s] to every State in this Union a Republican Form of Government." U.S. CONST. art IV, § 4. This guarantee confers a right on "the State," to be exercised by the "ultimate sovereign[]", the people. *ASL*, *supra* at *31. The Guarantee Clause therefore cannot be used by the legislature to attack limitations that the people, acting as sovereign, place on the authority of the legislature, within their own constitution. The *Kerr* plaintiffs do just that: they assert injury based on deprivation of a right that the Constitution grants to the people. Accordingly, plaintiffs have suffered no injury.

Finally, *Coleman v. Miller*, 307 U.S. 433 (1939),[4] the other principal case in which the Court found in favor of legislative standing, does nothing to call into question the proposition that legislative standing should not lie when the representatives seek to challenge restrictions imposed by the people. There, half of the Kansas State Senators, whose votes "would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment," were held to

[4] It is worth observing that *Coleman* also implicated an express right granted to the "legislature" under the Constitution. Specifically, Article V of the Constitution commits to the "legislatures of three fourths of the several states" the power to ratify amendments to the Constitution under Article V. *See* U.S. CONST. ART. V. Although the question of whether the commitment of this power "to the legislature" afforded any role for the lieutenant governor in the Constitutional process was presented to the Court, the Court did not address it because the Justices were deadlocked on whether such a question was justiciable. *See Coleman*, 307 U.S. at 446-47.

have "standing to challenge, as impermissible under Article V of the Federal Constitution, the State Lieutenant Governor's tie-breaking vote for the amendment." *ASL*, *supra* at *13-14 (quoting *Coleman*, 307 U.S. at 446). Thus, the *Coleman* plaintiffs simply had standing to contest restrictions placed upon their authority by a coordinate branch of government, not by the sovereign itself.

2. *ARIZONA STATE LEGISLATURE* CONFIRMS THAT LEGISLATIVE STANDING GENERALLY WILL NOT EXIST WHERE SUIT IS BROUGHT BY A GROUP OF LEGISLATORS WHOSE VOTES ARE INSUFFICIENT TO ENACT OR DEFEAT LEGISLATION.

Notwithstanding the foregoing, and even assuming that legislators in the state of Colorado *could* bring suit to challenge TABOR, the plaintiffs here lack standing because they do not share the dispositive factors for legislative standing identified by the Court in *Arizona State Legislature.* Examining *Coleman v. Miller*, 307 U.S. 433 (1939) (finding legislative standing), and *Raines v. Byrd*, 521 U.S. 811 (1997) (rejecting legislative standing), the Court highlighted a controlling distinction between the cases, which should also control here: legislative standing generally will not exist where the suit is brought by a group of legislators whose votes are insufficient to control whether proposed legislation is enacted or defeated. The Court emphasized that the *Raines* plaintiffs lacked standing because they were a mere "*six individual Members* of Congress," who had no ground to contend that they represented either the institution itself or a voting block large

enough to control the outcome of any specific legislation. *ASL*, *supra* at *12 (emphasis in original). The Court also noted that *Raines* "attach[ed] some importance to the fact that [the *Raines* plaintiffs had] not been authorized to represent their respective Houses of Congress," and that "both houses actively oppose[d] their suit." *Id*.

By contrast, the Arizona State Legislature commenced its action "after authorizing votes in both of its chambers." *Id*. In this respect, the Arizona State Legislature demonstrated an "institutional injury" closer to that found to confer standing in *Coleman*, which "stood 'for the proposition that *legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue* if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.'" *Id*. at *14 (quoting *Raines*, 307 U.S. at 823) (emphasis added).

Although legislative standing may not always require that the institution bring the lawsuit as a whole, see *Coleman*, or even that the institution authorize the legal challenge, *Arizona State Legislature* strongly suggests that standing requires, at minimum, that a group of legislators (usually a majority) sufficient to control the outcome in at least one chamber of the legislative body support the suit. This threshold of support demonstrates that the affected body at least has the capacity to act, and as such, the alleged injury is not entirely speculative. In light of this

understanding, the legislator-plaintiffs here are in an exceedingly feeble position: their argument only commands the support of five members of the Colorado General Assembly, and the Colorado General Assembly has not authorized this challenge to TABOR[5]—facts of crucial significance to both the *Coleman* and *Arizona State Legislature* Courts. For these reasons alone, the panel should reverse its prior ruling on standing.

At bottom, Amicus does not contend that the plaintiffs have to demonstrate the existence of support sufficient to actually pass a new tax measure through the legislature as a whole, or demonstrate that the Governor would sign the proposed legislation. Plaintiffs must, however, show that their votes could effectively pass the proposed tax measure out of their own legislative chamber; only where this threshold of support exists, and is rendered ineffective, can the legislators colorably claim that their votes have been "completely nullified."

3. *ARIZONA STATE LEGISLATURE* CONFIRMS THAT PLAINTIFFS DO NOT SUFFER A "CONCRETE" INJURY, GIVEN THAT NO ATTEMPT TO ENACT A TAX MEASURE HAS BEEN MADE.

Arizona State Legislature does not require lawmakers to engage in futile attempts to enact legislation, or to "violate the [State] Constitution," in an effort to establish a concrete injury. *ASL*, *supra* at *12; see also *Kerr*, 744 F.3d. at 1170

[5] *See Kerr*, *supra* note 1, at 1119 and 1133 (noting that the five "Legislator–Plaintiffs also concede that they have not been authorized to bring this action on behalf of the General Assembly").

(standing jurisprudence does not demand acts of futility). Hence, even though the Arizona Legislature had not attempted to enact its own redistricting map, a concrete injury existed, because the Legislature's "passage of a competing [redistricting] plan and submission of that plan to the Secretary of State" would "directly and immediately conflict with the regime Arizona's Constitution establishes." *ASL*, *supra* at *11. These circumstances, the Court noted, "would 'completely nullif[y]' any vote by the Legislature, now or 'in the future,' purporting to adopt a redistricting plan." *Id*. at *14 (citing *Raines*, 521 U.S. at 823-24).

By contrast, TABOR does not automatically render futile attempts by Colorado's General Assembly to enact new taxes. TABOR simply states that if plaintiffs can persuade the other members of the Legislature to pass a new tax or tax increase, and that measure is signed by the governor, it is then referred to the statewide ballot for a voter referendum. Such legislation "may become law," and so "a successful vote still has substantial legal effect." *Kerr v. Hickenlooper*, 759 F.3d 1186, 1190-91 (10th Cir. 2014) (Tymkovich, J., dissenting from denial of rehearing *en banc*). Here, the "legislator-plaintiffs have not voted in favor of a successful tax measure that was subsequently denied in a referendum." *Kerr*, 759 F.3d at 1191. No legislative action has gone into effect or failed to be effected; no legislative action has been taken at all. See *Raines*, 521 U.S. at 832 ("[L]egislators

whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue *if that legislative action goes into effect (or does not go into effect."*) (emphasis added). Accordingly, in the current case there is no "concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *ASL*, *supra* at *14 (quoting *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S 464, 472 (1982)). No ruling from this Court will remedy any past attempt by the plaintiffs to pass taxes that was stymied be the people; it will simply prescribe a new legislative process for future proposals. Consequently, it is clear that these plaintiffs claim only an abstract injury and seek "speculative" relief, which cannot confer legislative standing. *Lujan,* 504 U.S. at 560-61.

In addition, requiring that plaintiffs show that an attempt to pass a new tax or tax increase has been made ensures both that a real dispute exists between the parties, and that plaintiffs are accountable to the electorate for their legislative acts and omissions. TABOR was designed and enacted to protect Coloradoans from excessive taxation. Tax increases are unpopular, but foster political accountability. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2655 (2012) ("Taxes have never been popular, … and in part for that reason, … they must originate in the legislative body most accountable to the people, where legislators must weigh the need for the tax against the terrible price they might pay at their next

election[.]") (joint dissent); *United States v. Munoz-Flores*, 495 U.S. 385, 395 (1990) (noting that Federalist No. 58 defended "the decision to give the origination power to the House on the ground that the Chamber that is more accountable to the people should have the primary role in raising revenue"). If lawmakers were allowed to challenge the Constitutionality of this law without first taking the unpopular step of trying to enact a new tax measure, plaintiffs would be shielded from the scrutiny of the electorate and free from the accountability built into the political process. See also *Vieth v. Jubelirer*, 541 U.S. 267, 304 (2004) (dismissing action where adjudication would "deter[] the political process from affording genuine relief") (Scalia, J., plurality opinion). Life tenured judges do not exist to provide gratuitous political protections to the people's elected representatives. This case should be dismissed for lack of standing.

B. *ARIZONA STATE LEGISLATURE* CLARIFIES THE POLITICAL QUESTION DOCTRINE, AND SHOWS THAT PLAINTIFFS' CLAIMS ARE NOT JUSTICIABLE.

1. *ARIZONA STATE LEGISLATURE* SUPPORTS THE PROPOSITION THAT GUARANTEE CLAUSE CLAIMS CONCERNING INTERFERENCE WITH THE STATE ELECTORATE'S ABILITY DIRECTLY OR INDIRECTLY TO CONTROL THE STATE GOVERNMENT ARE JUSTICIABLE.

Baker v. Carr, 369 U.S. 186 (1962), requires a court to analyze six factors in determining whether a claim presents a nonjusticiable political question. "Prominent on the surface of any case held to involve a political question is found

a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 216.

Considered within this framework, Amicus, like the Court in *Arizona State Legislature*, agrees with the panel that not all Guarantee Clause claims present nonjusticiable political questions. Footnote 3 of *Arizona State Legislature* confirms the language of *New York v. United States*, 505 U.S. 144, 185 (1992), that "perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." This footnote confirms that "judicially discoverable and manageable standards," *Baker*, 369 U.S. at 216, that are "principled, rational, and based upon reasoned distinctions" can be found for cases that challenge restrictions on the sovereignty of the electorate to control policy. See *Vieth*, 541 U.S. at 278.

In discussing the merits of the question presented in *Arizona State Legislature*, the Court engaged in a lengthy discussion concerning the "ultimate

sovereignty" of the people, and the concomitant right of the people to control the government. *ASL*, *supra* at *30-31. The Court emphasized that "our fundamental instrument of government derives its authority from 'We the People,'" and noted that "[o]ur Declaration of Independence, ¶ 2, drew from Locke in stating: 'Governments are instituted among Men, deriving their just powers from the consent of the governed.'" *Id*. at *31. The Court's analysis rings similar to that of other constitutional scholars who have suggested that, while the concept of a republican form of government is "a spacious one" and "many particular ideas can comfortably nestle under its big tent," it is not without a "central pillar." Akhil Reed Amar, *Guaranteeing a Republican Form of Government: The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749 (1994). This "central pillar" is that "We the People" are sovereign. *Id*. at 749; see also Fred O. Smith, Jr, *Awakening the People's Giant: Sovereign Immunity and the Constitution's Republican Commitment*, 80 FORDHAM L. REV. 1941, 1949 (2012) (defining the Republican Principle as "the cardinal and indispensible [sic] axiom that the ultimate sovereignty in our constitutionally recognized polities rests in the hands of the governed, not persons who happen to govern").

The *Arizona State Legislature* Court's embrace of the people as the source of governmental authority strongly implies that the subset of Guarantee Clause

claims that are justiciable are those imperiling the sovereignty of the people. Accordingly, the Guarantee Clause should be viewed as a "viable source of protection against restrictions on the sovereignty of the electorate." Brief for CCJ at 2. "Actions wresting control of the government (whether such control is direct or through elected representatives) from the electorate imperil the Republican form of Government" by "rendering the consent of the governed irrelevant." *Id*. at 6. In this way, *specific* government actions directed against the electorate threaten this central pillar of the Guarantee Clause, and claims against such actions will generally lend themselves to "judicially discoverable and manageable standards" for adjudication. By way of analogy, claims restricting voting rights held by the electorate, although arising under different constitutional provisions, are often found to present justiciable questions. See, e.g., *Baker*, 369 U.S. at 297; *Reynolds v. Sims*, 377 U.S. 533 (1964).

2. CONVERSELY, *ARIZONA STATE LEGISLATURE* STRONGLY SUGGESTS THAT GUARANTEE CLAUSE CLAIMS RAISING QUESTIONS CONCERNING THE EXTENT TO WHICH THE ELECTORATE MAY EXERCISE DIRECT DEMOCRACY ARE NOT JUSTICIABLE.

In addition to suggesting that claims implicating the electorate's ability to control state government *are* justiciable under the Guarantee Clause, the Court's opinion in *Arizona State Legislature* also strongly suggests that cases concerning the appropriate amount of direct versus representative democracy *are*

nonjusticiable political questions. Citing *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), the Court stated that "[t]he people's sovereign right to incorporate themselves into a State's lawmaking apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives, is one this Court has ranked a nonjusticiable political matter." *ASL*, *supra* at *5 n.3 (citing *Pacific States*, which rejected a challenge to the referendum process under the Guarantee Clause). *Pacific States* establishes that the use of direct democracy in the initiative and referendum processes on matters of state tax policy presents a nonjusticiable political question. The political nature of such a claim was revealed by the challenge being "addressed to the framework and political character of the government by which the statute levying the tax was passed," and not the "tax as a tax." *Pacific States*, 223 U.S. at 150. This holding demonstrates that questions concerning the *degree* to which the electorate exercises its sovereignty directly or indirectly are for political resolution because questions of degree are, by their nature, nonbinary. Nonbinary questions are generally not amenable to "judicially manageable standards" with which courts can judge whether a particular rule has been violated. *Baker*, 369 U.S. at 216. Indeed, *Baker* explicitly acknowledged that cases that present claims akin to those presented in *Pacific States* are nonjusticiable because "the Guaranty Clause is not a repository of judicially manageable standards which a court could utilize

independently in order to identify" the proper form of a State's lawful government. *Baker*, 369 U.S. at 223.

In this vein, Plaintiffs here ask this Court to announce a new rule of how much direct democracy is too much. Such a question, in addition to lacking "judicially discoverable and manageable standards," also requires the Court to make "an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 216. In the original decision, the panel implicitly acknowledged the difficulty in trying to resolve the question posed by the plaintiffs and avoided identifying the standards it would apply. See *Kerr*, 744 F.3d at 1178-79 ("An attempt to define those standards thoroughly would necessarily implicate adjudication on the merits not appropriate for interlocutory appeal."). The panel also acknowledged the "sparse judicial precedent" available for making determinations under the Guarantee Clause. *Id*. In response, Judge Gorsuch, dissenting from the Tenth Circuit's denial of rehearing *en banc*, queried, "[w]here are the legal principles for deciding a claim like [plaintiffs']? . . . To date, the plaintiffs have declined to advance any test for determining when a state constitutional provision requiring direct democracy on one subject (here, taxes) does or doesn't offend the Clause." *Kerr v. Hickenlooper*, 759 F.3d 1186, 1194 (10th Cir. 2014) (Gorsuch, J., dissenting from denial of rehearing *en banc*); see also *id.* at 1193 ("Moreover, the panel's opinion does not expressly find that there

are 'judicially discoverable and manageable standards' for resolving the case; it simply assures the reader that judicially manageable standards might emerge at a future stage of litigation.") (Tymkovych, J., dissenting from denial of rehearing *en banc*).

The reason that the plaintiffs cannot can suggest such standards, even after more than four years of litigation, is because they do not exist. An "attempt to define those standards thoroughly" would implicate much more than adjudication on the merits; it would require the court to engage in the policy determination of a polycentric question of degree. The amount of direct democracy that is consistent with a republican form of government is a question that requires more than a yes or no answer. "Modern state governments are not dichotomous, but instead exist on a continuum, combining elements of direct and indirect democracy in various ways and to varying extents." Brief for CCJ at 9. Judge Gorsuch noted this diversity in his dissent from the Tenth Circuit's denial of rehearing *en banc* when he remarked that "to hold for plaintiffs in this case would require a court to entertain the fantasy that more than half the states (27 in all) lack a republican government." *Kerr*, 759 F.3d at 1195.

The Court's merits analysis in *Arizona State Legislature* further confirms the nonjusticiable political nature of the plaintiffs' claim in this case. The Court held that the Elections Clause's grant of authority to the "Legislature" —a specific term

that "everybody understood" at the founding of this country to refer to "representative institutions," *ASL*, *supra* at *5, *14 (Roberts, C.J., dissenting)—was broad enough to include the power of "the people" to remove the representative body from the redistricting process and create an independent commission in their stead. *Id.* at *24. If the word "Legislature" in the Elections Clause is spacious enough to include "the people's" authority to use the initiative process to establish an independent redistricting commission, then the more general "guarantee to every *State* in this Union a Republican Form of Government" encompasses the authority of the State's sovereign—the people—to curtail the power of the legislature to raise taxes. The breadth of the Guarantee Clause's protection of a "Republican Form of Government," and the many political power arrangements a "Republican Government" can encompass, show that courts cannot draw judicially manageable lines around the definition of "republican government," and that questions raising this issue are therefore not justiciable. Indeed, *Arizona State Legislature* clearly demonstrated that the republican form of government necessarily encompasses an indeterminate amount of direct democracy: "[a] State is entitled to order the processes of its own governance." *ASL*, *supra* at *27 (citing *Alden v. Maine*, 527 U.S. 706, 752 (1999)). "As Madison put it: "'The genius of *republican* liberty seems to demand . . . not only that all power should be derived from the people, but that those intrusted with it

should be kept in dependence on the people." *Id.* at *30-31 (citing The Federalist No. 37, at 223) (emphasis added). This recognition of the people's broad power to control their representatives confirms there is no judicially manageable method to examine the republican form adopted by the people in cases such as this.

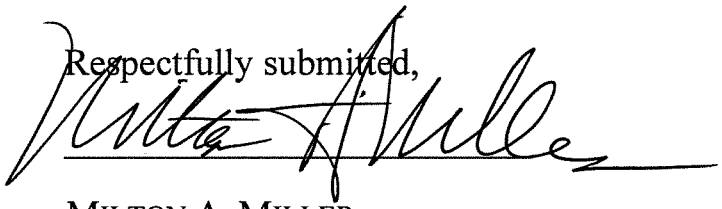
Moreover, the effort to discover judicially manageable standards to determine the constitutionally permissible amount of direct democracy encompassed by the Guarantee Clause would require a policy determination of the kind unfit for judicial decisionmaking. Political scientists from the founding generation to the present have wrestled with how much direct democracy is compatible with a "republican form of government." Some scholars believe that the Framers sought to preclude via the Guarantee Clause democracies along with aristocracies and monarchies. As evidence they cite Federalist Number 10, which explains that "[t]he two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended." The Federalist No. 10 (James Madison). However, other political scientists argue that the Framers did not draft the Guarantee Clause with the purpose of excluding direct democracies. The guarantee of a republican form of government "does not … prohibit all forms of direct democracy, such as initiative and referendum, but neither does it require

ordinary lawmaking via these direct populist mechanisms.'" Amar, *supra*, at 749 (footnote omitted); see also Robert G. Natelson, *A Republic, Not a Democracy? Initiative, Referendum, and the Constitution's Guarantee Clause*, 80 TEX. L. REV. 807, 825, 818-19, 835 & n.155 (2002) (marshalling evidence that the Framers frequently described the generally direct democracies of ancient Greece and of the Swiss cantons as "republics"). If more than two centuries of political debate and scholarship have not been able to determine the proper balance between direct and representative democracy, then the Court should not use this case as the vehicle to deal with this policy issue.

IV. CONCLUSION

For the foregoing reasons, and those in appellant's briefs, this Court should reverse its holding in *Kerr v. Hickenlooper*, 744 F.3d 1156 (10th Cir. 2014), and dismiss for lack of standing and for the presentation of a nonjusticiable political question.

Respectfully submitted,



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July 31, 2015

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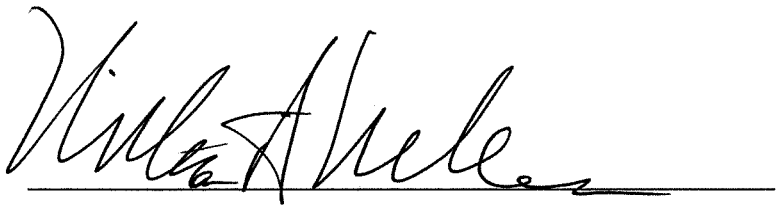

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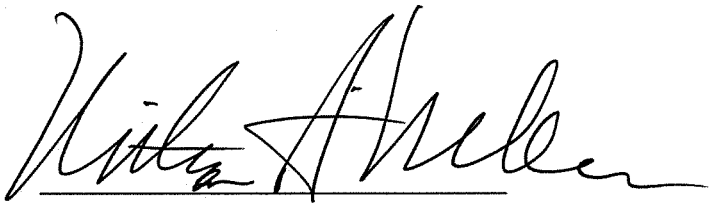

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CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit using the court's CM/ECF system, which will send notification of such filing to all participants in the case who have consented to service in this manner.

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