CASE NO. 12-1445

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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

On Remand from the United States Supreme Court Case No. 14-460

PLAINTIFFS-APPELLEES' OPENING MEMORANDUM BRIEF

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STATEMENT OF RELATED CASES

On March 7, 2014, this panel considered this case on appeal from the United States District Court for the District of Colorado and issued its decision, which is reported at 744 F.3d 1156 (10th Cir. 2014). This Court denied Defendant's petition for *en banc* reconsideration on July 22, 2014. On Defendant's Petition for a Writ of Certiorari, the United States Supreme Court on June 30, 2015 ordered the Petition granted, the judgment vacated, and the case remanded for reconsideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015).

STATEMENT OF ISSUES

By the Court's July 1, 2015 Order, this memorandum brief is limited "to addressing solely the issue of whether the Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* . . . requires the panel to reconsider its holding." The only question decided in *Arizona* that bears on this case is whether the plaintiff, the Arizona Legislature, had standing. Thus, the sole issue addressed in this brief is whether the Supreme Court's treatment of legislative standing in *Arizona* requires this panel to reconsider its treatment of the issue in its March 7, 2014 decision. *See Kerr v. Hickenlooper*, 744 F.3d 1156, 1163-72 (10th Cir. 2014).

STATEMENT OF THE CASE

Because the posture and facts of the case are familiar to the Court, they are only briefly recited here. *See id.* at 1161-63 (fully describing the procedural posture and facts of the case). Plaintiffs-Appellees, a group of legislators, educators, and citizens, filed this action to challenge the so-called Taxpayer Bill of Rights ("TABOR"), Colo. Const. art. X, § 20. Plaintiffs complain that TABOR violates their right to a Republican Form of Government because it restructured Colorado's government to abrogate the legislature's authority to raise revenue and to appropriate some existing revenues.

In the District Court, Defendant moved to dismiss Plaintiffs' claims pursuant to Rules 12(b)(1) and 12(b)(6), asserting the claims were nonjusticiable and that Plaintiffs lacked standing. After oral argument and supplemental briefing, the District Court denied the motion, except as to Plaintiffs' Equal Protection claim.

The District Court held that Plaintiffs had standing. That court reasoned that TABOR deprived the General Assembly of the power to tax because it assigned that power exclusively to the voters, and held that the legislator Plaintiffs satisfied all the requisite elements for Article III standing. In addition, the District Court concluded that Plaintiffs stated justiciable claims, and that the political question doctrine did not bar their claims.

Subsequently, pursuant to 28 U.S.C. § 1292(b), Defendant received the District Court's certification for review and petitioned this Court to review the District Court's ruling. This Court agreed to take the interlocutory appeal. This panel affirmed the District Court's holding as to standing and justiciability. Thereafter, the full Court denied Defendant's petition for *en banc* rehearing.

Following this Court's issuance of a stay, Defendant filed a Petition for Writ of Certiorari with the United States Supreme Court. On June 30, 2015, the Supreme issued an Order granting the Petition, vacating this Court's prior judgment, and remanding the case for consideration in light of *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015) ("*Arizona*").

The Supreme Court limited the argument in *Arizona* to two questions: "1) Do the Elections Clause of the United States Constitution and 2 U.S.C. §2a(c) permit Arizona's use of a commission to adopt congressional districts? [and] 2) Does the Arizona Legislature have standing to bring this suit?" *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314, Order List (U.S. Oct. 2, 2014).

Only the second question – the treatment of the standing issue in *Arizona* – bears on the threshold procedural issue of standing before this Court on remand. The issue of justiciability was neither presented nor decided in *Arizona*.

SUMMARY OF THE ARGUMENT

The *Arizona* Court addressed the question of whether the Arizona Legislature had Article III standing to challenge the constitutionality of the Arizona Redistricting Commission and concluded that it did. *Arizona*, 135 S. Ct. at 2663-66. (Then, on the merits, it decided that the Commission did not violate the Elections Clause. *Id*. at 2666-77.) Only the *Arizona* holding and discussion of legislative standing are relevant here.

The analysis of standing in *Arizona* relied primarily on the Supreme Court's determination that the legislators there had suffered an injury-in-fact comparable to that suffered by the legislators granted standing in *Coleman v Miller*, 307 U.S. 433 (1939), and that the barriers to standing present in *Raines v. Byrd*, 521 U.S. 811 (1997), did not apply.

The panel's analysis of legislator standing in this case is consistent with the Supreme Court's treatment of the issue in *Arizona*. The legislator Plaintiffs' legal injury in this case – the disempowerment of their core powers to tax and spend – is, under the analysis in *Coleman*, equivalent to *Arizona*. Also consistent with the panel's previous decision, the factors that the Supreme Court considered in *Arizona* to distinguish *Raines* are applicable to the Colorado legislator Plaintiffs.

The relief sought here, as in *Arizona*, will redress the injuries about which Plaintiffs complain.[1]

The *Arizona* opinion discussed other circumstances affecting standing that faced the Arizona legislators and that echo the Colorado legislators' circumstances. For example, *Arizona* makes clear that legislator plaintiffs are not required to undertake the futile act of passing a law facially unconstitutional to establish legislative standing. In addition, *Arizona* instructs that the bases for standing should neither be confused nor conflated with the question of the strength of case on the merits. In other words, the question of standing should be considered separately from the merits of the case.

Nothing in *Arizona* should cause the panel to reconsider its prior holding. This Court should reinstate its previous decision and remand the case to the District Court for further proceedings.

[1] Even if *Arizona* called the panel's prior holding on legislative standing into question – which it did not – the proper disposition would be to remand the case to the District Court for consideration of the standing of the non-legislator Plaintiffs, an issue as to which there has been no determination. *Kerr*, 744 F.3d at 1163 ("The district court determined that the plaintiffs who are current state legislators (the 'legislator-plaintiffs') have standing and thus declined to assess the standing of any other named plaintiffs . . . . We similarly limit our review to the standing of the legislator-plaintiffs.").

ARGUMENT

I. Introduction

This Court has asked the parties to brief a narrow question: Does the Supreme Court's decision in *Arizona* require the panel to reconsider its holding?

In a word: "No." [2]

Arizona involved a voter initiative known as Proposition 106, an amendment to Arizona's Constitution that took the authority to draw federal congressional districts away from the Arizona Legislature and gave it to a new body called the Arizona Independent Redistricting Commission. *Arizona*, 135 S. Ct. at 2658. Having lost the authority to redistrict, the Arizona Legislature sued the Redistricting Commission, complaining that Proposition 106 violated the Elections Clause of the U.S. Constitution, which provides, in pertinent part, that the time, place, and manner of holding federal elections "shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1.

[2] The Supreme Court remanded this case in its disposition of Defendant's Petition for Writ of Certiorari. The Supreme Court's "GVR" order granting, vacating, and remanding the case for reconsideration in light of *Arizona* carries no presumption that this panel's prior decision on Plaintiffs' standing was incorrect. See *Univ. of Notre Dame v. Burwell*, 786 F.3d 606 (7th Cir. 2015); *see also* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs – and an Alternative*, 107 Mich. L. Rev. 711, 712 (2009) ("In issuing a GVR, the Court does not determine that the intervening event necessarily changes the outcome of the case, just that it might.").

The *Arizona* Court addressed two issues: (1) whether the Arizona Legislature had Article III standing to sue the Commission; and (2) the meaning of the word "Legislature" as used in the Elections Clause. *See Arizona*, 135 S. Ct. at 2659. Although the first issue is relevant to the case at hand, the second is not.

As the panel's prior decision recognized, this case remains at a threshold stage. The merits have not been litigated and are not before the Court. *Kerr*, 744 F.3d at 1161 ("The merits of the case are not before us. We express no view on the substantive issues and intend none."). Thus, the discussion of the Elections Clause in *Arizona* has no bearing on this case in its current posture.[3]

The Supreme Court's determination on standing in *Arizona* was both consistent with this panel's holding and parallel in its reasoning. The two decisions track together in three important ways.

First, both the *Arizona* opinion and this panel's holding are grounded in the requirements of Article III standing. Both examine whether the plaintiff has pled "injury in the form of invasion of a legally protected interest that is concrete and particularized and actual or imminent," and that is "fairly traceable to the challenged action and redressable by a favorable ruling." *Compare id.* at 2663

[3] This panel's previous decision addressed both legislative standing and justiciability. In *Arizona*, the only mention of justiciability was in passing in a footnote that had no bearing on the decision and that affords no basis for reconsideration of this panel's holding on justiciability. *Compare Arizona*, 135 S. Ct. at 2660 n.3, with *Kerr*, 744 F.3d at 1172-82.

(quoting *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 64 (1997) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)) and *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)) (internal quotation marks omitted), *with Kerr*, 744 F.3d at 1163 (citing the same language from *Lujan*).

Second, both the *Arizona* opinion and this panel examined *Raines* and *Coleman*. Each determined that, while neither *Raines* nor *Coleman* mapped perfectly on the case before it, *Coleman* was a closer fit because of the critical factor of a nullification of legislators' votes. *Compare Arizona*, 135 S. Ct. at 2664-65, *with Kerr*, 744 F.3d at 1163-71.

Third, both the *Arizona* opinion and this panel took notice that a plaintiff need not "engage in an obviously futile gesture" to establish standing. *Compare Kerr*, 744 F.3d at 1168-70, *with Arizona*, 135 S. Ct. at 2663-64. Both the *Arizona* opinion and this panel's holding considered and rejected the argument that the injury sustained by the legislators was too speculative, conjectural, and hypothetical to establish standing. Both saw no need to attempt a futile legislative act that would be facially unconstitutional under the challenged constitutional provision.

Accordingly, and as explained more fully below, this panel's holding granting standing to the legislator Plaintiffs, just as the *Arizona* decision did, fully comports with *Arizona* and should not be reconsidered. Instead, this panel's prior

ruling should be reinstated and the case remanded to the District Court for litigation on the merits.[4]

II. Parallel Analyses

To reach its decision that the Legislature possessed standing to challenge the constitutionality of Proposition 106, the *Arizona* court determined and applied the requirements of Article III standing; entertained and rejected the need for a specific legislative act; and examined and applied *Raines*, *Coleman*, and the principle of nullification stated in *Coleman*. This panel's holding followed the same path.

A. Article III Standing Requirements

The *Arizona* opinion began with the factors set forth in *Lujan* and explained the requirements for Article III standing. *Arizona*, 135 S. Ct. at 2663. As iterated in the opinion, a plaintiff's alleged injury must be: (1) "an invasion of a legally protected interest"; (2) "concrete and particularized"; (3) "actual or imminent"; (4) "fairly traceable to the challenged action"; and (5) "redressable by a favorable ruling." *Id.* (quoting *Arizonans for Official English*, 520 U.S. at 64 (quoting *Lujan*, 504 U.S. at 560) and *Clapper*, 133 S. Ct. at 1147).

[4] This would be the proper disposition even if *Arizona* gave reason to question the standing of the legislator Plaintiffs. That is because standing has thus far been determined by the District Court, and affirmed by this Court, only as to the legislator Plaintiffs. *See Kerr*, 744 F.3d at 1163. No examination has yet been undertaken regarding the standing of any of the other Plaintiffs. *See supra* p. 4 n.1.

This panel's holding likewise began with *Lujan*, explaining that a plaintiff must show: (1) "a concrete and particular injury in fact that is either actual or imminent"; (2) "[an] injury [that] is fairly traceable to the alleged actions of the defendant"; and (3) "[an] injury [that] will likely be redressed by a favorable decision." *Kerr*, 744 F.3d at 1163 (quoting *Lujan*, 504 U.S. at 560-61).

In describing these standing requirements, the *Arizona* Court warned against letting the merits of the case affect a decision about standing, noting "one must not 'confus[e] weakness on the merits with absence of Article III standing.'" *Arizona*, 135 S. Ct. at 2663 (quoting *Davis v. United States*, 131 S. Ct. 2419, 2434 n.10 (2011)) (internal quotation marks and brackets omitted). That is because "standing often turns on the nature and source of the claim asserted, but it in no way depends on the merits of the claim." *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)) (internal quotation marks omitted). The *Arizona* Court determined that the Arizona Legislature had standing, even while finding that its claim failed on the merits, *i.e.*, that Proposition 106 did not violate the Elections Clause. *Id.* at 2665, 2671-77.[5]

[5] For a different treatment of the relationship of standing to a merits analysis, *see Largess v. Supreme Judicial Court*, 373 F.3d 219 (1st Cir. 2004), where standing was seen as "intertwined and inseparable from the merits of the underlying [constitutional] claim." *Id.* at 224-25. This is not to suggest that *Largess* compels a merits review of Plaintiffs' claims at this stage of the litigation. However, the

{footnote continued}

Separating the "nature and source" of the Arizona Legislature's claims from the merits of the case, the *Arizona* opinion concluded that Proposition 106, "regardless of the Legislature's action or inaction, strip[ped] the Legislature of its alleged prerogative to initiate redistricting." *Id.* at 2663. It held the nature and source of the Arizona Legislature's alleged injury to be actual or imminent, concrete and particularized, and to affect a legally protected interest – satisfying Article III standing requirements. *Id.* The opinion saw the Legislature's alleged injury as fairly traceable to the challenged action and redressable by a court order enjoining enforcement of Proposition 106. *Id.* This is so because the controversy "[would] be resolved . . . in a concrete factual context conducive to a realistic interpretation of the consequences of judicial action." *Id.* at 2666-67 (quoting

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Largess court acknowledged that Guarantee Clause cases are unique and the standing inquiry may be adjusted accordingly.

> If the Plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry – which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated – might well be adjusted to the nature of the claimed injury.

Id. at 225; *see also Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006) (explaining that "the term 'legally protected interest' must do some work in the standing analysis . . . [and] has independent force and meaning without any need to open the door to the merits considerations at the jurisdictional stage").

Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)) (quotation marks omitted).

Just as disempowering the Arizona Legislature of its authority to redistrict gave it standing to challenge the constitutionality of Proposition 106, so has disempowering the legislative Plaintiffs of their core taxing and spending functions given them standing to challenge the constitutionality of TABOR.[6]

B. No Requirement of Specific Legislative Act

The *Arizona* Court considered and rejected arguments that standing depended on whether the Arizona Legislature had been thwarted in the specific legislative act that Proposition 106 prohibited, *i.e.*, unless the Legislature passed a competing redistricting plan and the Arizona Secretary of State refused to implement it. *Id.* at 2663. Here, the panel confronted the comparable question. *Kerr*, 744 F.3d at 1168 ("[W]e must reject [the] argument that plaintiffs' failure to

[6] In the same way that the *Arizona* holding on standing disregarded the merits of that case, so did the panel in this case. *See supra* at p. 9. Still, lest the merits discussion in *Arizona* be distracting, the merits here – while obviously awaiting proof at trial – are easily distinguished. The redistricting power at issue in *Arizona* is an incidental function of the Arizona Legislature; the taxing and spending powers at issue here are core functions of the Colorado General Assembly required for state government to meet its responsibilities in a Republican Form of Government. *See*, *e.g.*, *City & County of Denver v. Lewin*, 105 P.2d 854, 858 (Colo. 1940) (quoting a treatise for the proposition that "[t]he power of taxation is an essential and inherent attribute of sovereignty, belonging as a matter of right to every independent government . . . possessed by the government without being expressly conferred by the people").

identify a 'specific legislative act' that TABOR has precluded is fatal to their claim.").

It would have been unavailing, the *Arizona* Court reasoned, to require the Legislature to take action in "direct[ ] and immediate[ ] conflict with the regime Arizona's Constitution establishes." *Arizona*, 135 S. Ct. at 2663-64 (analogizing to *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 944 n.2 (1982) ("failure to apply for permit that 'would not have been granted' under existing law did not deprive plaintiffs of standing to challenge permitting regime")). Thus, standing did not require the Arizona Legislature to enact a competing redistricting plan that would require it and the Secretary of State to violate the Arizona Constitution, as amended by Proposition 106. *Id.* at 2663-64.

Similarly, this panel explained that, to require Plaintiffs first to "refer a tax increase to the voters, and have that measure rejected, before they bring suit . . . misunderstands the alleged injury" because it is the Plaintiffs' "disempowerment rather than the failure of any specific tax increase" that is the source of their actual injury. *Kerr*, 744 F.3d at 1168-69. That is, this panel recognized that TABOR had removed the Colorado General Assembly's power to legislate in the area of taxation and above a prescribed level of spending. In the same way that *Arizona* refused to require the Arizona Legislature to violate the Arizona Constitution, this panel explained that, because "TABOR plainly bars the General Assembly from

instituting a new tax through legislative action . . . [o]ur standing jurisprudence does not demand that plaintiffs engage in an obviously futile gesture." *Id.* at 1169.

The lack of a failed specific legislative act does not render a suit premature, nor its alleged injury too "conjectural" or "hypothetical" to establish standing in the majority's eyes. *Compare Arizona*, 135 S. Ct. at 2663 (quoting language from *Lujan*, 504 U.S. at 560) *with Kerr*, 244 F.3d at 1170 ("TABOR plainly bars the [Colorado] General Assembly from instituting a new tax through legislative action.").

C. *Raines*, *Coleman*, and Disempowerment

As a final element in its treatment of legislative standing, the *Arizona* Court examined and applied *Raines* and *Coleman*, and concluded that the Legislature's suit was closer to *Coleman* than to *Raines*. *Arizona*, 135 S. Ct. at 2664-65.

The *Arizona* Court distinguished *Raines* on several grounds, including the point that the legislator plaintiffs in *Raines*, "[h]aving failed to prevail in their own Houses, . . . could not repair to the Judiciary to complain." *Id.* at 2664. In finding *Coleman* "[c]loser to the mark," *id.* at 2665, the *Arizona* Court relied on the fact that, in *Coleman*, the plaintiff legislators' "votes have been completely nullified." *Id.* (quoting *Raines*, 521 U.S. at 823).

This theory of vote nullification, or disempowerment, ties *Coleman* to *Arizona* and to this case, and separates them from *Raines* and its "lost vote"

rationale. *Compare id.* ("Our conclusion that the Arizona Legislature has standing fits that bill [of vote nullification].") *with Kerr*, 744 F.3d at 1165 ("These allegations fall closer to the theory of vote nullification espoused in *Coleman* than to the abstract dilution theory rejected in *Raines*.").

As this panel's holding noted, *Raines* stands apart because "[w]e are not confronted with claimants who complain of nothing more than a lack of success within the legislature." *Kerr*, 744 F.3d at 1166. Here, Plaintiffs' "complaint alleges that TABOR has stripped the legislature of its rightful power," *id.*, in the same way that the Arizona Legislature complained that Proposition 106 did. *See id.* at 1165-66 (further distinguishing *Raines* on grounds that "[u]nder TABOR, a vote for a tax increase is completely ineffective because the end result of a successful legislative vote in favor of a tax increase is not a change in the law . . . [because] [a] vote that is advisory from the moment it is cast, regardless of how other legislators vote, is 'ineffective' in a way no vote envisioned by [the Line Item Veto Act in *Raines*] could be").

And, because here, as in *Arizona*, the barrier to legislative authority lies in the state constitution, legislators lack the remedy available in *Raines*: persuading their colleagues to repeal the offending law. *See id.* at 1166 ("[T]he case at bar does not share other characteristics highlighted by the *Raines* Court. Unlike [the

Line Item Veto Act], TABOR was not passed by, and cannot be repealed by, the Colorado General Assembly.").

The theory of disempowerment obviates any argument that *Raines*, *Coleman*, or *Arizona* conditions legislative standing on a complaint being brought by a particular quantum of legislators. Standing in this context depends not on the number of legislators who have sued, but, rather, on whether those who have sued have been deprived of the ability to cast any effective vote. *See id.* at 1167, 1169 ("[T]he plaintiff-legislators in this case challenge a provision that, they allege, deprives them of the ability to cast meaningful votes at all" and "[i]f an elected official cannot sue on his own behalf to assert legislative prerogatives on the theory that his power properly belongs to his constituents, legislative standing would cease to exist outside [a] narrow category of particularly unfair treatment.").

III. Conclusion

Arizona not only supports this panel's holding on legislative standing, its analysis closely mirrors this panel's reasoning. Nothing in *Arizona* calls this panel's holding on standing into question. For these reasons, this panel's previous decision should be reinstated and the case remanded to the District Court.

Respectfully submitted this 31st day of July, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 4,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman.

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that the foregoing **PLAINTIFFS-APPELLEES' OPENING MEMORANDUM BRIEF** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee VirusScan Enterprise + AntiSpyware Enterprise Version number: 8.8.0 (8.8.0.1385), Last Update 7/30/2015, Scan engine version (32-bit): 5400.1158, DAT version: 7878.0000, DAT Created on: 7/30/2015, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

This is to certify that on this 31st day of July, 2015, I have provided service of the foregoing **PLAINTIFFS-APPELLEES' OPENING MEMORANDUM BRIEF** through the federal ECF filing protocol and by e-mailing to the following attorneys or their law firms:

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