No. 14-460

In The Supreme Court of the United States

JOHN HICKENLOOPER,

Petitioner,

v.

ANDY KERR, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

AMICI CURIAE BRIEF OF THE COLORADO UNION OF TAXPAYERS FOUNDATION, MOUNTAIN STATES LEGAL FOUNDATION, AND 22 COLORADO STATE LEGISLATORS, IN SUPPORT OF PETITIONER

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amicus Curiae

[Individual Legislators Listed On Inside Cover]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

ADDITIONAL AMICI

Sen. Kevin Lundberg (SD 15)
Sen. Ellen Roberts (SD 6)
Rep. Jerry Sonnenberg (HD 65)
Rep. Justin Everett (HD 22)
Rep. Spencer Swalm (HD 37)
Rep. Janak Joshi (HD 16)
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)
Rep. Dan Nordberg (HD 14)
Rep. Frank McNulty (HD 43)
Rep. Chris Holbert (HD 44)
Rep. Kevin Priola (HD 56)
Sen. Scott Renfroe (SD 13)
Sen. Bill Cadman (SD 12)
Sen. Steve King (SD 7)
Sen. Greg Brophy (SD 1)
Rep. Lori Saine (HD 63)
Rep. Bob Gardner (HD 20)
Sen. George Rivera (SD 3)

QUESTIONS PRESENTED

1. Whether, after this Court's decision in *New York v. United States*, 505 U.S. 144 (1992), Plaintiffs' claims that Colorado's government is not republican in form remain non-justiciable political questions.

2. Whether a minority of legislators have standing to challenge a law that allegedly dilutes their power to legislate on a particular subject.

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AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER

Pursuant to Supreme Court Rule 37.2, the Colorado Union of Taxpayers Foundation ("CUT"), Mountain States Legal Foundation ("MSLF") and 22 members of the Colorado General Assembly respectfully submit this Amici Curiae brief in support of Petitioner.[1]

IDENTITY AND INTEREST OF AMICI CURIAE

CUT is a nonprofit, public-interest, membership organization organized under the laws of the State of Colorado. CUT was formed to educate the public regarding the dangers of excessive taxation, regulation, and government spending. Among the specific goals of CUT is to protect citizens' rights to petition the government. CUT members spent considerable time and money generating support for the passage of the Taxpayers' Bill of Rights ("TABOR"), Colo. Const. art. X, § 20, and CUT continues to advocate for

[1] Pursuant to Supreme Court Rule 37.2(a), notice of intent to file this Amici Curiae brief was received by counsel of record for all the parties at least 10 days prior to the due date of this brief and all parties consent to the filing of this Amici Curiae brief. The undersigned further affirms that no counsel for a party authored this brief in whole or in part, and no person or entity, other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

taxpayers to make their own decisions regarding how their money is spent.

MSLF is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. MSLF attorneys are actively engaged in litigation aimed at ensuring the proper interpretation and administration of TABOR. *See Colorado Union of Taxpayers Foundation v. City of Aspen*, 2014CA1869 (Colo. Ct. App.); *TABOR Foundation v. Colorado Bridge Enterprise*, 2014SC766 (Colo. S. Ct.); *TABOR Foundation v. Regional Transportation Dist.*, 13CV854 (Denver Dist. Ct.).

The legislators filing as Amici Curiae are 22 members of the Colorado General Assembly who object to the attempted assault on the Colorado Constitution brought by Respondents. The legislators filing this brief are: Sen. Kevin Lundberg; Sen. Ellen Robert; Rep. Jerry Sonnenberg; Rep. Justin Everett; Rep. Spencer Swalm; Rep. Janak Joshi; Sen. Ted Harvey; Sen. Kent Lambert; Sen. Mark Scheffel; Sen. Kevin Grantham; Sen. Vicki Marble; Rep. Dan Nordberg; Rep. Frank McNulty; Rep. Chris Holbert; Rep. Kevin Priola; Sen. Scott Renfroe; Sen. Bill Cadman; Sen. Steve King; Sen. Greg Brophy; Rep. Lori Saine; Rep. Bob Gardner; and Sen. George Rivera.

STATEMENT OF THE CASE

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. However, it also contains several limitations on the General Assembly's power to levy taxes. *See, e.g.*, Colo. Const. art. X, § 3(1)(a) ("Each property tax levy shall be uniform. . . ."); *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. . . ."). One such limitation is TABOR, which was added to the Colorado Constitution by voter initiative in 1992. Colo. Const. art. X, § 20.[2] Unlike other provisions of the Colorado Constitution, TABOR does not alter legislators' authority to propose tax increases; it merely requires voter approval before implementation of such increases.[3] Colo.

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[2] 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).

[3] Prior to TABOR, it was the governor, rather than the taxpayers, who had power to veto a tax increase, and the legislature then had the option of voting to override the gubernatorial veto. *See* Colo. Const. art. IV, § 11. Post-TABOR, the General Assembly retains the authority to implement emergency

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Const. art. X, § 20(4)(a); *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 891 (Colo. 2011) ("[TABOR] 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 procedural limitation that Respondents are challenging.

Respondents, three Colorado state legislators and a handful of local government officials and citizens, sued the Colorado Governor, alleging that TABOR deprives the State of a republican form of government, in violation of the Guarantee Clause of the United States Constitution, U.S. Const. art. IV, § 4. *Kerr v. Hickenlooper*, 880 F. Supp. 2d 1112, 1120-21 (D. Colo. 2012). The Governor moved to dismiss, arguing that Respondents lacked standing and that their claims presented a non-justiciable political question. The district court denied in part the Governor's motion to dismiss, holding that the Respondents had standing to sue because TABOR interfered with their power to tax.[4] *Id.* at 1131. The district court also

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taxes through a two-thirds majority vote of each house. Colo. Const. art. X, § 20(1).

[4] Neither the district court nor the Tenth Circuit considered whether any Respondents besides the three legislators had standing. *Kerr*, 880 F. Supp. 2d at 1141; *Kerr v. Hickenlooper*, 744 F.3d 1156, 1163 (10th Cir. 2014). Amici submit that other Respondents also lack standing, because "[t]he only injury [they] allege is that the law – specifically the [Guarantee Clause] – has not been followed. This injury is precisely the kind of undifferentiated,

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held that Respondents' claims do not implicate the political question doctrine. *Id.* at 1152.

The Governor filed an interlocutory appeal, and the Tenth Circuit affirmed. *Kerr*, 744 F.3d at 1156. Addressing only the issues of legislative standing and justiciability, the panel ruled that: (1) Respondents suffered an injury-in-fact because "TABOR deprives them of their ability to perform the legislative core functions of taxation and appropriation[;]" (2) the alleged injury was caused by TABOR; (3) the alleged injury is redressable by striking down TABOR; and (4) the political question doctrine does not bar Respondents' suit because Respondents challenged only "a single provision of a state constitution" rather than "the validity of a state's government[.]" *Id.* at 1163, 1171-74. The Governor timely petitioned for rehearing en banc, which was denied 6-4 and over strong dissenting opinions by Judges Hartz, Tymkovich, and Gorsuch. *Kerr v. Hickenlooper*, 759 F.3d 1186 (10th Cir. 2014).

SUMMARY OF ARGUMENT

In determining that Respondents had standing to challenge TABOR, the Tenth Circuit turned this Court's precedent regarding legislative standing on

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generalized grievance about the conduct of government that [this Court] ha[s] refused to countenance in the past." *Lance v. Coffman*, 549 U.S. 437, 442 (2007).

its head. Article III standing limits the jurisdiction of federal courts. Consideration of Respondents' claims would open the doors of Article III courts to a litany of previously non-justiciable claims. First, Respondents' claim that TABOR "deprives them of their ability to perform the 'legislative core functions of taxation and appropriation[,]'" *Kerr*, 744 F.3d at 1163, is a generalized, institutional injury, not a concrete and particularized one. Such an abstract dilution in the power of a legislature has been considered insufficient by this Court to establish a concrete injury, and the General Assembly as a body has not authorized Respondents to sue on its behalf. Second, Respondents have failed to demonstrate that the generalized injuries listed in their Complaint were caused by TABOR. Third, because Respondents can point to no personalized injury or vote that was nullified by TABOR, they have failed to demonstrate that their alleged injuries are redressable by a favorable decision in this case.

Finally, Respondents' claims run headlong into the political question doctrine and challenge the very form of Colorado's government. Such claims are outside the purview of Article III courts. Thus, Amici respectfully request this Court grant the Petition.

REASONS FOR GRANTING THE PETITION

I. THE TENTH CIRCUIT'S DECISION UNDERMINES THE CONCEPT OF SEPARATION OF POWERS BY HOLDING THAT ARTICLE III COURTS MAY ADJUDICATE CLAIMS INVOLVING ABSTRACT INJURIES.

The Article III standing requirement is an essential part of the separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984) ("[T]he law of Article III standing is built on a single basic idea – the idea of separation of powers."), *abrogated in part on other grounds*, *Lexmark Intern., Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014). "To permit a complainant who has no concrete injury to require a court to rule" on important questions "would create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction.'" *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974); *see also United States v. Richardson*, 418 U.S. 166, 192 (1974) (Powell, J., concurring) ("[W]e risk a progressive impairment of the effectiveness of the federal courts if their limited resources are diverted increasingly from their historic role to the resolution of public-interest suits brought by litigants who cannot distinguish themselves from all taxpayers or all citizens.").

As the Tenth Circuit itself has recognized in the past, "[a]lthough the standing question is often

dressed in the dazzling robe of legal jargon, its essence is simple – what kind of injuries are courts empowered to remedy and what kind are they powerless to address?" *Schaffer v. Clinton*, 240 F.3d 878, 883 (10th Cir. 2001). This Court answered that question with respect to legislative standing in *Raines v. Byrd*, 521 U.S. 826, 828 (1997), emphasizing the restricted role of Article III courts and declining to extend standing to cases "of claimed injury to official authority or power." *See also* Note, *Standing in the Way of Separation of Powers: The Consequences of Raines v. Byrd*, 112 Harv. L. Rev. 1741, 1749-50 (1999) ("A close examination of the *Raines* opinion reveals that the majority was making a[n] . . . argument against 'a system of judicial refereeship' in denying congressional standing.") (quoting *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring)). Separation of powers concerns undergird *Raines* because this Court recognized that, until a vote nullification or other concrete, personal injury has occurred, there is a political remedy available to address the problem. 521 U.S. at 829; *see also Russell v. DeJongh*, 491 F.3d 130, 133 (3d Cir. 2007) ("Concern for separation of powers and the limited role of the judiciary are at the core of Article III standing doctrine and the requirement that a plaintiff allege an injury in fact. . . . *Those concerns are particularly acute in legislator standing cases*. . . .") (emphasis added).

The Tenth Circuit's decision greatly departs from "the accepted and usual course of judicial proceedings"

with regard to the power of the judiciary. Supreme Court Rule 10. By holding that Respondents' claims of injury to their "core functions" were sufficient to grant them standing, *Kerr*, 744 F.3d at 1163, the Tenth Circuit opened the courthouse doors to injuries that have previously been considered too tenuous to provide standing by this Court and the circuit courts – injuries "wholly abstract and widely dispersed[.]" *See, e.g.*, *Raines*, 521 U.S. at 821-22; *Chenoweth v. Clinton*, 181 F.3d 112, 115 (D.C. Cir. 1999); *Baird v. Norton*, 266 F.3d 408, 415 (6th Cir. 2001). The panel's decision conflicts directly with the "restricted role for Article III courts" outlined by this Court. *Raines*, 521 U.S. at 828.

II. THE TENTH CIRCUIT EVISCERATED THIS COURT'S LEGISLATIVE STANDING PRECEDENT BY HOLDING THAT INDIVIDUAL LEGISLATORS HAVE STANDING BASED ON ALLEGATIONS OF AN INCREMENTAL DIMINUTION IN INSTITUTIONAL POWER.

A. The Injury Alleged By Respondents Is A Diminution In Institutional Power, Not A Loss Of Any Private Right.

It is a basic principle of standing that plaintiffs are required to demonstrate a "concrete and particularized" injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). This requirement of a concrete injury has been consistently applied to determine whether individual legislators have standing. *Raines*,

521 U.S. at 818-19 (discussing legislative standing within an Article III standing framework).

The leading cases on legislative standing are *Coleman v. Miller*, 307 U.S. 433 (1939), and *Raines*, 521 U.S. at 811. In *Coleman*, a group of Kansas state senators brought suit challenging the state legislature's use of the lieutenant governor's vote as a tie-breaker on a proposed constitutional amendment. 307 U.S. at 436. In a limited opinion, this Court concluded that the legislators had standing to challenge the procedure, based on the effective nullification of their votes. *Id.* at 446-47. This Court explained, "at least the twenty senators whose votes, if their contention were sustained, would have been sufficient to defeat the resolution ratifying the proposed constitutional amendment, have an interest in the controversy which . . . is sufficient to give the Court jurisdiction to review that decision." *Id.* at 447.

In *Raines*, this Court emphasized the narrowness of its holding in *Coleman*. There, legislators claimed that the Line Item Veto Act made their future votes less "effective" because it gave the President authority to "cancel" certain spending programs and tax benefit measures after he signed them into law. *Raines*, 521 U.S. at 815, 825. This Court found such an argument "pulls *Coleman* too far from its moorings. . . . There is a vast difference between the level of vote nullification at issue in *Coleman* and the abstract dilution of institutional legislative power that is alleged here." *Id*. at 825-26. This Court held that, where legislators' claims are "based on a loss of political power, not loss

of any private right," they do not suffer a concrete and particularized injury. *Id.* at 811, 819. This distinction is significant:

> If one of the Members were to retire tomorrow, he would no longer have a claim; the claim would be possessed by his successor instead. The claimed injury thus runs (in a sense) with the Member's seat, a seat which the Member holds (it may quite arguably be said) as trustee for his constituents, not as a prerogative of personal power.

Id. at 811. As the circuit courts have emphasized post-*Raines*, "[f]or legislators to have standing as legislators, they must possess votes sufficient to have either defeated or approved the measure at issue." *Baird*, 266 F.3d at 412 ("Baird claims vote nullification, but her vote alone would not have been sufficient to defeat either the concurrent resolution, which passed despite her 'nay' vote, or legislation to similar effect."); *Alaska Legislative Council v. Babbitt*, 181 F.3d 1333, 1338 (D.C. Cir. 1999) (If individual legislators "cannot enact legislation implementing the Act because this would be at odds with their State Constitution, their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature.").

In ruling that Respondents' injuries fall within the traditionally narrow interpretation of legislative standing, the Tenth Circuit deviated from other circuits' decisions and relied heavily on Respondents'

alleged "'interest in maintaining the effectiveness of their votes.'" *Kerr*, 744 F.3d at 1163-64 (quoting *Coleman*, 307 U.S. at 438). This effectiveness, the panel determined, was hampered by TABOR's requirement for voter approval of tax increases, resulting in "vote nullification." *Id.* at 1164-66. The panel attempted to distinguish *Raines* and its progeny based on "[t]he extent and type of disempowerment [in] the case before us." *Id.* at 1169-70.

However, the Tenth Circuit failed to recognize that legislators have standing only in "narrow circumstances." *Babbitt*, 181 F.3d at 1337; *Baird*, 266 F.3d at 415 (Emphasizing that *Coleman* "has been narrowly construed by *Raines*") (Rice, J., concurring). Without exception, in order to establish standing, this Court and the circuits have required legislators to allege deprivation of votes on specific legislation that would have passed but-for the allegedly unconstitutional procedure they were challenging, *or* a personalized injury, such as deprivation of one's Congressional seat. *See Coleman*, 307 U.S. at 436 (legislation would have passed but-for the challenged procedure); *Powell v. McCormack*, 395 U.S. 486, 493 (1969) (congressman excluded from his House seat had standing to sue); *Baird*, 266 F.3d at 412 (single legislator's claim that concurrent resolution was unconstitutional was insufficient to confer standing); *Babbitt*, 181 F.3d at 1338 (legislators lacked standing because they did not have the votes to enact a particular measure). As the Tenth Circuit itself has recognized, a legislator's "moral outrage, however profoundly and personally

felt, does not endow him with standing to sue. . . ." *Schaffer*, 240 F.3d at 884.

No vote nullification has occurred here. The three legislators do not possess the votes necessary to pass any legislation, and have not alleged that any specific legislation they *did* have the votes to pass was nullified by TABOR. Similarly, like the plaintiffs in *Raines*, Respondents "do not claim that they have been deprived of something to which they *personally* are entitled – such as their seats as Members of [the General Assembly] after their constituents had elected *them*." *Raines*, 521 U.S. at 821 (all emphasis in original). Respondents are not individually entitled to increase taxes without voter approval even in the absence of TABOR. *See Baird*, 266 F.3d at 412 (single legislator did not have standing to claim vote nullification regarding a law that passed because "[t]he Michigan Constitution may require a majority of all members' votes for legislation to be approved, but it does not require unanimity").

Instead of a concrete and particularized injury, Respondents have alleged only an "abstract dilution of institutional legislative power." *Raines*, 521 U.S. at 826; *see Kerr*, 744 F.3d at 1165 ("Plaintiffs claim that they have been deprived of their power over taxation and revenue [by TABOR]."). Respondents' alleged injury is thus similar to that of the Alaskan legislators in *Babbitt*, where a handful of legislators challenged a federal statute regarding hunting and fishing on the theory that the statute rendered them "unable to control hunting and fishing on federal

lands within the State" consistent with their duties under the state constitution. 181 F.3d at 1338. The D.C. Circuit determined the legislators did *not* have standing because "there is not the slightest suggestion here that these particular legislators had the votes to enact a particular measure, that they cast those votes or that the federal statute or the federal defendants did something to nullify their votes." *Id.* The Tenth Circuit attempted to distinguish *Babbitt* on the basis that the state legislators there "complained only that they lost some control over federal lands, a power the Constitution expressly grants to Congress[,]" whereas here, Respondents "alleged that TABOR strips them of all power to conduct a 'legislative core function' that is not constitutionally committed to another legislative body." *Kerr*, 744 F.3d at 1169-70. However, *Babbitt* – and *Raines* before it – denied legislators standing, not because they failed to allege an injury to a "legislative core function" not designated to another body, but because "their loss (or injury) is a loss of political power, a power they hold not in their personal or private capacities, but as members of the Alaska State Legislature." *Babbitt*, 181 F.3d at 1338 (citing *Raines*, 521 U.S. at 821). No case has accepted deprivation of a "core legislative function" as a concrete injury.[5] *See Chenoweth*, 181

[5] Frankly, Respondents' assertion that taxation is a core legislative function is offensive to the role of government as our Founders envisioned it. *See* Randy E. Barnett, *The Proper Scope of the Police Power*, 79 Notre Dame L. Rev. 429, 453 (2004) ("Benjamin Franklin articulated this popular view to the

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F.3d at 113 (rejecting standing where four congressmen claimed that the President's use of an executive order "deprived [them] of their constitutionally guaranteed responsibility of open debate on issues and legislation" involving interstate commerce and the expenditure of federal money); *Campbell v. Clinton*, 203 F.3d 19, 21-22 (D.C. Cir. 2000) (rejecting standing where 31 congressmen claimed the President "waged war in the constitutional sense without a congressional delegation" in violation of the War Powers Resolution, thereby "circumventing [Congress's] legislative authority"); *Kucinich v. Bush*, 236 F. Supp. 2d 1, 7 (D.D.C. 2002) ("[T]he claim that [congressmen] were deprived of a constitutional right and duty to participate in treaty termination is, like the dilution of legislative power alleged in *Raines*, an institutional injury lacking a personal, particularized nature."). Respondents are no different here. If they are voted or term-limited out of office, their alleged injury disappears. The alleged injury is thus only to the institution, not to the individual legislators.

Constitutional Convention: 'In free Governments the rulers are the servants, and the people their superiors & sovereigns.' ") (quoting James Madison, Notes of Debates in the Federal Convention of 1787, at 371 (W.W. Norton & Co. 1987) (1840)); John Locke, *Second Treatise of Government*, § 140 (1690) (C. B. Macpherson ed., 1980) ("[F]or if any one shall claim a *power to lay* and levy *taxes* on the people, by his own authority, and without such consent of the people, he thereby invades the *fundamental law of property*, and subverts the end of government. . . ." (all emphasis in original)).

In certain circumstances, a legislative body may properly allege an institutional injury to establish legislative standing. *Compare 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.") *with U.S. House of Representatives v. U.S. Dep't of Commerce*, 11 F. Supp. 2d 76, 84-86 (D.D.C. 1998), *aff'd sub nom. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316 (1999) (The House of Representatives itself had alleged a concrete injury caused by the Department of Commerce's failure to follow proper census procedures because the House has an "institutional interest in preventing its unlawful composition"). The rationale for this distinction is clear: "The two houses of Congress are legislative bodies representing larger constituencies. Power is not vested in any one individual, but in the aggregate of the members who compose the body, and its action is not the action of any separate member or number of members, but the action of the body as a whole." *United States v. Ballin*, 144 U.S. 1, 3 (1892); *see also* Anthony Clark Arend & Catherine B. Lotrionte, *Congress Goes to Court: The Past, Present, and Future of Legislator Standing*, 25 Harv. J. L. & Pub. Pol'y 209, 275 (2001) ("Because decisions by Congress are made by a vote as a collective whole, one or several members should not be able to 'step into the shoes of the' Congress and invoke its claim to injury." (quoting *Bender v. Williamsport Area School District*, 475 U.S. 534, 544 (1986)).

Here, the only injury Respondents could conceivably allege (but have failed to allege) is that TABOR's requirements incrementally diminish the institutional authority of the General Assembly by preventing the legislature from voting to override a gubernatorial veto, which was the pre-TABOR procedure. *See* Colo. Const. art. IV, § 11. However, the three Respondents in this case are not authorized to allege institutional injuries on behalf of the 100 members of the General Assembly.[6] Because Respondents alleged only an "abstract dilution of institutional legislative power[,]" *Raines*, 521 U.S. at 826, they have failed to articulate a concrete, particularized injury sufficient to grant them legislative standing. The Tenth Circuit's diversion from this well-established precedent threatens to monopolize judicial resources with lawsuits asserting legislators' personal grievances.

B. Respondents' Alleged Injuries Are Not Caused By TABOR.

To establish standing, Respondents must demonstrate not only a concrete and particularized injury,

[6] Although the Tenth Circuit found it persuasive that the General Assembly "has chosen to participate as an amicus curiae in favor of legislative standing in this appeal[,]" the panel also acknowledged that "[t]he General Assembly's amicus brief does not imply 'authorization' of the legislator-plaintiffs." *Kerr*, 744 F.3d at 1168, 1168 n.7. Absent authorization, Respondents do not represent the General Assembly, *Raines*, 521 U.S. at 829, and Amici here represent a far larger voting bloc of the General Assembly that actively *opposes* Respondents' suit.

but that such injury was "fairly traceable to the defendant's allegedly unlawful conduct. . . ." *Raines*, 521 U.S. at 818-19 (internal quotations omitted). The Tenth Circuit considered this factor satisfied because Respondents' alleged injury "is not a lack of revenue flowing into state coffers but the elimination of their authority to make laws raising taxes or increasing spending." *Kerr*, 744 F.3d at 1171.

However, because Respondents can point to no vote that was nullified by TABOR, their complaint relies on the broader injuries that they fear are caused by TABOR: (1) the state's alleged "slow, inexorable slide into fiscal dysfunction[;]" (2) their alleged inability "to raise and appropriate funds [to] meet [their] primary constitutional obligations or provide services that are essential for a state[;]" and (3) their alleged inability "to tax for the purpose of adequately funding core education responsibilities of the state[.]" *Id.* at 1120. Yet, these alleged consequences of TABOR are merely personal opinions or interests, not injuries.[7] Even if these interests were Article III injuries, none of them are fairly traceable to TABOR, because Respondents have failed to allege that revenue-raising measures have passed both houses of the

[7] Indeed, Respondents' allegations are strikingly similar to cases where "the alleged injury is based on the asserted effect of the allegedly illegal activity on public revenues" and where this Court has found such injury insufficient to grant a taxpayer standing. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006).

General Assembly only to be defeated by voters pursuant to TABOR.[8] *See Chenoweth*, 181 F.3d at 117 (finding a lack of causation where legislators failed to allege that the necessary majorities in Congress voted to block an executive order).

C. Respondents' Claims Are Not Redressable By A Federal Court.

To establish Article III standing, Respondents must also demonstrate that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Lujan*, 504 U.S. at 561. The Tenth Circuit determined that a decision striking down TABOR "would allow the legislator-plaintiffs to vote directly for increased taxes, thereby redressing their alleged injury." *Kerr*, 744 F.3d at 1171.

However, the panel's conclusion only emphasizes how far afield this case is from the vote nullification cases. In *Coleman*, a specific piece of legislation was at issue, and the outcome of the lawsuit would

[8] Amendment 23, adopted by voters in 2000, specifically requires per-pupil funding to keep pace with the rate of inflation, in addition to an increase of one percent per year of funding for fiscal years 2002-2011. Colo. Const. art. IX, § 17. Thus, Respondents' allegations regarding their inability to fund "core education responsibilities" are meritless. Indeed, Amendment 23 *prevents* the state legislature from appropriating monies from the state education fund for other purposes. *Id.* § 17(5). Amendment 23, like TABOR, appropriately limits the spending power of the General Assembly consistent with the views of the state's voters.

determine the effectiveness of the plaintiffs' votes with respect to that legislation. 307 U.S. at 438. Respondents have pointed to no measure that would pass as a result of invalidating TABOR; indeed, the only effect would be to transmit a successful measure to the governor, rather than the citizens, for approval. Colo. Const. art. X, § 20(3)-(4). In fact, this case presents the flip side of the injuries alleged by plaintiffs seeking taxpayer standing in *DaimlerChrysler Corp.*, where plaintiffs' alleged injury was "'conjectural or hypothetical' in that it depends on how legislators respond to a reduction in revenue. . . ." 547 U.S. at 344. Here, Respondents' alleged injuries are "conjectural or hypothetical" because, even if TABOR is held unconstitutional, whether Respondents' alleged injury is redressed depends on whether a bill to increase taxes is introduced in the future and how the other 97 legislators respond to this hypothetical bill. Because it is "merely speculative" that any alleged injury would ever be redressed by a decision in Respondents' favor, Respondents have failed to demonstrate redressability.[9] *See Rangel v. Boehner*, ___ F. Supp. 2d ___, 2013 WL 6487502 at *6 (D.D.C. Dec. 11, 2013) (Congressman could not show redressability because his requested relief "depends entirely on the

[9] The requirement that an injury is "likely" to be redressed prevents courts from engaging in "pure conjecture" regarding future events. *Massachusetts v. E.P.A.*, 549 U.S. 497, 546 (2007) (Roberts, C.J., dissenting) ("Schoolchildren know that a kingdom might be lost 'all for the want of a horseshoe nail,' but 'likely' redressability is a different matter.").

unbridled discretion of the House[.]"). This Court should grant the Petition to correct the Tenth Circuit's flawed interpretation of the traditionally narrow legislative standing doctrine.

III. THE TENTH CIRCUIT CONTRAVENED THE POLITICAL QUESTION DOCTRINE BY HOLDING THAT A DIRECT CHALLENGE TO COLORADO'S REPUBLICAN FORM OF GOVERNMENT WAS NOT A POLITICAL QUESTION.

Even if Respondents could demonstrate Article III standing and this case proceeded to the merits, their claims invite a federal court to engage in "'some amorphous general supervision of the operations of government'" and are, thus, non-justiciable under the political question doctrine. *Raines*, 521 U.S. at 828-29 (quoting *Richardson*, 418 U.S. at 192). This Court has been clear that the "value" of Article III courts lies in "'the protection it has afforded the constitutional rights of individual citizens and minority groups against oppressive or discriminatory government action.'" *Id.* (quoting *Richardson*, 418 U.S. at 192). This value is trivialized when federal courts "review those controversies which revolve around policy choices and value determinations. . . ." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). In *Luther v. Borden*, 48 U.S. 1, 42 (1849), this Court determined that the Guarantee Clause – the basis of Respondents' claims – vests Congress alone with the authority to determine whether a state

has established a republican form of government. Since *Luther*, this Court has held that the political question doctrine bars, without exception, cases seeking a judicial declaration of whether or not a state's government is republican in form.[10] *See Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 142 (1912); *see also* Arend, *supra*, at 278-79 ("While the Constitution may have established a legal framework for relationships among and within the Branches, it does not follow that the Constitution effectively endorses suits by members of Congress about the meaning of those provisions. . . . The purpose of the federal courts is to deal with cases that affect private rights.").

The Tenth Circuit attempted to distinguish *Luther* and *Pacific States* on the basis that "both cases involved wholesale attacks on the validity of a state's government rather than, as before us, a challenge to a single provision of a state constitution." *Kerr*, 744 F.3d at 1173. However, the panel glossed over the fact that Congress has "admitted into the councils of the Union" the senators and representatives of Colorado, thereby recognizing "the authority of the government under which they are appointed,

[10] Granted, this Court in dicta questioned whether "*all* claims under the Guarantee Clause present nonjusticiable political questions" in *New York v. United States*, 505 U.S. 144, 185 (1992) (emphasis added). However, in that case, this Court explained that it "need not resolve this difficult question today" because the alleged injuries did not even come close to denying the state a republican form of government. *Id.* at 185-86.

as well as its republican character." *Luther*, 48 U.S. at 42. This case thus presents the same separation of powers concerns that underlie *Luther* and *Pacific States*. If a federal court agrees with Respondents' claims that, in the 20 years since TABOR became law, Colorado has not had a republican form of government because TABOR violates the Guarantee Clause, the implications are significant. First, serious separation of powers concerns arise where a federal court decision has the potential to conflict with Congress's recognition of a state's government as republican. *See Japan Whaling Ass'n*, 478 U.S. at 230. Second, all the laws enacted in Colorado in the past 20 years would be called into question because they were allegedly not enacted under a republican form of government. *See Pacific States*, 223 U.S. at 141 (If "adoption of the initiative and referendum destroyed all government republican in form in Oregon . . . [plaintiffs' claims] would necessarily affect the validity, not only of the particular statute which is before us, but of every other statute passed in Oregon since the adoption of the initiative and referendum."). The Tenth Circuit thus contravened this Court's political question doctrine in holding that Respondents' claims of Guarantee Clause violations would not call into question the very republicanism of Colorado's government.

The concept of justiciability, whether embodied in the standing or political question doctrines, is intended to preserve the separation of powers and define the role of Article III courts. *Allen*, 468 U.S. at 750 ("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 . . . about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." (internal quotations omitted)). Where plaintiffs lack standing *and* allege claims that are barred by the political question doctrine, separation of powers concerns are even more grave, because this Court "has consistently declined to exercise any powers other than those which are strictly judicial in their nature." *Raines*, 521 U.S. at 819 (internal quotations omitted). Here, adjudication of whether or not Colorado's government is republican in nature could have the direct consequence of conflicting with Congress's recognition of Colorado's government as republican by disregarding Congress's acceptance of the representatives and senators of Colorado. *See Luther*, 48 U.S. at 42. This Court has long held that this power is "conferred upon Congress, and not, therefore, within the reach of judicial power[.]" *Pacific States*, 223 U.S. at 151. Similarly, allowing Respondents to have standing on the tenuous basis that the institutional authority of the Colorado General Assembly has been incrementally diminished by TABOR would open the doors of Article III courts to a litany of previously non-justiciable claims. *Kerr*, 759 F.3d at 1189 (Tymkovich, J., dissenting from denial of rehearing en banc) (listing provisions of the Colorado Constitution that are now subject to legislator challenge under the Tenth Circuit's opinion). Because either this Court's standing doctrine or the political question doctrine, standing alone, bars adjudication of Legislators'

claims in a federal court, Amici respectfully request that the Petition be granted.

CONCLUSION

If the Founders had any concern regarding the respective power of the branches of government, it was that the Legislative Branch would grow too powerful and threaten democracy. James Madison contended that "[t]he legislative department is everywhere extending the sphere of its activity and drawing all power into its impetuous vortex." The Federalist No. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961). By allowing any legislator to seek judicial review of a vote of the people merely because it incrementally diminishes the power of the legislature, the Tenth Circuit has granted the legislative branch carte blanche to "draw[ ] all power into its impetuous vortex." Thus, this Court should grant the Petition.

Respectfully submitted,

STEVEN J. LECHNER
Counsel of Record
GINA M. CANNAN
MOUNTAIN STATES LEGAL FOUNDATION
2596 South Lewis Way
Lakewood, Colorado 80227
(303) 292-2021
lechner@mountainstateslegal.com
gina@mountainstateslegal.com

Attorneys for Amici Curiae