No. 12-1445

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

ANDY KERR, *et al.*,
Plaintiffs-Appellees,

v.

JOHN HICKENLOOPER,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Colorado
No. 1:11-CV-01350-WJM-BNB, The Honorable William J. Martinez

AMICUS CURIAE BRIEF OF SEN. KEVIN LUNDBERG, REP. JERRY SONNENBERG, REP. JUSTIN EVERETT, REP. SPENCER SWALM, REP. JANAK JOSHI, REP. PERRY BUCK, SEN. TED HARVEY, SEN. KENT LAMBERT, SEN. MARK SCHEFFEL, SEN. KEVIN GRANTHAM, SEN. VICKI MARBLE, SEN. RANDY BAUMGARDNER, REP. DAN NORDBERG, REP. FRANK MCNULTY, REP. JARED WRIGHT, REP. CHRIS HOLBERT, REP. KEVIN PRIOLA, SEN. SCOTT RENFROE, SEN. BILL CADMAN, AND COLORADO UNION OF TAXPAYERS FOUNDATION IN SUPPORT OF APPELLANT URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The undersigned attorney for Amicus Curiae, Colorado Union of Taxpayers Foundation ("CUT"), certifies that CUT is a non-profit corporation that has no parent corporation and has never issued any stock.

Respectfully submitted this 11th day of February 2013.

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IDENTITY AND INTEREST OF AMICI CURIAE

Members of the Colorado Legislature and the Colorado Union of Taxpayers Foundation ("CUT") respectfully submit this amicus curiae brief in support of Appellant, urging reversal.[1] The legislators filing this amicus brief are members of the Colorado General Assembly who object to the assault on the Colorado Constitution being perpetrated by Plaintiffs in this action.[2] As members of the General Assembly, they dispute that the Taxpayer's Bill of Rights ("TABOR") has hampered their ability to govern the State or otherwise interfered with their ability to adequately represent their constituents. On the contrary, these legislators understand TABOR to be an important feature of constitutional government in Colorado, which helps to ensure that the General Assembly governs responsibly and adheres to its duty to protect the rights of all Coloradans.

CUT is a nonprofit, public-interest, membership organization with its principal place of business in Denver, Colorado. CUT was formed to educate the

[1] Pursuant to Fed. R. App. P. 29(a), all parties have consented to the filing of this brief.

[2] The legislators filing this brief are: Sen. Kevin Lundberg (SD 15); Rep. Jerry Sonnenberg (HD 65); Rep. Justin Everett (HD 22); Rep. Spencer Swalm (HD 37); Rep. Janak Joshi (HD 16); Rep. Perry Buck (HD 49); Sen. Ted Harvey (SD 30); Sen. Kent Lambert (SD 9); Sen. Mark Scheffel (SD 4); Sen. Kevin Grantham (SD 2); Sen. Vicki Marble (SD 23); Sen. Randy Baumgardner (SD 8); Rep. Dan Nordberg (HD 14); Rep. Frank McNulty (HD 43); Rep. Jared Wright (HD 54); Rep. Chris Holbert (HD 44); Rep. Kevin Priola (HD 56); Sen. Scott Renfroe (SD 13); and Sen. Bill Cadman (SD 12).

public as to the dangers of excessive taxation, regulation, and government spending. Among the specific goals of CUT is to protect citizens' rights to petition government. CUT members spent considerable time and money generating support for the passage of TABOR. CUT is also dedicated to enforcing TABOR, as evidenced by its lawsuit challenging the City of Aspen's grocery bag tax in Colorado state court. *Colorado Union of Taxpayers Foundation v. City of Aspen*, No. 12CV224 (Colo. Dist. Ct., filed Aug. 21, 2012). CUT represents the interests of taxpayers, who face higher taxes and larger government if TABOR falls. A judicial determination in favor of Plaintiffs would directly conflict with the efforts of CUT and its members by wiping TABOR off the books, and with it years of dedicated advocacy and education efforts. Accordingly, Amici Curiae respectfully submit this brief in support of Appellant, urging reversal.

ARGUMENT

I. BACKGROUND.

> The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.

The Federalist No. 48 (James Madison) (C. Rossiter ed., Mentor 1999).

The Colorado Constitution grants the General Assembly the power to levy "an annual tax sufficient, with other resources, to defray the estimated expenses of the state government for each fiscal year." Colo. Const. art. X, § 2. Yet, perhaps because of Madison's warning, what the constitution giveth, it taketh away. The General Assembly's power to propose taxes has always been subject to numerous constitutional limitations, qualifications, and exemptions. *See, e.g.,* Colo. Const. art. X, § 3(1)(a) ("Each property tax levy shall be uniform . . . ."); *id*. § 3(1)(c) ("The following classes of personal property . . . shall be exempt from property taxation . . . ."); *id*. § 3.5 (Homestead exemption for qualifying senior citizens and disabled veterans); *id*. § 4 (Public property exempt); *id*. § 5 (Property used for religious worship, schools, and charitable purposes exempt); *id*. § 7 (Municipal taxation by general assembly prohibited); *id*. § 11 ("[T]he rate of taxation on property for all state purposes, . . . shall never exceed five mills on each dollar of valuation . . . ."); *id*. § 16 (Appropriations not to exceed tax). Moreover, the Governor has the power to veto revenue and appropriation measures passed by the General Assembly. Colo. Const. art. IV, § 11. And the people retain ultimate veto

authority over all acts of the General Assembly, including taxation and spending. *Id*. art. V, § 1 ("The legislative power of the state shall be vested in the general assembly . . . but the people reserve to themselves the power . . . at their own option to approve or reject at the polls any act or item, section, or part of any act of the general assembly.").

In 1992, Colorado voters amended the state constitution by initiative, to include a Taxpayer's Bill of Rights ("TABOR"), imposing additional limitations on the legislature's power to tax and spend. Colo. Const. art X, § 20. Like other bill of rights provisions of the state constitution, TABOR is designed to constrain the authority of the state government and thereby allow individuals to exercise greater control over their own lives. Unlike other bill of rights provisions, TABOR does not prohibit the state government from exercising legislative authority or raising revenue. *Cf.* Colo. Const. art. II, § 4 ("No person shall be required to attend or support any ministry or place of worship, religious sect or denomination against his consent."); *id*. § 10 ("No law shall be passed impairing the freedom of speech"). Rather, and only, TABOR "was designed to protect citizens from unwarranted tax increases." *Submission of Interrogatories on Senate Bill 93-74*, 852 P.2d 1, 4 (Colo. 1993). Thus, TABOR does not alter legislators' authority to propose tax increases; it simply requires voter approval before implementation of

such tax policy changes.[3] Colo. Const. art. X, § 20(4)(a); *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011). Thus, TABOR's primary restraint on the legislature is procedural, not substantive. *See Huber*, 264 P.3d at 891. ("Amendment 1 did not change the types or kinds of taxing statutes allowable under our constitution. Rather, it altered who ultimately must approve imposition of new taxes, tax rate increases, and tax policy changes . . . ."). It is this element of democratic accountability and constitutional restraint that Plaintiffs challenge in this litigation.[4]

Specifically, Plaintiffs have sued Governor Hickenlooper, alleging that the limitations on the taxing authority of the General Assembly imposed by TABOR deprive the State of a republican form of government, in violation of the Guarantee and Supremacy Clauses of the United States Constitution, U.S. Const. art. IV, § 4 and art. VI, the Colorado Enabling Act, 18 Stat. 474 (1875), and various clauses of

[3] TABOR requires voters to approve "any new tax, tax rate increase, mill levy above that for the prior year, valuation for assessment ratio increase for a property class, or extension of an expiring tax, or a tax policy change directly causing a net tax revenue gain to any district." Colo. Const. art. X, § 20(4)(a). TABOR also places mathematical limits on the growth of government in order to prevent the perceived need for new taxes. Colo. Const. art. X, § 20(7).

[4] Plaintiffs are a handful of state legislators and other Colorado government officials and citizens. *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1119–20 (D. Colo. 2012).

the Colorado Constitution relating to the General Assembly's authority to spend revenue.[5] *Kerr*, 880 F. Supp. 2d at 1120–21.

Governor Hickenlooper moved to dismiss, arguing that Plaintiffs lacked standing and that Plaintiffs' claims presented a nonjusticiable political question. The district court denied in part the Governor's motion to dismiss. The district court held that the Plaintiffs who are members of the Colorado General Assembly have standing to sue because their power to tax has allegedly been "remov[ed]" by TABOR. *Kerr*, 880 F. Supp. 2d at 1131. The district court also held that the claims do not implicate the political question doctrine because, purportedly, the nature of a republican form of government can be determined by judicially manageable standards and is not a judgment committed to a coordinate branch of government. *Id*. at 1152.

The district court's ruling suffers from at least four independent errors, as demonstrated below. First, Plaintiffs lack standing because they have not suffered a concrete injury. Second, Plaintiffs have failed to demonstrate how their claims are redressable. Third, any injury that they could conceivably have suffered is shared by every member of the General Assembly and Plaintiffs act contrary to the views of many of its members. Fourth, even if Plaintiffs had standing, Plaintiffs'

[5] Plaintiffs also alleged that TABOR violates the Equal Protection Clause of the Fourteenth Amendment; that claim was properly dismissed. *Kerr*, 880 F. Supp. 2d at 1156.

claims involve a political question committed to Congress by the U.S. Constitution and, thus, judicial consideration of Plaintiffs' claims would be inappropriate. Accordingly, the judgment of the district court should be reversed and the case remanded for dismissal.

II. PLAINTIFFS LACK STANDING.

The district court held that the legislator-Plaintiffs had standing to challenge TABOR because TABOR directly constrains the General Assembly's authority to enact or raise taxes.[6] *Kerr*, 880 F. Supp. 2d at 1131–32. The district court purported to analyze the legislator-Plaintiffs' standing pursuant to the Supreme Court's guidance in *Raines v. Byrd*, 521 U.S. 811 (1997), looking to the following factors: (1) whether the alleged injury is concrete or abstract; (2) whether the legislators allege an institutional injury in their official capacities that is common to all members of the legislative body; (3) whether the legislators have been authorized to bring suit on behalf of the legislative body; (4) whether separation-

[6] Because the district court held that the legislator-Plaintiffs had standing, it declined to address the standing of any other Plaintiffs. *Kerr*, 880 F. Supp. 2d at 1141 (citing *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 & n.9 (1977); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984); *Horne v. Flores*, 557 U.S. 433, 446–47 (2009)). The other Plaintiffs do not have standing, because "[t]he only injury plaintiffs allege is that the law—specifically the [Guarantee Clause]—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

of-powers concerns are present; (5) whether the legislators have an adequate internal remedy within the legislative body; and (6) whether declining standing to the legislators would foreclose any constitutional challenge to the disputed measure. The district court found that the injury alleged here was concrete and that there was no internal remedy within the legislative body, but that the other factors either weighed against standing or were irrelevant; nevertheless the court held that the legislator-Plaintiffs had standing. *Kerr*, 880 F. Supp. 2d at 1132. The district court's holding on standing is flawed in three principal respects: (1) it overstates the concreteness of the alleged injury; (2) it fails to consider that Plaintiffs' claims are not redressable; and (3) it ignores that the alleged injury is common to all members of the legislative body and that Plaintiffs act contrary to the views of many of the General Assembly's members.

A. The Irreducible Constitutional Minimum Of Standing.

Article III, section 2 of the U.S. Constitution limits the jurisdiction of federal courts to "cases" or "controversies." "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). The standing inquiry "involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (citing *Barrows v. Jackson*, 346 U.S. 249, 255–56 (1953)). To satisfy the

constitutional limitations, a plaintiff must fulfill each of the following three elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical[.]'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan, 504 U.S. at 560–61 (substitutions and omissions in original) (internal citations and footnotes omitted).

In addition to these "immutable" requirements of Article III, *Bennett v. Spear*, 520 U.S. 154, 162 (1997), the Supreme Court has "also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 474 (1982). "Like their constitutional counterparts, these 'judicially self-imposed limits on the exercise of federal jurisdiction' are 'founded in concern about the proper—and properly limited—role of the courts in a democratic society[.]'" *Bennett*, 520 U.S. at 162 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Warth*, 422 U.S. at 498). The Supreme Court has summarized these prudential principles as follows:

> First, the Court has held that when the asserted harm is a "generalized grievance" shared in substantially equal measure by all or a large class

> of citizens, that harm alone normally does not warrant exercise of jurisdiction. Second, even when the plaintiff has alleged injury sufficient to meet the "case or controversy" requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

Warth, 422 U.S. at 499–500 (internal citations omitted). It is well established that the party invoking federal jurisdiction bears the burden of establishing standing. *Lujan*, 504 U.S. at 561. Here, Plaintiffs failed to demonstrate standing and the district court erred in concluding otherwise.

B. Plaintiffs Have Not Suffered A Concrete Injury.

The district court recognized that the concreteness of the alleged injury is a critical component of standing. *Kerr*, 880 F. Supp. 2d at 1132 (citing *Lujan,* 504 U.S. at 560). However, the district court badly misconstrued the nature of the alleged injury, and thus relied on inapposite precedent to find standing in this case.

The district court described the legislators' injury as "vote nullification," citing the Supreme Court's decision in *Coleman v. Miller*, 307 U.S. 433, 438 (1939), because "'[TABOR] removes entirely from the Colorado General Assembly any authority to change state law concerning taxation . . . .'" *Kerr*, 880 F. Supp. 2d at 1130–31 (quoting Operative Complaint ¶ 80). The district court's

conclusion misstates the effect of TABOR and, as a consequence of this error, the district court misapplied *Coleman*.[7]

In *Coleman*, the Supreme Court held that state senators had standing to appeal a decision of the state supreme court upholding a tie-breaking vote cast by the lieutenant governor regarding a proposed amendment to the federal constitution. *Coleman*, 307 U.S. at 438. The Court found standing because the senators' votes on the proposed amendment would have been improperly nullified if the vote of the lieutenant governor was unlawful. The Supreme Court held that "these senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id*. But *Coleman* has no place here because the effectiveness of legislators' votes is unchanged by TABOR; Plaintiffs fail to point to any discrete vote that has been "nullified" as a result of TABOR.

Here, Plaintiffs' alleged injuries cannot be deemed vote nullification in the sense of *Coleman*, because, as demonstrated above, they retain the same authority

[7] Part of the district court's error stems from the fact that it accepted as true legal conclusions in the complaint that were couched as factual allegations. *Kerr*, 880 F. Supp. 2d at 1131. The district court had no obligation to ignore the plain terms of TABOR in favor of Plaintiffs' hyperbolic description. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1385 (10th Cir. 1997) ("Mere legal conclusions and factual allegations that contradict such a properly considered document are not well-pleaded facts that the court must accept as true.") (citing *Jackson v. Alexander*, 465 F.2d 1389, 1390 (10th Cir. 1972)).

to hold a vote to raise revenue. The only change post-TABOR is that such a vote will transmit the measure directly to the people for approval, rather than to the governor, as would have been the case pre-TABOR. Colo. Const. art. X, § 20(3)–(4). And even before TABOR was enacted, new taxes were also subject to final approval by the people. Colo. Const. art. V, § 1. TABOR simply makes the requirement of citizen approval automatic. Thus, post-TABOR, legislators still retain the power to vote to raise revenue, that vote must still be independently approved before it has any effect, and the people still retain final say over the General Assembly's actions. If any officer of Colorado's government has suffered a discrete, particularized injury due to TABOR, it is the governor, who no longer has the authority to veto revenue-raising measures. Colo. Const. art. IV, § 11.

The district court cited in passing *Miller v. Moore*, 169 F.3d 1119, 1122–23 (8th Cir. 1999), as an example of a case involving a concrete legislative injury, but that case illustrates the diffuseness of Plaintiffs' alleged injury here. In *Miller*, individual legislators were singled out for special treatment, earning the label "DISREGARDED VOTERS [sic] INSTRUCTIONS ON TERM LIMITS" alongside their name on the ballot if they did not support term limits. *Id*. at 1124. Here, every legislator is affected by TABOR in the same way and no individual injury results because of TABOR. *See Schaffer v. Clinton*, 240 F.3d 878, 885 (10th Cir. 2001) ("Like the plaintiffs in *Raines*, Congressman Schaffer has not

alleged a sufficiently personal injury to establish standing because he has not been singled out for specially unfavorable treatment as opposed to other Members of the House of Representatives.").

C. Plaintiffs' Claims Are Not Redressable.

Even if Plaintiffs had suffered a concrete injury, it is clear that Plaintiffs' claims are not redressable. The district court assumed that if "the Legislator-Plaintiffs have sufficiently alleged injury in fact, the Court has little trouble concluding that the remaining causation and redressability elements for legislative standing are also met at the pleading stage." *Kerr*, 880 F. Supp. 2d at 1139. Accordingly, the court's discussion of these aspects of standing was inappropriately perfunctory. *Id*.

Plaintiffs have not alleged that any vote they have cast to raise revenue has been nullified; it is indisputable that the General Assembly accomplished that very goal in 2006 with the passage of Referendum C, which allowed the State to retain revenue that would have been refunded under TABOR. *See* C.R.S. § 24–77–103.6. Thus, the scenario presented by *Coleman*—where votes were cast on a specific piece of legislation and then allegedly unlawfully nullified—is not present here. Even assuming that Plaintiffs succeed in carving TABOR from the Colorado Constitution, they have pointed to no revenue or spending measures that would pass as a result of that legal victory. This is in stark contrast to *Coleman*, where a

specific piece of legislation hung in the balance and the result of the lawsuit would dictate whether or not the legislators' votes would be effective with respect to that legislation. *See Coleman*, 307 U.S. at 438.

D. Plaintiffs Cannot Allege An Institutional Injury To The General Assembly Because Many Of Its Members Dispute That Any Injury Has Occurred.

The only injury that the legislator-Plaintiffs can reasonably allege—but which they have not alleged—is that the submission of revenue measures to the people instead of the governor incrementally diminishes the institutional authority of the General Assembly by preventing the legislature from voting to override a gubernatorial veto. Pre-TABOR, if the governor had vetoed a revenue measure, the legislature could have voted to override that veto by a two-thirds vote of both houses. Colo. Const. art. IV, § 11. No such mechanism is available to override a vote of the people pursuant to TABOR, or any other referendum. *See* Colo. Const. art. V, § 1. Although, even pre-TABOR, the people held the ultimate veto over any legislative acts; TABOR simply makes the people's approval required for revenue measures. *Id*. But this sort of diffuse and speculative "injury" to the legislative institution is not properly brought by a handful of its members. *Raines*, 521 U.S. at 829 ("We attach some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit."); *cf. U.S. House of Representatives*

v. U.S. Dep't of Commerce, 11 F. Supp. 2d 76, 89 (D.D.C. 1998) (The House is, as per the precise language used by the Supreme Court, "claim [ing] that [it is being] deprived of something to which [it] personally [is] entitled.") (substitutions in original) (quoting *Raines*). Indeed, the district court recognized as much here, but ignored this glaring problem with Plaintiffs' standing because it had erroneously concluded that Plaintiffs had suffered a concrete injury. *Kerr*, 880 F. Supp. 2d at 1133–34 ("Given . . . the institutional injury alleged by the Legislator-Plaintiffs here, and the fact that they have not been authorized to bring suit on behalf of the Colorado General Assembly, draws some skepticism from this Court regarding whether the injury alleged can provide a legitimate basis for standing.").

Amici add their voices here in order to emphasize that Plaintiffs not only act without the authority of the General Assembly, they act contrary to the views of many of its members. If the General Assembly had spoken with one voice to seek to end the revenue approval procedures imposed by TABOR, the suggestion that TABOR cripples state governance would be easier to countenance. *See Raines*, 521 U.S. at 829. But, as demonstrated by Amici, no such unified support has been forthcoming. The injury supposed to have been suffered by Plaintiffs is thus illuminated to be merely a political disagreement in which they hold the losing hand, not a judicially cognizable injury to a legally protected interest.

The implications of the district court's loose interpretation of standing doctrine are far reaching. The gravamen of Plaintiffs' claim is that "taxation and appropriation" are "legislative core functions" and by limiting the General Assembly's authority to act unilaterally on these matters, "[TABOR] removes entirely from the Colorado General Assembly any authority to change state law concerning taxation." *Kerr*, 880 F. Supp. 2d at 1130–31 (quoting Operative Complaint ¶¶ 43, 83–84); *see* U.S. Const. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government . . . ."). Dubious as that proposition is, it implies an even more dubious argument regarding limitations on the State's police power. Since time immemorial, the police power has been at least as significant an aspect of sovereignty as the taxing power. *See The License Cases*, 46 U.S. (5 How.) 504, 584 (1847) ("[T]he police powers of a state . . . are nothing more or less than the powers of government inherent in every sovereignty to the extent of its dominions[.]"). If the Guarantee Clause were invaded by constitutional limitations on taxing and spending, then it must be torn asunder by constitutional limitations on the police power. Every State bill of rights measure would thus implicate the Guarantee Clause, and—under Plaintiffs' view of standing—any legislator begrudged by political outcomes could resort to the Federal courts to re-try the political battle under the guise of the Guarantee Clause. Indeed, any legislator could challenge any limits on legislative authority imposed

by a State constitution as violating the Guarantee Clause. The Federal courts would be flung open to challenges of every limitation the people placed on the authority of their elected representatives. The Federal courts would become a venue for second run political disagreements when the outcomes of the legislative process disappoint. The perennial "concern about the proper—and properly limited—role of the courts in a democratic society" would become academic under the district court's theory of standing. *Allen*, 468 U.S. at 751.

Because the district court overstated the concreteness of the alleged injury, failed to consider its inability to redress the alleged injury, and ignored the fact that any conceivable injury is common to all members of the General Assembly, its holding on standing is fundamentally flawed. Accordingly, the district court erred in concluding that Plaintiffs have standing to sue.

III. PLAINTIFFS' CLAIMS PRESENT A NONJUSTICIABLE POLITICAL QUESTION.

Assuming arguendo that any Plaintiff has standing, their claims are nevertheless precluded by the political question doctrine. *See Schlesinger v. Reservist Comm. to Stop the War*, 418 U.S. 208, 215 (1974) ("[E]ither the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party."). The district court erred by determining that the claims here, all based on the Guarantee Clause,

do not present a nonjusticiable political question.[8] *Kerr*, 880 F. Supp. 2d at 1147. The district court conducted an analysis pursuant to the Supreme Court's six-part test laid out in *Baker v. Carr*, 369 U.S. 186, 217 (1962), but the resolution of this case is much simpler than all that. Where the Guarantee Clause is concerned, the Supreme Court has twice unequivocally shut the courthouse doors, in order to prevent "the inconceivable expansion of the judicial power and the ruinous destruction of legislative authority in matters purely political which would necessarily be occasioned by giving sanction to" Guarantee Clause claims in federal court. *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 141 (1912); *see also Luther v. Borden*, 48 U.S. 1, 42 (1849).[9] The district court brushed aside these precedents because it considered them fact-bound. Neither opinion supports such a conclusion.[10]

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[8] The United States carried out its obligation under the Guarantee Clause in the Colorado Enabling Act of 1875, which provides "that the constitution shall be republic in form." 18 Stat. 474, sec. 4 (1875). The rationale applied by the Supreme Court to Guarantee Clause claims therefore applies with equal force to Plaintiffs' claims brought under the Colorado Enabling Act. *See Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 139 (1912) (dismissing enabling act claim as a nonjusticiable political question).

[9] As explained in the Governor's Opening Brief at 47–54, the *Baker* factors further demonstrate that Plaintiffs' claims raise a political question. But the *Baker* analysis is unnecessary in light of the Supreme Court's explicit direction in *Luther* and *Pacific States* regarding the nonjusticiability of Guarantee Clause claims.

[10] The district court quoted *New York v. United States*, 505 U.S. 144 (1992), for the proposition that "'perhaps not all claims under the Guarantee Clause present

Even before Colorado entered the Union, the Supreme Court determined that the Guarantee Clause vests Congress alone with the authority to judge whether or not a State has established a republican form of government:

> Under this article of the Constitution it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority.

Luther, 48 U.S. at 42. For twenty years since the passage of TABOR, Congress has "admitted into the councils of the Union" the senators and representatives of the State of Colorado, thereby recognizing "the authority of the government under which they are appointed, as well as its republican character." *Id*. Never has Congress considered TABOR an impediment to its recognition that the Colorado Constitution establishes a republican form of government consistent with the Guarantee Clause.

If the district court were to consider the merits of Plaintiffs' claims, such

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nonjusticiable political questions.'" *Kerr*, 880 F. Supp. 2d at 1143 (quoting *New York*, 505 U.S. at 185). But the Supreme Court's musings on the subject in *New York* fall short of overturning, or even reconsidering, *Luther* and *Pacific States*. Accordingly, it is not the district court's place—or this Court's—to upend 100 years of Supreme Court precedent. *Luther* and *Pacific States* are therefore controlling.

consideration would thrust the judiciary into a political dispute with Congress, which has exercised its constitutional authority to recognize the government of the State of Colorado as the legitimate republican government of the State. Accordingly, if the district court were to hold TABOR unconstitutional under the Guarantee Clause, this holding would be in unavoidable conflict with Congress's judgment that the Guarantee Clause is satisfied by the Colorado Constitution.

Pacific States makes clear that *Luther*'s holding is not based on a narrow consideration of a particular set of facts. Rather, the political question doctrine bars the federal courts from considering Guarantee Clause claims because such claims, however narrowly focused, go to the very existence of the States, "demand[ing] of the state that it establish its right to exist as a state, republican in form." *Pacific States*, 223 U.S. at 151. If the district court were to conclude that TABOR renders the Colorado Constitution unrepublican, that judgment "would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in [Colorado] since the adoption of [TABOR]." *Pacific States*, 223 U.S. at 141. The Constitution vests Congress with the sole authority to judge whether the Guarantee Clause has been satisfied in order to avoid the constitutional crisis that would result from enlisting the federal courts:

> [T]o examine as a justiciable issue the contention as to the illegal existence of a state, and if such contention be thought well founded, to disregard the existence in fact of the state, of its recognition by all of the departments of the Federal government, and practically award a

> decree absolving from all obligation to contribute to the support of, or obey the laws of, such established state government.

Id. at 142. "If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order." *Luther*, 48 U.S. at 43.

IV. THE STANDING AND POLITICAL QUESTION DOCTRINES ARE ESSENTIAL TO PRESERVING SEPARATION OF POWERS.

The concept of justiciability, whether embodied in the standing or political question doctrines, is intended to preserve the separation of powers:

> "All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government."

Allen, 468 U.S. at 750 (quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178–1179 (D.C. Cir. 1983) (Bork, J., concurring)). This fundamental concern about the "the proper—and properly limited—role of the courts in a democratic society," *Allen*, 468 U.S. at 751, makes swift dismissal of the instant case critically important. Because Plaintiffs lack standing and have alleged claims that go to the heart of the political question doctrine, consideration of the merits in this case risks significant erosion of the concept of separation of powers.

"[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers." *Id.* at 752. Standing "defines with respect to the

Judicial Branch the idea of separation of powers on which the Federal Government is founded." *Id*. The political question doctrine is likewise grounded in separation of powers concerns:

> Restrictions derived from the separation of powers doctrine prevent the judicial branch from deciding political questions, controversies that revolve around policy choices and value determinations constitutionally committed for resolution to the legislative or executive branches.

Aktepe v. United States, 105 F.3d 1400, 1403 (11th Cir. 1997) (citing *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986)). Chief Justice Marshall first expressed the recognition by the judiciary of the existence of a class of cases constituting "political act[s] belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the Supreme Executive." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803).

"The ultimate purpose of . . . separation of powers is to protect the liberty and security of the governed." *Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise*, 501 U.S. 252, 272 (1991). That is, the "essence of the separation of powers concept . . . is that each branch, in different ways, within the sphere of its defined powers and subject to the distinct institutional responsibilities of the others, is essential to the liberty and security of the people." *Id*. (internal quotations omitted); *Public Citizens v. U.S. Dept. of Justice*, 491 U.S.

440, 468 (1989) (Kennedy, J., concurring) ("Framers of our Government knew that the most precious liberties could remain secure only if they created a structure of Government based on a permanent separation of powers"); *see The Federalist No. 51* (James Madison) (C. Rossiter ed., Mentor 1999) (the "separate and distinct exercise of the different powers of government . . . is . . . essential to the preservation of liberty").

The doctrine of separation of powers applies particularly to the judicial branch, preventing it from involving itself in potentially political disputes. "From its earliest history this [C]ourt has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Raines*, 511 U.S. at 819 (internal quotations omitted). The Supreme Court has recognized an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere[.]" *Id*. at 820. Thus, separation of powers operates to "exclude[] from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress[.]" *Japan Whaling Ass'n*, 478 U.S. at 230. It is clear that under the United States Constitution, "the Executive holds the sword of the community [and] [t]he legislature . . . commands the purse [and] prescribes the rules by which the duties and rights of every citizen are to be regulated." *Id.* "The judiciary, on the contrary, *has no influence over either the sword or the purse*; no direction

either of the strength or the wealth of the society; and can take no active resolution whatever." *Id*. (emphasis added). That is, "it has neither force nor will, but merely judgment[.]" *Id*.

For example, though the judiciary may judge what the term "invasion" means with respect to the Invasion Clause, determining when an invasion has occurred under the interpretation of the term provided by the judiciary is purely a political and policy issue. Five states have separately filed suit against the United States and its officers to compel the United States to defend those States from rampant, out of control illegal immigration from Mexico. They also asked for money to compensate the States for the cost of this immigration. These cases are, in order of decision date: *Chiles v. United States*, 69 F.3d 1094 (11th Cir. 1995), *cert. den*., 517 U.S. 1188 (1996) (Florida); *Padavan v. United States*, 82 F.3d 23 (2d Cir. 1996) (New York); *New Jersey v. United States*, 91 F.3d 463 (3d Cir. 1996); *California v. United States*, 104 F.3d 1086 (9th Cir. 1997), *cert. den.*, 522 U.S. 806 (1997); and *Arizona v. United States*, 104 F.3d 1095 (9th Cir. 1997) (decided "for the same reasons set forth in *California v. United States*"). In those cases, the courts defined an invasion and held that determining whether an invasion had in fact occurred was a political and policy decision, properly made by the political branches. In *California*, for example, the Court explained:

> For this Court to determine that the United States has been "invaded" when the political branches have made no such determination would

> disregard the constitutional duties that are the specific responsibility of other branches of government, and would result in the Court making an *ineffective non-judicial policy decision*.

104 F.3d at 1091 (emphasis added).

In the same way here, a court may opine about what the Guarantee Clause means by "republican form of government," but the Supreme Court long ago decided that the Constitution reserves to Congress the authority to judge whether or not a State constitution meets this standard. *Pacific States*, 223 U.S. at 141; *Luther*, 48 U.S. at 42.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for dismissal.

Respectfully submitted this 11th day of February 2013.

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As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief is proportionally spaced and contains 6189 words. I relied on Microsoft Word to obtain the count. I certify that the information on this page is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

/s/ James M. Manley
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I hereby certify that on the 11th day of February 2013, the foregoing document was filed using the appellate ECF system and that all parties of record were served through that system. Additionally, I certify that seven copies of the foregoing document will be delivered to the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit within two business days.

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