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 Response Brief on Remand from the Supreme Court

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INTRODUCTION

According to Plaintiffs, *Arizona State Legislature v. Arizona Independent Redistricting Commission* is all but irrelevant to this case. The legislative standing analysis in that opinion is, in Plaintiffs' view, immaterial. And the remainder of the opinion "has no bearing on this case in its current posture." Pls.' Opening Mem. Br. at 6. Thus, Plaintiffs maintain that this Court is free to ignore the portions of *Arizona State Legislature* that explicitly address the Governor's two other arguments: first, that Guarantee Clause-based challenges to direct democracy are non-justiciable under the political question doctrine and, second, that this case lacks merit because the people of Colorado are "the font of [the State's] governmental power." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2674 (2015).

The trouble with Plaintiffs' selective reading of *Arizona State Legislature* is that this Court must "give[ ] significant deference to *all* statements of the Supreme Court, including dicta." *Chastain v. AT&T*, 558 F.3d 1177, 1182 (10th Cir. 2009) (emphasis added). Read fairly and fully, *Arizona State Legislature* provides dispositive guidance on three

issues—legislative standing, the political question doctrine, and the merits—any of which are proper grounds for dismissal. After *Arizona State Legislature*, this lawsuit is no longer viable.

ARGUMENT

I. Standing

A. Under *Arizona State Legislature* and *Raines*, individual legislators lack standing to assert an institutional injury.

Arizona State Legislature confirms that only two types of injury confer Article III standing on legislative plaintiffs. First are *personal* injuries, which occur when individual legislators have been "singled out for specially unfavorable treatment as opposed to other Members of their respective bodies." *Raines v. Byrd*, 521 U.S. 811, 821 (1997). For example, legislators may sue individually if they "have been deprived of something to which they *personally* are entitled—such as their seats as Members of Congress after their constituents had elected *them*." *Id.* (emphasis in original).

Second are *institutional* injuries. By definition, these injuries accrue to the legislature as a whole and may be asserted only by a bloc of legislators large enough to alter the outcome of formal legislative

action. Thus, for example, a group of "legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act" may sue if their votes supporting or opposing the act are thwarted by allegedly unlawful or unconstitutional maneuvering. *Raines*, 521 U.S. at 823. But because these injuries do not "zero[ ] in on any individual Member," they leave individual legislators without a "personal stake" sufficient to satisfy Article III. *Ariz. State Legislature*, 135 S. Ct. at 2664 (citing *Raines*, 521 U.S. at 821).

The three individual Legislator–Plaintiffs here—in contrast to the unitary institutional plaintiff in *Arizona State Legislature*—have never mustered institutional support for this lawsuit. They did not commence "this action after authorizing votes in both of [the General Assembly's] chambers." *Id*. To the contrary, the Legislator–Plaintiffs who initiated this lawsuit concede they do *not* speak for the General Assembly as an institution. (App. Vol. 2 at 470 ¶ 9.) Yet they maintain, contrary to *Arizona State Legislature*, that they may seek redress for injuries that TABOR allegedly inflicts on the General Assembly as a whole.[1]

[1] The 2013 amicus brief, although it was purportedly filed on behalf of the General Assembly as a whole, is irrelevant to the question of

(footnote continued on following page)

In their Opening Memorandum Brief, Plaintiffs confirm this jurisdictional defect. They do not even attempt to argue that the alleged injury at issue in this case is personal rather than institutional. Instead, they assert that

- TABOR "abrogate[d] *the legislature's* authority to raise revenue and to appropriate some existing revenues," Pls.' Opening Mem. Br. at 1 (emphasis added);
- "the taxing and spending powers at issue here are core functions *of the Colorado General Assembly*," *id.* at 11, n.6 (emphasis added); and
- TABOR "removed *the Colorado General Assembly's* power to legislate in the area of taxation and above a prescribed level of spending," *id.* at 12 (emphasis added).

Under *Arizona State Legislature*, these institutional injuries may be asserted only by the institution itself.

Plaintiffs nonetheless assert that their "theory of disempowerment obviates any argument that *Raines*, *Coleman*, or *Arizona* conditions legislative standing on a complaint being brought by a particular

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legislative standing. As 44 current members of the Colorado General Assembly explain in their own recently filed amicus brief, in 2013 there were "[a]t most … six members of the Joint Committee on Legal Services that endorsed Plaintiffs' position on the alleged institutional injury in this case." Amicus Br. of Colo. Union of Taxpayers, et al., at 15 n.11. This is far fewer than the number necessary to demonstrate institutional authorization.

quantum of legislators." *Id.* at 15. In other words, Plaintiffs believe that their allegations of legislative injury are somehow unique and, for that reason, their case is distinguishable from otherwise binding Supreme Court precedent.

There is no principled reason for granting special treatment to Plaintiffs and their allegations of legislative "disempowerment." The legislatures at issue in *Coleman*, *Raines*, *and Arizona State Legislature* all were allegedly disempowered. Each faced a substantial and real diminution in their legislative authority and prerogatives. Even so, only two of those three cases survived to their merits.

Arizona State Legislature explains why the plaintiffs in *Raines* lacked standing. In *Raines*, the individual legislators comprised a tiny minority of the legislature as a whole and were not "an institutional plaintiff asserting an institutional injury." 135 S. Ct. at 2664. The Arizona Legislature, in contrast, sued *as an institution* to reclaim its alleged right to engage in lawmaking related to redistricting. "That 'different … circumstanc[e]' was not *sub judice* in *Raines*." *Id.* (internal citation omitted).

Thus, *Arizona State Legislature* establishes that allegations of legislative disempowerment alone, when asserted by individual legislators, are not enough to invoke federal jurisdiction. A group of legislators seeking to vindicate institutional interests must also show that they represent the injured entity—the legislature itself. Because the Legislator–Plaintiffs here have not and cannot do so, they lack standing.[2]

[2] There is a separate reason why, in light of *Arizona State Legislature*, Plaintiffs' claim of legislative standing fails. Under the Arizona Constitution, the Arizona State Legislature faced an independent substantive limitation on its lawmaking power, making any attempt to engage in legislative redistricting void *ab initio*. *Ariz. State Legislature*, 135 S. Ct. at 2664 (noting that the Arizona Legislature was prohibited from "adopt[ing] any measure that supersedes [an initiative], in whole or in part," including a redistricting measure). Colorado's constitution has no similar limitation. TABOR instead specifically *contemplates* the act of referring a tax measure to the voters. Colo. Const. art. X, § 20(4). Thus, here, pursuing a legislative remedy would not require Plaintiffs to "disregard the State's fundamental instrument of Government." *Ariz. State Legislature*, 135 S. Ct. at 2664. Accordingly, only if the General Assembly actually passes a tax or spending measure, and only if the electorate rejects that measure, would a group of legislators be able to demonstrate Article III injury.

B. This Court is obliged to decide now, before remand, whether any remaining plaintiffs have standing.

Plaintiffs assert that this case should be remanded for further consideration because "[n]o examination has yet been undertaken regarding the standing of any of the other Plaintiffs." Pls.' Opening Mem. Br. at 8 n.4; *see id.* at 4 n.1. They offer no legal support for that course of action, and there is none. "[S]tanding is a component of this court's jurisdiction, and [must be] consider[ed] … sua sponte to ensure the existence of an Article III case or controversy." *Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1176 (10th Cir. 2009).

As the Supreme Court has explained, appellate courts "have an obligation essentially to search the pleadings on core matters of federal-court adjudicatory authority" and "to consider, also, *the authority of the lower courts to proceed*." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 73 (1997) (emphasis added). This Court therefore "has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in [the] cause under review." *McKissick v. Yuen*, 618 F.3d 1177, 1196 (10th Cir. 2010) (quoting *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)).

This is particularly true where, as here, a defendant's arguments against standing are facial rather than factual. *Cf. Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). At every stage of this case, the Governor has challenged the standing of *all* Plaintiffs, based only on the allegations in the complaint. At every stage, Plaintiffs have responded. The parties have not engaged in discovery, and the district court considered no evidence. The purely legal question of whether all parties have standing can and must be decided before remand.

For the reasons set forth in the Governor's Supplemental Memorandum Brief and in his prior briefing before this panel, the non-legislator Plaintiffs lack standing as a matter of law, and this case should be dismissed.

II. The Political Question Doctrine

Plaintiffs argue that this Court need not reconsider whether the political question doctrine applies to this case. But the political question doctrine is not optional. Like mootness, ripeness, and standing, it is a matter of jurisdiction. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007). Because the Supreme Court "vacated … the [prior] judgment of this

court" (Order of Aug. 2, 2015), there is no extant holding on the political question doctrine. Unless the Court dismisses this case on standing or the merits, it must address the Governor's jurisdictional objection based on that doctrine.

Plaintiffs suggest that even if this Court revisits the political question doctrine, the outcome should remain unchanged. In their view, *Arizona State Legislature* examined the political question doctrine only in "passing in a footnote that ha[s] no bearing on the decision [of this Court] and that affords no basis for reconsideration of this panel's holding on justiciability." Pls.' Opening Mem. Br. at 6 n.3. But Plaintiffs may not presume that the Supreme Court's discussion of the political question doctrine was gratuitous. The circuit courts "are bound by Supreme Court dicta almost as firmly as by the Court's outright holdings, particularly when the dicta is recent and not enfeebled by later statements." *Peterson v. Martinez*, 707 F.3d 1197, 1210 (10th Cir. 2013) (quoting *United States v. Serawop*, 505 F.3d 1112, 1122 (10th Cir. 2007)).

The guidance from *Arizona State Legislature* is clear. The Court reaffirmed that under *Pacific States Telephone & Telegraph Co. v.*

Oregon, 223 U.S. 118 (1912), Guarantee Clause challenges to direct democracy are per se non-justiciable. 135 S. Ct. at 2660 n.3 (citing *Pacific States* favorably). There is no need for a more complicated, multi-factor analysis like the one in *Baker v. Carr*, 369 U.S. 186 (1962)—a case the Supreme Court declined even to cite.[3] When it comes to Guarantee Clause-based challenges to "[t]he people's sovereign right to incorporate themselves into a State's lawmaking apparatus," *Ariz. State Legislature* 135 S. Ct. at 2660 n.3, the federal courts categorically lack jurisdiction.

III. The Merits

More than four years into this litigation, Plaintiffs for the first time assert that "the question of standing should be considered separately from the merits of the case." Pls.' Opening Mem. Br. at 4. Before now, they urged the opposite—that "[t]he standing claims of all Plaintiffs should be treated as inextricably intertwined with the merits

[3] Indeed, in analyzing the legislature's Guarantee Clause claim, the district court in *Arizona State Legislature* cited *Pacific States* a number of times but did not mention *Baker*. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 997 F. Supp. 2d 1047 (D. Ariz. 2014).

of their Guarantee Clause claims." (Answer Br. at 57; App. Vol. 2 at 354–55.)

Whichever position is correct, Plaintiffs' case must be dismissed. As explained above, none of the Plaintiffs have standing and this case presents a non-justiciable political question. Separately, *Arizona State Legislature* makes equally clear that there is no merit to this case. *See* Governor's Supp. Mem. Br. at 21–23. Even if Plaintiffs' earlier position was correct—i.e., that standing in this case is "intertwined and inseparable from the merits of the underlying [constitutional] claim," Pls.' Opening Mem. Br. at 9 n.5 (quoting *Largess v. Supreme Judicial Court*, 373 F.3d 219, 224–25 (1st Cir. 2004))—there is no relief available to them in the federal courts.[4]

CONCLUSION

Although Plaintiffs attempt to downplay *Arizona State Legislature*, its significance to this case is unmistakable. *Arizona State*

[4] Indeed, *Largess* ultimately held—based on a combination of standing, the political question doctrine, and the merits—that absent extreme circumstances, the Guarantee Clause "simply does not permit a federal court to intervene in the arrangement of state government." 373 F.3d at 229. This Court may follow the same approach in dismissing this case.

Legislature requires this Court to vacate the district court's order denying the Governor's motion to dismiss, remand this case, and instruct the district court to dismiss Plaintiffs' complaint and enter judgment for the Governor.

Respectfully submitted on August 20, 2015.

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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 2,171 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: August 20, 2015.

/s/ Frederick Yarger

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I certify that with respect to this brief,

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Date: August 20, 2015.

/s/ Frederick Yarger

CERTIFICATE OF SERVICE

On August 20, 2015, I served this **Governor's Supplemental Response Brief on Remand from the Supreme Court** through CM/ECF, which will provide notice to the following:

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