CASE NO. 12-1445

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

ANDY KERR, Colorado State Representative, *et al.*,

Plaintiffs-Appellees,

v.

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

Defendant-Appellant.

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

PLAINTIFFS-APPELLEES' MEMORANDUM BRIEF IN RESPONSE TO DEFENDANT-APPELLANT'S SUPPLEMENTAL MEMORANDUM BRIEF

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ARGUMENT

I. Contrary to the Governor's Claims, Legislator Standing Is the Only Issue the Supreme Court Remanded for Reconsideration.

This Court's briefing Order of July 1, 2015, prescribed that briefs in this matter should "[address] solely the issue of whether the Supreme Court's decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission* . . . [135 S. Ct. 2652 (2015) ('*Arizona*')] requires the panel to reconsider its holding."

This panel's prior holding was limited to the issues of standing and justiciability. *See Kerr v. Hickenlooper*, 744 F.3d 1156, 1172, 1181 (10th Cir. 2014) ("*Kerr*").[1] Similarly, the Supreme Court's briefing order in *Arizona* had limited the issues there to (1) standing and (2) the meaning of the Elections Clause of the U.S. Constitution, U.S. Const. art. I, § 4, cl. 1. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, No. 13-1314, Order List (Oct. 2, 2014) (the "*Arizona* Order").

While the second issue in *Arizona* was on the merits, the merits have yet to be reached in the instant case. It follows that the only part of the *Arizona* decision

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[1] "We emphasize once again that this interlocutory appeal allows us to consider only whether the legislator-plaintiffs have established Article III standing and whether prudential standing jurisprudence or the political question doctrine precludes consideration of their Guarantee Clause and Enabling Act claims. Our answer to those questions completes our role at this stage of the proceedings." *Kerr*, 744 F.3d at 1182-83.

that bears on possible reconsideration of the panel's holding is the part addressing the procedural issue in common with *Kerr*, namely, standing.

The decision in *Arizona* would require a change in the panel's prior holding only if its treatment of standing in *Kerr* was inconsistent with or contradicted by the treatment of standing in *Arizona*. Such is not the case. Like *Arizona*, this case involves the standing of state legislators to bring a complaint in federal court about their disempowerment. As explained below, *Arizona* reinforces the correctness of this Court's ruling that the state legislators' disempowerment claim meets the threshold for Article III standing.

II. The Treatment of Legislator Standing in *Kerr* is Consistent with the Treatment of Legislator Standing in *Arizona*.

A. *Arizona* and *Coleman* Granted Legislative Standing Because of the *Type* of Injury Alleged, Not Because of the *Number* of Legislators Who Sued.

The Governor misconstrues *Arizona*'s interpretation of *Coleman v. Miller*, 307 U.S. 433 (1939), and *Raines v. Byrd*, 521 U.S. 811 (1997). What mattered in both *Coleman* and *Raines* was the nature and the quality of injury done to the legislator plaintiffs, and whether their "injury" was remediable by the legislature itself, and not the number of legislators complaining.

The fact that all members of the Arizona Legislature had brought the suit was immaterial in the *Arizona* decision. The *Arizona* Court relied on *Coleman* (and distinguished *Raines*) because the injury alleged in *Arizona* was the same type

of disempowerment that the legislators had claimed in *Coleman* – an injury that the legislature itself could not remedy. *See Arizona*, 135 S. Ct. at 2665 ("Proposition 106, together with the Arizona Constitution's ban on efforts to undermine the purposes of an initiative, . . . would completely nullify any vote by the [Arizona] Legislature now or in the future purporting to adopt a redistricting plan.") (citation, quotation marks, and brackets omitted.). This injury is properly distinguished from that of the legislators in *Raines* who complained of a "lost vote" injury that could have been remedied within the legislative process. *See id.*

The Governor concedes that the injury-in-fact at issue in *Arizona,* which was the basis for standing there, fits the injury alleged here. As the Governor explains, the disempowerment injuries in both *Arizona* and *Kerr* go "well beyond mere 'abstract dilution' [that was present in *Raines*] and involved an allegation that the legislature had 'been deprived of its power'"; (2) neither "could [] 'be repealed . . . pursuant to the normal legislative process'"; and (3) both "'dealt 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*." Gov. Opp'n Br. at 7 (quoting this panel's decision, *Kerr*, 744 F.3d at 1165, 1166, 1168, and drawing comparison to *Arizona*, 135 S. Ct. at 2663, 2663-64, 2671).

The Governor tries in vain to make a meaningful distinction based on the fact that the legislator Plaintiffs here are fewer in number than those who sued in *Coleman*, and are much fewer than the entire body that sued in *Arizona*. Gov. Opp'n Br. at 4-9. Under this logic, only the legislature itself, or a controlling number of its members, may suffer a cognizable injury. *Id.* at 8 ("Until they can muster enough General Assembly members to do so, Plaintiffs cannot sue to vindicate the legislature's alleged institutional interests.").

The fact that a large number, even a majority, of members of a legislature may be willing to abandon, or acquiesce in the delegation of, a foundational function of their office, especially one as unpopular as taxation, does not make it constitutional:

> That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow. [Citations omitted.] Abdication of responsibility is not part of the constitutional design.

Clinton v. New York, 524 U.S. 417, 452 (1998) (Kennedy, J., concurring).

Neither *Coleman* nor *Arizona* mandates that a court count votes as part of its inquiry into Article III standing for legislators. The *Arizona* Court's analysis of *Coleman* and its conclusion on standing are grounded in the nature and quality of the state legislators' disempowerment injury, not the quantity of legislators who brought suit. *See Arizona*, 135 S. Ct. at 2665. The reference to "institutional"

injury should not be misread to imply that the "institution" must itself complain; *i.e.*, an institutional injury does not presuppose an institution as plaintiff. Nor did *Coleman* involve a vote by the institution to bring suit.[2] *Coleman*, 307 U.S. at 436 ("This original proceeding [was brought] in the Supreme Court of Kansas by twenty-one members of the Senate, including the twenty senators who had voted against the resolution, and three members of the house of representatives.").

Both *Arizona* and *Coleman* make clear that there is no requirement for unanimity – or even a majority – among state legislators before an alleged constitutional injury is properly presented for review. *See Coleman*, 307 U.S. at 438; *accord Arizona*, 135 S. Ct. at 2665. Review of such an injury should not be

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[2] Absent from *Coleman* is any suggestion that the institution – there, the Kansas Senate – needed to have voted to authorize the aggrieved Senators' suit. *See Coleman*, 307 U.S. at 438. *Arizona* relies on *Coleman* as its primary authority for legislator standing and, as such, the circumstance of a vote by the legislature in *Arizona* to authorize the lawsuit is not critical to the standing analysis. *See Arizona*, 135 S. Ct. at 2665. The reference in *Arizona* to an "authorizing vote" is in the context of comparing and distinguishing *Raines*, and is not part of a discussion of any minimum percentage of a legislative body required to bring suit. In *Raines*, the absence of an authorizing vote was part of the discussion of the availability of a political remedy to the plaintiff Members of Congress. *See id.* at 2664 (characterizing and contrasting the plaintiffs in *Raines* and noting that "[h]aving failed to prevail in their own Houses, the suitors could not repair to the Judiciary to complain," and that the "'different . . . circumstance' was not *sub judice* in *Raines*"). The Supreme Court has never held that some "critical mass" of legislators is required to establish standing.

subject to institutional temerity, lying dormant until picked up, if ever, by strong enough political winds.

For legislator standing, what matters is not whether a sufficient number of legislators have sued so that the alleged injury may be asserted in the name of the institution itself, but rather whether the legislators who have sued share personally in the institutional injury and have properly alleged that particular and personal injury. *See Coleman*, 307 U.S. at 438; *accord Arizona*, 135 S. Ct. at 2665. Put another way, the *Arizona* Court did not read *Coleman* – and *Coleman* should not be misread – to imply that the institution itself must complain or that an institutional plaintiff is prerequisite to standing. *See Arizona*, 135 S. Ct. at 2665. Here, it is the nature of the legislator Plaintiffs' claim, and not their number, that evokes standing.[3]

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[3] The Third Circuit made a comprehensive survey of legislator standing decisions in *Russell v. DeJongh*, 491 F.3d 130, 134-36 (3d Cir. 2007). In denying standing in that case, the *Russell* court made a trenchant observation about cases where standing was granted, including *Coleman*, saying "[t]hose cases [granting standing] are readily distinguishable . . . in that the challenged actions in those cases left plaintiffs with no effective remedies in the political process." *Id.* at 135. Here, as this panel previously noted, the legislator Plaintiffs have no political remedy. *Kerr*, 744 F.3d at 1166. The *Russell* court also noted that respect for separation of powers underlies much of the legislator standing jurisprudence – a concern not present here. *Russell*, 491 F.3d at 133.

B. A Pre-Emptory Dismissal Without Proper Consideration of the Standing of the Non-Legislator Plaintiffs Would Be In Error.

The Governor cites several cases to support his argument that the panel should dispose of the standing of the non-legislator Plaintiffs now. Gov. Opp'n Br. at 12-16. None of the cases cited supports such a proposition, and the panel should not for the first time, on remand from the Supreme Court, without full briefing, endeavor to address a question that has never previously been addressed either here or by the district court.[4] In any event, the standing of the non-legislator Plaintiffs is not before the panel.

The Governor also argues for saving the time of the district court and the parties from "wide-ranging and expensive discovery." Gov. Opp'n Br. at 12. To bolster his argument for a first-time decision on the standing of the non-legislator Plaintiffs, the Governor then makes an *in terrorem* reference to the scope of discovery initially outlined by Plaintiffs in a draft scheduling order. *Id.* at 12 n.6.[5]

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[4] As noted in Plaintiffs' Opening Memorandum Brief, there has been no determination of standing for most of the Plaintiffs in this case. *Arizona* does not cast doubt on the panel's prior decision on the standing of the legislator Plaintiffs. Even if it did, the proper step would be to remand the case to the district court for consideration of the standing of the non-legislator Plaintiffs. *Kerr*, 744 F.3d at 1163 ("The district court determined that the plaintiffs who are current state legislators (the 'legislator-plaintiffs') have standing and thus declined to assess the standing of any other named plaintiffs . . . . We similarly limit our review to the standing of the legislator-plaintiffs.").

[5] The Governor cites no authority for the proposition that a first-time decision on standing should rest on a draft pretrial document.

A summary disposition at this stage should not turn on the degree to which a party might seek evidence to substantiate an alleged violation of the Constitution.

III. Neither the Political Question Doctrine, Nor the Merits Question of What is Required to Maintain a Republican Form of Government, Are Properly Before this Court.

The Governor would use the occasion of this limited review of the implications of *Arizona* for standing to revisit the question of whether the political question doctrine ("PQD") poses a bar to this suit, even though that issue was not a matter for decision in *Arizona*. Similarly, the Governor urges the panel to leap ahead and take his reading of the merits in *Arizona* as reason to dismiss this case on the merits. Gov. Opp'n Br. at 21-23. As eager as Plaintiffs are for a hearing on the merits of their claims, summary disposition at this stage without any opportunity to present their evidence is not the appropriate way to proceed.

Nothing in *Arizona,* and so nothing in the panel's briefing order, opens the issue of PQD. The Supreme Court order granting a writ of certiorari in *Arizona* limited the briefing and argument there only to standing and to the meaning of the Elections Clause. *See Arizona* Order.

Nothing in the panel's briefing order opens the merits of Plaintiffs' case for consideration at this stage – certainly not for the preemptory dismissal the Governor urges. This is consistent with the panel's current and previous view of

its scope of review.[6] A review by this Court, on remand from the Supreme Court, in an interlocutory appeal of a ruling on a narrowly-focused dismissal motion, should not take up issues never fully briefed or decided in the district court, this Court, or the Supreme Court.

In any event, this case does not challenge, must less threaten, "the people's exercise of legislative power." Gov. Opp'n Br. at 22. It challenges only TABOR's requirement that certain core legislative powers be exercised only by a vote of the people. Plaintiffs seek to restore to the General Assembly its concurrent power in the areas now assigned by TABOR exclusively to the people.[7]

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[6] The panel has been explicit in the scope of review in this case, which remains an interlocutory appeal:

> Although we may exercise our discretion in certain circumstances to reach issues "fairly included" in an order subject to interlocutory review, we "may not reach beyond the certified order." . . . Because the order at issue in this limited interlocutory appeal does not include a decision as to whether the Guarantee Clause claim asserted by plaintiffs plausibly states a basis for relief . . . we cannot address that question. We stress that our decision on plaintiffs' Guarantee Clause claim is quite limited, leaving all issues other than standing, prudential standing, and the political question doctrine to the district court.

Kerr, 744 F.3d at 1181.

[7] The *Arizona* court voiced no limitation on the extent to which populist movements may properly remove powers from the legislature. Recognition of some necessary limitation will therefore await development in later cases. This is one such case.

To date, Plaintiffs have not had the opportunity to present evidence on the merits of their claims. Those claims are that the fiscal powers of taxation and appropriation are so fundamental to a state legislature that without them the legislative branch cannot perform its constitutional responsibilities and satisfy the Constitution's guarantee of a Republican Form of Government. *See* U. S. Const. art. IV, sec. 4. Full briefing is needed before any court should consider those claims.

When this lawsuit *is* heard on the merits, the Framers' words will afford guidance. "In a republican government, the legislative authority predominates." The Federalist No. 51 at 350 (James Madison) (J. E. Cooke ed., 1961). "A complete power, therefore, to procure a regular and adequate supply of [money] . . . . may be regarded as an indispensable ingredient in every constitution." The Federalist No. 30, *id.* at 188 (Hamilton).

CONCLUSION

The analysis of legislator standing in *Arizona* supports this panel's holding and does not require it to be changed on reconsideration. No other issues are before the Court. The panel's previous decision should be reinstated and the case remanded to the district court.

Respectfully submitted this 20th day of August, 2015.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because: this brief contains 3,759 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

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I hereby certify that the foregoing **PLAINTIFFS-APPELLEES' MEMORANDUM BRIEF IN RESPONSE TO DEFENDANT-APPELLANT'S SUPPLEMENTAL MEMORANDUM BRIEF** as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with McAfee Agent Version number: 4.6.0.3122, Last Update 4/10/2013 10:20:06 AM, Scan engine version (32-bit): 5400.1158, DAT version: 7040.0000, DAT Created on: 8/20/15, and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

This is to certify that on this 20th day of August, 2015, I have provided service of the foregoing **PLAINTIFFS-APPELLEES' MEMORANDUM BRIEF IN RESPONSE TO DEFENDANT-APPELLANT'S SUPPLEMENTAL MEMORANDUM BRIEF** through the federal ECF filing protocol and by e-mailing to the following attorneys or their law firms:

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