No. 12-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, *et al.*,
Plaintiffs-Appellees,

v.

JOHN HICKENLOOPER,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
No. 1:11-CV-01350-WJM-BNB, The Honorable William J. Martinez

AMICUS CURIAE BRIEF OF THE COLORADO UNION OF TAXPAYERS FOUNDATION, 18 CURRENT COLORADO STATE SENATORS, 26 CURRENT COLORADO STATE REPRESENTATIVES, AND 7 FORMER COLORADO STATE LEGISLATORS IN SUPPORT OF APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Amicus Curiae, Colorado Union of Taxpayers Foundation ("CUT"), certifies that CUT is a non-profit corporation that has no parent corporation and has never issued any stock.

Respectfully submitted this 31st day of July 2015.

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GLOSSARY OF TERMS

CUT – Colorado Union of Taxpayers Foundation

TABOR – Taxpayer's Bill of Rights

IDENTITY AND INTEREST OF AMICI CURIAE

Members of the Colorado Legislature and CUT respectfully submit this amicus curiae brief in support of Appellant.[1] CUT is a nonprofit, public-interest, membership organization with its principal place of business in Denver, Colorado. CUT was formed to educate the public as to the dangers of excessive taxation, regulation, and government spending. Among the specific goals of CUT is to protect citizens' rights to petition government. CUT members spent considerable time and money generating support for the passage of the Taxpayer's Bill of Rights ("TABOR"). CUT is also dedicated to enforcing TABOR, as evidenced by its lawsuit challenging the City of Aspen's grocery bag tax in Colorado state court. *Colorado Union of Taxpayers Foundation v. City of Aspen*, No. 2014CA001869 (Colo. Court of Appeals). CUT represents the interests of taxpayers, who face higher taxes and larger government if TABOR falls. A judicial determination in favor of Plaintiffs-Appellees (hereinafter "Plaintiffs") would directly conflict with the efforts of CUT and its members by invalidating TABOR, and with it years of dedicated advocacy and education efforts.

The current legislators filing this amicus curiae brief are members of the Colorado General Assembly who object to the assault on the Colorado Constitution

[1] Pursuant to Fed. R. App. P. 29(c)(5), the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than Mountain States Legal Foundation ("MSLF"), its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

being perpetrated by Plaintiffs in this action.[2] As members of the General Assembly, they dispute that TABOR has hampered their ability to govern the State or otherwise interfered with their ability to adequately represent their constituents. On the contrary, these legislators understand TABOR to be an important feature of constitutional government in Colorado, which helps to ensure that the General Assembly governs responsibly and adheres to its duty to protect the rights of all Coloradans.

The former legislators filing this amicus curiae were members of the

[2] The current legislators filing this brief are Sen. David Balmer (R – District 27); Sen. Randy Baumgardner (R – District 8); Sen. Bill Cadman (R – District 12); Sen. John Cooke (R – District 13); Sen. Larry Crowder (R – District 35); Sen. Kevin Grantham (R – District 2); Sen. Owen Hill (R – District 10); Sen. Chris Holbert (R – District 30); Sen. Kent Lambert (R – District 9); Sen. Kevin Lundberg (R – District 15); Sen. Vicki Marble (R – District 23); Sen. Beth Martinez Humenik (R – District 24); Sen. Tim Neville (R – District 16); Sen. Ellen Roberts (R – District 6); Sen. Mark Scheffel (R – District 4); Sen. Ray Scott (R – District 7); Sen. Jerry Sonnenberg (R – District 1); Sen. Laura Woods (R – District 19); Rep. Jon Becker (R – District 65); Rep. J. Paul Brown (R – District 59); Rep. Perry Buck (R - District 49); Rep. Kathleen Conti (R - District 38); Rep. Don Coram (R - District 58); Rep. Brian DelGrosso (R - District 51); Rep. Tim Dore (R – District 64); Rep. Justin Everett (R – District 22); Rep. Stephen Humphrey (R – District 48); Rep. Janak Joshi (R – District 16); Rep. Gordon Klingenschmitt (R – District 15); Rep. Lois Landgraf (R – District 21); Rep. Polly Lawrence (R – District 39); Rep. Paul Lundeen (R – District 19); Rep. Patrick Neville (R District 45); Rep. Dan Nordberg (R – District 14); Rep. Kevin Priola (R – District 56); Rep. Bob Rankin (R – District 57); Rep. Kim Ransom (R – District 44); Rep. Catherine "Kit" Roupe (R – District 17); Rep. Lori Saine (R – District 63); Rep. Lang Sias (R - District 27); Rep. Dan Thurlow (R – District 55); Rep. Yeulin Willett (R – District 54); Rep. James Wilson (R – District 60); Rep. JoAnn Windholz (R – District 30).

Colorado General Assembly when this lawsuit was originally filed.[3] They recognize that TABOR did not prevent them from fulfilling their legislative function and, like the legislators filing this brief, understand TABOR as an important feature of constitutional government in Colorado. If Plaintiffs succeed in their suit, the will of the people, as reflected in TABOR, will be undermined. Accordingly, Amici Curiae respectfully submit this brief in support of Appellant.

INTRODUCTION

Plaintiffs, five individual state legislators; a few individual local government officials, educators, and education officials; and a handful of Colorado citizens commenced this action against the Governor of Colorado, alleging that TABOR, Colo. Const. art. X, § 20, violates the Guarantee Clause of the United States Constitution, U.S. Const. art. IV, § 4. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1162 (10th Cir. 2014), *cert. granted, judgment vacated*, No. 14-460, 2015 WL 2473514 (U.S. 2015). The Governor moved to dismiss, arguing that Plaintiffs lacked standing and that their claims presented a nonjusticiable political question. *Id.* The district court denied in part the Governor's motion to dismiss, holding that the legislator Plaintiffs had standing to sue because TABOR interfered with their

[3] The former legislators filing this brief are Former Rep. Bob Gardner (R – District 21); Former Sen. Ted Harvey (R – District 30); Former Sen. Mike Kopp (R – District 22); Former Sen. and Rep. Andy McElhany (R – Senate District 12, House District 17); Former Rep. Frank McNulty (R – District 43); Former Sen. Scott Renfroe (R – District 13); Former Rep. Spencer Swalm (R – District 37).

power to tax. *Id.* The district court also held that Plaintiffs' claims do not implicate the political question doctrine. *Id.*

The Governor filed an interlocutory appeal, and this Court affirmed. *Kerr*, 744 F.3d at 1156. Addressing only the issues of legislative standing and justiciability, this Court ruled that: (1) Plaintiffs suffered an injury-in-fact because "TABOR deprives them of their ability to perform the legislative core functions of taxation and appropriation[;]" (2) the alleged injury was caused by TABOR; (3) the alleged injury is redressable by striking down TABOR; and (4) the political question doctrine does not bar Plaintiffs' suit because they challenged only "a single provision of a state constitution" rather than "the validity of a state's government[.]" *Id.* at 1163, 1171–74. The Governor timely petitioned for rehearing en banc, which was denied 6-4 over strong dissenting opinions by Judges Hartz, Tymkovich, and Gorsuch. *Kerr v. Hickenlooper*, 759 F.3d 1186 (10th Cir. 2014).

On October 17, 2014, the Governor timely filed a Petition for Writ of Certiorari with the United States Supreme Court. On June 30, 2015, the Court granted the Petition, vacated this Court's decision, and remanded for further consideration in light of the the decision in *Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). On July 1, 2015 this Court ordered the parties and amici to file supplemental memorandum briefs addressing

the issue of whether *Arizona State Legislature* requires the panel to reconsider its holding. As demonstrated below, *Arizona State Legislature* mandates that the panel hold that the Plaintiffs lack standing to challenge TABOR and that their claims are nonjusticiable political questions. Accordingly, this Court should reverse the judgment of the district court and remand the case with instruction to dismiss the case in its entirety.

ARGUMENT

I. PLAINTIFFS LACK STANDING UNDER THE STANDARD ARTICULATED IN *ARIZONA STATE LEGISLATURE.*

In *Arizona State Legislature*, the Court clearly established the conditions that legislators who assert institutional injuries must meet to have standing. The Court ruled that the Arizona State Legislature had standing only because it "is an institutional plaintiff asserting an institutional injury, and it commenced this action after authorizing votes in both of its chambers . . . ." 135 S. Ct. at 2664. In this case, Plaintiffs are asserting an institutional injury, but they are not an institution nor did they commence this action after an authorizing vote of their respective legislative bodies.[4] Accordingly, this panel should reconsider its previous decision and dismiss Plaintiff's suit for lack of standing.

[4] Although this brief focuses on the individual legislator-Plaintiffs, the analysis applies equally to all Plaintiffs. None of the other Plaintiffs are institutional plaintiffs who are authorized by their institutions to bring this suit. *Kerr*, 744 F.3d at 1162; *see Arizona State Legislature*, 135 S. Ct. at 2664; *Lance v. Coffman*, 549

A. Plaintiffs Are Asserting An Institutional Injury.

Plaintiffs lack standing because they are suing as individual legislators and, thus, any purported institutional injury is widely dispersed and not sufficient for Article III Standing. *Arizona State Legislature*, 135 S. Ct at 2664 (citing *Raines v. Byrd*, 521 U.S. 811, 829 (1997)). In *Arizona State Legislature*, the Court drew a clear distinction between the case before it, which had the legislative body as a plaintiff, and *Raines*, which only had individual members of the legislative body. *Id.* ("In *Raines*, this Court held that six *individual Members* of Congress lacked standing to challenge the Line Item Veto Act." (emphasis in original)). The Court recognized that individual members of a legislative body cannot claim an institutional injury. *Id.*

Individual members cannot claim an institutional injury because, as explained in *Arizona State Legislature*, such an injury "scarcely zeroe[s] in on any individual Member" and is widely dispersed and necessarily impacts all members equally. *Arizona State Legislature*, 135 S. Ct at 2664 (citing *Raines*, 521 U.S. at 821, 829). In this case, Plaintiffs only allege institutional injuries. *See Kerr*, 744 F.3d at 1165 ("With respect to taxing and revenue, which the plaintiffs describe as 'legislative core functions,' the *General Assembly allegedly operates* not as a

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U.S. 437, 442 (2007) ("The only injury allege[d] is that the law . . . . has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that [this Court] ha[s] refused to countenance in the past.").

legislature but as an advisory body, empowered only to recommend changes in the law to the electorate."[5] (emphasis added)). In its complaint, Plaintiffs alleged that "'[TABOR] removes entirely from the Colorado General Assembly any authority to change state law concerning taxation to replace or increase existing revenue, and prohibits the General Assembly from raising funds by any other means . . . .'" *Kerr*, 880 F. Supp. 2d at 1130-31 (D. Colo. 2012) (quoting Operative Complaint ¶ 80). Likewise, Plaintiffs alleged that "'[b]y removing the taxing power of the General Assembly, the TABOR amendment renders the Colorado General Assembly unable to fulfill its legislative obligations . . . .'" *Id.* at 1131 (quoting Operative Complaint ¶ 83).

Therefore, even assuming arguendo that there are "legislative core functions," those core functions would belong to the General Assembly as a whole, not to any individual members. Like the plaintiffs in *Raines*, Plaintiffs "do not

[5] In *Arizona State Legislature*, the Supreme Court clearly ruled that there are no "legislative core functions" that inherently belong to the legislature. *See Arizona State Legislature*, 135 S. Ct. at 2671 (citing *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672 (1976), for the proposition that "[i]n establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature."); *cf. id*. at 2677 ("Both parts of the Elections Clause are in line with the fundamental premise that all political power flows from the people."); *see also* Part II, *infra*. Therefore, this Court does not have to accept as true Plaintiffs' alleged injury and can hold that Plaintiffs have not suffered a legally redressable injury. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (On a motion to dismiss, courts are not bound to accept as true a legal conclusion couched as a factual allegation.).

claim that they have been deprived of something to which they *personally* are entitled . . . ." *Raines*, 521 U.S. at 821 (all emphasis in original); *Schaffer v. Clinton*, 240 F.3d 878, 885 (10th Cir. 2001) ("Like the plaintiffs in *Raines*, Congressman Schaffer has not alleged a sufficiently personal injury to establish standing because he has not been singled out for specially unfavorable treatment as opposed to other Members of the House of Representatives."). Plaintiffs must allege that the General Assembly is injured because they are not individually entitled to increase taxes without voter approval, even in the absence of TABOR. *See Baird v. Norton*, 266 F.3d 408, 412 (6th Cir. 2001) (single legislator did not have standing to claim vote nullification regarding a law that passed because "[t]he Michigan Constitution may require a majority of all members' votes for legislation to be approved, but it does not require unanimity."); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) (Alaska state legislators lacked standing because "their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature." (citing *Raines*, 521 U.S. at 821)). Therefore, none of the Plaintiffs can "tenably claim a 'personal stake' in the suit." *Arizona State Legislature*, 135 S. Ct. at 2664 (quoting *Raines*, 521 US. at 830).

Furthermore, Plaintiffs cannot claim that their individual votes have been nullified by TABOR because, as the Court explained in *Arizona State Legislature*,

vote nullification is just another type of institutional injury. *Compare Arizona State Legislature*, 135 S. Ct. at 2664–65 ("Closer to the mark is this Court's decision in [*Coleman v. Miller*, 307 U.S. 433 (1939)]. There, plaintiffs were 20 (of 40) Kansas State Senators, whose votes would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment." (internal quotations omitted)); *with Kerr*, 744 F.3d at 1165 ("[Plaintiffs' allegations fall closer to the theory of vote nullification espoused in *Coleman* . . . ."). Distinguishing *Raines* from *Coleman*, the Court in *Arizona State Legislature* emphasized that the number of legislators bringing a suit is relevant to the standing determination. 135 S. Ct. at 2664–65. It noted that, in *Raines*, the plaintiffs had not been authorized to represent their respective houses of Congress and observed that both houses actively opposed the suit. *Id.* at 2664 (quoting *Raines*, 521 U.S. at 829). In contrast, "*Coleman,* as [] later explained in *Raines,* 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 2665 (quoting *Raines*, 521 U.S. at 823). Noting this distinction, the Court concluded that the Arizona State Legislature could claim vote nullification because, as an institution, it necessarily had enough votes to enact a law that would be affected by the voter initiative at issue. *See Arizona*

State Legislature, 135 S. Ct at 2665 ("Our conclusion that the Arizona Legislature has standing fits that bill" that there are enough votes to enact legislation.).

In contrast, Plaintiffs in this case do not have sufficient votes to "enact[] a specific legislative Act" that would be affected by TABOR. *Raines*, 521 U.S. at 823. Amici add their voices here in order to emphasize that Plaintiffs not only act without the authority of the General Assembly, they act contrary to the views of many of its members. A significant amount of Representatives, 26 of 65, and a majority of the State Senate disagree with the claims alleged by Plaintiffs in this case. *See Raines*, 521 U.S. at 829. Therefore, unlike in *Arizona State Legislature*, the General Assembly has not spoken with one voice to seek to end the revenue approval procedures imposed by TABOR. Plaintiffs' alleged injury is thus illuminated to be merely a political disagreement in which they hold the losing hand, not a judicially cognizable institutional injury.

Even if this Court accepts that "the legislator-plaintiffs' injury is their disempowerment rather than the failure of any specific tax increase," *Kerr*, 744 F.3d at 1169, that purported injury is as an institutional injury and is not realized until at least a majority of both houses could be affected by that alleged disempowerment.[6] *Arizona State Legislature*, 135 S. Ct. at 2665. Courts require

[6] Again, this Court should not accept this alleged injury as true, in light of the Supreme Court's decision in *Arizona State Legislature*. The Court clearly stated that only the people, not the legislature, could be disempowered. *Arizona State*

the institution, rather than individual members, to bring a suit because "legislative bodies represent[] larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole." *United States v. Ballin*, 144 U.S. 1, 3 (1892); *see also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 Harv. J. L. & Pub. Pol'y 209, 275 (2001) ("Because decisions by Congress are made by a vote as a collective whole, one or several members should not be able to 'step into the shoes of the' Congress and invoke its claim to injury." (quoting *Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986))). This suit is not the action of the General Assembly as a whole.

This Court's previous decision failed to recognize that Plaintiffs were alleging an institutional injury and, thus, only the institution could bring the case. In distinguishing this case from *Babbit*, this Court focused on Plaintiffs' allegation "that TABOR strips them of all power to conduct a 'legislative core function' that is not constitutionally committed to another legislative body" as opposed to the allegation in *Babbit* where individuals legislators "complained only that they lost

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Legislature, 135 S. Ct. at 2677 ("Invoking the Elections Clause, the Arizona Legislature instituted this lawsuit to disempower the State's voters from serving as the legislative power for redistricting purposes.").

some control over federal lands, a power the Constitution expressly grants to Congress . . . ." *Kerr*, 744 F.3d at 1169–70. The nuances of the allegation, however, are irrelevant to the question of standing. Instead, the nature of the injury—personal or institutional—determines whether an individual has standing. Where, as here, the alleged injury is institutional, only the institution has standing. *Arizona State Legislature*, 135 S. Ct. at 2664; *Chenoweth v. Clinton*, 181 F.3d 112, 113 (D.C. Cir. 1999) (rejecting standing where four congressmen claimed that the President's use of an executive order "deprived [them] of their constitutionally guaranteed responsibility of open debate on issues and legislation" involving interstate commerce and the expenditure of federal money); *Campbell v. Clinton*, 203 F.3d 19, 21–22 (D.C. Cir. 2000) (rejecting standing where 31 congressmen claimed the President "waged war in the constitutional sense without a congressional delegation" in violation of the War Powers Resolution, thereby "circumventing [Congress's] legislative authority."); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 7 (D.D.C. 2002) ("[T]he claim that [congressmen] were deprived of a constitutional right and duty to participate in treaty termination is, like the dilution of legislative power alleged in *Raines*, an institutional injury lacking a personal, particularized nature."). Accordingly, because Plaintiffs are individuals alleging an institutional injury, this Court must dismiss Plaintiffs' suit for lack of standing.

B. Plaintiffs Are Not Authorized To Represent The General Assembly.

Plaintiffs lack standing because unlike the plaintiff in *Arizona State Legislature,* Plaintiffs did not commence this action after an authorizing vote in both of its chambers. *See Arizona State Legislature*, 135 S. Ct. at 2664. It is anticipated that Plaintiffs will attempt to use Senate Joint Resolution 2013-016, which authorized an *amicus brief*, to argue that the General Assembly has authorized Plaintiffs' lawsuit. *See* Senate Joint Resolution 2013-016 (March 14, 2013), *available at* http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/AE5A0857CA39AEBD87257B13005E5BF3?open&file=SJR016_enr.pdf.[7] The language of the Joint Resolution, however, makes clear that the General Assembly did not authorize the Plaintiffs to bring a suit on behalf of the Institution.

> Joint Resolution 2013-016 authorizes:
>
> [T]he Committee on Legal Services . . . to retain legal counsel to represent the General Assembly through participation as *an amicus curiae* in any pending or future lawsuit in which the General Assembly is not a party *on the limited issue of standing* of the legislator plaintiffs if the Committee determines that standing is based upon advancing any institutional interest of the General Assembly.

[7] This Court has the authority to take judicial notice of documents from the General Assembly. *Kerr*, 744 F.3d at 1178–79 (citing Fed. R. Evid. 201(b)). For the Court's convenience, a true and accurate copy of the Resolution is reproduced at Addendum A.

Senate Joint Resolution 13-016 at 2–3 (all emphasis added). The legislators who voted for the Joint Resolution incorrectly thought that individual legislators could allege institutional injuries and, thus, authorized the filing of an amicus curiae brief to make that argument. *See* Colorado General Assembly Office of Legislative Legal Services, *Summary of Meeting, Committee on Legal Services* at 3 (March 19, 2013), *available at* http://tornado.state.co.us/gov_dir/leg_dir/olls/PDF/cols20130319.pdf ("Representative Gardner said if I understand the resolution, the resolution is about individual members of the General Assembly asserting standing, not the entire General Assembly by resolution itself asserting standing. Do I have that right? Mr. Cartin said yes, that's correct.").[8] The Supreme Court, however, has rejected that argument and now Senate Joint Resolution 13-016 has no bearing on the outcome of this case.[9] *Arizona State Legislature*, 135 S. Ct. at 2664.

Furthermore, Plaintiffs cannot even use the Resolution to argue that a majority of the General Assembly agrees with its allegations that TABOR injures an institutional interest because the Resolution does not express an

[8] For the Court's convenience, a true and accurate copy of the Summary is reproduced at Addendum B.

[9] Accordingly, the General Assembly will not be filing an amicus brief on remand.

opinion on that issue. The Joint Resolution expressly provides that "[t]he involvement of the General Assembly as amicus curiae on the limited issue of standing of individual legislators who are plaintiffs should carry no implication about the views of the General Assembly on the merits of such lawsuits . . . ." Senate Joint Resolution 13-016 at 2. In fact, Joint Resolution 13-016 does not reference this case or TABOR by name, and does not specify any alleged institutional injuries.[10] *See id.* at 2. Therefore, Plaintiffs cannot use the outdated opinions on standing expressed in Senate Joint Resolution 13-016 to satisfy the requirement that only a legislative institution can bring a suit based on an alleged institutional injury.[11]

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[10] The original draft of the Joint Resolution included language referencing TABOR, this lawsuit, and the alleged institutional injury to the "ability to enact taxes . . . ." Senate Resolution 13-016 as Introduced at 2 (February 27, 2013), *available at* http://www.leg.state.co.us/clics/clics2013a/csl.nsf/fsbillcont3/AE5A0857CA39AEBD87257B13005E5BF3?open&file=SJR016_01.pdf (reproduced at Addendum C). However, that is not the Resolution that the General Assembly adopted. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("'Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" (quoting *Nachman Corp. v. Pension Benefit Guaranty Corporation,* 446 U.S. 359, 392-93 (1980) (Stewart, J., dissenting))); *cf. Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

[11] At most, there were six members of the Joint Committee on Legal Services that endorsed Plaintiffs' position on the alleged institutional injury in this case. Colorado General Assembly Office of Legislative Legal Services, *Summary of Meeting, Committee on Legal Services* at 3 (March 19, 2013) ("The initial determination for the Committee pursuant to Senate Joint

Plaintiffs are a handful of state legislators attempting to bring suit based on a questionable alleged institutional injury. Even if this Court accepts Plaintiffs' allegation that TABOR injures legislative core functions, that purported injury is an institutional injury that can only be alleged by an institutional plaintiff. Plaintiffs in this case do not represent the General Assembly and do not have the General Assembly's authorization to bring this suit. In fact, a majority of the Senate and a significant minority of the House oppose their suit. Accordingly, based on the Supreme Court's decision in *Arizona State Legislature*, this court must dismiss Plaintiffs' claims for lack of standing.

II. IN *ARIZONA STATE LEGISLATURE*, THE COURT CLEARLY RULED THAT THE PEOPLE, NOT COURTS, DETERMINE THE ALLOCATION OF LEGISLATIVE POWER.

This Court should also dismiss Plaintiffs' suit as a nonjusticiable political question. *Arizona State Legislature*, 135 S. Ct. at 2660 n.3 ("The 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

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Resolution 16 is whether it is in the best interest of the General Assembly and the state of Colorado for the General Assembly to participate as amicus curiae in *Kerr v. Hickenlooper* on the limited issue of the standing of the legislator-plaintiffs to advance the institutional interests of the General Assembly and the taxation and appropriation powers."). Although the Committee purportedly acted on behalf of the General Assembly, only the Committee members actually voted on whether to file an amicus brief in this case.

elected representatives, is one this Court has ranked a nonjusticiable political matter." (citing *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912))). Although the Court indicated that some challenges under the Guarantee Clause may be justiciable, *id.*, the Court's analysis in *Arizona State Legislature* demonstrates that Plaintiffs' claims are not one of the few hypothetical claims a court can and should decide. *See id.* at 2675 ("The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution's conception of the people as the font of governmental power.").

Specifically, the Court made clear that there exists no "legislative core functions" that inherently belong to the legislature. *Arizona State Legislature*, 135 S. Ct. at 2667. Despite stating that redistricting "involves lawmaking in its essential features" the Court still held that the voters of Arizona could limit the Legislature's power over redistricting. *Id.* (internal quotations omitted). This is because "as to the 'power that makes laws' in Arizona, initiatives adopted by the voters legislate for the State just as measures passed by the representative body do." *Id.* at 2671 (citing *Eastlake*, 426 U.S. at 672, for the proposition that "In establishing legislative bodies, the people can reserve to themselves power to deal directly with matters which might otherwise be assigned to the legislature.").

Similarly, in Colorado, the "power that makes laws" also resides in voters through initiatives and voter-approved constitutional amendments. Colo. Const. art. V, § 1. Since the State's establishment, the citizens of Colorado have recognized that "[a]ll 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." Colo. Const. art. II, § 1;[12] *cf. Arizona State Legislature*, 135 S. Ct. at 2675 ("The people's ultimate sovereignty had been expressed by John Locke in 1690, a near century before the [federal] Constitution's formation . . . .").

Therefore, *Arizona State Legislature* mandates that this Court must reconsider its previous holding. As this Court previously stated "[i]f adjudicating this case required us or the district court to determine the wisdom of allocating certain traditionally legislative powers to the people," then this case would have to be dismissed as a nonjusticiable political question. *Kerr*, 744 F.3d at 1180 (citing *Baker v. Carr,* 369 U.S. 186 (1962)). Yet, the Supreme Court has made clear that there are no "traditionally legislative powers" that the Constitution allocates between the legislature and the people. *Arizona State Legislature*, 135 S. Ct. at 2673 ("We resist reading the Elections Clause to single out federal elections as the

[12] A copy of the founding Constitution is available at https://www.colorado.gov/pacific/sites/default/files/Colorado%20Constitution.pdf.

one area in which States may not use citizen initiatives as an alternative legislative process."). Instead, under the U.S. and Colorado Constitutions all legislative power resides in the people. *Id.* at 2675; *see also* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 453 (2004) ("Benjamin Franklin articulated this popular view to the Constitutional Convention: 'In free Governments the rulers are the servants, and the people their superiors & sovereigns.'" (quoting James Madison, Notes of Debates in the Federal Convention of 1787, at 371 (W.W. Norton & Co. 1987) (1840))); John Locke, *Second Treatise of Government*, § 140 (1690) (C. B. Macpherson ed., 1980) ("[F]or if any one shall claim a *power to lay* and levy *taxes* on the people, by his own authority, and without such consent of the people, he thereby invades the *fundamental law of property*, and subverts the end of government . . . ." (all emphasis in original)).

Therefore, if this Court determines that Plaintiffs have standing, the district court will have to do what this Court cautioned against, *i.e.* decide the wisdom of how the Colorado citizens allocated their legislative power. *See Arizona State Legislature*, 135 S. Ct. at 2673 ("This Court has 'long recognized the role of the States as laboratories for devising solutions to difficult legal problems.'" (quoting *Oregon v. Ice*, 555 U.S. 160, 171 (2009))). That is not a question for the district court, or any court, to decide. *Id.* ("Deference to state lawmaking allows local

policies more sensitive to the diverse needs of a heterogeneous society, permits innovation and experimentation, enables greater citizen involvement in democratic processes, and makes government more responsive by putting the States in competition for a mobile citizenry." (internal quotations omitted)).

The Purpose of the political question doctrine is to prevent "the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political . . . ." *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 141 (1912); *see also Luther v. Borden*, 48 U.S. 1, 42 (1849). Plaintiffs' claims invite a federal court to engage in "'some amorphous general supervision of the operations of government'" and are, thus, nonjusticiable under the political question doctrine. *Raines*, 521 U.S. at 828 –29 (quoting *U.S. v. Richardson*, 418 U.S. 166, 192 (1974)). The Supreme Court has been clear that the "value" of Article III courts lies in "'the protection it has afforded the constitutional rights of individual citizens and minority groups against oppressive or discriminatory government action.'" *Id.* (quoting *Richardson*, 418 U.S. at 192). This value is trivialized when federal courts "review those controversies which revolve around policy choices and value determinations . . . ." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986).

Finally, the concept of justiciability, whether embodied in the standing or political question doctrines, is intended to preserve the separation of powers and

define the role of Article III courts. *Allen v. Wright*, 468 U.S. 737, 750 (1984) ("All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (internal quotations omitted)), *abrogated in part on other grounds*, *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). Where plaintiffs lack standing *and* allege claims that are barred by the political question doctrine, separation of powers concerns are even more grave, because this Court "has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Raines*, 511 U.S. at 819 (internal quotations omitted). In 1992, Colorado voters exercised their legislative power and reserved the authority to approve any increases in taxing and spending. Colo. Const. art X, § 20. As the Supreme Court recently made clear, the wisdom of that decision is a matter of political, and not judicial, concern. *Arizona State Legislature*, 135 S. Ct. at 2673. Accordingly, this Court should reconsider its previous decision and dismiss Plaintiffs' claims for lack of standing and as raising a nonjusticable political question. *See Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[E]ither the absence of standing or the presence of a political

question suffices to prevent the power of the federal judiciary from being invoked by the complaining party.").

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand with instruction to dismiss Plaintiffs' claims in their entirety.

DATED this 31st day of July 2015.

Respectfully submitted,

/s/ Jeffrey W. McCoy
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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. P. 29, Fed. R. App. P. 32, and Tenth Circuit Rule 32, the attached Amicus Curiae Brief has a typeface of 14 points or more and contains 5,405 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

DATED this 31st day of July 2015.

/s/ Jeffrey W. McCoy
Jeffrey W. McCoy

CERTIFICATE OF ELECTRONIC FILING

In accordance with this Court's CM/ECF User's Manual and Local Rules, I hereby certify that a copy of the foregoing has been scanned for viruses with Trend Micro Antivirus+, updated July 28, 2015, and is free of viruses according to that program. In addition, I certify that all required privacy redactions have been made and the electronic version of this document is an exact copy of the written document to be filed with the Clerk.

DATED this 31st day of July 2015.

/s/ Jeffrey W. McCoy
Jeffrey W. McCoy

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on this 31st day of July 2015.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 31st day of July 2015.

/s/ Jeffrey W. McCoy
Jeffrey W. McCoy

ADDENDUM A

SENATE JOINT RESOLUTION 13-016

BY SENATOR(S) Carroll, Hudak, Steadman;
also REPRESENTATIVE(S) Pabon, Court, Hullinghorst, Kagan, Labuda, McLachlan, Melton, Murray, Rosenthal, Schafer, Young, Ferrandino.

CONCERNING AUTHORIZING AND DIRECTING THE COMMITTEE ON LEGAL SERVICES TO RETAIN LEGAL COUNSEL TO REPRESENT THE GENERAL ASSEMBLY AS AMICUS CURIAE IN ANY PENDING OR FUTURE LAWSUIT FOR THE PURPOSE OF PARTICIPATING ONLY TO ADDRESS THE ISSUE OF THE STANDING OF LEGISLATOR-PLAINTIFFS WHEN STANDING IS BASED UPON AN INSTITUTIONAL INTEREST OF THE GENERAL ASSEMBLY.

WHEREAS, To bring an action in a court of law, a complaint must contain allegations that the plaintiff or plaintiffs suffered an injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions; and

WHEREAS, Such a showing of standing is a jurisdictional requirement since courts may exercise their powers only when an actual case or controversy exists; and

WHEREAS, For purposes of standing, injuries may arise from numerous types of legally protected interests, including institutional rights; and

WHEREAS, The General Assembly has constitutionally protected institutional interests which, if threatened by injury, will confer standing upon the General Assembly, such as the General Assembly's exclusive authority to appropriate moneys; and

WHEREAS, The General Assembly's historic practice has been that

individual legislators cannot sue on behalf of the General Assembly, and the General Assembly does not authorize litigation on its own behalf, without express authorization through a joint resolution; and

WHEREAS, Despite not being expressly authorized, individual legislators may still have a sufficiently cognizable injury to establish standing for purpose of advancing an institutional interest if a core legislative power of the General Assembly, and thereby the ability of its members to fulfill their official responsibilities, has been nullified or eliminated; and

WHEREAS, The involvement of the General Assembly as amicus curiae on the limited issue of standing of individual legislators who are plaintiffs should carry no implication about the views of the General Assembly on the merits of such lawsuits; now, therefore,

Be It Resolved by the Senate of the Sixty-ninth General Assembly of the State of Colorado, the House of Representatives concurring herein:

That it is in the best interests of the General Assembly and the state of Colorado that the General Assembly participate as an amicus curiae in any lawsuit in which the General Assembly is not a party but individual members are plaintiffs on the limited issue of standing of those legislator-plaintiffs when standing is based upon advancing an institutional interest of the General Assembly; and

That the Committee on Legal Services, in furtherance of its authority under section 2-3-1001, Colorado Revised Statutes, is authorized and directed to retain legal counsel to represent the General Assembly through participation as an amicus curiae in any pending or future lawsuit in which the General Assembly is not a party on the limited issue of

standing of the legislator-plaintiffs if the Committee determines that standing is based upon advancing any institutional interest of the General Assembly.

John P. Morse
PRESIDENT OF
THE SENATE

Mark Ferrandino
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Cindi Markwell
SECRETARY OF
THE SENATE

Marilyn Eddins
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

ADDENDUM B

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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

March 19, 2013

The Committee on Legal Services met on Tuesday, March 19, 2013, at 7:38 a.m. in SCR 354. The following members were present:

Senator Morse, Chair
Senator Brophy
Senator Guzman
Senator Johnston (present at 7:50 a.m.)
Senator Roberts
Representative Foote
Representative Gardner
Representative Kagan
Representative Labuda, Vice-chair (present at 7:41 a.m.)
Representative Scott

Senator Morse called the meeting to order.

7:39 a.m. -- Dan Cartin, Director, Office of Legislative Legal Services, and Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 1 - Discussion of amicus participation in *Kerr v. Hickenlooper* and possible retention of legal counsel.

Mr. Cartin said Senate Joint Resolution 13-016 authorizes and directs the Committee to retain legal counsel to represent the General Assembly as amicus curiae in any pending or future lawsuit in which legislators are plaintiffs for the purpose of participating on the issue of the standing of those legislative plaintiffs when that standing is based upon an institutional

interest of the General Assembly. Pursuant to that resolution, Senator Morse asked that the Committee meet to discuss authorizing the participation of the General Assembly as an amicus curiae in the *Kerr v. Hickenlooper* lawsuit, which is currently pending on appeal before the United States Tenth Circuit Court of Appeals on the limited issue of the standing of the legislative plaintiffs based upon advancing the institutional interests of the General Assembly to enact laws on taxation and appropriations. If you first determine that the General Assembly should participate as an amicus curiae on the limited issue of standing, the second determination for the Committee will be who should be retained to draft and file the amicus brief with the Tenth Circuit. The Committee can address each of those questions by a separate motion.

Mr. Cartin said we'd like to briefly give you an overview of the standing issue on appeal before the federal court. The plaintiffs include five current legislators, Senators Kerr and Morse and Representatives Hullinghorst, Levy, and Court. Other plaintiffs are local government officials, educators, and education officials and citizens of Colorado. The plaintiffs filed this suit in their official capacities, without the authorization of the General Assembly, and the General Assembly is not a party to the suit. The plaintiffs claim that article X, section 20, of the Colorado constitution, which we know as TABOR, violates the guarantee clause and the equal protection clause of the United States constitution and the Colorado enabling act of 1875 by eliminating the General Assembly's plenary power to legislate on matters of taxation and appropriations, which, they allege, denies the state of Colorado and its citizens an effective representative democracy that is contrary to the constitutional guarantee of a republican form of government. As part of their claims, the plaintiffs argue that TABOR has inflicted an institutional injury upon all of the members of the General Assembly through the nullification of their ability to enact taxes to provide for the state's expenses, thus rendering the General Assembly unable to effectively fulfill its legislative obligations in a representative democracy and a republican form of government. The attorney general, who represents Governor Hickenlooper, filed a motion on behalf of the governor, asking the federal district court to dismiss the lawsuit on several grounds, including the ground that all of the plaintiffs lack standing to bring the lawsuit. The district court denied the motion to dismiss on all of the grounds except the equal protection claim, thus permitting the plaintiffs to pursue the lawsuit on the remaining claims. As part of its decision, the federal district court found that the legislator-plaintiffs have standing to maintain the lawsuit based upon the institutional interest of the General Assembly to enact taxes and appropriate money. Governor Hickenlooper has appealed this holding and other holdings of the district court that are favorable to the plaintiffs to the Court of Appeals for the Tenth Circuit where the lawsuit is currently pending. That's where Senate Joint Resolution 16 and the Committee's determination this morning intercept. Specifically, the first full "WHEREAS" paragraph on the second page of the resolution says despite not being expressly authorized, individual legislators may still have a sufficiently cognizable injury to establish standing for purposes of advancing an institutional interest if a core legislative power of the General Assembly, and thereby the ability of its members to fulfill their official

responsibilities, has been nullified or eliminated. In this instance, the plaintiffs have claimed, and the district court has agreed, that the ability of the General Assembly to enact taxes to provide for the state's expenses is a core legislative responsibility that's been nullified, which, the court held, is a concrete institutional injury common to all members of the General Assembly sufficient to infer standing upon those legislators to allege that institutional injury. The district court's conclusion that the plaintiffs have standing is on appeal before the Tenth Circuit and that's the discreet issue before the Committee today. The initial determination for the Committee pursuant to Senate Joint Resolution 16 is whether it is in the best interest of the General Assembly and the state of Colorado for the General Assembly to participate as amicus curiae in *Kerr v. Hickenlooper* on the limited issue of the standing of the legislator-plaintiffs to advance the institutional interests of the General Assembly and the taxation and appropriation powers.

Senator Morse said this resolution is all about us participating as amicus curiae whenever standing is at issue, not this particular case. Is that an accurate assessment? Mr. Cartin said that is correct.

Senator Morse said we are trying to decide whether to do that in this particular case but we'll never need another one of these resolutions. We'll be able to come directly to this Committee any time we think there's a standing issue and ask to do an amicus brief, or will we have to do another resolution? Mr. Cartin said I think the way the resolution is written it would provide grounds for a future legislator to raise the issue with the Committee and bring it back to the Committee on some other future, pending lawsuit.

Ms. Eubanks said but only on this limited issue of standing based on an institutional interest of the General Assembly.

Representative Gardner said if I understand the resolution, the resolution is about individual members of the General Assembly asserting standing, not the entire General Assembly by resolution itself asserting standing. Do I have that right? Mr. Cartin said yes, that's correct. What we've seen in the past is a joint resolution by the body authorizing participation in a particular proceeding or perhaps as amicus in a particular proceeding, and the entire body could weigh in on the issue of the General Assembly having standing in that proceeding. This resolution, as you have accurately characterized it, goes to those situations where individual legislators have filed the lawsuit, the General Assembly is not a party, and the General Assembly may want to weigh in as amicus on the standing issue.

Representative Gardner asked can you tell me what situations we've had in the past that involve individual legislators asserting that they have standing on behalf of the entire General Assembly? Mr. Cartin said to our knowledge, that particular scenario where individual legislators have asserted standing based on an institutional interest of the General Assembly where the General Assembly is not a party has not occurred.

Ms. Eubanks said I would like to note that there have been two cases we are aware of where individual legislators brought lawsuits that basically advocated an institutional interest. Those are old cases. Standing was never at issue, but they were not specifically authorized by the body to bring the lawsuits. They dealt with the power of appropriation. Standing was never an issue in those cases so they never directly dealt with the issue of whether individual members needed authorization by the body. It's been the practice when the General Assembly wants to participate that it does a resolution or goes to the executive committee during the interim. We are aware of at least two cases where individual members did bring actions dealing with institutional interests.

Representative Gardner said the question of standing was never addressed in those cases. The defense was never asserted or what happened there? Ms. Eubanks said the issue of standing was never raised in either of those cases and they were dealt with on other grounds.

Representative Gardner asked were they recent cases? Ms. Eubanks said I think the 1960s or 1970s.

Senator Morse said Senator Grossman - it may have been Representative Grossman at the time - sued over the supermotion issue in GAVEL. That was an individual legislator suing on an institutional interest as to whether or not the institution followed the rules. Does that not fit as one of your cases? Ms. Eubanks said in the Grossman situation, he was suing because of committee action on a particular piece of legislation that he sponsored and that was killed in committee. His assertion was that the procedure violated the constitution in terms of that process. He wasn't really representing the institutional interest in his lawsuit and he actually sued the General Assembly. He wasn't asserting an institutional interest.

Senator Roberts said a question that comes to my mind is, if this proceeds, do we run the risk of opening the door to any time even one legislator wants to make the case that he or she represents the institutional interest, we have no threshold that has to be met, such as two-thirds of the body has to agree that there is an institutional interest. In the Grossman instance, I can see a distinction as to why we would want to protect the individual legislators' right to committee due process. The concern I have is going forward on this, are we not going to throw open the doors to any one of 100 in any given year wanting this option of filing an amicus brief and drawing the whole General Assembly in because they individually had concerns? Where are the sideboards? Mr. Cartin said I think the sideboards, if there are sideboards - and I don't know if this would prevent the flood gate as Senator Roberts has characterized it - is that the resolution goes to those situations where there is a plaintiff-legislator in a legal proceeding and the issue is the standing of the legislator to advance an institutional interest where a core legislative responsibility has been impacted or nullified. Arguably, that is a narrow class of cases. I think that the legislature still has the right to do a joint resolution authorizing participation of the General Assembly as amicus on a standing issue where there are plaintiff-legislators, and not necessarily rely on this

particular resolution in every such instance. I think the resolution goes to a narrow class of cases involving standing of plaintiff-legislators to assert an institutional injury as a basis for their standing.

Representative Kagan said we are confronted with a resolution directing us to do certain things. Do we have a choice? Mr. Cartin said yes, the way the resolution is written gives the Committee a choice because of the language of the very last paragraph. It says in which the General Assembly is not a party on the limited issue of standing of the legislator-plaintiffs if the Committee determines that standing is based upon advancing any institutional interest of the General Assembly. I don't think the Committee is necessarily required to authorize participation as amicus in this particular proceeding by the very language of the resolution.

Representative Gardner said *Kerr v. Hickenlooper* is about one thing. It's about TABOR. Outside of TABOR and the legal theory for Senator Kerr's and Senator Morse's standing going to a core legislative power, I'm trying to figure out about what other core legislative power, other than TABOR and this taxing and appropriation power, would I as a member of the General Assembly say was being violated? Have you thought of any? Mr. Cartin said the main ones that we have identified are those legislative powers that are specifically in the constitution or that the courts have recognized, such as the power of appropriation, to provide a uniform school system, redistricting, and the legislative power in general, which is broad. I don't think there's a top ten we could give you. I think specifically, the power of appropriation and the power of taxation have been recognized as the responsibility of the General Assembly.

Representative Gardner said perhaps as an individual legislator I could ask the court to intervene in the *Lobato* case and basically say that the court doesn't have the authority to tell me to appropriate anything or to do anything as a legislator even if the constitution says so. I can say that I'm advancing an institutional interest and that being the case, when the inevitable standing challenge is raised - because I don't happen to believe that there is standing on the part of any individual legislator unless they have a particular wrong to them individually, as Senator Grossman did - I could come to the Committee and ask your Office to pay for an amicus brief. Is that a scenario that this resolution would support? Mr. Cartin said I think as you've characterized it, in the abstract, in a lawsuit where a legislator intervenes, and the legislator bases his or her standing on an institutional injury, that may come within the purview of this particular resolution.

Representative Kagan said if the executive branch were interfering with our ability to vote and a particular legislator was prevented from voting by being required to meet with one of the governor's staff at the time when votes were taking place, might that not be a constitutionally unsound action by the executive branch that warranted an individual legislator to challenge the actions of the executive on the basis of the constitutional privileges and immunities that are given to legislators and to do so on behalf of the entire General

Assembly? Mr. Cartin said given the scope of the resolution, we would probably want to give a little more thought to that particular scenario and whether or not the resolution addresses that for purposes of amicus participation on the issue of the standing of that legislator. That's not a direct answer, but I go back to the resolution which is directed at situations where plaintiff-legislators in lawsuits where the General Assembly is not a party assert standing based upon an institutional injury. I'm reluctant to opine on that particular scenario right now.

Senator Roberts said Representative Gardner's questions followed my concern, which is, regardless of this particular instance, are we setting a precedent for drawing in your Office any time one of 100 legislators wants to assert that they alone represent institutional interest? I'm trying to find the line of demarcation. Where does one legislator get to claim that they represent institutional interest such that it draws you in and the resources of the legislature in? In this instance there was more than one legislator, but what would stop one legislator from asserting the same? Perhaps it would be someone like former Representative Bruce who would have a completely different take on this related to TABOR. What would stop Representative Bruce from asserting that your Office needs to intervene or file a brief on behalf of the entire General Assembly with no threshold that has to be reached? Ms. Eubanks said first of all, I think it's important to recognize that *Kerr v. Hickenlooper* is the first such instance that we're aware of in terms of this type of scenario. In terms of in the future, is it possible? Yes. In terms of drawing the line, I don't know that it's necessarily drawing our Office into the mix. I think it's drawing the Committee into the mix based on the language of the resolution. I don't think you can prohibit an individual member from filing a lawsuit asserting standing based on an institutional interest of the General Assembly. Whether or not that member would like the General Assembly to weigh in as amicus then draws in the Committee to make a determination as to whether or not that's an appropriate thing for the General Assembly to do. I don't think it automatically creates participation. I think it draws in the Committee to make a determination as to whether participation is appropriate.

Senator Roberts said I guess this always gets reduced to a political question of who's in power. Is that not a fair assessment that it will always be whoever holds the majority, and not necessarily a threshold of two-thirds of the General Assembly? It's going to be the majority of this Committee.

Senator Morse asked can you tell us where two-thirds is from? Senator Roberts said that's just a random number, but I'm trying to say a super majority threshold before the General Assembly would be drawn in or, more particularly, the Office and the legislative branch resources. We have no benchmark to shoot for. I just picked a super majority as something other than 50% plus one. What I'm hearing Ms. Eubanks say is that if it always resides with this Committee, it's going to be a political decision based on the majority party.

Senator Morse said this resolution started with instructing this Committee to file an amicus brief and then was amended into the form it is now. Had it passed as originally written, it still

would have taken just 18 senators and 33 representatives to basically instruct this Committee to find a lawyer to write the amicus instead of instructing this Committee to think about whether or not to do it and, if so, then hire a lawyer. It doesn't ever seem to be anything more than 18 and 33 to do this as opposed to a super majority, whether we decide to file a lawsuit as an institution or to take action through this Committee to support or oppose a lawsuit that's been filed otherwise.

Mr. Cartin said for a joint resolution to pass, it's a majority vote on whether or not to authorize either participation in a lawsuit or the initiation of a lawsuit by the General Assembly as a body. As to Senator Roberts' second question on whether every future instance that may come before the Committee will be reduced to a political question, I don't know if that will necessarily be the situation in all circumstances.

Senator Roberts said but if it's decided in this Committee, it will be a majority vote. The only way I can see around that is if we have some sort of guidance, such as a bill that set a certain threshold. I just think that it's not just this instance but I think the Committee members ought to be thinking if we are setting a precedent. Roles can be reversed in terms of who is in charge, and I think for the legislative record and history it's important to know that the Committee took this course knowing that in the future other Committee majorities could tell the Office to insert themselves and spend resources to write a brief. To assert an individual legislator's rights is one thing. To assert institutional rights, as if one person speaks for 100, is concerning to me.

Ms. Eubanks said in terms of past participation by the General Assembly in various lawsuits, at times the institutional interest has transcended politics in terms of when the General Assembly was controlled by one party and the executive branch was controlled by the same party and the General Assembly still sued the governor. There have been instances and I guess I'm an optimist that members think of the institutional interest, but I also understand the reality of the situation.

Representative Gardner said I take issue with Ms. Eubanks' statement. I don't think the institutional interest ever transcends the politics. I think the politics may dictate that the institutional interest is superior because politics transcends partisan matters and it has to do with separation of powers sometimes and the power of the body. When I have seen that, both in my time here and prior to that, it has always been about the politics of maybe the General Assembly - Republicans and Democrats alike - and what they think their purview is and that's why the federal courts call these things political questions.

Representative Gardner said just to be clear for members of the Committee who may not have read the cases, this issue of standing seems to revolve around three different instances. One is where the General Assembly, by majority vote of both houses, passes a resolution and says we think there's an institutional interest. Two is a case, as in the Grossman case, where

Senator Grossman carries his own bill, he's subjected to a particular kind of treatment in committee, and he says to the court I have standing because my bill was treated in a particular way and while that may be institutional it is I that was wronged. I have personal standing because I was personally wronged. This seems to be a third case where only one United States supreme court has ever found standing for an individual member advancing an institutional interest and that is this case. In other words, the plaintiffs are saying we have standing because our institution has been generally wronged. Our institution hasn't voted to do this case but the General Assembly has been generally wronged and we individually have the right to bring that. That's the third case and it's not one that's been favored by the courts in the past. Do you agree with the three cases or is there some other kind of analysis to apply to this? Mr. Cartin said I find nothing to disagree with, relative to breaking down the three types of cases. That's a nice synopsis.

8:13 a.m.

Hearing no further discussion or testimony, Representative Labuda moved that the General Assembly participate as an amicus curiae in *Kerr v. Hickenlooper*, where it is currently pending before the Federal Court of Appeals for the Tenth Circuit as Case No. 12-1445, on the limited issue of the standing of legislator-plaintiffs which is based upon advancing the institutional interest of the General Assembly to enact laws on taxation and appropriations. Representative Gardner said I was distressed that the leadership of my own caucus in the Senate and the House did not take greater issue with the underlying resolution. This idea that an individual member of the General Assembly has standing is contrary to the notions of standing in the federal courts, and we are pulling the Office and the General Assembly budget into this. Perhaps I should go and see if I can intervene in *Kerr v. Hickenlooper* as a member of the General Assembly and see if I can get everybody to take my position, though I think the political climate would not allow for my amicus brief to be paid for opposing the notion of standing. I think this is a terrible road for us to go down. I don't think it is well-founded and I will be a no vote. Senator Brophy said I find it ironic that one, or in this case five, members of the General Assembly can assert standing on behalf of the General Assembly in a case that claims it is contrary to our republican form of government that the people of Colorado would limit the plenary powers of the legislature to raise taxes without a vote of the people because it's unrepublican for one or five members of a general assembly to assert standing on behalf of the general assembly when they clearly don't make up a majority as they make that claim for standing. I will be a no vote also. I do not like the precedent that it sets. The motion passed on a vote of 6-4, with Representative Foote, Representative Kagan, Representative Labuda, Senator Guzman, Senator Johnston, and Senator Morse voting yes and Representative Gardner, Representative Scott, Senator Brophy, and Senator Roberts voting no.

Senator Morse said we now move to the matter of who to hire to write the brief. Can you describe for us your recommendation? Mr. Cartin said it would be our recommendation that

the Committee and the General Assembly retain Maureen Witt of Holland and Hart. Holland and Hart and Ms. Witt have worked on a number of items over the past several years. They have the expertise and time to do the brief given the tight time frame. It is due with the court by April 18. That would be our recommendation. It is not our recommendation that our Office do the amicus, based on the time of year, the subject matter, and the level of expertise in the Tenth Circuit.

Representative Gardner said that's a very fine law firm and Ms. Witt is a very fine attorney. Do we have any estimate of what this is going to cost? Mr. Cartin said yes, the estimate is between $20,000 and $25,000.

Representative Labuda said you won't be actively involved in the case but are there one or two attorneys in the Office who might be involved, just to get some experience? Mr. Cartin said we would certainly extend that opportunity to one or more staff persons in our Office. It's a good idea. The reality is, there are 50 days left in the session and there's a lot to do. There may not be time for our staff to do that.

8:20 a.m.

Representative Labuda moved that Maureen Witt of Holland and Hart be retained to represent the General Assembly as an amicus curiae in *Kerr v. Hickenlooper*. Representative Gardner said I will be a no vote simply because I don't believe we should retain counsel and just in the interest of consistency. It's a good law firm. If this matter is going to be handled then it ought to be handled by a first-rate law firm. My no vote should be taken as that we should not be expending funds or retaining counsel for individual members to assert an institutional interest. They chose to do it and they need to assert it. The motion passed on a vote of 7-3, with Representative Foote, Representative Kagan, Representative Labuda, Senator Brophy, Senator Guzman, Senator Johnston, and Senator Morse voting yes and Representative Gardner, Representative Scott, and Senator Roberts voting no.

8:22 a.m.

The Committee adjourned.

ADDENDUM C

First Regular Session
Sixty-ninth General Assembly
STATE OF COLORADO

INTRODUCED

LLS NO. R13-0871.01 Sharon Eubanks x4336 **SJR13-016**

SENATE SPONSORSHIP

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Senate Committees **House Committees**

SENATE JOINT RESOLUTION 13-016

CONCERNING AUTHORIZING AND DIRECTING THE COMMITTEE ON LEGAL SERVICES TO RETAIN LEGAL COUNSEL TO REPRESENT THE GENERAL ASSEMBLY AS AMICUS CURIAE IN THE CASE OF *KERR V. HICKENLOOPER* FOR THE PURPOSE OF PARTICIPATING ONLY TO ADDRESS THE ISSUE OF THE LEGISLATOR-PLAINTIFFS' STANDING BASED UPON THE INSTITUTIONAL INTERESTS OF THE GENERAL ASSEMBLY.

WHEREAS, In 2011, thirty-two plaintiffs filed a lawsuit in Federal District Court against Governor John Hickenlooper, in his official capacity, seeking a ruling that Section 20 of Article X of the Colorado Constitution, the "Taxpayer's Bill of Rights" (TABOR), is unconstitutional and null and void because it violates several provisions

of the United States Constitution as well as the Colorado Enabling Act of 1875; and

WHEREAS, The plaintiffs, who include state legislators, local government officials, educators and education officials, and citizens of Colorado, claim that TABOR violates the Guarantee Clause, United States Constitution Article IV, Section 4, and the Equal Protection Clause, United States Constitution Amendment XIV, Section 1, and the Colorado Enabling Act of 1875, Section 4, by eliminating the General Assembly's plenary power to legislate on matters of taxation and appropriations and thereby denying the state of Colorado and its citizens an effective representative democracy, which is contrary to the constitutional guarantee of a Republican form of government; and

WHEREAS, As part of their claims, the plaintiffs argue that TABOR has inflicted an institutional injury upon all members of the General Assembly through the nullification of their ability to enact taxes to provide for the state's expenses, thus rendering the General Assembly unable to effectively fulfill its legislative obligations in a representative democracy and a Republican form of government; and

WHEREAS, In response to this lawsuit, the Attorney General filed a motion on behalf of Governor Hickenlooper asking the Federal District Court to dismiss the lawsuit on several grounds, including the ground that all of the plaintiffs lack standing to bring the lawsuit; and

WHEREAS, After briefings and oral arguments were completed, the Federal District Court denied the motion to dismiss on all grounds except the Equal Protection claim, thus permitting the plaintiffs to pursue the lawsuit on their remaining claims; and

WHEREAS, As part of its decision, the Federal District Court found that the legislator-plaintiffs have standing to maintain the lawsuit based upon the institutional interest of the General Assembly even though the legislator-plaintiffs have not been authorized by the General Assembly to bring this action on behalf of the institution; and

WHEREAS, In reaching this conclusion, the Federal District Court relied upon *Coleman v. Miller*, 307 U.S. 433 (1939), in which opinion the United States Supreme Court found that twenty Kansas State Senators had standing to sue to maintain the effectiveness of their votes after their votes on a measure were completely nullified; and

WHEREAS, The Federal District Court stated in its order that the institutional injury alleged by the legislator-plaintiffs in the current lawsuit is of greater magnitude than the single instance of vote nullification at issue in *Coleman v. Miller* and is a cognizable injury in fact sufficient to confer standing to the legislator-plaintiffs; and

WHEREAS, The defendant has appealed this and other conclusions of the Federal District Court to the Federal Court of Appeals for the Tenth Circuit, where it is currently pending as Case No. 12-1445; and

WHEREAS, The General Assembly's plenary power of taxation and appropriations is an interest of the General Assembly as an institution and not of the individual members thereof; and

WHEREAS, Individual members of the General Assembly have a sufficiently cognizable injury to establish standing for purposes of advancing the institutional interest if a core legislative power of the General Assembly, and thereby the ability of its members to fulfill their official responsibilities, has been nullified or removed by a constitutional amendment; and

WHEREAS, The General Assembly, acting as an amicus curiae, is best able to explain to the Federal Tenth Circuit Court of Appeals this institutional interest as represented by the legislator-plaintiffs; and

WHEREAS, The involvement of the General Assembly as amicus curiae on the limited issue of the standing of the legislator-plaintiffs should carry no implication about the views of the General Assembly on the policy merits of TABOR but only on the appropriateness of having a proper judicial determination of its constitutionality; now, therefore,

Be It Resolved by the Senate of the Sixty-ninth General Assembly of the State of Colorado, the House of Representatives concurring herein:

That, although the General Assembly is not a party in *Kerr v. Hickenlooper*, it is in the best interests of the General Assembly and the state of Colorado that the General Assembly participate in the *Kerr v. Hickenlooper* case as an amicus curiae on the limited issue of the standing of legislator-plaintiffs based upon the institutional interests of the General Assembly; and

That the Committee on Legal Services, in furtherance of its authority under section 2-3-1001, Colorado Revised Statutes, is authorized and directed to retain legal counsel to represent the General Assembly through participation in the *Kerr v. Hickenlooper* case as an amicus curiae on the limited issue of the standing of legislator-plaintiffs based upon the institutional interest of the General Assembly to enact laws on taxation and appropriations.