No. 12-1445

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, et al.

Plaintiffs/Appellees,

vs.

JOHN HICKENLOOPER, Governor of Colorado, in his official capacity,

Defendant/Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO
HONORABLE WILLIAM J. MARTINEZ, DISTRICT COURT JUDGE
CASE NO. 11-CV-01350-WJM-BNB

AMICUS CURIAE BRIEF OF THE COLORADO GENERAL ASSEMBLY IN SUPPORT OF PLAINTIFFS/APPELLEES AND AFFIRMANCE ON THE ISSUE OF LEGISLATOR STANDING

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Prior or Related Cases

There are no prior or related appeals.

AUTHORIZATION TO FILE

On March 6 and 7, 2013, the Colorado General Assembly passed Senate Joint Resolution 13-016 (SJR 13-016). In SJR 13-016, the General Assembly authorized and directed its Committee on Legal Services[1] to retain counsel to represent the General Assembly as 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."[2] S. J. Res. 13-016, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013). Pursuant to the authority granted by SJR 13-016, on March 19, 2013, the Committee on Legal Services voted to have the General Assembly participate as an amicus curiae in this appeal. The Committee's vote reflects its determination that advocating in favor of the legislator-plaintiffs' standing will advance an institutional interest of the General

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[1] The General Assembly's bipartisan Committee on Legal Services is a statutorily-created committee comprised of ten members of the General Assembly. The Committee's responsibilities include, among other things, retaining counsel to represent the General Assembly or its members. *See* Colo. Rev. Stat. §§ 2-3-502, 1001.

[2] The Colorado Senate adopted SJR 13-016 by a vote of 34-0, with one member excused. *See* S. Journal, 69th Gen. Assemb., 1st Reg. Sess., 57th Day, at 414-16 (Colo. Mar. 6, 2013). The Colorado House of Representatives adopted the joint resolution by a vote of 56-5, with four members excused. *See* H. Journal, 69th Gen. Assemb., 1st Reg. Sess., 58th Day, at 495-500 (Colo. Mar. 6, 2013).

Assembly, as well as the individual interest of each member of the General Assembly, including the legislator-plaintiffs.

IDENTITY AND INTEREST OF AMICUS CURIAE

Article V, Section 1(1) of the Colorado Constitution vests the state's legislative power in the Colorado General Assembly. COLO. CONST. art. V, § 1(1). The General Assembly is bicameral, composed of a 35-member Senate and a 65-member House of Representatives. All members of the General Assembly are elected in a general election and take an oath or affirmation to support the United States and Colorado constitutions and to perform their official duties to the best of their abilities. *Id.*, art. V, § 2(2). Two of the primary powers and responsibilities of the General Assembly's members are taxation and appropriation to meet the needs and further the interests of Colorado citizens. *See*, *e.g.*, *Mesa County Bd. of County Comm'rs v. State*, 203 P.3d 519, 527 (Colo. 2009) (taxation); *Colorado General Assembly v. Lamm*, 700 P.2d 508, 519-20 (Colo. 1985) (appropriation).

Five plaintiffs in this action are individual members of the General Assembly. Among other injuries, the legislator-plaintiffs have alleged that Colorado's Taxpayer's Bill of Rights (TABOR), COLO. CONST. art. X, § 20, has (1) stripped the General Assembly of its core legislative powers of taxation and appropriation, and (2) nullified the legislator-plaintiffs' votes on certain tax issues such that they are effectively unable to fulfill their official responsibilities. *See*

Aplt. App. 474 ¶43, 477-78, ¶¶ 63-66, 480 ¶ 74, 482-83, ¶¶ 80-83. The General Assembly files this amicus brief in support of the legislator-plaintiffs' standing to assert these arguments and challenge the constitutionality of TABOR.

STATEMENT OF COMPLIANCE WITH RULES 29(A) AND (C)(5)

Pursuant to Fed. R. App. P. 29(a) and (c)(5), the General Assembly states that (1) all parties consented to the filing of this brief, and (2) no party's counsel authored this brief in whole or in part, and no party, counsel, or person other than the General Assembly, its members, or its counsel contributed money that was intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The legislator-plaintiffs have standing to challenge TABOR's constitutionality. Each member of the General Assembly, including each legislator-plaintiff, has a constitutionally-protected interest in maintaining the effectiveness of his or her legislative vote. Taking the plaintiffs' allegations as true, TABOR infringes the legislator-plaintiffs' interests directly, concretely, and in a way that is particularized to them. Their injuries can only be redressed judicially. There is no legislative solution.

Taxation and appropriation are two of the General Assembly's core functions. The General Assembly's taxation and appropriation powers – including the power to determine all questions of timing, method, nature, purpose, extent,

and priority with respect to the imposition of taxes or the appropriation of funds – are plenary. TABOR strips those powers. Among other things, TABOR precludes the General Assembly from adopting "any new tax, tax rate increase, . . . extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district" without voter approval in a statewide vote. TABOR also precludes the General Assembly from acting with respect to certain tax issues, regardless of voter approval. Additionally, TABOR imposes a spending limit based on the inflation rate plus population growth rate and requires that all revenues exceeding that limit be returned to citizens. In essence, TABOR eliminates the General Assembly's plenary power over taxes and appropriations.

TABOR, however, does not inflict only institutional injury. TABOR nullifies the effectiveness of each individual legislator's vote on specific issues. In some cases, regardless of which way a legislator votes on certain tax issues, the legislator's vote is deprived of all validity. In other cases, TABOR effectively nullifies the legislator's ability to propose, sponsor, or vote for bills requiring funding by subjecting the General Assembly's plenary taxation power to a statewide vote. TABOR also guts legislators' ability to appropriate funds in light of fixed allocations and pre-existing priorities. As a result, TABOR renders every legislator unable to fulfill some of the legislator's most important constitutionally-mandated responsibilities.

Vote nullification – even *future* vote nullification – is a sufficiently concrete, personal injury to confer standing on the individual legislator-plaintiffs. The law does not require the legislator-plaintiffs to engage in the futile act of proposing or voting for a specific tax bill only to have TABOR nullify their votes. Nor does the fact that every legislator suffers the same injury make the legislator-plaintiffs' injury less personal or legally cognizable. Further, because TABOR is a constitutional provision, the legislator-plaintiffs cannot address its impact by proposing or voting for a legislative solution.

The legislator-plaintiffs have adequately alleged that TABOR has caused them to suffer an injury-in-fact that will be redressed by a favorable result on the merits. Accordingly, this Court should affirm the district court's holding that the legislator-plaintiffs have standing.

LEGAL STANDARD

In order to satisfy the Article III standing requirements, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997) (quoting reference and emphasis omitted). The "personal injury" element of the standing test requires that a plaintiff's complaint establish a "personal stake in the alleged dispute, and that the alleged injury is particularized as to [the plaintiff]." *Id*. at 819 (internal quotation marks omitted). The injury

must also be legally and judicially cognizable, meaning that the plaintiff must have suffered "an invasion of a legally protected interest which is . . . concrete and particularized" and that the dispute "is traditionally thought to be capable of resolution through the judicial process." *Id*. (quoting references omitted).

"When evaluating a plaintiff's standing at the stage of a motion to dismiss on the pleadings, 'both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party.'" *Southern Utah Wilderness Alliance v. Palma*, 707 F.3d 1143, 1152 (10th Cir. 2013) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Thus, although the General Assembly takes no position on the merits of the plaintiffs' allegations, it assumes that those allegations are true for purposes of this brief.

ARGUMENT

I. THE LEGISLATOR-PLAINTIFFS HAVE ALLEGED A PERSONAL INJURY.

The district court correctly determined that the legislator-plaintiffs have standing because TABOR eviscerates their ability to enact or raise taxes. The court properly analyzed and applied the *Raines* factors and found that: (1) the legislator-plaintiffs have alleged a concrete injury involving the removal of a "core" legislative power of the General Assembly; (2) the issue of institutional injury must be evaluated in the context of the other factors identified in *Raines*; (3)

there are no separation of powers concerns in this case, and any federalism concerns have diminished due to the passage of time since TABOR was adopted; (4) the legislator-plaintiffs have no available internal legislative remedy; and (5) it is irrelevant whether there is another plaintiff who would have standing to challenge the constitutionality of TABOR if the legislator-plaintiffs do not. *Kerr v. Hickenlooper*, 880 F. Supp. 1112, 1124-39 (D. Colo. 2012); Aplt. App. 413-30. The court then accurately concluded that the legislator-plaintiffs have sufficiently alleged that they suffered a cognizable injury-in-fact caused by TABOR which can only be redressed by the court. *Id.* at 1139-41; Aplt. App. 430-31.

The district court's opinion is thorough and well-reasoned. In addition to all the bases articulated by the district court, this Court should hold that the legislator-plaintiffs have standing because, along with causing institutional injuries, TABOR completely nullifies individual legislators' votes on some tax issues, effectively nullifies their votes on other tax issues, and, as a result, severely impairs their ability to appropriate funds, fulfill their official duties, and serve their constituents.

A. Each Member Of The General Assembly Has A Constitutionally Protected Interest In Maintaining The Effectiveness Of His Or Her Vote.

"State legislatures are, historically, the fountainhead of representative government in this country." *Reynolds v. Sims*, 377 U.S. 533, 564 (1964). Thus, individual state legislators have a well-established, "plain, direct and adequate

interest in maintaining the effectiveness of their votes." *Coleman v. Miller*, 307 U.S. 433, 438 (1939). In Colorado, that interest is particularly strong with respect to taxation and appropriation.

Colorado courts have long recognized the unique and important nature of the legislature's power to tax. The Colorado Supreme Court has recognized as a "basic legal concept" the principle that a sovereign has an inherent power to tax regardless of whether the people expressly confer that power on the government. *City and County of Denver v. Lewin*, 105 P.2d 854, 858 (Colo. 1940); *accord Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) ("[T]axes are the life-blood of government . . . ."). In Colorado, the people did, in fact, confer the power to tax on the government, COLO. CONST. art. X, § 2, and the Colorado Supreme Court has repeatedly recognized that taxation is an exclusively legislative function over which the General Assembly has plenary power:

> [T]he legislature has plenary power on the matter of taxation, and it alone has the right and discretion to determine all questions of time, method, nature, purpose, and extent in respect of the imposition of taxes, the subjects on which the power may be exercised, and all the incidents pertaining to the proceedings from beginning to end . . . ."

Hoffman v. Colorado State Bd. of Assessment Appeals, 683 P.2d 783, 785 (Colo. 1984) (quoting *Lewin*, 105 P.2d at 858); *see also Skidmore v. O'Rourke*, 383 P.2d

473, 474 (Colo. 1963) ("It is the rule of law in most, if not all, states, including Colorado, that the taxing power of the state is exclusively a legislative function.").

The Colorado Supreme Court has also consistently recognized the critical nature of General Assembly's "plenary taxation role" in Colorado's government. *See*, *e.g.*, *Washington County Bd. of Equalization v. Petron Dev. Co.*, 109 P.3d 146, 149 (Colo. 2005). Indeed, one of the "fundamental principles contained in the Colorado Constitution's revenue provisions, statutes, and case law" is that "the General Assembly cannot refuse to exercise its taxation authority and must enact tax statutes so that governmental operations may be funded." *Id.*; *see also Bd. of County Comm'rs v. Vail Assocs., Inc.*, 19 P.3d 1263, 1273-74 (Colo. 2001) (citing cases for the same proposition). In short, the power of taxation is and always has been "one of the [General Assembly's] core functions." *Mesa County Bd. of County Comm'rs*, 203 P.3d at 527; *see also* Aplt. App. 469, 478.

The same is true of the General Assembly's power to appropriate. The Colorado Supreme Court has described the General Assembly's appropriation power as "absolute" and "plenary." *Lamm*, 700 P.2d at 519-20. As the court has recognized, this means that the General Assembly has the "undisputed" power "to set apart from the public revenue a certain sum of money for a specified object, in such manner that the executive officers of the government are authorized to use that money, and no more, for that object and no other." *Id*. (quoting *People ex rel.*

Ammons v. Kenehan, 136 P. 1033, 1036 (Colo. 1913) (internal quotation marks omitted).

Because it is beyond dispute that the legislator-plaintiffs have a constitutionally protected interest in maintaining the effectiveness of their votes – particularly those votes related to tax and appropriation matters – the standing inquiry here turns on whether TABOR deprives any of the legislator-plaintiffs' votes "of all validity." *See Raines*, 521 U.S. at 822. Assuming, as this Court must, that the plaintiffs' allegations are true, the answer is yes.

B. TABOR Nullifies Legislators' Constitutionally-Protected Interests In Maintaining The Effectiveness Of Their Votes On Some Tax Issues, Renders Other Votes Effectively Null, And Makes It Virtually Impossible For Legislators To Appropriate In A Manner That Adequately Serves Their Constituents.

Cases alleging vote nullification typically fall into one of two categories: true vote nullification and lost political battles. Only the former confers legislative standing and this case falls squarely into that category.

1. This case involves vote nullification, not a mere lost political battle.

Coleman is the seminal vote nullification case. There, the plaintiffs included 20 Kansas senators who voted against ratifying a child labor amendment to the Kansas constitution. 307 U.S. at 435-36. After the Kansas Senate deadlocked – meaning that ratification would have failed – Kansas's Lieutenant Governor cast a deciding vote in favor of ratification. *Id*. at 436. Although the Supreme Court

eventually ruled against the plaintiffs on the merits, it held that the state senators had standing because their votes had "been overridden and virtually held for naught although if they are right in their contentions their votes would have been sufficient to defeat ratification." *Id*. at 439. *Coleman* thus stands 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." *Raines*, 521 U.S. at 823.

Courts have recognized, however, that vote nullification can also occur when a legislature is divested of unique rights. For example, in *Dennis v. Luis*, eight members of the Virgin Islands' legislature challenged the Governor's appointment of an "acting" Commissioner of Commerce after the legislature had already rejected the nominee for permanent appointment. 741 F.2d 628, 629-30 (3d Cir. 1984). Under a unique statutory provision, the Governor could appoint a Commissioner of Commerce only with the legislature's "advice and consent." *Id*. The Third Circuit held that the individual legislators had standing, reasoning that because the right to advise and consent was vested only in the legislature, the allegation that the governor had usurped this right was sufficiently personal to constitute an injury in fact. *Id*. at 631.

In contrast, legislators lack standing to challenge the constitutionality of a particular act simply because they voted against it and lost. In *Raines*, six members of Congress who voted against the Line Item Veto Act attempted to challenge the constitutionality of the Act, which was passed by both the Senate and House. 521 U.S. at 814. The Supreme Court rejected the Congressmen's standing argument, which alleged that the Act would render their votes on appropriations bills less effective. *Id*. at 825-26. The Court pointed out that the Congressmen: (1) simply lost the vote over whether to pass the Act; (2) could not allege that the Act would nullify their votes in the future; and (3) had an adequate legislative remedy, because Congress could repeal the Act or exempt appropriations bills from its reach. *Id*. at 824, 829. Thus, the Court held that to grant the Congressmen standing would pull "*Coleman* too far from its moorings." *Id*. at 825.

Similarly, in *Schaffer v. Clinton*, this Court held that a member of the U.S. House of Representatives lacked standing to challenge a statute authorizing cost of living adjustments for members of Congress. 240 F.3d 878, 884-86 (10th Cir. 2001). Like the Congressmen in *Raines*, Representative Schaffer simply lost the vote over cost of living adjustments; his vote on that issue was not nullified and he had an adequate legislative remedy: he could try to persuade his fellow legislators to change the law. *Id*. at 885-86.

Here, the legislator-plaintiffs have not just lost a vote, they have been completely divested of their right to vote on certain issues, which is an even more significant injury than occurred in *Coleman*. Further, because TABOR is a constitutional amendment, they cannot reclaim their right to vote by persuading their fellow legislators to change the law. The legislator-plaintiffs' injury is concrete and personal and it has been caused directly by TABOR.

2. The legislator-plaintiffs have had their votes nullified and their legislative power divested.

TABOR's impact on the legislator-plaintiffs' votes is analogous to *Coleman* and *Dennis*, not *Raines* and *Schaffer*. TABOR's provisions have been detailed at length in the parties' and other amici's briefs. In sum, TABOR (1) precludes the General Assembly from adopting "any new tax, tax rate increase, . . . extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district" without voter approval in a statewide vote, COLO. CONST. art. V, § 20(4)(a), and (2) imposes a spending limit and requires that any excess revenue be returned to the citizens, *id.* at § 20(7). TABOR also completely precludes the General Assembly from acting with respect to tax issues in some circumstances, regardless of voter approval. For example, one section of TABOR precludes the General Assembly from enacting any income tax law change that does not require all taxable net income to be taxed at one rate. *Id.* at § 20(8)(a). That same section

also precludes the General Assembly from enacting a state property tax or enacting any new or increased transfer tax rates on real property. *Id.*

The effect of these provisions is to nullify any vote that any member of the General Assembly – including the legislator-plaintiffs – might cast on progressive income taxes, property taxes, or transfer tax rates. On other tax issues, TABOR mandates that it is the citizens' votes – not the legislators' votes – that ultimately determine whether a tax will be implemented. TABOR also effectively deprives legislators of their ability to address and further the needs of constituents because it makes proposing or sponsoring any bill that requires a new or increased tax either a futile act or one that requires voter approval.

a. TABOR's nullification of the legislator-plaintiffs' votes is not speculative.

As a threshold issue, the fact that the legislator-plaintiffs have not pointed to a particular tax bill which would have passed but for TABOR does not render their injury speculative. TABOR has already rendered the proposal and sponsorship of certain tax bills a futile act, which is a very present injury suffered by each legislator. *Randall v. Potter*, 366 F.Supp.2d 120, 128 (D. Me. 2005) (The law does not require "the doing of a . . . futile thing."); *see also Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (Dubofsky, J., specially concurring) ("it is a recognized maxim that the law requires not impossibilities"). Further, *Raines* indicates that an individual legislator can establish standing by demonstrating *future* vote nullification. *See*

521 U.S. at 824 ("Nor can [the legislators] allege that the Act will nullify their votes in the future in the same way that the votes of the *Coleman* legislators had been nullified.").

TABOR makes it pointless for the legislator-plaintiffs to try to vote on certain tax issues, because those votes would have no effect. For example, it would be a futile exercise for the General Assembly to vote on any bill that included a progressive income tax rate or imposed a state property tax. Though the General Assembly otherwise has plenary power over the method and nature in which taxes are imposed, *Hoffman*, 683 P.2d at 785, TABOR would automatically invalidate every vote cast on either bill, COLO. CONST. art. V, § 20(8). In other words, any future vote members of the General Assembly might cast on a progressive income tax bill or a state property tax bill will, in fact, be nullified by TABOR.

With respect to other tax bills, TABOR effectively nullifies every legislator's vote, albeit less blatantly than with respect to progressive income taxes and property taxes. TABOR's impact on individual legislators is currently playing out in the General Assembly via Senate Bill 13-213 (SB 213), which is intended to overhaul Colorado's school funding system. *See* S. B. 13-213, 69th Gen. Assemb., 1st Reg. Sess. (Colo. 2013). The Colorado Senate passed SB 213 on April 2, 2013. *See* S. Journal, 69th Gen. Assemb., 1st Reg. Sess., 84th Day, at 676 (Colo. Apr. 2,

2013). Ordinarily, if the bill were also to pass the Colorado House, the bill would go to the Governor to sign or veto. But because of TABOR, even if the General Assembly passes SB 213 and the Governor signs it, SB 213 will still necessarily be contingent on funding from an initiative that Colorado's citizens may or may not approve. Said differently, even if every member of the General Assembly votes for a school funding plan like SB 213 and the Governor signs that plan into law, the legislators' votes are given no effect absent voter approval. The plan is still held hostage by a statewide vote on a separate initiative and the legislators have no independent ability to perform their constitutional duty to fund schools by enacting a tax.[3]

Another telling example is Colorado's recent legalization of marijuana. Article XVIII, Section 16(b)(V) of the Colorado Constitution now mandates that all marijuana sold in the state "will be labeled and subject to additional regulations to ensure that consumers are informed and protected." COLO. CONST., Art. XVIII,

[3] This example is hypothetical because SB 213 has not yet passed the House or been signed by the Governor. But the hypothetical nature of the example does not change the actual nature of the legislator-plaintiffs' injury. *See*, *e.g.*, *Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 630 (10th Cir. 1998) (for purposes of showing an injury-in-fact, the invasion of a judicially cognizable interest must be actual or imminent). Regardless of the outcome of SB 213, TABOR already vitiates legislators' ability to propose or sponsor tax legislation or bills to be funded by a new or supplemental tax without voter approval. TABOR will also always nullify the legislator-plaintiffs' votes on certain issues, and *Raines* indicates that future vote nullification is a personal injury sufficient to confer standing. *See* 521 U.S. at 824.

§ 16(b)(V). This constitutional mandate, of course, requires funding that, to date, has never existed. But any vote a legislator might cast to fund the labeling and regulation of marijuana with a progressive income tax or a state property tax will be automatically nullified. And any vote a legislator might cast to fund marijuana labeling and regulation with any other new tax or tax rate increase will be meaningless without voter approval. As with SB 213, whatever plan legislators might come up with to fulfill their duty under Article XVIII, Section 16(b)(V) by enacting a tax will be wholly ineffective unless the voters approve it.

TABOR's impact is similar to the usurpation of legislative power in *Dennis*. *See* 741 F.2d at 629-31. As in *Dennis*, the General Assembly is vested with an exclusive and unique right. There, the right was to advise and consent to the Governor's appointment of a particular cabinet member, *see id.*; here it is to determine the method, nature, purpose, and extent of taxes and appropriations with respect to, among other issues, school funding, *see*, *e.g.*, *Hoffman*, 683 P.2d at 785; COLO. CONST. art. IX, § 2. And just as the Governor usurped the legislature's unique right in *Dennis*, TABOR usurps the General Assembly's powers of taxation and appropriation here. Like the legislators in *Dennis*, the legislator-plaintiffs have a personal interest in maintaining the effectiveness of their votes and the unique rights granted only to the General Assembly.

Of course, progressive income taxes, property taxes, school funding, and marijuana regulation funding are just a few of many possible examples of how TABOR nullifies the effectiveness of legislators' votes and renders them unable to perform their duties. Simply put, by stripping the General Assembly of its exclusive taxation power, TABOR has deprived the legislator-plaintiffs' votes of their efficacy and validity on a host of issues. There is no need for the legislator-plaintiffs to engage in the futile exercise of trying to pass a tax bill only to see TABOR automatically nullify their votes (as in the case of a progressive income tax) or presumptively nullify their votes by requiring voter approval, notwithstanding the General Assembly's plenary power to tax. *See*, *e.g.*, *Austin*, 682 P.2d at 54 (Dubofsky, J., specially concurring). In addition to the divestiture of the legislators' constitutional powers, future vote nullification is a sufficient injury for standing purposes and one that the legislator-plaintiffs have, in fact, suffered.

b. TABOR's nullification of the legislator-plaintiffs' ability to perform their sworn duties is not speculative.

The legislature's inability to raise revenues via taxation has had a correspondingly dramatic impact on individual legislators' ability to address their constituents' needs through appropriations. Over the past four years, for example, TABOR's impact on available state revenue has left the General Assembly with a

single option: reduce spending by reducing appropriations. TABOR has prevented the General Assembly from providing spending authority through appropriations at the levels it would otherwise deem necessary. As a result, TABOR has nullified individual legislators' ability to exercise their discretion in addressing various needs within the State of Colorado. TABOR has forced extremely limited and difficult choices, acutely prioritized spending, and reduced levels of appropriations for most state departments, regardless of need. In some instances, TABOR has also required changes to substantive law to allow funding to certain programs to be reduced with correspondingly lower levels of appropriations.

A good example is the Department of Education appropriation, of which approximately $3.5 billion is for school finance. Over the past four years, that appropriation has been reduced by approximately $303 million. *See* Colorado Gen. Assembly J. Budget Comm., Appropriations Report: Fiscal Year 2012-2013, at 15, *available at* http:/www.state.co.us/gov_dir/leg_dir/jbc/FY12-13apprept.pdf (last visited Apr. 26, 2013). School funding has suffered a significant adverse impact as a result. Appropriations for other departments, such as the Department of Local Affairs, which has had its appropriations reduced by approximately $67 million, have been similarly cut. *See id.* A few departments have seen increased appropriations, at the expense of other State demands, but only because legislators

had no other legal option. For example, the level of appropriations for the Department of Health Care Policy and Financing grew because federal Medicaid caseloads increased and the State was compelled to provide additional funding as a condition of participation in the federal Medicaid program. *See id.* at 122-24. But, because of TABOR, the diversion of funding to accommodate continued participation in the federal Medicaid program came at the cost of reducing appropriations for other State necessities.

In short, TABOR's nullification of the legislator-plaintiffs votes on taxes goes hand-in-hand with its impact on appropriations. Because the General Assembly can no longer tax, its discretion to appropriate funds as it sees fit has been neutered. As a result, TABOR also nullifies the legislator-plaintiffs' ability to serve their constituents by allocating sufficient funds for whatever objective the General Assembly determines requires funding.

c. The legislator-plaintiffs' injury is concrete and particularized.

The Governor contends that the legislator-plaintiffs' injury is an abstract, institutional injury that is not personal in nature. *See* Op. Br. at 24-27. The Governor is wrong for at least three reasons. First, this case is nothing like *Raines* or *Schaffer*, where the individual legislators were on the losing end of a political vote and did not have their votes nullified. Importantly, in both cases, the courts emphasized the existence of a legislative remedy. *Raines*, 521 U.S. at 829

(legislators "may repeal the Act or exempt appropriations bills from its reach"); *Schaffer*, 240 F.3d at 886 (legislators "may repeal the Act [or vote to refuse the COLAs]"). Here, by contrast, TABOR is a constitutional amendment that the General Assembly cannot repeal or amend. COLO. CONST. art. XIX, §§ 1, 2. At most, the General Assembly could, by a two-thirds vote of both the House and Senate, propose a constitutional amendment that the citizens are free to reject. *Id.* But the fact that such proposed amendments are limited to a single subject makes it virtually impossible to address the restrictions imposed by TABOR via constitutional amendment. COLO. CONST. art. V, § 1(5.5); *see* Amicus Curiae Br. of Bell Policy Center and Colorado Fiscal Institute at 8 & nn.15-16 (explaining how the single-subject rule prevents TABOR—which contains multiple subjects—from being repealed). Thus, the legislator-plaintiffs have no political means to remedy the divestiture of power and vote nullification TABOR inflicts.

Second, this is not an abstract dilution of power case like *Raines* where the legislators are, at best, contending that some of the legislature's institutional power has been shifted to another branch of government. *See* 521 U.S. at 825-26. In *Raines*, the legislators argued that because of the Line Item Veto Act, a "yes" vote for an appropriations bill that passed Congress no longer necessarily meant that either (1) the bill would become law and all projects listed in the bill would go into effect, or (2) the President would veto the bill in its entirety and it would not

become law. *Id*. Instead, the Act allowed a third option: the bill could become law, but the President could cancel a particular project. *Id*. The legislators' theory was this third option "nullified" their votes by rendering them less effective and changing their "meaning" or "integrity." *Id*. at 825. The Supreme Court rejected this argument, citing the "vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that [was alleged in *Raines*]." *Id*. at 826.

Here, TABOR does not simply change the meaning or integrity of the legislator-plaintiffs' votes on tax issues. Nor does TABOR simply shift some small measure of legislative power to the executive branch. TABOR effectively divests the General Assembly of the ability to perform two of its core functions. As described above, the consequence to individual legislators is that TABOR deprives their votes of "all validity" on certain issues, as was the case in *Coleman*. *Id*. at 822 (discussing *Coleman*).

Finally, the legislator-plaintiffs do not need the General Assembly's authorization to "speak for the General Assembly as a whole" in order to have standing. *See* Op. Br. at 27. The Governor is correct that *Raines* attached "some importance" to the fact that the legislators there "[had] not been authorized to represent their respective Houses of Congress." *See* 521 U.S. at 829. But that reasoning does not apply here. Unlike the legislators in *Raines*, the legislator-

plaintiffs do not seek redress for a purely institutional injury. TABOR nullifies the legislator-plaintiffs' votes and vote nullification is indisputably a personal injury sufficient to confer standing. *Coleman*, 307 U.S. at 438. And, by virtue of its decision to authorize this brief, the General Assembly has determined that, from the General Assembly's perspective, granting the individual legislator-plaintiffs standing to challenge TABOR's constitutionality would advance a matter of institutional interest. *See* Colo. S. J. Res. 13-016.

d. The Governor's prudential standing argument is meritless.

The analysis here does not change simply because all 100 members of the General Assembly may have suffered the same injury. For all the reasons detailed by the district court and described above, the prudential standing principle precluding federal courts from resolving "abstract questions of wide public significance" is not implicated in this case. *See* Aplt. App. 431-34 (collecting cases). Additionally, *Raines* did not create a per se rule divesting individual legislators of standing in any case in which every other member of the legislature also had his or her vote nullified. Had the Supreme Court intended to do so, it could have overruled *Coleman* or required that an individual legislator be authorized to bring suit on behalf of the entire legislative body if other legislators could claim the same injury. But the Court did neither and such a rule would make no sense. An individual legislator's "injury in the nullification of his personal vote

continues to exist whether or not other legislators who have suffered the same injury decide to join the suit." *Silver v. Pataki*, 755 N.E.2d 842, 849 (N.Y. 2001). In fact, a primary reason why the General Assembly as a whole supports the legislator-plaintiffs' standing is that TABOR nullifies *every* member's vote with respect to certain issues and severely constrains *every* member's ability to fulfill his or her duties with respect to two of the General Assembly's core legislative powers. *See* Colo. S. J. Res. 13-016.

II. THE LEGISLATOR-PLAINTIFFS' INJURIES WERE CAUSED BY TABOR AND WOULD BE REDRESSED BY A FAVORABLE DECISION ON THE MERITS.

The Governor's argument on causation and redressibility also misses the point. Op. Br. at 23-24. Instead of addressing the injury TABOR inflicts on the legislator-plaintiffs, the Governor cherry-picks several injuries alleged by differently-situated plaintiffs. For example, the Governor argues that the plaintiffs cannot demonstrate that a favorable decision on the merits would arrest Colorado's "slow, inexorable slide into fiscal dysfunction" or cause the General Assembly to begin to adequately fund education, because there is no way to predict what the General Assembly would do in the absence of TABOR. *See* Op. Br., at 23. This is a strawman.

Like the educator-plaintiffs, the injury for which the legislator-plaintiffs seek redress is *not* decreased funding. *See* Amicus Curiae Br. of Colorado Association

of School Boards (CASB) and Colorado Association of School Excutives (CASE) at 7. Rather, it is the nullification of the legislator-plaintiffs' votes on tax and appropriation issues and the nullification of their ability to fulfill their constitutionally-mandated duties. As CASB and CASE point out, it does not matter for standing purposes whether TABOR's repeal would result in the General Assembly increasing school funding or, for that matter, whether it would increase taxes for other purposes. What matters is that individual legislators are effectively forbidden from even trying to exercise the General Assembly's power of taxation and are correspondingly handcuffed in exercising their power to appropriate.

As the district court recognized, when analyzed through the correct framework, there is little doubt that the legislator-plaintiffs satisfy the causation and redressibility elements necessary to establish standing. Their alleged injury is directly caused by TABOR, and if TABOR is determined to be unconstitutional, each member of the General Assembly can cast a meaningful vote on tax and appropriation issues. This is true regardless of whether the General Assembly as a whole actually votes to pass a particular bill. Without TABOR, the legislator-plaintiffs could again vote for or against a progressive income tax bill, a state property tax bill, a school funding bill, a bill funding marijuana regulation as required by Amendment 64, or any other tax or appropriations bill, and they would know that their votes would count.

CONCLUSION

The Court should affirm the district court's holding that the legislator-plaintiffs have standing to challenge the constitutionality of TABOR.

Dated: April 26, 2013.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

In compliance with Fed. R. App. P. 32(a)(7)(C), the undersigned counsel states that this Amicus Curiae Brief complies with the type-volume limitation set forth in Rule 32(a)(7)(B) and Rule 29(d), because this brief, exclusive of the items listed in Rule 32(a)(7)(B)(iii) contains 5,958 words.

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CERTIFICATE OF SERVICE

I certify that on April 26, 2013, a true and correct copy of the foregoing **AMICUS BRIEF OF THE COLORADO GENERAL ASSEMBLY** was served through the court's ECF system on the following:

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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

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