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, Denver, No. 1:11-cv-01350

CORRECTED BRIEF OF TEXAS, IDAHO, INDIANA, AND MICHIGAN AS AMICI CURIAE IN SUPPORT OF REVERSAL

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Identity and Interest of Amici Curiae

Amici curiae are the States of Texas, Idaho, Indiana, and Michigan. Like the State of Colorado, the amici States have an important interest in the viability of direct-democracy measures such as the longstanding and widespread method of governance challenged here—constitutional amendment by direct citizen vote. In approximately 20 States, citizens are authorized to put constitutional amendments on the ballot for voter approval. *See* The Counsel of State Governments, The Book of the States 2010, at 15 (2010) (Table 1.3, Constitutional Amendment Procedure: By Initiative). And, in every State except one, proposed constitutional amendments adopted by a Legislature may be ratified only by the people's vote. *See id.* at 13-14 (Table 1.2, Constitutional Amendment Procedure: By the Legislature). Direct-democracy measures such as these are permissible and valuable features of a republican form of government.

The States file this amicus brief because allowing individual state legislators to bring claims against a State under the Guarantee Clause of the Constitution threatens direct-democracy principles. The States therefore urge reversal of the district court's decision.

This brief is authorized by this Court's July 1, 2015 order permitting supplemental amicus briefs. Pursuant to the first sentence of Federal Rule of Appellate Procedure 29(a), leave of court is not required to file this brief.

ARGUMENT

The Supreme Court has ordered this Court to reconsider this case in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). That case addressed a different sort of plaintiff than here—a state Legislature, rather than individual legislators—and the Supreme Court's reasoning distinguishing those two types of plaintiffs highlights Plaintiffs' misunderstanding of Article III standing requirements. A proper understanding of the Guarantee Clause and standing to assert claims under it is important to the amici States and their citizens, as it has significant consequences for direct-democracy measures and the States' role as laboratories of experimentation in our federalist system.

1. The Guarantee Clause requires that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . . ." U.S. CONST. art. IV, § 4. This constitutional obligation of the federal government serves to ensure the people of a State authority over their government. The writings of the Framers, the Supreme Court's precedent, and state practices that continue to this day all demonstrate that the Guarantee Clause accommodates direct democracy as an appropriate mechanism through which the people retain authority over the method of governance.

The Federalist Papers provide significant evidence of this understanding. For example, Alexander Hamilton explained that the Guarantee Clause "could be no impediment to reforms of the State constitutions by a majority

of the people in a legal and peaceable mode. This right would remain undiminished." THE FEDERALIST No. 21, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Likewise, a "fundamental principle of republican government [includes] the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness." THE FEDERALIST No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961). James Madison, too, recognized that the "genius of republican liberty . . . demand[s] . . . that all power should be derived from the people." THE FEDERALIST No. 37, at 227 (James Madison) (Clinton Rossiter ed., 1961). Properly understood, in a republican government a "majority of the people" remain "competent at all times . . . to alter or abolish its established government." THE FEDERALIST No. 39, at 246 (James Madison) (Clinton Rossiter ed., 1961).

Early decisions of the Supreme Court also recognize that a republican government is "one constructed on [the] principle [] that the Supreme Power resides in the body of the people," *Chisolm v. Georgia*, 2 U.S. (2 Dall.) 419, 457 (1793), and that "sovereignty resides in the great body of the people," *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 93 (1795). In *Luther v. Borden*, the Supreme Court explained that "according to the institutions of this country, the sovereignty in every State resides in the people of the State, and [] they may alter and change their form of government at their own pleasure." 48 U.S. (7 How.) 1, 47 (1849). Hence, the Guarantee Clause serves to protect the people's sovereignty by assuring "the states sufficient independence to maintain

the responsiveness of their governments to popular will." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 29–30 (1988).

Finally, state constitutions contain numerous provisions that enable the people to carry out the principles embodied in the Guarantee Clause. From voter control over constitutional amendments in 49 States, to the initiative and referendum processes in nearly half the States, the people retain control over the structure of their state governments. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2010, at 13-15. The Supreme Court's recent decision in *Arizona State Legislature* again expresses approval of such direct-democracy measures. *See Ariz. State Leg.*, 135 S. Ct. at 2668 (stating that the Court "see[s] no constitutional barrier to a State's empowerment of its people by embracing [the initiative] form of lawmaking").

The Guarantee Clause thus helps preserve for the people the right of self-governance—the "animating principle of our Constitution that the people themselves are the originating source of all the powers of the government." *Id.* at 2671; *see* THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. July 4, 1776) ("to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"). This Court should adhere to that fundamental principle and refuse to countenance individual legislators' lawsuits claiming nullification of a power which they enjoy only as the people's delegates. To do otherwise, would threaten the important

"role of the States as laboratories for devising solutions to difficult legal problems" and undermine the States' ability to experiment with ways to make the "government more responsive" to the needs of its citizenry. *Ariz. State Leg.*, 135 S. Ct. at 2673 (internal quotations marks and citations omitted).

2. The reasoning of *Arizona State Legislature* confirms that individual legislators lack standing to sue the State under the Guarantee Clause. There, the Supreme Court reaffirmed that individual state legislators lack standing to sue for an alleged violation that does not "zero[] in on any individual" legislator, or "strip" and "completely nullify" a legislator's vote. *Id.* at 2662, 2663, 2665 (alteration marks omitted). The Supreme Court drew a contrast between the *institution* of the Arizona Legislature and individual *members* of that institution. It held that the Arizona Legislature did have standing to complain that a certain voter initiative violated the Elections Clause of the U.S. Constitution by withdrawing power allegedly held exclusively by the Legislature, but the Court emphasized that individual state legislators would lack standing because they present a "different circumstance." *Id.* at 2664 (alteration and ellipsis marks omitted).

The Court thus distinguished the Arizona Legislature from the individual legislators who lacked standing in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, the "institutional injury" from the alleged violation of Congress's Article I powers "scarcely zeroed in on any individual Member" of Congress but was instead "[w]idely dispersed" across that body. *Ariz. State Leg.*, 135 S. Ct. at 2664.

Here, the alleged injury likewise "scarcely zeroe[s] in on any individual" legislator within one branch of the Colorado government. *Id.* Just as an individual member of one chamber of the U.S. Congress lacks standing to complain of an alleged injury to that institution's powers (*Raines*), an individual member of the legislative branch of Colorado's government lacks standing to complain of an alleged violation of that State's rights. *See id.* at 2664-66 (reaffirming the lack of standing in *Raines*, 521 U.S. at 821, 829). Even assuming *arguendo* that the Colorado General Assembly would have standing to claim that the actions of the people of Colorado have violated the Guarantee Clause of the U.S. Constitution, the General Assembly is not a plaintiff here and has not authorized this lawsuit. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1168 & n.7 (10th Cir. 2014) (recognizing the lack of such authorization). This case is therefore unlike *Arizona State Legislature*, where the institution itself sued. In short, the individual legislators suing here do not allege any injury that zeroes in on them specifically and is not shared by, at a minimum, their fellow individual legislators.

Nor does the challenged voter initiative amount to a "strip[ping]" and "complete[] nullif[ication]" of a vote that the individual legislators have cast or would cast. *See Ariz. State Leg.*, 135. S. Ct. at 2663, 2665. As *Arizona State Legislature* explains, that test comes from *Coleman v. Miller*, 307 U.S. 433 (1939), in which 20 (of 40) Kansas legislators cast votes against a certain resolution and thus had standing to challenge the constitutionality of the Lieu-

tenant Governor's tie-breaking vote for the resolution. *Id.* at 446. In determining standing, careful attention is required to "the kind of claim" advanced. *See Ariz. State Leg.*, 135 S. Ct. at 2664 (so noting in discussing the related context of the standing of states to sue the federal government). And, in contrast to *Coleman*, Plaintiffs do not even amount to a controlling block of legislators. And, even if they did, their complaint does not show the same sort of "stripping" and "complete nullification" as in *Coleman*. Plaintiffs can still vote on whether to pass or reject a tax-increase bill, and the General Assembly's passage of a bill is still necessary before such a law can take effect. Colorado voters have not completely stripped the right to vote on taxing laws and vested that right in an independent commission, similar to what occurred in *Arizona State Legislature*. Rather, the people of Colorado have merely chosen to supplement the General Assembly's role by adding an additional step before a taxing bill becomes law—such a law must be approved by the people, who themselves hold and can exercise the "legislative power." *Id.* at 2674; *cf. id.* at 2663, 2665.

The General Assembly also retains its power to initiate the process of repealing the constitutional amendment, and it can alter "other limitations on local governments as a way to provide fiscal relief, including repealing tax rate caps and allowing local governments a wider variety of tax options." *See* Judith I. Stallmann, *Impacts of Tax & Expenditure Limits on Local Governments: Lessons from Colorado and Missouri*, 37(1) J. Reg'l Analysis & Pol'y 62, 65 (2007). Hence, this case presents a claim not about an action that nullifies properly exercised legislative power (as in *Coleman*), but about competing visions of

how the people should exercise their legislative power—i.e., a balance of involvement by the people voting directly and the people represented by their elected delegates. Hence, this is a dispute about different *forms* of republican government—not whether a government *is* republican or not. And Plaintiffs fail to identify any basis in the Guarantee Clause on which the judiciary can decide that sort of dispute by application of distinctly legal principles.

Moreover, a state legislature enjoys power only to the extent that state citizens have delegated that power to the legislature in the state constitution. Accordingly, the people's change to their constitution cannot sensibly be viewed as a "nullification" of a legislative power at all, where the constitutional provision sued upon is one that *protects* the people's right to self-government. The Clause serves to prevent a return to monarchy or dictatorship by enshrining a State's rights to the principle of popular sovereignty, in which the people have the ultimate say over their government. So it would be quite remarkable under that Clause to allow individual state legislators to challenge the people of Colorado's use of the initiative process to shape the operation of their own government. Individual state legislators cannot find in the text or history of the Guarantee Clause a right whose alleged violation they can vindicate through a lawsuit *against* the State.

This Court's original standing ruling—before *Arizona State Legislature*—rested on the premise that the unchecked ability to pass a taxing law is a "legislative core function[]" that is "nullified" when voters also have a direct say.

Kerr, 744 F.3d at 1165. The Supreme Court's decision in *Arizona State Legislature* has now negated that pivotal premise. It recognizes that "the people of a State exercise legislative power coextensive with the authority of an institutional legislature." *Ariz. State Leg.*, 135 S. Ct. at 2674. In light of that principle, this Court should now recognize that Plaintiffs seek to insert the federal courts into a dispute about *how* the people of Colorado exercise the legislative power—not *whether* the federal government has failed to ensure that the people of Colorado have a government responsive to the popular will. Refusing Plaintiffs' invitation to insert the judiciary into that dispute will prevent a flood of future litigation by individual legislators who cannot achieve their political goals through the processes erected by the people of a State.

3. Plaintiffs' vision of standing would have significant consequences outside of this dispute about the Colorado Taxpayer Bill of Rights. In *Arizona State Legislature*, the Supreme Court discussed how direct-democracy measures, such as initiative and referendum processes, have been increasing across States over the years. *See id.* at 2677. Plaintiffs' view that individual state legislators have standing to bring Guarantee Clause claims against a State not only departs from Supreme Court precedent, but could also create litigation over numerous provisions of state law in nearly every State. *Cf. id.* at 2676 (recognizing that the "list of endangered state election laws . . . would not stop with popular initiatives").

State constitutional amendments require a direct-democracy component in 49 States; in many States, the citizens themselves can place constitutional

amendments on the ballot. *See* THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 2010, at 13-14 (2010) (Table 1.2, Constitutional Amendment Procedure: By the Legislature); *id.* at 15 (Table 1.3, Constitutional Amendment Procedure: By Initiative). Indeed, the people of some States have reserved the power to enact laws independent from the legislature. *E.g.*, COLO. CONST. art. V, § 1(1). Those longstanding practices may well be challenged by individual state officials wishing more power for themselves if this Court accepts Plaintiffs' mistaken view of standing to allege a Guarantee Clause violation. Such a decision would be a model for individual state officials across the country who are unhappy at the outcome of the democratic process.

Moreover, many substantive provisions would also be subject to attack. The voters have enshrined balanced-budget requirements in nearly every state constitution, *see* NATIONAL CONFERENCE OF STATE LEGISLATURES, NCSL FISCAL BRIEF: STATE BALANCED BUDGET PROVISIONS 11-13 (Oct. 2010), in order to ensure some level of fiscal discipline and protect the public fisc. Yet Plaintiffs wish this Court to hold that a limit on the General Assembly's ability to unilaterally impose a tax "strips" individual legislators of power to conduct a "core function" that the people may not directly control. If that anti-democratic reasoning is accepted, then identical arguments could be raised in the future by individual legislators unhappy with the restriction against enacting a budget in deficit. The same could occur for constitutional provisions regarding veto powers, super-majority requirements, and term limits for legislators. All of those impose limitations on an individual

member's power to legislate. States should not be forced to *defend* against challenges to those and other provisions under a Clause that defines a protection *owed to* the States.

Plaintiffs' view that a few legislators may challenge in federal court decisions made by the people about how they will be governed demonstrates a grave misunderstanding of the role of federal courts and the nature of the Guarantee Clause. At its core, Plaintiffs' view betrays the right of self-governance that is preserved for the people. That is antithetical to the founding principles embodied in the Constitution, including the Guarantee Clause.

CONCLUSION

This Court should reverse the district court's order and remand for dismissal of this case.

Respectfully submitted.

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Certificate of Compliance

This brief complies with the length, typeface, and type-style requirements of Federal Rule of Appellate Procedure 32(a) and this Court's July 1, 2015 order authorizing this amicus brief because it has been prepared in a 14-point, proportionally spaced typeface using Microsoft Word and contains no more than 10,000 words.

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Certificate of Service

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