No. 12-1445
United States Court of Appeals
for the Tenth Circuit

ANDY KERR,
Colorado State Representative, et al.,
Plaintiffs–Appellees,

v.

JOHN HICKENLOOPER,
in his official capacity as
Governor of Colorado,
Defendant–Appellant.

On Appeal from the U.S. District Court for the District of Colorado, No. 11-CV-01350-WJM-BNB (Martinez, J.)

Governor's Supplemental Memorandum Brief on Remand from the Supreme Court

---

CYNTHIA H. COFFMAN
Attorney General

MEGAN PARIS RUNDLET
Senior Assistant Attorney General

MATTHEW D. GROVE
Assistant Solicitor General

JONATHAN P. FERO
Assistant Solicitor General

FREDERICK R. YARGER
Solicitor General

Office of the Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6168
E-mail: fred.yarger@state.co.us

Attorneys for Defendant–Appellant Governor of Colorado

Counsel Requests Oral Argument
Filed July 31, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES

CASES (*con't*)

TABLE OF AUTHORITIES

CONSTITUTIONS

OTHER AUTHORITIES

In accordance with the Court's order of July 1, 2015, Defendant–Appellant John W. Hickenlooper submits this supplemental memorandum brief addressing "whether the Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. ___[, 135 S. Ct. 2652, 192 L. Ed. 2d 704] (2015), requires the panel to reconsider its holding."[1]

INTRODUCTION

In response to the Governor's petition for a writ of certiorari, the Supreme Court vacated this Court's judgment and remanded for further consideration in light of *Arizona State Legislature*. Orders of this sort, known as "GVRs," are significant. As this Court has observed, circuit courts "cannot ignore" them. *United States v. Brooks*, 751 F.3d 1204, 1212 (10th Cir. 2014). Although GVRs "are not 'final determination[s] on the merits' … [t]hey do … indicate the Supreme Court believes there is a 'reasonable probability' [that a lower court receiving a GVR] 'would

[1] Because the Court ordered supplemental memorandum briefs rather than full re-briefing, the Governor incorporates his past briefs into this one and reasserts the arguments he previously made to this Panel.

reject a legal premise on which [it previously] relied.'" *Id.* (quoting *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001)). A GVR order also suggests that the premise to be reconsidered "may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Here, the Supreme Court's GVR requires dismissal. *Arizona State Legislature* conclusively rebuts each of the three major legal premises underlying Plaintiffs' lawsuit.

First, Plaintiffs assert that three legislators[2] may sue to invoke the rights of the legislature as a whole. *Arizona State Legislature* clarified that they may not. Only the body itself, or a majority voting bloc of that body, may do so.[3]

Second, Plaintiffs have asserted—contrary to every court decision that has considered the question directly—that their claims are

---

[2] In 2013, when the Governor filed his opening brief in this appeal, there were five sitting legislators among the Plaintiffs. Two have since left office.

[3] The standing of the non-legislator Plaintiffs remains to be addressed, but because those Plaintiffs clearly lack standing, and because this Court must independently evaluate jurisdiction at every stage, it should resolve that issue before remanding this case.

justiciable and not foreclosed by the political question doctrine. *Arizona State Legislature* reaffirmed that this view of the political question doctrine is incorrect. Although some Guarantee Clause claims may be justiciable, challenges to direct democracy are not.

Third, Plaintiffs have asserted that Colorado's government, by incorporating the electorate into the state lawmaking process on matters of fiscal policy, is not "republican in form" as a matter of federal constitutional law. *Arizona State Legislature* refutes that assertion, making clear that direct democracy at the state level is perfectly compatible with the United States Constitution.

In light of *Arizona State Legislature*'s guidance on these dispositive issues, and in light of the Supreme Court's GVR order, this Court should reverse the district court's denial of the motion to dismiss and remand for entry of judgment in favor of the Governor.

ARGUMENT

I. Standing

A. The Legislator–Plaintiffs lack standing under *Arizona State Legislature* because they do not form a voting bloc sufficient to take or prevent formal legislative action.

In *Arizona State Legislature*, the Supreme Court considered a legal challenge that was, in important respects, analogous to this one. First, the challenged Arizona law was the product of voter initiative. Second, the Arizona law allegedly injured a lawmaking power (congressional redistricting) that, in the plaintiff's view, the United States Constitution granted to state legislatures rather than voters. Here, Plaintiffs similarly allege that Colorado's voter-initiated Taxpayer's Bill of Rights ("TABOR") injures a lawmaking power—the power to set fiscal policy—that the federal Constitution vests in the state legislature. (App. Vol 2. at 469–70 ¶¶ 6–8, 478 ¶¶ 64–65.)

But *Arizona State Legislature* also differs from this case in one crucial—and ultimately dispositive—way. There, "the party invoking federal-court jurisdiction" was the Arizona State Legislature itself. 135 S. Ct. at 2666 n.14. It was "an institutional plaintiff asserting an

institutional injury," and it "commenced [the] action" only "after authorizing votes in both of its chambers." *Id*. at 2664. Here, no such votes have taken place. Only five (now three) of 100 total General Assembly members authorized this suit. These Legislator–Plaintiffs have admitted from the beginning that they lack authority to represent the General Assembly as a whole. (App. Vol. 2 at 470 ¶ 9.) Under *Arizona State Legislature*, that admission is fatal.

Arizona State Legislature did hold that, in some circumstances, an abridgement of institutional legislative power can amount to an injury-in-fact under Article III. But the Court's analysis, and particularly its treatment of *Raines v. Byrd*, 521 U.S 811 (1997), makes clear that while a *legislative body* can sometimes assert an institutional injury in federal court, *individual legislators* cannot. As the Court put it, individual legislators like those who tried to sue in *Raines* (and like those attempting to sue here) cannot represent the interests of a legislature as a whole because "'institutional injury' … scarcely zeroe[s] in on any individual Member." *Ariz. State Legislature*, 135 S. Ct. at 2664 (quoting *Raines,* 521 U.S. at 821). Institutional injuries are too "widely

dispersed"; they "necessarily impact[ ] all Members … and both Houses equally." *Id*. (internal quotations and alterations omitted). "None of the plaintiffs [in *Raines*], therefore, could tenably claim a 'personal stake' in the suit." *Id*.

Particularly telling is the way *Arizona State Legislature* distinguished *Raines* from *Coleman v. Miller*, 307 U.S. 433 (1939). The key difference was that, in *Coleman*, the plaintiffs were a bloc of legislators large enough to alter the outcome of a formal legislative act—they "were 20 (of 40) Kansas State Senators, whose votes 'would have been sufficient to defeat [a] resolution ratifying [a] proposed [federal] constitutional amendment.'" *Ariz. State Legislature*, 135 S. Ct. at 2665 (quoting *Coleman*, 307 U.S. at 446). Because their collective ability to defeat the amendment "ha[d] been completely nullified" by an allegedly unlawful "tie-breaking vote" of the State's Lieutenant Governor, they had standing to sue. *Id*. In contrast, *Raines*, like this case, involved only "*individual Members*" who had "not been authorized to represent their respective Houses of Congress." *Id.* at 2664 (quoting *Raines,* 521 U.S. at 829) (emphasis in original).

In its previous decision, this Panel observed that "[n]either *Coleman* nor *Raines* maps perfectly onto the alleged injury in this case." *Kerr v. Hickenlooper*, 744 F.3d 1156, 1165 (10th Cir. 2014). *Arizona State Legislature*, in contrast, does map onto the allegations here:

- In *Arizona State Legislature*, as here, the injury went "well beyond mere 'abstract dilution'" and involved an allegation that the legislature had "been deprived of [its] power." *Kerr*, 744 F.3d at 1165; *accord Ariz. State Legislature*, 135 S. Ct. at 2663 (noting that the challenged Arizona law "strip[ped] the Legislature of its alleged prerogative to initiate redistricting").

- The challenged Arizona law, like TABOR, could not "be repealed … 'pursuant to the normal legislative process.'" *Kerr*, 744 F.3d at 1166 (quoting *Schaffer v. Clinton*, 240 F.3d 878, 885–86 (10th Cir. 2001)); *accord Ariz. State Legislature*, 135 S. Ct. at 2663-64 (noting that the Arizona constitution prohibited the legislature from adopting any measure that "supersede[d]" the challenged law "in whole or in part" (quoting Ariz. Const., Art. IV, pt. 1, §1(14)).

- *Arizona State Legislature* "deal[t] with the relationship between a state legislature and its citizenry," meaning that the case did not present "the [federal] separation-of-powers concerns that were present in *Raines*." *Kerr*, 744 F.3d at 1168; *accord Ariz. State Legis.*, 135 S. Ct. at 2671 ("To restate the key question in this case … does the Elections Clause preclude the people of Arizona from creating a commission operating independently of the state legislature to establish congressional districts?").

Thus, *Arizona State Legislature* provides the guidance that was missing when the Panel first considered this case. Under similar facts, the only

party who could claim injury was "an institutional plaintiff asserting an institutional injury." *Ariz. State Legislature*, 135 S. Ct. at 2664. The three individual legislators here, to use the Supreme Court's phrase, don't "fit[ ] that bill." *Id.* at 2665.

The Legislator–Plaintiffs in this case insist that they have standing because TABOR, in their view, "arrogat[es]" legislative power to the people. (App. Vol. 2 at 481 ¶ 76.)[4] Even if that were true, "none of the [Legislator–Plaintiffs can] tenably claim a 'personal stake' in the suit": their numbers are insufficient to either authorize this lawsuit on

---

[4] The Governor has consistently disputed this description. TABOR does not "nullify" legislative authority or "arrogate" legislative power. The legislature may enact tax increases; TABOR requires only that they be referred to the voters.

This leads to another reason the Legislator–Plaintiffs lack standing: they have not identified a "specific legislative act" that TABOR has invalidated. *Raines*, 521 U.S. at 823 (citing *Coleman*, 307 U.S. at 446). In *Arizona State Legislature*, enacting a "specific legislative act" was impossible because "two prescriptions of Arizona's Constitution" prohibited the legislature from taking any formal action on the subject of redistricting. 135 S. Ct. at 2663-64. Here, no comparable provision in Colorado prevents the General Assembly from passing a tax increase, and the Legislator–Plaintiffs need not "disregard the State's fundamental instrument of government" to create the specific legislative act that *Raines* requires. *Id.*

behalf of the General Assembly or "enact[ ] a specific legislative Act." 135 S. Ct. at 2664-65 (quoting *Raines*, 521 U.S. at 823, 830). Until they muster enough General Assembly members to do so, Plaintiffs cannot sue to vindicate the legislature's alleged institutional interests.

B. The *amicus* brief filed in 2013 does not change the standing analysis under *Arizona State Legislature*.

Two years ago, Plaintiffs were able to recruit enough support in the General Assembly to authorize the filing of *amicus* briefs in any lawsuit, including this one, that raised "the limited issue of standing of individual legislators." S. Joint Res. 16, 69th Gen. Assembly, 1st Regular Sess., at 2 (Colo. 2013) ("Senate Joint Resolution 13-016"), Attached as Addendum A. But for two reasons, that fact does not alter the standing analysis here.

First, "the right to file a brief as *amicus curiae* is no substitute for the right to intervene as a party in the action." *Coal. of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 844 (10th Cir. 1996) (distinguishing an intervenor, which "has the right to file legitimate motions" that "the district court [must] sort through,"

from an *amicus curiae*, which lacks that right); *see also Wyo. Farm Bureau Fed'n v. Babbitt*, 199 F.3d 1224, 1230 n.2 (10th Cir. 2000) (refusing to consider arguments raised only by *amici*). Indeed, by design, the General Assembly's *amicus* participation in 2013 did not carry with it an institutional endorsement of the merits of Plaintiffs' claims. Senate Joint Resolution 13-016 said the opposite: "The involvement of the General Assembly … should carry *no implication about the views of the General Assembly on the merits of such lawsuits*." Add. A at A-3 (emphasis added). As a result, the 2013 limited-purpose resolution bears no similarity to the circumstances of *Arizona State Legislature*, where the legislature as a whole commenced a lawsuit as the real party in interest. 135 S. Ct. at 2664.

Second, standing is "focused on whether the party invoking jurisdiction had the requisite stake in the outcome *when the suit was filed*." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (emphasis added). Subsequent events cannot create standing. *S. Utah Wilderness All. v. Palma*, 707 F.3d 1143, 1153 (10th Cir. 2013). The 2013 vote to authorize an *amicus* brief came two years after this suit

was filed, too late to convert the allegations of a few individual legislators into full-blown claims of institutional injury. Indeed, if the 2013 vote were enough to *create* standing, the present actions of individual legislators must be enough to *defeat* standing. Today, 44 current and former General Assembly members, including a majority of the current Colorado Senate, filed an *amicus* brief *supporting* the Governor and opposing this lawsuit.

C. The remaining Plaintiffs lack standing, and this Court should dispose of their claims now.

After finding that the Legislator–Plaintiffs had standing, the district court declined to consider whether the same was true of the remaining Plaintiffs.[5] *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1141 (D. Colo. 2012). In its previous decision, this Court "similarly limit[ed

[5] The remaining Plaintiffs include current or former county commissioners, mayors, city councilpersons, members of boards of education, public university presidents and professors, public school teachers, and parents of school-age children. (App. Vol. 2 at 470–74 ¶¶10–42). None of these Plaintiffs have been authorized to represent their local governments or institutions. (*Id.* at 474 ¶ 9.) In previous briefing to the Panel, the Governor explained why these Plaintiffs lack standing. (Opening Br. at 16–29, Reply Br. at 9–18.)

its] review to the standing of the legislator-plaintiffs." *Kerr*, 744 F.3d at 1163.

As explained above, *Arizona State Legislature* clarifies that the Legislator–Plaintiffs lack Article III standing. But that does not end the inquiry. "[A] justiciable case or controversy must remain extant at all stages of review," *Leser v. Berridge*, 668 F.3d 1202, 1207 (10th Cir. 2011), and this Court is "compelled to assure itself that it has subject matter jurisdiction." *Cellport Sys., Inc. v. Peiker Acustic GMBH & Co. KG*, 762 F.3d 1016, 1029 (10th Cir. 2014) (quotation marks and citation omitted). Additionally, it would be inappropriate for the Court to remand for wide-ranging and expensive discovery[6] in a case cluttered with parties who cannot demonstrate the existence of a justiciable controversy specific to them. *See Veasey v. Perry*, 29 F. Supp. 3d 896, 902 (S.D. Tex. 2014) ("While one plaintiff with standing may satisfy the

[6] In a joint proposed scheduling order, the parties explained to the district court that discovery in this case could involve 165 lay witnesses (including numerous sitting state government officials) and 20 experts. (App. Vol. 2 at 555–59.) The Governor disputes that this amount of discovery—or any discovery, for that matter—is necessary to resolve Plaintiffs' purely legal claims.

Court's Article III jurisdiction, the Court still has the obligation to police its docket and dismiss parties who do not have standing." (citing *Nat'l Rifle Ass'n of America, Inc. v. McCraw*, 719 F.3d 338, 344 n.3 (5th Cir. 2013)). Thus, regardless of its holding on the legislative standing issue, this Court should address the standing of the remaining Plaintiffs.

Article III standing has three elements, which the non-legislator Plaintiffs bear the burden of establishing: (1) an injury in fact; (2) a causal connection between the injury and the challenged conduct; and (3) a likelihood that the injury will be redressed by a favorable court decision. *United States v. Rodriguez-Aguirre*, 264 F.3d 1195, 1204 (10th Cir. 2001). And even if Plaintiffs satisfy these three elements, they still must clear a prudential hurdle. They cannot enlist this Court in deciding generalized grievances shared by all Coloradoans.

Injury-in-Fact. Plaintiffs' complaint fails to allege an injury-in-fact. The complaint does not, for example, allege that the General Assembly passed, but the voters rejected under TABOR, a revenue measure that would have led to public spending benefiting Plaintiffs.

Instead, the complaint alleges "interests" in, among other things, a "representative democracy," "the legislative core functions of taxation and appropriation," and "adequately funding core education responsibilities." (App. Vol. 2 at 470 ¶ 8, 474 ¶¶ 43, 45.) The complaint further alleges that TABOR has caused Colorado to "slide into fiscal dysfunction." (App. Vol. 2 at 468 ¶ 3.)

None of these allegations describe concrete and particularized injuries-in-fact that Plaintiffs *themselves* have uniquely suffered. Plaintiffs are "seeking relief that no more directly and tangibly benefits [them] than it does the public at large." *Lance v. Coffman*, 549 U.S. 437, 439 (2007); *see also Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (noting that "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court" (quoting *Allen v. Wright*, 468 U.S. 737, 754 (1984))).

Causation and Redressability. Plaintiffs have not alleged facts to suggest that a ruling in their favor would arrest the "slow, inexorable slide into fiscal dysfunction" that Plaintiffs claim TABOR has caused;

nor does their complaint allege that eliminating TABOR would cause the State to begin "funding core education responsibilities" in a manner Plaintiffs would find "adequate[ ]." (App. Vol. 2 at 468 ¶ 3, 474 ¶ 45.) Nothing in the complaint plausibly suggests that the legislature would, or could, increase taxes and public spending in the absence of TABOR. Plaintiffs' complaint is therefore "'conjectural or hypothetical' in that it depends on how legislators [might] respond" if TABOR were invalidated. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

Prudential Limits on Standing. Even if Plaintiffs can clear the hurdle of Article III standing, they still fail prudential limitations on federal jurisdiction. The complaint alleges that TABOR deprives all citizens of Colorado "of effective representative democracy." (App. Vol. 2 at 470 ¶ 8.) By Plaintiffs' own admission, then, the injury TABOR has allegedly inflicted is "shared in substantially equal measure" by everyone in Colorado. *See Citizens' Comm. to Save Our Congress v. U.S. Forest Serv.*, 297 F.3d 1012, 1026 (10th Cir. 2002) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). The federal courts are the wrong forum for such a widespread dispute. *Valley Forge Christian Coll. v.*

Am. United for Separation of Church & State, 454 U.S. 464, 474–75 (1982). Complaints about a state's "legislative process" are "generalized, abstract grievance[s], shared by all … citizens" and therefore inappropriate for judicial resolution. *Common Cause of Penn. v. Pennsylvania*, 558 F.3d 249, 258–60, 262 (3d Cir. 2009) (Ebel, J., sitting by designation).

II. The Political Question Doctrine

In addition to the issue of legislative standing, *Arizona State Legislature* sheds light on another case-determinative legal question: whether the political question doctrine bars Plaintiffs' claims. After *New York v. United States*, 505 U.S. 144 (1992), a number of courts questioned whether they should depart from the Supreme Court's longstanding practice of dismissing Guarantee Clause claims as *per se* nonjusticiable. *See, e.g.*, *Largess v. Supreme Judicial Court*, 373 F.3d 219, 228–29 (1st Cir. 2004). *Arizona State Legislature* explicitly reaffirmed that courts should *not* depart from that practice, at least for one category of Guarantee Clause claims—challenges to "[t]he people's sovereign right to incorporate themselves into a State's lawmaking

apparatus, by reserving for themselves the power to adopt laws and to veto measures passed by elected representatives." 135 S. Ct. at 2660 n.3 (citing *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U. S. 118 (1912)). TABOR fits that description precisely. It "incorporates [Colorado voters] into [the] State's lawmaking apparatus" on questions of fiscal policy. *Id.* Plaintiffs' legal challenge to TABOR therefore "rank[s] [as] a nonjusticiable political matter." *Id.*[7]

As it did in *New York*, the Court in *Arizona State Legislature* acknowledged that "perhaps" some type of claims under the Guarantee Clause are justiciable. *Id.* (citing *New York*, 505 U.S. at 185). But in doing so, the Court distinguished challenges to direct democracy from other possible Guarantee Clause claims, juxtaposing *New York* with *Pacific States*. *See Ariz. State Legislature*, 135 S. Ct. at 2660 n.3 (citing both cases, but distinguishing *New York* with a "but see" signal).

[7] The plaintiff in *Arizona State Legislature* attempted to bring a claim under the Guarantee Clause. The lower court determined that the claim raised a nonjusticiable political question and declined to consider it. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047, 1050, 1055 (D. Ariz. 2014). The Supreme Court not only left that ruling undisturbed but also explicitly endorsed it. 135 S. Ct. at 2660 n.3.

New York involved a state's challenge to a coercive federal statute; the Court assumed justiciability and opted to dispose of the Guarantee Clause claim on the merits. 505 U.S. at 185–86; *see Largess*, 373 F.3d at 228 (noting that *New York* "involved claims by a state that the executive and legislative branches of the federal government were interfering with state matters" rather than a claim that the internal structure of a state government was unconstitutional). *Pacific States*, meanwhile, was a challenge to a State's use of direct democracy. The Court dismissed that claim as nonjusticiable and has more recently described the claim as one "the judicial department has no business entertaining … because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth v. Jubelirer*, 541 U. S. 267, 277 (2004) (plurality opinion) (citing, among other cases, *Pacific States*, 223 U.S. 118).

Rightly so. It is impossible to draw justiciable lines separating "core" legislative powers, which in Plaintiffs' view the people may not "arrogate" (App. Vol. 1 at 109–10, 145; App. Vol. 2 at 417; Answer Br. at 5, 28), from non-core legislative powers. The Supreme Court has long

recognized the peril in attempting to make such distinctions. *E.g.*, *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 498 (2003) (rejecting a test that asked whether a suit interfered with a state's "core sovereign responsibilities"); *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 546–47 (1985) (rejecting as "unsound in principle and unworkable in practice" a rule that turned on whether a state function was "integral" or "traditional"); *see also Helvering v. Gerhardt*, 304 U.S. 405, 427 (1938) (Black, J., concurring) ("There is not, and there cannot be, any unchanging line of demarcation between essential and non-essential governmental functions.").

Plaintiffs' claim under the Colorado Enabling Act, which duplicates their Guarantee Clause claims, does not make this case justiciable. In *Pacific States*, the Supreme Court rejected an analogous enabling act claim, noting that "every reason urged to support [it] is solely based on [the Guarantee Clause]." 223 U.S. at 140. In other words, the enabling act claim was duplicative of the Guarantee Clause claim and failed on the same grounds: nonjusticiability. And no decision of the Supreme Court holds, as Plaintiffs have insisted, that statutory

claims are always immune from the political question doctrine. *E.g.*, *Texas v. United States*, 106 F.3d 661, 666–67 (5th Cir. 1997) (dismissing claims under the Guarantee Clause and Texas Articles of Annexation); *see also Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1435 (2012) (Sotomayor, J., concurring in part and concurring in the judgment) (explaining that a statute "requir[ing] a court to resolve the very same issue we found nonjusticiable in [*Nixon v. United States*, 506 U.S. 224 (1993),]" would not create a justiciable cause of action). It would be remarkable if a statute alone could expand Article III's cases or controversies requirement—a notion the Supreme Court has rejected. *See, e.g.*, *Raines*, 521 U.S. at 820 n.3.[8]

[8] Another Supreme Court case from this term also provides dispositive guidance on Plaintiffs' asserted statutory claim. In *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), the Court held that a litigant cannot invoke federal courts' equitable powers to "circumvent Congress's [express or implied] exclusion of private enforcement" from a federal statute such as the Colorado Enabling Act. *Id.* at 1385. Plaintiffs here, who seek to invoke federal equitable power to enjoin TABOR, have cited no case establishing that the "republican form of government" provision in that statute is privately enforceable.

III. The Merits

Finally, *Arizona State Legislature* removed all doubt regarding the merits of Plaintiffs' case. The Court recognized, repeatedly, that legislative power ultimately resides in the people of each State, not their elected representatives. In doing so, it unambiguously endorsed the people's right to exercise lawmaking powers that their representatives may wish to wield without restraint:

- "[L]awmaking authority … can be carried out by a representative body, but if a State so chooses, legislative authority can also be lodged in the people themselves." *Ariz. State Legislature*, 135 S. Ct. at 2668 n.17.

- "[T]he animating principle of our Constitution [is] that the people themselves are the originating source of all the powers of government." *Id.* at 2671.

- "[I]nitiatives adopted by the voters legislate for the State just as measures passed by the representative body do." *Id.*

- "[I]t is characteristic of our federal system that States retain autonomy to establish their own governmental processes." *Id.* at 2673.

- "[I]t would be perverse to interpret the term 'Legislature' in the Elections Clause so as to exclude lawmaking by the people …." *Id.* at 2675.

To the Court, it did not matter—as Plaintiffs have argued here (*see* Answer Br. at 14–19)—that "[t]he 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." *Id.* at 2674. Whether or not anticipated at the founding, expansive forms of direct democracy are "in full harmony with the Constitution's conception of the people as the font of governmental power." *Id.*

Given the Supreme Court's unmistakable guidance on the constitutionality of the people's exercise of legislative power, this Court should address the merits of Plaintiffs' claims, which have been fully briefed to this Court[9] and raise only pure questions of law. *See United States v. Jarvis*, 499 F.3d 1196, 1201–02 (10th Cir. 2007) (noting that this Court may reach "a pure matter of law" on appeal if "the proper resolution of the issue is certain," "no additional findings of fact or presentation of evidence [are] required for the issue's disposition," and "both parties had the opportunity to address the issue in their appellate briefing"); *see* 16 Charles A. Wright et al., Federal Practice and Procedure § 3929, at 457 (3d ed. 2012) (noting that, on interlocutory

[9] *See* Opening Br. at 31–41, Answer Br. at 12–19, Reply Br. at 21–31.

appeal, "[t]he court may … consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court"). There is no need to remand for discovery—doing so would serve only to waste the time and resources of both the district court and the parties. This Court should, if it declines to dispose of this case on standing or political question grounds, reach the merits of this case, decide them, and remand for dismissal.

CONCLUSION

The Court should vacate the district court's order denying the Governor's motion to dismiss and remand with instructions to dismiss Plaintiffs' complaint and enter judgment for the Governor.

Respectfully submitted on July 31, 2015.

/s/ Frederick Yarger

CYNTHIA H. COFFMAN
Attorney General

MEGAN PARIS RUNDLET*
Senior Assistant Attorney General

MATTHEW D. GROVE*
Assistant Solicitor General

JONATHAN P. FERO
Assistant Solicitor General

FREDERICK R. YARGER*
Solicitor General

Office of the Attorney General
1300 Broadway, 10th Floor
Denver, Colorado 80203
Telephone: (720) 508-6168
E-Mail: fred.yarger@state.co.us
*Counsel of Record

Attorneys for Defendant–Appellant Governor of Colorado

WORD COUNT AND TYPEFACE

I certify that

(1) This brief complies with the type-volume limitation set forth in the Court's July 1, 2015 order: it contains 4,428 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): it has been prepared in a proportionally spaced typeface (fourteen-point Century Schoolbook Font) using Microsoft Word 2010.

Date: July 31, 2015.

/s/ Frederick Yarger

REDACTIONS AND DIGITAL SUBMISSIONS

I certify that with respect to this brief,

(1) all required privacy redactions have been made in compliance with 10th Cir. R. 25.5;

(2) if additional paper versions of this document are required to be filed, the ECF submission is an exact copy of those paper versions;

(3) the digital submissions have been scanned for viruses with the most recent version of the commercial virus scanning program System Center Endpoint Protection, Version 1.203.883.0, which was updated on July 31, 2015, and according to that program the digital submissions are free of viruses.

Date: July 31, 2015.

/s/ Frederick Yarger

CERTIFICATE OF SERVICE

On July 31, 2015, I served this **Governor's Supplemental Memorandum Brief on Remand from the Supreme Court** through CM/ECF, which will provide notice to the following:

Attorneys for Plaintiffs:
Lino S. Lipinsky de Orlov (llipinsky@dentons.com)
Herbert Lawrence Fenster(hfenster@cov.com)
David Evans Skaggs (dskaggs@dentons.com)
Michael F. Feeley (mfeeley@bhfs.com)
John A. Herrick (jherrick@bhfs.com)
Geoffrey W. Williamson (gwilliamson@bhfs.com)
Carrie Elizabeth Johnson (cjohnson@bhfs.com)
Sarah Levine Hartley (shartley@bhfs.com)
Sarah May Mercer Clark (sclark@bhfs.com)
Michael Lee Bender (mbender@perkinscoie.com)

Attorneys for Amici Curiae:
Melissa Hart (melissa.hart@colorado.edu)
David Benjamin Kopel (david@i2i.org)
John M. Bowlin (john.bowlin@dgslaw.com
Emily L. Droll (Emily.droll@dgslaw.com)
Andrew M. Low (Andrew.low@dgslaw.com)
D'Arcy Winston Straub (darcystraub@gmail.com)
Ilya Shapiro (ishapiro@cato.org)
Steven J. Lechner (lechner@mountainstateslegal.com)
Jeffrey McCoy (jmccoy@mountainstateslegal.com)
Harold Haddon (hhaddon@hmflaw.com)
Laura Kastetter (lkastetter@hmflaw.com)
Matthew Douglas (matthew.douglas@aporter.com)
Nathaniel J. Hake (Nathaniel.hake@aporter.com)
Paul Rodney (paul.rodney@aporter.com)
Holly Elizabeth Sterrett (holly.sterrett@aporter.com)
Joseph Guerra (jguerra@sidley.com)
Kathleen Moriarty Mueller (kmueller@sidley.com)
Catherine Carla Engberg (engberg@smwlaw.com)
Richard A. Westfall (rwestfall@halewestfall.com)

John Eastman (jeastman@chapman.edu)
Mitlon A. Miller (Milt.Miller@lw.com)
Luke A. Wake (luke.wake@nfib.org)
Karen Harned (karen.harned@nfib.org)
Stephen G. Masciocchi (smosciocchi@hollandhart.com)
Maureen Witt (mwitt@hollandhart.com)
J. Campbell Barker (cam.barker@texasattorneygeneral.gov)
Autumn Hamit Patterson
(autumn.patterson@texasattorneygeneral.com)

s/ Mary A. Brown

Addendum A to the Governor's Supplemental Memorandum Brief

Senate Joint Resolution 16, 69th Gen. Assembly, 1st Regular Sess. (Colo. 2013)

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